



ALBANY LAW SCHOOL

CENTER FOR CONTINUING LEGAL EDUCATION

Movement Lawyering: Representing Activists in Criminal Cases

June 10, 2020

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MOVEMENT LAWYERING: REPRESENTING ACTIVISTS IN CRIMINAL CASES

June 10, 2020

Agenda

2:00pm - 2:05pm

Introduction

Prof. Sarah F. Rogerson, Esq.
Albany Law School

2:05 - 2:20pm

Setting the Stage: On the Ground Experience at Protests in Albany, New York

Krys Macharie, J.D. Candidate 2021
Albany Law School

2:20pm - 2:45pm

Pre-Arrest

Brenda Baddam, Esq. '17
Barclay Damon LLP

2:45pm-3:10pm

Arrest, Bail, and Common Charges

Lee C. Kindlon, Esq.
Kindlon Law Firm, PLLC

3:10-3:40pm

Representing Racial Justice and Other Progressive Activists and Pre-Trial Practice

Mark S. Mishler, Esq.
Law Office of Mark Mishler

3:40-4:00pm

Representing Minors in Family Court

Trevor W. Hannigan, Esq. '03
Trevor W. Hannigan Attorney at Law PLLC

4pm-4:15pm

Questions and Answers

MOVEMENT LAWYERING: REPRESENTING ACTIVISTS IN CRIMINAL CASES

Presenter Biographies

Professor Sarah Rogerson directs the Immigration Law Clinic in the Justice Center at Albany Law School, an experiential course through which students represent immigrant victims of crime including child abuse and neglect, domestic violence, and sexual assault. Her students also regularly participate in related legislative advocacy and community outreach initiatives. Professor Rogerson worked as a public interest attorney in Newark, New Jersey, and has represented immigrant adults and children in cases involving torture, domestic violence, and human trafficking at a human rights non-profit in Dallas, Texas. Her scholarship is focused on the intersections between domestic violence, family law, race, gender, international law, and immigration law and policy.

Krys Macharie, J.D. Candidate 2021 at Albany Law School, graduated from the State University of New York at Albany with a B.A. in English Language and Literature. Before attending law school, Krys worked as a teaching assistant at East Ramapo Central School District, where she worked with students in the Special Education program. As a clinical student in the Family Violence Litigation Clinic, Krys represented victims of domestic violence in family offense and custody proceedings. Krys currently works as an intern under the Advocacy Director at Legal Aid, where she handles Landlord/Tenant cases and works on the St. Clare's Hospital dissolution proceeding. Krys is the President of the Albany Law Latin American Law Students Association, the American Bar Association representative for the Student Bar Association, and the Vice President of the National Lawyers Guild Albany Law Chapter.

Brenda Baddam, Esq. '17, Barclay Damon LLP, primarily concentrates her practice on both regulatory and compliance issues in the health care industry. She is a former Assistant District Attorney with Albany County. Her passion for advocacy and litigation was engrained in her from a very young age by her Cuban grandparents who migrated from Cuba to the U.S. in the 1950s. Brenda is also a Board Member of the Capital District Black and Hispanic Bar Association, the Capital Region Hispanic Chamber of Commerce, and the Capital Region's New Leaders Council. Brenda frequently presents continuing legal education seminars on topics such as language diversity and diversity in public and private sectors. She also is a member of Barclay Damon's Diversity and Inclusion Committee. Before entering Albany Law School, Brenda worked as a Court Clerk at the Broward County Courthouse in Fort Lauderdale, Florida.

Lee Kindlon, Esq., the founding partner of the Kindlon Law Firm, has represented clients in some of the area's most high-profile criminal cases. From those hard-fought courtroom battles,

he uses his experience to benefit clients across the legal spectrum. Lee's experience in civil litigation includes matters based on contract, fraud, civil rights violations, and negligence. He has successfully resolved a number of high-value personal injury and wrongful death cases. Lee's practice also includes the representation of corporations and professionals in white collar criminal cases. From preventative advice for companies to successful resolution for those charged with financial crimes, fraud or larceny, Lee has the knowledge and experience to provide excellent legal representation. After receiving his commission in the Marine Corps during law school, Lee returned to active duty in January 2003, and was stationed at Camp Lejeune, North Carolina. During his three and a half years on active duty with the Marines, Lee worked as a Judge Advocate, first in Legal Assistance, and then as the prosecutor for Marine Corps Base Camp Lejeune. In September 2005, he deployed to Iraq as a Battalion Judge Advocate and was stationed in Fallujah until April 2006. Now a Lieutenant Colonel, he remains part of the Marine Corps Reserve as the Reserve Officer in Charge of Appellate Defense for the Navy-Marine Corps Court of Appeals. Lee, an Albany native, attended Williams College, where he played football and graduated in 1998 with a degree in History. After graduation, Lee attended the University of Connecticut School of Law. He concentrated his studies in Constitutional and Criminal Law and received his law degree in 2002. Lee was admitted to practice in New York State in December 2002 and the District of Columbia in January 2008. He is also admitted to practice in the United States District Courts for the Northern and Western Districts of New York, the Second Circuit Court of Appeals, and he is certified to practice in all military courts. Lee is a nationally-recognized speaker on evidence in both state and federal court as well as state and federal gun laws, and he has taught CLE courses on matters across the legal spectrum.

Mark Mishler, Esq., practices criminal and civil rights law in Albany, New York. Since the 1980s, he has represented progressive activists and groups in protest or strike-related cases, including activists in the anti-apartheid, AIDS funding, public education funding, peace, environmental, anti-police brutality, Occupy, Poor People's Campaign, and labor movements. Mark has litigated first amendment and police misconduct cases as well as discrimination cases. He developed and taught courses on "Mass Incarceration: The New Jim Crow" at Albany Law School in 2012, and at the University at Albany School of Criminal Justice from 2015-16. As a community activist, Mark served for 20 years as an Executive Board member of the Albany NAACP, served on the steering committee of the Capital District Coalition Against Racism and Apartheid, and currently is a member of the steering committee of Capital Area Against Mass Incarceration, a Board member of the NYS Labor-Religion Coalition, and an activist with Jewish Voice for Peace. Mark has been a member of the National Lawyers Guild since his first year in law school in 1978 and is a member of the NLG's Mass Defense Committee. Mark received a J.D., with honors, from Boston College School of Law in 1981, and a B.A. from Brandeis University in 1978. He also serves as Counsel and Legislative Director for NYS Senator Julia Salazar (18th Senate District), a strong voice in the NYS legislature for tenants' rights, women's rights, for equitable tax policy (taxing the rich), ending mass incarceration, and for meaningful reform of the criminal legal system.

Trevor Hannigan, Esq. '03, is a former Assistant District Attorney in Albany County who is now in private practice representing clients in civil, criminal and Family Court proceedings.

REPRESENTING RACIAL JUSTICE AND OTHER PROGRESSIVE ACTIVISTS

Mark S. Mishler

*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 since 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> 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-weekes-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? Chose 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)



CITY OF ALBANY
OFFICE OF THE MAYOR
CITY HALL
24 EAGLE STREET
ALBANY, NEW YORK 12207
TELEPHONE (518) 434-5100

KATHY M. SHEEHAN
MAYOR

EMERGENCY ORDER 315-4

RE: Emergency Curfew Order Pursuant to the Emergency Declaration of May 30, 2020, Related to the Outbreak of COVID-19 & Ongoing Civil Unrest

I, Kathy Sheehan, Mayor, of the City of Albany, New York, in accordance with a Proclamation of State of Emergency executed on the 15th day of March, 2020, and thereafter renewed on April 13, 2020, and May 12, 2020, do hereby declare that a curfew is established and imposed.

The curfew will commence at 11:00 PM on the 30th day of May, 2020, and shall continue until removed by my order or upon termination of the Emergency Declaration of May 12, 2020.

During the period of this curfew between the hours of 9:00 PM and 7:00 AM no person, with the exception of emergency personnel and those commuting to, from, or in the course of essential functions, located within the City of Albany may be in a public place during the curfew period, regardless of the mode of transportation.

During the period of this curfew between the hours of 9:00 PM and 7:00AM all non-essential travel shall be suspended.

I hereby direct the Albany Police Chief Eric Hawkins and the City of Albany Police Department to enforce this order by all lawful means. Violation of the curfew shall be a misdemeanor pursuant to NY Executive Law §24(5).

All reading this are encouraged to take the following preventative measures to impede the spread of COVID-19:

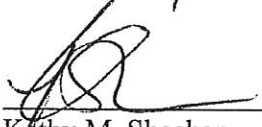
- Stay home as much as possible.
- Avoid touching your eyes, nose, and mouth.

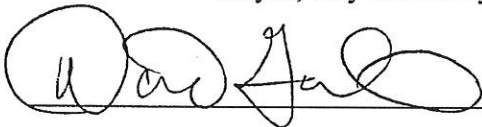
- Clean and disinfect frequently touched objects and surfaces using a regular household cleaning spray or wipe.
- Follow CDC's recommendations for using a facemask when in public places.
- Wash your hands often with soap and water for at least 20 seconds, especially after going to the bathroom; before eating; and after blowing your nose, coughing, or sneezing.
- If soap and water are not readily available, use an alcohol-based hand sanitizer with at least 60% alcohol. Always wash hands with soap and water if hands are visibly dirty.

All reading this are also encouraged to visit the Centers for Disease Control's website at <https://www.cdc.gov/coronavirus/2019-ncov/> and New York State Department of Health's website at <https://coronavirus.health.ny.gov/home> for updates, particularly on preventative measures as more is known about this virus. All are also encouraged to visit the City of Albany COVID-19 Resource Guide by visiting <https://bit.ly/AlbanyCOVIDResponseGuide>.

Signed this 30 day of ^{May 2020} ~~June~~, 2020 at 11 o'clock in Albany, New York.

Signed:


Kathy M. Sheehan
Mayor, City of Albany



David Galin

Sworn to before me this 30th
day of May, 2020.

NOTARY PUBLIC

<p>DAVID GALIN NOTARY PUBLIC, STATE OF NEW YORK Registration No. 02GA6329068 Qualified in Albany County My Commission Expires: <u>8/17/2023</u></p>



CITY OF ALBANY
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TELEPHONE (518) 434-5100

KATHY M. SHEEHAN
MAYOR

EMERGENCY ORDER 315-4.1

RE: Emergency Curfew Order Pursuant to the Emergency Declaration of May 31, 2020, Related to the Outbreak of COVID-19 & Ongoing Civil Unrest

I, Kathy Sheehan, Mayor, of the City of Albany, New York, in accordance with a Proclamation of State of Emergency executed on the 15th day of March, 2020, and thereafter renewed on April 13, 2020, and May 12, 2020, do hereby declare that a curfew is established and imposed.

The curfew will commence at 7:00 PM on the 31st day of May, 2020, and shall continue until removed by my order or upon termination of the Emergency Declaration of May 12, 2020.

During the period of this curfew between the hours of 7:00 PM and 7:00 AM no person, with the exception of emergency personnel and those commuting to, from, or in the course of essential functions, located within the City of Albany may be in a public place during the curfew period, regardless of the mode of transportation.

During the period of this curfew between the hours of 7:00 PM and 7:00AM all non-essential travel shall be suspended.

I hereby direct the Albany Police Chief Eric Hawkins and the City of Albany Police Department to enforce this order by all lawful means. Violation of the curfew shall be a misdemeanor pursuant to NY Executive Law §24(5).

All reading this are encouraged to take the following preventative measures to impede the spread of COVID-19:

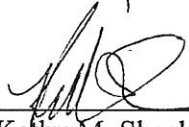
- Stay home as much as possible.
- Avoid touching your eyes, nose, and mouth.


- Clean and disinfect frequently touched objects and surfaces using a regular household cleaning spray or wipe.
- Follow CDC's recommendations for using a facemask when in public places.
- Wash your hands often with soap and water for at least 20 seconds, especially after going to the bathroom; before eating; and after blowing your nose, coughing, or sneezing.
- If soap and water are not readily available, use an alcohol-based hand sanitizer with at least 60% alcohol. Always wash hands with soap and water if hands are visibly dirty.

All reading this are also encouraged to visit the Centers for Disease Control's website at <https://www.cdc.gov/coronavirus/2019-ncov/> and New York State Department of Health's website at <https://coronavirus.health.ny.gov/home> for updates, particularly on preventative measures as more is known about this virus. All are also encouraged to visit the City of Albany COVID-19 Resource Guide by visiting <https://bit.ly/AlbanyCOVIDResponseGuide>.

Signed this 31 day of May, 2020, at 10:00 o'clock in Albany, New York.

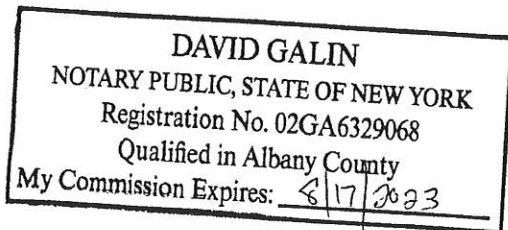
Signed:


Kathy M. Sheehan
Mayor, City of Albany


David Galin

Sworn to before me this 31
day of May, 2020.

NOTARY PUBLIC



Poor People's Campaign confronts society's injustices

A need for disruption

By Mark Mishler

Civic leaders, upset by a series of disruptive demonstrations for justice, said, "We recognize the natural impatience of people who feel that their hopes are slow in being realized," adding that the protests by "outsiders" were "unwise and untimely." They noted that, "these days of new hope are (not) days when extreme measures are justified." The leaders said the tactics were "not really very considerate of working-class people who are just trying to get around," and that the demonstrations were led by "protesters who bus and drive into our city to disrupt it." They advised the protesters that there were "better ways to deliver the message" and proposed to meet with the activists to try to persuade them to change their tactics.

The first two of those sentences come from a 1963 letter by white clergy in Alabama, who were angry at Martin Luther King, Jr., and other activists regarding a series of disruptive and confrontational demonstrations in Birmingham. The second two depict the response of Albany Mayor Kathy Sheehan and her chief of staff, Brian Shea, in 2018, responding to the Poor People's Campaign.

It is impossible to tell the difference between those expressions of hostility. It's been said that when historical events repeat themselves, the first time is tragedy, the second time farce.

In 2018, a crisis affects every aspect of the lives of poor and working people. Around the country, thousands have joined the Poor People's Campaign: A National Call for Moral Revival. Poor people, clergy, labor activists, fighters for racial justice, women's equality, LG-BTQ rights, and the environment, along with their comrades, have committed to six weeks of confrontational yet peaceful, nonviolent actions in Washington, D.C., and in close to 40 state capitals. These actions call attention to the connected and solvable evils of racism, poverty, militarism, and ecological devastation, and demand the implementation of comprehensive solutions. Building on King's 1968 Poor People's Campaign,

the 2018 campaign is modeled on King's principles of creative and confrontational nonviolent civil disobedience.

In Albany and other state capitals, these actions have seen hundreds of caring, dedicated and loving people block intersections and otherwise demonstrate that "business as usual" is no longer acceptable.

Positive change in times of crisis requires disruption.

Without disruption, workers would not have the right to organize, African-Americans would not have won victories in the civil rights era. Women would not have won the constitutional right to vote, control their own bodies or recognition of their right to equality at work. We would not have ended the terrible U.S. military involvement in Vietnam. LGBTQ people would not have had their human rights recognized.

“There is a type of constructive nonviolent tension that is necessary for growth. The purpose of direct action is to create a situation so crisis-packed that it will inevitably open the door to negotiation.”

— Martin Luther King Jr.

Strikes are disruptive. The protests of the 1960s civil rights movement interfered with business as usual in Birmingham and cities across the South. Students made college campuses ungovernable. Stonewall was labeled a "riot." And so on.

And, whenever people have joined together to demand justice, those in power have angrily declared that their tactics were too confrontational.

In 1963, in Birmingham, it was a tragedy when white clergy implored King and thousands of brave activists to be more patient. The protesters were labeled as outsiders. King was locked up in the Birmingham jail when white clergy published an "open" letter, chastising him for the demonstrations in the streets of Birmingham. King wrote his famous "Letter from Birmingham Jail" in response. He showed how their criticisms were baseless and served no purpose other than the perpetuation of the evil of violently enforced segregation.

tion.

In 2018, in Albany, history repeated itself as Sheehan and Shea went out of their way to publicly chastise the Poor People's Campaign for having caused some inconvenience.

Nonviolent direct action, in the tradition of King, causes tension, disruption, inconvenience and crisis. It does in 2018 as it did in 1963. "There is a type of constructive nonviolent tension that is necessary for growth," King said. "(T)he purpose of direct action is to create a situation so crisis-packed that it will inevitably open the door to negotiation."

In 1963, King responded to the argument that he and others were "outsiders" by clarifying that there were residents of Birmingham engaged in the struggle for justice, that he and his staff were invited to Birmingham by activists in the city, and, finally, by noting that there is an "interrelatedness of all communities" and that "injustice anywhere is a threat to justice everywhere."

The same holds true for Albany in 2018. Albany is the seat of power in New York. What happens here resonates throughout the state. There is nothing wrong with people joining us in Albany to fight for justice. Also, far from being "outsiders," many of the people involved in the Poor People's Campaign live in Albany.

Similarly, the demand that people suffering injustice ought to be more patient is as unjustified in 2018 as it was in 1963 when King observed that there has never been a "direct-action movement that was 'well-timed' according to those who have not suffered unduly from the disease of segregation."

Rather than holding news conferences or launching tweets to attack conscientious fighters for justice, Sheehan and her staff could have better used that time to read King's "Letter From Birmingham Jail." The opportunity still exists. Take a few minutes. Read how King responded to criticisms that sound terribly close to the words you have spoken. Then, join with your constituents and their allies in standing up for what is right.

► Mark Mishler is an Albany attorney and longtime civil rights activist. King's letter can be read at <http://tinyurl.com/47u7qm>

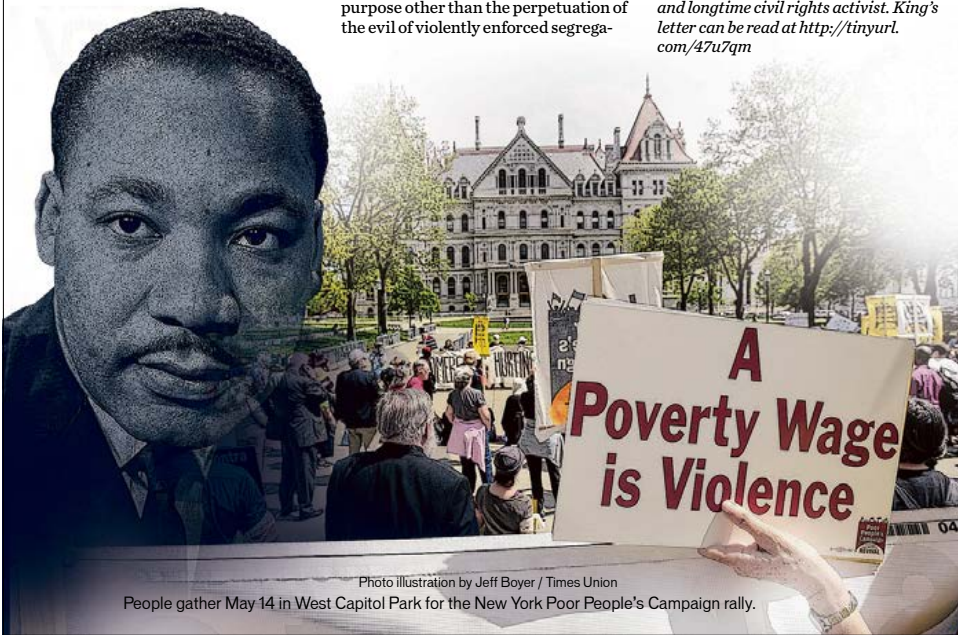


Photo illustration by Jeff Boyer / Times Union

People gather May 14 in West Capitol Park for the New York Poor People's Campaign rally.

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

Mark S. Mishler

Advocacy and Activism Today - Albany Law School, February 25, 2017
Sponsored by Albany NLG, Cap. District Chapter of NYCLU, Albany Law School, and the
NYSBA Pro Bono Services Department

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

Mark S. Mishler ¹

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?

¹ Law Office of Mark S. Mishler, PC, 750 Broadway, Albany, NY 12207, (518) 462-6753, mishlerlaw@gmail.com , www.markmishlerlaw.com . © 2017, all rights reserved. This is a revised and updated version of CLE materials initially prepared for a seminar at Albany Law School in 2003 (at the beginning of the Iraq war) on representation of peace activists, which was revised in 2015 for a training in Binghamton, NY of lawyers engaged in representing anti-fracking protestors at Seneca Lake.

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, LGBTQ people, and immigrants at the receiving end of brutal governmental policies and actions.

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

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

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

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 Embarrassing*, 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.

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

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 repression¹⁶, 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

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)

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., at 1110.)

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,

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.

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 discovery²³, for *Brady* material²⁴,

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>

suppression²⁵, for dismissal on the grounds that the accusatory instrument is jurisdictionally defective²⁶, dismissal on speedy trial or readiness for trial grounds²⁷, 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 defective²⁸, 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

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

²⁹Article 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

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

³³The 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.

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/locallawyer.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

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

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.

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 videotapes, 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.

**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]

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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 States for 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](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.

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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 Paquete 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,

vs.

Defendant.

No.

FILED

107 07 2011

CLERK OF CIRCUIT COURT

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-1030voicelettersbriefs-20111030-17,0,7568>

817.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.

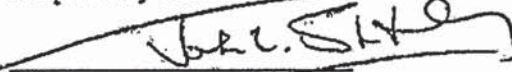
28. The arrests and charging of the defendants in this case also violated the First

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,



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*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 factors⁷ 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 Garage¹⁸ 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 disobedience.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 on September 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] its 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 nity 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=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.

DISORDERLY CONDUCT : (PL 240.20 - Violation)

§ 240.20. Disorderly conduct:

“A person is guilty of disorderly conduct when, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof:

1. He engages in fighting or in violent, tumultuous or threatening behavior; or
2. He makes unreasonable noise; or
3. In a public place, he uses abusive or obscene language, or makes an obscene gesture; or
4. Without lawful authority, he disturbs any lawful assembly or meeting of persons; or
5. He obstructs vehicular or pedestrian traffic; or
6. He congregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse; or
7. He creates a hazardous or physically offensive condition by any act which serves no legitimate purpose.”

Disorderly conduct is a violation.

The main issue with this charge, which is used extensively in both protest and non-protest cases, is whether there are sufficient allegations or evidence of an impact on the PUBLIC. Many cases have been dismissed or convictions have been reversed for this reason.

Often, even where the charges are based on (5) (blocking traffic) or (6) (failure to disperse) the case hinges on the public harm element.

CASES:

People v. Baker, 20 NY3d 354 (2011) The Court of Appeals reversed a conviction where a man had engaged in a loud verbal altercation with a police officer, including swearing at him, in a public street, and it attracted a number of onlookers.

The Court stated, “The significance of the public harm element in disorderly conduct cases cannot be overstated. ... [W]e have employed a contextual analysis that turns on consideration of many factors, including ‘the time and place...; the nature and character of the conduct; the number of other people in the vicinity; whether they are drawn to the disturbance and, if so, the nature and number of those attracted; and any other relevant circumstances.’ (Quoting *People v. Weaver*) ... [T]he risk of public disorder does not have to be realized but the circumstances must be such that defendant’s intent to create such a threat (or reckless disregard thereof) can be readily inferred.”

The Court said that in that case the public outburst was brief, and was limited to a verbal altercation between the defendant and a police officer. While a group of bystanders was drawn to the confrontation, they were content to watch. The Court said that, “unlike *Weaver*, there was no significant likelihood that defendant’s brief statements - loud though they were - would disrupt peace and order in the vicinity.” In addition, yelling obscenities, “unaccompanied by provocative acts or other aggravating circumstances” will rarely allow the requisite inference of public harm.

The counterpoint is *People v. Weaver*, 16 NY3d 123 (2011) where the Court upheld the conviction where the defendant was yelling at both his wife and a police officer in a public parking lot and street in the early morning in a small village. The Court said there were a number of people nearby at a time when quiet was expected. Interestingly, it was not clear if onlookers were attracted to the disturbance, as occurred in Baker. One distinction the Court focused on was the fact that a verbal altercation solely involving the defendant and the police would rarely result in a disorderly conduct conviction. Here the police were called because the defendant was already screaming at his wife in public.

More recently there is *People v. Gonzalez*, 25 NY3d 1100 (2015) where the Court of Appeals reversed the conviction and granted suppression, saying there was not even probable cause for an arrest for disorderly conduct, where the defendant had shouted obscenities at a police officer in a subway station. The Court stated, at 1101:

“Defendant shouted obscenities at police officers in a subway station in Manhattan, [2] provoking looks of surprise and curiosity from some passengers and evasive movements from others. The officers followed defendant to another level of the station, where a police sergeant prevented him from leaving. The sergeant observed an illegal knife on defendant's person and arrested him.

Here, ... there is no record support for the motion court's determination that defendant's rant against the police officers constituted the crime of disorderly conduct. " [A] person may be guilty of disorderly conduct only when the situation extends beyond the exchange between the individual disputants to a point where it becomes a potential or immediate public problem' " ([People v Baker, 20 NY3d 354, 359-360, 984 NE2d 902, 960 NYS2d 704 \[2013\]](#)), quoting [People v Weaver, 16 NY3d 123, 128, 944 NE2d 634, 919 NYS2d 99 \[2011\]](#).”

The Appellate Term decided *People v. Canjura*, 2014 WL 6980429 (App. Term, 2nd Dep't 2014), reversing convictions for disorderly conduct (and resisting and harassment), finding (as to discon) that the Information was facially insufficient because it did not allege that anyone was drawn to the altercation.

In *People v. McMillon* 2015 WL 94817 (3rd Dep't 2014) the 3rd Dep't upheld a discon conviction where police were called to a disturbance and D came to the door and started swearing at the cop - in front of her children and some neighbors - she then made a rude gesture at him. It may have upheld because apparently she was so out of line and the cop kept trying to calm her down to no avail – so a longer time period than some other cases.

(5) Blocking Vehicular or Pedestrian Traffic

In *People v. Jones*, 9 NY3d 259 (2007), the Court reversed the conviction (the defendant had pled guilty and the conviction had been upheld by the appellate court) and held that standing in the middle of a sidewalk so people have to walk around you does not constitute blocking pedestrian traffic with the public harm element. This seems obvious but it wasn't to the 1st Dep't.

In *People v. Pesola*, 37 Misc.3d 569 (NYC 2012), an OWS case, the court held that, on a motion to dismiss for facial insufficiency, the allegations that the defendant was part of a crowd jumping up and down on a public sidewalk, causing people to go into the street to walk around them, were NOT enough to go forward under (5) (blocking traffic). (But it was enough to go forward under [6] - failure to disperse).

(6) Failure to Disperse

In *People v. Johnson*, 22 NY3d 1162 (2014) the Court recently held that where the defendant and 3 other men, alleged to be gang members, stood on a street corner and refused to move when told by police to leave the area, this was not enough because there was insufficient evidence of the public harm element. (I would prefer if they had said that an order to disperse was not lawful under these circumstances, but at least they reached the right result.)

In *Pesola*, supra, the court said that where defendant was part of a crowd jumping up and down on a public sidewalk, causing people to go into the street to walk around them, the allegation that he did not move when told by police to disperse was enough to go forward with the charge.

In *People v. Diaz*, 39 Misc.3d 1237(A) (Kings Co. Crim Ct. 2013) (a protest case) the court granted a motion to dismiss in the interest of justice, stating, “a video ... showed that the defendants were peaceably assembled and did not attempt to prevent anyone from ingress and egress [they were standing in front of the door of a police station.] If there was no justifiable reason for the protesters to move, then it cannot be said that the police’s order to disperse was lawful.” This is good language, but it was a lower court and it was part of a decision dismissing in the interest of justice, not on the sufficiency of the evidence.

In *People v. DeJesus*, 2015 N.Y. Misc. LEXIS 3410 (Queens CO 2015) the court said “In the instant case the defendant was standing with four other individuals on the sidewalk, was asked to move, and refused. The court finds that these factual allegations do not support, for pleading purposes, the count of disorderly conduct (*see People v. Coley*, 38 Misc 3d 1220[A], 967 N.Y.S.2d 868 [Crim. Ct. New York County 2013]). ...”

RESISTING ARREST: PL 205.30 (“A” Misdemeanor)

§ 205.30. Resisting arrest:

“A person is guilty of resisting arrest when he intentionally prevents or attempts to prevent a police officer or peace officer from effecting an authorized arrest of himself or another person.”

Resisting arrest is a class A misdemeanor.

With this charge, the main issue is often whether there were sufficient allegation of an authorized underlying arrest. There have to be non-hearsay evidentiary allegations.

Also, it is still unclear whether going limp can be a basis for a resisting arrest charge.

People who affirmatively do something, like move their body back and forth, etc, can be charged with resisting, but the cases are divided on going limp/ purely passive resistance.

CASES:

People v. Alejandro, 70 NY2d 133 - there must be non-hearsay evidentiary allegations of an authorized underlying arrest. The Alejandro court stated:

“The misdemeanor information for resisting arrest was unquestionably insufficient on its face. ... It is an essential element of the crime of resisting arrest that the arrest be authorized and, absent proof that the arresting officer had a warrant or probable cause to arrest defendant for commission of some offense, a conviction cannot stand. Thus, to comply with the statute, the factual portion of the information for resisting arrest must contain ‘[non-hearsay] allegations [which would] establish, if true’ that the underlying arrest was authorized. These essential allegations are omitted from the information here. ...” Alejandro, supra, at 134-136, citations deleted and emphasis supplied.

People v. DeJesus, 34 Misc.3d 141(A) (App. Term 2nd Dep’t 2012) - there was no authorized arrest (so the resisting conviction - based on a guilty plea - was reversed) where the allegations as to disorderly conduct were insufficient as to the public harm element.

Re “going limp” and related allegations

People v. Leopard, 83 AD3d 1214 (3rd Dep’t 2011) - The 3rd Dep’t upheld a conviction for Resisting where the defendant went to the scene of a traffic stop and apparently yelled at and threatened the person who was stopped (who he may have suspected of having stolen his car stereo). The defendant then drove away but the cop tracked him down and told him he was under arrest for discon. When the cop tried to cuff him, D turned away and put his hands out of reach. The court said there was probable cause for the arrest and thus the arrest (for discon and obstructing at the traffic stop) was authorized - because the cop “could have reasonably believed” there was enough for the public harm element of discon.) This seems to be a different standard than what was required for facial sufficiency in the Court of Appeals cases on both Discon and Resisting but leave to appeal was denied.

People v. McDaniel, 154 Misc. 2d 89 (2nd Dep’t 1992) The Second Department held in this antiabortion protest case that going limp does not constitute resisting arrest. That is, as long as the person does not “affirmatively act” to resist the arrest. There can be a fine line here, i.e. moving your arm slightly away from the handcuffs etc, and can come down to credibility issues - your word against the cop’s. However, in order for the accusatory instrument to be facially sufficient, there must be allegations of more than simply going limp.

People v. Arbeiter, 169 Misc. 2d 771 (1st Dep’t 1996) Here, the First Department followed McDaniel and held that going limp is not resisting arrest.

People v. Canjura, 2014 WL 6980429 (App Term 2nd Dep’t 2014) - the resisting conviction was reversed as against the weight of the evidence where the court stated, “defendant was in the

process of complying with the arresting officer's order to leave the premises when that officer grabbed defendant's shoulder from behind. Defendant responded thereto by merely pulling away.

Moreover, the officer testified that he had never told the defendant he was under arrest prior to grabbing him....” (Interestingly, the court also said that even if that conviction hadn't been against the weight of the evidence, it would have been reversed based on the failure to charge justification as to that charge.)

People v. Berardi, 180 Misc.2d 922 (NYC Crim Ct 1999) (court upheld resisting where D chained herself to a steel pipe and said that was different from just going limp without doing that.)

People v. Bauer, 161 Misc. 2d 588 (Watertown City Court 1994) (going limp does constitute Resisting.)

OBSTRUCTION OF GOVERNMENTAL ADMINISTRATION IN THE SECOND DEGREE (OGA)(PL 195.05 - “A” Misdemeanor)

§ 195.05. Obstructing governmental administration in the second degree

“A person is guilty of obstructing governmental administration when he intentionally obstructs, impairs or perverts the administration of law or other governmental function or prevents or attempts to prevent a public servant from performing an official function, by means of intimidation, physical force or interference, or by means of any independently unlawful act, or by means of interfering, whether or not physical force is involved, with radio, telephone, television or other telecommunications systems owned or operated by the state, or a county, city, town, village, fire district or emergency medical service or by means of releasing a dangerous animal under circumstances evincing the actor's intent that the animal obstruct governmental administration.”

Obstructing governmental administration is a class A misdemeanor.

This charge is tricky -there has to be physical interference but that doesn't always mean a lot -sometimes it can be approaching a scene or being in the vicinity of a scene and saying something (like 'the cops are here'). The police also have to be performing an official authorized function, but that element is usually satisfied.

Refusing to cooperate with police by not answering questions, or even by running away does NOT constitute Obstruction (but running away does constitute Resisting).

CASES:

Not enough physical interference -*People v. Case*, 42 NY2d 98 (1977). This case held that in order to constitute obstruction, there would have to be physical interference - with an official governmental function. Here, the defendant sent a CB message regarding the location of a speedtrap - this was not considered obstruction. However, this is in contrast to *Davan L.*, below.

Enough physical interference -*Matter of Davan L*, 91 NY2d 88 (1997) In this case, a young man was convicted of obstruction (or the equivalent in Family Ct) for yelling “5.0! - Cops!” to warn supposed drug dealers of the presence of police. The court said this was “physical” because it caused a physical reaction - ie a bunch of people left the area. (To me it seems the same as Case but occurred 20 years later with an African-American defendant in a drug case...)

Enough physical interference -*People v. Dumay*, 23 NY3d 518 (2014). This very recent case upheld the facial sufficiency of an OGA charge where the defendant was alleged to have slapped the trunk of a police car and then stood behind the car “preventing the police from patrolling.” This was said to be enough even though the charge didn’t say the car couldn’t move forward.

Enough physical interference -*In re Joshua C.*, 289 AD2d 1095 (4th Dep’t 2001). The 4th Dep’t upheld an OGA adjudication where the police were called to a domestic dispute between the respondent’s parents, and they told him to leave the scene - he refused and “continued his disruptive behavior” - he was arrested when he approached a deputy trying to restrain his brother. So he was on the scene and somehow being disruptive and then approached - it didn’t say how he was being disruptive or how close he approached - but this was said to be enough.

Not enough physical interference -*In re Kendall R.*, 71 AD3d 553 (1st Dep’t 2010). More recently, the 1st Dep’t reversed the OGA adjudication where the kid was either fighting or playing with some other people, failed to leave when told to do so by police, and then swore at police when pushed against a wall. The court said “Appellant did not struggle or do anything to interfere with police, and he did not intrude himself into, or get in the way of, an ongoing police activity. ... Any physical contact between appellant and an officer was initiated by the officer. Appellant’s failure to comply with the order to disperse, without more, lacked the requisite intentional physical component.”

Not enough physical interference : -*Hilderbrandt v NYC*, 2014 WL 4536737 (EDNY 2014) - This very recent fed civil rights case examined whether there was probable cause to arrest the plaintiff for OGA, looking at several NY cases and saying, “[t]he physical [interference] requirement need not be satisfied by the use of physical force, but can be met instead by physical encroachment on police officers’ work or by the performance of threatening and distracting movements near officers. The court cited *People v. Baltes*, 75 AD3d 656 (3rd Dep’t 2010) where an OGA conviction was upheld when D came ‘increasingly closer to’ police engaged in a lawful function and ‘continued to interfere’ after being told to remain quiet. The federal court said “Failing to obey a police order, in itself, will not satisfy the requirements of the statute. However, ‘[w]hen failing to obey the order creates some other hazard or interference, it can rise to the [requisite] level. ... These cases typically involve words that have an interfering effect combined with unwarranted physical intrusion into an area of police activity.” ... Such cases, however, have not disturbed the rule that ‘words alone, even abusive ones, cannot give rise to probable cause to arrest for [OGA] as a matter of law.”

In this case there was no probable cause for arrest where the plaintiff had approached police to ask a question about what the police were doing with a tenant of his, and than continued to calmly explain his position after the officer told him to move away. It seems that if he had been

less calm (or the court had been less sympathetic to him for whatever reason) this could easily have gone the other way.

In *People v. Dejesus*, 2015 N.Y. Misc. LEXIS 3410 (Queens CO 2015) refusing to leave the sidewalk was not enough – the Court stated, “The information alleges that the defendant blocked [*5] pedestrian traffic with five others on a sidewalk, blocking pedestrian traffic during a homicide investigation and refused to leave. The Court finds, such allegations, without more, do not sufficiently allege any attempt or actual obstruction of an official function. Accordingly, the count of Obstructing Governmental Administration in the Second Degree under [PL § 195.05](#) is insufficient.”

People v. Syska, NYLJ 1202563856163 at 1 (Dist., Suffolk Co. 2012). The court dismissed OGA (and Resisting) charges as facially insufficient where “the defendant did try to push past [the cop] in an effort to avoid to answer questions and kept screaming ‘do you have a warrant?’” The court said that there was not enough because the allegation was that D’s intent was not to answer questions. This could easily have gone the other way, and probably would have, if the cop had worded the allegations a little differently.

People v. Ferreira, 10 Misc.3d 441 (NYC Crim Ct 2005). Here, the court dismissed the OGA (and Discon and Resisting) charges for facial insufficiency where D walked away when police told him to stay and answer questions about a shooting where he was a witness but not a suspect. There was no probable cause to detain him under *People v. DeBour*, 40 NY2d 210, and so he had a right to leave under *People v. Howard*, 50 NY2d 583.

People v. Bryan, 190 Misc. 2d 818 (Poughkeepsie 2002) This case held that running away from the police - even if you are a suspect and they have a right to chase you - is not obstruction, although it would constitute resisting arrest. *People v. Tillman*, 184 Misc. 2d 20 (2000) said the same thing.

Going limp -*People v. McDaniel*, 154 Misc. 2d 89 (2nd Dep’t 1992) This case said the same about OGA as is did with respect to resisting arrest - that going limp does not constitute obstruction. The court stated: “...the [physical] interference must be accompanied by some inaction or omission, and in the absence of an independent duty to cooperate and walk to the bus for arrest, the omission to act is not an offense.”

No Authorized Function -*People v. Stewart*, 32 Misc.3d 133(A) (App Term, 2nd Dep’t 2011). The court reversed convictions for OGA (and resisting and discon) based on legal insufficiency where there was insufficient evidence as to an authorized function. The police had told D to leave a court building which was generally open to the public at that time and she refused and then struggled with police. It was not established that the officer had the authority to close the building, so the court said there was insufficient evidence that the order to leave was authorized.

In *People v. Ford*, 2016 N.Y. Misc. LEXIS 2658 (Bronx Co 2016) the court also found insufficient allegations of an “official function” where it was only alleged that the officer was performing his shift.

Also, in *People v. Cofield*, 2015 N.Y. App. Div. LEXIS 6390 (2nd Dep't 2015) the court likewise found no official function where the police pursuit of the defendant was unauthorized.

Public Servant

In *People v. Wilson*, 2015 N.Y. Misc. LEXIS 4246 (Bronx Co. 2015) there was no OGA where there was no proof the defendant *knew* the plainclothes officer was a police officer.

TRESPASS PL 140.05 - Violation (Simple Trespass) and CRIMINAL TRESPASS IN THE THIRD DEGREE PL 140.10 ("B" misdemeanor -in a building or enclosed area)

§ 140.05. [Simple] Trespass:

"A person is guilty of trespass when he knowingly enters or remains unlawfully in or upon premises."

Trespass is a violation.

§ 140.10. Criminal trespass in the third degree:

"A person is guilty of criminal trespass in the third degree when he knowingly enters or remains unlawfully in a building or upon real property

(a)which is fenced or otherwise enclosed in a manner designed to exclude intruders; or (various other sections involving, for example, schools and railroads)

Criminal trespass in the third degree is a class B misdemeanor.

CASES:

Here, if the property is not open to the public, the evidence has to show that the person had reason to know they were not allowed to be there, either because it was conspicuously posted, or because that fact was communicated to them.

If the property is public, but the defendant has been banned, the ban must not be based on the defendant's constitutionally or statutorily protected activity. *People v. Leonard*, 62 NY2d 404 (1984).

BUT the place in *Leonard* was a public university, as opposed to private property often open to the public, such as a mall, where people can be banned for engaging in First Amendment activity. See *Downs v. Town of Guilderland*, 70 A.D.3d 1228 (3rd Dep't 2010) where the Third Dep't, following the Court of Appeals in *Shad Alliance v. Smith Haven Mall*, 66 NY2d 496 (1985) held that first amendment rights don't apply at malls because there is said to be insufficient "state action."

If the property is partly open to the public, the person can be charged with trespass if they enter into the portion of the property not open to the public. See *People v. Gaines*, 74 NY2d

358 (1989).

A person who has a reasonable belief that they are licensed to be on premises can't be convicted of trespass. *People v. Basch*, 36 NY2d 154. But in *People v. Jackson*, 38 AD3d 1052 (3rd Dep't 2007) the court said that under the circumstances it wasn't reasonable for D to think he could go back to his old girlfriend's place to get his stuff.

Criminal Trespass - re "fenced or otherwise enclosed in a manner designed to exclude intruders" applies to buildings - in *People v. Moore*, 5 NY3d 725 (2005) the Court of Appeals upheld the dismissal of this charge where the accusatory instrument did not allege that the building in question was fenced or otherwise enclosed in a manner designed to exclude intruders. The Court pointed out that the word "premises" in the Simple Trespass statute includes buildings, so in order for it to be more serious, it had to be more than just a "building." But the writer of the McKinney's Practice Commentary thinks this doesn't make sense and that the Legislature should fix it.

Moore was followed in *People v. O'Leary*, 41 Misc.3d 144(A) (App Term 2nd Dep't 2013) (and some other cases) where a criminal trespass conviction in a stairway was vacated for this reason. And see *People v. James*, 28 Misc.3d 345 (NY Co. 2010) (charge of Criminal Trespass in the third degree dismissed as facially insufficient).

In *People v. Crespi*, 2017 N.Y. Misc. LEXIS 113 (NY Co. 2017) the court found that a fenced playground did not suffice, stating, "The allegation that defendant was observed inside a playground that was enclosed by a fence does not permit a reasonable inference that defendant's presence inside the playground was unlawful. A Fence may serve many purposes. In the case of a playground, a fence may be designed to secure children and confine play activity. Whether the fencing around a place is designed to exclude intruders depends on the facts and circumstances of each place. Absent additional facts, the court may not reasonably infer that the fence around the playground referenced in the information was designed to exclude intruders."

LOITERING by wearing a mask PL 240.35(4)

PL 240.35(4) provides "4. Being masked or in any manner disguised..., loiters, remains or congregates in a public place with other persons so masked ...; except that such conduct is not unlawful when it occurs in connection with a masquerade party or like entertainment if, ... permission is first obtained from the police..."

First, similar to Disorderly Conduct, this must occur in a public place.

Secondly, it sounds as though, by use of the phrase "with other persons" that there must be at least 3 people congregating together wearing masks.

Third, the exception for a "masquerade party or like entertainment" can sometimes be invoked successfully.

The New York cases involving interpretation of PL 240.35(4) all involve large groups of people who covered their faces (with hoods or bandanas) during a demonstration with the intent to obscure their identities. See, i.e., *Church of the Ku Klux Klan v. Kerik*, supra; *People v. Aboaf*, 187 Misc.2d 173 (NY Co. 2001); *People v. Bull*, 5 Misc.3d 39 (App. Term, 1st Dep't 2004). The Second Circuit stated in *Kerik*, at 205, that the statute was "aimed at deterring violence." In *Bull*, supra, at 41, the court noted that the defendants were likely trying to conceal their identity because they were in possession of items such as "...paint-filled balloons and metal 'slingshot'-type 'cans' used for 'hurling' such balloons."

The Loitering statute contains an exception when permission is obtained for a "masquerade party or like entertainment." It has been held that a street theater protest falls within this exception and qualifies as "like entertainment." *Schumann v. New York*, 270 F. Supp. 730 (SDNY 1967). That case involved the Bread and Puppet Theatre, which performed in New York City.

FIRST AMENDMENT, OVERBREADTH AND VAGUENESS

There have been several cases which had held that anti-mask statutes such as this one violate the First Amendment – and/or are unconstitutionally overbroad and vague -when they are not construed to require an intent to conceal one's identity or an intent to harm others in some way. *Church of the American Knights of the Ku Klux Klan v. City of Erie*, 99 F. Supp.2d 583 (W.D.P.A. 2000) (an anti-mask ordinance, even though it contained several other intent requirements, was unconstitutionally overbroad and vague due to its impact on First Amendment protected speech); *American Knights of the Ku Klux Klan*, 50 F. Supp.2d 835 (N.D. Ind. 1999) (an anti-mask ordinance, even though it required an intent to conceal one's identity, violated the First Amendment); *Aryan v. Mackey*, 462 F.Supp. 90 (N.D. Tex. 1978) (University could not prevent students from wearing masks at protest – they had a First Amendment right to do so); *Robinson v. Florida*, 393 So.2d 1076 (Sup. Ct. FL 1981) (Florida's high court held that a nearly identical anti-mask statute was unconstitutionally overbroad); *Daniels v. State*, 448 SE2d 185 (Sup. Ct. GA 1994) (Georgia's high court construed a very similar anti-mask statute to require an intent to conceal one's identity and knowledge that one's actions are intimidating); *Hernandez v. Commonwealth*, 406 SE2d 398 (Ct. App. VA 1991) (VA appellate court construed a very similar anti-mask statute to require an intent to conceal one's identity); *Ghafari v. Municipal Court*, 87 Cal.App.3d 255 (Ct. of Appeal, 1978) (CA appellate court held that an anti-mask ordinance, even though it required an intent to conceal one's identity, was unconstitutionally overbroad and vague in violation of the First Amendment.)

INAPPROPRIATE ORDERS OF PROTECTION

Some jurisdictions have started to grant orders of protection (OOPs) under CPL 530.10 and 530.13 (which are supposed to be used to protect a victim of a crime, or certain witnesses) to improperly keep protestors away from certain places. In DeWitt Town Court, these OOPs have been granted to "protect" the Commander of Hancock Air Base (where drones are flown to kill people in Afghanistan and elsewhere) and keep drone protestors away from the base, with the threat of a misdemeanor contempt violation. (They have been "stay away" orders.) *This is currently at the Court of Appeals in People v. Grady Flores.*

CPL 530.13 (1) provides that OOPs can be issued "for good cause shown." (Preconviction

they are “temporary” and once the case is resolved, the temporary OOP becomes a nullity and if there is a conviction, a “permanent” OOP may be issued.

According to CPL 530.13(4) for a felony conviction, the OOP may last for up to eight years from the sentencing or the person’s release from incarceration (whichever is later). For an “A” misdemeanor, it can last up to five years, and for any other offense, it can last up to two years.

CASES

Inappropriate protected party

People v. Konieczny, 2 NY3d 626 (2004) trial court has no authority to issue OOP for someone who was not a victim or witness

People v. Raduns, 70 AD3d 1355 (4th Dep’t 2010) - trial court had no authority to issue OOP for someone who was not a victim or witness.

People v. Somerville, 72 AD3d 1285 (3rd Dep’t 2010) - Permanent OOP could not be issued for witness who testified at trial but did not actually witness the offense for which D was convicted.

People v. Collier, 35 AD3d 1037 (3rd Dep’t 2006) - OOP could not be issued in favor of people who were not victims or witnesses.

McKeon v. Heath, 2013 WL 5818591 (EDNY 2013) OOP could not be issued in favor of people who were not victims or witnesses. (But they were not considered part of the sentence so they didn’t render it invalid.)

People v. Shultis, 61 AD3d 1116 (3rd Dep’t 2009) - OOP was overbroad in that it directed D to stay away from all individuals under 18 rather than just victims or witnesses.

Contempt charges based on invalid OOPs

If the OOP is not challenged in the trial court, the issue of its validity may not be raised on appeal of that case (or a contempt case based on violating it). *People v. Konieczny*, 2 NY3d 626 (2004)

But in *Konieczny* the Court also said that even though the D didn’t challenge the OOP [the challenge was based on the protected party not being a victim or witness] he could challenge it in the contempt case. (The problem was that he didn’t do that, pleading guilty to contempt and then raising the issue on appeal for the first time.) The Court said, “FN1 -..Defendant apparently did not object to the order of protection when it was issued in the [earlier case] ... In a later contempt proceeding, defendant remained free to pursue the argument that the order of protection was not properly issued, notwithstanding his failure to appeal in the earlier proceeding.”

In *People v. Trombley*, 91 AD3d 1197 (3rd Dep't 2012), the 3rd Dep't similarly held that D couldn't challenge an OOP - in a contempt case - for the first time on appeal.

In *People v. Panetta*, 41 Misc.3d 614 (Middletown City Ct 2013) the Court dismissed a contempt charge where the underlying OOP was not valid in that it was granted in favor of people (employees at animal rescue operations) who were not victims or witnesses. The court said as such, it was "not a lawful mandate" and could not be the basis for a contempt charge. See also *People v. Muchuca*, 43 Misc.3d 1220(A) (NYC Crim Ct. 2014).

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PRISON ABOLITION AND GROUNDED JUSTICE**ABSTRACT**

This Article introduces to legal scholarship the first sustained discussion of prison abolition and what I will call a “prison abolitionist ethic.” Prisons and punitive policing produce tremendous brutality, violence, racial stratification, ideological rigidity, despair, and waste. Meanwhile, incarceration and prison-backed policing neither redress nor repair the very sorts of harms they are supposed to address--interpersonal violence, addiction, mental illness, and sexual abuse, among others. Yet despite persistent and increasing recognition of the deep problems that attend U.S. incarceration and prison-backed policing, criminal law scholarship has largely failed to consider how the goals of criminal law--principally deterrence, incapacitation, rehabilitation, and retributive justice--might be pursued by means entirely apart from criminal law enforcement. Abandoning prison-backed punishment and punitive policing remains generally unfathomable. This Article argues that the general reluctance to engage seriously an abolitionist framework represents a failure of moral, legal, and political imagination. If abolition is understood to entail simply the immediate tearing down of all prison walls, then it is easy to dismiss abolition as unthinkable. But if abolition consists instead of an aspirational ethic and a framework of gradual decarceration, which entails a positive substitution of other regulatory forms for criminal regulation, then the inattention to abolition in criminal law scholarship and reformist discourse comes into focus as a more troubling absence. Although violent crime prevention and proportional punishment of wrongdoing purportedly justify imprisonment, this Article illuminates how the ends of criminal law might be accomplished in large measure through institutions aside from criminal law administration. More specifically, this Article explores a form of grounded preventive justice neglected in existing scholarly, legal, and policy accounts. Grounded preventive justice offers a positive substitutive account of abolition that aims to displace criminal law enforcement through meaningful justice reinvestment to strengthen the social arm of the state and improve human welfare. This positive substitutive abolitionist framework would operate by expanding social projects to prevent the need for carceral responses, decriminalizing less serious infractions, improving the design of spaces and products to reduce opportunities for offending, redeveloping and “greening” urban spaces, proliferating restorative forms of redress, and creating both safe harbors for individuals at risk of or fleeing violence and alternative livelihoods for persons subject to criminal law enforcement. By exploring prison abolition and grounded preventive justice in tandem, this Article offers a positive ethical, legal, and institutional framework for conceptualizing abolition, crime prevention, and grounded justice together.

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*1158 INTRODUCTION

At bottom, there is one fundamental question: Why do we take prison for granted? . . . The most difficult and urgent challenge today is that of creatively exploring new terrains of justice, where the prison no longer serves as our major anchor.

-Angela Davis, *Are Prisons Obsolete?*¹

[P]reventive justice is, upon every principle of reason, of humanity, and of sound policy, preferable in all respects to punishing justice

-William Blackstone, *Commentaries on the Laws of England*²

In 1973, the U.S. Department of Justice sponsored a National Advisory Commission on Criminal Justice Standards and Goals to study the “American Correctional System,” and after extensive research and analysis, the Commission published a report concluding that U.S. prisons, juvenile detention centers, and jails had established a “shocking record of failure.”³ The Commission recommended a moratorium on prison construction to last ten years.⁴ Instead, as a vast and compelling body of scholarship attests, in the years to follow, both prison construction and the U.S. prison population-- characterized by stark racial disparities--boomed.⁵ Forty years later, one in every thirty-five American adults was under criminal supervision of some form.⁶ Penal intervention had become even more alarmingly prevalent among African American men. According to some estimates, one of every three young African American men may expect *1159 to spend part of his life in prison or jail.⁷ In 2009, Senator Jim Webb tried and failed to establish another National Criminal Justice Commission, though numerous experts testified that U.S. prisons and jails were still “broken and ailing,”⁸ a “national disgrace,”⁹ and reflected rampant “horrors” of sexual abuse and violence¹⁰ --in short, that U.S. prisons and jails were in a state of “crisis.”¹¹

Apart from the inhumanity of incarceration, there is good reason to doubt the efficacy of incarceration and prison-backed policing as means of managing the complex social problems they are tasked with addressing, whether interpersonal violence, addiction, mental illness, or sexual abuse.¹² Moreover, beyond ***1160** prisons and jails, broader reliance on punitive policing to handle myriad social problems leads to routine use of excessive police force and to volatile, often violent, police-citizen relations.¹³

Yet, despite persistent and increasing recognition of the problems that attend incarceration and punitive policing in the United States, criminal law and criminological scholarship almost uniformly stop short of considering how the professed goals of the criminal law--principally deterrence, incapacitation, rehabilitation, and retributive justice--might be approached by means entirely apart from criminal law enforcement.¹⁴ Abandoning carceral punishment and punitive policing remains generally unfathomable.¹⁵

***1161** If prison abolition is conceptualized as an immediate and indiscriminate opening of prison doors--that is, the imminent physical elimination of all structures of incarceration--rejection of abolition is perhaps warranted. But abolition may be understood instead as a gradual project of decarceration, in which radically different legal and institutional regulatory forms supplant criminal law enforcement. These institutional alternatives include meaningful justice reinvestment to strengthen the social arm of the state and improve human welfare; decriminalizing less serious infractions; improved design of spaces and products to reduce opportunities for offending; urban redevelopment and "greening" projects; proliferating restorative forms of redress; and creating both safe harbors for individuals at risk of or fleeing violence and alternative livelihoods for persons otherwise subject to criminal law enforcement. When abolition is conceptualized in these terms--as a transformative goal of gradual decarceration and positive regulatory substitution wherein penal regulation is recognized as morally unsustainable--then inattention to abolition in criminal law scholarship and reformist discourses comes into focus as a more troubling absence.¹⁶ Further, the rejection of abolition as a horizon for reform mistakenly assumes that reformist critiques concern only the occasional, peripheral excesses of imprisonment and prison-backed policing rather than more fundamentally impugning the core operations of criminal law enforcement, and therefore requiring a departure from prison-backed criminal regulation to other regulatory frameworks.

This Article thus introduces to legal scholarship the first sustained discussion of what I will call a "prison abolitionist framework" and a "prison abolitionist ethic." By a "prison abolitionist framework," I mean a set of principles and positive projects oriented toward substituting a constellation of other regulatory and social projects for criminal law enforcement. By a "prison abolitionist ethic," I intend to invoke and build upon a moral orientation elaborated in an existing ***1162** body of abolitionist writings and nascent social movement efforts, which are committed to ending the practice of confining people in cages and eliminating the control of human beings through imminently threatened police use of violent force.¹⁷ I argue that abolition in these terms issues a more compelling moral, legal, and political call than has been recognized to date.

Prison abolition--both as a body of critical social thought and as an emergent social movement--draws on earlier abolitionist ideas, particularly the writings of W.E.B. Du Bois on the abolition of slavery.¹⁸ According to Du Bois, to be meaningful, abolition required more than the simple eradication of slavery; abolition ought to have been a positive project as opposed to a merely negative one.¹⁹ Du Bois wrote that simply declaring an end to a tradition of violent forced labor was insufficient to abolish slavery.²⁰ Abolition instead required the creation of new democratic forms in which the institutions and ideas previously implicated in slavery would be remade to incorporate those persons formerly enslaved and to enable a different future for all members of the polity.²¹ To be meaningful, the abolition of slavery required fundamentally reconstructing social, economic and ***1163** political arrangements.²² In the aftermath of slavery in the United States, reconstruction fell far short of this mark in many respects, and criminal law administration played a central role in the brutal afterlife of slavery.²³ The work of abolition remained then--and arguably still remains today--to be completed. Confronting criminal law's continuing violence is an important part of that undertaking.

Along these lines, then, a prison abolitionist framework involves initiatives directed toward positive rather than exclusively negative abolition. A prison abolitionist framework entails, more specifically, developing and implementing other positive substitutive social projects, institutions, and conceptions of regulating our collective social lives and redressing shared problems-- interventions that might over the longer term render imprisonment and criminal law enforcement peripheral to ensuring relative peace and security. Efforts of prison abolitionist organizations, such as Critical Resistance and the Prison Moratorium Project, to both oppose imprisonment and enable access to food, shelter, community-based mediation, public safety, and well-being without penal intervention exemplify this orientation towards positive abolition.²⁴ Conceived of as such, abolition is a matter both of decarceration and substitutive social--not penal-- regulation.

***1164** In contrast to leading scholarly and policy efforts to reform criminal law, abolition decidedly does not seek merely to replace incarceration with alternatives that are closely related to imprisonment, such as punitive policing, noncustodial criminal supervision, probation, civil institutionalization, and parole.²⁵ Abolition instead entails a rejection of the moral legitimacy of confining people in cages, whether that caging is deemed “civil” or whether it follows a failure to comply with technical terms of supervised release or a police order.²⁶ So too the positive project of abolition addressed in this Article is decidedly not an effort to replicate the institutional transfer that occurred in the aftermath of the deinstitutionalization of mental institutions.²⁷ An abolitionist framework requires positive forms of social integration and collective security that are not organized around criminal law enforcement, confinement, criminal surveillance, punitive policing, or punishment.

This distinction between substitutive nonpenal social regulation and noncustodial (but still criminal) supervision is an important one because the use of quasi-criminal noncustodial supervisory preventive measures dramatically increased alongside (and as an extension of) prison-based punishment during the late twentieth and early twenty-first centuries.²⁸ These purportedly preventive measures include stop and frisk policing, noncustodial criminal supervision, registration requirements for people convicted of certain crimes (especially sex-related offenses),²⁹ and preventive detention.³⁰ These punitive preventive measures-- often referred to as “preventive justice” interventions--have ***1165** generated a body of predominantly critical scholarship.³¹ This critical scholarship identifies how these contemporary punitive preventive interventions eviscerate important liberty interests and violate basic criminal rule of law principles, primarily by imposing significant adverse consequences before a meaningful, procedurally regular finding of guilt.³² Much of this work also considers what procedural protections would be required to render such preventive restraints more just.³³

Yet, just as scholars addressing overincarceration and overcriminalization in the United States tend to not consider abolition as a reformist framework, or to engage reformist strategies that operate entirely separate from criminal law enforcement, so too the preventive justice literature hardly entertains preventive justice's possible manifestations outside the context of criminal and quasi-criminal law enforcement or punitive prevention.³⁴ Nor does this important body of work, for the most part, consider how the problems associated with punitive prevention (from its procedural laxity to its broader injustice) run from peripheral exercises of punitive preventive measures all the way to criminal law enforcement's core practices.³⁵

But preventive justice, in its overlooked iterations--outside the criminal law context--may begin to illuminate how it might be possible to rely radically less on criminal law enforcement to serve the ends of security and collective peace. This neglected version of preventive justice, which focuses on social rather than penal projects, is consistent with (even essential to) an abolitionist framework and may be understood to date back as far as to the late eighteenth and early nineteenth centuries, a period preceding the establishment of professional police forces and large prison and jail systems.³⁶ During this period, social reformers, including most famously Jeremy Bentham, contemplated how to maintain peace ***1166** and security without unduly imperiling individual freedom and without involving professional police and security forces, let alone massive networks of criminal detention facilities.³⁷ Quite separate from Bentham's famous plans for a panoptic prison, this social reform project sought to prevent crime and harm without involving what we now understand as criminal law enforcement.³⁸ Crime prevention,

as early reformers conceptualized it, ought to be realized in large part through social projects that reduced risks of harm and engaged people in common endeavors through infrastructure, education, and social integration, not primarily through punitive policing or prison-backed punishment.³⁹ Bentham called these efforts “indirect legislation” to capture the concept of governmental interventions that operated “off the beaten track” to shape socially constructive, peaceable interaction at a distance by “triggering . . . remote effects.”⁴⁰ In contrast, William Blackstone's conception of preventive justice centered on “obliging those persons whom there is a probable ground to suspect of future misbehavior to . . . give full assurance . . . that such offence as is apprehended shall not happen”⁴¹ But preventive justice in this alternative register invoked by Bentham, and focused on a broader regulatory environment separate from criminal law enforcement (and also separate from characterological assessments of criminality of the sort Blackstone imagined), operated little, if at all, with recourse to instruments of the criminal process.⁴²

Admittedly, much of Bentham's writings on regulating crime are disturbing, even distinctly bizarre. For instance, he wrote extensively of tattooing all British subjects for identification purposes (and to prevent crime).⁴³ The purpose of invoking this earlier body of thought, though, is not to defend it in its entirety but to summon an alternative tradition of harm and crime prevention focused on addressing violence and social discord through socially integrative and transformative *1167 projects aside from criminal law enforcement, projects within which people are able to more equitably and freely govern themselves.⁴⁴ At this earlier time, the notion that order would be maintained primarily by punitive policing and prison-based punishment remained highly controversial, too similar to tyranny to obtain much support.⁴⁵

At present, this often-overlooked form of crime prevention is manifest on a small, incipient scale in a range of efforts to shift resources from criminalization to other social and political projects. These efforts simultaneously aim to prevent theft, violence, and other criminalized conduct, through empowerment and movement building among vulnerable groups, urban redevelopment, product design, institutional design, and alternative livelihoods programs.⁴⁶ Whereas the interventions typically captured under the rubric of preventive justice generally aim to avert harmful conduct before it occurs by targeting persons believed to be prone to criminal offending, what I will call grounded preventive justice may be understood to operate through this variety of measures not engaged at all with the criminal process. These structural reform measures focus instead on expanding the space in which people are safe from interpersonal harm and are able to forge relationships of greater equality. These measures are less heavily overshadowed by the legacies of racial and other forms of subordination too often perpetuated in the United States through criminal law enforcement. Preventive justice may be reconceptualized in these terms as a crucial component of an abolitionist framework, both in its critical analysis of punitive preventive forms of state intervention and in this overlooked alternative iteration as grounded noncriminal prevention through institutional and structural reforms.

Accordingly, this Article explores these two discourses-- prison abolition and preventive justice--seldom considered in tandem, in order to make vivid the promise of abolition as a manner of envisioning meaningful criminal law reform, as well as the related possibilities of crime prevention focused on structural reform rather than individualized criminal targeting. Prison abolition, on this account, is an aspirational ethical, institutional, and political framework that aims to fundamentally *1168 reconceptualize security and collective social life, rather than simply a plan to tear down prison walls. As such, abolition seeks to ultimately render “prisons obsolete.”⁴⁷

Before proceeding further, it bears noting that there may be, in the end, some people who are so dangerous to others that they cannot live safely among us, those rare persons referred to in abolitionist writings as “the dangerous few.”⁴⁸ Who and how many are the dangerous few? The answer to this question is by no means self-evident but its complete and final resolution ought not to interfere with serious engagement with abolitionist analysis, given that there are many millions of the one in thirty five American adults presently living under criminal supervision who fall outside any such small category that may exist.⁴⁹ U.S. jails, and to a lesser extent U.S. prisons, house numerous people who have never committed acts of violence or perpetrated serious harm against others at all.⁵⁰ Decarceration as it relates to this population is relatively less controversial, as there are many thousands of people incarcerated in this category that are plainly outside any plausible definition of the dangerous few.⁵¹

Further, the category of the dangerous few is absolutely not reducible to those individuals who are presently incarcerated in state prisons after being convicted of violent crimes--by some estimates about half of the U.S. prison population.⁵² Many persons convicted of violent offenses have not even committed what are commonly understood as acts of violence: Possession of a gun or statutory rape *1169 are often classified as violent crimes.⁵³ Additionally, homicide in the United States and other crimes properly categorized as violent are often a product of participation in illegal economies where the only means of dispute resolution may involve violence.⁵⁴ Enabling other livelihoods outside criminalized markets, and decriminalizing certain narcotics markets, would reduce considerably the dangers those criminalized livelihoods pose.⁵⁵ Participants in those markets are thus not properly understood as part of the dangerous few. Their criminal conduct would be displaced by a wider embrace of a positive substitutive abolitionist program.

Others who are convicted of crimes of violence are not especially dangerous and would not perpetrate such violence if they had a means of self-support or means of mental health care or other necessary care that would enable them to avoid criminal process contact in the future.⁵⁶ This point is powerfully conveyed by the experience of those who committed heinous, violent crimes as young people--including murders, carjackings, beheadings, and torture--after which these individuals moved on to full, productive, even altruistic lives of service to others through contributions to social justice, culture, business, and the arts.⁵⁷

Moreover, current enforcement patterns disproportionately focus on certain forms of often racialized criminal threat and ignore altogether other forms of grave interpersonal harm. Racially targeted policing and racial disproportionality throughout the criminal process reflect how crime and threat are understood in reference to race in ways that exacerbate racialized police violence and distract attention entirely from actual locations of danger.⁵⁸ Many currently dangerous people who perpetrate vast economic harms, or abuse the vulnerable too afraid to seek redress, or wage unjust wars that kill many thousands, will never face *1170 punishment for their wrongdoing in the criminal process.⁵⁹ While racially targeted policing of minor offenses is rampant in many jurisdictions, the vast majority of rapes and sexual assaults go unaddressed, and many economic wrongs are not understood as dangerous or as crimes.⁶⁰

But even those egregious forms of economic wrongdoing, like the harms perpetrated by Bernard Madoff and his associates, might well be better managed through other forms of preventive regulation than through incarcerating those individuals after the fact.⁶¹ Similarly, other regulatory and social projects promise to reduce gun violence and other forms of interpersonal harm without invoking the criminal process at all.⁶²

In short, there are many who have committed acts of violence but who, under circumstances of social coexistence enabled by positive abolition, would pose no threat of harm to themselves or others. A commitment to any significant decarceration, let alone abolition, entails more than simply eliminating incarceration for nonviolent, nonserious, nonfelony convictions,⁶³ or less serious felony convictions classified as violent.⁶⁴ Even people convicted of serious, violent felonies are not properly understood as the dangerous few and should be able to live their lives outside of cages. A commitment to any significant degree of decarceration requires a willingness to abandon managing perceived risks of violence *1171 by banishing and relegating to civil death any person convicted of serious crime. Reducing social risk by physically isolating and caging entire populations is not morally defensible, even if abandoning such practices may increase some forms of social disorder.

If there are indeed some small subset of people properly denominated the dangerous few, they are only those who are intent on perpetrating acts of vicious harm against others such that they are an imminent threat to all those around them regardless of their circumstances. An abolitionist framework is not necessarily committed to denying the existence of these dangerous few persons, though the dangerous few are vastly outnumbered by many millions of nondangerous individuals living under criminal supervision and any such dangerousness on the part of those incarcerated currently is exacerbated by features of prison society that a wider embrace of an abolitionist ethic and framework would improve. Because any such dangerous few persons

constitute at most only a small minority of the many millions of people under criminal supervision in the United States--the one of every thirty-five American adults under criminal supervision of some form⁶⁵--the question of the danger these few may pose can be deferred for some time as decarceration could by political necessity only proceed gradually. And so the question of the dangerous few ought not to eclipse or overwhelm the urgency of a thorough consideration of abolitionist analyses and reformist projects of displacement of criminal regulation by other regulatory approaches.

In any event, an abolitionist ethic recognizes that even if a person is so awful in her violence that the threat she poses must be forcibly contained, this course of action ought to be undertaken with moral conflict, circumspection, and even shame, as a choice of the lesser of two evils, rather than as an achievement of justice. To respond to victims of violence justly would be to make them whole and to address forms of collective vulnerability so those and other persons are less likely to be harmed again. Even when confronting the dangerous few, on an abolitionist account, justice is not meaningfully achieved by caging, degrading, or even more humanely confining, the person who assaulted the vulnerable among us.

This Article develops these arguments in five parts. Part I aims to motivate the case for a prison abolitionist ethic. Part II argues that an abolitionist ethic promises to address U.S. criminal law administration's most significant problems in ways importantly distinct from (and in certain respects superior to, though not necessarily exclusive of) a reformist framework. Part III addresses the preventive justice literature and reveals how a largely overlooked account of prevention in a structural register serves as an important supplement to the current body of critical¹¹⁷² work centered on punitive preventive measures, as well as to an abolitionist framework. Part IV examines how prevention in this alternative register functions on the ground in a range of settings as an incipient abolitionist framework. Part V responds preliminarily to an anticipated retributive objection, in part through an account of what I will call "grounded justice."

I. PRISON ABOLITION

Criminal punishment organized around incarceration in the United States, as well as incarceration's corollaries (punitive policing, arrest, probation, civil commitment, parole), subject human beings to extreme violence, dehumanization, racialized degradation and indignity, such that prison abolition ought to register as a more compelling call than it has to date.⁶⁶ At the same time, the use of imprisonment as a means of achieving collective peace and security, as well as meaningful retributive justice, ought to be called into serious doubt.⁶⁷

Prison abolition seeks to end the use of punitive policing and imprisonment as the primary means of addressing what are essentially social, economic, and political problems. Abolition aims at dramatically reducing reliance on incarceration and building the social institutions and conceptual frameworks that would render incarceration unnecessary. Abolition is not a simple call for an immediate opening or tearing down of all prison walls, but entails an array of alternative nonpenal regulatory frameworks and an ethic that recognizes the violence, dehumanization, and moral wrong inherent in any act of caging or chaining--or otherwise confining and controlling by penal force--human beings. This holds true even in the case of those few people who may pose a severe, demonstrated danger to others and so, as the lesser of two evils, must be convicted and the threat they pose contained.⁶⁸

This Part explores the entrenched structural problems that recommend abolition, along with its theoretical, legal, and political contours and implications. I will first examine the violence, dehumanization, and racial subordination inherent in the basic structural parameters of imprisonment and punitive policing in the United States that motivate the turn toward an abolitionist framework. One problem with more moderate reformist accounts (of which most criminal legal scholarship consists) is that they fail to identify the basic structural terms of punitive policing and incarceration in the U.S. that render these practices¹¹⁷³ fundamentally indefensible, and instead assume that the problematic features of these practices are more peripheral and subject to elimination or thoroughgoing change. As a consequence, moderate reformist accounts are limited to recommending only minor revisions to the fundamental structures of incarceration and punitive policing practices--which are not susceptible to meaningful change without far more fundamental reconstitution.⁶⁹

This Part begins by mapping the structural problems and inherent dynamics of penal practices that create and maintain patterns of dehumanization, violence, and racial subordination. It will then assess an abolitionist ethic with reference to economic and criminological analyses of incarceration's purported crime-reductive effects.

A. Violence and Dehumanization

Prisons are places of intense brutality, violence, and dehumanization.⁷⁰ In his seminal study of the New Jersey State Prison, *The Society of Captives*, sociologist Gresham M. Sykes carefully exposed how the fundamental structure of the modern U.S. prison degrades the inmate's basic humanity and sense of self-worth.⁷¹ Caged or confined and stripped of his freedom, the prisoner is forced to submit to an existence without the ability to exercise the basic capacities that define personhood in a liberal society.⁷² The inmate's movement is tightly controlled, sometimes by chains and shackles, and always by orders backed with the threat of force;⁷³ his body is subject to invasive cavity searches on command;⁷⁴ he is denied nearly all personal possessions; his routines of eating, sleeping, and bodily maintenance are minutely managed; he may communicate and interact *1174 with others only on limited terms strictly dictated by his jailers; and he is reduced to an identifying number, deprived of all that constitutes his individuality.⁷⁵ Sykes's account of "the pains of imprisonment"⁷⁶ attends not only to the dehumanizing effects of this basic structure of imprisonment--which remains relatively unchanged from the New Jersey penitentiary of 1958 to the U.S. jails and prisons that abound today⁷⁷--but also to its violent effects on the personhood of the prisoner:

[H]owever painful these frustrations or deprivations may be in the immediate terms of thwarted goals, discomfort, boredom, and loneliness, they carry a more profound hurt as a set of threats or attacks which are directed against the very foundations of the prisoner's being. The individual's picture of himself as a person of value . . . begins to waver and grow dim.⁷⁸

In addition to routines of minute bodily control, thousands of persons are increasingly subject to long-term and near-complete isolation in prison. The Bureau of Justice Statistics has estimated that 80,000 persons are caged in solitary confinement in the United States, many enduring isolation for years.⁷⁹

Solitary confinement routinely entails being locked for twenty-three to twenty-four hours per day in a small cell, between forty-eight and eighty square feet, without natural light or control of the electric light, and no view outside the *1175 cell.⁸⁰ Persons so confined may be able to spend one hour per day in a "concrete exercise pen," which, although partially open to the outdoors, is typically still configured as a cage.⁸¹

Raymond Luc Levasseur, who was held in solitary confinement at the Federal Correctional Complex at Florence, Colorado, a prison devoted to solitary confinement (also called administrative segregation (ADX)), wrote of the first year of his isolation:

Picture a cage where top, bottom, sides and back are concrete walls. The front is sliced by steel bars. . . . The term "boxcar" is derived from this configuration: a small, enclosed box that [does not] move. . . . The purpose of a boxcar cell is to gouge the prisoner's senses by suppressing human sound, putting blinders about our eyes and forbidding touch. . . . It seems endless. Each morning I look at the same gray door and hear the same rumbles followed by long silences. It is endless. . . . I see forced feedings, cell extractions Airborne bags of shit and gobs of spit become the response of the caged. The minds of some prisoners are collapsing in on them. . . . One prisoner subjected to four-point restraints (chains, actually) as shock therapy had been chewing on his own flesh.

Every seam and crack is sealed so that not a solitary weed will penetrate this desolation When they're done with us, we become someone else's problem.⁸²

Following thirteen years of solitary confinement, Levasseur was released from prison in 2004.⁸³

The images that follow are not primarily intended to render more vivid this exploration of incarceration and punitive policing, but instead are incorporated to illustrate an important part of this Article's argument: We must look at what these practices actually entail, especially because so often the ideology of criminal regulation renders much of the criminal process and its violent consequences opaque or even invisible to us. By removing the violent results of these regulatory approaches from the center of our attention, and often removing them entirely from our view, this same ideology persuades us of the necessity and relative harmlessness of incarceration and punitive policing. An abolitionist ethic, however, requires us to confront what penal regulation actually involves rather than assuming that creating a certain spatial distance --by putting particular persons in *1176 cages, or controlling individuals and communities through prison-backed police surveillance -- satisfactorily addresses the social and political problems of violence, mental illness, poverty or joblessness, among others, that those persons and communities have come to represent.

This photograph portrays prisoners who are suffering from mental illness and subject to solitary confinement in an Ohio State Prison, held in cages for a “group therapy” session:

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

⁸⁴

These persons' bodies are revealed in this image as objects locked in isolated small spaces, shackled, rendered plainly less than human.

Cages are also used for booking mentally ill inmates in California prisons, as reflected in the record addressed in the U.S. Supreme Court's opinion in *Brown v. Plata*:

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

*1177 ⁸⁵

This is a suicide watch cell, also used for isolation, in a state prison in California, drawn from a related court record:

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

⁸⁶

In these cells, feces may be smeared on the walls as those detained mentally decompensate, the odor of rot and acute despair palpable.⁸⁷

*1178 As incarcerated populations have increased, solitary confinement has emerged as a primary mechanism for internal jail and prison discipline, such that the actual number of individuals confined to a small cell for twenty-three hours per day remains unknown and may be significantly in excess of 80,000.⁸⁸ Some people are sentenced to “Super-Max” facilities that only contain solitary cells; other people are placed in solitary confinement as punishment for violating prison rules or for their own protection.

Stays in solitary confinement are often lengthy, even for relatively minor disciplinary rule violations, and may be indefinite. For example, one young prisoner caught with seventeen packs of Newport cigarettes was sentenced to fifteen days solitary confinement for each pack of cigarettes, totaling more than eight months of solitary confinement.⁸⁹ Another prisoner in New Jersey spent eighteen years in solitary confinement. Although his solitary confinement status was subject to review every ninety days, this prisoner explained that he eventually stopped participating in the reviews as he felt they were “a sham, with no real investigation,” and lost hope that he would ever be able to leave.⁹⁰

Solitary confinement has become a widely tolerated and “regular part of the rhythm of prison life,”⁹¹ yet this basic structure of prison discipline in the United States entails profound violence and dehumanization; indeed, solitary confinement produces effects similar to physical torture. Psychiatrist Stuart Grassian first introduced to the psychiatric and medical community in the early 1980s that prisoners living in isolation suffered a constellation of symptoms including overwhelming anxiety, confusion, hallucinations, and sudden violent and self-destructive outbursts.⁹² This pattern of debilitating symptoms, sufficiently consistent among persons subject to solitary confinement (otherwise known as ***1179** the Special Housing Unit (SHU)), gave rise to the designation of SHU Syndrome.⁹³

Partly on this basis, the United Nations Special Rapporteur on Torture has found that certain U.S. practices of solitary confinement violate the U.N. Convention Against Torture and Other Cruel, Inhuman and Degrading Punishment.⁹⁴ Numerous psychiatric studies likewise corroborate that solitary confinement produces effects tantamount to torture.⁹⁵ Bonnie Kerness, Associate Director of the American Friends Service Committee's Prison Watch, testified before the Commission on Safety and Abuse in America's Prisons that while visiting prisoners in solitary confinement, she spoke repeatedly “with people who begin to cut themselves, just so they can feel something.”⁹⁶ Soldiers who are captured in war and subjected to solitary confinement and severe physical abuse also report the suffering of isolation to be as awful as, and even worse than, physical torture.⁹⁷

But despite its more apparent horrors, solitary confinement is simply an extension of the logic and basic structure of prison-backed punishment-- punitive isolation and surveillance-- to the disciplinary regime of the prison itself. Solitary confinement's justification and presumed efficacy flows from the assumed legitimacy of prison confinement in the first instance. Prison or jail confinement ***1180** isolates the detained individual from the social world he inhabited previously, stripping that person of his capacity to move of his own volition, to interact with others, and to exercise control over the details of his own life. Once that initial form of confinement and deprivation of basic control over one's own life is understood to be legitimate, solitary confinement merely applies the same approach to discipline within prison walls. But the basic physical isolation and confinement is already countenanced by the initial incarceration.

In addition to the dehumanization entailed by the regular and pervasive role of solitary confinement in U.S. jails, prisons, and other detention centers, the environment of prison itself is productive of further violence as prisoners seek to dominate and control each other to improve their relative social position through assault, sexual abuse, and rape. This feature of rampant violence, presaged by Sykes's account, arises from the basic structure of prison society, from the fact that the threat of physical force imposed by prison guards cannot adequately ensure order in an environment in which persons are confined against their will, held captive, and feared by their custodians.⁹⁸ Consequently, order is produced through an implicitly sanctioned regime of struggle and control between prisoners.⁹⁹

Rape, in particular, is rampant in U.S. jails and prisons.¹⁰⁰ According to a conservative estimate by the U.S. Department of Justice, 13 percent of prison inmates have been sexually assaulted in prison, with many suffering repeated sexual assaults.¹⁰¹ While noting that “the prevalence of sexual abuse in America's inmate confinement facilities is a problem of substantial magnitude,” the Department of Justice acknowledged that “in all likelihood the institution-reported data significantly undercounts the number of actual sexual abuse victims in prison, due to the phenomenon of underreporting.”¹⁰² Although the

Department had previously recorded 935 instances of confirmed sexual abuse for 2008, further analysis produced a figure of 216,000 victims that year (victims, not incidents).¹⁰³ These figures suggest an endemic problem of sexual violence in U.S. prisons and jails *1181 produced by the structure of carceral confinement and the dynamics that inhere in prison settings.

In one notable case that makes vivid these underlying dynamics, Roderick Johnson sued seven Texas prison officials for failing to protect him from victimization by prison gang members who raped him hundreds of times and sold him between rival gangs for sex over the course of eighteen months.¹⁰⁴ Johnson, a gay man who had struggled with drug addiction, was incarcerated for probation violations following a burglary conviction.¹⁰⁵ Rape was so prevalent in the facility where Johnson was incarcerated that it had a relatively fixed price: A former prisoner witness explained to the judge and jury at the trial that a purchased rape in that prison cost between \$3 and \$7.¹⁰⁶ When Johnson sought protection from prison officials, he was told he would have to “fight or fuck.”¹⁰⁷

Seeking to avoid liability at trial, one of the prison official defendants, Jimmy Bowman, explained that prison officials were not responsible for failing to protect Johnson because “an inmate has to defend himself.”¹⁰⁸ Richard E. Wathen, the assistant warden, conceded that “[p]rison . . . is a violent place,” but he testified that prison officials ought not to be held accountable under the Eighth Amendment for repeated gang rapes of prisoners if there was little officials could have done to prevent the abuse: “I believe that we did the right thing then, and I would make the same decision today. . . . There has to be some extreme threat before we put an offender in safekeeping.”¹⁰⁹

In any event, safekeeping in many detention settings only amounts to solitary confinement. And though prisoners are less likely to be subject to rape if they are held in relative isolation for their own protection, they are likely to suffer other substantial psychological harm, as previously noted.¹¹⁰ Ultimately, Johnson lost his civil case as the jury found for the prison officials.¹¹¹ After his trial, Johnson relapsed in his addiction recovery, reoffended by attempting to steal money *1182 (presumably to buy drugs), and returned to serve out a further nineteen-year prison sentence.¹¹²

These horrific experiences of incarceration are not simply outlier forms of dehumanization and violence, but are produced by the structure of U.S. imprisonment—by the basic manner in which caging or confining human beings strips individuals of their personhood and humanity, and sets in motion dynamics of domination and subordination. In research widely known as the Stanford Prison Experiment, psychologists Philip Zimbardo and Craig Haney further elucidated these structural dynamics.¹¹³ Notwithstanding subsequent criticism, their experiment revealed how the basic structure of the prison in the United States tends toward dehumanization and violence.¹¹⁴ At the outset of their now famous (or infamous) experiment, Zimbardo and Haney placed a group of typical college students into a simulated prison environment on Stanford University's campus.¹¹⁵ Zimbardo and Haney randomly designated certain of the students as mock-prisoners and others as mock-guards.¹¹⁶ What happened in the course of the six days that followed shocked the researchers, professional colleagues, and the general public.¹¹⁷ Zimbardo and Haney found that their “‘institution’ rapidly developed sufficient power to bind and twist human behavior”¹¹⁸ Mock-guards engaged with prisoners in a manner that was “negative, hostile, affrontive, *1183 and dehumanizing,” despite the fact that the “guards and prisoners were essentially free to engage in any form of interaction.”¹¹⁹ “[V]erbal interactions were pervaded by threats, insults and deindividuating references The negative, anti-social reactions observed were not the product of an environment created by combining a collection of deviant personalities, but rather the result of an intrinsically pathological situation which could distort and rechannel the behavior of essentially normal individuals.”¹²⁰

The Stanford Prison Study has been criticized for methodological, ethical, and other shortcomings, but, despite its limitations, it attests to the dehumanizing dynamics that routinely surface in carceral settings.¹²¹ According to some critics, for instance, the Stanford Prison Study reflects the participants' obedience and conformity to stereotypic behavior associated with prisoners and guards, rather than an effect produced exclusively and directly by the institutional environment of prisons.¹²² But even if

the study's critics are correct, it remains true that these same features of conformity and behavioral expectations obtain in actual prison environments. Therefore, whether the Stanford Prison Study measures institutional effects or the tendency of people in such institutional settings to conform to widely understood behavioral expectations associated with such settings, it is still the case that these settings will tend to reproduce powerful dynamics of dominance, subordination, dehumanization, and violence.

Of separate though equal concern, the violence and dehumanization of incarceration not only shapes those who are incarcerated, but produces destructive consequences for entire communities.¹²³ People leaving prison are marked by the experience of incarceration in ways that makes the world outside prison more violent and insecure; it becomes harder to find employment and to engage ***1184** in collective social life because of the stigma of criminal conviction.¹²⁴ Further, incarcerating individuals has harmful effects on their families. The children, parents, and neighbors of prisoners suffer while their mothers, fathers, children, and community members are confined.¹²⁵ Coming of age with a parent incarcerated generally has a substantial and negative impact on the life chances of young people.¹²⁶

It is insufficient to simply seek to reform the most egregious instances of violence and abuse that occur in prison while retaining a commitment to prison-backed criminal law enforcement as a primary social regulatory framework. Of course, less violence in these places would undoubtedly render prisons more habitable, but the degradation associated with incarceration in the United States is at the heart of the structure of imprisonment elucidated decades ago by Sykes: Imprisonment in its basic structure entails caging or imposed physical constriction, minute control of prisoners' bodies and most intimate experiences, profound depersonalization, and institutional dynamics that tend strongly toward violence. These dehumanizing aspects of incarceration are unlikely to be meaningfully eliminated in the U.S., following decades of failed efforts to that end, while retaining a commitment to the practice of imprisonment. This is especially so in the United States for reasons related to the specific historical and racially subordinating legacies of American incarceration and punitive policing. Two hundred and forty years of slavery and ninety years of legalized segregation, enforced in large measure through criminal law administration, render U.S. carceral and punitive policing practices less amenable to the reforms undertaken, for example, in Scandinavian countries, which have more substantially humanized their prisons.¹²⁷

***1185** The following Subpart addresses the racial dynamics associated with incarceration and punitive policing in the United States and the practices of racial dehumanization through which U.S. carceral and policing institutions developed.

B. Racial Subordination and the Penal State

Alongside imprisonment's general structural brutality, abolition merits further consideration as an ethical framework because of the racial subordination inherent in both historical and contemporary practices of incarceration and punitive policing. Michelle Alexander's *The New Jim Crow* popularized a critique of incarceration as a means of racialized social control in the United States, but Alexander's account was preceded and accompanied by earlier historical, psychological, literary, and sociological studies focused on how maintaining social order through incarceration emerged as a way to preserve the power relationships inherent in slavery and Jim Crow; these studies further demonstrate how punitive policing and imprisonment continue to be haunted at their very core by a dehumanizing inheritance of racialized violence.¹²⁸ These various accounts elucidate how in the immediate aftermath of the Civil War the ascription of criminal status-- leading to the classification and separation of citizens and the curtailment of their rights of citizenship-- served as an instance of the process Reva Siegel has called "preservation through transformation," defined as the evolution of a mode of status-enforcing state action in response to contestation of the status' earlier manifestations (in this case, chattel slavery and later de jure racial segregation).¹²⁹ Because this history of slavery and Jim Crow's afterlife in criminal punishment practices is already addressed elsewhere, here I will only briefly ***1186** examine the racially subordinating structure of punitive policing and imprisonment insofar as it is relevant to an abolitionist framework and ethic.¹³⁰

The significance of this material from an abolitionist standpoint is that it further underscores the constitutive role of degradation in core U.S. incarceration and punitive policing structures, as they fail to treat targeted persons as fully human and thus deserving of equal dignity and regard. Understanding practices of punitive policing and imprisonment as a legal and political technology developed, in large part, both through and for degradation and racial subordination calls for greater scrutiny of these techniques. In particular, critical analysis must attend to whether the purported ambitions of these techniques are meaningfully achieved and separable so as to disconnect the present applications of punitive policing and incarceration from their brutal racialized pasts. In this Subpart, I argue that the racial legacies of incarceration and punitive policing infect these practices to their core by shaping the tolerated range of violence in criminal law enforcement contexts, as well as by coloring basic perceptions of and ideas about criminality and threat.

The racialized dimensions of punitive policing and incarceration are not, of course, merely historical; they are vividly present in, among other places, the continued killings of African American men by white police officers.¹³¹ As recently ***1187** as the 1990s, some Los Angeles police officers referred to cases involving young African American men as “N.H.I.” cases, standing for “no humans involved.”¹³² In 2003, after a Las Vegas police officer shot and killed a black man named Orlando Barlow, who was on his knees, unarmed, and attempting to surrender, an investigative series by the *Las Vegas Review-Journal* revealed that the officers in the unit celebrated the shooting by ordering t-shirts portraying the officer's gun “and the initials B.D.R.T. (Baby's Daddy Removal Team)—a racially charged term and reference to Barlow, who was watching his girlfriend's children before he was shot.”¹³³ The acronym B.D.R.T. continues to circulate in police culture, as do the associated racially subordinating associations directed at African American men. For example, online stores that sell police-themed clothing continue to market B.D.R.T. t-shirts, and, in 2011, officers with the Panama City, Florida, Police Department adopted the acronym for their kickball police league team.¹³⁴ Whereas Alexander argues the legacy and persistence of these dynamics require a social movement to markedly reduce incarceration and disproportionate minority confinement, my analysis entails in addition (or instead) that the structural character of these racial legacies requires a movement committed to the thoroughgoing replacement (and elimination) of these imprisonment and punitive policing practices with other social regulatory frameworks, along with a critique and rejection of many of criminal law administration's ideological entailments.¹³⁵

1188 **

The racialized constitution of imprisonment and punitive policing began in the South even before the Civil War, though in the pre-Civil War period the relatively small population of Southern prison inmates were primarily white, as most African Americans were held in slavery.¹³⁶ Although the legal institution of slavery was abolished with the end of the Civil War, the work necessary to incorporate former slaves as political, economic, and social equals was neglected, and in many instances actively resisted.¹³⁷ In particular, criminal law enforcement functioned as the primary mechanism for the continued subordination of African Americans for profit.¹³⁸ During Reconstruction, Southern legislatures sought to maintain control of freed slaves by passing criminal laws directed exclusively at African Americans.¹³⁹ These laws treated petty crimes as serious offenses and criminalized certain previously permissible activities, but only for the “free negro.”¹⁴⁰ Specific criminalized offenses included “mischief,” “insulting gestures,” “cruel treatment to animals,” “cohabitating with whites,” “keeping firearms,” and the “vending of spirituous or intoxicating liquors.”¹⁴¹

These “Black Codes” were adopted by legislatures in Alabama, Florida, Georgia, Louisiana, Mississippi, South Carolina, and Texas.¹⁴² These laws quickly expanded Southern inmate populations and transformed them from predominantly white to predominately African American.¹⁴³ Convict leasing was exempted from the Thirteenth Amendment's prohibition on slavery, which outlawed involuntary servitude except in the case of those “duly convicted.”¹⁴⁴ ***1189** Criminal law enforcement was then used to return African Americans to the same plantations on which they had labored as slaves, as well as to condemn thousands to convict leasing operations, chain gangs, and prison plantations.¹⁴⁵

Even before the Civil War, penitentiaries in the North contained a disproportionate number of African Americans, many of them former slaves.¹⁴⁶ New York legislated the emancipation of slaves and the founding of the state's first prison on the same date in 1796.¹⁴⁷ In Alexis de Tocqueville's and Gustave de Beaumont's classic 1883 account, *On the Penitentiary System in the United States and Its Application in France*, the two wrote: “[I]n those [Northern] states in which there exists one Negro to thirty whites, the prisons contain one Negro to four white persons.”¹⁴⁸

There are many similarities in form between slavery and the early Northern penitentiaries. Both subordinated their subjects to the will of others, and Southern slaves and inmates alike followed a daily routine dictated by white superiors.¹⁴⁹ Both forced their subjects to rely on whites for the fulfillment of their basic needs for food, water, and shelter. Both isolated them in a surveilled environment. The two institutions also frequently forced their subjects to work for longer hours and less compensation than free laborers.¹⁵⁰ Although the basic structure of Northern prisons that purported to rehabilitate through a routine of solitude and discipline may seem at first blush quite removed from the dehumanizing and violent dynamics that characterized the Southern convict experience, one dehumanizing feature remained markedly constant: Even in rehabilitative contexts in the North, the penitentiary aimed to strip and degrade the inmate of his former self so as to reconstitute his being according to the institution's preferred terms. And as commentators, such as Charles Dickens, noted at the time, *1190 the “slow and daily tampering with the mysteries of the brain” entailed by this form of incarceration could be “immeasurably worse than any torture of the body.”¹⁵¹

In the Reconstruction era South, whether sentences were short or long, convicted persons, especially African Americans, were routinely conscripted into vicious conditions of forced labor.¹⁵² For example, although the sentence for the crime of intermarriage in Mississippi was confinement in the state penitentiary for life, convictions were often punishable by a fine not in excess of fifty dollars.¹⁵³ If a person was unable to pay, that person could be hired out to any white man willing to pay the fine.¹⁵⁴ Preference was given to the convict's former master, who was permitted to withhold the amount used to pay the fine from the convict's wages.¹⁵⁵ This common practice resulted in situations where freedmen would spend years, even entire lifetimes, working off their debt for a small criminal fine.¹⁵⁶

By contrast to this sort of peonage and criminal surety operation, the convict lease operated through a bidding system wherein companies would offer a set amount of money per day per convict, and the highest bidder would win custody of the group of convicts and be entitled to their labor.¹⁵⁷ Leased convicts worked on farms, constructed levees, plowed fields, cleared swampland, and built train tracks across the South.¹⁵⁸ They moved from work site to work site, usually in a rolling iron cage, which also served as their living quarters during jobs.¹⁵⁹ Convict lessors justified their use of convict labor because they claimed free labor was prohibitively costly; but as bidding expanded, the daily price of a convict's labor increased and free labor began to compete.¹⁶⁰ Eventually, it was this trend toward parity in the cost of free and convict labor, more than any outrage at the brutal exploitation of the convict lease, which led to the abolition of the lease and its *1191 replacement by the chain gang.¹⁶¹ Chain gangs, unlike the convict lease, worked on maintaining public roads and performed other hard labor in the public rather than private sector.¹⁶²

State prisons also directly used African Americans for their labor, working prisoners in the fields for profit and holding them at night in wagons that were guarded by white men with rifles and dogs.¹⁶³ Some prisons were actually constructed on former plantations, and consisted of vast tracts of land used for farming; white prisoners were appointed to serve as guards or trustees, assistants to the regular prison administrators.¹⁶⁴ The state prison plantations could even generate considerable profit. For instance, in 1917, Parchman Prison farm in Mississippi contributed approximately one million dollars to the state treasury through the sale of cotton and cotton seed, almost half of Mississippi's entire budget for public education that year.¹⁶⁵ By 1917, African Americans still represented some ninety percent of the prison population in Mississippi.¹⁶⁶ The most dehumanizing

abuses in these various settings were directed exclusively at African Americans.¹⁶⁷ Southern states enacted statutes to prohibit the confinement of white and African American prisoners in shared quarters. In 1903, Arkansas, for example, passed a law declaring it “unlawful for any white prisoner to be handcuffed or otherwise chained or tied to a negro prisoner.”¹⁶⁸ It is thus that the practices of U.S. criminal law administration were forged through the racial dehumanization of African American people.¹⁶⁹

***1192** Whereas the connections between slavery and the Northern penitentiary were further removed, the penal state in the South preserved and expanded the African American captive labor force and maintained racial hierarchy through actual incarceration or threat of criminal sanctions, as well as through the conditions of confinement. As recently as 1970, in *Holt v. Sarver*,¹⁷⁰ a District Court in Arkansas upheld the brutal exploitation of working convicts (almost all of whom were African American), concluding that the “[Thirteenth] Amendment's exemption manifested a Congressional intent not to reach such policies and practices.”¹⁷¹ The awful mistreatment directed at convicted persons under the convict lease, chain gang, and prison plantations of the South was in these ways inextricably tied to the afterlife of slavery and the failures of abolition as a positive program of the form W.E.B. Du Bois envisioned.

In the Northern and the Western United States, prisons were used for solitary work and sought to reform inmates with a strictly controlled routine of labor and bible study. Prisoners were still usually segregated by race; African Americans were often relegated to substandard locations.¹⁷² Leasing was applied almost exclusively to African Americans convicted of crimes, because the Leasing Acts set aside prison sentences for persons serving ten or more years, and white convicts generally received more significant sentences because the courts rarely punished whites for less serious crimes.¹⁷³ Very few whites convicted for petty criminal offenses were sent to prison, and when such sentencing occurred, whites routinely received quick pardons from the governor.¹⁷⁴

Beyond criminal punishment, criminal law administration was also entwined with practices of racial subordination through lynching. Even in the North, lynch mobs would gather by the thousands outside the jailhouse or courthouse and wait until African Americans were released from pretrial detention.¹⁷⁵ In some cases, criminal law enforcement officials themselves actively participated in the lynch mobs.¹⁷⁶

Further instances of the direct entwinement of criminal law administration and overt racial violence abound throughout the twentieth century. ***1193** Notable examples include the Scottsboro Boys Cases of the 1930s.¹⁷⁷ The Scottsboro Cases involved the hurried convictions of nine young African American men, all sentenced to death by white jurors.¹⁷⁸ The limited procedural protections afforded to these young men-- the mob-dominated atmosphere surrounding their convictions, the denial of the right to counsel until the eve of trial rendering any assistance necessarily ineffective, and the intentional exclusion of blacks from the grand and petit juries that first indicted and later convicted the young men¹⁷⁹--and their challenges to the U.S. Supreme Court arguably mark the birth of constitutional criminal procedure.¹⁸⁰

This entwinement of racialized violence and the criminal process runs from the 1930s through the end of the twentieth century. It is prominently illustrated by, among other similar episodes, the brutal torture perpetrated against countless African American men over two decades, from the 1970s to 1990s, by white Chicago police officer John Burge and his deputies, who used suffocation, racial insults, burning, and electric shocks to coerce confessions, ultimately leading then-Illinois Governor George Ryan to commute all death sentences in the state.¹⁸¹

These uses of criminal law administration as a central means of resisting the abolition of slavery, Reconstruction, and desegregation, continue to inform criminal processes and institutions to this day by enabling forms of brutality and disregard that would be unimaginable had they originated in other, more democratic, egalitarian, and racially integrated contexts. As W.E.B. Du Bois predicted, this legacy of managing abolition and reconstruction in large part by invoking criminal law in racially subordinating ways, contrasted sharply with a different abolitionist framework, one that would have incorporated freed-persons

into a reconstituted democracy: “If the Reconstruction of the Southern states, from slavery to free labor, and from aristocracy to industrial democracy, had been conceived as a major national program of America, whose accomplishment at any price was well worth the effort, we should be living today in a different world.”¹⁸² *1194 Our historical inheritance and this legacy illuminates the connection between the abolitionist path not taken in the aftermath of slavery and what ought to be an abolitionist ethos in reference to practices of prison-backed criminal regulation today.

Instead, as the American economy underwent a shift from industrial to corporate capitalism in the 1970s, resulting in the erosion of manufacturing jobs occupied by poor and working class people in the inner cities, especially African Americans, a distinct underclass emerged, with few options for survival other than low wage work, welfare dependence, or criminal activity.¹⁸³ This transformation in the U.S. economy contributed substantially to the emergence of a population that would be permanently unemployed or underemployed.¹⁸⁴ In turn, federal, state, and local governments invested greater resources in coercive mechanisms of social control,¹⁸⁵ prioritizing criminal law enforcement over other social projects, such as urban revitalization and expanded social welfare and education spending.¹⁸⁶

In 1972, just before the National Advisory Commission on Criminal Justice Standards and Goals published the 1973 report noted at the beginning of this Article, there were 196,000 inmates in all state and federal prisons in the United States--a population housed in conditions that the Commission believed justified a ten year moratorium on prison construction.¹⁸⁷ By 1997, however, the prison population had surged to 1,159,000¹⁸⁸ and in 2002 there were a record 2,166,260 people housed in U.S. prisons and jails.¹⁸⁹

This rapidly increasing population was characterized, as we now well know, by glaring racial asymmetries: As of 1989, one in four African American men were in criminal custody of some sort.¹⁹⁰ In certain municipalities, the imprisonment *1195 rates for African Americans were even more striking. In 1991 in Washington D.C., 42.5 percent of young African American men were in correctional custody on any given day.¹⁹¹ In Baltimore during 1990, 56 percent of the city's African American males between ages eighteen and thirty-five were either in criminal justice custody or wanted on warrants.¹⁹² By 2004, more than 12 percent of African American men nationally between the ages of twenty-five to twenty-nine were incarcerated in prison or jail.¹⁹³ Although rates of incarceration and disproportionate minority confinement have declined very modestly in recent years because of fiscal crises at both the state and federal level, as well as a global decrease in crime, African American men remain subject to criminal confinement and arrest at rates that far exceed their representation in the population.¹⁹⁴

Prisoners are generally no longer subjected to chain gangs or hard physical labor for profit, although these practices persisted in certain jurisdictions through the end of the twentieth century.¹⁹⁵ Currently, another form of incarceration and punitive policing has emerged, one that effectuates the mass containment and exercises mass racial discipline, leading to the elimination of large numbers of poor and especially poor African American people from the realm of civil society. A felony conviction, disproportionately meted out to African Americans, Latinos, and indigent whites, results in a permanent loss of voting rights in most states, employment bars in numerous professions, and a lifetime ban on federal student aid, among other damaging consequences.¹⁹⁶ These consequences further exacerbate the physically segregative effects of incarceration post-release, inhibiting opportunities for meaningful integration available to persons and communities most affected by incarceration.¹⁹⁷ These consequences of conviction constitute a basic denial of equal citizenship, and, as such, conviction recreates the civil death associated with enslavement.

*1196 Further, the criminal process still operates on a for-profit model importantly distinct, but not entirely removed from, earlier systems of confinement for profit that were the direct outgrowth of slavery.¹⁹⁸ Prisoners' labor does not itself directly provide a significant source of profit to a lessor or single business as it once did. Instead, large-scale incarceration--marked by prisoners' suffering, dehumanization, and violence-- generates a market for the construction of facilities to house approximately

two million prisoners and jail inmates; the technology and mechanisms to maintain almost seven million persons under criminal supervision; and the employment of thousands of prison guards, prison staff, probation and parole officers, and other penal professionals.¹⁹⁹ The large sums of money poured into prisons and criminal surveillance have drawn major firms and a variety of Wall Street financiers to prison construction.²⁰⁰ Underwriting prison construction through private finance and the sale of tax-exempt bonds has served as a lucrative undertaking in itself.²⁰¹ Though only used to manage a small portion of detention facilities, private corrections corporations, such as Corrections Corporation of America and Wackenhutt, submit bids to governments to manage different detention systems, especially immigration detention, and guarantee to provide these services at a lower cost than the state is able to deliver.²⁰² Additionally, vendors of everything from stand alone cells, hand and foot cuffs, razor wire, and shank proof vests make considerable profits from prisons.²⁰³ A single contract to *1197 provide prisoners in the state of Texas with a soy-based meat substitute, awarded to VitaPro Foods, went for \$34 million per year.²⁰⁴ The profits for phone service inside prison walls make food contracts seem insignificant.²⁰⁵

Meanwhile, prisoners continue to serve as a captive labor force, working for approximately one dollar per hour, and often less.²⁰⁶ Numerous firms use prisoners as a component of their workforce in the United States, as do government entities that use prison labor to manufacture products that are then sold to other government agencies.²⁰⁷ Although prisoners are no longer forced to work by or for the state (as they were in the South well into the twentieth century), the perverse profit motive that spurred the convict lease system with all its horror might be understood in historical context as preserved yet transformed in these various other guises.

Criminal fines and fees generate substantial additional revenue for the criminal process itself and for certain municipalities and other jurisdictions.²⁰⁸ And the grossly disproportionate number of African Americans imprisoned, arrested, criminally fined, and stopped by police further accentuates the associations between earlier forms of racialized penal subordination for profit and the contemporary racial dynamics of criminal law administration.²⁰⁹

The deep, structural, and both conscious and unconscious entanglement of racial degradation and criminal law enforcement presents a strong case for aspiring to abandon criminal regulatory frameworks in favor of other social regulatory projects, rather than aiming for more modest criminal law reform. Multiple *1198 studies have confirmed the implicit, often immediate, and at times unconscious associations made between African Americans, criminality, and threat.²¹⁰ These associations, borne of this history, continue to be reproduced by these structures and by the development of punitive policing and incarceration practices that treat certain people as not fully human. To provide but a few examples, psychologists Jennifer Eberhardt, Philip Atiba Goff, and their collaborators studied how individuals in various scenarios determine who “looks like a criminal.”²¹¹ Perhaps not surprisingly, controlling for other factors, the study's subjects chose people who looked African American, particularly those who looked more “stereotypically” African American and those coded as having more “Afro-centric” features.²¹² In a similar study, psychologists Brian Lowery and Sandra Graham studied subjects' responses to juvenile arrestees. When the study's subjects were primed to understand the youth as African American, the juveniles were judged to be more blameworthy and deserving of harsher and more punitive treatment.²¹³ Consciously expressed egalitarian racial beliefs did not significantly moderate the effects of implicit bias in these contexts.²¹⁴

Conscious and unconscious biases on the part of police officers often have lethal outcomes. Shooter and weapons biases, for instance, are well-documented. In researching how subjects behave in simulated video game shooting settings, multiple studies have found that the likelihood of shooting a suspect who is armed or possesses a device other than a gun significantly increases when the suspect is African American and decreases when the suspect is white.²¹⁵ This is true *1199 both for white and African American shooters.²¹⁶ Similarly, psychologist Philip Atiba Goff and his colleagues, in a study examining archival material from actual death penalty cases in Pennsylvania, found that defendants depicted as implicitly “apelike” were more likely to be executed than those who were not; African Americans were more likely to be depicted as implicitly “apelike” than

whites.²¹⁷ Judges, jurors, and prosecutors in related studies likewise reflect considerable racial bias in their determinations at numerous critical stages of the criminal process.²¹⁸

The landscape of contemporary criminal law enforcement is thus, in significant and fundamental respects, part of the afterlife of slavery and Jim Crow, and this legacy is deeply implicated in criminal law's persistent practices of racialized degradation. Perceptions of criminality, threat, and the prevalence of violence, informed by these racialized material histories and dehumanizing associations, operate at all levels of criminal law administration, often without the relevant actors' awareness. This suggests something of how difficult it would be to remove racialized violence from prison-backed policing and imprisonment while retaining these practices as a primary mechanism of maintaining social order. The racialized degradation associated with criminal regulatory practices, then, compels an abolitionist ethical orientation on distinct and additional grounds apart from the general dehumanizing structural dynamics addressed in the preceding Subpart, particularly insofar as there are other available means of accomplishing crime-reductive objectives.

If we are indeed committed to democratic and egalitarian values, the need to scrutinize closely the other purported purposes of the criminal process presses with increasing urgency. So, too does the question of whether there are alternative regulatory frameworks and approaches that might achieve similar ends with less racially encumbered and violent consequences.

C. The Question of Efficacy

Beyond the violence, dehumanization, and racial subordination associated with incarceration and prison-backed policing, what are the other effects of imprisonment? How should incarceration's efficacy be assessed relative to these problems? What, after all, is the end of imprisonment and prison-backed policing? And how well does the prison-backed regime of criminal law enforcement fare in accomplishing its purported ends?

***1200** To begin, determining the efficacy of imprisonment and prison-backed policing is no simple matter, because the question of criminal regulation's efficacy must follow two prior questions: "Efficacy at what?" and "efficacy compared to what?" The assumption in the relevant economic and criminological literatures is generally that the only or primary relevant association is the relationship between incarceration rates and reported crime, or (less commonly) victimization rates. These comprise only one set of variables, though, among others that ought to be of concern. In particular, the effect of incarceration on other measures of welfare--education, democratic or civic participation, households' ability to meet basic needs--is all too often neglected, as are imprisonment's impact on racial and economic equality and other important social metrics. Further, narrowly framing the question of incarceration's cost-efficiency as a comparison of incarceration rates relative to crime rates, and the effort spent to measure that relationship with ever-increasing specificity largely ignores the complexity of incarceration's myriad significant impacts, the importance of other forms of social welfare, as well as how reformed social arrangements might produce better, more just, and more meaningful welfare-enhancing and crime-reductive effects.²¹⁹

Even apart from this concern with the limited frame within which the efficacy question is generally posed, the existing empirical accounts of the relationship of incarceration to crime vary widely and present decidedly mixed results. Several studies identify no relationship between incarceration rates and crime rates,²²⁰ while other studies have found a crime drop of anywhere between 0.11 percent to 22 percent associated with a 10 percent increase in incarceration, depending on whether national-level, state-level, county-level or other data is used.²²¹ One study even identified higher crime rates associated with higher incarceration rates in states with relatively high rates of imprisonment.²²² Consequently, ***1201** based on the available research, one could contend that a 10 percent increase in incarceration is associated with (a) no decrease in crime rates, (b) a 22 percent lower index crime rate, (c) a 2 percent to 4 percent decrease in crime rates, or (d) a decrease only in property crime but not violent crime.²²³ In short, to measure and weigh the possible crime reductive effects against the criminogenic and other consequences of incarceration has yet to be accomplished in any comprehensive and definitive manner.²²⁴

Further, even if all of the relevant variables could be properly and definitively accounted for, the political and moral significance of crime reduction as compared to other important social goals-- such as equality, education, and poverty alleviation--would remain an open political and ethical question.²²⁵ To the extent crime prevention is entwined with larger goals of equality or education-- for example preventing gender or race-based violence while simultaneously advancing gender or racial equality-- crime prevention and reduction should not be pursued in a way that is inattentive to these other goals.

In any event, at their best, regression analyses that seek to identify a relationship between crime rates and incarceration provide us with causal inferences about ways the world has behaved in the past. Although an obvious point, it remains an important, often overlooked consideration that these analyses rely on archival data and cannot meaningfully tell us how the world might be reconstituted in the face of significant shifts in social and political organization. In other words, there is nothing in the existing statistical analyses of the crime-incarceration relationship that undermines the interest or urgency of the ethical case for abolition and of other forms of social organization that might result in improved well-being and reduced violence.

Additionally, any compelling account of the crime-reductive effects of incarceration ought to also be able to identify a mechanism through which incarceration functions to deter crime, or rehabilitate or incapacitate criminals.²²⁶ Any such crime-reductive causal mechanism's impact will be affected, of course, by those dimensions of incarceration that are undoubtedly criminogenic, including the difficulty formerly incarcerated persons face in finding lawful *1202 employment after imprisonment and the vast incidence of unreported rape and other forms of violence inside prisons, to name but a few.²²⁷

Those who support incarceration for its supposed deterrent effect generally ground their account on Gary Becker's writings on the economics of crime.²²⁸ In brief, in Becker's model, raising the costs of criminal activity by imposing a penalty of incarceration will cause a certain number of potential criminals to decide not to pursue criminal activity because they will rationally weigh the costs and benefits of their possible future criminal conduct.²²⁹ This model, however, rests on a set of assumptions that apply poorly to many people who are inclined to criminally offend even if the model succeeds in capturing the deterrence of others who avoid criminal activity following cost-benefit calculations. The model assumes (a) that those who break the criminal law rationally calculate the costs and benefits of their intended course of conduct; (b) that they possess information and beliefs that allow them to assume a high likelihood of apprehension and sentencing; and (c) that criminal punishment will render those subject to it no more likely to commit future crimes than they would be otherwise. In fact, each of these assumptions is subject to substantial doubt, especially when considering the class of people prison sentences purport to deter most immediately rather than those who are likely to be law-abiding because of reputational interests, secure employment, family obligations or otherwise.²³⁰ Many people who break the criminal laws do so in a condition of severe mental illness, alcohol or drug addiction, or in a state of rage. In these cases, Becker's assumptions of rational risk calculation are *1203 questionable, and hence the deterrent qualities of incarceration will have uncertain, if any, effect on them.²³¹ Other people who break the criminal law surely believe (and often rightly so) that they are unlikely to be apprehended and sentenced. Most cases of child sexual abuse, for instance, go unreported, as do many cases of rape of adults; similarly, people in positions of power who engage in deceptive economic transactions and even many who physically harm others routinely evade any adverse consequence.²³² What is more, criminal punishment may make those who are imprisoned more, rather than less, likely to reoffend. As discussed above, incarceration produces a set of destructive consequences for both the incarcerated and their communities, consequences that may tend to increase rather than decrease crime.²³³ This is not to say that incarceration has no deterrent impact,²³⁴ but that the assumptions of deterrence theory fail to apply to the large class of persons at whom criminal sanctions are directed, even if deterrence is effective in other cases. And any deterrent potential of punitive policing and imprisonment should be assessed bearing in mind the dehumanizing, racially degrading, violent, and otherwise destructive dimensions of these practices.²³⁵

*1204 Further questions apply to incarceration's purportedly incapacitating effects. By removing people from their home communities and transferring them into prison, incarceration generally prevents prisoners from committing crimes outside prison. But prison itself is a place where interpersonal violence, theft, and abuse are rampant and largely unreported.²³⁶ Therefore, incarceration does not necessarily reduce or incapacitate the commission of crime, but rather changes its location.

In this respect, the argument for incapacitation reveals the disregard for the humanity of incarcerated persons that is inherent in the basic structure of U.S. penal discourse: This discourse only (or primarily) counts crime as significant if it occurs outside prison. Yet approximately 216,000 sexual assaults occurred in U.S. prisons in 2008, making prisons perhaps the most sexually violent place in the country, a site of serial rape.²³⁷ A further complicating factor for any account of incarceration's incapacitating effects is that, insofar as imprisonment is criminogenic, it may reduce crime outside prison during the time a person is incarcerated, but it may likewise exacerbate that person's likelihood of committing a criminal offense post-release.²³⁸

Although there is some evidence that rehabilitative programming in prison reduces recidivism relative to incarceration in harsher, more punitive conditions, this does not demonstrate that imprisonment is more rehabilitative than other modes of social response outside of the prison setting.²³⁹ In fact, there is good reason to think that interventions that address addiction or provide educational opportunities would more likely enable different patterns of behavior upon release if they occurred in a context more closely parallel to one that persons would live within over the longer term rather than solely within the context of incarceration.²⁴⁰ This is not to deny the relative benefits of minimum security confinement with opportunities for education and addiction recovery programming over, for instance, long-term solitary confinement (a reform not inconsistent with abolitionist aims), but instead to suggest that there is no persuasive evidence that rehabilitative incarceration is more likely to produce desired results than an alternative array of interventions not organized around imprisonment.

Accordingly, although various studies have attempted to demonstrate the crime-reductive effects of carceral sentencing through analysis of large datasets of ***1205** reported crime and incarceration rates, as well as by using theoretical models of incarceration's crime-reductive mechanisms, it remains the case, as economist John Donohue explains, that "the empirical literature has not yet generated clear and unequivocal answers to these key questions."²⁴¹ In particular, it is unclear whether "a reallocation of resources to alternative crime-fighting strategies would achieve the same benefits [of incarceration] at lower social costs" ²⁴² In economic terms, these analyses do not capture the potential opportunity costs of achieving order maintenance through prison-backed criminal law enforcement and incarceration, rather than through other means.²⁴³

There is compelling evidence that the opportunity costs of allocating public resources to incarceration are immense. Nobel Prize-winning economist James Heckman has found, for example, spending on early childhood education for disadvantaged children produces much higher returns than criminal law enforcement expenditures.²⁴⁴ To properly assess the desirability of incarceration relative to alternatives such as Heckman's, one must also consider the enormity of the economic resources allocated to imprisonment and punitive policing. In 2008, U.S. federal, state, and local governments spent approximately \$75 billion on corrections, primarily on incarceration.²⁴⁵ Expenditures on incarceration are particularly concentrated on disadvantaged populations from narrowly confined geographic areas. In certain blocks in Brooklyn, New York, for instance, the state has spent multiple millions of dollars per block per year to confine people in prison.²⁴⁶ Similarly, Pennsylvania taxpayers have spent over \$40 million per year to imprison residents from a single zip code in a Philadelphia neighborhood, where ***1206** 38 percent of households have annual incomes under \$25,000.²⁴⁷ Likewise, in one neighborhood in New Haven, Connecticut, the state spent \$6 million per year to return people to prison for technical parole and probation violations.²⁴⁸ According to one recent study, reducing the incarcerated population convicted only of nonviolent offenses by half would result in cost savings of approximately \$16.9 billion annually, without any significant associated decrease in public safety.²⁴⁹

It also bears noting that much crime goes unreported, unmentioned, hidden by the shame associated with victimization or as a result of other fears, including the fear of sending loved ones to prison.²⁵⁰ These forms of violence are not meaningfully accounted for in the existing analyses of incarceration's efficacy. Indeed, much of the violence police inflict on young African American men during police searches and seizures is not even understood as criminal.²⁵¹ The same could be said of myriad forms of harm inflicted upon the relatively powerless and dispossessed by those who escape entirely censure or redress. A poem attributed to an anonymous poet of the 1700s, and circulated variously in prison writing since, captures this final point well:

The law will punish a man or woman who steals the goose from the hillside, but lets the greater robber loose who steals the hillside from the goose.²⁵²

In a speech to inmates in Cook County Jail in 1902, Clarence Darrow conveyed a similar abolitionist insight in these terms:

The only way in the world to abolish crime and criminals is to abolish the big ones and the little ones together. Make fair conditions of life. Give men a chance to live. . . . There should be no jails. They do not accomplish what they pretend to accomplish. . . . They are a blot upon any civilization, and a jail is an evidence of the lack of charity of the people on the outside who make jails and fill them with the victims of their greed.²⁵³

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In sum, the evidence as to whether incarceration and prison-backed policing meaningfully make us more secure is mixed at best, at least when the broader harmful effects of incarceration are accounted for, along with crime that occurs in areas, forms, and among populations where it currently goes unreported, unnoticed, and unaddressed. Unless the only important social goal is to reduce reported crime outside of prison at all costs, questioning the efficacy of incarceration requires considering any crime-reductive effects of incarceration relative to ethical concerns, social consequences, welfare measures, aspirations, and opportunities incarceration forecloses to govern ourselves in other more humane and just ways. At a minimum, the available evidence on imprisonment's efficacy does not diminish the importance of the critical abolitionist ethical demand.

The next Part explores how a critical abolitionist ethic differs from a more moderate reformist framework, before turning to consider abolitionist aims in a positive register--in line with W.E.B. Du Bois' account of abolition as a positive project--as well as with reference to an overlooked variant of grounded preventive justice.

II. ABOLITION VERSUS REFORM

Abolition promises to reorient both criminal law and politics in important and distinct respects. There are five primary ways in which an abolitionist ethic is distinguishable from a more moderate reformist orientation. First, an abolitionist ethic identifies more completely the dehumanization, violence, and racial degradation of incarceration and punitive policing in the basic structure and dynamics of penal practices in the United States. Rather than understanding these features as more superficial flaws that might be repaired while holding constant the role of criminal law administration relative to other social regulatory projects, a critical abolitionist ethic centers on how caging or confining human beings in a hierarchically structured, depersonalizing environment developed through historical practices of overt racial subordination tends inherently toward violence and degradation. In this, an abolitionist ethic more accurately identifies the wrong entailed in holding people in cages or policing them with the threat of imprisonment, as well as more fully recognizes the transformative work that would be required to meaningfully alter these dynamics and practices.

Second, an abolitionist ethic, in virtue of its structural critique of penal practices, is oriented toward displacing criminal law as a primary regulatory framework and replacing it with other social regulatory forms, rather than only or primarily moderating criminal punishment or limiting its scope or focus. ***1208** Displacing criminal regulation and replacing it with other regulatory forms entails a primary orientation toward proliferating substitutive approaches to address social problems, root causes, and interpersonal harm through institutions, forms of empowerment, and regulatory approaches separate and apart from the criminal law. By contrast, a more moderate reformist framework typically aims at reducing the costs and impositions of incarceration by granting people convicted of less serious offenses options for supervised, monitored release (typically backed by the threat of

imprisonment for noncompliance with the more lenient terms).²⁵⁴ Abolition's critical project opens the space, in other words, for a positive project of proliferating social and regulatory alternatives to take the place of criminal law enforcement, and in this regard, abolition, as opposed to more moderate reform, enacts its profound skepticism of the legitimacy of prison-backed criminal regulatory interventions through its ongoing transformative efforts.

Third, abolition in its radical call for change appropriately captures the intensity that ought to be directed to transforming the regulation of myriad social problems through punitive policing and incarceration. More modest reform, in tolerating with relative comfort imprisonment and punitive policing, does not register the need for change with as much urgency. The following figure projects the time that would be required to return incarceration levels in the United States to where they were in 1980, assuming a rate of decline in incarceration equivalent to that which occurred in 2012. The product of a perfect storm for prison reformists--fiscal crises in numerous states, relatively low rates of reported crime, and a growing political commitment in both more conservative and liberal states to reduce the harshness and cost of criminal sentencing approaches--2012 marked a considerable decline in rates of imprisonment.²⁵⁵

***1209 Historical and Projected U.S. Federal and State Prison Populations, Based on 2012 Rate of Decline**

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

Source: Bureau of Justice Statistics, Prisoners Series (Sentencing Project 2013).

A reformist trajectory would likely under the best of circumstances yield decreases in incarceration roughly consistent with this course. Whereas expanding diversionary noncarceral criminal supervisory mechanisms may be expected to accelerate rates and avenues of decarceration, reform would in time, of course, face challenges during periods when, for one reason or another, public opinion tended in a more punitive direction than it did in 2012. Even under these most optimal conditions, however, with consistent, marked incarceration-reductive reforms such as those in 2012, it would take almost one hundred years to return to 1980 levels of imprisonment. Yet, already, in 2013, this downward trend reversed course as incarceration increased slightly at the state and federal levels.²⁵⁶

Although a significant achievement, the commitment by the bi-partisan #Cut50 prison reform coalition to reduce incarceration levels by half in the United States over ten years, would still leave the United States an outlier in the expanse and harshness of its criminal processes.²⁵⁷ This bi-partisan coalition primarily is able to achieve consensus on reducing incarceration primarily for nonviolent, nonserious, nonfelony convictions.²⁵⁸ And even if bi-partisan reform ***1210** efforts were able actually to reduce the number of nonviolent offenders in prison and jail by half, the United States would still have by far the highest incarceration rate in the OECD.²⁵⁹

But abolition makes a bolder critical demand, which requires more thoroughgoing transformation, recognizing the importance of a substitutive regulatory logic, rather than a shift from imprisonment to prison-backed noncarceral alternatives. And even if abolition fails in its call for more marked change in criminal law enforcement, it renders moderate reform a more palatable option, potentially advancing a more moderate reformist program by articulating a critical and radically transformative project in the same legal and policy space.

Fourth, an abolitionist ethic in its critical dimensions and moral resonance--by exposing the dehumanization and illegitimate brutality of the core prison-backed projects of the criminal process--stands to produce greater discomfort and shame in carrying out criminal punishment. Even in those instances where imposing punishment remains perhaps necessary, as the lesser of two evils, when someone has committed and continues to pose a great threat of violence to others, an abolitionist ethic does not allow us to remain complacent in the rationalization of criminal law enforcement's violence and neglect. In this, an abolitionist ethic does not necessarily deny that in some instances there may be people so violent that they cannot be permitted to live among others. (These individuals are referred to in abolitionist writings as "the dangerous few" in order to underscore how

very rare they are relative to the vast population of the incarcerated (and how much rarer they might be if we chose to live in ways less productive of such violence)).²⁶⁰ But the associated discomfort and shame with which an abolitionist critique imbues such punishment promises to reshape the experience of punishing even these dangerous few by rendering criminal politics and jurisprudence more conflicted and ambivalent, and thereby improved, both at the highest level of abstraction and in the most concrete doctrinal and statutory details. This conflict, shame, discomfort, and ambivalence, in significant measure produced by an abolitionist critique of the ideology that rationalizes prison-backed punishment, simultaneously promises to make available broader imaginative horizons within which we are able to govern ourselves.

*1211 Jonathan Simon, in *Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear*, exposes how political and social thought in the United States have come to focus on crime control to the exclusion of other frames of reference for governance.²⁶¹ Simon explains that “[w]hen we govern through crime, we make crime and the forms of knowledge historically associated with it-- criminal law, popular crime narrative, and criminology--available outside their limited original . . . domains as powerful tools with which to . . . frame all forms of social action as a problem for governance.”²⁶² An important part of this ideological capture is, as Angela Davis reveals, the “simultaneous presence and absence” of incarceration and criminal law enforcement.²⁶³ Crime governance thrives when we are able to imagine we have addressed interpersonal violence, theft, and other problems by depositing certain people in prison. But when we are forced to confront what prisons do, we are compelled to consider the ideological work prison performs. We come to recognize prison, then, as more than “an abstract site into which undesirables are deposited, relieving us of the responsibility of thinking about the real issues afflicting those communities from which prisoners are drawn in such disproportionate numbers.”²⁶⁴ An abolitionist ethic, by unmasking the hidden violence inherent in this ideological capture and by encouraging conflict about its perpetuation rather than unknowing acquiescence, promises to loosen the capture's hold and renders us--citizens and legislators alike--better able to imagine other frameworks for governance and collective social life. This is a product both of abolition's fundamental moral condemnation of prison-backed criminal law enforcement's legitimacy as a means of managing complex social problems, and of the awareness an abolitionist ethic facilitates about the choice--rather than the necessity--of addressing complex social problems through incarceration and punitive policing.

At the level of judicial decision making and legislatively enacted criminal law, related forms of ideological capture confine the courts' and legislatures' capacities to address gross injustice in the criminal process. Here too, then, an abolitionist ethic promises an escape, or at least a substantial challenge to, acquiescence in these legal commitments--especially to the primacy of finality of a criminal conviction, what I will call the “fetish of finality.”

If we understand law in the powerful and evocative terms proposed by Robert Cover as part of a normative universe or “nomos,” we then appropriately *1212 recognize that “law and narrative are inseparably related.” Law, Cover explains, is “constituted by a system of tension between reality and vision,” between law as it is and our aspirations as to what it might become.²⁶⁵ As Cover writes: “[L]aw is not merely a system of rules to be observed, but a world in which we live.”²⁶⁶ He reveals how the normative and interpretive “commitments--of officials and of others-- . . . determine what law means and what law shall be.”²⁶⁷ As judges carry out their interpretive work, they must attempt to resolve these competing normative claims; judges themselves are variously aligned and torn between warring narratives and values as they steer law's potential for violence or peace.²⁶⁸

An abolitionist ethic resists the circumscription of the nomos of criminal jurisprudence, inviting (even demanding) new perspectives within and against those which judges, legislators, and citizens might make law. More precisely, an abolitionist ethic contributes an unapologetic insistence on the brutal and morally illegitimate violence of criminal punishment--whether imprisonment or incarceration followed by state-inflicted death--to the nomos of constitutional criminal jurisprudence. This ethic throws down a gauntlet to the general jurisprudential comfort with the inevitability and moral unassailability of criminal conviction's finality and lessens, perhaps, the dread of grinding the wheels of justice to a halt.²⁶⁹ In other words, an abolitionist ethic decenters the primacy of finality and the smooth operation of the criminal process such that it becomes less comfortable

to rest at ease with the unimpeded operations of criminal punishment institutions, especially the imposition of imprisonment or a sentence of death.

In *Herrera v. Collins*,²⁷⁰ for example, the U.S. Supreme Court held that claims of actual innocence based on newly discovered evidence do not state an independent ground for federal habeas relief absent identification of an independent constitutional violation, even in a case where a defendant is sentenced to die *1213 and may be innocent.²⁷¹ Although Justice Blackmun cautions in dissent that the “execution of a person who can show that he is innocent comes perilously close to simple murder,”²⁷² Justice Rehnquist, writing for the majority, nonetheless concludes that the important principle of finality trumps, given “the very disruptive effect that entertaining claims of actual innocence would have on the need for finality”²⁷³ This fetish of finality is grounded in a narrative and background norms—a *nomos*—that complacently treats the conventional criminal process followed by conviction and prison-based punishment (or killing by the state) as basically moral and just. The majority opinion relates these ideas thus:

In any system of criminal justice, “innocence” or “guilt” must be determined in some sort of judicial proceeding. . . . A person when first charged with a crime is entitled to a presumption of innocence, and may insist that his guilt be established beyond a reasonable doubt. Other constitutional provisions have the effect of ensuring against the risk of convicting an innocent Once a defendant has been afforded a fair trial and convicted of the offense, the presumption of innocence disappears The existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus.²⁷⁴

This narrative telling naturalizes conviction as the point at which moral (or at least constitutional) concern ends, unless there has been a new and independent ground of constitutional error identified at trial. This is true, on the Court's account, even for a person who would be killed despite his possible innocence.

An abolitionist ethic, by starkly calling into question the marker of conviction as one that properly puts an end to moral (and constitutional) concern and instead exposes the dehumanization at the core of that legal marking practice, holds the potential to impose greater shame and discomfort, or at least ambivalence and conflict, at this point of decision. A prison abolitionist ethic holds this promise of unsettlement more powerfully than a death penalty abolitionist demand because prison abolition calls into question the legitimacy of the finality of conviction as an end of moral concern in a more thoroughgoing and structural form.

Death penalty abolition, by comparison, in proposing the substitution of life imprisonment without parole for state killing, reinforces the same account of the *1214 legitimacy of a conviction's finality as does the Court's majority, even if death penalty abolitionists prefer a non-death sentence.²⁷⁵ It is for this reason, perhaps, as Robin West pointedly and provocatively observes of the dissent in *Herrera*, that Justice Blackmun stops short of understanding the killing of a possibly innocent person as homicidal and instead characterizes the Court's chosen course as “perilously close to simple murder.”²⁷⁶ West writes: “That extraordinary remark, I believe, suggests two questions of relevance here: First, why ‘perilously *close*’? . . . [S]econd, is Blackmun suggesting that the Justices that did this are ‘perilously close’ to being murderers? . . . Or was he speaking metaphorically?”²⁷⁷ Perhaps instead, Justice Blackmun (who, famously, eventually himself became a death penalty abolitionist), similarly understands the imposition of conviction to lessen the moral concern for any act upon the convict that follows, even if that act entails killing a possibly innocent person, thereby transforming that conduct from simple murder into something instead “perilously close” to it.²⁷⁸

The Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) has codified this fetish of finality into a statutory framework that often causes constitutional challenges to criminal convictions in federal court to be altogether disregarded. AEDPA purports to strip federal courts of jurisdiction to consider in habeas “a determination of a factual issue made by a State

court,”²⁷⁹ and limits disturbing a state conviction in habeas to cases where “the facts underlying the claim [are] . . . sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.”²⁸⁰ As a consequence, under AEDPA, even in cases with gutting evidence of possible innocence, courts have deferred to the *1215 state's right to kill possibly innocent persons on the ground that finality of a conviction must take priority over other moral and constitutional considerations.

For example, in *Cooper v. Brown*, the Ninth Circuit ordered the denial of a Petition for Rehearing and Petition for Rehearing En Banc to which Judge William Fletcher wrote a more than one hundred page dissent.²⁸¹ Judge William Fletcher began his dissent as follows:

The State of California may be about to execute an innocent man. From the time of his initial arrest [in 1983] until today, Kevin Cooper has consistently maintained his innocence of the murders for which he was convicted There is substantial evidence that three white men, rather than Cooper [who is African American] were the killers. . . . Some of the evidence, even though exculpatory, was deliberately destroyed [by the police] Some of the evidence, even though exculpatory, was concealed from Cooper [T]he only survivor of the attack, first communicated . . . that the murderers were three white men.²⁸²

An earlier opinion in this case is also noteworthy for its discussion of the glaring evidence of law enforcement misconduct in the investigation of Kevin Cooper:

Significant evidence bearing on Cooper's culpability has been lost, destroyed or left unpursued, including, for example, blood-covered coveralls belonging to a potential suspect who was a convicted murderer, and a bloody t-shirt, discovered alongside the road near the crime scene. The managing criminologist in charge of the evidence used to establish Cooper's guilt at trial was, as it turns out, a heroin addict, and was fired for stealing drugs seized by the police. Countless other alleged problems with the handling and disclosure of evidence and the integrity of forensic testing and investigation undermine confidence in the evidence.²⁸³

Judge Fletcher concludes his impassioned dissent with this admonition:

Doug, Peggy and Jessica Ryan, and Chris Hughes, were horribly killed. Josh Ryen, the surviving victim, has been traumatized for life. . . . The criminal justice system has made their nightmare even worse. . . . Kevin Cooper has now been on death row for nearly half his life. In my opinion, he is probably innocent of the crimes for which the State of California is about to execute him. If he is innocent, the real *1216 killers have escaped. They may kill again. They may already have done so. We owe it to the victims of this horrible crime, to Kevin Cooper, and to ourselves to get this one right. We should have taken this case en banc and ordered the district judge to give Cooper the fair hearing he has never had.²⁸⁴

But Judge Rymer, by way of response, presumably representing the position of the majority of judges of the Ninth Circuit who voted to deny rehearing, primarily relied on AEDPA's codification of the fetish of finality, definitively concluding of Judge Fletcher (and Kevin Cooper's) claims, quite simply, that “AEDPA mandates their dismissal.”²⁸⁵

Wider circulation of an abolitionist ethic, in calling the lie on the point of conviction as the end of moral (and constitutional) concern as codified by AEDPA, might facilitate an extension of Judge Fletcher's outrage into further reaches of the judiciary

and into legislatures and civil society, or at least an ever deeper moral unease at viewing conviction as making it less than simple murder to execute a quite possibly innocent man. An abolitionist ethic promises, too, to increase all of our discomfort, shame, and conflict over ignoring the claim to humanity of those who stand convicted, whether or not they are innocent or sentenced to die.²⁸⁶

Constitutional jurisprudence concerning racial bias in the criminal process similarly stands to be improved by the wider circulation of an abolitionist (as opposed to a reformist) ethic. The Supreme Court's opinion in *McCleskey v. Kemp*,²⁸⁷ for instance, dismissed the overwhelming evidence presented by Warren McCleskey of racial bias affecting Georgia's capital-sentencing process. The holding rested in large measure on a concern that “if we accepted McCleskey's claim . . . we could soon be faced with similar claims as to other types of penalty.”²⁸⁸ This narrative--effectively about the intolerable threat posed by grinding the wheels of justice to a halt--leads the Court to tolerate a death-sentencing regime that impacts African Americans and white defendants differently *1217 on the basis of their race.²⁸⁹ So here, too, an abolitionist ethic, particularly in its attention to the racial violence that inheres at the core of the criminal process, makes available a response to racially infected moral wrongs in criminal sentencing that is less defensive, less sure of the desirability of avoiding “similar claims as to other types of penalty,” and perhaps even willing to extend moral and constitutional concern to less obvious and deliberate sites of racial bias, as well as to persons who stand convicted of serious crimes.²⁹⁰ Along these lines, then, the shame, discomfort, ambivalence, and conflict with which an abolitionist ethic imbues criminal punishment may help us to begin to escape these confines, both in our politics more broadly and in the doctrines and legalist assumptions that make a fetish of criminal law's finality.

Fifth and finally, an abolitionist framework opens the space for a transformational politics involving different individual actors, groups, and communities to address the problems that haunt criminal law administration. Rather than rely on correctional experts--and their increasingly fine-tuned plans to reinvent probation or parole supervision to reduce crime or to render prisons more humane--an abolitionist ethic creates space within which community members may organize themselves to empower vulnerable individuals and to address crime prevention by other means. One example of such an organization is the Brooklyn-based “Sistas Liberated Ground” (SLG).²⁹¹ SLG is a group of women of color residents of Bushwick, Brooklyn, who have committed themselves to holding community members accountable for domestic violence and empowering vulnerable individuals to keep themselves safe, to locate safe spaces, to access mediation, and to address their needs for security without involving the criminal process unless they choose to do so.²⁹² This sort of work is encouraged by an abolitionist ethic because abolition inspires forms of social organization to address interpersonal harm apart from criminal law enforcement, where otherwise recourse to criminal law's intervention would be more reflexive because it would be less subject to question and critique. This positive project of abolition *1218 and prevention in an often overlooked register, which the remainder of this Article explores, also promises to lessen the dread that accompanies the thought that judges and legislators (and others) might “soon be faced with similar claims as to other types of penalty”--that is, the terror of the idea that the wheels of the criminal legal process might slow.

The problem remains, of course, of how to envision in more complete terms a manner of preventing interpersonal harm consistent with this critical abolitionist ethic. The remainder of this Article engages the preventive justice and related literatures toward this end, developing an overlooked and structurally focused form of grounded preventive justice not centered on individualized criminal law enforcement targeting.

III. PREVENTIVE JUSTICE

Preventive justice designates a range of measures aimed at reducing the incidence of harmful behavior, typically by targeting the risks posed by specific individuals and less often by addressing the potential harm posed by given social situations. Preventive measures run the gamut from preventively detaining people deemed dangerous to increased spending on social programs that may serve to decrease crime.²⁹³ In some respects, in its most general sense the term preventive justice designates a field of regulatory activity not meaningfully distinguishable from general crime prevention apart from its reference to justice.

The scholarly literature focused on preventive justice is overwhelmingly engaged with critically considering the injustice of particular (recent) punitive preventive measures, like sex offense registries or terrorism watch lists, and with underscoring the threats to vulnerable populations and to the liberal, libertarian, and rule of law values imperiled by individualized preventive targeting in criminal law administration.²⁹⁴ This scholarly work is primarily and remedially focused on *1219 addressing how procedural protections might limit the excesses of coercive, punitive preventive measures.²⁹⁵

By contrast, this Part explores a distinct and largely neglected structural and institutional conception of preventive justice that promises to minimize criminal law's injustice and reduce crime. This alternative conception is aimed at prevention of interpersonal harm, along with other social problems, that might operate without enlisting criminal law enforcement. Although the current organization of an idea of security around punitive policing and prison-backed punishment has gradually come to seem natural and inevitable, this alternative conception of preventive justice serves as a corrective to the false sense of necessity that so often accompanies punitive preventive policing and punishment. Additionally, this alternative conception of preventive justice offers a manner of constraining punitive preventive measures other than through procedural mechanisms--namely, by substantively conceptualizing prevention in other terms and proliferating noncoercive modes of facilitating collective security.

This neglected framework of prevention may operate without involvement of the conventional criminal process, without targeting individual persons for heightened surveillance, and without jeopardizing core principles of justice and fairness. Prevention so configured attends to the problems posed by interpersonal violence and other criminalized conduct by decreasing opportunities to offend and confronting criminalized conduct without first resorting to policing, prosecution, and conventional criminal punishment. This move away from preventive policing, prosecution, and punishment-- away from the sort of interventions that Professor Bernard Harcourt has critically coined "punitive preventive measures"--and toward situational, structural, and institutional prevention entails an alternative form of preventive crime regulation consistent with an abolitionist project in that it does not rely on strategies of intervention that instigate criminal law's institutions, violence, or surveillance.²⁹⁶ Prevention in this alternative register may, for these reasons, function as a constructive supplement to a prison abolitionist ethic.

This Part explores how this alternative conception of prevention is consistent with an earlier vision of ensuring social order and collective peace, one that arguably dates to the late eighteenth and early nineteenth centuries, but has *1220 been largely abandoned or merely glossed over in contemporary criminal law scholarship.

Preventive justice first surfaced as a relevant concept in Anglo-American legal discourse before there were established police forces, at a time when it remained uncertain how rapidly industrializing societies would seek to limit interpersonal harm while maintaining a commitment to liberty and privacy.²⁹⁷ Although Blackstone conceived of preventive justice as tied to directly policing probable criminals through an assessment of their character rather than other actuarial means,²⁹⁸ later social reformers were committed to a different approach to maintaining social order quite apart from what we would today conceive of as criminal law enforcement.²⁹⁹ The most famous of these reformers was Jeremy Bentham, who went as far in his unfinished *Constitutional Code* to explore the convening of a "Preventive Services Ministry," the function of which would be to prevent "delinquency and calamity."³⁰⁰ This conception of prevention was organized not so much around crime as around uncertainty, insecurity, and risk.³⁰¹ Its purpose was to ensure the "security of [future] expectations" to the greatest extent possible.³⁰² This involved an expanded conception of security, according to which individual criminal deviance was not any more of concern than the safety of mines and factories, precautions against fire and floods, and other "calamities" of nineteenth century life.³⁰³ Quite apart from his famous (or infamous) plans for panoptic prison reform, Bentham conceptualized security more broadly as a project of environmental design and risk reduction. As Martin Dubber has explained, "[Bentham's] idea was to prevent the exigency. And so the possibility of an exigency became the justification for police power actions, rather than the *1221 exigency itself."³⁰⁴ A professional punitive police power backed by the threat of imprisonment was thus not understood by

Bentham and his contemporaries to be an inevitable force for preserving security, even as it is now an entirely taken for granted component of the modern state. Indeed, there was widespread suspicion of and resistance to the establishment of a punitive preventive police force centered on crime interdiction, and this deep suspicion of punitive policing persisted for years. As David Garland explores in his celebrated study, *The Culture of Control: Crime and Social Order in Contemporary Society*:

[E]ven the idea of “police” referred not to the specialist agency that emerged in the nineteenth century but to a much more general programme of detailed regulation. . . . The aim of this kind of “police” regulation was to promote public tranquility, and security, to ensure efficient trade and communications in the city, and to enhance the wealth, health, and prosperity of the population. To this end, city authorities promulgated detailed by-laws calling for . . . programmes of street lighting [and] the regulation of roads and buildings³⁰⁵

Even though the police force that began to take shape during the nineteenth century focused more directly on crime control, the original purpose of prevention was “not to pursue and punish individuals but to focus upon the prevention of criminal opportunities and the policing of vulnerable situations.”³⁰⁶

During this time period, the idea that punitive policing would take up the work of limiting interpersonal harm was dismissed for decades as illiberal, prone to tyrannical abuse, and dangerous. For example, a Select Committee in the British House of Commons convened for three years to consider the introduction of a formal police force, concluding in 1818:

[T]hough their property may occasionally be invaded, or their lives endangered by the hands of wicked and desperate individuals, yet the institutions of the country being sound, its laws well administered, and justice executed against offenders, no greater safeguards can be obtained, without sacrificing all those rights which society was instituted to preserve.³⁰⁷

The Committee thus recognized that risk of harm was an inevitable threat associated with social life. Consequently, the Committee could not conceive that *1222 extraordinary measures could be taken to avert crime and the risk thereof beyond institutional and structural efforts to limit risk and isolated responses against those individuals who committed offensive wrongs. Instead, by and large, these reformers thought that society ought to organize itself to minimize crime without unnecessary individual targeting, both by empowering people to care for themselves and by organizing collective social life to minimize opportunities for victimization and harm. This premise is at the core of the potential confluence of an abolitionist framework and this earlier form of prevention focused on structural measures of risk reduction rather than individualized targeting.

Along these lines, the Select Committee of the House of Commons acknowledged:

It is no doubt true, that to prevent crime is better than to punish it: but the difficulty is not in the end but the means, and though your committee could imagine a system of police that might arrive at the object sought for, yet in a free country, or even in one where any unrestrained intercourse of society is admitted, such a system would of necessity be odious and repulsive, and one which no government would be able to carry into execution. . . . [T]he very proposal would be rejected with abhorrence; it would be a plan which would make every servant of every house a spy upon the actions of his master, and all classes spies upon each other.³⁰⁸

Again in 1822, the House of Commons Select Committee Fourth Report concluded:

It is difficult to reconcile an effective system of police, with that perfect freedom of action and exemption from interference, which are the great privileges and blessings of society in this country; and your Committee think that the forfeiture or curtailment of such advantages would be too great a sacrifice for improvements in police, or facilities in detection of crime, however desirable in themselves if abstractly considered.³⁰⁹

Only in 1828 did a Select Committee finally recommend the convening of a centralized criminal police force, but the force's purpose was to prevent crime through diversified regulation, not to serve as an adjunct to punishment. As the Committee explained, “[the force's] main object ought to be the prevention of crime, and not the punishment of it.”³¹⁰ When a Scottish magistrate, Patrick *1223 Colquhoun, sought to centralize the police by creating an organization with fulltime police officers, officers were to address indigence, not just crime.³¹¹ To the extent officers sought to prevent crime directly, policing was to be organized to prevent criminal opportunities and vulnerable situations.³¹² Colquhoun's *Treatise on the Police of the Metropolis* conceptualizes preventive policing to include regulations involving “markets, hackney-coach stands, paving, cleansing, lighting, watching, marking streets, and numbering houses.”³¹³ It was apparent to these social reformers that any program of policing or crime regulation should consider education, employment, social integration, and engagement as indispensable and central components of their mandate. Even to proponents of policing, the advent of an organized police was understood to be part of a diversified form of governance, primarily social rather than punitive in orientation, and one in which citizens and society were principally responsible for crime prevention.³¹⁴

In the intervening centuries, an idea of security organized around punitive policing and prison-backed punishment gradually has come to seem natural and inevitable, but this earlier conception of prevention may offer a corrective to that false sense of necessity and to the scholarship and reformist efforts centered on containing punitive preventive measures solely through procedural reform (rather than substantively reconceptualizing prevention in other terms and proliferating noncoercive modes of prevention).³¹⁵ Much of the work of prevention in this alternative register is situation-specific, incremental, and unglamorous, but it promises the most urgently needed change in practices of overcriminalization and to criminal law enforcement's violence.

A further factor commending prevention in this alternative register, and an abolitionist ethic more broadly, is that the violence and dehumanization that haunts criminal law administration, and the needed reduction in overcriminalization and overpunishment, requires a much more radical shift than merely an attack *1224 on coercive preventive measures like sex offense registries or terrorism watchlists and a concomitant expansion of procedural protections. Different approaches are needed within which prevention may be conceptualized apart from individualized targeting and coercion, both before and after the fact of a criminal conviction. Preventive ambitions, as Fred Schauer has illuminated, are of course ubiquitous throughout the criminal law: “[U]sing the criminal law in order to achieve preventive goals is a pervasive dimension of our long-standing practices of punishment”³¹⁶ Although critics of punitive preventive measures decry the procedural informality--or even irregularity--that routinely accompanies such measures (and importantly and rightly so), these critics overlook how eviscerated procedural protections are characteristic not just of the preventive periphery of precrime enforcement, but of most of the adjudications at criminal law's core.³¹⁷ As political theorist Stephen G. Engelmann provocatively put it, “[I]n the criminal law . . . elaborate procedures . . . are routinely suspended in ongoing orgies of plea-bargaining.”³¹⁸ These “orgies of plea-bargaining” are produced by the often almost exclusive reliance on criminal law administration to manage social risk rather than proliferating other noncriminal forms of prevention and justice.

More far-reaching emphasis on this framework of prevention would beneficially focus conventional criminal law's properly reactive processes on those relatively rare instances where some form of collective sanction--subject to procedural protections--is most called for. Such circumstances might include those relatively limited situations of interpersonal harm--instances of rape

and murder, chief among them--where the rituals of the criminal process may perform important and desirable societal work, or at least for which we can conceive presently of no other appropriate response.

The following Part continues to reconceptualize criminal law's necessary ambit and the prevention of harm outside the institutions that form the penal arm of the state.

IV. RECONCEPTUALIZING PREVENTION

This Part surveys an array of preventive projects that operate in this alternative social institutional and structural register. In so doing, the analysis that follows ³¹⁹ begins to illustrate what an abolitionist framework would entail for crime prevention, justice, and security.

A. Justice Reinvestment

Justice reinvestment has become a catchphrase in criminal law reformist discourse to describe various efforts to reduce spending on imprisonment, some of which include substituting shock incarceration-backed probation monitoring for longer prison sentences.³¹⁹ But justice reinvestment in line with an abolitionist framework means something different, more specific, and more thoroughgoing: It involves reconceptualizing justice and prevention in ways that independently strengthen valuable social projects that would simultaneously stand to reduce crime. This entails reinvesting criminal law administrative resources in other sectors and also reinvesting the concepts of justice and prevention with more expansive meaning.

In the broadest terms, justice reinvestment along these lines would refocus collective energy on strengthening the social (rather than the criminal) arm of the state out of concern for justice and in virtue of a commitment to security, and, as this Article has argued, as a project of criminal law reform consistent with an abolitionist ethic. Preventive justice in its overlooked structural variant provides a conceptual ground for understanding security anew in terms much deeper and more vast than mere crime prevention through probationary supervision.³²⁰ Security is more meaningfully furthered in these terms by social solidarity, flourishing neighborhoods, dignified work, education, labor unions, empowerment of vulnerable persons, community organizations, and basic social infrastructure.³²¹

In more specific terms, recall the economist Heckman's research on the social importance of early childhood education relative to other criminal law administrative interventions to address crime.³²² The early childhood educational organizations that are the subject of Heckman's ongoing work include an array of well-established and pilot programs centered on education, health care, and expanding social opportunities for very young disadvantaged children.³²³ These ³²⁴ ***1226** institutions serve as models of preventive justice and justice reinvestment in these terms--promoting social flourishing and security, as well as preventing harm and allocating resources to more just ends, in accord with a broader, more meaningful conception of justice than reactive criminal punishment serves.³²⁴ This is not to claim that these social projects are exclusively positioned to take up the work of justice reinvestment within an abolitionist framework, but to identify the shapes that reinvestment and just prevention consistent with an abolitionist ethic could take in terms resonant with W.E.B. Du Bois' vision of positive abolition.

B. Decriminalization

De jure and de facto decriminalization are similarly an important component of prevention and justice in a structural register and consonant with an abolitionist ethic--both preventing crime and acting in service of a fuller conception of justice than punishment of minor offenses achieves. Decriminalization may assume any number of forms. Numerous U.S. jurisdictions have decriminalized marijuana, which stands to reduce the harms of punitive policing of marijuana users and to prevent all marijuana offenses currently criminalized.³²⁵ Although marijuana convictions constitute only a very small part of the problems associated with U.S. criminal law administration, punitive policing of marijuana users enables the racial harassment of thousands of young

men of color, including many of the 50,000 persons arrested in 2011 in New York City for minor possession of marijuana.³²⁶ Some jurisdictions have gone considerably further, such as Portugal, which in 2001 became the first European country to abolish criminal sanctions for personal possession of narcotics, including heroin, cocaine, and methamphetamine.³²⁷ Although persons involved in possession of these narcotics may be referred through a civil order for treatment, there is no threat of imprisonment that accompanies noncompliance with such a referral. Notably, in the aftermath of complete decriminalization of drug possession in Portugal, the number of HIV infections transmitted by sharing needles decreased and the percentage of adolescents using narcotics declined, while the numbers of people pursuing addiction treatment increased substantially.³²⁸

***1227** De facto decriminalization, or at least reduced sentencing, may involve exercises of police or prosecutorial discretion to simply not pursue, arrest, or prosecute particular categories of cases while retaining a legal norm of criminalization. For example, in 2013 Attorney General Eric Holder instructed assistant U.S. attorneys not to charge particular criminal cases in a way so as to trigger certain stiff criminal sentences.³²⁹

Importantly and additionally, efforts to confront the “school-to-prison pipeline” by eliminating zero-tolerance policies in schools that turn children who misbehave in school over to police are another significant measure to eliminate criminalization. Reform along these lines stands to address some of criminal law’s violence in a readily achievable manner consistent with an abolitionist ethic.³³⁰

Although the precise scope of desirable de jure and de facto decriminalization remains uncertain, and though there is surely some violent conduct that the law ought to plainly condemn, decriminalization deserves a more prominent place than it currently occupies in criminal law reformist discourse, both in the narcotics context and elsewhere.³³¹

C. Creating Safe Harbors

Another crucial component of an abolitionist approach to prevention is a form of social organization that enables vulnerable persons and communities to care for themselves, rather than having to rely exclusively on the criminal law administrative apparatus to serve basic needs for personal and community security. The Brooklyn-based “Sistas Liberated Ground” (SLG) is again illustrative—an instance of both facilitating forms of restorative justice and mediation as well as creating a safe harbor for those vulnerable to domestic violence.³³² Similarly, Violence Interrupters, a program pioneered by epidemiologist Gary Slutkin, consists of a task force of community mediators, many of whom are formerly gang-involved community members, who may be called upon to help deescalate situations of mounting community conflict, whether gang-related or otherwise.³³³

***1228** Studies of Violence Interrupters’ work in Chicago and Baltimore, conducted by researchers at Northwestern and Johns Hopkins Universities, found that homicide rates decreased with the implementation of these programs.³³⁴ In one neighborhood, the rates decreased by over 50 percent.³³⁵ These are interventions that borrow from restorative models of dispute resolution but ground those practices in specific community-based projects.

This model of community self-care occupied a central place in the Black Panther Party’s philosophy as a means of enabling people to avoid reliance on criminal law enforcement to solve legal and social problems. The Black Panthers, for instance, convened “People’s Free Medical Clinics” in cities around the country in the 1970s, after the Civil Rights Acts were passed.³³⁶ Though the Black Panther Party is not often remembered in these terms today, their public health initiatives sought to foster liberatory politics organized around creating safe spaces and community well-being. Freedom and justice, in these terms, following W.E.B. Du Bois, are understood in terms of an end of racial subordination as a positive project of human flourishing, rather than merely freedom from discrimination or as a punitive response in the wake of wrongdoing.

Prevention in a structural register might also be understood, then, more generally to encompass the creation of additional spaces of liberatory security separate from the criminal arm of the state—spaces in which harm is prevented and just conditions are

manifest at a small scale, as well as alternative forms of dispute resolution, restorative interventions of the sort implemented by SLG and similar organizations.

D. Alternative Livelihoods

Alternative livelihoods programs also rely upon institutions separate from criminal law enforcement to prevent conduct otherwise frequently addressed through criminal law administration. Alternative Development Programming, for example, undertaken by the United Nations in the criminal law and development context, subsidizes narcocultivators to shift to nonnarcotic crops, and then assists growers in accessing national and international markets until they are able ³³⁷ to make the financial transition to the alternative crop by themselves. In certain programs, participation is voluntary and unaccompanied by the threat of criminal or other penalties. Over time, many narcocultivators switch to the legal alternative if it becomes equivalently lucrative. Transition to alternative crops is associated with a significant reduction in threats of violence due to the insecurity that accompanies narcotics trafficking.³³⁸ Relatedly, certain Latin American countries have sought to purchase cocoa crops from growers, which may be used in manufacturing products like toothpaste and soap.³³⁹ More generally, these alternative development programs offer a manner of conceptualizing how crime prevention might be attempted through employment programs and small business development assistance, such as for those involved in narcotics sales in the United States, as well as for those involved in other forms of for-profit criminal activity.³⁴⁰ These initiatives thus prevent harm and enable more sustainable conditions of social life.

E. Universal Design

Improved security may also be enabled by simple design innovations that leave public spaces better lit to reduce the likelihood of assault in public at night, as well as by making products less susceptible to theft.³⁴¹ The regulation of theft and shoplifting provides one illustration of how design innovations may actually more effectively and cheaply prevent the offending conduct, simultaneously promoting the ends of justice by avoiding unnecessary criminal law enforcement. Shoplifting may be regulated either through policing, prosecution, and punishment, or through using infrastructural and design-focused preventive interventions. On a criminal regulatory model that targets individual thieves, in-store security and registers of suspected offenders identify shoplifters (these are examples of individualized precrime preventive targeting). In instances of identified ³⁴² violations, accused individuals may be subject to arrest, charge, prosecution, and punishment (with both post-offense responsive ambitions and preventive deterrent ambitions). But shoplifting may also be preventively addressed, and arguably more effectively so, by using design interventions, which do not entail the individual liberty intrusions associated with either punitive preventive or conventional criminal law enforcement responses. Local business groups or city regulations could instead require store owners to implement store policies, such as packaging and display practices, that make it virtually impossible to steal.³⁴² Thus, shoplifting need not be a prosecutorial priority in order to reduce its incidence very considerably; by contrast, the available evidence suggests that police arrest less than one percent of shoplifters, so the design-based, noncriminal regulatory regime may actually be more effective.³⁴³ Auto theft likewise may be prevented through straightforward changes by auto manufacturers to vehicles so as to make it either impossible to access the car to steal it or to inhibit the mobility of a car in the case of intrusion.³⁴⁴ This simple form of prevention promises not only less individualized targeting by police through reduced criminal law enforcement involvement, but also potentially, at least in the case of theft, improved effectiveness.

F. Urban Redevelopment

Urban redevelopment is a further way to promote security, even from violent crime. Redevelopment can engage community members in common projects and populate urban areas that might otherwise be desolate, particularly those plagued by violence. More generally, these projects also promise to enhance community well-being. For example, one recent study of urban “greening” projects, conducted by epidemiologists at the University of Pennsylvania School of Medicine, found that “greening

was associated with reductions in certain gun crimes and improvements in residents' perceptions of safety.”³⁴⁵ The study randomly selected two groups of vacant lots in Philadelphia: One set was greened through an urban gardening initiative and the other, which was not, served as the control. Assault in the general area, both with and without guns, *1231 declined after the greening began and residents' general sense of safety and security near their homes improved.³⁴⁶ The study's authors attribute these associations to a greater sense of unity fostered in the neighborhood as a result of the common project, as well as the greater difficulty in hiding guns and criminal activity in a green space as opposed to a trash-filled lot.³⁴⁷

This research builds upon University of Pennsylvania epidemiologist Charles Branas's work comparing outcomes associated with thousands of greened and nongreened vacant lots over the course of nine years.³⁴⁸ Branas found that greening could be associated with reduced gun assaults, vandalism, stress, and increased physical exercise.³⁴⁹

In 2010, there were 40,000 vacant lots in Philadelphia, many in neighborhoods suffering from considerable violence and neglect.³⁵⁰ Detroit--another city with high rates of criminalization, arrest, incarceration, and gun violence--has approximately forty square miles of vacant lots and is considering whether to convert some of these lots to greened uses.³⁵¹ Cleveland, partly in response to this body of research, has created a program to supply grants to community groups to manage parcels of vacant land.³⁵² Proposals have included community gardens and orchards, as well as permeable parking structures.³⁵³

Greening surely cannot eliminate all violence in urban spaces, but it is an instance of a preventive measure consistent with an abolitionist ethic that may, at a minimum, improve residents' impressions of safety and thereby improve community well-being.³⁵⁴ Regardless of whether the “broken windows” theory of policing is empirically valid, greening and other urban redevelopment projects are ways to promote “orderliness” that do not involve punitive policing interventions with all their known costs and exemplify an approach that promises other demonstrated benefits, including the empowerment of impacted communities to seek security and justice in other terms than through criminalization and incarceration.³⁵⁵

*1232 The following Part considers further whether and how justice may be achieved within an abolitionist framework focused generally on structural prevention rather than punishment of crime.

V. GROUNDING JUSTICE

Thus far, this Article has argued that a broader framework of grounded justice--concerned with human welfare as well as legacies of racial subordination and practices of dehumanization--demands a rejection of much of the work currently performed by the criminal legal process in the United States, as well as compelling a central place for an overlooked variant of structural prevention, and a departure from continued reliance on primarily retributive, individual, punitive, criminal legal responses to interpersonal violence and other forms of socially harmful conduct. To the extent that more just outcomes may be achieved by prioritizing structural forms of prevention over individual criminal response, this broader conception of grounded justice requires allocation of energy and resources to social structural responses over criminal prosecution and punishment. Doing so does not require immediately eliminating the ability to invoke the rituals of the criminal process in certain instances of grave interpersonal harm. Yet, the determination in cases of significant individual wrongdoing of whether to rely on criminal punishment and how much should always be a difficult one. There is no easy manner of determining how or when this should be done, though any such imperfect determination ought to seek to condemn violence, promote security, and protect the human dignity, freedom, and equality of the accused and accuser alike. An abolitionist ethic entails, in any case, that we should strive to eliminate the need to invoke such punitive responses and approach their invocation with deep conflict and ambivalence, even shame.

This account of grounded justice, of course, is in deep tension with a retributivist account of criminal punishment. A retributivist objection to this account of abolition and prevention--of grounded justice--might run as follows: Retributive justice requires that any wrongful and illegal act be followed by state-imposed punishment, subject to fair procedural constraints, in order to

counteract the harm done by the offender to the victim, honor the moral agency of both the victim and the perpetrator, and to recognize the threat posed to the democratically endorsed rule of law.³⁵⁶ Any punishment should proportionally match the *1233 wrong of the crime, considering both the offender's culpability and the harm suffered by the victim.³⁵⁷ Only fitting criminal punishment, in this view, respects the free moral agency of the defendant and the victim alike.³⁵⁸ Imprisonment is the primary institution for imposing just punishment because it avoids overt brutality that eliminates human agency or makes a spectacle of violence, such as the imposition of a death penalty or flogging, and because of a democratic consensus around incarceration as a criminal sanction.³⁵⁹ The retributivist objection might posit, therefore, that an abolitionist ethic and its instantiation of prevention in a noncoercive register is contrary to these principles because it ignores the demands of justice (and of retributive justice in particular) by addressing wrongdoing through interventions focused institutionally, structurally, and socially, rather than by fitting punishment to legally and morally condemn criminalized acts and recognize the moral agency of the criminal perpetrator and the victim alike. Although a retributivist would likely be receptive to the critique of the U.S. criminal process for its disproportionality and other excesses, so too is the abolitionist turn to grounded preventive justice in tension with retributivism's commitment to proportional agency-respecting punishment. An abolitionist response to this retributivist account centers not only on the above sketch of justice in a broader social frame, but also on what I am calling grounded justice--an account of justice that is concerned with how ethical analysis fares in light of the operations of criminal and other processes in the world. On this account, what counts as a just response to criminalized conduct turns crucially on the sociological, historical, and institutional settings in which punishment actually unfolds and has historically unfolded. Justice should be centrally concerned with those empirical facts and the possibilities that actually inhere within ongoing situations of punishment. Especially relevant are the known facts about the furthest horizons of possibility for transforming those settings, their fundamental structures and dynamics, and the most concerning forms of interpersonal harm that transpire within them. The brutal violence, dehumanization and racially subordinating organization of the institutions in the United States *1234 that administer criminal law are not merely incidental facts but ought to meaningfully inform the terms that any aspirational account of justice should adopt.

Grounded justice and an abolitionist ethic participate in what political theorist Raymond Geuss has argued political philosophy ought to engage: A theoretical project of ethical reflection that is deeply concerned with sociological, historical, and political situations and possibilities rather than primarily with deductive moral reasoning from first premises.³⁶⁰ In this respect, Geuss writes critically of political philosophy in what he describes as a dominant "Rawlsian" vein, which is concerned generally with identifying abstract conditions of justice separate from a critique and analysis of existing social and political circumstances. Geuss suggests tendentiously that:

“[N]ormative” moral and political theory of the Rawlsian type [focused in large part on inequality] has nothing, literally nothing, to say about the real increase in inequality [that coincided with the ascendance of this mode of political philosophy in the academy], except perhaps “so much the worse for the facts. . .” This is not a criticism to the effect that theoreticians should *act* rather than merely thinking, but a criticism to the effect that they are not thinking about relevant issues in a serious way.³⁶¹

Reading Geuss charitably, his point is not to hold political philosophy responsible for any broader structural changes in the world that occurred during a period of one political theoretical school's ascendance; rather, he presents a provocative critique of the choice on the part of certain political theorists of inequality to elect a mode of analysis largely disengaged from the sociological and political economic conditions within which inequality persists in the world.

Geuss continues with a positive account of what this mode of theoretical analysis would entail (and the account of grounded justice elaborated here extends this to the realm of criminal law and philosophy and legal theory). Geuss proposes a form of political philosophical reflection that grapples with theoretical questions and with history, social, and economic institutions, and the real world of politics in a reflective way. This is not incompatible with

“doing philosophy;” rather, in this area, it is the only sensible way to proceed. After all, a major danger in using highly abstractive methods in political philosophy is that one will succeed merely in generalizing one’s own local prejudices and repackaging them as demands of reason.³⁶²

***1235** Although its full elaboration is beyond the scope of this Article and will be reserved for future work, the account of grounded justice here begins to apply to criminal law theory this more general account of empirically engaged political theoretical work proposed by Geuss, and seeks to theorize alternatives to punishment through prison abolition and grounded prevention with attention to the social contexts in which criminal law in the United States operates in virtue of its historical inheritance and basic structures. This is not merely a distinction between ideal and nonideal theory, but an account of how and to what extent theoretical analysis and critique ought to take stock of, engage with, and respond to ongoing conditions in the world. An abolitionist framework sets as an aspirational goal the elimination of prison-based punishment and prison-backed policing in the United States because of an engaged analysis of present and past U.S. practices of punishment. Ultimately, the dehumanizing nature and racially subordinating legacy of criminal punishment in American society compel the conclusion that, all things considered, an abolitionist orientation is preferable to a retributivist one, arguably even to advance certain retributivist ends concerned with respecting the moral agency of persons.

So a further response to the retributivist objection in reference to grounded justice would continue like this: Despite the intuitive appeal of certain premises of retributivism, the retributivist account does not offer a vision of criminal punishment that is anywhere close to just in a society that even partially resembles our own.³⁶³ Even if we grant that the relevant ideal justification of punishment is retributive, we should consider what actual retribution will be, rather than some idealized, seemingly unachievable version of it. If we insist that retribution is required in a particular instance and should take a particular form, we should advocate as vigorously for retribution taking that form in reality (rather than the brutal form it currently takes) as we do for retribution in principle. This is what the principles of retribution themselves demand--the abolition of much of our current regime of agency-disrespecting criminal law and punishment. If agency-respective prison-based punishment is infeasible for the reasons this Article explores, then even on retributivist grounds, an abolitionist ethic registers a compelling claim.

Further concerns about even the retributivist ideal, apart from its unattainability in a society constituted as ours is, arise when attending to the question of what justice requires in its full, grounded complexity. Consider, for example, the ***1236** case of rape. It is unclear why justice requires primarily that for a rape one should spend a period of years in prison. Why does imprisonment justly “fit” the crime of rape or respect the agency of the rapist and the dignity and harm suffered by the survivor of rape? These facts ought to have some bearing on the answer to these questions: That many rapes are unreported in part because of how poorly criminal law responds to the harms of rape, that survivors whose rapes are prosecuted are on some accounts significantly less well off than those who do not seek redress through the criminal process, that rape is especially pervasive in prison, and that there are other means of preventing and perhaps even redressing rape that more effectively address the risk and harm of sexual violence.³⁶⁴ At a minimum, on an account of grounded justice, responding to the problem of rape requires a much broader framework for conceptualizing a just response than retributive punishment focused on carceral responses affords. This is not to say criminal law ought to play no part in responding to sexual violence, but that the alternative registers of prevention and justice explored here ought to take primacy of place in addressing the conditions that render so many persons, including prisoners themselves, vulnerable to sexual violation, and in responding to those violations.³⁶⁵

Additional questions responsive to the retributive objection that sound in terms of grounded justice are as follows: By what figures or metric should specific sentences be anchored in order to be proportionate and agency-respecting given the actual contexts of punishment or the possible contexts of punishment in the United States? How should we measure harm and culpability so as to meaningfully match carceral punishment in the United States to crime given what we now know about the inherent dynamics, structural violence, and dehumanization associated with imprisonment? Although some retributive theorists distinguish between what retributivism would require with regard to imprisonment in a reasonably just society as compared

to an unjust society,³⁶⁶ and between minimum conditions of confinement and extreme conditions of confinement,³⁶⁷ these modifications, while important corrections to other retributivist accounts, fail to consider broadly, imaginatively, and with sensitivity to present and historical contexts what justice might entail in more expansive terms. For example, how does a criminal sentence of a period of years confirm the moral agency of the person sentenced and that of the victim when it requires nothing beyond “doing time” from the offender and fails to work to prevent directly similar harms from befalling *1237 similar victims? Would it not be more just for all concerned to engage the perpetrator of violence and others in collective projects that would make victims whole and tend to prevent future harm? Why is justice cabined by the terms of retributivism rather than considering what is just with reference to the broader contexts in which human beings either flourish or suffer violence, poverty, and despair?

My argument is not that the retributivist cannot respond to these questions. Nor is the problem that a retributivist lacks the theoretical resources to respond to these points from within a retributivist framework. Rather, my claim is that the main scholarly legal literature of a retributivist bent has simply failed to engage with these questions. To meaningfully respond to these concerns, a retributivist must do more than point out that incarceration and other punitive responses are required by a respect for moral agency. Moreover, any account committed to a concern for the moral agency of persons must be able to explain why alternative, less violent, less degrading schemes of social coexistence are less responsive to moral agency than punitive schemes organized around the criminal legal process.

For these reasons, retributivist commitments should not retain such powerful force without an account of how retributivism stands to respond to and improve existing conditions. The hollowness of retributivist justice in this regard is suggested by the ready invocation of retributivist precepts by sentencing judges and harsh punishment's supporters when actual punishment regimes so little conform to retributivist principles; yet, the malleability of a retributive framework that purports to match the harm and culpability of crimes to sentences, even if it is a misapplication of that framework, is routinely used to justify existing punishment practices that extinguish the moral agency and diminished life chances of millions of persons in criminal custody or under criminal supervision in the United States. What this elucidates is that matching punishments to crimes can rest hopelessly in the subjective eye of the sentencer and that of the detached retributivist observer, failing to account for the ultimate incommensurability of punishment and crime when considered from the standpoint of the grounded victim or defendant, let alone the broader social setting in which both victim and defendant coexist. By grounded justice's lights, popular invocations of retributive justice are narrow and pale allusions to justice, inattentive to human needs in their fuller, grounded complexity.

An abolitionist ethic nonetheless confronts a second, separate potential problem with respect to which retributive justice fares better. An abolitionist ethic and framework require a fundamental reorientation in how we think and act, one far beyond the sorts of aspirational demands entailed by retributive justice. To be oriented toward the abolition of criminal punishment and to conceptualize *1238 justice in a broader framework of social equality and prevention of harm is to suspend at least much of the time what are now basic, instinctual reactions to particular sorts of wrongdoing, reactions of vengeance and anger that have become core to social thought and practice. A shift toward abolition would involve transforming ourselves and some of our most deeply held ideas and practices about blame, responsibility, and desert. The challenge, then, of an abolitionist ethic and of prevention in a structural mode is that both require reconstructing how we conceptualize crime, punishment, justice, and ultimately how we understand ourselves. The contention at the heart of this Article, though, is that we could change our social and criminal regulatory frameworks in quite significant measure, without losing too much that we cherish of ourselves. Indeed, this transformative work--the ethical, conceptual, institutional, regulatory, social, and structural shift it would entail--is consonant with other important shared ideas and values.

CONCLUSION

[T]here has never been a major social transformation in the history of mankind that has not been looked upon as unrealistic, idiotic, or utopian by the large majority of experts even a few years before the unthinkable became reality.³⁶⁸

In significant part, this Article's aim has been to situate prison abolition--a critical project and nascent social movement effort often construed as off the wall--alongside and in conversation with core scholarly accounts in criminal law scholarship, criminology, and criminal law reformist discourse.³⁶⁹ Abolition, as explored in this Article, ought to occupy a more central place in criminal law scholarship, policy discourse, criminological analysis, and political philosophy than it has to date. Prevention and grounded justice, reconceptualized as social and structural noncoercive undertakings, may offer means of articulating abolitionist aspirations in tandem with a commitment to crime prevention and repair of harm. In the face of the suffering wrought by overincarceration, overcriminalization, and the racialized violence that haunts punitive policing and *1239 imprisonment, a radical shift in our social and legal regulatory landscape is both necessary and possible. This Article has argued that the regulation of interpersonal harm could begin to be fundamentally reimaged without undue negative repercussions by attending to a neglected conception of prevention and to grounded justice. Ultimately, grounded justice's promise is a world with less violence, both within and without the criminal law; more just, limited, and increasingly diminishing use of the criminal process; and enlistment of an array of other institutions and social projects in working to promote collective peace.

Abolition as an ethical and institutional framework--as an aspirational horizon for reform--is not unduly or merely utopian, but orients critical thought and reformist efforts toward meaningful and just legal, ethical, and institutional transformation to which we might commit ourselves.³⁷⁰ Nor is abolition through gradual decarceration and the incremental investment in other substitutive social projects apart from criminal law enforcement utterly implausible. Faced with fiscal crises, many jurisdictions are actively rethinking their dependence on incarceration as a means of responding to criminalized conduct, including through de facto and de jure decriminalization.³⁷¹ Although the elimination of the penal state in its current forms is difficult to imagine, as the German abolitionist criminologist Sebastian Scheerer suggested decades ago, so too were many other transformative events, right up until the time they came to pass. Among those once unfathomable historical transformations, one might recall the abolition of slavery, the end of the British Empire, the end of the Cold War, and the embrace of gay marriage around the world. Rather than setting criminal law reformist ambitions exclusively on noncustodial criminal monitoring or punitive preventive measures with procedural constraints, and funding a "reentry industry" overseen by probation and parole departments (a currently ascendant punitive preventive regime), further elaboration of an abolitionist preventive framework may make available an array of less violent, less racialized, less coercive, and more just modes of reducing risks of interpersonal harm and promoting human flourishing.

Footnotes

- 1 ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 15, 21 (2003).
- 2 4 WILLIAM BLACKSTONE, COMMENTARIES * 251 (emphasis omitted) .
- 3 NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS & GOALS, U.S. DEPT' OF JUSTICE, REPORT ON CORRECTIONS 597 (1973).
- 4 *See id.*
- 5 *See, e.g.,* DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 168 (2001); NICOLA LACEY, THE PRISONERS' DILEMMA: POLITICAL ECONOMY AND PUNISHMENT IN CONTEMPORARY DEMOCRACIES (2008); JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR (2007); BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA (2006).
- 6 *See* LAUREN E. GLAZE & DANIELLE KAEBLE, BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2013 (Dec. 19, 2014), [http:// www.bjs.gov/content/pub/pdf/cpus13.pdf](http://www.bjs.gov/content/pub/pdf/cpus13.pdf). As of 2003, one in every one

hundred forty U.S. residents was in prison or jail .PAIGE M. HARRISON & ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2003, at 2 (Nov. 2004).

- 7 *See* THOMAS P. BONCZAR, BUREAU OF JUSTICE STATISTICS, PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974-2001, at 1 (Aug. 2003), <http://bjs.ojp.usdoj.gov/content/pub/pdf/piusp01.pdf> (reporting that if then-current incarceration rates continued, one in three black men could expect to serve time in prison); BECKY PETTIT, INVISIBLE MEN: MASS INCARCERATION AND THE MYTH OF BLACK PROGRESS 1 (2012) (same). *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 2 (2012) (arguing that old forms of racial subordination have not been entirely eliminated but rather reconfigured in criminal law administration); DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM ((1999) (examining race- and class-based inequities in U.S. criminal law administration).
- 8 *Exploring the National Criminal Justice Commission Act of 2009: Hearing Before the Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary*, 111th Cong. 31 (2009) (statement of William J. Bratton, Chief of Police, Los Angeles Police Department).
- 9 *Id.* at 7 (quoting George Kelling).
- 10 *Id.* at 13 (statement of Pat Nolan, Vice President, Prison Fellowship, Lansdowne, Virginia).
- 11 *Id.* at 12.
- 12 *See, e.g., States Cut Both Crime and Imprisonment*, PEW CHARITABLE TR. (Dec. 19, 2013), <http://www.pewtrusts.org/en/multimedia/data-visualizations/2013/states-cut-both-crime-and-imprisonment> (revealing that numerous states have reduced crime and incarceration rates at the same time and suggesting that maintaining large prison populations is not necessary from a public safety standpoint); RUSSELL SAGE FOUND., DO PRISONS MAKE US SAFER? THE BENEFITS AND COSTS OF THE PRISON BOOM 2 (Steven Raphael & Michael A. Stoll eds., 2009) (noting the growing evidence of the destructive consequences of imprisonment, including vast allocation of public resources to incarceration at the cost of public spending in other areas such as education, diminishing crime-reductive returns associated with increases in incarceration, instability of family and community ties among high prison-sending demographics, depressed labor-market opportunities for persons with criminal convictions and consequent pressures to reoffend, legal disenfranchisement of former prisoners, and the acceleration of communicable diseases such as AIDS among inmates and their non-incarcerated intimates); JOHN SCHMITT ET AL., CTR. FOR ECON. & POL'Y RESEARCH, THE HIGH BUDGETARY COST OF INCARCERATION (2010) (demonstrating the exorbitant costs of incarceration and substantial potential savings associated with decarceration that could be devoted to other important governmental and public functions); DON STEMEN, VERA INSTITUTE OF JUSTICE, RECONSIDERING INCARCERATION: NEW DIRECTIONS FOR REDUCING CRIME 2 (Jan. 2007), http://www.vera.org/sites/default/files/resources/downloads/veraincarc_vFW2.pdf (proposing that “effective public safety strategies should move away from an exclusive focus on incarceration to...a more comprehensive policy framework for safeguarding citizens,” one that would incorporate reductions in unemployment, increases in real wage rates, and improved educational opportunities); *see also* Allegra M. McLeod, *Regulating Sexual Harm: Strangers, Intimates and Social Institutional Reform*, 102 CAL. L. REV. 1553, 1557 (2014) (exploring the various criminogenic effects of U.S. criminal sex offense regulations).
- 13 *See* Paul Butler, *Stop and Frisk: Sex, Torture, Control*, in LAW AS PUNISHMENT / LAW AS REGULATION 155, 155 (Austin Sarat et al. eds., 2011) (“[S] tops and frisks cause injuries similar to those of illegal forms of tortures....”).
- 14 *See, e.g.,* MARIE GOTTSCHALK, THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA 239 (2006) (proposing that “the U.S. penal system [be infused] with an ethos of respect and dignity for its millions of prisoners, parolees, probationers, and former prisoners that is sorely lacking”); DAVID M. KENNEDY, DON'T SHOOT: ONE MAN, A STREET FELLOWSHIP, AND THE END OF VIOLENCE IN INNER-CITY AMERICA (2011) (exploring a model for reducing incarceration focused on collaboration between police, prosecutors, and community members to agree upon cessation of criminal activity with provision of social services and under threat of severe criminal enforcement in the event of gang member noncompliance); MARK A.R. KLEIMAN, WHEN BRUTE FORCE FAILS: HOW TO HAVE LESS CRIME AND LESS PUNISHMENT 115 (2009) (proposing a regime of intensive probation supervision backed by flash incarceration as a manner of reducing reliance on imprisonment); FRANKLIN E. ZIMRING, THE CITY THAT BECAME SAFE: NEW YORK'S LESSONS FOR URBAN CRIME AND ITS CONTROL 131-32, 147-50, 194-95 (2012) (arguing that New York City-style “hot spot” and other associated policing tactics stand to reduce crime and incarceration and contending that no other factor can explain New York City's concomitant drop in crime and incarceration during a period when other parts of the country experienced increases in incarceration);

see also PAUL BUTLER, LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE 4 (2009) (“‘Criminal justice’ is what happens after a complicated series of events has gone bad. It is the end result of failure--the failure of a group of people that sometimes includes, but is never limited to, the accused person. What I am not saying: prison should be abolished; people should not be held accountable for their actions. I don't believe that.... I will never deny that society needs an official way to punish....”); David Cole, *Turning the Corner on Mass Incarceration?*, 9 OHIO ST. J. CRIM. L. 27, 41 (2011) (proposing reduced sentence lengths, direction of resources to address root causes of crime, and expanded empathy, but noting that “incarceration is frequently necessary” for the “half of the incarcerated population [that is] serving time for violent crimes”); Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 603 (1996) (“The law can discourage criminality not just by ‘raising the cost’ of such behavior through punishments, but also through instilling aversions to the kinds of behavior that the law prohibits.”); Louis Michael Seidman, *Hyper-Incarceration and Strategies of Disruption: Is There a Way Out?*, 9 OHIO ST. J. CRIM. L. 109 (2011) (exploring various reformist responses to large-scale use of incarceration including criminal procedure liberalism, experimental prison education programs, drug courts, and ideology critique, among other efforts, and finding there “is little reason...to be hopeful about the possibilities of change”); Carol S. Steiker, *Tempering or Tampering? Mercy and the Administration of Criminal Justice*, in FORGIVENESS, MERCY AND CLEMENCY 16, 31 (Austin Sarat & Nasser Hussain eds., 2007) (“Given the predictability of an ever-upward tending ratchet of punishment...we need some counterratchet, some way of checking this tendency and working against it. I contend that the ideal of mercy--taken quite self-consciously from the very religious tradition that contributes to retributivism's ratchet--is that necessary counterbalance.... [[M]ercy is [a] virtue that can be cultivated not only by the actors who exercise discretion within the criminal justice system but also by the general public....”).

15 See, e.g., DAVIS, *supra* note 1, at 9-10 (“[T]he prison is considered an inevitable and permanent feature of our social lives.... In most circles prison abolition is simply unthinkable and implausible. Prison abolitionists are dismissed as utopians and idealists whose ideas are at best unrealistic and impracticable, and, at worst, mystifying and foolish.”).

16 See, e.g., Liat Ben-Moshe, *The Tension Between Abolition and Reform*, in THE END OF PRISONS: REFLECTIONS FROM THE DECARCERATION MOVEMENT 83, 85-87, 92 (Mechthild E. Nagel & Anthony J. Nocella II eds., 2013).

17 See, e.g., Reina Gossett & Dean Spade, *No One Is Disposable: Everyday Practices of Prison Abolition* (2014), available at <http://bcrw.barnard.edu/event/no-one-is-disposable-everyday-practices-of-prison-abolition>.

18 Ben-Moshe, *supra* note 16, at 85.

19 See W.E.B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA* (Transaction Publishers 2013) (1935). Du Bois explains: “The South...opposed...education, opposed land and capital...and violently and bitterly opposed any political power. It fought every conception inch by inch: no real emancipation, limited civil rights....” *Id.* at 166. Du Bois concludes: “Slavery was not abolished even after the Thirteenth Amendment. There were four million freedmen and most of them on the same plantation, doing the same work that they did before emancipation....” *Id.* at 169. In response to the question of how freedom was to “be made a fact,” Du Bois wrote: “It could be done in only one way.... They must have land; they must have education.” *Id.* “The abolition of slavery meant not simply abolition of legal ownership of the slave; it meant the uplift of slaves and their eventual incorporation into the body civil, politic, and social, of the United States.” *Id.* at 170.

20 See *id.* at 175 (citing with approval Charles Sumner's exhortation that with emancipation, the work of abolition “is only *half done*”).

21 See *id.* at 194-95 (discussing the potential, and ultimate, abolition of the Freedmen's Bureau, “the most extraordinary and far-reaching institution of social uplift that America has ever attempted,” the aim of which was to transition refugees and free persons “from a feudal agrarianism to [more equitable and just] modern farming and industry”); see also *id.* at 198 (“For the stupendous work which the Freedmen's Bureau must attempt, it had every disadvantage....It was so limited in time that it had small chance for efficient and comprehensive planning. It had at first no appropriated funds.... Further than this it had to use a rough military machine for administrating delicate social reform.”). “The Freedmen's Bureau did an extraordinary piece of work but it was but a small and imperfect part of what it might have done if it had been made a permanent institution, given ample funds for operating schools and purchasing land” *Id.* at 204.

22 See *id.* at 213 (“[Abolition required] civil and political rights, education and land, as the only complete guarantee of freedom, in the face of a dominant South which hoped from the first, to abolish slavery only in name.”).

- 23 *See id.* at 451 (“The whole criminal system came to be used as a method of keeping Negroes at work and intimidating them. Consequently there began to be a demand for jails and penitentiaries beyond the natural demand due to the rise of crime.”).
- 24 *See, e.g., About*, CRITICAL RESISTANCE, <http://criticalresistance.org/about> (last visited Apr. 11, 2015). Critical Resistance's Vision Statement reads as follows:
Critical Resistance's vision is the creation of genuinely healthy, stable communities that respond to harm without relying on imprisonment and punishment. We call our vision abolition, drawing, in part from the legacy of the abolition of slavery in the 1800's. As PIC [prison industrial complex] abolitionists we understand that the prison industrial complex is not a broken system to be fixed. The system, rather, works precisely as it is designed to-- to contain, control, and kill those people representing the greatest threats to state power. Our goal is not to improve the system even further, but to shrink the system into non-existence. We work to build healthy, self-determined communities and promote alternatives to the current system.
Id. The Prison Moratorium Project also seeks to proliferate responses to interpersonal conflict and forms of community flourishing that do not rely on the penal arm of the state. The Prison Moratorium Project organizes boycotts of further prison and jail construction, but also works to empower community members to resolve disputes through means other than criminal law enforcement, and to expand access to education and social institutions apart from policing and penal interventions. *Prison Moratorium Project*, SOC. JUSTICE MOVEMENTS, http://socialjustice.ccnmtl.columbia.edu/index.php/Prison_Moratorium_Project (last visited Apr. 11, 2015).
- 25 *See, e.g.,* KLEIMAN, *supra* note 14; ZIMRING, *supra* note 14, at 131-32, 147-50; *see also* Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 614-15 (2014) (exploring how misdemeanor case processing involves a largely noncustodial criminal supervisory regime of “managing people over time through engagement with the criminal justice system”).
- 26 *See generally* Bernard E. Harcourt, *From the Asylum to the Prison: Rethinking the Incarceration Revolution*, 84 TEX. L. REV. 1751 (2006) (revealing that the aggregate rate of involuntary institutional confinement over the course of the twentieth century remained more constant than previously recognized, if confinement is taken to include both commitment to mental hospitals, as well as incarceration in prisons and jails).
- 27 *See, e.g.,* Samuel R. Bagenstos, *The Past and Future of Deinstitutionalization Litigation*, 34 CARDOZO L. REV. 1 (2012); Robert Weisberg, *Restorative Justice and the Danger of “Community”*, 2003 UTAH L. REV. 343, 364.
- 28 *See generally* Bernard E. Harcourt, *Punitive Preventive Justice: A Critique*, in PREVENTION AND THE LIMITS OF THE CRIMINAL LAW 252 (Andrew Ashworth et al. eds., 2013) (detailing the expanded use of punitive preventive measures, comparing the purported efficacy of such measures with the empirical data, and arguing that the need for such measures is overstated and really a product less of crime reduction and more, as with prisons generally, of control).
- 29 *See, e.g.,* Allegra M. McLeod, *Regulating Sexual Harm: Strangers, Intimates, and Social Institutional Reform*, 102 CAL. L. REV. 1553, 1573-80 (2014).
- 30 *See* ANDREW ASHWORTH & LUCIA ZEDNER, PREVENTIVE JUSTICE 144-70 (2014).
- 31 *See, e.g.,* PREVENTION AND THE LIMITS OF THE CRIMINAL LAW, *supra* note 28.
- 32 *See id.*
- 33 *See* ASHWORTH & ZEDNER, *supra* note 30, at 261 (“The general conclusion is that there should be no deprivation of liberty without the provision of appropriate procedural safeguards.”).
- 34 *See, e.g., id.* at 2-7 (explaining that those preventive approaches that do not involve criminal regulatory or quasi-criminal regulatory coercion are generally beyond the scope of the relevant extant scholarship).
- 35 *But see* Frederick Schauer, *The Ubiquity of Prevention*, in PREVENTION AND THE LIMITS OF THE CRIMINAL LAW, *supra* note 28, at 12, 22.
- 36 *See, e.g.,* GARY T. MARX, UNDERCOVER: POLICE SURVEILLANCE IN AMERICA 20-21 (1988) (“After intense debate, a permanent municipal public police force was created in London in 1829....Drawing on ideas of the utilitarian philosophers ... the British police were to be unarmed, uniformed and on duty 24 hours a day throughout the city....Advocates of this system argued that

it was more consistent with British traditions of liberty, and more humane and effective, to prevent crime from ever occurring. The alternative was to rely on draconian punishment after the fact....”).

- 37 See JEREMY BENTHAM, *Of Indirect Means of Preventing Crimes*, in A FRAGMENT ON GOVERNMENT AND AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (Wilfrid Harrison ed., 1760) (1948); see also GARLAND, *supra* note 5, at 31 (examining how the character of crime control has shifted slowly over the past two centuries “from being a generalized responsibility of citizens and civil society to being a specialist undertaking largely monopolized by the state’s [criminal] law-enforcement system”).
- 38 See Philip Schofield, *Panopticon*, in BENTHAM: A GUIDE FOR THE PERPLEXED 70 (2009).
- 39 See BENTHAM, *supra* note 37; GARLAND, *supra* note 5, at 31.
- 40 Stephen G. Engelmann, “*Indirect Legislation*”: *Bentham’s Liberal Government*, 35 POLITY 369, 377 (2003).
- 41 BLACKSTONE, *supra* note 2, at *251.
- 42 See, e.g., Engelmann, *supra* note 40, at 372 (“For Bentham, the contours of any subject who can be freed or chained are drawn entirely by an existing regulatory environment. He aspires to better arrange what he sees as a field of practices that supplies the very meanings of interference and laissez-faire.”).
- 43 See *id.* at 371.
- 44 See, e.g., P. COLQUHOUN, A TREATISE ON THE POLICE OF THE METROPOLIS 594 (7th ed. 1806) (showing that Scottish Magistrate Colquhoun’s account of “prevention” of crime and “policing” focused on an array of regulations including lighting, paving, coach stands, and governance of markets). *But see* Engelmann, *supra* note 40, at 370 n.1; *id.* at 383 (explaining how Bentham envisioned tattooing would improve social trust broadly, wherein any social encounter could be entered with the following assuring words, as Bentham wrote: “Sir, I don’t know you, but shew me your mark, and it shall be as you desire”) (internal quotation marks omitted).
- 45 See, e.g., SELECT COMMITTEE ON THE POLICE OF THE METROPOLIS, THIRD REPORT, 1818, H.C. 32 (U.K.); ASHWORTH & ZEDNER, *supra* note 30, at 37.
- 46 See *infra* Part IV.
- 47 See DAVIS, *supra* note 1 (introducing a theory of the possible obsolescence of prisons in her path-breaking abolitionist account).
- 48 See PRISON RESEARCH EDUC. ACTION PROJECT, INSTEAD OF PRISONS: A HANDBOOK FOR ABOLITIONISTS 81, 135 (Mark Morris ed., 1976). I use this terminology--“the dangerous few”--because of its prominence in certain strands of abolitionist discourse and because it captures succinctly the anticipated objection of a critic who resists an abolitionist framework in virtue of a concern for public safety. There is reason, though, to be skeptical of this phrasing in virtue of the amorphous bogeymen it conjures and because of its potential unstated raced, classed, and other assumptions.
- 49 See GLAZE & KAEBLE, *supra* note 6.
- 50 See MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS 258 (2015) (“[N]umerous people are serving time today for nonviolent offenses, many of them property or petty drug offenses, that would not warrant a sentence in many other countries.”).
- 51 See, e.g., John F. Pfaff, *Waylaid by a Metaphor: A Deeply Problematic Account of Prison Growth*, 111 MICH. L. REV. 1087, 1088 (2013) (explaining that a relatively small proportion of prison growth is attributable to the incarceration of low-level nonviolent drug offenses).
- 52 See GOTTSCHALK, *supra* note 50, at 169 (“[O]n closer inspection, all ‘violent’ offenders are not necessarily what they first seem.”). As Jonathan Simon has explained, “violence is a much more capacious legal category than most people assume.” Leon Neyfakh, *OK, so Who Gets to Go Free?*, SLATE (Mar. 4, 2015, 3:37 PM), http://www.slate.com/articles/news_and_politics/crime/2015/03/prison_reform_releasing_only_nonviolent_offenders_won_t_get_you_very_far.html.

- 53 See GOTTSCHALK, *supra* note 50, at 169; Neyfakh, *supra* note 52.
- 54 See GOTTSCHALK, *supra* note 50, at 276-77 (“[C]rime is distributed in highly unequal ways, and...unacceptably high rates of violent crime persist in certain urban neighborhoods.... The homicide victimization rate for young black men involved in criminally active groups in a high crime neighborhood on Chicago’s west side is 3,000 per 100,000, or about 600 times the national rate. Put another way, this is three times the risk of stepping on a landmine in Afghanistan, a real war zone.”) (citations omitted).
- 55 See *id.* at 278-79 (“If the United States is serious about addressing these high levels of concentrated violence, then it has to be serious about addressing the country’s high levels of inequality and concentrated poverty....What we do know conclusively is that states and countries that spend more on social welfare tend to have lower incarceration rates, and high rates of inequality are associated with higher rates of imprisonment and higher rates of crime.”).
- 56 See *id.* at 169; Neyfakh, *supra* note 52.
- 57 See Brief of Former Juvenile Offenders Charles S. Dutton, et al. Amici Curiae in Support of Petitioners, *Graham v. Florida*, 560 U.S. 48 (2010) (No. 08-7412), 2009 WL 2219302.
- 58 See, e.g., Devon Carbado, *Legalizing Racial Profiling* (forthcoming 2015) (draft on file with author).
- 59 See, e.g., ROSE CORRIGAN, UP AGAINST A WALL: RAPE REFORM AND THE FAILURE OF SUCCESS (2013) (examining the dramatic under reporting and under enforcement of violations of criminal laws relating to rape and sexual assault).
- 60 See, e.g., *id.*; McLeod, *supra* note 29; Carbado, *supra* note 58.
- 61 See Associated Press, *Madoff Aide Gets 10 Years in Prison for Role in Fraud*, N.Y. TIMES (Dec. 8, 2014), <http://www.nytimes.com/2014/12/09/business/madoff-aide-gets-10-years-in-prison-for-role-in-fraud.html>.
- 62 See *infra* text accompanying notes 335 and 350-355.
- 63 See GOTTSCHALK, *supra* note 50, at 169 (“The proportion of people in prison for drug law violations because they were exclusively users amounts to 4 percent of drug offenders in state and federal prisons and just 1 percent of all prisoners.”).
- 64 See Dana Goldstein, *How to Cut the Prison Population by 50 Percent*, MARSHALL PROJECT (Mar. 4, 2015, 7:15 AM) (“To halve the prison population, sentencing would have to change not only for the so-called ‘non, non, nons’-- non-violent, non-serious, and non-sex offender criminals--but also for some offenders convicted of violent crimes....Simple math shows why violent offenders would have to be part of any serious attempt to halve the number of prisoners. Consider the nation’s largest incarcerated population, the 1,315,000 held in state prisons. Only 4 percent are there for drug possession. An additional 12 percent are incarcerated for drug sales, manufacturing, or trafficking. Eleven percent are there for public order offenses such as prostitution or drunk driving, and 19 percent for property crimes such as fraud and car theft, including some property crimes that many consider serious or violent, such as home invasion.”); see also Eric L. Sevigny & Jonathan P. Caulkins, *Kingpins or Mules: An Analysis of Drug Offenders Incarcerated in Federal and State Prisons*, 3 CRIMINOLOGY & PUB. POL’Y 401, 421-22 (2004) (finding that “unambiguously low-level drug offenders” comprise less than 6 percent of state inmates and less than 2 percent of federal inmates); GOTTSCHALK, *supra* note 50, at 259 (stating that “reducing the time served for a wider range of offenders is necessary”).
- 65 See GLAZE & KAEBLE, *supra* note 6.
- 66 See COMM’N ON SAFETY & ABUSE IN AMERICA’S PRISONS, CONFRONTING CONFINEMENT 52 (2006).
- 67 See, e.g., PETTIT, *supra* note 7, at 9; RUSSELL SAGE FOUND., *supra* note 12.
- 68 See *supra* text accompanying notes 63-64.
- 69 See NAOMI MURAKAWA, THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA 154 (2014) (“Administrative tinkering does not confront the damning features of the American carceral state, its scale and its racial concentration...Without a normatively grounded understanding of racial violence, liberal reforms will do the administrative shuffle.”).
- 70 See COMM’N ON SAFETY & ABUSE IN AMERICA’S PRISONS, *supra* note 66, at 52.

- 71 See GRESHAM M. SYKES, *THE SOCIETY OF CAPTIVES: A STUDY OF A MAXIMUM SECURITY PRISON* 79 (Princeton Univ. Press 2007) (1958).
- 72 See *id.*
- 73 See *Maryland General Assembly Status Report 2013*, WASH. POST, <http://apps.washingtonpost.com/g/page/local/maryland-general-assembly-status-report-2013/88> (last updated Apr. 9, 12:01 AM) (reporting Maryland House Bill 829, which would discourage shackling of pregnant inmates during childbirth, died in committee).
- 74 See *Florence v. Bd. of Chosen Freeholders of Burlington*, 132 S. Ct. 1510, 1525 (2012) (Breyer, J., dissenting) (upholding as reasonable under the Fourth Amendment a search upon admission to jail of a person mistakenly arrested that included “spreading and/or lifting his testicles to expose the area behind them and bending over and/or spreading the cheeks of his buttocks to expose his anus”) (quoting *Dodge v. Cnty. of Orange*, 282 F. Supp. 2d 41, 46 (S.D.N.Y. 2003)).
- 75 See SYKES, *supra* note 71, at 78-82.
- 76 *Id.* at 63-78.
- 77 In his *Introduction to the Princeton Classic Edition of The Society of Captives*, sociologist Bruce Western explains how Sykes identifies the core structure of imprisonment such that his analysis remains relevant to any assessment of the experience of incarceration today--an insight Western arrived at in part through teaching Sykes's classic study to a group of men incarcerated in the same prison Sykes's work addressed. Western writes:
 In the summer of 2003 I taught an undergraduate criminology class to a group of prisoners at New Jersey State Prison--the site of Gresham Sykes' *Society of Captives*. The obvious relevance of the case study, its beautiful writing, and classic status all made *Captives* essential reading....Sykes's survey of the pains of imprisonment resonated with the students' experience of incarceration....Sykes's work captured basic truths about penal confinement, and the field research still rings true.... *The Society of Captives* remains a cornerstone of prison sociology and indispensable for those who would understand the current era of mass incarceration. These days, we tend to look in free society for the prison's significance. We study the prison's effects on crime rates, or poverty, or family life. Sykes draws us back inside the institution, delving into the internal logic of the prison society.
 Bruce Western, *Introduction to the Princeton Classic Edition of GRESHAM M. SYKES, THE SOCIETY OF CAPTIVES: A STUDY OF MAXIMUM SECURITY PRISON*, at ix-x (Princeton University Press 2007) (1958).
- 78 See SYKES, *supra* note 71, at 79.
- 79 See COMM'N ON SAFETY & ABUSE IN AMERICA'S PRISONS, *supra* note 66, at 52.
- 80 See *id.* at 57.
- 81 *Id.*
- 82 Raymond Luc Levasseur, *Trouble Coming Every Day: ADX--The First Year 1996*, in *THE NEW ABOLITIONISTS: (NEO)SLAVE NARRATIVES AND CONTEMPORARY PRISON WRITINGS* 45, 47-48 (Joy James ed., 2005).
- 83 See *id.* at 45.
- 84 See *FRONTLINE: The New Asylums* (PBS television broadcast May 10, 2005), available at <http://www.pbs.org/wgbh/pages/frontline/shows/asylums/view>.
- 85 See *Brown v. Plata*, 131 S. Ct. 1910, 1949-50 app. B-C (2011); see also Dave Gilson, *Slideshow: California's Jam-Packed Prisons*, M OTHER JONES, <http://www.motherjones.com/slideshows/2011/05/california-prison-overcrowding-photos/holding-cages> (last visited Apr. 11, 2015) (describing and displaying images from the record in *Brown v. Plata* not incorporated in the Court's opinion).
- 86 See sources cited *supra* note 85 .
- 87 See *A Tour of East Mississippi Correctional Center*, ACLU, <https://www.aclu.org/prisoners-rights/tour-east-mississippi-correctional-facility> (last visited Apr. 11, 2015); see also Erica Goode, *Seeing Squalor and Unconcern in a Mississippi Jail*, N.Y. TIMES (June 7, 2014), <http://www.nytimes.com/2014/06/08/us/seeing-squalor-and-unconcern-in-southern-jail.html> (“Open fires sometimes

burn unheeded in the solitary-confinement units of the East Mississippi Correctional Facility, a privately run state prison in Meridian....Inmates spend months in near-total darkness. Illnesses go untreated. Dirt, feces and, occasionally, blood are caked on the walls of cells.”).

88 Solitary confinement is used daily in immigration detention and local jails around the United States. *See* COMM’N ON SAFETY & ABUSE IN AMERICA’S PRISONS, *supra* note 66, at 53 (“[T]he growth rate in of the number of prisoners housed in segregation far outpaced the growth rate of the overall prison population....”).

89 *See id.* at 54.

90 *Id.* at 55.

91 *Id.* at 53.

92 *See* Stuart Grassian, *Psychopathological Effects of Solitary Confinement*, 140 AM. J. PSYCHIATRY 1450 (1983).

93 *See id.*

94 *See* Terri Judd, *UN Advisor Says Sending Muslim Cleric Abu Hamza to US Would Equal Torture*, INDEP. (Oct. 3, 2012), [http:// www.independent.co.uk/news/uk/home-news/un-advisor-says-sending-muslim-cleric-abu-hamza-to-us-would-equal-torture-8194857.html](http://www.independent.co.uk/news/uk/home-news/un-advisor-says-sending-muslim-cleric-abu-hamza-to-us-would-equal-torture-8194857.html).

95 *See, e.g.*, TERRY KUPERS, PRISON MADNESS: THE MENTAL HEALTH CRISIS BEHIND BARS AND WHAT WE MUST DO ABOUT IT (1999); LORNA A. RHODES, TOTAL CONFINEMENT: MADNESS AND REASON IN THE MAXIMUM SECURITY PRISON (2004); Craig Haney, *Mental Health Issues in Long-Term Solitary and “Super-Max” Confinement*, 49 CRIME & DELINQ. 124 (2003); Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. REV. L. & SOC. CHANGE 477 (1997); *see also* Commonwealth of Pa. H.R., H. Democratic Policy Comm. Hearing, at 9 (2012) (stating that according to Psychiatrist Terry Kupers “most inmates in solitary confinement are released into society and emerge mentally destroyed and full of rage”).

96 COMM’N ON SAFETY & ABUSE IN AMERICA’S PRISONS, *supra* note 66, at 58.

97 Physician and Professor of Public Health Atul Gawande describes in his powerful essay, *Hellhole*, focused on solitary confinement, how Senator John McCain experienced his time in solitary confinement as a prisoner of war in Vietnam as, in McCain’s own words, “an awful thing.... It crushes your spirit and weakens your resistance more effectively than any other form of mistreatment.” Gawande clarifies that this statement of relative suffering “comes from a man who was beaten regularly; denied adequate medical treatment for two broken arms, a broken leg, and chronic dysentery; and tortured to the point of having an arm broken again.” A U.S. military study of more than 150 naval aviators imprisoned during the Vietnam War, some of whom endured physical abuses even worse than those suffered by McCain, revealed that these persons too felt solitary confinement to be more or equivalently torturous to any physical agony they endured. Atul Gawande, *Hellhole*, NEW YORKER, Mar. 30, 2009, at 36.

98 *See* SYKES, *supra* note 71, at 42-46.

99 *See id.*

100 *See, e.g.*, Christopher Glazek, *Raise the Crime Rate*, 13 N+1 5 (2012); *see also* Sharon Dolovich, *Strategic Segregation in the Modern Prison*, 48 AM. CRIM. L. REV. 1, 2-3 (2011) (discussing the acute problems for LGBTQ prisoners and others vulnerable to sexual victimization behind bars).

101 *See* U.S. DEP’T OF JUSTICE, Docket No. OAG-131, RIN 1105-AB34, PROPOSED NATIONAL STANDARDS TO PREVENT, DETECT, AND RESPOND TO PRISON RAPE UNDER THE PRISON RAPE ELIMINATION ACT (PREA), at 4 (Jan. 24, 2011) (“The total number of inmates who have been sexually assaulted in the past twenty years likely exceeds 1,000,000.”).

102 *Id.* at 4, 6.

103 *See* Glazek, *supra* note 100, at 5.

- 104 See Adam Liptak, *Inmate Was Considered ‘Property’ of Gang, Witness Tells Jury in Prison Rape Lawsuit*, N.Y. TIMES (Sept. 25, 2005), http://www.nytimes.com/2005/09/25/national/25rape.html?_r=0.
- 105 See *id.*
- 106 See *id.*
- 107 Glazek, *supra* note 100, at 4.
- 108 Liptak, *supra* note 104.
- 109 *Id.* (quoting Richard E. Wathen) (internal quotation marks omitted).
- 110 See, e.g., Ian Urbina & Catherine Rentz, *Immigrants Held in Solitary Cells, Often for Weeks*, N.Y. TIMES (March 23, 2013), <http://www.nytimes.com/2013/03/24/us/immigrants-held-in-solitary-cells-often-for-weeks.html> (reporting that detainees, including those in civil immigration detention, are routinely placed in solitary confinement “for protective purposes when the immigrant was gay,” and that “[f]ederal officials confined Delfino Quiroz, a gay immigrant from Mexico, in solitary for four months in 2010, saying it was for his own protection”).
- 111 See *Johnson v. Texas*, 257 S.W.3d 778 (Tex. App. 2008).
- 112 See *id.*; see also Michael Rigby, *Sexually Abused Texas Prisoner Loses Federal Lawsuit, Returns to Prison*, PRISON LEGAL NEWS (Sept. 15, 2006), <https://www.prisonlegalnews.org/news/2006/sep/15/sexually-abused-texas-prisoner-loses-federal-lawsuit-returns-to-prison>.
- 113 See Craig Haney & Philip Zimbardo, *The Past and Future of U.S. Prison Policy: Twenty-Five Years After the Stanford Prison Experiment*, 53 AM. PSYCHOLOGIST 709, 709 (1998).
- 114 See *id.*; see also *infra* notes 117-122 and accompanying text (discussing subsequent criticism of the Stanford Prison Experiment).
- 115 See Haney & Zimbardo, *supra* note 113, at 709.
- 116 See *id.*
- 117 The authors reflected on the experiment:
 Otherwise emotionally strong college students who were randomly assigned to be mock-prisoners suffered acute psychological trauma and breakdowns. Some of the students begged to be released from the intense pains of less than a week of merely simulated imprisonment, whereas others adapted by becoming blindly obedient to the unjust authority of the guards. The guards, too...quickly internalized their randomly assigned role. Many of these seemingly gentle and caring young men, some of whom had described themselves as pacifists or Vietnam War “doves,” soon began mistreating their peers and were indifferent to the obvious suffering that their actions produced. Several of them devised sadistically inventive ways to harass and degrade the prisoners, and none of the less actively cruel mock-guardians ever intervened or complained about the abuses they witnessed...[The] planned two-week experiment had to be aborted after only six days because the experience dramatically and painfully transformed most of the participants in ways we did not anticipate, prepare for, or predict.
Id.
- 118 *Id.* at 710.
- 119 *Id.*
- 120 *Id.*
- 121 The primary criticism leveled against the study is that what the principal investigator Zimbardo primarily measured was not, as he claimed, the impact of prisons as an institution in producing cruelty, but rather the already engrained expectations study participants had about how persons in prison behave, as well as their desire to please him and follow his implicit instruction to mimic the comportment of prisoners and prison guards. See, e.g., Ali Banuazizi & Siamak Movahedi, *Interpersonal Dynamics in a Simulated*

Prison: A Methodological Analysis, 30 AM. PSYCHOLOGIST 152 (1975); Carlo Prescott, Op-Ed., *The Lie of the Stanford Prison Experiment*, STAN. DAILY, Apr. 28, 2005, at 4.

122 See, e.g., Banuazizi & Movahedi, *supra* note 121.

123 See Adriaan Lanni, *The Future of Community Justice*, 40 HARV. C.R.-C.L. L. REV. 359, 389 (2005) (“The severity of the current sentencing regime has devastating effects on high-crime communities, including reduced employment opportunities, financial hardship, disruption suffered by the offender’s family and children, and the erosion of social capital and organization resulting from the aggregation of these effects over the community.”).

124 See Dorothy E. Roberts, *The Social and Moral Costs of Mass Incarceration in African-American Communities*, 56 STAN. L. REV. 1271, 1281 (2004) (“There is a social dynamic that aggravates and augments the negative consequences to individual inmates when they come from and return to particular neighborhoods in concentrated numbers.”).

125 See *id.* at 1284 (“Separation from imprisoned parents has serious psychological consequences for children, including depression, anxiety, feelings of rejection, shame, anger, and guilt, and problems in school.”).

126 See DONALD BRAMAN, *DOING TIME ON THE OUTSIDE: INCARCERATION AND FAMILY LIFE IN URBAN AMERICA* (2004) (examining the stigma, shame, and hardship experienced by children of incarcerated parents).

127 See, e.g., Allegra M. McLeod, *Confronting Criminal Law’s Violence: The Possibilities of Unfinished Alternatives*, 8 HARV. UNBOUND 109, 122 (2013) (discussing the Scandinavian prisoners’ welfare movement, convened in part around a “Parliament of Thieves,” which included furloughed prisoners along with criminologists and other experts, and which ultimately organized to substantially transform the conditions in prisons in Norway, Sweden and Denmark).

128 See ALEXANDER, *supra* note 7, at 20-22.

129 See Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J., 2117, 2118-20 (1996); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111 (1997). Preservation through transformation does not entail simply that one status regime persist through time in an identical state; to locate a subordinating institution preserved though transformed is not to identify two absolutely equivalent entities. Disproportionate minority confinement (or hyper-incarceration, to invoke Loïc Wacquant’s term) and slavery are not equivalent practices, just as wife battering protections and marital privacy prerogatives are not equivalent. See Loïc Wacquant, *Class, Race & Hyperincarceration in Revanchist America*, DÆDALUS, Summer 2010, at 74. Instead, the older systems of status privilege are translated and transposed into a new historical period in accord with a less controversial social idiom but in a manner that effectively protects prior subordinating relationships. See COLIN DAYAN, *THE LAW IS A WHITE DOG: HOW LEGAL RITUALS MAKE AND UNMAKE PERSONS* (2011) (exploring how the legacies of past forms of violence and subordination create unacknowledged but pervasive effects in the present); SAIDIYA V. HARTMAN, *SCENES OF SUBJECTION: TERROR, SLAVERY, AND SELF-MAKING IN NINETEENTH-CENTURY AMERICA* (1997) (same); PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991) (same).

130 See, e.g., ALEXANDER, *supra* note 7; HARTMAN, *supra* note 129; Wacquant, *supra* note 129.

131 See, e.g., Nusrat Choudhury, *Ferguson Is Everytown U.S.A.*, HUFFINGTON POST (Aug. 18, 2014, 7:41 PM), http://www.huffingtonpost.com/nusrat-choudhury/ferguson-is-everytown-usa_b_5689547.html (reporting the alarming frequency with which police kill unarmed African American men in the United States and examining a spate of such killings in the summer of 2014); Mark Govaki, *Family of Man Shot at Walmart Wants Answers, Surveillance Video*, DAYTON DAILY NEWS (Aug. 11, 2014, 6:49 PM), <http://www.daytondailynews.com/news/news/crime-law/family-of-man-shot-at-walmart-wants-answers-survei/ngzT4> (reporting on police killing in Beavercreek, Ohio, of John Crawford III, an African American man, in a Walmart who was holding a BB gun he picked up on a store shelf); Scott Martelle, *Why Don’t We Know How Often a Michael Brown Is Killed by Police?*, Op-Ed., L.A. TIMES (Aug. 19, 2014, 12:28 PM), <http://www.latimes.com/opinion/opinion-la/la-ol-ferguson-police-killing-african-americans-20140819-story.html> (describing the killing of Michael Brown, an unarmed African American teenager, who was gunned down in the street in broad daylight in Ferguson, Missouri, by a police officer, with multiple shots fired through the young man’s body and head); John A. Moreno, et al., *Police Fatally Shoot Man in South L.A.; Family Members Say He Was Lying Down When Shot*, KTLA 5 (Aug. 12, 2014, 5:01 AM), <http://ktla.com/2014/08/12/man-hospitalized-after-being-shot-by-police-in-south-la> (describing the police killing of Ezell Ford, an African American man, who was shot by Los Angeles police during an investigative stop, during which, as his mother reported, he was lying on the ground complying with officers’ orders when the officer shot him three

times in the back); Ken Murray et al., *Staten Island Man Dies After NYPD Cop Puts Him in Chokehold*, N.Y. DAILY NEWS (July 17, 2014, 10:41 PM), <http://www.nydailynews.com/new-york/staten-island-man-dies-puts-choke-hold-article-1.1871486> (reporting on the killing by police of Eric Garner, an African American man, who died because New York police placed him in a chokehold, a prohibited arrest technique, and rammed his head into a sidewalk when taking him into custody for allegedly selling illegal cigarettes); Jeremy Ross & Katie Delong, *Witness Account of Officer-Involved Shooting Is Very Different From Police Account*, FOX6NOW.COM (May 5, 2014, 8:50 PM), <http://fox6now.com/2014/05/05/witness-account-of-officer-involved-shooting-is-very-different-from-police-account> (reporting on the fatal police shooting of Dontre Hamilton, a 31-year-old African American man, in Milwaukee, Wisconsin, who, according to an eyewitness working in the area as a Starbucks barista, was killed when the officer stood ten feet away from Hamilton, pulled out a gun, and shot him multiple times in quick succession without any verbal warning).

- 132 See Sylvia Wynter, *No Humans Involved: An Open Letter to My Colleagues*, 8 VOICES OF THE AFRICAN DIASPORA 13, 13 (1992).
- 133 See Lawrence Mower, *Troubles Follow Some Officers Who Fire Their Guns on the Job*, LAS VEGAS REV. J. (Nov. 27, 2011, 12:00 AM), <http://www.reviewjournal.com/news/deadly-force/always-justified/troubles-follow-some-officers-who-fire-their-guns-job>.
- 134 Amber Southard, *Panama City Police Chief Upset Over Initials BDRT*, WJHG.COM (Aug. 9, 2011, 10:07 PM), <http://www.wjhg.com/home/headlines/127341373.html>; Radley Balko, *What Cop T-Shirts Tell Us About Police Culture*, HUFFINGTON POST (June 21, 2013, 3:00 PM), http://www.huffingtonpost.com/2013/06/21/what-cop-t-shirts-tell-us_n_3479017.html.
- 135 But see Michelle Alexander, *The New Jim Crow*, 9 OHIO ST. J. CRIM. L. 7, 24-26 (2011). See also Dorothy Roberts, *Constructing a Criminal Justice System Free of Racial Bias: An Abolitionist Framework*, 39 COLUMBIA HUMAN RIGHTS L. REV. 261, 263 (2007) (exploring this same history and proposing “abolishing criminal justice institutions with direct lineage to slavery and Jim Crow....The only explanation for the endurance of these barbaric practices is their racist function and the only moral remedy is their abolition.”). Although Roberts frames her account as abolitionist it seeks the elimination only of particular practices of carceral punishment tied to slavery and Jim Crow. As she explains, “The goals...would be: to drastically reduce the prison population by seeking state and federal moratoriums on new prison constructions, amnesty for most prisoners convicted of nonviolent crimes, and repeal of excessive, mandatory sentences for drug offenses; to abolish capital punishment; and to implement new procedures to identify and punish police abuse.” See *id.* at 284.
- 136 See DAVID M. OSHINSKY, “WORSE THAN SLAVERY”: PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE 6, 7 (1996) (explaining how before the Civil War criminal punishment was intended primarily for whites whereas “[s]laves were the property of their master, and the state did not normally intervene” and noting Mississippi’s early convict population “was overwhelmingly white and male, reflecting a society in which slaves were punished by the master and white women were seen as ‘virtuous’ and ‘pure’”).
- 137 See W.E.B. DU BOIS, *supra* note 19 (examining how the “criminal system came to be used as a method” for keeping African Americans “at work and intimidating them”).
- 138 See *id.*
- 139 See OSHINSKY, *supra* note 136, at 20-21.
- 140 See *id.* at 21.
- 141 See *id.*
- 142 See *id.* For a brief history of racial bias in the drafting of criminal statutes, see District Judge Cahill’s opinion in *United States v. Clary*, 846 F. Supp. 768, 774 (E.D. Mo. 1994).
- 143 See OSHINSKY, *supra* note 136, at 34 (“Almost overnight, the jail-house had become a ‘negro preserve.’”).
- 144 See U.S. CONST. amend. XIII, §1.
- 145 See OSHINSKY, *supra* note 136, at 21, 33-34, 37, 40-41.
- 146 See THOMAS EDDY, AN ACCOUNT OF THE STATE PRISON OR PENITENTIARY HOUSE IN THE CITY OF NEW YORK (1801); JAMES MEASE, OBSERVATIONS ON THE PENITENTIARY SYSTEM AND PENAL CODE OF PENNSYLVANIA

34-36 (1828); PRISON DISCIPLINE SOC'Y, FIRST ANNUAL REPORT OF THE BOARD MANAGERS 35, 36 (1826); PRISON DISCIPLINE SOC'Y, SECOND ANNUAL REPORT OF THE BOARD MANAGERS 43-46, 79-80 (1827); NEGLEY K. TEETERS & JOHN D. SHEARER, THE PRISON AT PHILADELPHIA, CHERRY HILL: THE SEPARATE SYSTEM OF PRISON DISCIPLINE, 1829-1913, at 84 (1957); Thomas R. Dew, *Professor Dew on Slavery*, in THE PRO-SLAVERY ARGUMENT 287, 34-35 (1852).

- 147 See Scott Christianson, *Our Black Prisons*, 27 CRIME & DELINQ. 364, 373 (1981).
- 148 GUSTAVE DE BEAUMONT & ALEXIS DE TOCQUEVILLE, ON THE PENITENTIARY SYSTEM IN THE UNITED STATES AND ITS APPLICATION IN FRANCE 61 (Francis Lieber, trans., 1833).
- 149 See Joy James, *Introduction: Democracy and Captivity*, in THE NEW ABOLITIONISTS, (NEO)SLAVE NARRATIVES AND CONTEMPORARY PRISON WRITINGS, *supra* note 82, at xxi, xxiii (“Racially fashioned enslavement shares similar features with racially fashioned incarceration.”).
- 150 See *id.*
- 151 CHARLES DICKENS, AMERICAN NOTES FOR GENERAL CIRCULATION 43 (Penguin Books 1972) (1842).
- 152 See, e.g., OSHINSKY, *supra* note 136, at 41-45.
- 153 WILLIAM C. HARRIS, PRESIDENTIAL RECONSTRUCTION IN MISSISSIPPI (1967); JAMES WILFORD GARNER, RECONSTRUCTION IN MISSISSIPPI (1901).
- 154 See OSHINSKY, *supra* note 136, at 41.
- 155 See *id.*
- 156 See *id.* at 60-61, 73-81.
- 157 See *id.* at 55-65.
- 158 See *id.* at 63-81.
- 159 See, e.g., ALEX LICHTENSTEIN, TWICE THE WORK OF FREE LABOR: THE POLITICAL ECONOMY OF CONVICT LABOR IN THE NEW SOUTH xvii (1996) (“[C]onvict labor in the South was steeped in brutality; the rawhide whip, iron shackle, sweat box, convict cage, and bloodhound were its most potent instruments....”); OSHINSKY, *supra* note 136, at 59.
- 160 See LICHTENSTEIN, *supra* note 159, at 15.
- 161 See HARTMAN, *supra* note 129; LICHTENSTEIN, *supra* note 159, at 15.
- 162 LICHTENSTEIN, *supra* note 159.
- 163 See OSHINSKY, *supra* note 136, at 147-55; NICOLE HAHN RAFTER & DEBRA L. STANLEY, PRISONS IN AMERICA 12-13 (1999).
- 164 See OSHINSKY, *supra* note 136, at 147-55.
- 165 See *id.* at 155.
- 166 See *id.* at 137.
- 167 See, e.g., *id.* at 63 (“A black man brought in...was punished much more severely than a white man arrested for the same offense.”); *id.* at 124 (relating that even where criminal statutes did not discriminate on the basis of race, “the decision to arrest, prosecute, and sentence depended in large part on a person's skin color, as did the workings of the trial itself”); *id.* at 149 (“Arkansas, Texas, Florida, and Louisiana all used the lash on their convicts...[as] part of the regional culture, and most prisoners were black.”); *id.* at 155 (“Parchman [Prison Farm] was a powerful link to the past--a place of racial discipline where blacks in striped clothing worked the cotton fields for the enrichment of others.”).

- 168 RICHARD BARDOLPH, *THE CIVIL RIGHTS RECORD: BLACK AMERICANS AND THE LAW, 1849-1970*, at 137 (1970).
- 169 See JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* (2003). Although Whitman does not focus on the importance of race in constituting the harshness of U.S. criminal punishments, he does recognize that U.S. criminal law administration adapted U.S. practices of leveling down rather than leveling up in the treatment of convicted persons.
- 170 309 F. Supp. 362 (E.D. Ark. 1970).
- 171 See *id.* at 372.
- 172 See, e.g., Loïc Wacquant, *Deadly Symbiosis: When Ghetto and Prison Meet and Mesh*, 3 PUNISHMENT & SOC'Y 95, 110 (2001).
- 173 See OSHINSHKY, *supra* note 136, at 41.
- 174 See *id.* at 264 & n.24.
- 175 See, e.g., *Duluth Lynching Online Resource*, MINN. HIST. SOC'Y, <http://collections.mnhs.org/duluthlynchings/html/background.htm> (last visited Apr. 11, 2015).
- 176 See HERBERT APTHEKER, *A DOCUMENTARY HISTORY OF THE NEGRO PEOPLE IN THE UNITED STATES 1945-1951*, at 179-82 (1993).
- 177 See Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 50-52 (2000).
- 178 See DAN T. CARTER, *SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH* (rev. ed. 1979).
- 179 See RONALD JAY ALLEN ET AL., *CRIMINAL PROCEDURE: INVESTIGATION AND THE RIGHT TO COUNSEL* 93 (2d ed. 2011).
- 180 See Alan Blinder, *Alabama Pardons 3 'Scottsboro Boys' After 80 Years*, N.Y. TIMES (Nov. 21, 2013), <http://www.nytimes.com/2013/11/22/us/with-last-3-pardons-alabama-hopes-to-put-infamous-scottsboro-boys-case-to-rest.html>.
- 181 See Chris Wetterich, *Ryan to Pardon 4 on Death Row*, CHI. SUN TIMES ((Jan. 10, 2003), http://articles.chicagotribune.com/2003-01-10/news/0301100372_1_death-row-chicago-police-cmdr-pardons; George Ryan, III, Governor, Speech at Northwestern University College of Law (Jan. 11, 2003), available at <http://www.nytimes.com/2003/01/11/national/11CND-RTEX.html>.
- 182 DU BOIS, *supra* note 19, at 633.
- 183 See GARLAND, *supra* note 5, at 1-3.
- 184 See Wacquant, *supra* note 172.
- 185 See *id.* at 81-82; WESTERN, *supra* note 5, at 5, 7.
- 186 See GARLAND, *supra* note 5, at 7 (“[T]he strong similarities that appear in the recent policies and practices...with patterns repeated across the fifty states and the federal system of the USA...are evidence of underlying patterns of structural transformation...brought about by a process of adaptation to the social conditions that now characterize these (and other) societies.”). This is not an account of a single factor that gave rise to an increase in incarceration but rather an account of the context from which hyper-incarceration emerged.
- 187 See NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS & GOALS, *supra* note 3 and accompanying text.
- 188 See MARC MAUER, *THE SENTENCING PROJECT, RACE TO INCARCERATE* 114 (1999).
- 189 See U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *PRISONERS IN 2002* (2003), <http://www.bjs.gov/content/pub/pdf/p02.pdf>.

- 190 See MARC MAUER & TRACEY HULING, SENTENCING PROJECT, YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER 4 (1995), [http:// www.sentencingproject.org/doc/publications/rd_youngblack_5yrslater.pdf](http://www.sentencingproject.org/doc/publications/rd_youngblack_5yrslater.pdf).
- 191 See, e.g., JONATHAN SIMON, POOR DISCIPLINE: PAROLE AND THE SOCIAL CONTROL OF THE UNDERCLASS, 1890-1990, at 141 n.4 (1993).
- 192 See Don Terry, *Prison as Usual/ A Special Report.: More Familiar, Life in a Cell Seems Less Terrible*, N.Y. TIMES (Sept. 13, 1992), [http:// www.nytimes.com/1992/09/13/us/prison-usual-special-report-more-familiar-life-cell-seems-less-terrible.html](http://www.nytimes.com/1992/09/13/us/prison-usual-special-report-more-familiar-life-cell-seems-less-terrible.html).
- 193 WESTERN, *supra* note 5, at 3.
- 194 See, e.g., Cole, *supra* note 14.
- 195 See, e.g., Lynn M. Burley, *History Repeats Itself in the Resurrection of Prisoner Chain Gangs: Alabama's Experience Raises Eighth Amendment Concerns*, 15 L. & INEQUALITY 127 (1997); Neil R. Peirce, *Don't Judge the Olympic City by the Icons of the Past but in Its Prisons, Georgia Has Reverted to the Bad Old Days*, PHILA. INQUIRER (July 19, 1996), [http:// articles.philly.com/1996-07-19/news/25620001_1_penal-system-prison-georgia](http://articles.philly.com/1996-07-19/news/25620001_1_penal-system-prison-georgia) (discussing the reintroduction of chain gangs in several states); see also DAYAN, *supra* note 129, at 253 (“This book began when I saw chain gangs on the roads and in the prisons of Tucson Arizona in May 1995.”).
- 196 See ALEXANDER, *supra* note 7.
- 197 See WESTERN, *supra* note 5.
- 198 See, e.g., Diane Cardwell, *Private Businesses Fight Federal Prisons for Contracts*, N.Y. TIMES (Mar. 14, 2012), [http:// www.nytimes.com/2012/03/15/business/private-businesses-fight-federal-prisons-for-contracts.html](http://www.nytimes.com/2012/03/15/business/private-businesses-fight-federal-prisons-for-contracts.html); Ian Urbina, *Using Jailed Migrants as a Pool of Cheap Labor*, N.Y. TIMES (May 24, 2014), <http://www.nytimes.com/2014/05/25/us/using-jailed-migrants-as-a-pool-of-cheap-labor.html>.
- 199 See, e.g., Gabriel Dance & Tom Meagher, *U.S. Incarceration: Still Mass*, MARSHALL PROJECT (Dec. 19, 2014, 10:08 AM), [https:// www.themarshallproject.org/2014/12/19/u-s-incarceration-still-mass](https://www.themarshallproject.org/2014/12/19/u-s-incarceration-still-mass) (noting that in 2013 in the United States there were approximately 731,200 people incarcerated in jails, 1,574,700 incarcerated in prisons, and 6,899,000 people under some form of criminal supervision).
- 200 Among them are Turner Construction, Brown and Root, and CRSS, along with architectural firms such as DLR Group and KMD Architects. See GREGG BARAK, BATTLEGROUND: CRIMINAL JUSTICE 525 (2007) (examining the structure of public and private prison finance during the 1990s, particularly the period between 1990 and 1995 when 213 new prisons were constructed); JOEL DYER, THE PERPETUAL PRISONER MACHINE: HOW AMERICA PROFITS FROM CRIME 13 (2000).
- 201 See *Finance/New Issues; California is Offering Prison and Water Bonds*, N.Y. TIMES (Apr. 16, 1986), [http:// www.nytimes.com/1986/04/16/business/finance-new-issues-california-is-offering-prison-and-water-bonds.html](http://www.nytimes.com/1986/04/16/business/finance-new-issues-california-is-offering-prison-and-water-bonds.html) (“Bonds for prison construction were among the larger deals in the tax-exempt market yesterday when California began offering \$395 million of general obligation bonds for the purpose of financing the construction of new state prisons.”).
- 202 See, e.g., Jennifer Steinhauer, *Arizona May Put State Prisons in Private Hands*, N.Y. TIMES (Oct. 23, 2009), [http:// www.nytimes.com/2009/10/24/us/24prison.html](http://www.nytimes.com/2009/10/24/us/24prison.html).
- 203 See DYER, *supra* note 200, at 14.
- 204 See *id.*
- 205 See *id.*; Andrew Rosenthal et al., *Unfair Phone Charges for Inmates*, N.Y. TIMES (Jan. 6, 2014) (reporting on exorbitant prices charged to inmates and their families for phone calls and efforts of the FCC to regulating unfair pricing).
- 206 See Cardwell, *supra* note 198; NAT'L INST. OF JUSTICE, U.S. DEPT OF JUSTICE, WORK IN AMERICAN PRISONS: JOINT VENTURES WITH THE PRIVATE SECTOR ((1995), available at <https://www.ncjrs.gov/pdffiles/workampr.pdf>).

- 207 See Cardwell, *supra* note 198.
- 208 See, e.g., Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CAL. L. REV. 277, 281 n.10 (2014) (“The majority of individuals charged with crimes or delinquencies are assessed economic sanctions.”).
- 209 See, e.g., Report of Jeffery Fagan, at 3-4, *Floyd v. City of New York*, 861 F. Supp. 2d 274 (S.D.N.Y. 2012) (No. 08 Civ. 01034 (SAS)) (finding that racial composition of a neighborhood predicts police stop patterns even after controlling for influences of crime, social conditions, and police allocation of resources); JACK MCDEVITT ET AL., RHODE ISLAND TRAFFIC STOP STATISTICS: DATA COLLECTION STUDY iii (Jan. 2014) (finding Rhode Island police are more likely to pull over people of color but less likely to give them a ticket); see also FERGUSON POLICE DEP’T, RACIAL PROFILING DATA (2013), <https://web.archive.org/web/20140817074649/>; <http://ago.mo.gov/VehicleStops/2013/reports/161.pdf> (demonstrating that African Americans were stopped out of proportion with their numbers in the general population, even though whites were far more likely to be found with contraband) (accessed by searching Internet Archive index).
- 210 See, e.g., Devon W. Carbado & Daria Roithmayr, *Critical Race Theory Meets Social Science*, 10 ANN. REV. LAW SOC. SCI. 149, 160-161 (2014) (discussing the cumulative effect of implicit biases at crucial decisionmaking stages of the criminal process, including a police officer’s decision to arrest, a defense lawyer’s determination to plead guilty, a prosecutor’s charging decision, a jury’s determination to convict, and a judge’s sentencing, and stating that “[e]ach of these decisions involves implicit bias at a key point in the criminal case but also interacts in a structural way with the preceding and subsequent decisions”).
- 211 Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 885-91 (2004) [hereinafter Eberhardt et al., *Seeing Black*]; Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCHOL. SCI. 383, 383-86 (2006); Philip Atiba Goff et al., *Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences*, 94 J. PERSONALITY & SOC. PSYCHOL. 292, 292-306 (2008).
- 212 See Eberhardt et al., *Seeing Black*, *supra* note 211; Goff et al., *supra* note 211.
- 213 See Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 L. & HUM. BEHAV. 483, 494 (2004).
- 214 See *id.*
- 215 See CHERYL STAATS ET AL., IMPLICIT BIAS REVIEW 37 (2013); Joshua Correll et al., *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot*, 92 J. PERSONALITY & SOC. PSYCHOL. 1006, 1020-22 (2007).
- 216 See STAATS ET AL., *supra* note 215, at 38.
- 217 See Goff et al., *supra* note 211, at 304.
- 218 See STAATS ET AL., *supra* note 215, at 39-45.
- 219 Cf. Harcourt, *supra* note 28, at 270-71.
- 220 See, e.g., Tomislav V. Kovandzic & Lynne M. Vieraitis, *The Effect of County-Level Prison Population Growth on Crime Rates*, 5 CRIME & PUB. POL’Y 213, 213 (2006); Tomislav V. Kovandzic et al., *Unintended Consequences of Politically Popular Sentencing Policy: The Homicide Promoting Effects of “Three Strikes” in U.S. Cities (1980-1999)*, 1 CRIMINOLOGY & PUB. POL’Y 399 (2002); see also STEMEN, *supra* note 12, at 3.
- 221 See, e.g., STEMEN, *supra* note 12, at 3; WESTERN, *supra* note 5, at 186-87; Joel A. Devine et al., *Macroeconomic and Social-Control Policy Influences on Crime Rate Changes, 1984-1985*, 53 AM. SOCIOLOGICAL REV. 407, 410, 413 (1988); Thomas B. Marvell & Carlisle E. Moody, *The Impact of Out-of-State Prison Population on State Homicide Rates: Displacement and Free-Rider Effects*, 36 CRIMINOLOGY 513, 513, 525, 529 (1998); Thomas B. Marvell & Carlisle E. Moody, *The Impact of Prison Growth on Homicide*, 1 HOMICIDE STUD. 205, 205, 220 (1997); see also Steven D. Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors That Explain the Decline and Six That Do Not*, 18 J. ECON. PERSPECTIVES 163, 184 (2004).

- 222 See Raymond V. Liedka et al., *The Crime-Control Effect of Incarceration: Does Scale Matter?*, 5 CRIMINOLOGY 245, 248-49 (2006).
- 223 See STEMEN, *supra* note 12, at 3.
- 224 See John J. Donohue III, *Assessing the Relative Benefits of Incarceration: Overall Changes and the Benefits on the Margin*, in DO PRISONS MAKE US SAFER? THE BENEFITS AND COSTS OF THE PRISON BOOM, *supra* note 12, at 272.
- 225 See Harcourt, *supra* note 28, at 271 (writing of cost-benefit analyses focused on the efficiency of various crime-reductive measures that in “choosing a narrow objective and then simply costing alternative policies, we have *shaped* our political value system without ever having explicitly engaged *politics*”).
- 226 For a discussion of the question of the retributive justification for punishment, see *infra* Part V. 0
- 227 See, e.g., WESTERN, *supra* note 5, at 5 (reporting adverse criminogenic impacts of incarceration associated with difficulty in finding employment opportunities and disruption of family life); see also Amy E. Lerman, *The People Prisons Make: Effects of Incarceration on Criminal Psychology*, in DO PRISONS MAKE US SAFER?: THE BENEFITS AND COSTS OF THE PRISON BOOM, *supra* note 12, at 151, 152 (examining the “significant and criminogenic effect of placement in a higher-security prison”).
- 228 See Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968); Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193 (1985); see also Daniel S. Nagin, *Deterrence: A Review of the Evidence by a Criminologist for Economists*, 5 ANN. REV. ECON. 83, 83-105 (2013) (reviewing the literature on the deterrent effects of policing and incarceration and reporting generally some deterrent effects associated with policing, minimal deterrence associated with increased sentences of incarceration after a certain point, and little useful information on the deterrent effects of capital punishment).
- 229 See Becker, *supra* note 228, at 176, 203.
- 230 See, e.g., DEIRDRE GOLASH, *THE CASE AGAINST PUNISHMENT: RETRIBUTION, CRIME PREVENTION, AND THE LAW* 25 (2005) (“Most people have other reasons--such as reasons of conscience and effects on reputation--to refrain from committing serious crimes. People who lack such reasons--who instead expect criminal behavior to enhance their reputations, or who are not deterred by pangs of conscience--may well be less responsive to punitive measures as well... [Y]oung men who were not deterred from such killings by the immediate threat of deadly retaliation by the friends of the victim would hardly be deterred by the comparatively remote threat of imprisonment or even death at the hands of the criminal justice system.”).
- 231 See *id.* at 24-29 (debunking philosophically much of the deterrence rationale for the crime-preventive effects of punishment); see also Neal Katyal, *Deterrence's Difficulty*, 95 MICH. L. REV. 2385 (1997) (discussing various factors that complicate and undermine the standard assumption that criminal punishment will create deterrence); Louis Michael Seidman, *Soldiers, Martyrs, and Criminals: Utilitarian Theory and the Problem of Crime Control*, 94 YALE L.J. 315 (1984) (exploring vulnerabilities of a utilitarian model of crime control). There is also decidedly mixed evidence on the deterrent effects of order-maintenance policing. See, e.g., Adam M. Samaha, *Regulation for the Sake of Appearance*, 125 HARV. L. REV. 1563, 1629 (2012) (analyzing extensively the empirical literature on “zero-tolerance” or “broken windows” policing and concluding that “[o]n the available evidence, a sensible conclusion is that the probability of generating a beneficial self-fulfilling prophecy with broken windows policing is uncertain, low or confined in important ways”); see also John E. Eck & Edward R. Maguire, *Have Changes in Policing Reduced Violent Crime? An Assessment of the Evidence*, in THE CRIME DROP IN AMERICA 207, 228 (Alfred Blumstein & Joel Wallman eds., 2000) (“Overall, the evidence is mixed on the efficacy of generic zero-tolerance strategies in driving down rates of violent crime, though serious questions have been raised about their effects on police-community relations.”); BERNARDE E. HARCOURT, *ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING* (2001) (analyzing the empirical evidence in support of broken windows policing and concluding the claims made in support of the theory on the basis of this evidence are false); Levitt, *supra* note 221, at 184 (explaining that zero tolerance policing practices probably do not explain much of the drop in crime in the 1990s because crime went down everywhere, even in places where police departments did not implement new policing strategies; rather, the decline in crime was caused by some combination of legalized abortion, the ebbing of the crack epidemic, increased imprisonment, and increases in the number of police).
- 232 See, e.g., CORRIGAN, *supra* note 59 (examining the dramatic under reporting and under enforcement of violations of criminal laws relating to rape and sexual assault).

- 233 See, e.g., WESTERN, *supra* note 5, at 5 (“The employment problems and disrupted family life of former inmates suggests that incarceration may be a self-defeating strategy for crime control.”).
- 234 See Nagin, *supra* note 228.
- 235 See, e.g., *supra* text accompanying notes 123-126.
- 236 See *supra* text accompanying notes 123-126.
- 237 See David Kaiser & Lovisa Stannow, *Prison Rape and the Government*, N. Y. REV. BOOKS (Mar. 24, 2011), <http://www.nybooks.com/articles/archives/2011/mar/24/prison-rape-and-government>.
- 238 Cf. WESTERN, *supra* note 5, at 5.
- 239 See, e.g., Lerman, *supra* note 227, at 152 (explaining that “there is a significant and criminogenic effect of placement in a higher-security prison”).
- 240 See, e.g., WESTERN, *supra* note 5, at 5, 7.
- 241 Donohue, *supra* note 224, at 272; see also John J. Donohue III & Peter Siegelman, *Allocating Resources Among Prisons and Social Programs in the Battle Against Crime*, 27 J. LEGAL STUD. 1, 1 (1998) (“[I]f a broadly implemented preschool program (more enriched than the current Head Start program) could generate half the crime-reduction benefits achieved in the pilot studies, then cutting spending on prisons and using the savings to fund intensive preschool education would reduce crime...”); John J. Donohue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 STAN. L. REV. 791, 794, 841 (2005) (analyzing statistical studies of the deterrent effect of the death penalty and concluding there is not just “reasonable doubt” but “profound uncertainty” as to whether the death penalty has any deterrent effect).
- 242 Donohue, *supra* note 224, at 272.
- 243 See, e.g., John J. Donohue, *Fighting Crime: An Economist's View*, 73 MILLIKEN INST. REV., Mar. 2005, at 46.
- 244 See, e.g., James J. Heckman & Dimitriy V. Masterov, *The Productivity Argument for Investing in Young Children*, 29 REV. OF AGRIC. ECON. 446, 447 (2007); James Heckman et al., *Understanding the Mechanisms Through Which an Influential Early Childhood Program Boosted Adult Outcomes*, 103 AM. ECON. REV. 2052 (2013).
- 245 See JOHN SCHMITT ET AL., *supra* note 12.
- 246 See *Justice Mapping Center Launches First National Atlas of Criminal Justice Data*, JUSTICE MAPPING CTR. (Oct. 5, 2010), <http://www.justicemapping.org/archive/26/multi-%E2%80%98million-dollar%E2%80%99-blocks-of-brownville>.
- 247 See *id.*
- 248 See Diane Orson, *'Million Dollar Blocks' Maps Incarceration's Costs*, NPR (Oct. 2, 2012), <http://www.npr.org/2012/10/02/162149431/million-dollar-blocks-map-incarcerations-costs>.
- 249 See SCHMITT ET AL., *supra* note 12, at 1.
- 250 See, e.g., CORRIGAN, *supra* note 59, at 78.
- 251 But see Butler, *supra* note 13, at 155.
- 252 Jalil Muntaqim, *The Criminalization of Poverty in Capitalist America (Abridged)*, in THE NEW ABOLITIONISTS: (NEO)SLAVE NARRATIVES AND CONTEMPORARY PRISON WRITINGS, *supra* note 82, at 29, 29.
- 253 Clarence Darrow, *An Address to the Prisoners in the Cook County Jail, Chicago, Illinois--1902*, in INSTEAD OF PRISONS, *supra* note 48, at 13.
- 254 See, e.g., KENNEDY, *supra* note 14; KLEIMAN, *supra* note 14; Kohler-Hausmann, *supra* note 25; McLeod, *supra* note 127.

- 255 See Charlie Savage, *Trend to Lighten Harsh Sentences Catches on in Conservative States*, N.Y. TIMES (Aug. 12, 2011), <http://www.nytimes.com/2011/08/13/us/13penal.html> (noting increasing support in traditionally conservative states for reduced incarceration, including on the part of prominent conservatives such as Edwin R. Meese III, Grover Norquist, and Asa Hutchinson).
- 256 See Erick Eckholm, *Report Finds Slight Growth in Population of Inmates*, N.Y. TIMES (Sept. 16, 2014), <http://www.nytimes.com/2014/09/17/us/number-of-prisoners-in-us-grew-slightly-in-2013-report-finds.html>.
- 257 See, e.g., #Cut50, <http://www.cut50.org>.
- 258 See, e.g., Pat Nolan, *Conservative and Liberals Join Together for Criminal Justice Reforms*, HUFF. POST, Apr. 16, 2015, http://www.huffingtonpost.com/pat-nolan/conservative-and-liberals_b_7057184.html?utm_hp_ref=tw (celebrating Texas and South Carolina's criminal law reforms to increase penalties for violent offenses and expand alternatives to incarceration for nonviolent offenses).
- 259 See JOHN SCHMITT ET AL., *supra* note 12, at 10-11.
- 260 See Ben-Moshe, *supra* note 16, at 90 (examining abolitionist analyses of the problem of the dangerous few). See also *supra* notes 49-64 and accompanying text.
- 261 See SIMON, *supra* note 5.
- 262 *Id.* at 17.
- 263 DAVIS, *supra* note 1, at 15.
- 264 *Id.* at 16.
- 265 Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 5, 9 (1983).
- 266 *Id.* at 5.
- 267 *Id.* at 7.
- 268 See *id.* at 53, 67.
- 269 See *Herrera v. Collins*, 506 U.S. 390, 417 (1993) (“[B]ecause of the very disruptive effect that entertaining claims of actual innocence would have on the need for finality in capital cases, and the enormous burden that having to retry cases based on often stale evidence would place on the States, the threshold showing for such an assumed right would necessarily be extraordinarily high.”); *McCleskey v. Kemp*, 481 U.S. 279, 315 (1987) (“[I]f we accepted McCleskey’s claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty.”).
- 270 See 506 U.S. 390.
- 271 *Id.* at 400 (“Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding.”).
- 272 *Id.* at 446 (Blackmun, J., dissenting).
- 273 *Id.* at 417 (majority opinion).
- 274 *Id.* at 398-400 (citation omitted).
- 275 See, e.g., DAVIS, *supra* note 1, at 106 (“As important as it may be to abolish the death penalty, we should be conscious of the way the contemporary campaign against capital punishment has a propensity to recapitulate the very historical patterns that led to the emergence of the prison as a dominant form of punishment. The death penalty has coexisted with the prison, though imprisonment was supposed to serve as an alternative to corporal and capital punishment.”); see also Judith Butler, *On Cruelty: The Death Penalty*, 36 LONDON REV. BOOKS 31, 33 (2014) (“[T]he opposition to the death penalty has to be linked with an opposition to forms of

induced precarity both inside and outside the prison, in order to expose the various different mechanisms for destroying life, and to find ways, however conflicted and ambivalent, of preserving lives that would otherwise be lost.”).

- 276 See Robin West, *The Lawless Adjudicator*, 26 CARDOZO L. REV. 253, 2256 (2005) (quoting *Herrera*, 506 U.S. at 444 (Blackmun, J., dissenting)).
- 277 *Id.*
- 278 *Herrera*, 506 U.S. at 446.
- 279 28 U.S.C. §2254(e)(1) (2012) (“[A] determination of a factual issue made by a State court shall be presumed to be correct.”).
- 280 *Id.* §2244(b)(2)(B)(ii) (2012).
- 281 *Cooper v. Brown*, 510 F.3d 870 (9th Cir. 2007), *reh'g denied*, 565 F.3d 581 (9th Cir. 2009) (Fletcher, J., dissenting).
- 282 565 F.3d 581, 581-85 (Fletcher, J., dissenting).
- 283 510 F.3d at 1004 (McKeown, J., concurring).
- 284 565 F.3d at 634-35 (Fletcher, J., dissenting).
- 285 *Id.* at 636 (Rymer, J., concurring).
- 286 See J. PATRICK O'CONNOR, SCAPEGOAT: THE CHINO HILLS MURDERS AND THE FRAMING OF KEVIN COOPER 11 (2012) (investigating Kevin Cooper's experience leading to his conviction and over the course of his lengthy incarceration on death row, where he has spent more than half his life); Abbe Smith, *In Praise of the Guilty Project: A Criminal Defense Lawyer's Growing Anxiety About Innocence Projects*, 13 U. PA. J.L. & SOC. CHANGE 315, 324, 329 (2010) (exploring the dangers posed by a focus on actual innocence in reducing concern about more pervasive forms of injustice and brutality in the criminal process, particularly in the treatment of “guilty” persons) .
- 287 *McCleskey v. Kemp*, 481 U.S. 279, 315 (1987).
- 288 *Id.* at 315.
- 289 *Cf.* at 303, 315.
- 290 See RICHARD THOMPSON FORD, THE RACE CARD: HOW BLUFFING ABOUT BIAS MAKES RACE RELATIONS WORSE 92 (2008) (“As racial politics increasingly focuses on trivial slights, innocent slips of the tongue, and even well-intentioned if controversial decisions, the most severe injustices--such as the isolation of a largely black underclass in hopeless ghettos or even more hopeless prisons-- receive comparatively little attention because we can't find a bigot to paste to the dartboard.”).
- 291 See *Prison Moratorium Project*, *supra* note 24.
- 292 See *id.* A further example of grassroots organizing along these lines, though not necessarily to abolitionist ends, is the work of formerly incarcerated people to organize themselves and to work together for change to the U.S. criminal process. See, for example, the work of Just Leadership. See JUSTLEADERSHIPUSA, <https://www.justleadershipusa.org>.
- 293 See, e.g., ASHWORTH & ZEDNER, *supra* note 30, at 2 (“Preventive measures taken by the state in order to reduce risks to harm are legion. Many of them, such as those involving situational crime prevention, social crime prevention, and even the most common forms of surveillance, do not involve (direct) coercion and therefore lie beyond the scope of the present study.”).
- 294 See, e.g., *id.*, at 22-23; R.A. Duff, *Pre-Trial Detention and the Presumption of Innocence*, in PREVENTION AND THE LIMITS OF THE CRIMINAL LAW, *supra* note 28, at 115; Harcourt, *supra* note 28, at 256; see also David Cole, *The Difference Prevention Makes: Regulating Preventive Justice*, CRIM. L. & PHIL. (2014) (examining the abuses of prevention where it involves coercion, and the constitutional and other constraints implicated by preventive measures, and arguing that informal constraints like cost and legitimacy may play a more significant role in checking abuses of prevention).

- 295 See, e.g., ASHWORTH & ZEDNER, *supra* note 30, at 19-20; Carol S. Steiker, *Proportionality as a Limit on Preventive Justice*, in PREVENTION AND THE LIMITS OF THE CRIMINAL LAW, *supra* note 28, at 194.
- 296 Harcourt, *supra* note 28, at 252. For this reason, prevention in this alternative structural register does not provoke worries of a Foucaultian sort focused on pervasive surveillance and discipline, because it does not markedly expand discipline or surveillance. See MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 127-29 (Alen Sheridan trans., 1975).
- 297 See GARLAND, *supra* note 5, at 31; ASHWORTH & ZEDNER, *supra* note 30, at 38.
- 298 See BLACKSTONE, *supra* note 2, at *252 (“[I]f we consider all human punishments in a large and extended view, we shall find them all rather calculated to prevent future crimes than to expiate the past.”); see also ASHWORTH & ZEDNER, *supra* note 30, at 30 (“Reading Blackstone’s analysis of preventive justice, it is evident that crime prevention rested on the assumption that it was possible to identify potential wrongdoers not so much by their choices or actions but rather by who they were or appeared to be.”).
- 299 See ASHWORTH & ZEDNER, *supra* note 30, at 30.
- 300 JEREMY BENTHAM, CONSTITUTIONAL CODE 213 (1830).
- 301 See GARLAND, *supra* note 5, at 31.
- 302 BENTHAM, THE WORKS OF JEREMY BENTHAM, PRINCIPLES OF THE CIVIL CODE pt. 1, ch. 7 (1789).
- 303 BENTHAM, *supra* note 300, at 321. I am not invoking Bentham’s work here to endorse his projects in their entirety, or even to ground abolition in a utilitarian conception of justice, but because of the particular usefulness of Bentham’s analysis of prevention to an account of grounded abolitionist justice.
- 304 MARTIN D. DUBBER, THE POLICE POWER: PATRIARCHY AND THE FOUNDATIONS OF AMERICAN GOVERNMENT 118 (2005).
- 305 GARLAND, *supra* note 5, at 31.
- 306 *Id.*
- 307 ASHWORTH & ZEDNER, *supra* note 30, at 37 (quoting SELECT COMMITTEE ON THE POLICE OF THE METROPOLIS, THIRD REPORT, 1818, H.C. 32 (U.K.)).
- 308 *Id.* at 38 (quoting SELECT COMMITTEE ON THE POLICE OF THE METROPOLIS, THIRD REPORT, 1818, H.C. 32 (U.K.)).
- 309 *Id.*
- 310 Remarks of Mr. Alderman Waithman, EUR. PARL. DEB. (28) 813 (Feb. 28, 1828).
- 311 See GARLAND, *supra* note 5, at 31.
- 312 See *id.*
- 313 COLQUHOUN, *supra* note 44, at 594.
- 314 See GARLAND, *supra* note 5, at 31-34 (examining this earlier conception of “police” as “the path not taken”).
- 315 Interestingly, in his genealogical analysis of the substitution of what Garland calls “penal-welfare” for this earlier broad social conception of “police,” Garland suggests that although penal institutions in the mid-twentieth century began to assume credit for controlling crime, it was more likely the case that crime control was meaningfully ensured by “the resilience of social controls in working-class communities,” “work discipline,” “religious revivals,” the “moral campaigns of churches and reform organizations,” “charities and settlements,” “trade unions,” “working men’s associations, and boys clubs,” “family,” and “neighbourhood,” which “provided a vigorous, organic underpinning to the more reactive, intermittent action of policeman state.” See GARLAND, *supra* note 5, at 33.

- 316 See Frederick Schauer, *The Ubiquity of Prevention*, in PREVENTION AND THE LIMITS OF THE CRIMINAL LAW, *supra* note 28, at 12.
- 317 See Kohler-Hausmann, *supra* note 25, at 685.
- 318 Engelmann, *supra* note 40, at 388.
- 319 See, e.g., JAMES AUSTIN ET AL., ENDING MASS INCARCERATION: CHARTING A NEW JUSTICE REINVESTMENT 15 (2013); Mark A.R. Kleiman, *Justice Reinvestment in Community Supervision*, 10 CRIMINOLOGY & PUB. POL'Y 651, 654-56 (2011).
- 320 But see Mark A.R. Kleiman, *Jail Break: How Smarter Parole and Probation Can Cut the Nation's Incarceration Rate*, WASH. MONTHLY, <http://www.washingtonmonthly.com/features/2009/0907.kleiman.html> (last updated Apr. 11, 2015).
- 321 See GARLAND, *supra* note 5, at 31-34; WESTERN, *supra* note 5, at 5, 7.
- 322 See *supra* text accompanying note 244.
- 323 See, e.g., Heckman & Masterov, *supra* note 244, at 488; Heckman et al., *supra* note 244, at 2053.
- 324 See, e.g., Heckman & Masterov, *supra* note 244, at 458; Heckman et al., *supra* note 244, at 2070.
- 325 See *States That Have Decriminalized*, NORML, <http://norml.org/aboutmarijuana/item/states-that-have-decriminalized> (last visited Apr. 11, 2015).
- 326 See, e.g., *The Marijuana Arrest Problem, Continued*, N.Y. TIMES, July 5, 2012, at A18.
- 327 GLENN GREENWALD, CATO INST., DRUG DECRIMINALIZATION IN PORTUGAL: LESSONS FOR CREATING FAIR AND SUCCESSFUL DRUG POLICIES 2 (2009), http://object.cato.org/sites/cato.org/files/pubs/pdf/greenwald_whitepaper.pdf.
- 328 See *id.* at 11-16.
- 329 See, e.g., Charlie Savage, *U.S. Orders More Steps to Curb Stiff Drug Sentences*, N.Y. TIMES, Sept. 20, 2013, at A18.
- 330 Tona M. Boyd, *Confronting Racial Disparity: Legislative Responses to the School-to-Prison Pipeline*, 44 HARV. C.R.-C.L. REV. 571, 573-75 (2009).
- 331 The analysis in this Part draws in part on my previous work on criminal law reformist alternatives and the theory of the “unfinished” developed by Scandinavian social theorist Thomas Mathiesen. See, e.g., McLeod, *supra* note 127, at 120-23.
- 332 See *supra* text accompanying notes 291-292.
- 333 See, e.g., Gary Slutkin, *Re-Understanding Violence as We Had to Re-Understand Plague..to Cure It*, HUFFINGTON POST (Apr. 19, 2012, 11:05 AM), http://www.huffingtonpost.com/gary-slutkin/reunderstanding-violence-_1_b_1431360.html; see also THE INTERRUPTERS (Kar-temquin Films 2011) (documentary film examining the Violence Interrupters' work).
- 334 See McLeod, *supra* note 127, at 131; Daniel W. Webster et al., *Effects of Baltimore's Safe Streets Program on Gun Violence: A Replication of Chicago's CeaseFire Program*, 90 J. URB. HEALTH 27 (2012).
- 335 See Webster et al., *supra* note 334, at 33.
- 336 See ALONDRA NELSON, BODY AND SOUL: THE BLACK PANTHER PARTY AND THE FIGHT AGAINST MEDICAL DISCRIMINATION 75-85 (2011).
- 337 See, e.g., U.N. OFFICE ON DRUGS & CRIME, ALTERNATIVE DEVELOPMENT: A GLOBAL THEMATIC EVALUATION: FINAL SYNTHESIS REPORT, at v-vi, 12-13 (2005).
- 338 See *id.* at 9-10.

- 339 See, e.g., Allegra M. McLeod, *Exporting U.S. Criminal Justice*, 29 YALE L. & POL'Y REV. 83, 161 (2010); *Evo Morales Launches 'Coca Colla'*, TELEGRAPH (Jan. 10, 2010), <http://www.telegraph.co.uk/news/worldnews/southamerica/bolivia/6962746/Evo-Morales-launches-Coca-Colla.html>; Jean Friedman-Rudovsky, *Bolivian Buzz: Coca Farmers Switch to Coffee Beans*, TIME (Feb. 29, 2012), <http://content.time.com/time/printout/0,8816,2107750,00.html>.
- 340 See, e.g., McLeod, *supra* note 127, at 127.
- 341 See *id.* at 127-28; Neal Kumar Katyal, *Architecture as Crime Control*, 111 YALE L.J. 1039, 1056-57 (2002); Erika D. Smith, *Streetlights Must Be Part of Crime-Fighting Plan*, INDY STAR (Mar. 28, 2014, 2:31 PM), <http://www.indystar.com/story/opinion/columnists/erika-smith/2014/03/28/erika-d-smith-streetlights-must-part-crime-fighting-plan/7016621>.
- 342 It bears noting that these requirements might produce disparate burdens if efforts at crime prevention target certain neighborhoods (and certain people) differently than others. In creating any such regulatory regime, however, policymakers ought to devise the relevant preventive mechanisms so that they apply equally to all demographics rather than burdening particular groups, businesses, or individuals.
- 343 McLeod, *supra* note 30, at 1628.
- 344 See Ronald V. Clarke & Patricia M. Harris, *Auto Theft and Its Prevention*, 16 CRIME & JUST. 1, 37 (1992); McLeod, *supra* note 127, at 127-29.
- 345 Eugenia C. Garvin et al., *Greening Vacant Lots to Reduce Violent Crime: A Randomised Controlled Trial*, 19 INJ. PREVENTION 198, 198 (2013).
- 346 *Id.* at 200.
- 347 See *id.* at 201.
- 348 See Charles C. Branas et al., *A Difference-in-Differences Analysis of Health, Safety, and Greening Vacant Urban Space*, 174 AM. J. EPIDEMIOLOGY 1296, 1296 (2011).
- 349 *Id.* at 1301.
- 350 See Michaela Krauser, *The Urban Garden as Crime Fighter*, NEXT CITY (Aug. 22, 2012), <http://nextcity.org/daily/entry/the-urban-garden-as-crime-fighter>.
- 351 *Id.*
- 352 *Id.*
- 353 *Id.*
- 354 A similar study in Houston found no significant effect in crime after greening, but significant change in residents' perception of their own safety and reduced fear of crime. See *id.*
- 355 See, e.g., Branas et al., *supra* note 348; HARCOURT, *supra* note 231, at 213-14.
- 356 RICHARD L. LIPPKE, *RETHINKING IMPRISONMENT* (2007) (offering a retributivist justification of imprisonment, grounded in what Lippke calls "censuring equalization retributivism," which holds we should punish criminals proportionately to the seriousness of their crimes).
- 357 See, e.g., *id.*; Dan Markel, *Retributive Justice and the Demands of Democratic Citizenship*, 1 VIRGINIA J. CRIM. L. 1 (2012).
- 358 See, e.g., R.A. Duff, *Perversions and Subversions of Criminal Law*, in *THE BOUNDARIES OF THE CRIMINAL LAW* 88, 112 (2010) ("[W]e should not subvert [criminal law] by subjecting those who commit or might commit such public wrongs to non-criminal modes of regulation or control that fail to address them as responsible citizens.").

- 359 See, e.g., Jeffrey Reiman, *Should We Reform Punishment or Discard It?*, 11 PUNISHMENT & SOC'Y 395, 403 (2009) (“That people deserve punishment will then justify the State's right to impose the legally stipulated punishment for illegal behavior.”).
- 360 See RAYMOND GEUSS, *OUTSIDE ETHICS* 38 (2005).
- 361 *Id.*
- 362 *Id.* at 38-39.
- 363 See DAVID BOONIN, *THE PROBLEM OF PUNISHMENT* 94-103 (2008) (arguing that legal punishment is unjustified because no philosophical justifications of legal punishment, including retributivist justifications, are valid).
- 364 See Allegra M. McLeod, *supra* note 29, at 1575.
- 365 See *id.* at 1615.
- 366 See, e.g., LIPPKE, *supra* note 356, at 80-98.
- 367 See, e.g., *id.* at 104; see also Thom Brooks, Book Review, 118 ETHICS 562 (2008) (reviewing LIPPKE, *RETHINKING IMPRISONMENT* (2007)).
- 368 Sebastian Scheerer, *Towards Abolitionism*, 10 CONTEMP. CRISES 5, 7 (1986).
- 369 JACK M. Balkin, *CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD* 189-83 (2011) (discussing the concepts of “on the wall” and “off the wall”); See also Jack M. Balkin, *The Framework Model and Constitutional Interpretation*, in *PHILOSOPHICAL FOUNDATIONS OF CONSTITUTIONALISM* (David Dyzenhaus and Malcolm Thorburn, eds., forthcoming 2016) (“[T]he point of the distinction between what is ‘off the wall’ and ‘on the wall’ ... is to emphasize that what is plausible and reasonable ... is produced over time through intellectual and political work.”).
- 370 See Cover, *supra* note 265, at 44.
- 371 See GREENWALD, *supra* note 327, at 2; McLeod, *supra* note 29, at 1631; *States That Have Decriminalized*, *supra* note 325.

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Symposia Movement Lawyering Roundtable Symposium

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SYMPOSIUM INTRODUCTION

Many lawyers who advise, counsel, and otherwise participate in social justice organizations are called “movement lawyers.” They work with organizations such as Black Lives Matter, Make the Road, the Community Justice Project, the Center for Constitutional Rights, workers' rights collectives, and loosely-organized community groups to use the law to effect social change. This work builds upon the long history of lawyers involved in social justice who have developed models of lawyering often known as community lawyering, political lawyering, or empowerment lawyering. Law and organizing is a richly developed field of study and practice.¹

Fundamental to movement lawyering is the acknowledgment that these lawyers do not necessarily represent clearly defined client entities. Many groups are not organized along hierarchical or other lines. They often intentionally avoid such categorization. A “client” may be an idea, not an entity. Occupy Wall Street, Earth First, or Black Lives Matter are ideas, not entities.² The lawyers working with these groups may provide *2 advice to many individuals who identify with the group, and the lawyer must work with the understanding that these movements are ill-defined and certainly not entities in any traditional sense. The classic legal ethics issue, “Who is the Client?,” is one that challenges movement lawyers and because there often is no clear structure, the lawyer must engage to define roles, provide clarity, and do so in a collaborative manner.

In much of this work, the lawyer intentionally plays a background role, in order to empower individuals and community groups. The lawyer helps to demystify the law so that the law may be used as one of many tools to effectuate change. As Purvi Shah, the founder of Law for Black Lives³ and current director of the Movement Law Lab⁴ posits, what distinguishes movement lawyering from past progressive lawyers is that it focuses upon empowerment and self-determination where lawyers seek to transfer their “skills, knowledge and power” to others with the understanding that change is a collective process.⁵ Movement lawyers understand the value of “collectivizing issues rather than traditional methods of atomizing and individualizing issues.”⁶ Movement lawyers engage in conscious dialogue with individuals and groups to help people understand the qualitative difference between improving only the individual's circumstances from improving the situation for “everyone else.”⁷

Although it may often seem that movement lawyering has a great deal in common with lawyering by the former generations of public interest, civil rights, and civil liberties lawyers, there are important distinctions in approaches and perspectives. A key concept in most movement lawyering is “centering” the issues on the client or cause, not upon more traditional notions of lawyer counseling, advocacy, management, and control of a matter.

Lawyers traditionally often refer to aspects of their role as “decision making authority” but even the term of “authority” belies the very notion of cooperation that undergirds the idea of lawyers for movements. Classic issues that are viewed as clearly within the lawyer's authority *3 become ones for movement lawyers where clients decide, often in consultation with the lawyers. For example, in legal ethics rules and unless otherwise agreed, the client's decision-making authority in civil cases is confined to the terms of settlement.⁸ Lawyers are encouraged to communicate effectively with the clients about other matters, but it is

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not the centerpiece of the rules regarding decision-making.⁹ This is but one of the many differences between language and approach employed by movement lawyers.

Even in classic litigation, movement lawyers “center” decision making on the clients, meaning that clients control the course of the case. For example, in the New York City stop-and-frisk case, *Floyd v. City of New York*, movement lawyers at the Center for Constitutional Rights successfully litigated a case against the municipality for constitutional and civil rights violations by the police.¹⁰ Partnering not only with the named clients, but with community groups whose significant organizing efforts were responsible for the evidence gathering that led to positive results, the lawyers turned to these constituencies to ask for suggested remedies for judicial enforcement by a court monitor. The clients convened a two-day long community meeting to discuss proposed remedies. The lawyers participated in that summit, but the community suggestions prevailed. The organizer's demands of community involvement in enforcement were implemented by the court. One fundamental lesson is that litigation is not an end in itself but can strengthen a movement for social change.¹¹

This Roundtable was inspired by years of consultation with various movement lawyers about a range of ethical, strategic, and tactical concerns. Lawyers for movement groups face a range of knotty ethical and tactical issues that are not readily addressed by the Rules of Professional Conduct that govern the lawyer's conduct.¹²

*4 This convening of selected movement lawyers and legal ethicists was a unique opportunity to discuss significant, difficult, and often recurring legal ethics issues. It was the first of its kind.

The day began with an overview of movement lawyering by Purvi Shah. Her talk framed the day's discussion. Her provocative essay that amplifies her talk begins this Symposium.¹³ Shah directs the national Movement Law Lab and, for the last fifteen years, has worked with a small group of lawyers around the country to develop methodologies to train lawyers on social change, to popularize the concept of movement lawyering, and to build communities of practice where lawyers are encouraged to think deeply about our role in social change. She challenged the participants to address “ethics writ large”—the moral compass for lawyering—and not solely particular ethics rules-based issues.¹⁴ Her challenge to think broadly began with data about the current crisis in our democracy, the lack of legal representation for marginalized individuals and communities, and the profession's failures to address broader concern about social justice. In her essay, she asks: “So what is to blame for our profession's failure to acknowledge its responsibility to address the human suffering we are witnessing on a massive scale?”¹⁵ She then seeks to provide solutions.

Shah offers her perspective about the goals of movement lawyering beginning with the values that movements and their lawyers seek to impart. Collective action, empowerment, and self-determination are the key concepts. She implores us to develop a new code of ethics—the North Star—that is less of a code than fundamental principles of professional responsibility for the profession: “Dignity: honoring the self-determination of our clients;” “Integrity: an obligation to respond to moments of great injustice;” “Collectivity: a commitment to use law to aggregate people with similar problems versus atomize them;” “Collaboration: a commitment to working with other types of change-makers to address oppression.”¹⁶

After Shah's talk, the Roundtable then delved into Case Studies that were developed by the lawyer participants from various client representations. Each involves thorny ethical and tactical issues. The premise for the Roundtable was to confront situations where lawyers often find resolution of the ethical issues to be unclear and difficult under the existing Model Rules of Professional Conduct. In some cases, *5 the Rules impede social justice and the lawyers were asked to address what changes in those Rules would enhance best practices in movement lawyering.

Each case study was partnered by a movement lawyer and a legal ethicist. The movement lawyer presenter for each case study was asked to address questions such as “How did you deal with the issues? What was most difficult? What were the considerations? What ethics rules/provisions did you find to be helpful/troubling?” The legal ethicist then responded to the issues, addressing the history and context of the ethics rules and professional concerns that are implicated, and what, if anything, needs change so as not to impede social justice and movement lawyering. Wide ranging discussion followed for each case study.

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The case studies reported in this Volume and the excellent detailed commentary by legal ethicists present unique and often overlapping ethical issues that in Rules-based terminology include client identity, maintaining attorney-client confidentiality, client counseling and decision making, conflicts of interest, unauthorized practice of law, and various financial concerns such as fee sharing, third-party payments, and gifts to clients, among many others.

The first case study, *Movement Groups With Flat Innovative Governance Structures*, by Meena Jagganath and Sameer Ashar, confronts the problems of lawyers working with an organization that is an idea or a mobilization rather than a formal, traditional organization.¹⁷ Black Lives Matter and Occupy Wall Street are classic examples. The models are not hierarchical but are “horizontal, leader-full structures or network models.”¹⁸ It may be that the group is philosophically disinclined to barriers to participation in working groups. They may work through committees that include lawyers. Or the “organization” may be a rapid response network where formal relationships cannot be quickly established, or it is a mobilization that has not yet crystallized into an organization that has a membership structure and the capacity to enter into contract with lawyers. Lawyers and non-lawyers may consider themselves as participants of the groups.

This case study set the stage for examination of the classic questions in professional responsibility. It asks:

- Who is the client and who can speak for the organization?

- How can lawyers participate in a legal working group if some of the members of the group are non-lawyers?

- *6 • What if those non-lawyers are holding themselves out to the public as part of the legal working group and giving “quasi-legal” advice?

- Can legal advice be given to someone with nothing more than apparent authority to liaise or coordinate with a different working group within the network?

The case study then examines confidentiality and conflicts issues and the unauthorized practice of law.

It makes a significant contribution in setting forth goals of lawyering for movement groups. These are to: establish equality between lawyer and client; respect and nurture creative organizing, organizational, and network structures; understand the aims of the movement formations that have developed such structures; facilitate organizing and service to advance the movement; protect individuals, entities, and networks from liability for legal or ethical violations; protect third parties who may be involved in movement activities; avoid demobilizing movements; democratize legal information; and build relationships. With those goals in mind, the case study commentary sets forth strategies to accomplish these goals to comport with the profession's Model Rules of Professional Conduct.

In *Case Study 2: Advising Grassroots Organizations*, former clinical professor Marci Seville and Professor Bruce Green present a range of difficult issues in advising and representing grassroots organizations.¹⁹ These organizations may be more traditionally organized than the mobilization and network movement groups described in Case Study One. The organization in this case study is a worker's center comprised of non-lawyer organizers. Some of them represent individuals at administrative hearings pursuant to a statute authorizing representation by lay persons. In the context of such representation, the organizers may sometimes engage in conduct related to the administrative hearing that may run afoul of the often-uncertain laws about the unauthorized practice of law (“UPL”). The case study provides a detailed analysis of UPL rules and makes suggestions as to how the lawyers may best advise the organizers. This study then examines and provides detailed suggestions as to how to preserve confidentiality and privilege in the presence of non-lawyers. Finally, it discusses various concerns in publicizing a lawsuit.

Case Study 3: Movement Lawyers and Community Organizers in Litigation: Issues of Finances and Collaboration by Baher Azmy and Professor Paul R. Tremblay examines the often thorny issues of lawyers *7 who desire to offer financial assistance to the community groups they represent.²⁰ Some legal organizations that work in a collaborative fashion with groups of indigent clients have significant cash reserves and would like to assist those groups in organizing efforts and other forms of financial support. The lawyers may have obtained significant attorneys' fees in class actions lawsuits and desire to help the organizations who assisted in various ways in the lawsuit. In this case study, the legal organization represents a refugee group in a lawsuit. It settles the lawsuit and now desires to help the organization financially. This study asks: May a tax-exempt nonprofit law firm provide its client with financial assistance to help the client achieve its goals?

It provides a detailed analysis of Rule of [Professional Conduct 1.8\(e\)](#) that permits only limited financial assistance to clients and says the Rule “might strike many as an absurd restriction on a lawyer's generosity.”²¹ It provides a detailed analysis of the Rule's operation and explores how the organization might assist the clients with financial needs. The study then addresses another concern that arises when considering financial assistance--conflicts of interest.

This study then considers a different scenario about issues that arise when working with more traditional lawyers. It examines a situation where the movement lawyers work with an organization that is a well-funded nationally known organization (called PJP) and is represented by counsel. PJP lawyers are not movement lawyers and they operate more traditionally than the clients desire. The movement lawyers believe that PJP is not adequately serving the clients' interests. This case scenario asks whether the movement lawyers may recommend that the organization change counsel, and, if replacing PJP is not a viable resolution or does not happen for some reason, how should movement lawyers best work with the PJP counsel? It provides practical advice for movement lawyers working with more traditional ones.

The fourth case study, *Lawyer for a Coalition of Organizations with an Informal, Unofficial Coordinator* was prepared by Clinical Professor Michael Haber and Professor Scott Cummings.²² Difficult and ongoing concerns arise when lawyers counsel and represent groups that work in coalitions and the lawyers are also requested to advise, counsel and prepare documents on behalf of the coalition itself. The coalition often does not have an organizational structure other than an unofficial *8 coordinator. This case study addresses these issues in the context of a law school clinic that works with a statewide non-profit housing advocacy organization. The nonprofit, with assistance from the clinic, organizes a statewide coalition. The clinic advises members of the coalition and prepares documents on behalf of the coalition. The clinic anticipates the “who is the client” issue and identifies conflicts of interest. It enters into retainer agreements, but conflicts develop later on. This case study asks what should have been done to clarify the role of the Clinic and address the conflicts of interest. It provides useful guidance for lawyers who work in such roles.

The fifth case study, *Coalitions and Campaigns: A Workers' Rights Policy Campaign*, written by Sarah Leberstein and Professor Susan Carle, addresses the complicated issues that arise in coalition work when the lawyer is on the staff of a national workers organization that joins the coalition.²³ The context for this case study is a legislative campaign where one organization starts the campaign and later invites other allies or potential allies to join it. Once again, the organizations and the campaign itself have a loose structure. It illustrates the tensions that may develop between local grassroots and national organizations and the need for lawyers to urge movement organizations to develop reasonable systems for decision-making and accountability. This case study raises difficult questions about which of the many types of creative work movement lawyers do constitute “the practice of law” for purposes of legal ethics analysis. This study explores the tension between the need for legal ethics rules to provide appropriate safeguards to clients and the potential for application of those rules in an overbroad manner that risks constraining the potential creativity of movement lawyers as they strive for new and more effective ways of proceeding in partnership with other movement actors to achieve their goals.

In the final case study, *Working with Traditional Lawyers*, Professor Kate Cruse and Mary Yanik delve into the thorny issues that arise when movement lawyers for community organizations seek to assist members who have more traditional lawyers.²⁴ This case study first examines a community organization that runs an accompaniment program for the high risk “check in” appointments with Immigration and Customs Enforcement (“ICE”). The case study explains why lawyers are essential to that process. The movement lawyer who assists in accompaniment knows that the person is also represented by a more *9 traditional

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immigration lawyer. This study explains how such dual representation is possible. Effective communication and clarity of roles among lawyers is essential and this case study addresses the ethical and most effective course of action.

It then examines a deeper tension between the perspectives of movement lawyers and more traditional ones. In this scenario, the organization is engaged in collective action to change immigration policy and practice and its movement lawyer agrees to assist an undocumented person who has been charged with a crime and is represented by counsel. The movement lawyer and the organization may have goals and a proposed course of action that differs from the criminal defense lawyer. This case study examines these significant difficulties, especially where charges are lodged against the movement lawyer for undue influence and manipulation. It discusses the path toward effective client assessment of risk and benefits. It concludes by highlighting that “the strategies of social movement rely on building collaborations, partnering with diverse constituencies, amplifying the voices of those affected by social justice, and grounding advocacy of the needs of those they seek to serve.”²⁵

These case studies and the *Movement Lawyering Ethics Symposium* seek to address recurrent issues in a manner that is helpful to lawyers in similar situations. It is hoped that the overview and these case studies will provide guidance as lawyers seek to navigate difficult ethical and tactical issues in representing community and movement organizations. We also hope that it will provide useful materials for legal ethicists who seek to reform ethics rules so that the Rules of Professional Conduct enhance, rather than impede, such representations. Finally, the bibliographies at the end of the Case Studies compile materials for those who seek to gain greater understanding of the history and current views of movement lawyering.²⁶

Footnotes

^{a1} Professor and Director of the Monroe H. Freedman Institute for Legal Ethics. I thank all of the participants of the Roundtable. This Symposium issue owes its success to their diligence. Everyone was committed to in depth exploration of the issues and production of materials that would be useful to the larger community. The participants are listed at the end of this introduction. I am especially indebted to Purvi Shah for her inspired leadership in this work and to the Freedman Social Justice Fellows and the Freedman Institute coordinator, Deborah Grattan. The Fellows are: Mehrin Bahkt, Sandra Beaubrun, Sarah Beechay, Anique Cato, Michael Guttentag, Samantha Holloway, Henderson Hui, Victoria Hypolite, Seema Rambaran, and Zoila Sanchez. Special thanks to Gowri Krishna, Associate Professor of Law, New York Law School, the reporter for the Roundtable, whose detailed contributions enriched this symposium issue.

¹ See Michael Grinthal, *Power With: Practice Models for Social Justice Lawyering*, 15 U. PENN. J. L. & SOC. CHANGE 25, 33-39 (2011) (discussing the various models, courses, and literature about law and organizing).

² See BLACK LIVES MATTER, <https://blacklivesmatter.com> (last visited Nov. 10, 2018); EARTH FIRST!, <http://earthfirst.org> (last visited Nov. 10, 2018); OCCUPY WALL STREET, <http://occupywallst.org> (last visited Nov. 10, 2018); see also Glen Craig, *What is Occupy Wall Street and Should You Care?*, FREE FROM BROKE (July 24, 2014) <http://freefrombroke.com/what-is-occupy-wall-street-and-should-you-care>.

³ L. FOR BLACK LIVES, <http://www.law4blacklives.org> (last visited Nov. 10, 2018).

⁴ MOVEMENT L. LAB, <https://movementlawlab.org> (last visited Nov. 10, 2018).

⁵ Purvi Shah, Transcript of the Movement Lawyering Roundtable (on file with author). An inspiration for “movement lawyering” was Professor Arthur Kinoy, who called himself a People’s Lawyer and trained generations of law students to follow that path. As one of the founders of the Center for Constitutional Rights, Kinoy’s approach foreshadowed much of that adopted by the Center for Constitutional Rights and other movement lawyers and organizations. *Id.* See generally ARTHUR KINOY, RIGHTS ON TRIAL: THE ODYSSEY OF A PEOPLE’S LAWYER (1983). Kinoy worked in the tradition of the founder of movement lawyering.

⁶ Shah, *supra* note 5.

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7 *Id.*

8 *See* MODEL RULES OF PROF'L CONDUCT r. 1.2 cmt. (AM. BAR ASS'N 2018).

9 *See id.*

10 [Floyd v. City of N.Y.](#), 959 F. Supp. 2d 540, 658-67 (S.D.N.Y. 2013).

11 JULES LOBEL, *SUCCESS WITHOUT VICTORY: LOST LEGAL BATTLES AND THE LONG ROAD TO JUSTICE IN AMERICA* (2003) (describing the significant organizing role that litigation plays, even where lawyers know that the cases will be lost in court); DAVID COLE, *ENGINES OF LIBERTY: THE POWER OF CITIZEN ACTIVISTS TO MAKE CONSTITUTIONAL LAW* (2016) (discussing three distinct causes and movements and how citizen action and organizing shaped constitutional law, which includes marriage equality, the right to bear arms, and Guantanamo and the war on terror).

12 Each state has its own version of the Model Rules of Professional Conduct. California followed a somewhat unique perspective on ethics issues in its Business and Professional Code but recently adopted a version of the Model Rules. *See* Joyce E. Cutler, *California Adopts Modified ABA Model Rules (1)*, BLOOMBERG NEWS (May 11, 2018), <https://www.bna.com/california-adopts-modified-n73014476007>. Many of the Rules throughout the U.S. are the same or similar. A lawyer reviewing this Symposium and its case studies should review the particular version of Rules in that lawyer's jurisdiction.

13 Purvi Shah, *Rebuilding the Ethical Compass of Law*, 47 HOFSTRA L. REV. 11 (2018).

14 *Id.* at 15.

15 *Id.* at 13.

16 *Id.* at 16.

17 Meena Jagannath & Sameer Ashar, *Case Study 1: Movement Groups with Flat, Innovative Governance Structures*, 47 HOFSTRA L. REV. 19 (2018).

18 *Id.* at 19.

19 Bruce Green & Marci Seville, *Case Study 2: Advising Grassroots Organizations*, 47 HOFSTRA L. REV. 33 (2018).

20 Paul R. Tremblay & Baher Azmy, *Case Study 3: Movement Lawyers and Community Organizers in Litigation: Issues of Finances and Collaboration*, 47 HOFSTRA L. REV. 43 (2018).

21 *See* MODEL RULES OF PROF'L CONDUCT r. 1.8(e) (AM. BAR ASS'N 2018).

22 Scott Cummings & Michael Haber, *Case Study 4: Lawyer for a Coalition of Organizations With an Informal Unofficial Coordinator*, 47 HOFSTRA L. REV. 61 (2018).

23 Susan D. Carle & Sarah Leberstein, *Case Study 5: Coalitions and Campaigns: A Workers' Right Policy Campaign*, 47 HOFSTRA L. REV. 77 (2018).

24 Katherine R. Kruse & Mary Yanik, *Case Study 6: Working with Traditional Lawyers*, 47 HOFSTRA L. REV. 91 (2018).

25 *Id.* at 98.

26 Susan D. Carle, *Selected Historical Bibliography on African American Women's Activism (Focusing on 1880 to 1920)*, 47 HOFSTRA L. REV. 117 (2018); Purvi Shah, Ctr. for Const. Rts., *Movement Lawyering Reading Guide*, 47 HOFSTRA L. REV. 99 (Ellen Yaroshefsky ed.) (2018).

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Workshop participants were: Professor Sameer Ashar, Clinical Professor of Law and Co-Director of the UC Irvine Immigrant Rights Clinic at University of California, Irvine; Baher Azmy, Legal Director at Center for Constitutional Rights; Professor Susan Carle, Professor of Law at American University, Washington College of Law; Professor Scott Cummings, Robert Henigson Professor of Legal Ethics at UCLA Law; King Downing, Director of Mass Defense at National Lawyers Guild; Sienna Fontaine, Co-Legal Director at Make the Road New York; Professor Bruce Green, Louis Stein Chair of Law; Director, Stein Center for Law and Ethics at Fordham University School of Law; Professor Michael Haber, Associate Clinical Professor of Law and Attorney-in-Charge, Community & Economic Development Clinic at Maurice A. Deane School of Law, Hofstra University; Meena Jagannath, Co-founder at Community Justice Project, Inc.; Professor Gowri Krishna, Associate Professor at New York Law School; Professor Kate Kruse, Professor of Law, Associate Dean of Experiential Education and Curriculum at Mitchell Hamline School of Law, Hamline University; Sarah Leberstein, Associate Director, Stein Center for Law and Ethics at Fordham University School of Law; Professor Theo Liebmann, Clinical Professor of Law and Director of Clinical Programs at Maurice A. Deane School of Law, Hofstra University; Professor Jennifer (JJ) Rosenbaum, Global Labor Justice Project and Lecturer at Harvard Law School; Angel Reyes, Community Organizer with LatinoJustice; Professor Marci Seville, Professor Emerita, Director, Women's Employment Rights Clinic (1993-2015), Golden Gate University School of Law; Purvi Shah, Founder & Executive Director at Movement Law Lab, Co-Founder & Advisory Board Member of Law For Black Lives; Marbre Stahly-Butts, Co-Director (Partnership) at Black Lives Matter/Law for Black Lives; Professor Paul Tremblay, Clinical Professor of Law at Boston College Law School; Chris Williams, Workers' Law Office, P.C.; Mary Yanik, Staff Attorney and Liman Fellow at New Orleans Workers' Center for Racial Justice and National Guestworker Alliance; Professor Ellen Yaroshefsky, Howard Lichtenstein Distinguished Professor of Legal Ethics and Executive Director of the Monroe H. Freedman Institute for the Study of Legal Ethics at Maurice A. Deane School of Law, Hofstra University.

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RADTALKS: WHAT COULD BE POSSIBLE IF THE LAW REALLY STOOD FOR BLACK LIVES?

A Series of Talks Delivered at the Law for Black Lives Convening, Organized by the Bertha Justice Institute at the Center for Constitutional Rights

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I. INTRODUCTION: PURVI SHAH^{d1}

"You've got to seriously ask yourself, what are you willing to sacrifice to change the human condition? Radical means going against the norm or changing the norm. Radical means stepping outside the box. Radical means giving up comfort. Radical means being excited by the challenges of poverty and war . . . America, as a matter of fact, as a culture does not encourage; it works tenaciously at obstructing the path to radical thought, to radical development, to radical thinking--and as a consequence, all day long we are being subliminally bombarded with mass media, technology, with press to stay away from anything that changes the norm."

--Harry Belafonte, 2014¹

***92** *"In order for us as poor and oppressed people to become part of a society that is meaningful, the system under which we now exist has to be radically changed. This means that we are going to have to learn to think in radical terms. I use the term radical in its original meaning--getting down to and understanding the root cause. It means facing a system that does not lend itself to your needs and devising means by which you change that system."*

--Ella Baker, 1969²

Is our radical imagination dead?

For many of us, going to law school was a radical choice. We chose the law because at some point in our lives, we witnessed injustice and oppression up close--maybe in our own homes, maybe in our neighborhoods, maybe in a community far away from home. But somewhere along the way we developed a gut-sense that something was deeply wrong with the world. And as we searched for a way to be useful in the fight to improve the human condition, we imagined law would help us solve some of society's most daunting and intractable problems--from poverty and police brutality to climate change and xenophobia.

When we arrive at law school, we spend countless hours reading hundreds of pages of legal jurisprudence for classes where there is no mention of these societal problems. We are advised that we would be best served by learning to distinguish fact from opinion and to divorce our passion from reason. While we try to make sense of this new sterile way of thinking, we are introduced to a new set of myths: about the importance of lawyers, about the neutrality of the law, about how the law protects all equally. We begin to believe that as lawyers, we have the answers.

When we join the field, we learn the cold-truth that lawyers working for the most vulnerable in our society are severely under-resourced and outnumbered. We work day and night, drowning and overwhelmed by the never-ending stream of crisis, cases, and clients. The hours we spend slouched in meetings and on conference calls talking over and past each other give rise to disillusionment and detachment from the sense of purpose that initially drove us to this work. Our imagination starts to dwindle, and our cynicism blooms. We become cogs in the wheel.

As some of us begin to run legal organizations, we experience levels of alienation, competition, ego, and oppression reminiscent *93 of the corporate world we used to impugn. We talk about our work in terms of deliverables and platitudes, sexy enough yet safe enough to satisfy the funders that keep our organizations afloat. We're too busy to evaluate our work in authentic ways. As leaders, we are fearful and fail to solicit real feedback from our staff, clients, and partners, [because] being honest about the failings of our work would mean losing what little self-worth we have. Worst of all, some days when we go home, we can't feel anything at all. The law has turned us into problem-managers instead of problem-solvers.

However, in rare moments of contemplation, we may hear a voice inside us that asks quietly: are we really making things better? Is my work truly radical? Am I fundamentally transforming power relations, or am I simply tinkering at the margins by treating the symptoms of injustice instead of the root causes? And just as soon as that voice emerges, with our bodies tired and our brains on super-drive, we push these overwhelming existential questions aside and return to the comfort of having what appears to be a noble job, and the simplicity of checking things off our to-do lists.

RadTalks intends to re-route this common trajectory. RadTalks is an intervention in the ever-pressing grind of day-to-day social justice work. It is a space where our individual and collective imaginations are free to run wild. A space where bold ideas pierce through the cynicism and routine of social justice work, re-centering us on what is possible when we find the courage to dream.

RadTalks is a curated series of short, inspiring talks given by visionary social justice thinkers on a theme relevant to the current moment. Speakers are asked to use their radical imaginations to present radical ideas that will lead the audience toward radical action.

Though the legal community is an intended audience for RadTalks, the talks are intentionally interdisciplinary, featuring visionaries in law, organizing, art, design, and entrepreneurship. By centering legal visionaries amongst other types of change-makers, RadTalks hopes to inspire the cross-pollination of radical ideas from different sectors working towards social justice. RadTalks asks speakers to subvert the traditional discourse of band-aid solutions and instead present transformative visions of how we might sever the very root of oppression and injustice in our communities.

In light of these goals, we launched the first RadTalks at the Center for Constitutional Rights' (CCR) Law for Black Lives convening *94 in the summer of 2015.³ Law for Black Lives was a national gathering of lawyers, law students, legal workers, and jailhouse lawyers committed to building a world where Black Lives Matter. More than a meeting or a conference, the gathering was a call to action for legal advocates from diverse parts of the country to join together and spend a day dreaming

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about how we can support the growing Movement for Black Lives. Law for Black Lives unapologetically prioritized the voices and leadership of people of color--most importantly Black lawyers and legal advocates.

Birthered out of CCR's experiences building legal infrastructure for the resistance in Ferguson and Baltimore, Law for Black Lives was a groundbreaking conversation that ignited a new level of inspiration, motivation, and intention within the legal community to support the Black Lives Matter movement. The two-day convening, endorsed by seventeen organizations, was hosted at the historic Riverside Church in Harlem and at Columbia University, and consisted of a combination of thirty-three workshops, panel discussions, and plenaries conducted by more than eighty renowned organizers, lawyers, and activists. About 1,000 participants joined us in person to dream big about how we can support the growing Movement for Black Lives. Beyond those who attended in person, the convening reached 4,400 people across the world through our livestream of the event. This conference trended nationally as one of the top three hashtags on Twitter (#Law4BlackLives).

The prompt for the first set of RadTalks was "What Could Be Possible if Law Really Stood for Black Lives?" and centered the voices of those often marginalized within the law--Black lawyers, community organizers, jailhouse lawyers, transgender individuals, and lawyers from the South. The combination of viewpoints and ideas in these first RadTalks was exhilarating and electric. From Alicia Garza's vision on how Black workers must be a part of the fight to make Black Lives Matter, to Norris Henderson's recounting of his perseverance as a jailhouse lawyer working to free himself after being wrongfully incarcerated in the Louisiana State Penitentiary at Angola for twenty-seven years, to Elle Hearn's vision of what it would take to build a world where transgender victims of police violence are not misgendered after their deaths, to Colette-Pichon Battle's talk on disaster recovery and how we go from resilience to resistance--each talk expanded our hearts and minds, *95 each talk made us reflect on our own work, each talk challenged us to think more radically.

What the transcripts you are about to read will not communicate is the energy of the room. The audience sat rapt during the RadTalks, incredibly moved by the speakers, at times bursting into applause.⁴ And at the end of the talks, many of us were moved to tears, having remembered how healing it is to dream about what is possible.

I created RadTalks⁵ to answer Mr. Belafonte's call to take radical action and to heed Ms. Baker's wisdom to focus on the root of the causes of injustice, and to give us fuel and inspiration in the long haul of social transformation. I hope at the end of reading these talks, you too will feel re-centered in your radical imagination and willing to take the risk to be as radical as possible in your work.

If changing the world begins with the belief that it is possible, then this is the moment. The problems of oppression, poverty and human suffering are not intractable, but solving them requires awakening the most creative and expansive part of ourselves.

Are you willing to dream with us?

II. COLETTE PICHON BATTLE^{d2}

Bonjour. It's so great to be here--thank you for having me.

The first question that most folks from the Gulf Coast get when we're in places like New York is, "Where were you when Katrina hit?" Well, I was in [[Washington,] D.C., practicing corporate law, trying to achieve success. Anybody feeling me? Any Black lawyers out here move to D.C. to achieve success? It's a whole bunch of success out there. Beautiful Black people, beautiful suits, nice *96 cars, they go to museums, they eat out. It's great, it's fantastic. Best couple of years of my life, loved every minute of it.

And then there was this really big storm in the Gulf. I checked on my family, and the next day we saw these images. And it took about two weeks before I knew everyone in my family was okay. There was one thing I understood as a lawyer: they might need some help with paperwork. [I thought,] "I'll go down and I'll volunteer. I'll go home for a little while." But what I didn't understand as a movement leader was how much injustice was located in the middle of disaster.

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My community has been in Slidell, Louisiana, actually just outside, since the 1770s. Our community, so says the oldest people there, who gave us testimony after the storm, said the water had never been that high. Where people live with water all the time, it had never come up that far. There was a thirty-foot tidal surge off the Gulf of Mexico and my community was completely underwater.

I was told I was talking to some lawyers today, so I don't have an inspirational talk. What I did make was a list of damages, so I thought you'd appreciate that. I'm not one of those [lawyers], I hate trial, [and] I don't like speaking in front of folks. Interestingly enough, in disaster work, there's a lot of different roles for lawyers. And one of the roles I found over the last ten years was just keeping a list of all of the things that we should be receiving damages for.

The first thing I want to mention is [that] we're waiting for damages from the oil companies that dredged canals in the lower part of Louisiana and allowed for the salt water intrusion to destroy the marshes that protect the land.⁶ I don't know how much money that will be, but if you could just restore the south of Louisiana, that would be okay. Whatever that equals, we'll take those damages.

The second damages on my list go to the federal government. Because it was actually the failure of levees built by our federal government *97 that flooded an entire city.⁷ New Orleans was 80% underwater, not because of Katrina, but because of levees that broke. What was found out at trial was that those levees were not built to the standards they were set to, and the standards that were set were not good enough to protect that city.⁸ There was a lawsuit; they even won.⁹ Turns out you can't sue the federal government for damages when the Army Corps of Engineers is at fault.¹⁰

The third on my list is the New Orleans Police Department. We just want damages for all the Black people they killed.¹¹ And when they do the calculations for the civil part of the trial, we would appreciate if you would value Black lives the way white lives get valued when these kind[s] of things happen.

Next on the list is the Jefferson Parish Sheriff's Office. I don't know if you heard, but in the middle of the storm, people literally tried to leave the city [to] get away from the water that was slowly rising. There were armed sheriffs on the bridge of the Crescent City connection telling people that they could not get out, and [they] sen[t] them back into Orleans Parish.¹² We would like some damages for that. I'm not sure how to calculate that; I'm willing to work with you all to figure out how that's gonna break down. But something about that seems a little illegal, and I think we have some civil claims to that.¹³ I asked my trial friends to help me with that.

Next on the list is BP [British Petroleum]. Five years after we *98 were recovering from Katrina, and the levee breaches and the floods, just when people were starting to come out of the trauma that follows a disaster like that, there was a massive disaster in the Gulf of Mexico. 3.1 million barrels-- three hundred million gallons--of oil, not regular oil, [but] heavy crude oil.¹⁴ And if that wasn't bad enough, BP, the federal government, [and] several other people, said, "Let's sink the oil floating on the top by spraying toxic dispersant on it."¹⁵ And let's use toxic dispersants that are banned in Europe for their human impact,¹⁶ for their *known human impact*--the cancer-causing properties of this stuff--let's spray it on South Louisiana."¹⁷ And that's what they did. Recently there was a judgment. Some people were happy about it, [but] most people in South Louisiana were not. The judgment was \$20 billion against BP.¹⁸ Some people think that's a lot of money. But \$20 billion was what was settled for the Alaska Exxon Valdez, an oil spill that was a fifth the size, one state, on rocky coast, with no population. We would like the rest of our money. We could just multiply that and count it out.

Finally, we would like damages from all of the people who came down to South Louisiana, South Mississippi, and South Alabama to exploit for their careers, interests, and volunteer desire. [They] came down to exploit my people for [their] benefit. We would like our damages.

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Our disaster recovery is not a game. It's not a learning moment. There are some injustices going on, and if you're not coming to help us find justice, we don't need you there. If you came and you get a paper, or you got some kind of grant, or you wrote some[thing], [or made] a movie or such, we'll take all of the profits that you got from that. Just send it on down.

***99** So, small list of damages. [In] a room full of lawyers, I know we can figure out a way to work this out. These are my "radical ideas" . . . damages for things that are very clearly to be paid to us.

I made another list, [be]cause I like lists. [T]here are some changes we'd like to make in South Louisiana and in the Gulf South, and they have to do with laws.

The first thing we want is to see a change in federal disaster law. Does anybody know what the federal government has to do in disasters? What does the federal government *have* to do in disasters? Not a damn thing. The next time Sandy comes through, [or] the next time something happens to your community, please note it is a discretionary movement of the federal government to act.¹⁹ We don't have any law on our books that says the federal government has to come to the aid of its citizens in a disaster. And if you lived in Louisiana at the time of George [W.] Bush, and you had a Democratic governor and a Republican president, you quickly find out what decisions people make when they have the discretion.²⁰ Somehow, when there's discretion, Black lives don't get valued. We're not the ones that get saved, and we weren't chosen, and we weren't valued, and we weren't saved.

Next, I just want to mention this little thing called voting rights. Thought I'd mention it, because when you displace millions of people at gunpoint with one-way tickets and you don't help them get back home, and then you hold elections, and you say there's just no voter turnout, and then you purge the voter rolls, because they just haven't been home, but there are no homes to come back to--well, we've come to the conclusion that we might need some voting rights in disasters.²¹ So, [for] the conversation on voting rights that's happening right now . . . be ready for when the disaster comes, because that is the hit. That is the moment when our power really gets taken away: when we are at our weakest, most traumatic space.

The next change: we just need a law that protects public institutions. When there's a hurricane that hits your coast, and levees ***100** that flood your city, we need laws that protect the strongest buildings that are on the highest ground, that are meant to withstand wind, where even the rich people go because they're the strongest buildings in the city. That's our public housing; that was our public housing in New Orleans. It got torn down.²² Not because it flooded. But because somebody wanted to "shift the density of poverty," is what they said.²³ What it actually meant is it permanently displaced thousands of people, who are still not home, because they were living in public housing, and they were never allowed to come back to their city.²⁴ We think public housing should be protected in disasters. All public institutions.

And speaking of public institutions, we might want to protect our hospitals, too. We have a big hospital called Charity. It was built at the same time that our public housing was built. It's [in] downtown New Orleans, and the only thing that flooded was its basement.²⁵ [It] turns out that [when] the whole team of medical staff . . . and the military group [that] cleaned it [[and] got it surgery-ready . . . told the government, "We're ready to receive patients at Charity," the government and a few other folks put a gag order on the doctors and military, opened the windows, and re-flooded Charity Hospital.²⁶ The dollars that were supposed to go to rebuild Charity Hospital, clean it up, [and] save the people who were stuck went to a new facility right next door.²⁷ When you come down, check it out. They could've just rebuilt Charity [or] cleaned it up. But Charity Hospital is a hospital for poor Black people. And ***101** so they just pushed it to the side, and . . . they're starting to privatize the public money put into those hospitals.

Finally, another public institution: schools. Turns out New Orleans has become the epicenter of the charter [school] movement.²⁸ But let me tell you what's really happening. We're seeing children who go to four schools in four years, because a charter school really [just] takes \$300 and a signature to start. These children can't write their names, they can't add, they can't figure anything out, and there's no connection to the crime that we see in our city. "It's just their fault for not making better choices." It ought to be our fault for not protecting our children and the public institutions that they need to grow.

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So for housing, hospitals, and schools, let's just protect them as public institutions, and let's not allow your tax dollars to go to help privatize these institutions, which is what's happening now.

The next law we ought to think about: a federal law banning racial and religious profiling. After Katrina, there were thousands of immigrants brought into our city to help with the recovery and rebuilding. When those immigrants asked for their paychecks, they were fired, and they immediately lost their status.²⁹ When they lost their status and they drove from their home to their work, or to find more work, they were profiled for being brown.³⁰ Turns out Black folks in New Orleans knew all about that trick. Black men in my family [have] been profiled all my life. And right after [September] 11, our Muslim brothers and sisters started getting profiled, too.

A suggestion: we need a federal law that bans racial profiling. It's come up, [[but for] some reason it can't get passed. I don't know why this isn't a priority, but when police have the right to stop you based on your skin color, that ought to be illegal.

We also need some laws that actually promote an alternative economic system. It turns out that in the middle of a disaster, capitalism [is] not the best thing. Not the best thing for Black lives. In *102 fact, what we saw in South Louisiana after Katrina was the barter system, because the ATMs weren't full and the banks were closed. We saw people actually using what they had and getting what they need[ed].

I remember one morning, I woke up to a bag of okra in my FEMA trailer as payment for some legal services that I had done. Now, I love okra, so that was a very good payment for me. But it was [from] a lady down the street who didn't have any money. She gave me some okra, I was hungry: it all worked out. I don't understand why these kinds of [systems] can't be part of our conversation.

And one last suggestion. And this one you might not connect immediately to Black lives, but trust me, it's connected. We need federal recognition for the United Houma Nation. The United Houma Nation is a Native American tribe in South Louisiana with 17,000 tribal roll members.³¹ They are the Nation that put the red stick in the ground that we now call Baton Rouge. They've always existed where we are. But our federal government doesn't recognize them.³²

The problem when the federal government doesn't recognize you when you're the largest tribe in South Louisiana is that you don't get royalties when your land sits on a lot of oil and gas.³³ You also don't get a say in how disasters are cleaned up in your community, with your tribe. We want federal recognition for the United Houma Nation, not only because it's the right thing to do, but because what we've figured out in South Louisiana is that none of our struggles, none of our movements, will go anywhere until we have movements and justice for our indigenous brothers and sisters.

So, I'll wrap it up. I just thought I'd give you some things to think about, because the question was, "If law worked for Black lives, what would the world be like?" Well, this is just a suggestion *103 on where we could start, and this is from ten years of disaster recovery in the Gulf South. So I'm going to leave you with one request, and I'm going to let you know what's going on down in the Gulf South.

The request is: remember us on August 29. This is ten years since Hurricane Katrina, and no matter what you hear up here in New York, or over there in Ohio, or way on the West Coast, don't believe that the recovery is finished. Don't believe that we're okay. Don't believe that justice has been served. That has not occurred. And if you don't believe it, we invite you down to come see for yourself.

There's an initiative called Gulf South Rising led by local Black people.³⁴ Local Black people saying, "This is how we want to remember Katrina ten years later." Those people are taking to the city, and they're asking you to join them for a march and for healing rooted in traditional arts and culture. The Gulf South Rising movement is going to build power: we're building our own infrastructure, leaders, [and] financial system. That's goal number one. We invite you to join us.

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Goal number two is that we're coming together, not just to party . . . specifically, to heal our bodies, our minds, our relationship with one another, and our relationship to Mother Earth. We've got some healing to do, and the healing is going to go down in New Orleans on August 29.

We're also moving from this notion of resilience to resistance. Now, we do acknowledge that we are resilient people. We are [resilient], thank you very much: when you punch me, I can come back. That's right. It's good, I can take it--thanks. We figured that out. But stop hitting me.

So we're building a movement to just stop the punches. We don't need to prove anymore to the nation or anyone else that we can take a punch. We can take a punch. Stop hitting us, stop hurting us, stop killing us, [and] don't forget about us. And so this narrative from resilience to resistance is what we're going to be shouting on August 29. If you can't join us, at least remember that the legacy of resistance in this nation started in the Gulf South.

III. VINCENT WARREN^{d3}

How do we know that Black lives really do matter? One of the *104 ways I think about that is to look very far into the future, not to the campaign cycle, not to the fiscal year, not to the three-year strategic plan with measurable outcomes, but really far into the future. I am thinking not about our kids, not about their kids, or even their kids, but the generation after that. When *that* generation looks back on this moment, the question will be, "What do Black people thank us for?" It is a tough question to which I do not know the answer. However, what I do see, looking back from us so many generations away, are smiling faces. I see Black people that are at ease, I see Black people that are full of wonder, I see Black people that are unencumbered, I see Black people that are unafraid, and I see Black people that are full of joy.

But we have a problem; one that was best summed up by James Baldwin in "The Fire Next Time," where he writes:

This past, the Negro's past, of rope, fire, torture, castration, infanticide, rape; death and humiliation; fear by day and night, fear as deep as the marrow of the bone; doubt that he was worthy of life, since everyone around him denied it; sorrow for his women, for his kinfolk, for his children, who needed his protection, and whom he could not protect; rage, hatred, and murder, hatred for white men so deep that it often turned against him and his own, and made all love, all trust, all joy impossible.³⁵

When I look into the future; I think our call is to create joy. As lawyers, as people in the legal profession working with movements, it is an enormous task to think about how to create joy from a legal document. Perhaps you cannot. But I want to throw out a question to you all. I want you to think about our Constitution, which was ratified in 1789. Let us not think about it as a foundational document, but let us think about it as it really is--a [Microsoft] Word redlined document. For those who have worked on editing documents, you know how this works. You work on a document, you *105 make changes to the documents, and you make comments to the documents. Yet, this is what has happened to our Constitution. Our Constitution was redlined so that it excluded Black folks, women, Native Americans, and anyone who was not the landed white gentry.³⁶ That is the basic document that we are working with in our field.

If you think about that analogy, what then did we do? We deleted the section that said "three-fifths" for a Black man;³⁷ we added the section that said "yes, woman have rights too,"³⁸ and then the Supreme Court, the legal infrastructure, clicked "save as final." There is, however, also a comments section and the comments section is also something that the legal professional has sought to occupy. As a result, we will have comments in our documents that say, for example, that the Fourth Amendment should be read to include the following words before the actual amendments unless a police officer feels otherwise: "You have the right to be free from unreasonable searches and seizures."³⁹ There are other parts in the comments section that we put in as well.⁴⁰ Therefore, when we ask Black people in Black communities what the most important thing to them is, they will tell us the same things time and time again: education, housing, healthcare, being able to protect and provide for families, and

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not a single one of them is a right in our Constitution. So what are we spending our time doing? We are spending time in the comments section, trying to get our courts to accept changes. I do not think that is the path to joy. I do not see the path to showing that Black lives matter in the process we are currently engaged in.

Catherine Albisa,⁴¹ one of the board members for the Center *106 for Constitutional Rights, told me not too long ago that there are only two things worth doing in life. One is creating joy, and the other is eliminating pain. What we are doing here today, what we are trying to assemble, is a strategy to do both things simultaneously. I do not have to tell you that it is not easy because if it were easy someone in this room would have done it already. Yet it is obvious, and as Brother [Rev. Osagyefo] Sekou⁴² said to us just yesterday, we live in a time when stating the obvious is a revolutionary act, and we have been stating the obvious for two days in this conference.

When thinking about what that revolutionary act looks like moving forward, we need to think radically about our profession, about the role of our profession with respect to movements, groups, with respect to communities, but most importantly, we have to ask ourselves, “Can we get to where we need to be by doing the things we are doing now?” The answer is “No.” But that is actually why we are here today; that is why we are at this conference, because Law for Black Lives is about creating radical innovation in the way we think about our work as lawyers, which will then get us out of the “comments” section, into actually envisioning a legal document that includes fundamental, basic rights, and recognizes the humanity of Black people.

We are planting the seed. When you think about those generations moving forward and ask them what are they thankful for, they may say that it was that our generation came together to plant the seed. Then again, they may not, and for that reason this work also requires humility. When you go to a beautiful forest, for example, you are walking about, and you are enjoying the trees. You do not know the names of the people who planted them and made it possible, but they matter to you, so that even though you do not know their names, you thank them for it. Perhaps, then, with humility, with innovation, with solidarity, with comradery, we will be able to plant a seed so that years and years down the road, Black people will say, “We know that many years ago, there was a discussion about changing the way our society works, and our communities were involved, and our lawyers were involved. For that, we are eternally thankful.”

***107 IV. ALICIA GARZA^{d4}**

Black Lives Matter is a powerful network of Black people who have come together to finally eradicate anti-Black racism and state-sanctioned violence, once and for all.⁴³ For far too long, Black lives have not mattered in this country, nor have they mattered around this world.

Now, how do we know that? We know this, because, of the two-and-a-half million people who are locked in prisons and cages, one million of those people are Black.⁴⁴ We know this because no fewer than nine million people are under state supervision, and many of those people are Black.⁴⁵ We know this because, according to our comrades at the Malcolm X Grassroots Movement, every twenty-eight hours in this country, a Black person is murdered by police, security guards, or vigilantes.⁴⁶ We know this because Black women are the fastest growing prison population.⁴⁷ We know this because while the Confederate flag may have come down in South Carolina, it has not come down in Mississippi.⁴⁸ In fact, it is the state *108 emblem.⁴⁹ It is the symbol that says to Mississippi, “Black lives do not matter here.” We know this because Black women make 64 cents to every 78 cents that a white woman makes, to every dollar that a white man makes.⁵⁰ We know this because the average life expectancy of a Black transgender woman is thirty-five-years-old.⁵¹

I could go on and on about how we know that Black lives do not matter in this country and around this world, but more importantly, it is critical that we understand that Black Lives Matter both as a powerful network and as an international movement that was ignited by the murders of people like Michael Brown.⁵² Ignited by the murders of people like India Clarke.⁵³ Ignited by the murders of people like Jonathan Sanders.⁵⁴ Ignited by the murders of people like Jordan Davis.⁵⁵ Ignited by the people who are murdered like Aiyana Stanley-Jones.⁵⁶ Ignited by people who are murdered like Penny Proud,⁵⁷ like Oscar Grant,⁵⁸

like Sandra [[Bland],⁵⁹ like *109 Rekia Boyd,⁶⁰ like so many others. We know this because as all of these people are having their lives taken unnecessarily, we know that Black Lives Matter is about much more than police terror. It is about our fundamental right to live as Black people with dignity and respect.

In my work at the National Domestic Workers Alliance, we see ourselves as an integral part of the movement for Black lives. However, you may be asking yourself, what do domestic workers have to do with Black Lives Matter? Domestic work, caregiving that is administered in other people's homes, is rooted in and shaped by the legacy of slavery. Historically, enslaved Africans were forced to work in other people's homes, on other people's land, mostly for folks who were generating profit off of our backs. That is the legacy of domestic work.

How, then, did we get there? During the New Deal, Southern lawmakers and union leaders made a compromise that excluded domestic workers and agricultural workers from federal labor protections that were afforded to all other workers.⁶¹ Why did they do that? Because domestic workers and agricultural workers, at that time, were predominately Black.⁶²

Today, that means that domestic workers often live and work in the shadows of our society and in the shadows of our economy. They are often isolated as the only employee inside a home and oftentimes not even considered to be an employee but instead a member of the family. They are subject to exploitation and abuse. One woman I know personally said that she was brought here from Brazil with the promise that she could work for a family and be able to go to school. Instead, she had her passport taken from her, and she was forced to sleep on the porch while she cleaned and nourished and fed a family that was wealthy. They were, in fact, cancer researchers.

Domestic workers are often increasingly unprotected by the very laws that ensure that this type of exploitation does not happen.⁶³ Many domestic workers are Black immigrant women from *110 the Caribbean and from across the continent.⁶⁴ More than 500,000 Black immigrants are living in the shadows of our democracy. They are both being criminalized for being undocumented and they are being criminalized for being seen as Black American.⁶⁵ And while the tales are horrific, the organizing, which is led by these women, who hold the tatters of our democracy and our economy together, is restoring life and humanity to our homes and to our workplaces. Domestic workers have formed a powerful national alliance driven by them to fight for basic labor protections to set a fair floor, not just for us, but for everyone.⁶⁶ Domestic workers are also innovating and shaping the fastest growing economy. We are building new and innovative models of full and fair employment that can finally uproot structural racism from caregiving, once and for all.

In our work, we have won five state-level bills in five states in five years, and we are just getting started. Domestic workers from across the African Diaspora have joined the powerful movement for Black lives. Because not only are we workers, but we are also mothers. We are mothers who have a hard time sleeping at night, because we are worried that our children will not return home. We are mothers who live in communities where the police join forces with federal agents, and they separate our families, and they criminalize our children. We know all too well, as my sister Heather McGhee from Demos has said, Black bodies were the first currency of this nation, and as such we are uniquely positioned to transform this nation.

Black Lives Matter is much more than a hashtag. It is much more than a moment. Black Lives Matter is a powerful assertion. It is a demand that we value humanity. It is a demand that we restore the right to breathe. It is an assertion that our children deserve to grow up to be adults. It is a movement that is designed to restore *111 dignity and respect to a nation that was built off of our backs in the very first place. And we know that we will win.

V. ELLE HEARNS^{d5}

Hello everyone. The law has lied to us. The law has lied to you. Your academic degrees have lied to you as well. If the law really stood for Black lives, we would not have to continue to learn to say the names of countless beautiful Black people who have been murdered. If the law really stood for Black lives, we would understand exactly what state violence is and how it manifests itself in the lives of Black people. We would know that systemic and structural violence is a form of state violence, along with

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the very visible forms of police brutality that we all know. If the law really stood for Black lives, the officers who murdered Sam Dubose in Cincinnati, Ohio would have been fired the first time they murdered a Black man and got away with it.⁶⁷

If the law really stood for us as Black people, we would not have to defend ourselves against the very thing that is supposed to protect us. If the law really stood for Black lives, people from Paterson, New Jersey to Cleveland, Ohio would be able to live unapologetically in all of their Black glory without death being a constant in their lives.⁶⁸ I would not have been arrested after defending myself against a transphobic attack. The jail that I was placed in would not exist if the law really stood for Black lives.

Laws would not be the gateway to a better quality of life--investing in people would be. The ego of the law would be left at the door when coming in contact with those who are most impacted by laws. We would have a better practice in identifying and connecting to our human existence, as opposed to the circumstances that *112 often keep us divided. If the law really stood for Black lives, white people, you would not be so confused about the privilege you carry. There would be specific language around the dismantling of white supremacy, patriarchy, and capitalism in laws, if they really were for Black lives. We would have received reparations.

If the law really stood for Black lives, Ky Peterson, a Black transgender man who murdered his rapist, would not be in prison currently serving twenty years in Georgia.⁶⁹ Mya Hall's murder would not have gone unnoticed if the law really stood for Black lives.⁷⁰ Anthony Sowell would have never made the news if the law really stood for Black lives.⁷¹ The "House of Horrors" in Cleveland, Ohio would have been torn down long before Anthony Sowell had the opportunity to capture and detain Black women.⁷²

If the law really stood for Black lives, you all would know that I fear you, just like Black people fear the police. As a Black transgender woman, when I come into a space with you, I do not know if you will kill me, misgender me, out me, or verbally attack me. If the law really stood for Black lives, we would not have to listen to Bill O'Reilly.⁷³ If the law really stood for Black lives, we would not have had to watch in horror as Black people in Ferguson were not allowed to mourn, grieve, protest, or claim the very city they dominate. *113⁷⁴ If the law really stood for Black lives, Mike Brown's body would not have laid in the street for hours.⁷⁵ Detroit would be just as vibrant as it once was. We would not know the names of Black women like Sandra Bland, Raynette Turner, Kindra Chapman, Joyce Curnell, and Ralkina Jones.⁷⁶ We would not have to speculate whether or not they committed suicide. We would have confirmation for what we already know about their deaths.

If the law really stood for Black lives, one out of two Black transgender women would not have to live with the reality that they will sit in jail at some point in time in their life.⁷⁷ Black transgender women would have a life expectancy longer than thirty-five-years old.⁷⁸ Black transgender women would be able to anticipate making more than \$10,000 a year.⁷⁹ If the law really stood for Black lives, you would know I, as a Black transgender woman, am not interested in inclusion. I am not interested in marriage. I am not interested in equality. I am interested in the liberation, in the freedom, of Black people.

VI. CARL WILLIAMS^{d6}

Law for Black lives. The law is our enemy. The law is our enemy.

*114 The law as it stands today in this country and in this time is our enemy. Historically, it's what's enslaved us as Black people. It's what's Jim Crow-ed us. It's what gave us anti-miscegenation laws. Those were laws, structures that were in place in this country, and today we have even more of them. They have different names. They're parts of different systems. They're mandatory minimums. They're the school-to-prison pipelines. They're the war on drugs. They're stop-and-frisk procedures. All across the country from Portland, Maine [to] Portland, Oregon, from Miami to San Diego. Those laws that exist today are part of the core of what makes up the system of white supremacy in this country.

And those laws didn't just appear from nowhere. They appeared at the foundational points of this country. Vince was talking about the Constitution and sort of the ways to amend it and change it. The Constitution, and I always point this out, the very easy place to remember when it was first written. It's Article 1, section 2, [clause] 3 explicitly talks--it doesn't use the words "Black people"--but it explicitly talks about Black people, and many of you all know, maybe all of you know what it says right about Black people. Three-fifths of a human being. So it talked about us, at the core, *specifically* are not human beings. And I would be remiss if I left out our Native brothers and sisters--I'm arrogant myself--if we left out Native brothers and sisters. What does it say about Native brothers and sisters in that same [Article 1, section 2, clause 3 . . . of the Constitution](#)? Not even three-fifths. Don't count. Zero.

So our Constitution--or *their* Constitution, excuse me--talks about people of color. And it says we're maybe three-fifths, a little bit more than half, or zero, and that's the foundational document of this country. And the Declaration of Independence also speaks specifically about Native American people and refers to them as bloodthirsty savages.⁸⁰ Right? So that's from whence we come. That's where we come from. We need a wholesale change to the legal system of this country. We need that for ourselves, for Black people, for oppressed people inside the borders of this country, and we need it for the rest of the world.

***115** And more than that, we need to change the culture around it. I was at an activist gathering, and someone came up to me and said, "Couldn't we make it against the law so when a policemen kills somebody, that that should be murder? It should be illegal." And I said, "So what you're saying is when someone takes a gun and shoots a person, there should be a law that says that that's something and we could call that murder?" He said, "Yeah, we should have a law that says that." I said "There's probably, I don't [know], maybe fifteen [laws] in this state, and there's federal ones. We have those laws, but it isn't that law. It's the culture that surrounds it. It's the district attorneys. It's federal prosecutors. It's defense attorneys sometimes.

And it's the judges, and it's the grand juries, and it's the juries that look and say, "Doesn't look like that to me." It's that system, and it's that culture that we need to get to the root at, rip out and change.

We all know what Audre Lorde said: "The master's tools will never [dismantle] the master's house."⁸¹ With some apologies to the sister, I'm going to change it a little bit and say the master's laws will never destroy the master's system: white supremacy.

We can use those laws to bail ourselves out when we're on that journey, right? To get some people out of jail, to maybe have some less harsh conditions when people are behind enemy lines when people are in prison. We can use it to bail people out. Sometimes we can use our bar card to assist that process, but that is not going to destroy this system of white supremacy that is crushing human beings in this country.

So, where does that leave us? Right? Because that's the depressing part. Someone asked me, and I'm sure everyone in this audience has been asked, "Well, what does this Black Lives Matter movement want?" And I hate that question. But I thought about it, and I said, "We need to answer [to] these white supremacist people who keep saying this stuff." Right? We have to have some response to that. And I'm a trial lawyer at heart, so you'll forgive me for answering that. When I answer that for people, I answer it in a story.

I'm going to start out by asking a question to folks. How many people here have very young Black children? Put your hands up. First of all, everybody should clap for them because they're raising young Black children right?

***116** Now. Wait, wait. Keep your hands up. Keep your hands up. So for all of those folks, what I want to see happen . . . and y'all can tell me if it's what you want to see, too. I want to know the time when this happens, because I know that it will happen. I want that young child, not in the very far future, to grow up and come to their parent, their mother, their father, other folks, and [ask], "Is it true that in this country"--or maybe there won't be countries anymore, because we'll all be free--but, "When you were younger, was it true that Black people weren't free?" And you're going to be absolutely eloquent, absolutely on point, and explain exactly what it was like to live in this country today. And your beautiful Black child is going to look at you and go, "I don't understand. I don't understand what you mean. That doesn't make any sense. How could people live like that? How could people let other people-- for our allies and accomplices in the room--let other people, let us, let you, mom, dad, other folks live like that?" And then you're going to try to explain again and they're just going to [say], "I don't understand that. It doesn't make any sense to me." That's the day we win.

That day is coming. The only question is, how far that day is off? How far is it away? And that brings us to who we are and why we're here. So the only thing that all of this, the gathering in Cleveland, the movement for Black lives that happened, and everything that's happening around this country, everything that's happening around the world, for Black liberation, for racial justice, and for the liberation of people. The only thing that we are all doing is making that day come a little bit sooner. Right? So all we're doing is there's an X on the calendar, and we're just saying, "Let's move the date up a little bit, just a little bit closer to today," right? Let's have it so that child is a little bit more confused at this situation that was in this country today a little bit sooner. We want to invoke that. We want to speed up that confusion. And I think one of the things on a very core emotional level that we need to do to bring that day sooner, and one of the things that we can do right now in this room, is to believe.

[Imagine] if all of us were to get together, and we were a society of civil engineers, and we said, "We're going to go out and build a skyscraper." But a lot of us said, "Well, I don't believe that that's possible really. It's a nice dream, and we like to talk about it, and we write poems about it, and we sing about it, and we chant about it, and we have workshops about it, but I don't really actually believe it's a possibility. It's an impossible thing to happen."

*117 How many of you have sometimes doubted that we actually can be free? Fully free? I'm going to put my hand up, because I believe sometimes I doubt it. We have to one hundred percent commit ourselves to the belief that human beings want to be free, that we yearn to be free, and that we can make and believe in our own power in making ourselves free. Because like the engineers who don't believe in the skyscraper, it ain't never gonna get built. If we start to believe right now, right here--we may be wrong in the end--we one hundred percent have to believe that it is possible.

And in that, I want you all to put your hand against your heart and feel a little bit of your life inside. And I don't need you to chant it, because I don't want you to say it out loud so everybody outside can hear. I want you to say it inside, but with your voice. Say it. Say the words. Say, "I believe. I believe. I believe that we will win. I believe that we will win. I believe that we will win."

[Audience chants, "I believe that we will win."]

I got a little bit more for you. I'm not done. Just one last piece. Put your fist in the air. And now say, "I fuckin' know that we will."

Don't laugh. Say it. I'm going to [say] that again. "I fuckin' know that we will."

VII. NORRIS HENDERSON ^{d7}

This is supposed to be about something radical, about how we see ourselves in this moment This moment is about how we show up and how we show up for each other in this moment. One of the things about having legal skills and knowing the power of what you can do with it is how to pay it forward. What do we do with the skillset that we have acquired? So for all the lawyers, the jailhouse lawyers, and law students, the question to yourself is, how do you show up in the moment? When you look in the mirror in the morning, what do you see? Do you see this pretty person, this beautiful, handsome person, this lovely, gorgeous person, or do you see somebody who is really engaged and willing to commit themselves to helping others?

One of the things about acquiring a skill set is that you have to *118 do something with it. For example, I am a CPR instructor, but I cannot perform CPR on myself. I learned that so I could do it for somebody else. So when you learn the law, it is for you to use this talent that you have acquired to the benefit of somebody else. A service to humanity is the best work in life. And so how do we show up in these different moments? We are having a critical moment right now. Things are happening, and we are responding to them. But the thing is, I need to know where you are in that critical moment. I do not need to be in battle walking with you, and then when I get to the line of conflict, look over my shoulder and you are not there. I need to know that you are going to be there with me. For that reason, my biggest ask for everybody here is how we show up. How we show up in these critical moments when things are happening all around us.

Conversely, we cannot twist people because of their position or possessions. We have to meet people as we find them. We have to find people who are willing to do what they are capable of doing. We cannot get mad with people who say, "Check this out

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brother, this is as far as I can go.” If they tell me that is as far as they can go, I have to accept that and respect that. However, do not walk here with me, talking this talk, and then when I get there, say that I have to go. One of the things Michael [Jackson] said about talking to that man in the mirror is [that] he must check himself. If we do not check ourselves, we are going to wreck ourselves. We always talk about leaving the egos at the door, but somehow we seem to sneak them in our pocket and bring them in. This is about us being honest with each other.

I have been truly blessed. I am not supposed to be here. I had a life sentence. For years, I could not figure out how I got into the circumstance I found myself in. But I was there. I took a bad situation and turned it into something good. I learned the law by hook or crook, trying to figure out how to get myself out of prison. Before I found a way out for myself, however, I was also able to help thousands of other people.

This is about us coming together as a collective. Recently, we left our regional caucus and had a call about an incident in Mississippi. People drove eighteen hours to make a call stating that they may need help soon. Will we show up for those folks in Mississippi like we showed up in Ferguson, Baltimore, and Oakland? If we talk about winning, and about how we win, I have a very simple formula for that. We have to be willing to fight one day longer than our opposition. It is that simple--it is not a complicated thing.

*119 Envision that. For example, I remember [Joe] Frazier and [Muhammad] Ali, the “Thrilla in Manila.” I can hear Bundini Brown say, “All night long, champ, all night long.” But the expression on Ali’s face said, “I don’t know if I can go any farther.” Truth be told, he did not want to continue to fight, but at that moment, Joe quit on the other side of the ring; he threw in the towel. Ali did not even know it, he was still contemplating whether he could go back out there. Angelo Dundee looked over his shoulder, he saw that Joe threw in the towel, and he forced Ali to get up. Why? Because if we can look up, we can get up--that is what this is all about.

I am a bit late to organizing one-on-one, but we need to use this energy. We did not organize one-on-one in prison. Organizing in prison was a “no-no.” If you find yourself organizing in prison, you find yourself moving on the fast train in the wrong direction. However, we found a way to do it, though we had to do it spontaneously. Shit happens, somebody responds to it, and that is what is starting to happen across this country. Shit is happening, people are responding to it. Now we are trying to do it in a more organized way, so that when shit happens, we have a group of lawyers already waiting so that we are passing through the jail but not spending the night. In the old days, they spent the night in jail because the lawyer was trying to figure out what to do. We know what to do now. We need to have bail money, and we need to have someone right there advising somebody of what their rights are: “Don’t say anything. This is my client,” and he goes in and passes back out so he can get right back on the front line. That is how we built this army.

If we want to build an army, that is how we are going to build it. We build it one soldier at a time. At the same time, however, we cannot afford to get mad at our soldiers. One of our experiences on the inside when we was organizing, for example, was that there were some brothers inside who could not read and write. Their contribution to our movement was that they stuffed enveloped and licked them and put stamps on them. So imagine in a prison where you have 5,000 people sending out 10,000 pieces of mail, and you got a handful of people folding and licking envelopes and licking stamps. Nobody else wanted to do it, but they took on the task of doing it. So there is a role for everybody in this fight. Everybody.

I say this to the generals. For the generals, those folks, some self-anointed generals, and some of us who have lifted people up to be generals. The greatest action of the general occurs, not during *120 the battle, but in the first few minutes after. You have to find something to say to get those troops back there on the battlefield and keep them fighting. So when you take on this leadership position or are anointed or whatever, think about that and think about the impact your decisions have on all of the people you are asking to follow. Sometimes we make selfish decisions, and I tell people all the time when they say that we might go to jail, “Jail don’t scare me, I’ve been there.” Jail does not scare me, but for the person standing next to me, that may be a horrific experience for that person. I have to value that person’s opinion and feelings and position. So I cannot get upset with this person who says, “I cannot afford to go to jail.” I have got to respect that. At the end of the day, all I am saying is that we have a moment in front of us that if we do the right thing with it--if we do the right thing with it, we can accomplish so many things. So many great things.

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And so my final ask of everybody in the room is that, when we look at that mirror in the morning, we bring our whole self. I tell people all the time, “You know you better than I know you.” You know what you are capable of doing. You know how much commitment you are going to give, because inside, all you have inside is loyalty and commitment. That is all you have. You do not have the cash to pay for this and pay for that. Your face takes you everywhere you need to go to inside. Your face and your reputation for packing fair with people. And if we learn to pack fair with each other, [we'll] have people in this room from all over the country.

I came here early this morning, and I started to count the chairs. I was just sitting down and I saw it: ten rows here, ten rows deep. Well, that is one hundred [people], that is six hundred people who are going to fill up this room. This is a lot, this is a critical mass of people with real skills. We got organizers, we have advocates, we have attorneys, we have law students, but what do we do with it? The test of this is going to be when we leave here, today, tomorrow, or the next day. For those who live in New York, what do we do with this moment? How do we continue to stay connected to each other so that we do not always show up when it is critical, [like] when there is a Trayvon Martin⁸² or Mike Brown⁸³ or Freddie Gray?⁸⁴ We have to continue to show up for each other all the time.

*121 I get tired of going to funerals. We are in a place that leads the nation for capital incarceration. If that was really the solution, I do not think we would be leading the nation in crime, but those things are on the same parallel track. It tells me that something is wrong with this picture. However, we are in a position to make a change.

I always say “we” inclusively, because I am a part of this, whether it goes right or whether it goes wrong. We have to become owners of saying, “If it's to be, it starts with me.” Now think about what that saying means. You have made a commitment to yourself. You have just made a covenant with yourself that if anything is supposed to change, it starts with you. So, if it is not moving, blame yourself.

VIII. UMI SELAH^{d8}

*One day . . . when the glory comes . . . it will be ours, it will be ours. Ohhhhhoo . . . one day . . . When the war is won . . . It will be sure . . . It will be sure . . .*⁸⁵ I want to introduce myself, my name is Umi Selah.

I gotta center myself. Anybody with B.O.L.D.? Black Organizer for Leadership and Dignity?⁸⁶ Anybody? Anyone Black Love? We learn to center ourselves, so I'm gonna center myself. I'm gonna ask that the ancestors be with me. I wanna tell you all a story about my name.

Now I'm not gonna act like I'm not the same person I was two months ago. I'm not gonna hit you with that. There are many things that are similar with Umi and Phillip Agnew. Umi is a little bit taller though. Plays basketball; he's fantastic.

My name came to me in a dream. It was a crazy dream. It came to me on the evening of my thirtieth birthday: June 22nd, 2015. I've never had a dream like this--one that I remembered so vividly. I remembered every part of my dream. And I woke up and kinda laughed, because I thought I was awake. I thought I was awake in *122 the dream. In the dream we were all sitting in a circle. Aja [[Monet] was there,⁸⁷ and there was a bunch of folks and for some reason we were in Cuba. In the dream we had taken a trip to Cuba. For some reason we were talking about The Amistad--the ship. And in the dream, there was a young woman and she was saying, “You know, Cinqué?⁸⁸ Cinqué get all the love. You know, ‘give us us free.’⁸⁹ But there was a slave on there, a slave woman named Umi, who was really holding it down.” And I didn't know this, and I said “Really? Really? That sounds crazy. I never heard of this Umi.” And she said “Well you know, Umi? Umi was gangster. Umi was the one. Umi? She moved to Pensacola right afterwards.” This didn't make sense in my mind, but I remember in the dream saying, “My great-grandmother is from Pensacola.” And the woman in the dream said to me, “Your name is Umi. Your name is Umi.”

I looked up the name afterwards, and it has three meanings, for everybody that thinks I just chose a name without quality meanings. It has three different meanings in multiple languages to appeal to many folks. In Japanese, it means “beach.” In

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Arabic, it means “mother.” In Egyptian, it means “life.” I said, “All three of those sound cool. I would like to live on the beach with my mom.”

This is beautiful. And so a few days later, Aja [Monet] said, “Why don't you look up the Amistad?” You all know the story of Amistad. I thought I knew it all, I'd seen the movie with Matthew McConaughey. I know *everything* about the story; obviously, they wouldn't lie to me in the film.

So I looked it up. Honestly, I knew a fair degree of the story. I knew that the captured Africans had fought back and revolted and had killed everybody on the ship. And they had left the captain and his second-in-command alive, and they told him, “Take us back to Africa. Take us back to Africa.” But they tricked them and they wound up in the northeast of the United States, and they were taken in and there was a trial. They eventually were granted their freedom by the United States government, which does that often--grant freedoms.

*123 [Audience laughter]

But the interesting thing I found out was that the ship--before the mutiny that happened--the ship had just left Havana, Cuba. I said to myself, “Man, there's no way I could have known that. That's a little bit crazy.” And so, I was on Wikipedia . . . [in] . . . the Wikipedia rabbit hole. I clicked on everything. I clicked on every name. I clicked--I clicked, I clicked. I was deep in. I was like, looking at *The Godfather*, I don't know how. I began reading about the experience of our people on slave ships. And it was then that I began to really feel that the literal meaning of my name was trivial compared to the journey that I was supposed to be on.

I began to read about the experience of our people on slave ships. And that shit was horrible, y'all. One of the stories that I read was of an abolitionist reverend who fancied himself an abolitionist pirate. And what he would do is, after the transatlantic slave trade was abolished, he would go with a bunch of abolitionists to the high seas and look for slave ships. They would board them and they would liberate the slaves. He was a pretty gangster dude. And in one of the stories he talked about boarding this one specific slave ship. And on the slave ship he began to describe in vivid detail the conditions of the ship. He said the stench was one that would cause a man, or a woman, to collapse.

He spoke about a ship that had been at sea for seventeen days, storing over 500 Africans when it left the west coast of Africa, minus the fifty-six that it had thrown overboard. He talked about opening the hull--the grate that covered our people. And he talked about how small the area was; how they were stacked side-to-side-to-side laying down. Some of them chained two and three together. Stacked like muffins in an oven. He said the height from one floor to the next wasn't wide enough for them to ever turn. So for sometimes months our people would lay, just like this, in their own stool, in the stool of their neighbors, in their own vomit. He said there was a part of the ship where our people were stuffed in between each other's legs--hands in between legs--and some of them had to sit because they hadn't found the space to lay down for seventeen days. And he said on board the ship, it was eighty-nine degrees but the temperature couldn't read how hot it was, that smell that emanated from the bow of that ship.

There was a portion there, as he rounded out his depiction of the ship, where he was telling his abolitionist friends what he had seen on this ship, and they said, “Brother, that's nothing. Because we boarded a ship just a little while ago where the slaves were tied *124 two and three together. Sometimes we would pull one and the other two men would be dead, chained to him.” They said that there was a suffocating, stifling stench, and that they could not breathe. Many of them were in various stages of suffocation and death. Some of them were foaming at the mouth. And he went on to say that, in their last gasp, in their last ability to grasp onto life-giving air, that some of the men would strangle the man next to them. And that some of the women would dig at the eyes of the women next to them, so that they could just breathe. He said some of the children had died. And that when they came up aboard the ship, they would kill each other for a drop of water. And all they could remember was the stench. All they could remember was the stench.

I want to be very, very honest with y'all right now. I'm not a movement leader. Sometimes I feel dead inside because in this movement, this movement moment, sometimes I feel suffocated by a stench of death. Sometimes I feel numb. Things that would cause my thumb to stop and pause now I can pass up without the slightest glance. Everyday I'm inundated with news of somebody dying with the grotesque details of the last seconds of some of our sisters' and brothers' lives. And, I have to be

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honest, I'm tired of it. I can only speak for myself but sometimes I feel a dark cloud over the movement. I feel that we've decided to show folks that black lives matter by proving that only black deaths matter.

I want to be honest with you for a second and tell y'all that I'm not a movement leader. I'm a flawed person trying every day to do at least what I think is right but sometimes I feel a numbness. Sometimes I feel an aloofness about what's going on in the world. Sometimes I can feel a cynicism creeping up inside of me because I can feel the stench of yet another passing. Some days I feel a deep melancholy come over me and I don't want to go to the rally. I don't want to go to the vigil. I don't want to share the video. I don't want to know the story. I don't want to say the name because it gets tiring. It gets heavy. It's hard. Dang [it] feels good to say that.

We're in a moment of great, critical importance to the future of all of us. We're in a moment where we've got to remember that our lives truly do matter and we've got to prove that far before we deliver the eulogy. That our communities do matter far before blood runs in their streets. That our families matter far before their fathers, and their mothers, and their sisters, and their brothers, and their siblings are ripped from them. We've got to stop making celebrities out of people just doing their human duty. We've got to *125 stop making celebrities out of families that have lost theirs. And we've got to remember that no matter what you say, many of us are still on that slave ship and we'll strangle somebody just to get a little breathe of air. We will dig into the brains of our sister just to get one little piece of air while they live in abundance. We've got to remember who the enemy is. We've got to remember who's the one holding the whip. And we've also got to remember a crucial thing--and I'll end it here.

You know, the more *hotep* of our community,⁹⁰ they will tell you that we all came from kings and queens, and we all came from the people that built the pyramids. I've come to tell you that that is a lie. That by virtue of you being here, you probably were not a king or a queen. That you probably were just a farmer, and in the middle of the night, slavers came to take your forefather and your foremother, scared, not knowing what happened, they were placed in the bowel of a ship, arm to leg, arm to leg, arm to leg, arm to leg. I'm here to tell you that you weren't a king or a queen, but you were then a slave and you were then taken to the point of no return. And your foremother and your forefather scratched at the walls. They screamed out to *Oshun* in their language.⁹¹ They begged for forgiveness. They begged for help. They wondered what they had done to wind up in Mississippi. And they cried as their father was ripped from their family, and you weren't a king or a queen, but your forefather and your foremother, they worked every day and night beneath the beating sun of Alabama. And, they cried when they saw black bodies swinging from those southern trees. They knew very well the stench of burning flesh. I came to tell you that you were not a king or a queen, but your forefathers and foremothers plowed and plowed a plot of land. After [being] freed by this great government of ours, they plowed and plowed a plot of land that they planned to be yours. And raiding cowards in white robes came and sought to take that land away. And your forefathers and your foremothers decided to run north. No, you weren't a king or queen, but they decided to settle in Cleveland and Chicago and in New York and in St. Louis. And late at night, *126 they would think about you. They said, "I don't have much to give but my life, and I will give it for you." And every single day they withstood the insults. They withstood the "boy," the "girl." They withstood the sitting in the back. They withstood the fear and the fury of police because they knew that they didn't come from kings or from queens but they came from survivors.

When you think about that slave ship and you think about that passage and you break it down to the month and the nautical miles that we traveled--that our people traveled--in the darkness, and in the stench of death, it feels familiar doesn't it? But I'm reminded about a ship that came to me in a dream. An Amistad whose captured Africans rose up and fought for their freedom. They call out to us today.

A weird kind of footnote in my story. A classmate of mine three weeks ago added me on Instagram. And her name was "Black Pensacola." It's a true story. I went to her page. And the last post she had posted was a [paraphrased] quote from Cinqué, saying that, "I call out to my ancestors and they will be there with me."⁹²

As I stand to defend myself, my family, my community, my people, my ancestors will be there with me. And they're here with us today. They're here with us today, saying, "We have a beautiful history, but the one we will create in the future will astonish the world." Saying, "You will find me in the whirlwind." Saying, "You can find me in the whirlwind." Saying, "Up, you mighty race." Saying, "Up, you mighty race. Up, you mighty race. Accomplish what you will."⁹³

IX. MAURICE “MOE” MITCHELL⁴⁹

Oh my God, you're so beautiful! Could you look at one another and just acknowledge your presence, your beauty, your fierceness? Just look and say, “I see you.” And if you do have love in your heart for that person, say, “I love you.” [*Audience: “I see you. I love you.”*].

Blackbird was founded by myself, Thenjiwe McHarris, and Mervyn Marcano in this year of protest and resistance to respond rapidly and lovingly to the urgent needs of Black liberation. When *127 Blackbird was called to South Carolina and in Missouri, we both witnessed and heard of extreme violations of people's legal and civil rights. We also saw, in response, the courageousness of a small but dedicated legal community, right? In South Carolina, when we talked to members of street organizations--people who face constant intimidation and surveillance by law enforcement--we saw as they joined with direct action takers, and they shared with us how they too desired freedom and their freedom was linked to their communities' freedom. What we saw on the streets of Baltimore, in Missouri, and in many other communities, was this uncommon, unflinching desire to be free that brings many of us into this room.

However, a legal community that is in full defense of Black lives needs to be engaged *before* the killings, needs to be engaged *before* the tragic headlines, needs to be engaged *before* the hashtags. It needs to be concerned with the full spectrum of violence meted against Black bodies.

Standing with Black lives means the creation of a bench of lawyers dedicated to the particular and unique needs of trans Black women. Standing with Black lives means never being the type of attorney that would allow Kalief Browder to languish in jail for years.⁹⁴ Standing with Black lives means eschewing the respectability politics to join young people on the streets wherever they may go, in resistance to curfews, and to embrace all of their tools--if that might be slingshots and rocks, or tweets, or direct action, being on the front line ducking rubber bullets, ammunition, and tear gas canisters with young people. Standing with Black lives means challenging false dichotomies around good protesters and bad protesters, around violent and non-violent crime, around political and apolitical prisoners.

I want to free the U.S. Two Million. I don't want just some of our people to be free; we have to go in and free all of our people.

So, let me bring into context what many of you know and some people on this stage have already lifted up. The millions and millions of us who are in some way involved in the criminal justice system, the [seven] millio[n] of us who are in some form at the behest of correctional supervision,⁹⁵ and the more than two million of us who are behind bars,⁹⁶ one million being Black bodies.⁹⁷ *128 Black people are being executed on these streets.

Black parents are being sentenced to jail sentences because of their desire for a quality education for their children.⁹⁸ In a broken economy, Black people are finding ways in the informal economy to live out valuable and dignified lives, and are being punished because they want to feed their families and live their lives in dignity in an economy that doesn't have quality, just, and dignified labor.

So the law, currently, and primarily, functions as an instrument of the relatively privileged to maintain their privilege, to protect their property, to accumulate wealth, to disappear social problems, and to socially control Black people.

And when the law bends, and when it bends in its application, it's not towards fuzzy concepts of human rights. Unfortunately, it bends towards the often-irrational racial anxieties of a white middle class and the overwhelming momentum of globalized capitalism. So, the law in its application is an extension of racism, white supremacy, and capitalism, right? We need to have a clear analysis of what we're dealing with if we want to fix any problem, and we need to have that clarity. And we need to speak it. We need to say, capitalism--and the way that we deal with each other, the way that it turns ourselves, each other, into consumers, and laborers, and labor hours, and denies our capacity for love--is a problem. And the way that the law supports that is a fundamental problem.

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What we witnessed in Ferguson, and Baltimore, and Oakland, in the streets of New York, and other places, was working-class Black people--many of them young, many of them women, many of them queer, many of them trans--channeling an uncommon courage to expose these contradictions in the most dark and uncompromising way, and we all owe all of them a debt of gratitude.

So do we have the freedom of assembly? Do we have the freedom of speech? Do we?

Not when it interrupts white comfort. Not when it interrupts irrational but deeply felt white racial anxiety. The answer consistently *129 is no. Is there a right to a speedy trial? Not when those subject to arrest are objects of political or social control. The answer consistently is no.

So, when human dignity and justice is so tragically and wholly out of reach, the law's tendency to maintain order is actually a barrier to the achievement of justice, right? What is the value of order, what is the value of decorum, what is the value of law, in a caste system, in a state that essentially replicates this racial caste? What is the value of law, if not a replicator and a hardener of that racial caste system? So, a legal community that is in solidarity and stands for Black lives is committed to a *movement* of Black lives and must do a few things.

Number one: unflinchingly follow Black leadership. I'll say it again. Unflinchingly follow Black leadership.

Number two: put at the center the people who feel the brunt of the violence. Formerly incarcerated people. People who participate in informal economies, sex workers, corner boys, folks who are outside of traditional economies. Transgender women --folks who feel the brunt of state violence--must be at the center of our mission, of our cause, and are ultimately the experts in their own existence and their own experience.

Number three: take risk. Resist counsel that prioritizes order. What is the value, again, of order, when there is no justice?

And in leaning into risk, push your lawyering further. Embrace discomfort. Right? If you don't feel discomfort and fear, then you're not allowing yourself to move into the margins where the fight is. So challenge your lawyering and challenge your practice, and move it closer and closer to the theater of fear and discomfort, because that's where our people are every single day. That's our lived experience.

Match the urgency, intensity, promise, and scale of this movement. So we don't need small law. We need big, audacious, unflinching, powerful, revolutionary law. Right?

And build long term infrastructure for winning. Where are the pipelines for young Black folks to become movement lawyers? Where are the pipelines for young trans sisters, young trans brothers, young trans siblings, to become movement lawyers in order to lawyer to their community?

And the last piece: turn up. This movement is rooted in the turn up. We are all inspired by those young revolutionaries in Ferguson, and in Baltimore, who eschewed the counsel of their elders, of the pastors, of the traditional organizations, eschewed the respectability *130 politics, eschewed all of that, and channeled the courage that we haven't seen in decades. Let that be your guiding star, let that be your North Star. When you're behind your desk, when you're preparing for whatever legal battles you're in, figure out ways that you can channel that. So, in every space that you're in, deny orthodoxy, deny safety, deny white silence and white comfort, unchecked racism and gradualism. Don't allow any of those things to have safe quarter in your presence.

So, in closing, my people:

Center Black leadership. Ashe?⁹⁹ [*Audience: Ashe*].

Prioritize human dignity and justice over order. Ashe? [*Audience: Ashe*].

Match the urgency, scale, intensity, and promise of this moment. Ashe? [*Audience: Ashe*].

Lean into risk, and channel the courage of the young people on the streets. Ashe? [*Audience: Ashe*].

And turn up.

Footnotes

- d1 Purvi Shah is the Bertha Justice Institute Director at the Center for Constitutional Rights, where her work focuses on deepening the theory and practice of movement lawyering across the United States and the world. She recently co-founded the Ferguson Legal Defense Committee, a national network of lawyers working to support the Ferguson movement and the growing national Black Lives Matter movement. Prior to coming to the Center for Constitutional Rights, she spent a decade working as a litigator, law professor, and community organizer. At the Community Justice Project at Florida Legal Services--a project she co-founded and started--she litigated on behalf of taxi drivers, tenants, public housing residents, and immigrants in a variety of class actions and affirmative damages litigation. She was an adjunct clinical professor at the University of Miami School of Law, where she co-founded the Community Lawyering Clinic. She graduated from Northwestern University and the Berkeley School of Law at the University of California.
- 1 Harry Belafonte, Artist/Activist, Keynote Address at the Center for Constitutional Rights Social Justice Conference 2014 (June 6, 2014), <http://www.ccrjustice.org/home/BerthaJusticeInstitute/social-justice-conference-2014> [[<http://perma.cc/X58G-8WWQ>].
- 2 BARBARA RANSBY, ELLA BAKER AND THE BLACK FREEDOM MOVEMENT: A RADICAL DEMOCRATIC VISION (2003).
- 3 See LAW FOR BLACK LIVES, <http://www.law4blacklives.org> [[<http://perma.cc/CRJ8-WDKZ>].
- 4 You can see videos of the RadTalks at <http://www.law4blacklives.org/videos>.
- 5 It should be noted that RadTalks has been shaped by a series of conversations I've had with visionary thinkers, artists, and creatives, most notably Bryonn Bain, Harry Belafonte, Andre Robinson, Malik Benjamin, Steven Pargett, Camilo Ramirez, and Sally Rumble.
- d2 Colette Pichon Battle, Esq. serves as Director of the Gulf Coast Center for Law & Policy (GCCLP) managing programs focused on Global Migration, Community Economic Development, Climate Justice and Equitable Disaster Recovery. She works to develop regional and state advocacy initiatives, manages and provides legal services, and oversees training and analysis development for local community leaders on issues that intersect with race, systems of power, and ecology. Her legal specialization is in immigration and disaster law. She is a lead coordinator for Gulf South Rising 2015, a regional initiative around climate justice in the South. She earned her Bachelor's Degree in International Studies from Kenyon College, and is a former Thomas J. Watson Fellow and a graduate of the Southern University Law Center. This RadTalk can be viewed at <https://youtu.be/NzM1Lj8XNg>.
- 6 A lawsuit filed by the Southeast Louisiana Flood Protection Authority-East (a Louisiana statute-created board of experts tasked with overseeing flood protection on the Louisiana coast) against ninety-seven oil and gas companies that operate in Louisiana, seeks an injunction and unspecified damages. Various reports estimate the restoration of the coastline in a range of eighteen-billion to fifty-billion dollars. The actual figure to restore the coastline is hotly contested. See Bd. of Comm'rs of the Se. Louisiana Flood Prot. Auth.-E. v. *Tenn. Gas Pipeline Co., LLC*, 29 F. Supp. 3d 808, 808 (E.D. La. 2014).
- 7 See *In re Katrina Canal Breaches Litig.*, 673 F.3d 381, 399 (5th Cir. 2012), *opinion withdrawn on reh'g*, 696 F.3d 436 (5th Cir. 2012).
- 8 *Id.* at 386.

- 9 *Id.*
- 10 See *In re Katrina Canal Breaches Litig.*, 696 F.3d 436, 448 (5th Cir. 2012).
- 11 One study claims the exact figure will never be known, but estimates that 610 Black people died during Hurricane Katrina. See POPPY MARKWELL & RAOULT RATARD, DEATHS DIRECTLY CAUSED BY HURRICANE KATRINA, <http://dhh.louisiana.gov/assets/oph/Center-PHCH/Center-CH/stepi/specialstudies/KatrinaDeath1.pdf> [[<http://perma.cc/PJX9-CJZX>].
- 12 Gardiner Harris, *Police in Suburbs Blocked Evacuees, Witnesses Report*, N.Y. TIMES (Sept. 10, 2005), http://www.nytimes.com/2005/09/10/us/nationalspecial/police-in-suburbs-blocked-evacuees-witnesses-report.html?_r=0.
- 13 Four civil lawsuits stemming from the blockade have been filed in United States District Court for the Eastern District of Louisiana. Plaintiffs in those actions had alleged constitutional violations, as well as some state violations. All of those claims were dismissed by a federal judge. However, the Jefferson Parish Sheriff's Office reached a settlement with the Cantwell family of Algiers Point for \$10,000. See Richard Rainey, *Crescent City Connection blockade after Hurricane Katrina wasn't illegal, U.S. Justice Department says*, THE TIMES-PICAYUNE (Sept. 30, 2011), http://www.nola.com/politics/index.ssf/2011/09/us_justice_department_says_pol.html [[<http://perma.cc/9Z6K-EJM2>].
- 14 *In re Oil Spill by the Oil Rig Deepwater Horizon in the Gulf of Mexico, on Apr. 20, 2010*, 808 F. Supp. 2d 943 (E.D. La. 2011).
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- 16 Marian Wang, *In Gulf Spill, BP Using Dispersants Banned in U.K.*, PRO PUBLICA (May 18, 2010, 1:24 PM), <http://www.propublica.org/blog/item/In-Gulf-Spill-BP-Using-Dispersants-Banned-in-UK> [[<http://perma.cc/4DF4-VGHJ>].
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- 18 Rakteem Katakey et al., *BP's Record Oil Spill Settlement Rises to More than \$20 Billion*, BLOOMBERG BUS. (Oct. 5, 2015), <http://www.bloomberg.com/news/articles/2015-10-05/bp-s-record-oil-spill-settlement-rises-to-more-than-20-billion> [[<http://perma.cc/MS8Q-6HM9>].
- 19 42 U.S.C. § 5148 (2015); *McWaters v. Fed. Emergency Mgmt. Agency*, 436 F. Supp. 2d 802, 809 (E.D. La. 2006) (holding that the Federal Emergency Management Agency's decision to terminate provision of assistance is a “discretionary function,” irrespective of the potential negative impact on a particular class of persons).
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- 21 See Damian Williams, *Reconstructing Section 5: A Post-Katrina Proposal for Voting Rights Act Reform*, 116 YALE L.J. 1116, 1130-36 (2007).
- 22 ROBERT D. BULLARD & BEVERLY WRIGHT, RACE, PLACE, AND ENVIRONMENTAL JUSTICE AFTER KATRINA: STRUGGLES TO RECLAIM, REBUILD AND REVITALIZE NEW ORLEANS AND THE GULF COAST 28-30 (2009).
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- 33 NICHOLAS NG-A-FOOK, AN INDIGENOUS CURRICULUM OF PLACE: THE UNITED HOUMA NATION'S CONTENTIOUS RELATIONSHIP WITH LOUISIANA'S EDUCATIONAL INSTITUTIONS 8 (2007) (“[S]uddenly the land that the Houmas had called home for so long became even more important and of prime interest to non-Indians--oil was under it Nonetheless, the federal government refuses to increase oil and gas royalties, a demand that is continually requested each year by the Louisiana government, in order to improve its education, levee, and coastal restoration systems. The United Houma Nation has yet to see any royalties from the land they previously inhabited.” (quoting J. Curry, *A History of the Houma Indians and Their Story of Federal Nonrecognition*, 5 AM. INDIAN J.L. 8, 20 (1979))).
- 34 *Who We Are*, GULF SOUTH RISING, <http://www.gulfsouthrising.org/#whoweare> [[<http://perma.cc/8ADR-P5V4>].
- d3 Vincent Warren is the Executive Director of the Center for Constitutional Rights. He oversees CCR's groundbreaking litigation and advocacy work, which includes using international and domestic law to hold corporations and government officials accountable for human rights abuses; challenging racial, gender and LGBT injustice; and combating the illegal expansion of U.S. presidential power and policies such as illegal detention at Guantanamo, rendition, and torture. Prior to his tenure at CCR, he was a national senior staff attorney with the American Civil Liberties Union, where he litigated civil rights cases, focusing on affirmative action, racial profiling, and criminal justice reform. He was also involved in monitoring South Africa's historic Truth and Reconciliation Commission hearings, and worked as a criminal defense attorney for the Legal Aid Society in Brooklyn. He is a graduate of Haverford College and Rutgers School of Law. This RadTalk can be viewed at <https://youtu.be/gDWUAegvK-c>.
- 35 JAMES BALDWIN, THE PRICE OF THE TICKET: COLLECTED NONFICTION, 1948-1985, at 376 (1985).

- 36 *See, e.g.*, U.S. CONST. art. I, § 2, cl. 3, amended by U.S. CONST. amend. XIV, sec. 2 (“Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.”).
- 37 U.S. CONST. amend. XIV, sec. 2 (“Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.”).
- 38 U.S. CONST. amend. XIX (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.”).
- 39 *See generally* *Warden Penitentiary v. Hayden*, 387 U.S. 294 (1967); *Terry v. Ohio*, 392 U.S. 1 (1968); *Tennessee v. Garner*, 471 U.S. 1 (1985).
- 40 *See, e.g.*, *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (“The First Amendment has a penumbra where privacy is protected from governmental intrusion.”).
- 41 Catherine Albisa is the Executive Director and co-founder of National Economic and Social Rights Initiative, a non-profit dedicated to building legitimacy for human rights in general, and economic and social rights in particular, in the United States.
- 42 Rev. Osagyefo Uhuru Sekou is an author, documentary filmmaker, public intellectual, organizer, pastor, and theologian based in St. Louis, Missouri.
- d4 Alicia Garza is the Special Projects Director for the National Domestic Workers Alliance (NDWA). In 2013, she co-founded #BlackLivesMatter, an international organizing network developed after the murder of Trayvon Martin, focused on combating anti-Black racism in all of its forms. Before the NDWA, she served as Executive Director of People Organized to Win Employment Rights (POWER) in San Francisco. This RadTalk can be viewed at <https://youtu.be/cniRNj6m0-A>.
- 43 *About the Black Lives Matter Network*, BLACK LIVES MATTER, www.blacklivesmatter.com/about/ [[<http://perma.cc/4QD7-W9W7>]].
- 44 LAUREN E. GLAZE & DANIELLE KAEBLE, BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2013 (Dec. 2014), www.bjs.gov/content/pub/pdf/cpus13.pdf [[<http://perma.cc/QBY6-P53D>] (reporting 2,220,300 people incarcerated); TODD D. MINTON & ZHEN ZHENG, BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, JAIL INMATES AT MIDYEAR 2014 (June 2015), www.bjs.gov/content/pub/pdf/jim14.pdf [[<http://perma.cc/8RV5-B9T7>] (reporting that of the 744,600 inmates in city and county jails, 263,800 are black); E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, PRISONERS IN 2014 (Sept. 2015), www.bjs.gov/content/pub/pdf/p14.pdf [[<http://perma.cc/6SQ9-6V5C>] (reporting that of the 1,561,500 prisoners in state and federal facilities, 516,900 are black).
- 45 GLAZE & KAEBLE, *supra* note 44, at 1 (reporting 6,899,000 people under adult supervision).
- 46 TONGO EISEN-MARTIN, MALCOLM X GRASSROOTS MOVEMENT, WE CHARGE GENOCIDE AGAIN! (2012), <https://mxgm.org/wp-content/uploads/2013/05/we-charge-genocide-FINAL.pdf> [[<https://perma.cc/P67W-V843>]].
- 47 *See generally* GLAZE & KAEBLE, *supra* note 44.
- 48 *North Carolina Takes Down Confederate Flag*, HUFFPOST LIVE (Apr. 4, 2013), <http://live.huffingtonpost.com/r/segment/north-carolina/515ab3ce78c90a5be9000033> [[<http://perma.cc/9YT4-7HM8>]; *Mississippi Votes to Keep Controversial Flag*, ABC NEWS, <http://abcnews.go.com/US/story?id=93537> (last visited Dec. 7, 2015).
- 49 *State Flags*, MS.gov, <https://www.ms.gov/content/Pages/flags.aspx> [[<https://perma.cc/P789-JXSZ>]].

- 50 *Your Right to Equal Pay*, THE WHITE HOUSE, <https://www.whitehouse.gov/issues/equal-pay> [[<https://perma.cc/85JD-WZ7T>]].
- 51 This statistic is extrapolated from a 2014 study conducted by the Inter-American Commission on Human Rights (IACHR). According to the IACHR, eighty percent of documented killings of transgender persons in the Western Hemisphere, particularly trans women, were thirty-five years of age or younger. *See* Press Release, Inter-Am. Comm'n on Human Rights, IACHR Expresses Concern over Pervasiveness of Violence against LGBTI Persons and Lack of Data Collection by OAS Member States (Dec. 17, 2014) [hereinafter IACHR Press Release], http://www.oas.org/en/iachr/media_center/preleases/2014/153.asp [[<http://perma.cc/KXY6-CAUX>]].
- 52 Michael Brown was an eighteen-year-old Black man shot and killed by Darren Wilson, a police officer, in Ferguson, Missouri on August 9, 2014. In December 2014, a grand jury in St. Louis County refused to indict Wilson on criminal charges for Brown's murder.
- 53 India Clarke was a twenty-five-year-old Black transgender woman murdered in Tampa, Florida on July 21, 2015.
- 54 Jonathan Sanders was a thirty-nine-year-old Black man who was killed by a police officer in Stonewall, Mississippi, on July 8, 2015.
- 55 Jordan Davis was a seventeen-year-old Black teenager who was killed by Michael Dunn, a forty-five-year-old white man, in a Jacksonville, Florida gas station parking lot on November 23, 2012. In October 2014, Dunn was found guilty of Davis's murder and sentenced to life in prison.
- 56 Aiyana Stanley-Jones was a seven-year-old Black child who was shot and killed during a police raid of her home in Detroit, Michigan on May 16, 2010. Detroit Police Officer Joseph Weekley was initially charged with involuntary manslaughter for Jones's killing, but was eventually cleared of all charges.
- 57 Penny Proud was a twenty-one year-old Black transgender woman murdered in New Orleans, Louisiana, on February 9, 2015.
- 58 Oscar Grant was a twenty-two-year-old Black man killed by Bay Area Rapid Transit (BART) Police Officer Johannes Mehserle at the Fruitvale BART Station in Oakland, California on January 1, 2009. In 2010, Mehserle was found guilty on a lesser charge of involuntary manslaughter and sentenced to two years in prison; he was released on parole in 2011.
- 59 Sandra Bland was a twenty-eight-year-old Black woman who was found hanged while in police custody in Waller County, Texas, on July 13, 2015.
- 60 Rekia Boyd was a twenty-two-year-old Black woman, who was shot and killed by an off-duty police detective on March 21, 2012 in Chicago, Illinois.
- 61 *See* Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 O HIO ST. L.J. 95 (2011).
- 62 *Id.* at 98.
- 63 *See* INT'L LAB. OFFICE-GENEVA:ILO, DOMESTIC WORKERS ACROSS THE WORLD: GLOBAL AND REGIONAL STATISTICS AND THE EXTENT OF LEGAL PROTECTION (2013), http://www.ilo.org/wcmsp5/groups/public/--dgreports/--dcomm/--publ/documents/publication/wcms_173363.pdf [[<http://perma.cc/LWU8-93QE>]; *see also* LINDA BURNHAM & NIK THEODORE, NAT'L DOMESTIC WORKERS ALL., HOME ECONOMICS: THE INVISIBLE AND UNREGULATED WORLD OF DOMESTIC WORK (2012), <http://www.domesticworkers.org/sites/default/files/HomeEconomicsEnglish.pdf> [[<http://perma.cc/5EQH-SXMA>]].
- 64 *Id.*

- 65 See U.S. DEPT OF HOMELAND SECURITY, ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT (2014), <https://www.ice.gov/doclib/about/offices/ero/pdf/2014-ice-immigration-removals.pdf> [[<https://perma.cc/2X8K-VAHA>].
- 66 See, e.g., DOMESTIC WORKERS UNITED, NAT'L DOMESTIC WORKERS ALL., & THE COMM. DEV. PROJECT AT THE URBAN JUSTICE CTR., DOMESTIC WORKERS AND COLLECTIVE BARGAINING: A PROPOSAL FOR IMMEDIATE INCLUSION OF DOMESTIC WORKERS IN THE NEW YORK STATE LABOR RELATIONS ACT (Oct. 2010), <http://www.domesticworkers.org/sites/default/files/pdfs/collectivebargaining.pdf> [[<http://perma.cc/J7JD-8VMT>].
- d5 Elle Hearn is the Central Region Coordinator for GetEQUAL, and she was appointed to the position in early 2015. She is also a strategic partner of #BlackLivesMatter and works collaboratively with the #BlackLivesMatter team. This RadTalk can be viewed at <https://youtu.be/lSFeI0X1jJE>.
- 67 See John Mura & Sheryl Gay Stolberg, *Samuel DuBose's Death in Cincinnati Points to Off-Campus Power of College Police*, N.Y. TIMES (July 31, 2015), <http://www.nytimes.com/2015/08/01/us/samuel-duboses-death-in-cincinnati-points-to-off-campus-power-of-college-police.html> (“Mr. DuBose is the third black man to die after encounters with the [University of Cincinnati] police since 2010; Kelly Brinson, a 45-year-old psychiatric patient, and Everette Howard, an 18-year-old student, died in 2010 and 2011 after campus police officers fired Taser stun guns at them, according to lawsuits filed by their families.”).
- 68 See generally Nicholas Quah & Laura E. Davis, *Here's A Timeline Of Unarmed Black People Killed By Police Over Past Year*, BUZZFEED NEWS (May 1, 2015, 5:46 PM), <http://www.buzzfeed.com/nicholasquah/heres-a-timeline-of-unarmed-black-men-killed-by-police-over#.brDXqxl2> [[<http://perma.cc/ZCB8-FVBF>].
- 69 Sunnive Brydum & Mitch Kellaway, *This Black Trans Man Is in Prison for Killing His Rapist*, THE ADVOCATE (Apr. 08, 2015, 11:15 AM), <http://www.advocate.com/politics/transgender/2015/04/08/black-trans-man-prison-killing-his-rapist> [[<http://perma.cc/N2VP-42JL>].
- 70 Peter Hermann, *Baltimore's transgender community mourns one of their own, slain by police* (Apr. 3, 2015), https://www.washingtonpost.com/local/crime/baltimores-transgender-community-mourns-one-of-their-own-slain-by-police/2015/04/03/2f657da4-d88f-11e4-8103-fa84725dbf9d_story.html [[<https://perma.cc/GXF9-G5J9>].
- 71 Anthony Sowell, otherwise known as the “Cleveland Strangler,” was arrested on November 1, 2009 after a SWAT team entered his house and found the bodies of eleven rape victims that had been decomposing throughout his home. Prior to his 2009 arrest, Anthony previously served a fifteen-year prison sentence for kidnapping, raping, and torturing a twenty-one-year-old pregnant woman. See generally ROBERT SBERNA, *HOUSE OF HORRORS: THE SHOCKING TRUE STORY OF ANTHONY SOWELL, THE CLEVELAND STRANGLER* (2012).
- 72 David Lohr, *Serial Killer Anthony Sowell's 'House Of Horrors' Demolished*, THE HUFFINGTON POST (Dec. 7, 2011, 5:07 PM), http://www.huffingtonpost.com/2011/12/06/anthony-sowell-serial-killer-house-demolished_n_1130815.html [[<http://perma.cc/S25E-SFN7>].
- 73 For example, days after a white man shot nine people in a Black church in Charleston, South Carolina, Bill O'Reilly, the host of FOX News Channel's *The O'Reilly Factor*, compared the Black Panthers to bigots, blamed the Black community for “Black-on-Black crime,” and stated that “there is not an epidemic of racism in the United States of America.” Bill O'Reilly, *Bill O'Reilly: Demonizing America as a racist nation*, FOX NEWS (June 25, 2015), <http://www.foxnews.com/transcript/2015/06/25/bill-oreilly-demonizing-america-as-racist-nation/> [[<http://perma.cc/S9AP-ZKNE>].
- 74 See, e.g., Alex Altman, *Ferguson Protesters Try to Block Use of Tear Gas*, TIME (Dec. 12, 2014), <http://time.com/3631569/ferguson-protesters-try-to-block-use-of-tear-gas/> [[<http://perma.cc/7U2L-AU5Y>] (explaining that a federal judge in St. Louis ordered local police to limit their use of tear gas on Ferguson protesters following news that a grand jury had declined to indict officer Darren Wilson in the death of Michael Brown).

- 75 See Kim Bell & David Hunn, *Timeline: Four Hours After The Michael Brown Shooting*, ST. LOUIS POST-DISPATCH (Sept. 13, 2014, 3:57 PM), http://www.stltoday.com/timeline-four-hours-after-the-michael-brown-shooting/table_79c7ed69-4fbe-57fb-bf77-e1888dfff4e.html [[<http://perma.cc/RN4G-MLRY>].
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- 77 JAIME M. GRANT ET AL., NAT'L CTR. FOR TRANSGENDER EQUALITY & NAT'L GAY & LESBIAN TASK FORCE, INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 163 (2011), http://www.thetaskforce.org/static_html/downloads/reports/reports/ntds_full.pdf [[<http://perma.cc/4M65-758L>].
- 78 See IACHR Press Release, *supra* note 51.
- 79 GRANT ET AL., *supra* note 77, at 2 (finding that black transgender women were nearly four times more likely to have a household income of less than \$10,000/year as compared to the general population).
- d6 Carl Williams is a staff attorney at the American Civil Liberties Union (ACLU) of Massachusetts. He was previously a criminal defense attorney with the Roxbury Defenders Unit of the Committee for Public Counsel Services and a Givelber Distinguished Lecturer on Public Interest Law at Northeastern University School of Law, where he taught a class on social justice movements and the law. He is a graduate of the University of Rhode Island and the University of Wisconsin Law School. This RadTalk can be viewed at <https://youtu.be/3grlVu9XTRE>.
- 80 THE DECLARATION OF INDEPENDENCE para. 29 (U.S. 1776) (“He has excited domestic insurrections amongst us, and has endeavored to bring on the inhabitants of our frontiers, the merciless Indian Savages whose known rule of warfare, is an undistinguished destruction of all ages, sexes and conditions.”).
- 81 AUDRE LORDE, *The Master's Tools will Never Dismantle the Master's House*, in *SISTER OUTSIDER: ESSAYS & SPEECHES* 110-13 (1984).
- d7 Norris Henderson is currently Executive Director of Voice of the Ex-Offender (VOTE), a nonprofit organization designed to educate, organize, and mobilize formerly incarcerated persons about their right to vote in Louisiana. Wrongfully incarcerated for twenty-seven years, he was self-taught in criminal law during his years in prison as a paralegal, advocate, and organizer. He is a former Open Society Foundations Soros Justice Fellow, who promoted community organizing and advocacy campaigns to transform the criminal justice system in New Orleans. This RadTalk can be viewed at <https://youtu.be/cJms7Oxz8kw>.
- 82 Trayvon Martin was a seventeen-year-old Black youth shot and killed by George Zimmerman in Sanford, Florida on February 26, 2012. In July 2013, a jury found Zimmerman not guilty of second-degree murder in Martin's death.
- 83 See *supra* note 52.
- 84 Freddie Gray was a twenty-five-year-old Black man killed in police custody on April 19, 2015 in Baltimore, Maryland. In May 2015, a Baltimore grand jury indicted six police officers for Gray's death.
- d8 Umi Selah, formerly known as Phillip Agnew, is a co-founder and Organizer/Mission Director of the Dream Defenders, an organization committed to bringing social change by training and organizing youth in students in nonviolent civil disobedience, civic engagement, and direct action. He is a graduate of Florida A&M University. This RadTalk can be viewed at <https://youtu.be/rchmWq1S0o0>.
- 85 COMMON & JOHN LEGEND, *GLORY*, on *SELMA* (Columbia Records 2014).

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- 86 BOLD is a national training program designed to help rebuild Black social justice infrastructure in order to organize Black communities more effectively and re-center Black leadership in the U.S. social justice movement. See BOLD ORGANIZING.org, <http://boldorganizing.org/> [[<http://perma.cc/4YQ5-64NC>].
- 87 Aja Monet is a poet, singer, and activist based in Brooklyn, New York.
- 88 *Joseph Cinqué*, BLACKHISTORYNOW.com, <http://blackhistorynow.com/joseph-cinque/> [[<http://perma.cc/8MK7-ZHTM>] (“Joseph Cinqué (c.1814-c.1879) led an 1839 mutiny on board the Cuban schooner Amistad, initiating the first slave rebellion in history to be successfully defended in American courts. Captured off Long Island and nearly prosecuted on charges of murder, Cinqué and his fellow Amistad rebels were eventually set free following a Supreme Court decision that opposed the will of the President of the United States.”).
- 89 AMISTAD, at 1:33:52 (HBO Films 1997).
- 90 “Hotep” is a slang term that refers to Afrocentric-based cultural nationalism. See, e.g., Tunde Adeleke, *Black Americans, Africa and History: A Reassessment of the Pan-African and Identity Paradigms*, 22 W. J. OF BLACK STUD., 182, 189 (1998).
- 91 “Oshun” is an orisha (Yoruba deity) associated with water and fertility. Orishas and other aspects of traditional African religions made their way to Latin America and the Caribbean through the transatlantic slave trade. See, e.g., Sheila Walker, *Everyday and Esoteric Reality in the Afro-Brazilian Candomblé*, 30 HIST. OF RELIGIONS 103, 109 (1990).
- 92 AMISTAD, *supra* note 89, at 2:06:58.
- 93 This is a reference to a famous quote by Marcus Garvey, an activist who led the Black Nationalist Movement in the early 1900s, based in Harlem, New York. See HENRY HAMPTON & STEVE FAYER, VOICES OF FREEDOM: AN ORAL HISTORY OF THE CIVIL RIGHTS MOVEMENT FROM THE 1950S THROUGH THE 1980S 38 (1990).
- d9 Maurice is a co-founder of Blackbird and an organizer in the movement for Black Lives. This RadTalk can be viewed at <https://youtu.be/6yrxu8RbK2s>.
- 94 See Michael Schwirtz & Michael Winerip, *Kalief Browder, Held at Rikers Island for 3 Years Without Trial, Commits Suicide*, N.Y. TIMES (Jun. 8, 2015), <http://www.nytimes.com/2015/06/09/nyregion/kalief-browder-held-at-rikers-island-for-3-years-without-trial-commits-suicide.html>.
- 95 See GLAZE & KAEBLE, *supra* note 44, at 1.
- 96 *Estimated number of persons under correctional supervision in the U.S., 1980-2013*, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE (Aug. 20, 2015), <http://www.bjs.gov/index.cfm?ty=kfdetail&iid=487> [[<http://perma.cc/75T9-3MCF>].
- 97 *Criminal Justice Fact Sheet*, NAACP, <http://www.naacp.org/pages/criminal-justice-fact-sheet> [[<http://perma.cc/Y8D6-56HN>].
- 98 See Julianne Hing, *Kelley Williams-Bolar's Long, Winding Fight to Educate her Daughters*, COLORLINES (May 16, 2012, 9:30 AM), <http://www.colorlines.com/articles/kelley-williams-bolars-long-winding-fight-educate-her-daughters> [[<http://perma.cc/5V3S-32P2>]; Daniel Tepfer, *Tanya McDowell sentenced to 5 years in prison*, CONN. POST (Mar. 27, 2012), <http://www.ctpost.com/news/article/Tanya-McDowell-sentenced-to-5-years-in-prison-3437974.php#item-38492> [[<http://perma.cc/3BGK-H47P>].
- 99 “Ashe” is a Yoruba word, referring to the power to make change. *Ase (Yoruba)*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Ase_\(Yoruba\)](https://en.wikipedia.org/wiki/Ase_(Yoruba)) [[<https://perma.cc/U7XS-E5R7>].

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Raise the Age

Overview and Implementation

Legislation Signed into Law

Raise the Age (RTA) legislation was enacted on April 10, 2017 (Part WWW of Chapter 59 of the Laws of 2017):

- It prohibits 16- and 17-year-olds from being held in adult jails and prisons
- It makes substantive changes to the procedures and mechanisms used to process 16- and 17-year-olds in the criminal and youth justice systems
- It allows for additional services for youth and alters the types of detention and/or placement they may receive



Implementation will be phased in

- October 1, 2018: law takes effect for 16-year-olds
- October 1, 2019: law takes effect for 17-year-olds



Terms used in this presentation

- References to youth's age refer to their age on the date the alleged act occurred, unless otherwise noted
- Use of “16- and 17-year-olds” refers to individuals affected by the law when it is phased-in
- References to crime refer to the most severe offense the youth was charged with or was alleged to have committed



Three types of Offender Categories

- **Adolescent Offender (AO)** – New category created by *RTA*
- **Juvenile Offender (JO)**
- **Juvenile Delinquent (JD)**



Adolescent Offender (AO)

- **Age:** 16- or 17-years-old at the time of the offense
- **Alleged Crime:** Felony; if convicted, current adult sentencing applies
- **Court:** Youth Part of Superior (Criminal) Court
- **Pre-trial detention:** New “specialized secure juvenile detention facilities for older youth”
- **Probation Service:** Eligible for voluntary case planning services prior to conviction
- **Probation Supervision:** AOs will receive probation terms consistent with current law
- **Post-Sentence Confinement Options:**
 - Definite sentence of one year or less – new specialized secure juvenile detention or Office of Children and Family Services (OCFS) secure facility (judicial choice)
 - Sentence of one year or more and under 18-years-old at sentencing – new Department of Corrections and Community Supervision (DOCCS) AO facility
 - Sentence of one year or more and 18 or older at sentencing – existing DOCCS adult facility



Juvenile Offender (JO)

- **Age:** 13- to 15-years-old at the time of the offense
- **Alleged Crime:** Select set of serious offenses (e.g. murder, manslaughter, rape, robbery 1)
- **Court:** Youth Part of Superior (Criminal) Court
- **Pre-trial Detention:** Existing local detention facilities licensed by OCFS
- **Probation Service:** Eligible for voluntary case planning services prior to conviction
- **Probation Supervision:** JOs will receive probation terms consistent with current law
- **Post-Sentence Confinement:** Existing OCFS Secure Facilities



Juvenile Delinquent (JD)

JD classification is extended to include 16- and 17-year-olds under the appropriate circumstances

- **Age:** Under 16-years-old at the time of the offense
 - **Alleged Crime:** non-JO felony or a misdemeanor
 - **Court:** Family Court
 - **Pre-trial Detention:** Existing secure or non-secure juvenile detention facility licensed by OCFS
 - **Probation Service:** Eligible and suitable youth may receive adjustment services
 - **Probation Supervision:** Not to exceed two (2) years consistent with current law
 - **Post-sentence confinement:** Existing OCFS limited secure or non-secure facility or voluntary agency (OCFS or Local Departments of Social Services (LDSS) custody)
- **Age:** 16- or 17-years-old at the time of the offense
 - **Alleged Crime:** misdemeanor (except VTL)
 - **Age:** 16- or 17-years-old at the time of the offense
 - **Alleged Crime:** non-violent or violent felony offense (VFO) AND was removed to Family Court by the Youth Part



Pre-Adjudication Youth Process

- Juvenile questioning rooms, inspected and approved by the appropriate court administrator and usually located in police administrative offices, will be used for questioning youth who have been arrested
- Youth may be brought to his/her home by police, and with consent of the parent or legal guardian, be questioned there for a reasonable period of time
- Parental notification of arrest will be required for 16- and 17-year-olds, similar to what is now available for youth 15 years of age and under in Family Court



Court Jurisdiction

- **New Youth Part – County/Superior Court:** Family Court Judges and Criminal Court Rules
 - all 16- and 17-year-old felony (violent and non-violent) offenses and vehicle and traffic law (VTL) misdemeanors start in the Youth Part
 - all 13- to 15-year-old JOs
- **Existing Family Court:** Family Court Judges and Rules
 - all 7- to 15-year-old offenses start in Family Court (except JO offenses)
 - all 16- to 17-year-old misdemeanors start in Family Court (except VTL offenses)
 - 16- and 17-year-old felonies removed by Youth Part
- **Existing Local Criminal Courts:** Criminal Court Judges and Rules
 - all 16- and 17-year-old violations and infractions (e.g. traffic violations)



Youth Part

- The *RTA* legislation creates a “Youth Part” within the Superior (Criminal) Courts in each county and in New York City
- Judges presiding in the Youth Parts will be specially-trained Family Court judges



Youth Part Jurisdiction

- The following cases will be heard in the Youth Part:
 - 16- and 17-year-olds charged with felonies (i.e. AOs) whose cases are not removed to Family Court
 - 16- and 17-year-olds charged with VTL misdemeanors
 - 13-, 14-, and 15-year-old Juvenile Offenders (JOs) whose cases are not transferred to Family Court



Features of Youth Part

- Voluntary probation services tailored to youth will be available for AOs and JOs
- There is a presumption against detention



Removal from Youth Part to Family Court: Non-Violent AOs

- VTL misdemeanors cannot be removed to Family Court
- AOs accused of non-violent felonies will automatically be removed to Family Court within 30 days of arraignment, unless:
 - The defendant waives removal; or
 - The District Attorney (DA) moves to prevent removal
- If the DA moves to prevent removal, they must prove “extraordinary circumstances” that warrant keeping the case in the Youth Part or the case will be removed to Family Court



Removal from Youth Part to Family Court: Violent AOs

- Removal of AOs for violent felony offenses and Class A offenses (other than drug offenses) is based upon a three-part test. Cases will *not* be removed if:
 - The defendant displayed a firearm, shotgun, rifle, or deadly weapon;
 - The defendant engaged in certain criminal sexual conduct; or
 - The defendant caused significant physical injury on a non-participant in the crime
- If one of these three circumstances is not found, the case will be removed within 30 days unless the DA moves to prevent removal and demonstrates extraordinary circumstances
- Cases may be removed in less than 30 days with agreement from all parties



Removal from Youth Part to Family Court: JOs

- For Juvenile Offenders (JOs) in the Youth Part, the criteria for removal to Family Court will not differ from current law



Family Court Jurisdiction

- Juvenile Delinquent (JD) cases will continue to be heard in Family Court
- Family Court jurisdiction will expand to include 16- and 17-year-olds when:
 - They are accused of a misdemeanor (except VTL); or
 - Their cases are transferred from the Youth Part
 - AOs that are transferred to Family Court will then be classified and treated as JDs
- 16- or 17-year-olds in Family Court will be treated the same as 15-year-olds currently:
 - They will have an opportunity to limit detention and placement through available alternatives to detention
 - They will have the same dispositional options, such as placement or probation



Eligibility for Adjustment Services

- **Adolescent Offenders** removed to Family Court may receive adjustment services through probation
- **Juvenile Offenders** will not be eligible for adjustment services
- **Juvenile Delinquents** deemed eligible and suitable may receive adjustment services consistent with current law

3 Types of Pre-Sentence Confinement

- New specialized secure juvenile detention facilities
- Existing secure juvenile detention facilities
- Existing non-Secure juvenile detention facilities



Specialized Secure Juvenile Detention Facilities

- New type of detention created by the *RTA* legislation that is reserved exclusively for AOs
- Will be jointly certified and regulated by OCFS and the State Commission of Correction (SCOC)
- These facilities will be locally administered:
 - Outside of New York City, counties may opt to have the local probation or social services department administer the program in conjunction with the local sheriff
 - In New York City, the Administration for Children's Services (ACS) will administer these facilities in conjunction with the NYC Department of Correction (NYC DOC)
 - Not every county will be required to *operate* a facility, but all must have one *available* for use
- These facilities will not be co-located with local jails



Specialized Secure Juvenile Detention Facilities

- These facilities may be co-located with currently operating juvenile secure detention facilities, provided the following conditions are met:
 - AOs must be assigned to separate housing units from JDs and JOs
 - Facilities may share common spaces (e.g. cafeteria, medical, vocational and recreational) for AOs and JDs/JOs, but physical access between the populations must be prevented
 - Facilities may be allowed to share space for AOs, JDs, and JOs for educational purposes
 - Facilities must abide by all OCFS and SCOC regulations
- OCFS and SCOC have notified all sheriffs and juvenile detention agencies of this update
- OCFS and SCOC are actively working to promulgate regulations for the establishment, certification, and operation of these facilities



Specialized Secure Juvenile Detention Facilities

- **Pre-trial Detention:** AOs may be confined to a specialized secure detention facility while their criminal trial is pending
- **Post-conviction Sentencing:** These facilities will also be a post-conviction sentencing option for AOs with a definite sentence of one year or less



Rikers Island

- *RTA* legislation prohibits the placement of youth at Rikers Island
- **April 1, 2018:** All youth under the age of 18 must be removed from Rikers Island, if practicable
- **October 1, 2018:** All youth must be removed from Rikers Island



Adolescent Offender Facilities

- The law requires that DOCCS create one or more facilities to house AOs impacted by this legislation that are under 18 years of age at sentencing and sentenced to one year or more
- These facilities will operate a two-year treatment model developed in collaboration between DOCCS and OCFS
- A council made up of representatives from DOCCS, OCFS, SCOC and the Division of Criminal Justice Services (DCJS) will jointly oversee the facilities



AO Facilities: Hudson CF Model

- Pursuant to Governor Cuomo's Executive Order in 2015, Hudson CF in Columbia County currently houses incarcerated 16- and 17-year-olds and provides age-appropriate programming for its residents
- Hudson CF will transition to an AO Facility:
 - Hudson will remain the reception center for all (male and female) AOs received into DOCCS Custody
 - Hudson will remain an Office of Mental Health (OMH) and Medical Level 1 facility, providing medical and mental health services 24 hours a day
 - Hudson will be the only facility to house female AOs



AO Facilities: Additional Site Locations

Two sites were selected by DOCCS to serve as AO facilities:
Adirondack CF and the former Groveland Annex

Adirondack CF:

- Essex County
- Current Status: Medium Security, Male Facility
- Operational Date: October 1, 2018

Former Groveland Annex:

- Livingston County
- Current Status: Decommissioned Medium Security, Male Facility
- Operational Date: October 1, 2019



AO Facilities: County Housing

- As an interim measure before the law takes effect, DOCCS will continue to review requests from counties to house 16- and 17-year-olds who receive a definite sentence of imprisonment in excess of 90 days at Hudson CF
- If approved, due to limited capacity, there will be a per capita cost associated with housing these youth from the counties
- After Phase 1 of *RTA* implementation, DOCCS will continue this practice as it relates to 17-year-olds



AO Facilities: Program Treatment Model

- AO Facilities will operate under the Program Treatment Model:
 - Specialized therapeutic programs designed for adolescents to develop cognitive skills
 - Academic transition plans will be developed with the AO student and the school psychologist to transition the AO student to education programs, vocational training, and/or employment
 - Substance abuse treatment will be offered
 - AOs that complete the 2 year program model and are transferring to a DOCCS adult general confinement facility will have a transition plan in place



AO Facilities: Discharge Planning Services

- Discharge Planning Services are a coordinated effort between DOCCS correction and community supervision staff, Re-Entry Services, County Re-Entry Task Forces (CRTFs), and OCFS
- Where appropriate, this includes:
 - Family reintegration
 - Housing assistance
 - Mental health and medical continuity of care
 - Employment support
 - Educational needs
- Counties can sign up for a monthly automated email notification that will provide information on AOs released to their counties



Post Release Supervision

- DOCCS Community Supervision staff will provide post release supervision to both AOs released from DOCCS and JOs released from OCFS and DOCCS:
 - They will be supervised by a Parole Officer in bureaus based on county/area of residence
 - Until the age of 18, they will be supervised at a Youthful Offender risk level, which is a supervision ratio of 40:1
 - At age 18, a risk assessment instrument will determine the appropriate level of supervision



Sealing Provision

- Effective October 7, 2017, *RTA* provides individuals previously convicted of certain crimes with the opportunity to apply to have their criminal record sealed
- An application for sealing cannot be made until at least ten years has passed since the individual's date of conviction or date of release from confinement – and the individual has remained crime-free during that time period
- Individuals who were convicted of two or more felonies, a sex offense, violent felony, or other specified serious felonies are not eligible to have their records sealed
- This provision does not apply solely to youth – rather, all eligible, previously convicted individuals can apply to have their record sealed
- This provision will not impact the information available to law enforcement



Possible Impacts on Social Services Departments

- Counties may require more contracts with voluntary agencies to accommodate an increase in JD placements
- Local Social Services Departments that operate detention centers may have an increase in youth to be served in those facilities
- Localities may choose to operate specialized secure detention facilities with local sheriffs' departments (or NYC DOC)
- Unlike previous versions, the enacted *RTA* legislation does not include reforms for youth alleged or adjudicated to be a Person in Need of Supervision (PINS)
- Instead, state funding to localities for PINS detention and placement will expire in 2020 pending further policy actions



Possible Impacts on Social Services Departments, cont.

- Localities may need to change their claiming practices to isolate *RTA*-related expenses
- Local Social Services Departments designated the lead agency for Supervision and Treatment Services for Juveniles Program (STSJP) should anticipate expanded programs with increased eligibility
- **Effective October 1, 2018:** OCFS will expand eligibility for the Supervision and Treatment Services for Juveniles Program (STSJP) to include youth who are alleged to be or are convicted as Adolescent Offenders (JOs and JDs are already eligible by law)

OCFS-supported Juvenile Justice Alternatives Continuum

Prevention

Early Intervention

Alternative to Detention
[including specialized
secure]

Alternative to
Placement (ATP)

Aftercare / Reentry
Programming

Possible Impacts on Voluntary Agencies

- Voluntary agencies (VAs) will treat new youth in residential settings
- For VA placement, youth must be adjudicated JDs placed in non-secure care with OCFS or a Local Social Services Department; or placed with NYC ACS under the Close to Home program



Possible Impacts on Voluntary Agencies, cont.

- VAs may need additional staff and beds to meet the needs of the new population
- OCFS will determine the best Maximum State Aid Rate (MSAR) for the new population
- OCFS will review and modify current regulations as well as create new regulations, policies, and procedures to address the population, including searches, security, programming, law enforcement engagement, etc.

Possible Impacts on Probation Departments

- Probation Departments may need additional staff to meet the needs of the new population
- Probation Departments may need access to additional community-based services to meet the needs of the new population – e.g. educational, vocational, cognitive behavioral interventions, behavioral health, family treatment, intensive case management
- Probation Departments that operate detention centers may experience an increase in youth to be served in those facilities
- DCJS will review and modify current regulations to address the population, including case planning and the provision of services to AOs and JOs, intake and adjustment services, court ordered investigations, supervision, and other related regulatory changes

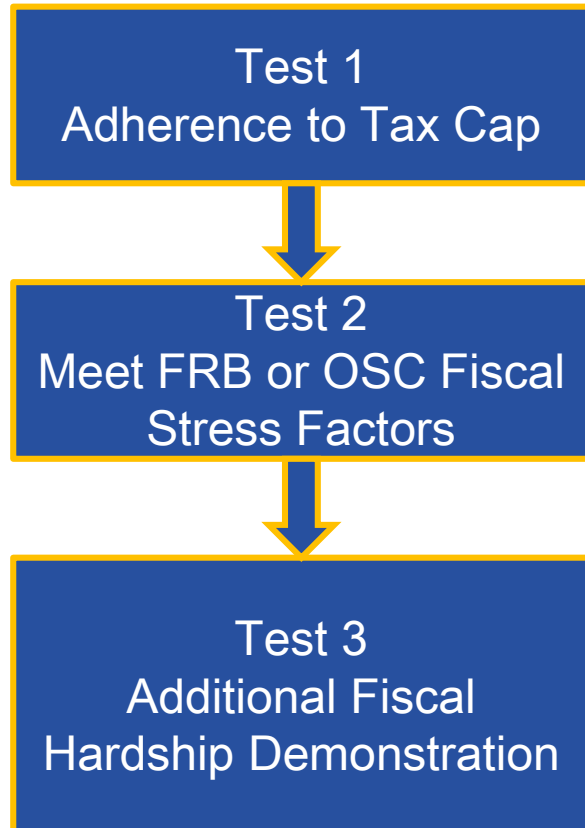


Local Costs

- State statute authorizes and the State Financial Plan assumes **100% State reimbursement** to eligible localities for *RTA*-related expenditures – this includes all incremental capital, personnel, and non-personnel costs counties/municipalities incur as a result of *RTA*
- The State will cover incremental costs, such as: law enforcement; local detention; court services; Sheriffs' transportation; probation services; youth placement; and aftercare services
- Counties that meet the following criteria are eligible for reimbursement:
 - **Remain under the tax cap** – counties that remain under the tax cap are NOT required to contribute a local share of expenditures for *RTA*-related costs
 - **Demonstrate financial hardship** – for those counties not subject to or that exceed the tax cap, the State is authorized to waive the local share for each that can demonstrate financial hardship



Local Costs



If the locality adheres to the tax cap, the State will reimburse the costs

If the locality is a Fiscally Eligible Municipality under the Financial Restructuring Board's (FRB) statutory criteria OR received a fiscal distress designation from the Office of the State Comptroller's (OSC) Fiscal Stress Monitoring System, the State will reimburse the costs

If the locality does not adhere to the tax cap or meet FRB or OSC fiscal stress factors, the Division of Budget will determine whether fiscal hardship is demonstrated, factors include: incremental cost of *RTA*; changes in state or federal aid payments; extraordinary costs, such as a disaster; infrastructure costs; growth in tax receipts; prepayment of expenses; fund balances, reserves, and surpluses; and control board oversight

Local Costs

- The State intends to maintain the current reimbursement process – where modifications are necessary, the State is dedicated to ensuring ease of execution
- Reimbursement will require cost tracking at the local level, but the State is committed to establishing a reimbursement process that is: timely; streamlined; user-friendly; simple to navigate; and easy to implement
- Information about the application process for state reimbursement will be available on the NYS Division of the Budget and *RTA* websites





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By: Zayra Rendon
2nd

Supreme Court Case

Standard

- **SSCG16** The student will demonstrate knowledge of the operation of the federal judiciary.



Court Case

- Miranda v. Arizona

Miranda v. Arizona



The Cause of the Case

- Ernesto Miranda lived in Arizona as a poor man in 1963. A woman accused him of committing a crime against her. Within two hours, he was arrested and questioned about the crime.



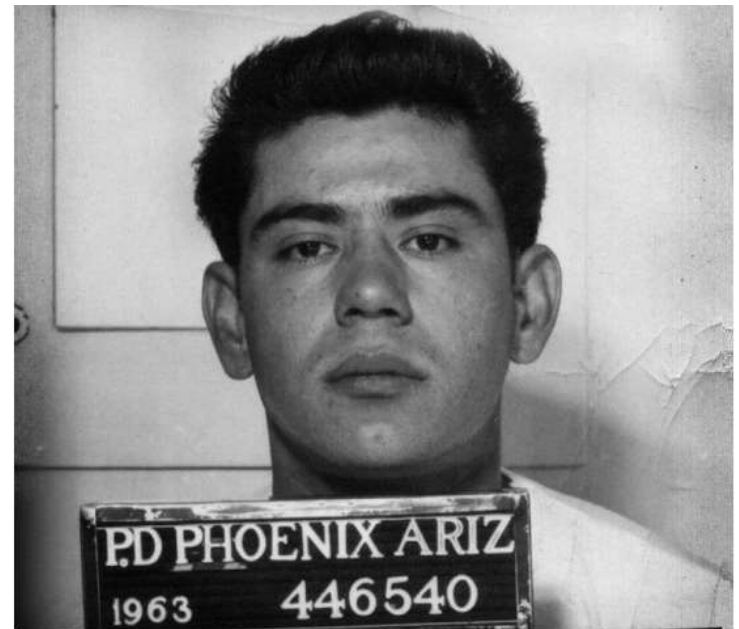
Amendments Violated

- In the United States, people accused of crimes have only certain rights granted from the constitution.
 - The 15th amendment states that we have the right to remain silent.
 - The 16th amendment states that we have the right to have a lawyer to defend ourselves.



Summary of the Case

- When Miranda was arrested, the police did not state that Miranda had those rights. After being questioned, Miranda signed a confession. The police used his confession against him during the trial and he was convicted of the crime.



Decision of the Case in the Lowest Court

- The judge decided to convict Miranda with 20 to 30 years in prison for each crime.



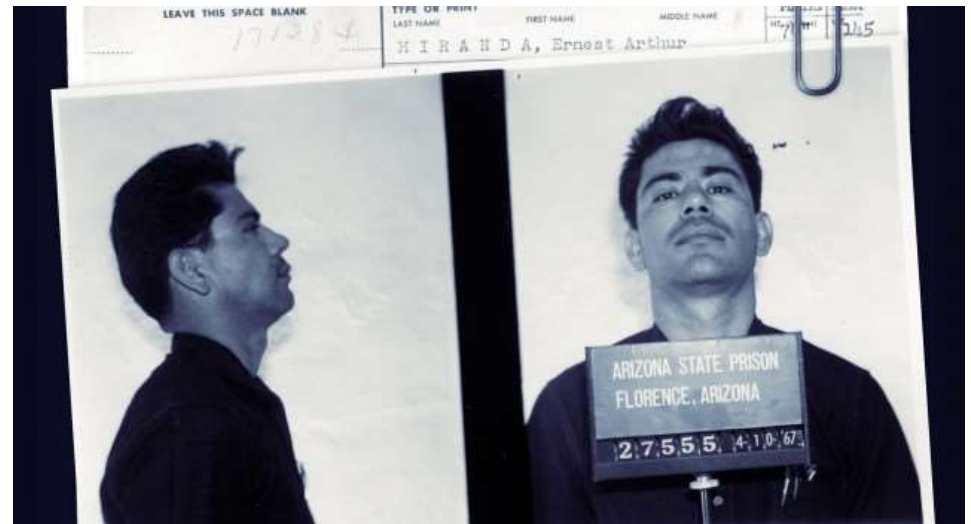
Supreme Court of Arizona

- Miranda decided to appeal his case to the Supreme Court in Arizona. His attorney stated that his confession shouldn't have been used against him because the police did not inform him of his rights, and he had no attorney present during questioning.



Decision of the Supreme Court of Arizona

- The government argued that since Miranda has been convicted to multiple crimes before, he should've know his rights to begin with. They denied his appeal and kept the charges on Miranda.



The Supreme Court of the United States.

- The Supreme Court agreed to hear Miranda's Case. They ruled, in a 5-4 decision, that the prosecution could not continue. They could not use Miranda's confession against him because the police failed to inform him about his rights.



The Supreme Court of the United States.

- Later on, Miranda was retried and convicted without the use of his confession.



Significance of the Case Cont.

- The “Miranda Rights” is still in forced. It has been upheld all these years and it’s still accepted as a valid precedent by appellate courts.



MIRANDA WARNING

- 1 You have the right to remain silent. 
- 2 Anything you say can and will be used against you in a court of law. 
- 3 You have the right to an attorney. 
- 4 If you cannot afford an attorney, one will be provided for you. 
- 5 Do you understand the rights I have just read to you?
With these rights in mind, do you wish to speak to me? 



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Research References, 1 Criminal Procedure in New York Ch. 4 Refs. (2d)

1 Criminal Procedure in New York Ch. 4 Refs. (2d)

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Part 1. Practice and Forms

Chapter 4. Arrest without a Warrant

Research References

West's Key Number Digest

- West's Key Number Digest, [Arrest](#) 63.4(.5)

Westlaw Databases

- [Constitutional Rights of the Accused \(CONRTACC\)](#)
- [Criminal Procedure \(CRIMPROC\)](#)
- [West's McKinney's Forms - Criminal Procedure Law \(MCF-CPL\)](#)

Treatises and Practice Aids

- [Cook, Constitutional Rights of the Accused §§ 3:33 to 3:39 \(3d ed.\)](#)
- [LaFave, Israel, and King, Criminal Procedure § 3.3](#)

Forms

- [West's McKinney's Forms Criminal Procedure Law § 140:1](#)

Research References, 1 Criminal Procedure in New York Ch. 4 Refs. (2d)

Law Reviews and Other Periodicals

- [Bascuas, The Unconstitutionality of “Hold Until Cleared”: Reexamining Material Witness Detentions in the Wake of the September 11th Dragnet, 58 Vand. L. Rev. 677 \(April, 2005\)](#)

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§ 4:1. Definition of arrest, 1 Criminal Procedure in New York § 4:1 (2d)

1 Criminal Procedure in New York § 4:1 (2d)

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§ 4:1. Definition of arrest

References

West's Key Number Digest

- West's Key Number Digest, [Arrest](#) 58

What constitutes an arrest? The statutes are silent as to a specific definition of arrest although [CPL 140.05](#) generally discusses the grounds where an officer or an individual may arrest a defendant without a warrant. It is not an arrest where a defendant is briefly handcuffed or put in a show-up for an individual to potentially identify the defendant as the perpetrator. (See [People v. Tucker](#), 223 A.D.2d 424, 636 N.Y.S.2d 759 (1st Dep't 1996)). According to the Court of Appeals in [People v. Chestnut](#), 51 N.Y.2d 14, 431 N.Y.S.2d 485, 409 N.E.2d 958 (1980), an arrest will determine whether the charge against an individual is of sufficient magnitude and the officers establish sufficient grounds that are a part of the original cause to substantiate the arrest.

Black's Law Dictionary defines "arrest" as the deprivation of a person's liberty by legal authority and the taking, under real or assumed authority, into custody of another for the purpose of holding or detaining the individual to answer a criminal charge or civil demand.¹ Any deprivation or restraint of a person's liberty constitutes an arrest. If a police officer interrupts an individual's freedom and restricts liberty of movement, there has been an arrest.² An arrest is the deprivation of a person's liberty by legal authority.³

An arrest may be manifested in several ways.⁴ It can be accomplished without touching, but there must be an intent on the part of the one to arrest and on the part of the other to submit to it.⁵ It is not always necessary that an accused be forcibly detained or imprisoned. For example, when a police officer orders one to stop, and the accused obeys that command, an arrest occurs.⁶ The real test of an arrest is the fact that the accused's liberty is restrained, regardless of how slight the degree.⁷ One is not arrested when approached by a police officer and merely questioned as to one's identity and actions; such activities amount to no more than accosting or an investigatory intrusion on the liberty of the individual.⁸ The issuance of a traffic summons is not an arrest.⁹

The brief detention and transportation of a burglary suspect to the nearby crime scene for further questioning by an investigator was not an arrest requiring probable cause where the rear door of the police car in which the defendant was seated was open

§ 4:1. Definition of arrest, 1 Criminal Procedure in New York § 4:1 (2d)

during the questioning; where the suspect was expressly told that he was not under arrest and was free to go; where the suspect was not handcuffed or otherwise restrained from leaving; and where other suspects, similarly informed of their status, actually left the scene on foot.¹⁰

The Criminal Procedure Law provides that a person who has committed or is believed to have committed an offense, and who is at liberty within the state, may be arrested for that offense although no arrest warrant has been issued, and although no criminal action has been commenced, provided the proper procedures are followed.¹¹ An arrest can be made although no accusatory instrument is in existence at the time it occurs.¹²

The statute also sets forth certain requirements that the officer making an arrest without a warrant must follow in order to make the arrest.¹³ The arresting officer must inform the person to be arrested of the officer's authority and purpose and the reason for the arrest.¹⁴ If the officer encounters physical resistance, flight, or other factors that would render this procedure impractical, the notification procedure does not have to be followed.¹⁵

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Footnotes

- 1 Black's Law Dictionary (5th ed).
 - 2 [People v. Fripp](#), 85 A.D.2d 547, 445 N.Y.S.2d 3 (1st Dep't 1981), order aff'd, 58 N.Y.2d 907, 460 N.Y.S.2d 505, 447 N.E.2d 53 (1983) (defendant grabbed and thrust against wall).
 - 3 [People v. Corley](#), 91 Misc. 2d 255, 397 N.Y.S.2d 875 (City Crim. Ct. 1977).
 - 4 [Terry v. Ohio](#), 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).
Defendant was subjected to a full-scale arrest when he was handcuffed at gunpoint to be transported to murder scene. [People v. Crosby](#), 91 A.D.2d 20, 457 N.Y.S.2d 831 (2d Dep't 1983).
 - 5 [Broughton v. State](#), 37 N.Y.2d 451, 373 N.Y.S.2d 87, 335 N.E.2d 310 (1975).
See [Blanchfield v. State](#), 104 Misc. 2d 21, 427 N.Y.S.2d 682 (Ct. Cl. 1980).
 - 6 [Dunaway v. New York](#), 442 U.S. 200, 99 S. Ct. 2248, 60 L. Ed. 2d 824 (1979).
But see [People v. Alba](#), 81 A.D.2d 345, 440 N.Y.S.2d 230 (1st Dep't 1981) (statement "all right then, you are under arrest" and detention of defendant in court clerk's office not arrest).
 - 7 [Terry v. Ohio](#), 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).
 - 8 [People v. Morales](#), 42 N.Y.2d 129, 397 N.Y.S.2d 587, 366 N.E.2d 248 (1977).
 - 9 [People v. McMillan](#), 112 Misc. 2d 901, 447 N.Y.S.2d 626 (County Ct. 1982).
 - 10 [People v. Gilbo](#), 214 A.D.2d 771, 624 N.Y.S.2d 659 (3d Dep't 1995).
 - 11 McKinney's CPL § 140.05.
See 34 NY Jur 2d, Crim L § 1995; 5 Am Jur 2d, Arrest §§ 22, 23.
 - 12 McKinney's CPL § 140.05.
[People v. Bock](#), 77 Misc. 2d 350, 353 N.Y.S.2d 647 (County Ct. 1974).
 - 13 McKinney's CPL § 140.15.
See 34 NY Jur 2d, Crim L §§ 2014, 2015, 2017; 5 Am Jur 2d, Arrest §§ 69 et seq.
- A.L.R. Library**
[Modern Status: right of peace officer to use deadly force in attempting to arrest fleeing felon](#), 83 A.L.R.3d 174.
- Treatises and Practice Aids**
[NY Pattern Jury Instructions](#), PJI 3:4, 3:5.

§ 4:1.Definition of arrest, 1 Criminal Procedure in New York § 4:1 (2d)

- 14 McKinney's CPL § 140.15(2).
 People v. Bertino, 93 A.D.2d 972, 461 N.Y.S.2d 613 (4th Dep't 1983) (defendant's testimony as
 establishing defendant informed of reason for arrest).
- 15 McKinney's CPL § 140.15(2).
-

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1 Criminal Procedure in New York § 4:2 (2d)

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Part 1. Practice and Forms

Chapter 4. Arrest without a Warrant

§ 4:2. Arrest by a police officer without a warrant

References

West's Key Number Digest

- West's Key Number Digest, [Arrest](#) 63.1

Article 140 of the Criminal Procedure Law sets forth the standard for arrest without a warrant. Under [CPL 140.10](#), the statute sets forth when and where a police officer is authorized to make an arrest without a warrant. Under [CPL 140.15](#), the statute sets forth when and how an arrest without a warrant can be made by a police officer. [CPL 140.20](#) sets forth procedure after a police officer effectuates an arrest without a warrant.

A police officer has the power to arrest an individual who has committed or is believed to have committed any offense and who is at liberty within the state under circumstances prescribed in the Criminal Procedure Law.¹

The police officer may arrest an individual for a crime when there is reasonable cause to believe that the person committed the crime whether or not it was committed in the police officer's presence.²

Without a warrant, a police officer may arrest for a petty offense only when that offense is committed in his or her presence.³ In addition to the requirement that the petty offense be committed in the officer's presence, the offense must also have been committed or believed by the police officer to have been committed within the geographical area of that police officer's employment; and the arrest must be made in the county in which the offense is committed or in an adjoining county, unless the police officer is in continuous close pursuit which commences either in the county in which the offense is committed, or in an adjoining county.⁴ The police officer may effect the arrest in any county of the state in which he or she apprehends the defendant.⁵

A police officer may arrest a person for a crime whether that crime is committed within the geographical area of the police officer's employment or not, and the arrest may be made anywhere within the state regardless of the situs of the commission

§ 4:2.Arrest by a police officer without a warrant, 1 Criminal Procedure in New York §...

of the crime.⁶ Further, the police officer may pursue a suspect beyond state boundaries and make an arrest in any state that has accepted the Uniform Close Pursuit Act.⁷

Pursuant to The Family Protection and Domestic Violence Intervention Act of 1994, police in New York are required to make mandatory arrests. A police officer must make an arrest if there is reasonable cause to believe that a person has committed a felony, with the exception of certain nonviolent felonies, against a member of the same family or household or when, in certain circumstances, the person has violated an order of protection.⁸ An arrest is also required for any family offense misdemeanor, unless the victim voluntarily and without any inquiry by the police officer initiates a request that the perpetrator not be arrested.⁹ In any event, the officer can neither inquire as to whether the victim seeks an arrest of such person, nor threaten the arrest of any person for the purpose of discouraging requests for police intervention.¹⁰ However, when an officer has reasonable cause to believe that more than one family or household member has committed a misdemeanor constituting a family offense, the officer is not required to arrest each such person but, instead, must attempt to identify and arrest the primary physical aggressor after considering: (1) the comparative extent of any injuries inflicted by and between the parties; (2) whether any such person is threatening or has threatened future harm against another party or another family or household member; (3) whether any such person has a prior history of domestic violence that the officer can reasonably ascertain; and (4) whether any such person acted defensively to protect himself or herself from injury.¹¹ The officer is required to evaluate each complaint separately to determine who is the primary physical aggressor and cannot base the decision to arrest or not to arrest on the willingness of a person to testify or otherwise participate in a judicial proceeding.¹²

While a search warrant sanctions the entrance by law enforcement officers upon private property to conduct a search within the confines of the warrant, it by no means lends judicial approval to the arrests of persons on the property.¹³

Police officers have the authority to arrest a defendant without a warrant and to search his or her apartment, where the arrest occurs in a public place such as when, for example, the person voluntarily enters the hallway.¹⁴ A defendant's attempt to evade the police by reopening his or her apartment door and trying to reenter the apartment does not afford the defendant additional constitutional protection against a warrantless arrest because he entered a private place.¹⁵ Where the deception is not so fundamentally unfair as to deny a person due process, an officer's use of a ruse to induce occupants to leave an apartment so as to allow for a warrantless arrest does not require the suppression of evidence obtained as a result of the arrest.¹⁶ Such was the case where officers knocked on an apartment door claiming that they were responding to a complaint of noise and requesting consent to enter. After being permitted to enter, the occupants were asked, not ordered, to leave the apartment. The officers did not have their guns drawn. The court concluded that this method to induce the defendant, an authorized resident, to consent to the officers' entry into the apartment and to induce the occupants to leave, for the purpose of effectuating the warrantless arrest of the defendant, was not so fundamentally unfair as to deny the defendant due process.¹⁷

In a 1980 case, the Court of Appeals ruled that merely because reckless driving is a misdemeanor rather than a traffic violation, an arrest, based on no more than what the police consider to be erratic driving, is neither called for nor the preferred procedure.¹⁸ In a 1994 case, the Appellate Division found that misdemeanor vehicle and traffic offenses, the use of an out-of-state driver's license, the prior revocation of a New York driver's license, and operating an uninsured motor vehicle justified a warrantless arrest.¹⁹ In 2001, the U.S. Supreme Court upheld as constitutional the arrest of a motorist who was arrested, handcuffed, and detained in jail for one hour for failing to wear her seat belt and failing to fasten her children in seat belts.²⁰ The Court held that for Fourth Amendment purposes, an officer who has probable cause to believe that an individual has committed even a very minor criminal offense in the officer's presence may, without violating the Fourth Amendment, arrest the offender.²¹

A police officer has the authority to make an arrest on a 24-hour basis for any offense, where there is reasonable cause to believe a person has committed an offense in the officer's presence.²² In addition, a police officer has the authority to arrest a person for any traffic infraction committed in the officer's presence even though courts have expressed a preference for the use of an appearance ticket in these situations.²³

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Footnotes

- 1 McKinney's CPL § 140.05.
See 34 NY Jur 2d, Crim L § 1995; 5 Am Jur 2d, Arrest §§ 22, 23.
- 2 McKinney's CPL § 140.10(1)(b).
People v. Kelland, 171 A.D.2d 885, 567 N.Y.S.2d 810 (2d Dep't 1991); People v. Jacobo, 154 Misc. 2d 540, 585 N.Y.S.2d 665 (Sup 1992).
Probable cause to arrest the accused for criminal possession of a weapon existed, where record checked by the state police disclosed no indication that the arrestee had sought to amend his license to authorize possession of a particular weapon, where witnesses stated to the police that the arrestee had pointed an unloaded pistol at others and where the arrestee possessed ammunition for the pistol. Kelly v. State, 105 A.D.2d 905, 482 N.Y.S.2d 70 (3d Dep't 1984).
See 33 NY Jur 2d, Crim L §§ 1228, 2013; 5 Am Jur 2d, Arrest §§ 24 et seq.
In one case, the police could not arrest a defendant based on their reasonable cause that the defendant was giving an obscene performance since judicial review is required prior to the arrest in order to determine whether or not defendant's conduct was obscene. People v. Adais, 114 Misc. 2d 773, 452 N.Y.S.2d 543 (City Crim. Ct. 1982).
Validity of arrest made in reliance upon uncorrected or outdated warrant list or similar police records, 45 A.L.R.4th 550.
Validity, in state criminal trial, of arrest without warrant by identified peace officer outside of jurisdiction, when not in fresh pursuit, 34 A.L.R.4th 328.
Lack of probable cause for Warrantless Arrest, 44 Am Jur Proof of Facts 2d 229; New York Pattern Jury Instructions, PJI 3:5.
- 3 McKinney's CPL § 140.10(1)(a).
- 4 McKinney's CPL § 140.10(2)(b).
- 5 McKinney's CPL § 140.10(2)(b).
- 6 McKinney's CPL § 140.10(3).
- 7 McKinney's CPL § 140.55.
The deputy sheriff improperly arrested the defendant following the pursuit of the defendant into Connecticut because the deputy did not have probable cause to believe a crime had been committed where the defendant's actions in driving to the left of the pavement markings only constituted a traffic infraction. People v. Lane, 144 Misc. 2d 953, 550 N.Y.S.2d 529 (App. Term 1989).
See 34 NY Jur 2d, Crim L §§ 2013, 2025, 2026; 5 Am Jur 2d, Arrest § 51.
A.L.R. Library
Validity, in state criminal trial, of arrest without warrant by identified peace officer outside of jurisdiction, when not in fresh pursuit, 34 A.L.R.4th 328.
- 8 McKinney's CPL § 140.10(4).
- 9 McKinney's CPL § 140.10(4).
- 10 McKinney's CPL § 140.10(4)(c).
- 11 McKinney's CPL § 140.10(4)(c).
- 12 McKinney's CPL § 140.10(4)(c).
- 13 Barr v. Albany County, 50 N.Y.2d 247, 428 N.Y.S.2d 665, 406 N.E.2d 481 (1980).
- 14 People v. Johnson, 114 Misc. 2d 578, 452 N.Y.S.2d 484 (Sup 1982), judgment aff'd, 126 A.D.2d 993, 510 N.Y.S.2d 994 (1st Dep't 1987).

§ 4:2.Arrest by a police officer without a warrant, 1 Criminal Procedure in New York §...

- 15 [People v. Jacobo](#), 208 A.D.2d 432, 617 N.Y.S.2d 457 (1st Dep't 1994) (where peace officer grabbed defendant in hallway in front of defendant's apartment and in ensuing struggle defendant dragged officer into his apartment, this did not afford added constitutional protection against warrantless arrest).
- 16 [People v. Robinson](#), 8 A.D.3d 131, 779 N.Y.S.2d 40 (1st Dep't 2004), leave to appeal denied, 3 N.Y.3d 680, 784 N.Y.S.2d 19, 817 N.E.2d 837 (2004).
- 17 [People v. Robinson](#), 8 A.D.3d 131, 779 N.Y.S.2d 40 (1st Dep't 2004), leave to appeal denied, 3 N.Y.3d 680, 784 N.Y.S.2d 19, 817 N.E.2d 837 (2004).
- 18 [People v. Howell](#), 49 N.Y.2d 778, 426 N.Y.S.2d 477, 403 N.E.2d 182 (1980).
- 19 [People v. Shambo](#), 208 A.D.2d 1161, 617 N.Y.S.2d 953 (3d Dep't 1994).
- 20 [Atwater v. City of Lago Vista](#), 532 U.S. 318, 121 S. Ct. 1536, 149 L. Ed. 2d 549 (2001).
- 21 [Atwater v. City of Lago Vista](#), 532 U.S. 318, 121 S. Ct. 1536, 149 L. Ed. 2d 549 (2001).
- 22 [McKinney's CPL § 140.10\(1\)](#).
[People v. Neuschatz](#), 88 Misc. 2d 433, 389 N.Y.S.2d 507 (App. Term 1975), order aff'd, 40 N.Y.2d 935, 390 N.Y.S.2d 61, 358 N.E.2d 885 (1976).
See [Washington v. New York City Housing Authority](#), 31 A.D.2d 700, 295 N.Y.S.2d 845 (3d Dep't 1968), order aff'd, 24 N.Y.2d 912, 301 N.Y.S.2d 642, 249 N.E.2d 481 (1969).
In warrantless arrest situations, undue delay in arraigning the suspect could vitiate the existence of probable cause. [Kelly v. State](#), 105 A.D.2d 905, 482 N.Y.S.2d 70 (3d Dep't 1984).
- 23 [McKinney's CPL § 140.10\(1\)\(a\)](#); [McKinney's VTL § 155](#).
[People v. Abrams](#), 119 A.D.2d 682, 501 N.Y.S.2d 110 (2d Dep't 1986) (arrest for driving without license proper).
[People v. Cortes](#), 86 Misc. 2d 155, 382 N.Y.S.2d 445 (Sup 1976).
See [People v. Copeland](#), 82 Misc. 2d 12, 370 N.Y.S.2d 775 (App. Term 1975), order aff'd, 39 N.Y.2d 986, 387 N.Y.S.2d 234, 355 N.E.2d 288 (1976).

1 Criminal Procedure in New York § 4:3 (2d)

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§ 4:3. Arrest by police officer without warrant— Procedure to effect arrest

References

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- West's Key Number Digest, [Arrest](#) 63.1

An arresting officer is required to inform the defendant of the officer's authority to make an arrest and the reason for such arrest on a warrant under CPL 140.15 (2). (See *People v. Seymour*, 14 A.D.3d 799, 788 N.Y.S.2d 260 (3d Dep't 2005), leave to appeal denied, 4 N.Y.3d 856, 797 N.Y.S.2d 430, 830 N.E.2d 329 (2005)).

There is no limitation imposed on a police officer in making an arrest. The officer may arrest a person for an offense at any hour of the day or night.¹ The arresting officer must inform the person of the authority, purpose, and reason for the arrest unless the police officer encounters physical resistance, flight, or other factors rendering the procedure impracticable.²

A police officer may use such physical force as is justifiable under the Penal Law³ in order to make the arrest.⁴ The operative section in the Penal Law provides that the police officer may use ordinary physical force other than deadly physical force as he or she reasonably believes necessary to consummate an arrest or to defend himself or herself or a third party during the arrest procedure.⁵ The police officer is authorized to use deadly physical force in effecting the arrest whenever he or she has reason to believe that it is necessary to defend himself or herself or another person from what the officer reasonably believes to be the use of or imminent use of deadly force by the person to be arrested.⁶ Deadly physical force may be used when the offense committed by the person was a felony or an attempt to commit a felony involving the use, attempted use, or threatened use of physical force against a person.⁷ The statute also provides that deadly force may be used in apprehending a felon if the officer has reasonable cause to believe that the person sought has committed kidnapping, arson, first-degree escape or first-degree burglary, or any attempt to commit such a crime.⁸ Deadly force is authorized where the officer reasonably believes that the offense committed or attempted was a felony and that in the course of resisting arrest or attempting to escape from custody, the person is armed with a firearm or deadly weapon.⁹ Regardless of the offense that is the subject of the arrest or attempted

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escape, it is enough that the officer reasonably believes that the use of deadly physical force is necessary to defend the officer or another person from what the officer reasonably believes to be the use or imminent use of deadly physical force.¹⁰

The statute authorizes a police officer to enter premises in the same manner as would be permissible if there is a warrant of arrest, provided that the officer reasonably believes the person to be present.¹¹ However, the officer must proceed in the manner specified pursuant to the provisions of the Criminal Procedure Law governing search warrants,¹² where the premises in which the officer reasonably believes the defendant to be present is the dwelling of a third party who is not the subject of the arrest warrant.¹³ Thus, the police officer is authorized to enter the premises without a warrant in order to arrest the defendant, where there is reason to believe the defendant is present there, by first making a reasonable effort to give notice of his or her authority and purpose to the occupant, unless there is reasonable cause to believe that giving notice will result in the defendant's escaping or endangering the life or safety of an officer or another person, or result in the destruction, damaging, or secretion of material evidence.¹⁴ If, after giving notice, the officer is not admitted or is authorized to enter without the giving of notice, the officer may enter the premises by breaking in, if necessary.¹⁵ Exigent circumstances allowing elimination of the notice requirement are present when police officers have reasonable cause to believe that the giving of notice of purpose would endanger their or other persons' lives or safety, where a defendant has discharged a weapon in the same room, and 18 hours earlier an arsenal of handguns and a number of people have been in the room.¹⁶

The provision in the Criminal Procedure Law authorizing an officer who is not armed with an arrest warrant to break into the defendant's home in order to make the arrest has come under fire in the United States Supreme Court.¹⁷ The Supreme Court previously held that an officer cannot enter a dwelling in order to make an arrest without a warrant unless there are exigent circumstances.¹⁸ Several years after its holding in that case that the federal law of plain view requires that the officer come across the piece of evidence inadvertently, the Supreme Court reversed its position with respect to the plain view doctrine in *Horton v. California*,¹⁹ holding that the Fourth Amendment does not prohibit the warrantless seizure of evidence of a crime in plain view, even if the discovery of the evidence was not inadvertent.

In a 1978 case, the New York State Court of Appeals, relying on the statutory authority of the former Code of Criminal Procedure, held that even without the exigent circumstances and without a warrant, the officer's entry into the apartment of a defendant in order to effect the arrest is lawful.²⁰ The U.S. Supreme Court reversed, holding that the former New York Code of Criminal Procedure, that permitted a warrantless arrest in a private residence using force if necessary, violated the Fourteenth Amendment privilege against warrantless and nonconsensual searches and seizures.²¹

In any event, New York courts have held that the Fourth Amendment prohibits warrantless arrests in the home absent both probable cause and exigent circumstances.²² Thus, the gunpoint seizure of a defendant in his or her doorway when he or she goes to the door constitutes a warrantless invasion of the privacy of the home, not a warrantless arrest in a public place.²³ However, entering the apartment of a defendant without a warrant but without using force and with the permission of a defendant's relative is permitted.²⁴

The court has enumerated six factors to consider when determining whether circumstances justify the intrusion of the police into a suspect's home in order to effectuate a warrantless arrest: (1) the gravity or violent nature of the offense with which the suspect is to be charged; (2) whether the suspect is reasonably believed to be armed; (3) the existence of probable cause to believe the suspect committed the crime; (4) a strong reason to believe that the suspect is in the premises to be entered; (5) a likelihood that the suspect will escape if not swiftly apprehended; and (6) the peaceful circumstances of the entry.²⁵ An arrest occurring outside the defendant's home raises no issue concerning a warrantless entry into the home to make an arrest.²⁶

A warrant is not required to arrest a suspect in a public place where there is probable cause to believe that he or she has committed a crime, and a suspect cannot defeat an arrest that has been set in motion in a public place by the expedient of escaping to a private place.²⁷ Accordingly, the constitutional guarantees against unreasonable search and seizure were not violated by the police officers' forcible entry into the defendant's apartment to effect a warrantless arrest that had been initiated on the street

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outside the apartment building, notwithstanding the two-hour delay between the time the suspect entered his home and the time the police made entry where the officers' concern that "things could happen" or that the defendant could harm himself did not abate during that period given the suspect's unresponsiveness to entreaties of both his wife and the police, and where the robbery for which the defendant was sought qualified as a grave offense for purposes of determining whether the circumstances justified the intrusion of the police into the defendant's apartment to effectuate the arrest.²⁸ The court noted that while the impending destruction of evidence may have justified the breaking down of the door to the apartment, that was not one of the factors to be taken into account in evaluating the warrantless arrest in the defendant's home.²⁹

Where the premises on which a defendant is arrested are not actually his or her home, the police will not be allowed to enter to make an arrest without some authority for their entry.³⁰ Where there is probable cause to believe that a kidnapped child is in a building, the kidnapped child has standing to, and impliedly does, give permission to the police to enter.³¹

The making of an arrest heightens the affirmative duty of the police to protect the welfare of bystanders, to safeguard against interference by third parties, intentional or innocent, and to insure personal safety.³² Because street encounters between the police and private citizens are so varied in their permutations, reasonable police action, of necessity, is based upon an on-the-spot evaluation of the exigencies and interests presented by the facts in each particular case.³³

The police have authority under the Criminal Procedure Law to enter private premises to make a warrantless arrest, if the arresting officer reasonably believes the suspect is present.³⁴ Furthermore, the entry by police into private premise by trick, ruse, or deception to execute a warrantless arrest does not constitute an illegitimate breaking in violation of the provisions of the Criminal Procedure Law or the Fourth Amendment of the United States Constitution.³⁵

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Footnotes

- 1 [McKinney's CPL § 140.15\(1\)](#).
[See 34 NY Jur 2d, Crim L §§ 2014, 2015, 2017; 5 Am Jur 2d, Arrest §§ 69 et seq.](#)
A.L.R. Library
[Modern Status: right of peace officer to use deadly force in attempting to arrest fleeing felon, 83 A.L.R.3d 174.](#)
Treatises and Practice Aids
[NY Pattern Jury Instructions, PJI 3:4, 3:5.](#)
- 2 [McKinney's CPL § 140.15\(2\)](#).
- 3 [Penal Law § 35.30](#).
- 4 [McKinney's CPL § 140.15\(3\)](#).
[People v. Urowsky, 89 A.D.2d 520, 452 N.Y.S.2d 208 \(1st Dep't 1982\) \(use of excessive force to effectuate arrest not justified\).](#)
- 5 [McKinney's Penal Law § 35.30\(1\)](#).
- 6 [McKinney's Penal Law § 35.30\(1\)\(c\)](#).
- 7 [McKinney's Penal Law § 35.30\(1\)\(a\)\(i\)](#).
- 8 [McKinney's Penal Law § 35.30\(1\)\(a\)\(ii\)](#).
- 9 [McKinney's Penal Law § 35.30\(1\)\(b\)](#).
- 10 [McKinney's Penal Law § 35.30\(1\)\(c\)](#).

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- 11 McKinney's CPL § 140.15.
People v. Miller, 109 Misc. 2d 276, 439 N.Y.S.2d 983 (City Crim. Ct. 1981).
- 12 McKinney's CPL art 690.
- 13 McKinney's CPL § 120.80(4).
See 34 NY Jur 2d, Crim L §§ 1991 to 1993.
- A.L.R. Library**
Issuance or service of state-court arrest warrant, summons, citation, or other process as tolling criminal statute of limitations, 71 A.L.R.4th 554.
Modern Status: right of peace officer to use deadly force in attempting to arrest fleeing felon, 83 A.L.R.3d 174.
- Treatises and Practice Aids**
Police Officer's use of excessive force in making arrest, 9 Am Jur Proof of Facts 2d 363; NY Pattern Jury Instructions, PJI 3:4, 3:5.
- 14 McKinney's CPL § 120.80(4)(a), (b), (c).
- 15 McKinney's CPL § 120.80(5).
- 16 People v. Coles, 104 Misc. 2d 333, 428 N.Y.S.2d 412 (Sup 1980).
Exigent circumstances were not present when police made warrantless arrest of defendant and another person in a motel, as it was a routine felony arrest and violated defendant's Fourth Amendment rights. People v. Graham, 90 A.D.2d 198, 457 N.Y.S.2d 962 (3d Dep't 1982).
- 17 McKinney's CPL § 120.80(4).
See Payton v. New York, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980).
There was no Payton violation where the defendant voluntarily came to his front door after he was informed that police had come to arrest him, arrest was made in the defendant's front door, and the defendant consented to the officers' entering his home while he dressed. People v. Schiavo, 212 A.D.2d 816, 623 N.Y.S.2d 273 (2d Dep't 1995).
- 18 Coolidge v. New Hampshire, 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971).
- 19 Horton v. California, 496 U.S. 128, 110 S. Ct. 2301, 110 L. Ed. 2d 112 (1990).
- 20 Former Code of Criminal Procedure § 117.
People v. Payton, 45 N.Y.2d 300, 408 N.Y.S.2d 395, 380 N.E.2d 224 (1978), judgment rev'd on other grounds, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980).
- 21 Former Code of Criminal Procedure § 117(3).
Payton v. New York, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980); People v. Anthony, 93 A.D.2d 892, 461 N.Y.S.2d 399 (2d Dep't 1983); People v. Daly, 180 A.D.2d 872, 579 N.Y.S.2d 491 (3d Dep't 1992) (tenant of record voluntarily consenting to police entry into apartment).
The defendant's constitutional rights were not violated when he was arrested by the police at his home since the defendant's wife consented to police entry into the home. People v. Harper, 119 A.D.2d 587, 500 N.Y.S.2d 757 (2d Dep't 1986).
The defendant's warrantless arrest in his apartment violated the rule established in Payton v. New York and rendered the seizure of the clothes from his apartment, as well as the knife found in the backyard as a result of the defendant's throwing it out his bedroom window, illegal. People v. Bernal, 92 A.D.2d 489, 459 N.Y.S.2d 83 (1st Dep't 1983).
- 22 People v. Cavanaugh, 264 A.D.2d 903, 695 N.Y.S.2d 625 (3d Dep't 1999) (warrantless arrest constitutional where neighbor reported his vehicle being struck by defendant's vehicle and that defendant appeared intoxicated. One officer had previously arrested defendant for DWI. He did not respond to repeated knocks on door, and when police entered, he appeared intoxicated).
- 23 People v. Long, 290 A.D.2d 332, 737 N.Y.S.2d 65 (1st Dep't 2002); People v. Beckford, 102 Misc. 2d 963, 427 N.Y.S.2d 908 (Sup 1980).
- 24 People v. Van Brunt, 104 Misc. 2d 97, 427 N.Y.S.2d 712 (Dist. Ct. 1980) (mother gave permission).
Where the police knew that the defendant's stepfather was the owner of the residence, but also knew that the defendant was 38 years old, that the door to the defendant's bedroom was closed, and the stepfather did not open the bedroom door for the police, but stood aside as the police opened the door and entered the room, the police were not justified in relying on the stepfather's authority to consent to the entry

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- without some inquiry into the stepfather's access to the room. *People v. Russo*, 201 A.D.2d 940, 607 N.Y.S.2d 520 (4th Dep't 1994).
- 25 *People v. Glia*, 226 A.D.2d 66, 651 N.Y.S.2d 967 (1st Dep't 1996) (citing *People v. Cruz*, 149 A.D.2d 151, 545 N.Y.S.2d 561 (1st Dep't 1989)).
- 26 *People v. Roe*, 73 N.Y.2d 1004, 541 N.Y.S.2d 759, 539 N.E.2d 587 (1989).
- 27 *People v. Glia*, 226 A.D.2d 66, 651 N.Y.S.2d 967 (1st Dep't 1996).
- 28 *People v. Glia*, 226 A.D.2d 66, 651 N.Y.S.2d 967 (1st Dep't 1996).
- 29 *People v. Glia*, 226 A.D.2d 66, 651 N.Y.S.2d 967 (1st Dep't 1996).
- 30 *People v. Jones*, 108 Misc. 2d 574, 438 N.Y.S.2d 75 (City Ct. 1981).
- 31 *People v. Rios*, 105 Misc. 2d 303, 432 N.Y.S.2d 63 (County Ct. 1980).
- 32 *People v. Natoli*, 103 Misc. 2d 557, 426 N.Y.S.2d 681 (City Crim. Ct. 1980), judgment aff'd, 109 Misc. 2d 49, 442 N.Y.S.2d 681 (App. Term 1981).
- 33 *People v. Natoli*, 103 Misc. 2d 557, 426 N.Y.S.2d 681 (City Crim. Ct. 1980), judgment aff'd, 109 Misc. 2d 49, 442 N.Y.S.2d 681 (App. Term 1981).
- 34 McKinney's CPL § 140.15(4).
- People v. Santiago*, 86 Misc. 2d 785, 384 N.Y.S.2d 361 (Sup 1976).
- 35 McKinney's CPL §§ 140.15(4), 120.80(4), (5).
- People v. Santiago*, 86 Misc. 2d 785, 384 N.Y.S.2d 361 (Sup 1976).

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§ 4:4.Reasonable cause, 1 Criminal Procedure in New York § 4:4 (2d)

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- West's Key Number Digest, [Arrest](#) 63.4(.5)

CPL 70(2) defines reasonable cause. As the Court of Appeals reiterated recently in [People v. Van Buren](#), 4 N.Y.3d 640, 797 N.Y.S.2d 802, 830 N.E.2d 1130, 35 Env'tl. L. Rep. 20098 (2005), an arrest by a police officer may occur when reasonable cause exists to believe that such person committed the offense in terms of any offense in the officer's presence.

A police officer may make a warrantless arrest for any offense that the officer has reasonable cause to believe occurred in the officer's presence, and for any crime that a police officer has reasonable cause to believe the person he or she is arresting committed, whether in the officer's presence or otherwise.¹ In dealing with the standard for reasonable suspicion, certainty is not required.² Reasonable suspicion has been defined as the quantum of knowledge sufficient to induce an ordinarily prudent and cautious person under the circumstances to believe criminal activity is afoot.³ As used in the statute, reasonable cause is the equivalent of probable cause; that is, it is information that would lead a reasonable person who possessed the same expertise as the officer to conclude under the circumstances that a crime is being or was committed.⁴ The term "reasonable cause to believe" is not necessarily applied in all situations since the police officer is authorized to make an arrest just as any citizen who is not a police officer may make an arrest pursuant to the Criminal Procedure Law.⁵ Any person, including a police officer, may make a warrantless arrest of a person for a felony when the person arrested has, in fact, committed that felony, and for any lesser offense when the person arrested has, in fact, committed the lesser offense in the presence of the arresting individual.⁶

If the arrest is for a felony, it may be made anywhere within the state; but if it is for an offense other than a felony, it must be made in the county in which the offense is committed.⁷

Where a police officer has arrested an individual, and that individual is subsequently convicted of the offense for which he or she was arrested, the arrest should be proper pursuant to the authority to arrest by any person.⁸ Every citizen has a right to make an arrest in the enforcement of traffic laws and regulations.⁹ A federal court ruled that under New York law, private citizens

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who make arrests do so at their own peril.¹⁰ If the person arrested did not, in fact, commit the crime, the person making the arrest is liable, even if the person acts in good faith, or has probable cause to make the arrest.¹¹

The authority to arrest based on reasonable cause that is given only to a police officer provides validation of an arrest even where it cannot be ultimately shown that the defendant committed the crime, if it can be shown that the officer had reasonable cause to believe that the defendant committed that crime.¹² A federal court decision stated that an officer may make an arrest when he or she has knowledge of facts and circumstances sufficient to warrant a prudent person in believing that an offense is being or has been committed.¹³ It does not matter whether the arrest is ultimately found justified, because the police do not need to conduct a trial before making an arrest¹⁴ or assemble evidence sufficient to establish guilt.¹⁵ Furthermore, reasonable cause means reasonably trustworthy information as would warrant someone of reasonable caution to believe that a person arrested is guilty of committing a crime.¹⁶

The requirement that an officer have reasonable cause for a warrantless arrest represents a compromise, with its roots deep in the common law, between the individual's interest in personal liberty and society's competing interest in its own protection through the apprehension of criminals.¹⁷ A warrantless arrest by a police officer is justified where there is reasonable cause to believe a felony has been committed, irrespective of the innocence of the person arrested.¹⁸ Reasonable cause to arrest an individual will vary according to the circumstances and exigencies of each particular case.¹⁹ As a consequence, a tight, inclusive definition is neither necessary nor desirable.²⁰ However, good faith alone is not enough to justify a warrantless arrest.²¹

In [People v. Jones](#), 148 A.D.3d 1666, 50 N.Y.S.3d 647 (4th Dep't 2017), the Appellate Division, Fourth Dept., held that contrary to defendant's contention, the People established that there was reasonable suspicion to believe that defendant "was involved in a felony or misdemeanor," thus justifying his forcible stop and detention. A police officer who had been called to the scene in the early morning hours heard numerous gunshots and saw a cloud of smoke coming from the area of those gunshots, i.e., an area between two vehicles. Immediately thereafter, the officer observed defendant and another man "pop up" from behind one of the vehicles. Inasmuch as defendant's temporal and spatial proximity to the area from where the shots were fired "made it highly unlikely that the suspect had departed and that, almost at the same moment, an innocent person ... coincidentally arrived on the scene", therefore, the court concluded that the officer had the requisite reasonable suspicion to stop and detain defendant.

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Footnotes

- 1 [McKinney's CPL § 140.10\(1\)\(a\), \(b\)](#).
[People v. Lee](#), 116 A.D.2d 740, 498 N.Y.S.2d 36 (2d Dep't 1986).
The defendant could not be arrested for giving an obscene performance based on a police officer's reasonable cause that he committed the crime since judicial review was a prerequisite in order to determine whether or not defendant's performance was obscene, and the police could not act as censors in violation of defendant's constitutional rights. [People v. Adais](#), 114 Misc. 2d 773, 452 N.Y.S.2d 543 (City Crim. Ct. 1982).
See 33 NY Jur 2d, Crim L §§ 1228, 2013; 5 Am Jur 2d, Arrest §§ 24 et seq.
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[Validity of arrest made in reliance upon uncorrected or outdated warrant list or similar police records](#), 45 A.L.R.4th 550.
[Validity, in state criminal trial, of arrest without warrant by identified peace officer outside of jurisdiction, when not in fresh pursuit](#), 34 ALR 4th 328.

§ 4:4.Reasonable cause, 1 Criminal Procedure in New York § 4:4 (2d)

Treatises and Practice Aids

Lack of probable cause for warrantless arrest, 44 Am Jur Proof of Facts 2d 229; NY Pattern Jury Instructions, PJI 3:5.

2 People v. Finlayson, 76 A.D.2d 670, 431 N.Y.S.2d 839 (2d Dep't 1980).

The police had reasonable suspicion to arrest the defendant for the unlawful possession of a weapon despite the discrepancy in the description provided to the police over the radio transmission since there was an unusual identifying element that the defendant was carrying a white shirt in his hand along with the geographical proximity where the defendant had been seen. People v. Fernandez, 58 N.Y.2d 791, 459 N.Y.S.2d 256, 445 N.E.2d 639 (1983).

3 People v. Dominquez, 84 A.D.2d 820, 444 N.Y.S.2d 120 (2d Dep't 1981).

4 People v. Bothwell, 261 A.D.2d 232, 690 N.Y.S.2d 231 (1st Dep't 1999) (warrantless arrest proper where officer, trained and on specific assignment to police quality of life offenses, observed defendant in public place holding partially concealed open bottle resembling beer bottle in manner suggesting bottle not empty).

5 McKinney's CPL § 140.30.

See 13 NY Jur 2d, Bus & Occ § 290; 34 NY Jur 2d, Crim L § 2027; 48 NY Jur 2d, Dom Rel § 1627; 5 Am Jur 2d, Arrest §§ 34 to 36.

Treatises and Practice Aids

Lack of probable cause for warrantless arrest, 44 Am Jur Proof of Facts 2d 229; NY Pattern Jury Instructions, PJI 3:5.

6 McKinney's CPL § 140.30(1).

7 McKinney's CPL § 140.30(2).

8 McKinney's CPL § 140.30(1).

9 McKinney's CPL § 140.30.

People v. Karp, 80 Misc. 2d 965, 365 N.Y.S.2d 414 (City Crim. Ct. 1975).

See Squadrito v. Griebisch, 1 N.Y.2d 471, 154 N.Y.S.2d 37, 136 N.E.2d 504 (1956); Sutton v. Evans, 4 A.D.2d 580, 168 N.Y.S.2d 112 (1st Dep't 1957).

10 Scanlon v. Flynn, 465 F. Supp. 32 (S.D. N.Y. 1978).

11 McKinney's CPL § 140.30.

Scanlon v. Flynn, 465 F. Supp. 32 (S.D. N.Y. 1978).

12 McKinney's CPL § 140.10(1).

People v. Harrison, 57 N.Y.2d 470, 457 N.Y.S.2d 199, 443 N.E.2d 447 (1982) (defendant's use of dirty rental car not sufficient to establish reasonable suspicion); People v. Herskowitz, 80 Misc. 2d 693, 364 N.Y.S.2d 350 (County Ct. 1975), order aff'd, 51 A.D.2d 1047, 382 N.Y.S.2d 293 (2d Dep't 1976), order aff'd, 41 N.Y.2d 1094, 396 N.Y.S.2d 356, 364 N.E.2d 1127 (1977).

13 U.S. v. Barnes, 443 F. Supp. 137, 2 Fed. R. Evid. Serv. 779 (S.D. N.Y. 1977).

See Beck v. State of Ohio, 379 U.S. 89, 85 S. Ct. 223, 13 L. Ed. 2d 142 (1964); Carroll v. U.S., 267 U.S. 132, 45 S. Ct. 280, 69 L. Ed. 543, 39 A.L.R. 790 (1925); U.S. v. Edmonds, 535 F.2d 714 (2d Cir. 1976).

14 U.S. v. Barnes, 443 F. Supp. 137, 2 Fed. R. Evid. Serv. 779 (S.D. N.Y. 1977).

See Morrison v. U.S., 491 F.2d 344 (8th Cir. 1974); Lathers v. U.S., 396 F.2d 524 (5th Cir. 1968) (overruled on other grounds by, U.S. v. Contreras, 667 F.2d 976 (11th Cir. 1982)) with respect to holding in Lathers that Miranda warning needed to explicitly convey to accused the right to counsel "here and now" as stated in U.S. Supreme Court case of California v. Prysock, which held that a Miranda warning is adequate if it fully informs accused of right to consult with attorney prior to questioning and does not condition right to appointed counsel on some future event, but Miranda warning need not explicitly convey to accused the right to counsel "here and now").

15 U.S. v. Barnes, 443 F. Supp. 137, 2 Fed. R. Evid. Serv. 779 (S.D. N.Y. 1977).

See Henry v. U.S., 361 U.S. 98, 80 S. Ct. 168, 4 L. Ed. 2d 134 (1959); U.S. v. Chaplin, 427 F.2d 14 (2d Cir. 1970).

16 People v. Blackman, 81 Misc. 2d 12, 364 N.Y.S.2d 704 (Sup 1975).

See People v. Lombardi, 18 A.D.2d 177, 239 N.Y.S.2d 161 (2d Dep't 1963), order aff'd, 13 N.Y.2d 1014, 245 N.Y.S.2d 595, 195 N.E.2d 306 (1963).

§ 4:4.Reasonable cause, 1 Criminal Procedure in New York § 4:4 (2d)

- 17 Smith v. Nassau County, 34 N.Y.2d 18, 355 N.Y.S.2d 349, 311 N.E.2d 489 (1974).
18 Smith v. Nassau County, 34 N.Y.2d 18, 355 N.Y.S.2d 349, 311 N.E.2d 489 (1974).
19 Smith v. Nassau County, 34 N.Y.2d 18, 355 N.Y.S.2d 349, 311 N.E.2d 489 (1974).
20 Smith v. Nassau County, 34 N.Y.2d 18, 355 N.Y.S.2d 349, 311 N.E.2d 489 (1974).
See People v. Coffey, 12 N.Y.2d 443, 240 N.Y.S.2d 721, 191 N.E.2d 263 (1963).
21 Smith v. Nassau County, 34 N.Y.2d 18, 355 N.Y.S.2d 349, 311 N.E.2d 489 (1974).
See McLoughlin v. New York Edison Co., 252 N.Y. 202, 169 N.E. 277 (1929); Snead v. Bonnoil, 166
N.Y. 325, 59 N.E. 899 (1901).

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1 Criminal Procedure in New York § 4:5 (2d)

Criminal Procedure in New York | September 2019 Update
Hon. Robert G. Bogle

Part 1. Practice and Forms

Chapter 4. Arrest without a Warrant

§ 4:5. Probable cause

References

West's Key Number Digest

- West's Key Number Digest, [Arrest](#) 63.4(.5)

Probable cause required for arrest does not require proof beyond a reasonable doubt. (See [People v. Ginyard](#), 16 A.D.3d 239, 791 N.Y.S.2d 114 (1st Dep't 2005), leave to appeal denied, 5 N.Y.3d 789, 801 N.Y.S.2d 809, 835 N.E.2d 669 (2005)).

When a police officer acts without an arrest warrant, the Supreme Court has held that there must be probable cause for the arrest in order to meet the standards of the Fourth Amendment.¹ The probable cause standard has been held to apply when a suspect has not been formally arrested but is in police custody for investigation purposes.² The U.S. Supreme Court has found that the involuntary transport of an individual to the police station for questioning, without probable cause or judicial authorization, is sufficiently like an arrest to invoke the traditional rule that arrests may constitutionally be made only on probable cause.³ In New York, the test for whether the defendant is “in custody” is whether a reasonable person, who is innocent of any crime, would believe himself or herself to be in custody.⁴

Probable cause exists where the facts and circumstances which are within the arresting officer's knowledge and of which he or she has reasonably trustworthy information are sufficient, in themselves, to warrant a person of reasonable caution to accept the belief that an offense has been or is being committed.⁵ The evidence need not rise to the level sufficient to support a conviction,⁶ or even sufficient to establish a prima facie case.⁷ Rather, probable cause requires a sufficiently specific and detailed description and circumstances that would cause a police officer to reasonably conclude that the defendant was the perpetrator of the crime.⁸ Probable cause sufficient to support a warrantless arrest requires more than conduct that is, at most, equivocal and suspicious.⁹

Probable cause determinations that involve questions of fact, or mixed questions of law and fact, generally are beyond the review power of the court of appeals.¹⁰ Thus, where the facts are disputed, where credibility is at issue, or where reasonable minds may differ as to the inference to be drawn from the established facts, the court of appeals, absent an error of law, will

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not disturb the findings of the appellate division and the suppression court.¹¹ On the other hand, when an issue arises as to the standard by which probable cause is measured, i.e., the minimum showing necessary to establish probable cause, a question of law is presented for review.¹²

Probable cause to arrest is the same as probable cause to search.¹³ It is axiomatic that probable cause for an arrest cannot be founded solely on evidence procured by an illegal search.¹⁴

To be entitled to a Dunaway suppression hearing on the issue of probable cause for an arrest, the defendant must provide some factual information as to his or her activities at the relevant time, so as to assist the court in determining whether probable cause for the arrest existed.¹⁵ A defense counsel's mere affirmation to the effect that, while an inmate, the defendant was questioned and gave a statement to the police did not provide sufficient facts demonstrating that probable cause did not exist, such that the defendant was not entitled to a Dunaway hearing on probable cause.¹⁶

In determining the existence of probable cause, the courts are concerned, not with the question of the guilt or innocence of the accused, but whether or not the arresting officer has reasonable grounds for the belief that prompted his or her action.¹⁷ Personal knowledge of the arresting officer is not necessary concerning all of the facts available to him or her if a combination of facts, information, and personal knowledge may raise the inference beyond opinion, suspicion, and conjecture to that of a reasonable probability, in order to establish sufficient probable cause to justify an arrest.¹⁸ The police officer should make a proper inquiry and investigation where there is an opportunity to do so.¹⁹ Where probable cause is based on hearsay information from an informant, the informant's basis of knowledge may be satisfied upon a showing that the information furnished is so detailed as to make it clear that it must have been based on personal knowledge.²⁰

The Court of Appeals has consistently made it clear that the basis for a belief supporting probable cause for arrest must not only be reasonable, but it must appear to be at least more probable than not that a crime has taken place and that the one arrested is its perpetrator.²¹ Conduct equally compatible with guilt or innocence will not suffice.²² There is no basis for a warrantless arrest if the officer observes conduct that just as frequently occurs in innocent transactions as in culpable transactions.²³ Thus, a police officer's expertness in detecting a pattern of conduct characteristic of a particular criminal activity does not provide probable cause for arrest if the pattern occurs just as frequently or even more frequently in innocent transactions.²⁴

Although the standard for probable cause is not met where the defendant's conduct is at most equivocal and suspicious, an arrest need not be supported by information and knowledge which, at the time, excludes all possibility of innocence and points to the defendant's guilt beyond a reasonable doubt.²⁵ Certainty is not required.²⁶ Probable cause does not require proof beyond a reasonable doubt or evidence sufficient to warrant a conviction, but merely information that would lead a reasonable person who possesses the same expertise as the officer to conclude under the circumstances that a crime is being or was committed.²⁷

The same stringent criteria that are applied to establish probable cause for an arrest with a warrant are applied to establish probable cause for an arrest without a warrant.²⁸ A rule that would require less to establish probable cause to act without a warrant could render meaningless the protection of the Fourth Amendment, since police officers would not likely assume the heavier burden of showing probable cause by seeking a warrant.²⁹ As mentioned earlier, it is not required that probable cause be established solely by facts within the personal knowledge of the arresting officer.³⁰ A combination of information and personal knowledge may raise the imprint beyond opinion, suspicion, and conjecture to reasonable probability.³¹ All information in the agent's possession, fair inferences from the information, and observations made by him or her are pertinent.³²

The arrest of a person whom the officer mistakenly believes to be someone else is valid if the officer has probable cause to arrest the person sought and reasonably believes the person arrested is the person sought.³³

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A consideration of the totality of the circumstances surrounding the arrest is necessary to determine the reasonableness of the officer's conduct.³⁴ In determining if a police officer has sufficient probable cause in a given situation, many factors must be considered: the officer's experience, training, and expertise; his or her intelligence and street knowledge; and the circumstances of the time and place—the area and its population, and the time of day of the events as it applies to the police.³⁵ The standard is that which would be probable cause to a reasonable, cautious, prudent police officer.³⁶ Although an officer is entitled to draw on all experience acquired in determining probable cause for arrest, the officer may not draw an inference of criminality when officers with the same expertise would not draw this type of inference.³⁷

An arrest merely on the basis that a person is in the company of another suspected of committing a crime is unwarranted.³⁸

Similarly, the mere fact that an individual is seen in a location having a notorious reputation, such as a “drug prone location,” is not sufficient to establish probable cause,³⁹ although, concededly, the instance of a high crime rate is a relevant circumstance to be considered in determining the existence of probable cause.⁴⁰ Thus, the character of a neighborhood as a known locale for illicit narcotic activity provides an additional objective empirical basis for an officer to evaluate whether probable cause exists to believe that a transaction involves illegality;⁴¹ but the mere passing of a glassine envelope in a neighborhood in which narcotics are known to have been present, unsupplemented by any additional relevant behavior or circumstances found to exist, is insufficient to raise the level of inference from suspicion to probable cause.⁴² The mere presence at the scene of criminal activity or an individual's flight is insufficient to establish probable cause, absent other indicia of criminal activity.⁴³ Accordingly, a defendant's presence at a narcotics transaction, in the absence of overt criminal activity or furtive behavior on his or her part, does not provide probable cause to arrest, although under certain circumstances, presence at the scene might provide a trained police officer with probable cause to arrest.⁴⁴ On the other hand, an officer had probable cause to believe that a felony had been or was about to be committed by the defendant where the officer was alerted by a radio message reporting the presence of prowlers and later found the defendant on the roof of a nearby building.⁴⁵ There was probable cause for an arrest for attempted burglary in view of a defendant's actions at the doorway of the complainant's home, coupled with a sudden departure when an alarm sounded.⁴⁶ Similarly, where police officers followed a defendant operating an automobile with a well-known narcotics addict as a passenger to a high school where the passenger exited the automobile to go into the school, and upon returning from the school, the defendant and the passenger were seen going into a house where narcotics were known to be sold, probable cause existed to arrest the defendant without a warrant.⁴⁷

Probable cause cannot be based on evidence that is obtained as a result of a search when the validity of the search itself depends on the validity of the arrest.⁴⁸

The question of probable cause is a mixed question of law and fact.⁴⁹ The truth and existence of the facts and circumstances bearing on the issue are a question of fact, and whether the facts and circumstances found to exist, and to be true, constitute probable cause is a question of law.⁵⁰ If the facts and circumstances adduced as proof of probable cause are controverted so that conflicting evidence is to be weighed, if different persons might reasonably draw opposing inferences, or if the credibility of witnesses is to be passed upon, issues as to the existence or truth of those facts and circumstances are to be passed upon as a question of fact.⁵¹ However, when the facts and circumstances are undisputed, when only one inference can reasonably be drawn and when there is no problem as to credibility, or when certain facts and circumstances have been found to exist, the issue as to whether they amount to probable cause is a question of law.⁵²

Although the court does not condone the indiscriminate stopping and interrogation of citizens at the whim of the police, the police do have a right to detain, make inquiry, and investigate persons on justifiable suspicion.⁵³ Police have the duties of crime prevention and detection as well as apprehension.⁵⁴ Police officers may approach a suspect, observe the suspect and his or her possessions, ask for identification, and an explanation of the suspect's conduct at the time.⁵⁵ The stopping of a defendant, by itself, does not constitute an arrest.⁵⁶

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Probable cause must be found by looking at the totality of the circumstances.⁵⁷ Although suspicion may be present, suspicion is not probable cause.⁵⁸ A hunch does not ripen into probable cause by a successful search.⁵⁹ Where a person is stopped merely for the purpose of inquiry, reasonable suspicion is required.⁶⁰

Eyewitness victims of a crime can provide probable cause for the arrest of their assailants.⁶¹ Although an eyewitness's identification of a defendant may not be admissible at trial, it can provide a basis for probable cause for arrest.⁶² Probable cause can also be provided by bystanders who tell police that they obtained their information from the victim of the crime.⁶³

An arrest made in good-faith reliance on a statute, which at the time of arrest had not been declared unconstitutional, is valid despite a subsequent judicial determination of unconstitutionality if the arrest is supported by probable cause, and any search incident to such arrest is valid.⁶⁴

The prosecuting authority has no duty to arrest a suspect as soon as probable cause exists but before the prosecution is satisfied that there is enough evidence to prove the suspect's guilt beyond a reasonable doubt.⁶⁵

In warrantless arrest situations, undue delay in arraigning the suspect could vitiate the existence of probable cause.⁶⁶

Where police officers heard gun shots and entered a street area and where two men pointed to a van yelling, "the van, the van" and after a brief pursuit stopped the vehicle and the police further observed that two occupants of the vehicle were wearing body armor such conduct established probable cause to search the van under the automobile exception clause. The Appellate Division properly refused to suppress any evidence from the seizure of the van where the defendant in this particular action was not a driver but a passenger. It should also be noted that during the course of this action the vehicle was parked in the middle of street with the lights out yet the two individuals remained in the car with the engine running.⁶⁷

Where the defendant had permission of the tenant (although not the landlord) to visit the tenant girlfriend's apartment complex where she lived with the defendant's son, the Court concluded that the police lacked probable cause to arrest the defendant for criminal trespassing and also lacked probable cause to arrest the defendant for resisting arrest. The Court found that the police lacked probable cause to arrest the defendant particularly in light of the fact the arresting officer's knew that the defendant was visiting the tenant, with the tenant's permission, based on an earlier meeting with the particular defendant.⁶⁸

In *People v. Miranda*,⁶⁹ the defendant made a motion to suppress physical evidence "seized from his person" on the basis that the property seized was the fruit of an unlawful arrest. At the conclusion of the suppression hearing, the court found probable cause for the arrest based on the officers' "observations over a nearly 30-minute period," during which defendant attempted to damage the locks on three different bicycles using a tool in a "sawing" motion. As one officer stopped defendant, defendant dropped a hacksaw. The officer put defendant's hands on a car, handcuffed him, and performed an initial pat down for the safety of the officers and felt a bag on his person underneath his coat. The officers searched the satchel and found pliers, screwdrivers and rubber gloves. The hearing court concluded that the search was incident to a lawful arrest. The Court of Appeals stated that, "the issued argued on this appeal is whether the warrantless search of defendant's satchel was unlawful as beyond the scope of a search incident to arrest. In particular, defendant contends that the exigencies that existed at the time of the arrest no longer existed at the time of the search because he was handcuffed and the seizure of the satchel was outside of a permissible full search of his person incident to arrest."

The court concluded, "Here, the hearing court did not expressly decide, in response to protest, the issues now raised on appeal. The issue at the suppression hearing was whether the officers had probable cause to arrest defendant. The hearing court's mere reference to 'search incident to a lawful arrest' is insufficient to preserve defendant's current arguments for this Court's review."

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Footnotes

- 1 [Brinegar v. U.S.](#), 338 U.S. 160, 69 S. Ct. 1302, 93 L. Ed. 1879 (1949).
See 34 NY Jur 2d, Crim L §§ 1999 to 2012; 5 Am Jur 2d, Arrest §§ 44 to 49.
The intrusion on a citizen's freedom may not reach the level of arrest unless the police have probable cause to believe that a crime has been committed. [People v. Battaglia](#), 82 A.D.2d 389, 442 N.Y.S.2d 316 (4th Dep't 1981), order rev'd on other grounds, 56 N.Y.2d 558, 450 N.Y.S.2d 178, 435 N.E.2d 395 (1982) (holding that officers who confronted only person found in immediate vicinity of commercial building where silent burglar alarm had been activated and who patted down defendant and searches of pocket and vehicle illegal).
- 2 [Dunaway v. New York](#), 442 U.S. 200, 99 S. Ct. 2248, 60 L. Ed. 2d 824 (1979).
- 3 [Kaupp v. Texas](#), 538 U.S. 626, 123 S. Ct. 1843, 155 L. Ed. 2d 814 (2003).
- 4 [People v. Yukl](#), 25 N.Y.2d 585, 307 N.Y.S.2d 857, 256 N.E.2d 172 (1969); [People v. Johnson](#), 112 Misc. 2d 590, 447 N.Y.S.2d 341 (Sup 1981).
- 5 [Draper v. U.S.](#), 358 U.S. 307, 79 S. Ct. 329, 3 L. Ed. 2d 327 (1959); [People v. Mena-Coss](#), 210 A.D.2d 745, 620 N.Y.S.2d 547 (3d Dep't 1994) (probable cause for DUI arrest established where defendant parked on highway shoulder when officer approached him, defendant's eyes were bloodshot, he had strong odor of alcohol, and he failed field sobriety tests); [People v. Lopez](#), 160 A.D.2d 167, 553 N.Y.S.2d 330 (1st Dep't 1990); [People v. Duke](#), 160 A.D.2d 1017, 554 N.Y.S.2d 729 (2d Dep't 1990); [People v. Farinaro](#), 110 A.D.2d 653, 487 N.Y.S.2d 801 (2d Dep't 1985); [People v. Cummins](#), 108 A.D.2d 962, 485 N.Y.S.2d 135 (3d Dep't 1985); [Feldman v. Town of Bethel](#), 106 A.D.2d 695, 484 N.Y.S.2d 147 (3d Dep't 1984); [People v. Farrell](#), 89 A.D.2d 987, 454 N.Y.S.2d 306 (2d Dep't 1982) (driving under influence of alcohol). A warrant is not required to arrest a suspect in a public place where there is probable cause to believe that the suspect has committed a crime, and there is no requirement that probable cause derives from the suspect's actions at the time of his arrest. [People v. Vasquez](#), 215 A.D.2d 118, 626 N.Y.S.2d 111 (1st Dep't 1995).
The officer had probable cause to arrest the defendant based not only on the statements made to him by a passing motorist that the occupants of the vehicle that defendant was operating had just been involved in a robbery, but also on information received from a radio report. [People v. Tyson](#), 160 A.D.2d 826, 554 N.Y.S.2d 621 (2d Dep't 1990).
There was probable cause to arrest the defendant for possession of narcotics when the defendant arrived in an automobile with two known drug dealers, entered the apartment that had been raided for drugs the previous day, fled from the apartment, and gave the police false identification information at the time he was apprehended. [People v. Sbraccia](#), 92 A.D.2d 628, 459 N.Y.S.2d 921 (3d Dep't 1983).
The police did not have probable cause to arrest the defendant since the arresting officer only knew that a drug deal had occurred at a prearranged time, which was not witnessed by him, and where there was no description of the people or the car involved in the transaction. [People v. Buffardi](#), 92 A.D.2d 899, 459 N.Y.S.2d 893 (2d Dep't 1983).
- 6 [People v. Miner](#), 42 N.Y.2d 937, 397 N.Y.S.2d 999, 366 N.E.2d 1353 (1977); [People v. Harris](#), 224 A.D.2d 711, 639 N.Y.S.2d 427 (2d Dep't 1996); [People v. Mercado](#), 117 A.D.2d 627, 497 N.Y.S.2d 957 (2d Dep't 1986).
- 7 [People v. Ellis](#), 83 A.D.2d 652, 442 N.Y.S.2d 184 (3d Dep't 1981) (probable cause for arrest where arrest occurred after defendant's admission of acts).
- 8 [People v. Harris](#), 224 A.D.2d 711, 639 N.Y.S.2d 427 (2d Dep't 1996).
- 9 [People v. Gomcin](#), 265 A.D.2d 493, 697 N.Y.S.2d 93 (2d Dep't 1999).

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- 10 [People v. Rosario](#), 78 N.Y.2d 583, 578 N.Y.S.2d 454, 585 N.E.2d 766 (1991); [People v. Cook](#), 68 N.Y.2d 830, 508 N.Y.S.2d 170, 500 N.E.2d 868 (1986) (finding that officers' observations upon arriving at scene were sufficient to sustain probable cause was beyond further review by court of appeals); [People v. McRay](#), 51 N.Y.2d 594, 435 N.Y.S.2d 679, 416 N.E.2d 1015 (1980).
- 11 [People v. McRay](#), 51 N.Y.2d 594, 435 N.Y.S.2d 679, 416 N.E.2d 1015 (1980).
- 12 [People v. McRay](#), 51 N.Y.2d 594, 435 N.Y.S.2d 679, 416 N.E.2d 1015 (1980).
- 13 [People v. McMillan](#), 112 Misc. 2d 901, 447 N.Y.S.2d 626 (County Ct. 1982).
- 14 [People v. Allah](#), 111 Misc. 2d 516, 444 N.Y.S.2d 412 (Sup 1981).
A police officer's testimony that he observed pills and white powder protruding from the top of a burlap bag did not provide probable cause for the arrest of the accused, where photographs of the accused's automobile showed that it was physically impossible to see the bag behind the driver's seat by looking directly through the driver's window. [People v. Feingold](#), 106 A.D.2d 583, 482 N.Y.S.2d 857 (2d Dep't 1984).
- 15 [People v. Rolland](#), 180 Misc. 2d 729, 693 N.Y.S.2d 803 (Sup 1999).
- 16 [People v. Rolland](#), 180 Misc. 2d 729, 693 N.Y.S.2d 803 (Sup 1999).
- 17 [People v. Coffey](#), 12 N.Y.2d 443, 240 N.Y.S.2d 721, 191 N.E.2d 263 (1963); [People v. Farrell](#), 90 A.D.2d 396, 457 N.Y.S.2d 260 (1st Dep't 1982), order aff'd, 59 N.Y.2d 686, 463 N.Y.S.2d 416, 450 N.E.2d 222 (1983) (mere hunch or suspicion insufficient as probable cause).
See also [Draper v. U.S.](#), 358 U.S. 307, 79 S. Ct. 329, 3 L. Ed. 2d 327 (1959); [Brinegar v. U.S.](#), 338 U.S. 160, 69 S. Ct. 1302, 93 L. Ed. 1879 (1949).
Probable cause to arrest was not established where the arresting officer acted solely on a description of the defendant provided by an undercover officer, and later could not recall the description on which he acted, or the manner in which the defendant was dressed. [People v. Brodie](#), 87 A.D.2d 653, 448 N.Y.S.2d 518 (2d Dep't 1982).
- 18 [Ng Pui Yu v. U.S.](#), 352 F.2d 626 (9th Cir. 1965); [People v. Luccioni](#), 120 A.D.2d 617, 502 N.Y.S.2d 228 (2d Dep't 1986) (observations of experienced narcotics officer as sufficient probable cause to arrest defendant); [People v. Wroblewski](#), 109 A.D.2d 39, 489 N.Y.S.2d 797 (4th Dep't 1985), order aff'd, 67 N.Y.2d 933, 502 N.Y.S.2d 719, 493 N.E.2d 943 (1986).
See also [Wong Sun v. U.S.](#), 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963); [Henry v. U.S.](#), 361 U.S. 98, 80 S. Ct. 168, 4 L. Ed. 2d 134 (1959).
- 19 [People v. Rosemond](#), 26 N.Y.2d 101, 308 N.Y.S.2d 836, 257 N.E.2d 23 (1970); [People v. Rivera](#), 14 N.Y.2d 441, 252 N.Y.S.2d 458, 201 N.E.2d 32 (1964); [People v. Hunter](#), 82 A.D.2d 893, 440 N.Y.S.2d 287 (2d Dep't 1981), order aff'd, 55 N.Y.2d 930, 449 N.Y.S.2d 191, 434 N.E.2d 260 (1982); [People v. Braan](#), 80 A.D.2d 920, 437 N.Y.S.2d 388 (2d Dep't 1981); [People v. Cameron](#), 73 Misc. 2d 790, 342 N.Y.S.2d 773 (Sup 1973).
- 20 [People v. Powell](#), 234 A.D.2d 397, 651 N.Y.S.2d 102 (2d Dep't 1996).
See §§ 4:7, 4:8.
- 21 [People v. Carrasquillo](#), 54 N.Y.2d 248, 445 N.Y.S.2d 97, 429 N.E.2d 775 (1981).
- 22 [People v. Carrasquillo](#), 54 N.Y.2d 248, 445 N.Y.S.2d 97, 429 N.E.2d 775 (1981); [People v. Powell](#), 234 A.D.2d 397, 651 N.Y.S.2d 102 (2d Dep't 1996); [People v. Amill](#), 88 A.D.2d 918, 450 N.Y.S.2d 565 (2d Dep't 1982).
- 23 [People v. Russell](#), 34 N.Y.2d 261, 357 N.Y.S.2d 415, 313 N.E.2d 732 (1974); [People v. Young](#), 202 A.D.2d 1024, 609 N.Y.S.2d 725 (4th Dep't 1994) (fact that defendant was lying face up in back of vehicle did not furnish probable cause for trespass arrest where police had no information at the time of the arrest that defendant did not have permission to be in the vehicle).
- 24 [People v. Parent](#), 103 A.D.2d 617, 481 N.Y.S.2d 536 (4th Dep't 1984) (men walking down street who stopped talking and glanced over their shoulders as officer passed by did not amount to probable cause).
- 25 [People v. Sanders](#), 79 A.D.2d 688, 433 N.Y.S.2d 854 (2d Dep't 1980).
- 26 [People v. Finlayson](#), 76 A.D.2d 670, 431 N.Y.S.2d 839 (2d Dep't 1980).
- 27 [People v. McRay](#), 51 N.Y.2d 594, 435 N.Y.S.2d 679, 416 N.E.2d 1015 (1980); [People v. Duke](#), 160 A.D.2d 1017, 554 N.Y.S.2d 729 (2d Dep't 1990); [People v. Nowell](#), 90 A.D.2d 735, 455 N.Y.S.2d 794 (1st Dep't 1982) (probable cause to arrest defendant and companion for robbery).

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28 U.S. v. Bosch, 209 F. Supp. 15 (E.D. Mich. 1962).

29 U.S. v. Bosch, 209 F. Supp. 15 (E.D. Mich. 1962).

30 Ng Pui Yu v. U.S., 352 F.2d 626 (9th Cir. 1965).

31 Ng Pui Yu v. U.S., 352 F.2d 626 (9th Cir. 1965).

32 Ng Pui Yu v. U.S., 352 F.2d 626 (9th Cir. 1965).

The fact that defendant, who was the lone person at railroad station, matched the description given to the police by an informant of two robbery suspects, including the plaid lapel detail on the defendant's coat, was sufficient probable cause for police officer to arrest the defendant. *People v. Crosby*, 91 A.D.2d 20, 457 N.Y.S.2d 831 (2d Dep't 1983).

A sufficiently descriptive anonymous phone call matched by police observation may provide probable cause to arrest. *People v. Foster*, 83 A.D.2d 282, 443 N.Y.S.2d 835 (1st Dep't 1981).

33 *People v. Tejada*, 270 A.D.2d 655, 704 N.Y.S.2d 365 (3d Dep't 2000).

34 *People v. Tejada*, 270 A.D.2d 655, 704 N.Y.S.2d 365 (3d Dep't 2000).

35 *People v. Cummins*, 108 A.D.2d 962, 485 N.Y.S.2d 135 (3d Dep't 1985); *People v. Garcia*, 132 Misc. 2d 350, 503 N.Y.S.2d 972 (City Crim. Ct. 1986); *People v. Cameron*, 73 Misc. 2d 790, 342 N.Y.S.2d 773 (Sup 1973).

The police had probable cause to arrest the defendant after a police dog “ran a track” from the rape victim's home to the defendant's home where the palm print exemplar which was subsequently given by the defendant to the police matched an exemplar lifted from the rear deck doorpost leading to the victim's bedroom. *People v. Prael*, 124 A.D.2d 607, 507 N.Y.S.2d 750 (2d Dep't 1986).

The police had probable cause to arrest the defendant since the defendant was observed in a known narcotics area sitting in a double-parked car talking to several pedestrians, and a short time later, after the defendant had committed a traffic infraction, a portion of a clear plastic bag containing white powder was observed in plain view. *People v. Piazza*, 121 A.D.2d 573, 503 N.Y.S.2d 623 (2d Dep't 1986).

The police had probable cause to arrest the defendant since the first time that the police confronted the defendant, they knew that the sexual assault of a child occurred within a time period where the defendant was the only male who had been with the child. *People v. Hendrie*, 117 A.D.2d 752, 498 N.Y.S.2d 475 (2d Dep't 1986).

36 *People v. Valentine*, 17 N.Y.2d 128, 269 N.Y.S.2d 111, 216 N.E.2d 321 (1966); *People v. Cameron*, 73 Misc. 2d 790, 342 N.Y.S.2d 773 (Sup 1973).

37 *People v. Russell*, 34 N.Y.2d 261, 357 N.Y.S.2d 415, 313 N.E.2d 732 (1974).

The purchase of a holster, in itself, is not sufficient evidence of criminality to permit more than an inquiry. *People v. Johnson*, 54 N.Y.2d 958, 445 N.Y.S.2d 146, 429 N.E.2d 824 (1981).

38 *People v. Boyd*, 78 A.D.2d 225, 434 N.Y.S.2d 221 (1st Dep't 1980).

The police had probable cause to arrest and detain the defendants in order to question them about the homicide since the defendants admitted that they were present when the victim was shot and had been hiding in the garage of the victim's residence when they were found by the police investigating the crime. *People v. Whitney*, 90 A.D.2d 640, 456 N.Y.S.2d 276 (3d Dep't 1982).

39 *People v. Marine*, 142 A.D.2d 368, 536 N.Y.S.2d 425 (1st Dep't 1989).

40 *People v. Oden*, 36 N.Y.2d 382, 368 N.Y.S.2d 508, 329 N.E.2d 188 (1975).

See also *People v. Brown*, 32 N.Y.2d 172, 344 N.Y.S.2d 356, 297 N.E.2d 94 (1973); *People v. Hunter*, 30 N.Y.2d 774, 333 N.Y.S.2d 761, 284 N.E.2d 879 (1972); *People v. Rivera*, 14 N.Y.2d 441, 252 N.Y.S.2d 458, 201 N.E.2d 32 (1964).

41 *People v. Gonzales*, 86 A.D.2d 634, 446 N.Y.S.2d 342 (2d Dep't 1982).

42 *People v. Oden*, 36 N.Y.2d 382, 368 N.Y.S.2d 508, 329 N.E.2d 188 (1975).

43 *People v. Flores*, 276 A.D.2d 710, 714 N.Y.S.2d 528 (2d Dep't 2000).

The fact that the car in which the defendant was riding was parked next to a subway station where a crime had occurred for a long period before the crime had been committed did not give the police probable cause to arrest the car's passenger. *People v. White*, 232 A.D.2d 437, 648 N.Y.S.2d 639 (2d Dep't 1996).

44 *People v. Elliotte*, 283 A.D.2d 719, 726 N.Y.S.2d 471 (3d Dep't 2001) (motion to suppress granted).

45 *People v. Molloy*, 22 A.D.2d 814, 254 N.Y.S.2d 769 (2d Dep't 1964), judgment aff'd, 17 N.Y.2d 431, 266 N.Y.S.2d 520, 213 N.E.2d 801 (1965).

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- 46 People v. Fridell, 79 A.D.2d 1009, 435 N.Y.S.2d 34 (2d Dep't 1981).
- 47 People v. Rodolitz, 47 Misc. 2d 129, 261 N.Y.S.2d 959 (Dist. Ct. 1965), adhered to on reargument, 48 Misc. 2d 546, 265 N.Y.S.2d 460 (Dist. Ct. 1965).
- 48 People v. McCarthy, 14 N.Y.2d 206, 250 N.Y.S.2d 290, 199 N.E.2d 382 (1964).
- 49 Director General of Railroads v. Kastenbaum, 263 U.S. 25, 44 S. Ct. 52, 68 L. Ed. 146 (1923); People v. Oden, 36 N.Y.2d 382, 368 N.Y.S.2d 508, 329 N.E.2d 188 (1975).
- 50 Director General of Railroads v. Kastenbaum, 263 U.S. 25, 44 S. Ct. 52, 68 L. Ed. 146 (1923); People v. Oden, 36 N.Y.2d 382, 368 N.Y.S.2d 508, 329 N.E.2d 188 (1975).
- 51 People v. Oden, 36 N.Y.2d 382, 368 N.Y.S.2d 508, 329 N.E.2d 188 (1975).
- 52 People v. Oden, 36 N.Y.2d 382, 368 N.Y.S.2d 508, 329 N.E.2d 188 (1975).
- 53 People v. Cameron, 73 Misc. 2d 790, 342 N.Y.S.2d 773 (Sup 1973).
A defendant's resemblance to the composite drawing of a suspect may constitute an articulable reason sufficient to warrant a police officer's request that the defendant produce identification. *People v. Harris*, 151 A.D.2d 777, 542 N.Y.S.2d 796 (2d Dep't 1989).
- 54 People v. Cameron, 73 Misc. 2d 790, 342 N.Y.S.2d 773 (Sup 1973).
- 55 CPL § 140.50(1).
Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); *People v. Hollman*, 79 N.Y.2d 181, 581 N.Y.S.2d 619, 590 N.E.2d 204 (1992); *People v. Rosemond*, 26 N.Y.2d 101, 308 N.Y.S.2d 836, 257 N.E.2d 23 (1970); *People v. Rivera*, 14 N.Y.2d 441, 252 N.Y.S.2d 458, 201 N.E.2d 32 (1964); *People v. Cameron*, 73 Misc. 2d 790, 342 N.Y.S.2d 773 (Sup 1973).
See 33 NY Jur 2d, Crim L § 1822, 34 NY Jur 2d, Crim L § 2036; 5 Am Jur 2d, Arrest §§ 1, 2.
- Treatises and Practice Aids**
NY Pattern Jury Instructions, PJI 3:5.
- Additional References**
What circumstances fall within “public safety” exception to requirement that law enforcement officer give person Miranda warnings as to federal constitutional rights before conducting custodial interrogation, 81 L Ed 2d 990.
Law enforcement officer's authority, under federal Constitution, to “stop and frisk” person—Supreme court cases, 32 L Ed 2d 942.
- 56 *Rios v. U.S.*, 364 U.S. 253, 80 S. Ct. 1431, 4 L. Ed. 2d 1688 (1960); *People v. Jenkins*, 209 A.D.2d 164, 617 N.Y.S.2d 766 (1st Dep't 1994) (no arrest where plainclothes officers, without guns drawn and with no physical restraint of defendant, commanded defendant in a public place to stop and show his hands); *People v. Entrialgo*, 19 A.D.2d 509, 245 N.Y.S.2d 850 (2d Dep't 1963), order aff'd, 14 N.Y.2d 733, 250 N.Y.S.2d 293, 199 N.E.2d 384 (1964).
- 57 *People v. Cameron*, 73 Misc. 2d 790, 342 N.Y.S.2d 773 (Sup 1973).
- 58 *People v. Cameron*, 73 Misc. 2d 790, 342 N.Y.S.2d 773 (Sup 1973).
- 59 *People v. Cameron*, 73 Misc. 2d 790, 342 N.Y.S.2d 773 (Sup 1973).
- 60 McKinney's CPL § 140.50.
People v. Jones, 172 A.D.2d 265, 568 N.Y.S.2d 88 (1st Dep't 1991).
- 61 *People v. Williams*, 206 A.D.2d 917, 614 N.Y.S.2d 842 (4th Dep't 1994) (victim's detailed description of armed robber matched defendant); *People v. Bandera*, 204 A.D.2d 340, 611 N.Y.S.2d 290 (2d Dep't 1994) (victim's contemporaneous accusations that defendant had assaulted her and had previously attempted to hit her with a chair provided probable cause for felony arrest); *People v. Crespo*, 70 A.D.2d 661, 417 N.Y.S.2d 19 (2d Dep't 1979).
A defendant was entitled to a Dunaway hearing after learning from the prosecution's opening statement that the complainant's identification of the defendant in a photo array, which identification provided the sole basis and probable cause for the defendant's arrest, was not based on the complainant's personal knowledge of the events. *People v. Lee*, 216 A.D.2d 326, 628 N.Y.S.2d 332 (2d Dep't 1995).
The warrantless arrest of the defendant was based on probable cause where three witnesses, who saw the perpetrator at the burglarized premises, gave the same description to the responding police officers

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who subsequently observed the defendant less than two blocks from the scene of the crime. [People v. Fontaine](#), 122 A.D.2d 71, 504 N.Y.S.2d 224 (2d Dep't 1986).

The police had probable cause to arrest the defendant where the victim gave the arresting officers a detailed description of the robber and of the car used in the robbery, including its license plate number, and shortly after the robbery, the police were able to locate the car at the residence of the registered owner who gave the police permission to search his apartment where the defendant was found hiding in a closet. [People v. Sanchez](#), 117 A.D.2d 685, 498 N.Y.S.2d 426 (2d Dep't 1986).

62 [People v. Phillips](#), 120 A.D.2d 621, 502 N.Y.S.2d 229 (2d Dep't 1986) (eyewitness's identification of defendant in restaurant, following witness's providing detailed description of defendant, sufficient to establish probable cause to arrest); [People v. Nelson](#), 79 A.D.2d 171, 436 N.Y.S.2d 505 (4th Dep't 1981) (abrogated by, [People v. Cintron](#), 199 A.D.2d 526, 606 N.Y.S.2d 52 (2d Dep't 1993)).

63 [People v. Bellinger](#), 74 N.Y.2d 633, 541 N.Y.S.2d 975, 539 N.E.2d 1103 (1989).

64 [People v. Talbert](#), 107 A.D.2d 842, 484 N.Y.S.2d 680 (3d Dep't 1985).

65 [People v. Hoff](#), 110 A.D.2d 782, 487 N.Y.S.2d 851 (2d Dep't 1985).

66 [Kelly v. State](#), 105 A.D.2d 905, 482 N.Y.S.2d 70 (3d Dep't 1984).

67 See [People v. Jackson](#), 52 A.D.3d 1318, 860 N.Y.S.2d 368 (4th Dep't 2008).

68 [People v. Finch](#), 2014 WL 1883961 (N.Y. 2014).

69 [People v. Miranda](#), 27 N.Y.3d 931, 30 N.Y.S.3d 600, 50 N.E.3d 224 (2016).

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§ 4:6.Probable cause—Flight as basis, 1 Criminal Procedure in New York § 4:6 (2d)

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- West's Key Number Digest, [Arrest](#) 63.3

In [People v. Cintron](#), 304 A.D.2d 454, 758 N.Y.S.2d 636 (1st Dep't 2003), police officers had reasonable suspicion to pursue a suspect where the suspect was similar to a description with the alleged perpetrator of a nearby robbery and was in close proximity to where the robbery occurred. When the officers attempted to contact the individual, he avoided police contact and fled rapidly after the police said stop. However, flight does not always indicate a basis of probable cause, notwithstanding the First Department's holding in [Cintron](#).

The fact that an accused flees from the scene is not sufficient to establish probable cause.¹ The defendant's flight, where there is nothing to establish that a crime has been or is being committed, is an insufficient basis for seizure.²

A person's flight while being questioned by a police officer does not constitute a crime.³ However, while a citizen need not cooperate with police officers, and may flee when questioned,⁴ police pursuit may be justified where the police approach a citizen based on a founded suspicion that criminal activity is afoot, and that person runs away immediately upon their approach.⁵ Thus, flight before inquiry by police officers may not be equated with the exercise of the right not to respond, but may be considered an escalating factor authorizing a greater level of police intrusion.⁶ Pursuit is justified only if an officer is endeavoring to complete the arrest of an individual for whom there exists probable cause to believe that he or she has committed or is about to commit a crime.⁷

Each situation is, however, unique and depending on the other facts and circumstances surrounding the flight, the flight itself is certainly an element to be considered in determining probable cause.⁸ Thus, probable cause is established where a police officer is reliably informed that the accused has committed a crime and is in flight.⁹

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The warrantless arrest of the defendant was justified since, after the police investigation and the informant's statement, the police had probable cause to believe that the defendant had murdered the victim where there were exigent circumstances which included the combined savagery of the crime, the late weekend hour, and the fact that the defendant had told the informant that he was going to flee the jurisdiction.¹⁰

Even where the police did not initially have probable cause to arrest, evidence legally recovered during the course of the flight may furnish probable cause.¹¹

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Footnotes

- 1 [People v. Felton](#), 78 N.Y.2d 1063, 576 N.Y.S.2d 89, 581 N.E.2d 1344 (1991); [People v. Bennett](#), 170 A.D.2d 516, 566 N.Y.S.2d 316 (2d Dep't 1991).
For a discussion on flight as basis for probable cause, see 34 NY Jur 2d, Crim L § 2010.
- 2 [People v. Felton](#), 78 N.Y.2d 1063, 576 N.Y.S.2d 89, 581 N.E.2d 1344 (1991); [People v. Chestnut](#), 91 A.D.2d 981, 457 N.Y.S.2d 573 (2d Dep't 1983).
- 3 [People v. Felton](#), 78 N.Y.2d 1063, 576 N.Y.S.2d 89, 581 N.E.2d 1344 (1991); [People v. Jones](#), 108 Misc. 2d 574, 438 N.Y.S.2d 75 (City Ct. 1981).
- 4 [People v. Leung](#), 68 N.Y.2d 734, 506 N.Y.S.2d 320, 497 N.E.2d 687 (1986); [People v. Howard](#), 50 N.Y.2d 583, 430 N.Y.S.2d 578, 408 N.E.2d 908 (1980); [People v. Johnson](#), 186 A.D.2d 420, 588 N.Y.S.2d 288 (1st Dep't 1992).
- 5 [People v. Leung](#), 68 N.Y.2d 734, 506 N.Y.S.2d 320, 497 N.E.2d 687 (1986); [People v. Cox](#), 210 A.D.2d 497, 620 N.Y.S.2d 459 (2d Dep't 1994) (probable cause for arrest was established when officers observed gun in hand of defendant who fled upon seeing police car); [People v. Thomas](#), 201 A.D.2d 316, 607 N.Y.S.2d 632 (1st Dep't 1994) (officer had reasonable suspicion to approach defendant whom he saw hand something to known drug offenders and flight by defendant justified pursuit by officer to defendant's apartment where drugs were found); [In re Dalmin M.](#), 201 A.D.2d 343, 607 N.Y.S.2d 637 (1st Dep't 1994) (flight by defendant who matched description of suspect in attempted armed robbery committed nearby and a short time earlier justified pursuit); [People v. Johnson](#), 186 A.D.2d 420, 588 N.Y.S.2d 288 (1st Dep't 1992).
- 6 [People v. Johnson](#), 186 A.D.2d 420, 588 N.Y.S.2d 288 (1st Dep't 1992).
- 7 [People v. Valo](#), 92 A.D.2d 1004, 461 N.Y.S.2d 507 (3d Dep't 1983); [People v. Jones](#), 108 Misc. 2d 574, 438 N.Y.S.2d 75 (City Ct. 1981).
Police officers had probable cause to arrest the defendant who immediately fled after the police officers approached the defendant and identified themselves, since the evidence of the defendant's flight along with the recovery of a gun from the bushes elevated the officers' suspicions to the level of probable cause to arrest. [People v. Leung](#), 116 A.D.2d 666, 497 N.Y.S.2d 734 (2d Dep't 1986), order aff'd, 68 N.Y.2d 734, 506 N.Y.S.2d 320, 497 N.E.2d 687 (1986).
The police lacked probable cause to arrest a defendant for resisting arrest, when apprehended while fleeing from an unauthorized arrest for suspected possession of an open beer bottle on public premises, where defendant had been standing in an alley clearly marked as private property. [People v. Bobo](#), 191 Misc. 2d 118, 740 N.Y.S.2d 793 (Dist. Ct. 2002).
- 8 [Peters v. New York](#), 392 U.S. 40, 88 S. Ct. 1912, 20 L. Ed. 2d 917 (1968); [People v. Manners](#), 120 A.D.2d 680, 502 N.Y.S.2d 99 (2d Dep't 1986) (rape defendant's flight with crowd in pursuit plus citizen's information sufficient to give arresting officer probable cause to arrest); [People v. Sbraccia](#), 92 A.D.2d 628, 459 N.Y.S.2d 921 (3d Dep't 1983); [People v. Mayes](#), 90 A.D.2d 879, 456 N.Y.S.2d 531 (3d Dep't 1982).

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- 9 [People v. Schneider](#), 58 A.D.2d 817, 396 N.Y.S.2d 272 (2d Dep't 1977).
10 [People v. Burr](#), 70 N.Y.2d 354, 520 N.Y.S.2d 739, 514 N.E.2d 1363 (1987).
11 [People v. Defares](#), 209 A.D.2d 875, 619 N.Y.S.2d 375 (3d Dep't 1994) (although police officers initially had subjective intent to make arrest without probable cause, officers' intervening discovery of cocaine in bag thrown away by defendant during flight furnished probable cause).

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1 Criminal Procedure in New York § 4:7 (2d)

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§ 4:7. Probable cause—Reliance on informer

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- West's Key Number Digest, [Arrest](#) 63.4(7.1)
- West's Key Number Digest, [Arrest](#) 63.4(8)

It is well established that information given to police by a citizen informant and based on the informant's personal observations will provide police with probable cause. Such was the case in [People v. Johnson](#), 19 A.D.3d 1163, 796 N.Y.S.2d 807 (4th Dep't 2005), leave to appeal denied, 5 N.Y.3d 829, 804 N.Y.S.2d 43, 837 N.E.2d 742 (2005) where a citizen informant provided the police with reasonable cause to believe that weapons were in a vehicle where the defendant was sitting and together with the sudden flight from the vehicle furnished reasonable suspicion that the defendant had committed a crime. However, a citizen informant is considered different from a police informer who is trying to alleviate a criminal record or who he himself has a substantial criminal background.

Information received from an informer is necessarily hearsay. There is no presumption that an informant speaks with personal knowledge.¹ However, hearsay may be used in the formulation of probable cause to support an arrest without a warrant.² An informant's basis of knowledge may be based on hearsay if that hearsay comes from a reliable source.³ The hearsay is not being invoked to determine the innocence or guilt of the accused at trial. Rather, it is an element to be considered upon a probable-cause inquiry.⁴ Where an informant's tip describes a criminal enterprise in minute detail, the exactness of the language of the tip itself can serve to negate the inference that the informant is relying on mere rumor or conjecture.⁵ A warrantless arrest will be sustained when the police observe conduct suggestive of, or directly involving, the criminal activity about which an informant who does not indicate the basis for knowledge has given information to the police, or when the information furnished about the criminal activity is so detailed as to make clear that it must have been based on personal observation of that activity.⁶

There is no probable cause to arrest a defendant where the officer has not seen the accused commit a crime in his or her presence and the reliability of the informant is contested at the trial, even though the district attorney makes an independent verification of the informant's story.⁷

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One of the methods to establish the reliability of the information provided by an informant is to establish that on past occasions, the informant provided accurate information.⁸ It is not always clear what past experience will qualify an informant as “reliable,” but it may be established that on several previous occasions, the informant supplied information that subsequently proved to be accurate.⁹ The fact that an informant has demonstrated general reliability in the past, however, is no index of the reliability of the specific information he or she passes on, since the informant may have received it from a totally unreliable source.¹⁰ To be considered “reliable,” an informant need not be a disinterested public-spirited citizen.¹¹ The criminal record of an informant does not necessarily render him or her unreliable.¹²

Absent a showing that an informant has given truthful information in the past, veracity may be established by the police independently observing incriminating details which corroborate the informant's story or by the existence of a relationship between the informant and the police so that the informant is aware that it will not be in his or her best interest if the information is untrue.¹³ The observed corroborating facts need not establish probable cause by themselves; it is sufficient if they are an unusual and inviting explanation, although they may be as consistent with innocence as with criminal activity.¹⁴

For the person of unsavory reputation, a court must inquire into his or her basis of knowledge and veracity.¹⁵ The “basis of knowledge” is satisfied if the informant has witnessed the facts that he or she asserts.¹⁶

Admissions against penal interest are alone sufficient to show an informant's veracity for purposes of determining probable cause.¹⁷

The veracity and reliability of a known, disclosed citizen is not to be evaluated under the same standards as that of a paid or anonymous informer.¹⁸ A citizen's reliability, as differentiated from that of a paid or anonymous informant, is assumed, since the informant could be prosecuted if the report is a fabrication.¹⁹ A citizen informer will be presumed reliable even though the absence of the informant makes it impossible to verify that the informant existed or gave the information ascribed.²⁰ In fact, police officers have a right to rely on information furnished by private citizens who report crimes that they have witnessed or were perpetrated against them.²¹

An informant's employment status as an employee of the Department of Housing Preservation and Development who came to the precinct to report that trespassers were present in an apartment in a building owned by the department provided sufficient support for the inference that the informant's knowledge that an apartment was legally vacant was based on personal familiarity with the legal status of the apartments owned by the informant's employer or on information gleaned from an equally reliable source such as another employee with such familiarity of department records.²²

Where an unknown informant provides the police with a detailed description of a person alleged to be carrying a concealed weapon, they may approach the suspect and, if the description checks out, stop him or her to make an inquiry.²³ They may not, however, frisk the person unless they have additional information indicating the presence of a weapon, such as a bulge, that suggests the existence of a gun.²⁴ The officer may feel the bulge, but he or she gains no automatic right to compel production of the object causing the bulge.²⁵

Where the police receive a vague physical description given by an unknown informant, then stop a defendant forcibly at gunpoint, the court held that this is an improper and unconstitutional seizure of the defendant's person.²⁶

In the 1964 U.S. Supreme Court case of *Aguilar v. State of Texas*,²⁷ the Court set forth a two-prong test. The test provided that when the basis for arrest depended on the information provided by an informer, it had to appear on the record that (1) some of the underlying circumstances from which the informant concluded the illegal activities were taking place, and (2) some of the underlying circumstances from which the officer concluded that the informant was credible or reliable. However, *Aguilar*

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was abrogated in the 1983 case of *Illinois v. Gates*,²⁸ where the Court abandoned the two-prong test and substituted it with the “totality of circumstances” approach that traditionally has informed probable cause determinations.

In New York, it must be shown that the informant disclosed a sufficient basis for his or her knowledge, and that the informant was reliable.²⁹ In order to satisfy the “basis of knowledge” prong, the informant need not have personally viewed the criminal activity.³⁰ Rather, what is required is information of such quality, considering its source and the circumstances in which it came into possession of the informant, that a reasonable observer would be warranted in determining that the basis of the informant's knowledge was such that it led logically to the conclusion that a crime had been committed by the defendant.³¹ If an informant carefully describes the underlying circumstances in which he or she obtains the information, and the description of the circumstances clearly indicates that the informant speaks with personal knowledge of the event he or she relates, the “basis of knowledge” requirement is satisfied.³² If an informant's prior tips are the basis for other arrests and convictions in a number of cases, the informant accurately describes the defendant and where the defendant can be found, and the arresting officer observes the defendant involved in what appears to be the criminal activities described by the informant, the reliability of the informant and the reliability of the information have been established.³³

Where the police officer obtains the information from an identified citizen as differentiated from a paid or anonymous informant, it is not necessary that the citizen provide the officer with information connecting the defendant with a crime so long as the information furnished provides probable cause.³⁴

Absent an eyewitness account by the informant, his or her basis of knowledge may be verified by police investigation that corroborates the defendant's actions or that develops information consistent with detailed predictions by the informant.³⁵ Where the information provided is derived solely from hearsay, and there is no indication of the source of the hearsay, it is impossible to determine the informant's basis of knowledge; and the evidence is, therefore, insufficient to establish probable cause.³⁶

The basis of knowledge requirement was not satisfied where the information provided by a citizen informant contained no statement that it was based on personal knowledge despite the prosecution's claim that the informant's twin brother was the source of the information, since even assuming such was the case, the informant's basis of knowledge still had to be demonstrated inasmuch as this information constituted double hearsay, especially where the information itself was not sufficiently detailed to permit a reasonable inference that it was based on the brother's personal knowledge.³⁷ The court noted that had the information related to the police by the informant described the crime in minute detail, it would have dispelled any inference that he, or the brother, was relying on mere rumor or conjecture and would have been an independent basis on which to predicate a finding that it was derived from personal observation.³⁸

A police officer may not safely rely, without investigation, on an anonymous telephone caller's complaint as a basis for arresting citizens.³⁹ However, the combination of an informer's tip and corroborative evidence obtained by police investigation may be sufficient to establish probable cause, even though each alone would not.⁴⁰ An informant's tip may be sufficiently credible if the government relates the circumstances under which the informant received the information, if the tip includes detailed descriptions of criminal activities of the defendant, or if independent investigation by government agents corroborates some of the information.⁴¹ The purpose of this inquiry is to guarantee that the informant is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation.⁴²

Detailed information provided by a disclosed victim who called the police to report that he had been sodomized and stabbed by a man who was sleeping in a white van parked outside the victim's residence was quickly determined to be correct and, when coupled with the defendant's appearance and statements upon exiting the vehicle, provided probable cause to believe that the defendant had perpetrated an action of violence on the victim warranting the defendant's warrantless arrest.⁴³

Footnotes

- 1 [People v. Elwell](#), 50 N.Y.2d 231, 428 N.Y.S.2d 655, 406 N.E.2d 471 (1980).
For a discussion of reliance on informer, see 34 NY Jur 2d, Crim L § 2005; 5 Am Jur 2d, Arrest § 46.
- 2 [Draper v. U.S.](#), 358 U.S. 307, 79 S. Ct. 329, 3 L. Ed. 2d 327 (1959); [People v. Beruvais](#), 231 A.D.2d 733, 648 N.Y.S.2d 117 (2d Dep't 1996).
- 3 [People v. Campbell](#), 215 A.D.2d 120, 626 N.Y.S.2d 462 (1st Dep't 1995), order aff'd, 87 N.Y.2d 855, 638 N.Y.S.2d 598, 661 N.E.2d 1380 (1995).
The prosecution must show the reliability of the informant and the basis of his or her knowledge. [People v. Wilkinson](#), 5 A.D.3d 512, 773 N.Y.S.2d 111 (2d Dep't 2004), leave to appeal denied, 2 N.Y.3d 809, 781 N.Y.S.2d 308, 814 N.E.2d 480 (2004).
- 4 [Draper v. U.S.](#), 358 U.S. 307, 79 S. Ct. 329, 3 L. Ed. 2d 327 (1959).
The police did not have probable cause for the warrantless arrest of the accused, where an informant had not told officers that he saw the accused in possession of drugs, nor did the warrant application state the informant's "basis of knowledge" indicating that the information was not so detailed as to make clear that it was based on personal observation. [People v. Bigelow](#), 105 A.D.2d 1110, 482 N.Y.S.2d 397 (4th Dep't 1984), order aff'd, 66 N.Y.2d 417, 497 N.Y.S.2d 630, 488 N.E.2d 451 (1985).
- 5 [People v. Rodriguez](#), 52 N.Y.2d 483, 438 N.Y.S.2d 754, 420 N.E.2d 946 (1981).
- 6 [People v. Elwell](#), 50 N.Y.2d 231, 428 N.Y.S.2d 655, 406 N.E.2d 471 (1980); [People v. Boria](#), 204 A.D.2d 652, 612 N.Y.S.2d 80 (2d Dep't 1994) (probable cause established where reliable informant wearing a wired transmitter bought cocaine with premarked money; informant was observed from both surveillance van and unmarked police car; and officers' observations confirmed informant's information); [People v. Jones](#), 172 A.D.2d 265, 568 N.Y.S.2d 88 (1st Dep't 1991) (drug sale coupled with defendant's flight providing probable cause for arrest).
- 7 [People v. Foster](#), 91 A.D.2d 1046, 458 N.Y.S.2d 645 (2d Dep't 1983) (acting solely on information of confidential informant as not constituting probable cause to arrest defendant); [People v. Yen Dong](#), 47 Misc. 2d 726, 263 N.Y.S.2d 102 (City Crim. Ct. 1965), order aff'd, 50 Misc. 2d 120, 269 N.Y.S.2d 529 (App. Term 1966).
A police officer's observations of defendant engaging in an apparent drug transaction could establish probable cause to arrest defendant independent of information provided by a confidential informant, making a Darden hearing unnecessary. This was not a case where there was insufficient evidence to establish probable cause apart from the testimony of the arresting officer as to communications received from the informant. [People v. Farrow](#), 98 N.Y.2d 629, 745 N.Y.S.2d 752, 772 N.E.2d 1110 (2002).
- 8 [McCray v. State of Ill.](#), 386 U.S. 300, 87 S. Ct. 1056, 18 L. Ed. 2d 62 (1967).
A sufficient showing was made of the basis of an informant's knowledge, where the police officer testified that the confidential informant had assisted him in at least half-dozen prior investigations, that the information provided by the informant led to arrest and convictions in such cases, and that the informant had personal knowledge of alleged criminal activity because he was originally offered a "contract" to kill an individual. [People v. Evans](#), 106 A.D.2d 527, 483 N.Y.S.2d 339 (2d Dep't 1984).
The reliability of a confidential informant was established where the detective testified that he had known and used the informant over a period of 10 years, and on five to 10 occasions, the information provided by the informant had been of material assistance in criminal investigations. [People v. Bing](#), 131 Misc. 2d 62, 499 N.Y.S.2d 313 (County Ct. 1985), judgment aff'd, 146 A.D.2d 178, 540 N.Y.S.2d 247 (2d Dep't 1989), order aff'd, 76 N.Y.2d 331, 559 N.Y.S.2d 474, 558 N.E.2d 1011 (1990) and order aff'd, 76 N.Y.2d 331, 559 N.Y.S.2d 474, 558 N.E.2d 1011 (1990).
- 9 [U.S. v. Perry](#), 380 F.2d 356 (2d Cir. 1967); [People v. Rodriguez](#), 52 N.Y.2d 483, 438 N.Y.S.2d 754, 420 N.E.2d 946 (1981).
- 10 [People v. Elwell](#), 50 N.Y.2d 231, 428 N.Y.S.2d 655, 406 N.E.2d 471 (1980).
- 11 [People v. Rodriguez](#), 52 N.Y.2d 483, 438 N.Y.S.2d 754, 420 N.E.2d 946 (1981).

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- 12 [People v. Rodriguez](#), 52 N.Y.2d 483, 438 N.Y.S.2d 754, 420 N.E.2d 946 (1981).
- 13 [People v. Clark](#), 103 Misc. 2d 498, 426 N.Y.S.2d 692 (Sup 1980).
- 14 [People v. Clark](#), 103 Misc. 2d 498, 426 N.Y.S.2d 692 (Sup 1980).
- 15 [People v. Clark](#), 103 Misc. 2d 498, 426 N.Y.S.2d 692 (Sup 1980).
- 16 [People v. Clark](#), 103 Misc. 2d 498, 426 N.Y.S.2d 692 (Sup 1980).
- 17 [People v. Muir](#), 3 A.D.3d 597, 771 N.Y.S.2d 220 (3d Dep't 2004), leave to appeal denied, 1 N.Y.3d 631, 777 N.Y.S.2d 30, 808 N.E.2d 1289 (2004).
- 18 [People v. LeGrand](#), 142 A.D.2d 977, 530 N.Y.S.2d 396 (4th Dep't 1988); [People v. Marin](#), 91 A.D.2d 616, 456 N.Y.S.2d 403 (2d Dep't 1982) (reliability resulting from citizen identifying defendants from past robbery of restaurant); [People v. Coles](#), 104 Misc. 2d 333, 428 N.Y.S.2d 412 (Sup 1980).
- 19 [People v. McCain](#), 134 A.D.2d 623, 521 N.Y.S.2d 517 (2d Dep't 1987); [People v. Inman](#), 80 A.D.2d 622, 436 N.Y.S.2d 63 (2d Dep't 1981).
- There was sufficient probable cause to arrest the defendant based on information from a private citizen who happened to witness the crime and was able to identify the alleged perpetrator since the witness's information was properly accorded a high level of reliability, especially in view of the criminal sanctions attendant upon falsely reporting such information to the authorities. [People v. Chipp](#), 75 N.Y.2d 327, 553 N.Y.S.2d 72, 552 N.E.2d 608 (1990).
- An accusation against a specific individual from an identified citizen is presumed reliable and may constitute the basis for police activity. [People v. Smith](#), 124 A.D.2d 756, 508 N.Y.S.2d 255 (2d Dep't 1986).
- 20 [People v. Clark](#), 103 Misc. 2d 498, 426 N.Y.S.2d 692 (Sup 1980).
- 21 [People v. Cunningham](#), 135 A.D.2d 725, 522 N.Y.S.2d 626 (2d Dep't 1987).
- 22 [People v. Campbell](#), 215 A.D.2d 120, 626 N.Y.S.2d 462 (1st Dep't 1995), order aff'd, 87 N.Y.2d 855, 638 N.Y.S.2d 598, 661 N.E.2d 1380 (1995).
- 23 [People v. Stewart](#), 41 N.Y.2d 65, 390 N.Y.S.2d 870, 359 N.E.2d 379 (1976).
- 24 [People v. Stewart](#), 41 N.Y.2d 65, 390 N.Y.S.2d 870, 359 N.E.2d 379 (1976).
- 25 [People v. Stewart](#), 41 N.Y.2d 65, 390 N.Y.S.2d 870, 359 N.E.2d 379 (1976).
- 26 [People v. Davis](#), 59 A.D.2d 722, 398 N.Y.S.2d 366 (2d Dep't 1977).
- 27 [Aguilar v. State of Tex.](#), 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964) (abrogated on other grounds by, [Illinois v. Gates](#), 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983)).
- 28 [Illinois v. Gates](#), 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983).
- 29 [People v. Beruvais](#), 231 A.D.2d 733, 648 N.Y.S.2d 117 (2d Dep't 1996).
- Information provided by an anonymous caller was insufficient to establish probable cause to arrest a murder suspect, where the caller did not indicate that she had any personal knowledge of the shooting or provide any details about the crime from which such knowledge could be inferred. [People v. Kennedy](#), 282 A.D.2d 759, 726 N.Y.S.2d 109 (2d Dep't 2001).
- 30 [People v. Beruvais](#), 231 A.D.2d 733, 648 N.Y.S.2d 117 (2d Dep't 1996).
- 31 [People v. Beruvais](#), 231 A.D.2d 733, 648 N.Y.S.2d 117 (2d Dep't 1996).
- 32 [People v. Rodriguez](#), 52 N.Y.2d 483, 438 N.Y.S.2d 754, 420 N.E.2d 946 (1981); [People v. Millard](#), 90 A.D.2d 590, 456 N.Y.S.2d 201 (3d Dep't 1982).
- 33 [People v. Rooney](#), 82 A.D.2d 840, 439 N.Y.S.2d 659 (2d Dep't 1981) (decided before Supreme Court abrogated two-prong test in [Aguilar v. Texas](#)).
- 34 [People v. Hairston](#), 117 A.D.2d 618, 498 N.Y.S.2d 161 (2d Dep't 1986); [People v. Inman](#), 80 A.D.2d 622, 436 N.Y.S.2d 63 (2d Dep't 1981).
- 35 [People v. Beruvais](#), 231 A.D.2d 733, 648 N.Y.S.2d 117 (2d Dep't 1996).
- 36 [People v. Beruvais](#), 231 A.D.2d 733, 648 N.Y.S.2d 117 (2d Dep't 1996).
- 37 [People v. Jackson](#), 235 A.D.2d 923, 653 N.Y.S.2d 419 (3d Dep't 1997).
- 38 [People v. Jackson](#), 235 A.D.2d 923, 653 N.Y.S.2d 419 (3d Dep't 1997).
- 39 [Manfredonia v. Barry](#), 401 F. Supp. 762 (E.D. N.Y. 1975); [People v. Cobb](#), 208 A.D.2d 453, 617 N.Y.S.2d 721 (1st Dep't 1994) (probable cause not established by anonymous tip about man selling credit cards,

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even though officer observed a man exactly fitting informant's description holding what could have been a credit card).

40 [Whiteley v. Warden, Wyo. State Penitentiary, 401 U.S. 560, 91 S. Ct. 1031, 28 L. Ed. 2d 306 \(1971\);](#)
[People v. Crespo, 207 A.D.2d 668, 616 N.Y.S.2d 32 \(1st Dep't 1994\)](#) (probable cause established where
arresting officer acted on information supplied by fellow officer, and arresting officer immediately
observed defendant, who matched description supplied by fellow officer, leave park where fellow officer
had observed defendant participate in drug transaction); [People v. Jiminez, 200 A.D.2d 889, 607 N.Y.S.2d](#)
[443 \(3d Dep't 1994\)](#) (probable cause established where officer heard codefendant call defendant “supply
man,” and informant twice received drugs shortly after defendant left codefendant's home).

41 [U.S. v. Shkoza, 406 F. Supp. 1065 \(S.D. N.Y. 1975\).](#)

42 [Spinelli v. U.S., 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 \(1969\)](#) (abrogated by, [Illinois v. Gates,](#)
[462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 \(1983\)](#)) (note that Spinelli was abrogated by [Illinois v.](#)
[Gates, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 \(1983\)](#) where the Supreme Court abandoned the
two-pronged test and substituted it with the “totality of the circumstances” approach).

43 [People v. Waite, 243 A.D.2d 820, 663 N.Y.S.2d 901 \(3d Dep't 1997\).](#)

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§ 4:8. Probable cause—Reliance on informer— Illustrations

References

West's Key Number Digest

- West's Key Number Digest, [Arrest](#) 63.4(7)

Anonymous tips to establish reasonable cause for arrest and/or appropriate seizure of a defendant are particularly tenuous when establishing reasonable cause. As the Court of Appeals stated in [People v. Moore](#), 6 N.Y.3d 496, 814 N.Y.S.2d 567, 847 N.E.2d 1141 (2006), an anonymous tip cannot provide reasonable suspicion to justify a seizure unless the tip contains predictive information such as information suggestive of criminal behavior so that the police can test the reliability of the tip.

An unidentified informant's tip that the defendant was present in the crowd at a jazz festival and that the defendant had been identified as the murder suspect in a recent newspaper article did not, together with the newspaper article, provide the police with probable cause to arrest the defendant where there was no separate basis supporting the reliability of the information provided by the informant.¹

The prosecution failed to establish the existence of an informant such that the information derived from the informant could not be used to establish probable cause to arrest the defendant, where the officer identified the informant by name but none of the police records the officer produced contained the name or photograph of the informant, and where efforts to locate the informant were perfunctory.²

The detective had probable cause to arrest the defendant since the informant's reliability was established by the fact that a meeting he had with the defendant at a Laundromat took place exactly as he had told the police as well as the report of the informant which sufficiently described the entire transaction.³

Oral and written statements given by an informer provided the probable cause needed to justify the arrest of the defendant on a homicide charge, where the information contained in those statements, indicating the informant's exact knowledge of

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circumstances relating to the incident and the fact that the informant's statement was against his own penal interest, was sufficiently detailed to indicate both his reliability as an informant and the basis of his knowledge.⁴

An informant's tip that described a different vehicle and quite possibly a different individual did not provide probable cause to sustain a warrantless arrest.⁵

In a prosecution for kidnapping, both the informant who had no criminal record and who was an upstanding citizen particularly concerned that the abducted child be found, and the source of the informant's information, personal observation, were considered reliable.⁶

An informant's identification of a suspect's photograph in an array constitutes probable cause to arrest the subject.⁷

Information provided by an informant was sufficiently reliable to give police probable cause to arrest the defendant without a warrant on suspicion of drug possession, where, after the informant was arrested for the sale of a controlled substance, he identified the defendant as his supplier and advised the police that every day for the preceding two weeks, he had driven to another city to pick up the defendant, returned with him to his apartment, and sold heroin brought by the defendant while the defendant waited, which admission was against the informant's penal interests and was corroborated to some extent by monitored telephone conversations between the defendant and the informant.⁸

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Footnotes

- 1 [People v. Rollock](#), 277 A.D.2d 51, 715 N.Y.S.2d 64 (1st Dep't 2000).
- 2 [People v. Phillips](#), 242 A.D.2d 856, 662 N.Y.S.2d 875 (4th Dep't 1997).
- 3 [People v. McCracken](#), 91 A.D.2d 339, 459 N.Y.S.2d 902 (3d Dep't 1983).
- 4 [People v. Smith](#), 107 A.D.2d 633, 484 N.Y.S.2d 17 (1st Dep't 1985).
- 5 [People v. Coston](#), 170 A.D.2d 773, 565 N.Y.S.2d 868 (3d Dep't 1991).
- 6 [People v. Rios](#), 105 Misc. 2d 303, 432 N.Y.S.2d 63 (County Ct. 1980).
- 7 [People v. Pinkney](#), 156 A.D.2d 182, 548 N.Y.S.2d 226 (1st Dep't 1989); [People v. Jacobo](#), 154 Misc. 2d 540, 585 N.Y.S.2d 665 (Sup 1992).
- 8 [People v. Muir](#), 3 A.D.3d 597, 771 N.Y.S.2d 220 (3d Dep't 2004), leave to appeal denied, 1 N.Y.3d 631, 777 N.Y.S.2d 30, 808 N.E.2d 1289 (2004).

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§ 4:9. Probable cause—With respect to narcotics transactions

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- West's Key Number Digest, [Arrest](#) 63.4(.5)

The establishment of probable cause concerning the exchange of illegal narcotics can be established on the same level as for any other criminal offense. (See [People v. Richardson](#), 27 A.D.3d 1168, 810 N.Y.S.2d 759 (4th Dep't 2006).

The level of drug trafficking in our society is extreme enough so that no longer is the mere possession of a glassine envelope and passage of it in a street encounter likely to be an innocent act. Rather, it is more likely to be the hallmark of an illicit drug exchange.¹ Accordingly, the observation of a trained drug enforcement officer, who observes the exchange of a glassine envelope in a high drug trafficking area, may give rise to probable cause to believe that a crime is being committed.² As a matter of law, an inference of probable cause to make a narcotics arrest arises when a trained and experienced police officer observes the delivery of one or more glassine envelopes in an area notorious for narcotics activity.³ It then becomes a question for those courts with fact-finding power to find whether, as a question of fact, probable cause existed.⁴

There are certain circumstances enumerated by the court which, when added to the exchange of a glassine envelope, would give rise to a finding of probable cause.⁵ These circumstances are: (1) the exchange of money; (2) evidence of furtive or evasive behavior on the part of the participants; or (3) the exchange occurs in an area rampant with narcotics activities, which is proven by competent evidence.⁶

Probable cause to arrest the defendant was present where the police observed the defendant on a deserted street of commercial stores, and they could see a portion of the defendant's behavior over a half-hour period, observing the defendant moving up and down the street, and giving attention to one particular store. The police knew the configuration of the store and observed the defendant enter an outside stairway that led to a basement room of that store, and then observed the defendant and another person

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carrying boxes, apparently coming from the basement room of the store. At that point, the police acted properly in moving in on the pair and making the arrest, and statements subsequently taken were admissible and should not have been suppressed.⁷

There is no single factor, not even observing an item exchanged, that is dispositive on the issue of whether probable cause exists to arrest a suspected drug trafficker, and there is no talismanic number of transactions that must be observed before the police have established probable cause to arrest a suspected drug trafficker.⁸

For a court to analyze a street encounter and apply the “fluid concept” of probable cause necessary in the drug trade, the court must rely on an officer's expertise in narcotics cases as well as the nature of certain neighborhoods and changing trends in marijuana and narcotics use and sale.⁹

The delivery of the glassine envelope, which is the “hallmark” of the drug transaction, in an area notorious for narcotics activities, may rise to probable cause for purposes of arresting the defendant.¹⁰ The observation by the police of an exchange between the defendant and another person of a small object and United States currency is not sufficient to establish probable cause to arrest the defendant.¹¹

Probable cause to arrest existed where the arresting officer saw the defendant remove a quantity of glassine envelopes out of a bag he was carrying and then put them back before placing them underneath the front seat of a van, after which the defendant kept stopping and turning around while walking, and where the officer had over five-years' experience, had made over 1,200 arrests and was assigned to a specialized narcotics unit at the time of the defendant's arrest, and had received instructions in recognizing packaging of both heroin and cocaine.¹²

A police officer experienced in making narcotics-related arrests, including arrests in the neighborhood in which she was working at the time of the defendant's arrest, had probable cause to arrest the defendant for possession of a controlled substance with intent to sell, even though the officer could not discern the exact nature of the objects she observed being transferred by the defendant in exchange for money.¹³

A detective's observation of a single drug transaction supported a finding of probable cause to arrest for a narcotics offense where he observed one participant handle an unidentified object in a manner typical of a drug sale and the other participant subsequently and furtively conceal a plastic bag among nearby cinder blocks and an exchange of currency, all of which occurred in a drug-prone location, and where the detective was an experienced officer trained in the investigation and detection of narcotics.¹⁴

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Footnotes

- 1 [People v. McRay](#), 51 N.Y.2d 594, 435 N.Y.S.2d 679, 416 N.E.2d 1015 (1980); [People v. Alston](#), 84 A.D.2d 737, 444 N.Y.S.2d 76 (1st Dep't 1981).
- 2 [People v. McRay](#), 51 N.Y.2d 594, 435 N.Y.S.2d 679, 416 N.E.2d 1015 (1980); [People v. Bailey](#), 215 A.D.2d 676, 628 N.Y.S.2d 291 (2d Dep't 1995); [People v. Hall](#), 234 A.D.2d 478, 651 N.Y.S.2d 575 (2d Dep't 1996); [People v. Schlaich](#), 218 A.D.2d 398, 640 N.Y.S.2d 885 (1st Dep't 1996); [People v. Alston](#), 84 A.D.2d 737, 444 N.Y.S.2d 76 (1st Dep't 1981).
- 3 [People v. Schlaich](#), 218 A.D.2d 398, 640 N.Y.S.2d 885 (1st Dep't 1996); [People v. Garcia](#), 132 Misc. 2d 350, 503 N.Y.S.2d 972 (City Crim. Ct. 1986).
- 4 [People v. Garcia](#), 132 Misc. 2d 350, 503 N.Y.S.2d 972 (City Crim. Ct. 1986).

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- 5 [People v. Jones](#), 90 N.Y.2d 835, 660 N.Y.S.2d 549, 683 N.E.2d 14 (1997); [People v. McRay](#), 51 N.Y.2d 594, 435 N.Y.S.2d 679, 416 N.E.2d 1015 (1980); [People v. Alston](#), 84 A.D.2d 737, 444 N.Y.S.2d 76 (1st Dep't 1981).
- 6 [People v. Jones](#), 90 N.Y.2d 835, 660 N.Y.S.2d 549, 683 N.E.2d 14 (1997); [People v. McRay](#), 51 N.Y.2d 594, 435 N.Y.S.2d 679, 416 N.E.2d 1015 (1980); [Matter of Devon H.](#), 225 A.D.2d 135, 650 N.Y.S.2d 120 (1st Dep't 1996); [People v. Alston](#), 84 A.D.2d 737, 444 N.Y.S.2d 76 (1st Dep't 1981).
The police officers' viewing of a clear plastic bag containing a white powder on the front seat of an automobile provided probable cause to arrest the occupants of the automobile. [People v. Cabot](#), 88 A.D.2d 556, 450 N.Y.S.2d 489 (1st Dep't 1982).
- 7 [People v. Valdez](#), 78 A.D.2d 449, 437 N.Y.S.2d 671 (1st Dep't 1981).
- 8 [Matter of Devon H.](#), 225 A.D.2d 135, 650 N.Y.S.2d 120 (1st Dep't 1996).
- 9 [People v. Mays](#), 190 Misc. 2d 310, 738 N.Y.S.2d 152 (Sup 2001), *aff'd*, 10 A.D.3d 556, 781 N.Y.S.2d 740 (1st Dep't 2004), leave to appeal denied, 4 N.Y.3d 765, 792 N.Y.S.2d 9, 825 N.E.2d 141 (2005).
- 10 [People v. Leung](#), 68 N.Y.2d 734, 506 N.Y.S.2d 320, 497 N.E.2d 687 (1986); [People v. McRay](#), 51 N.Y.2d 594, 435 N.Y.S.2d 679, 416 N.E.2d 1015 (1980); [People v. Schlaich](#), 218 A.D.2d 398, 640 N.Y.S.2d 885 (1st Dep't 1996); [People v. Alston](#), 84 A.D.2d 737, 444 N.Y.S.2d 76 (1st Dep't 1981).
- 11 [People v. Bennett](#), 170 A.D.2d 516, 566 N.Y.S.2d 316 (2d Dep't 1991).
- 12 [People v. Hall](#), 234 A.D.2d 478, 651 N.Y.S.2d 575 (2d Dep't 1996).
- 13 [People v. Schlaich](#), 218 A.D.2d 398, 640 N.Y.S.2d 885 (1st Dep't 1996).
- 14 [People v. Jones](#), 90 N.Y.2d 835, 660 N.Y.S.2d 549, 683 N.E.2d 14 (1997).

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§ 4:10. Probable cause—Radio transmissions, fellow officer rule, and computer records

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An arresting officer may rely on the information received from another police officer, particularly in a situation where that first police officer observed criminal conduct such as a drug transaction. (See [People v. Bass](#), 15 A.D.3d 287, 789 N.Y.S.2d 498 (1st Dep't 2005), leave to appeal denied, 4 N.Y.3d 851, 797 N.Y.S.2d 425, 830 N.E.2d 324 (2005)).

The “fellow officer rule” provides that even if an arresting officer lacks personal knowledge sufficient to establish probable cause, the arrest is lawful if the officer acts on the direction of, or as a result of, communication with a superior or fellow officer or another police department provided that the police as a whole possess information sufficient to constitute probable cause to make the arrest.¹ Thus, law enforcement authorities may properly rely and act on a police radio bulletin, and where the bulletin establishes probable cause, an arrest and subsequent search is authorized.² The rule also applies to information received by the police from an auxiliary officer.³

The fellow officer rule does not apply to a situation in which the arresting officer relies on information provided by a confidential informant rather than a fellow officer.⁴

When an arresting officer receives a radio transmission from another officer concerning a crime in progress, the reliability of the information conveyed may be assumed by the officer in the field.⁵ This police conduct is countenanced because the sender's knowledge is imputed to the receiver and, when the receiver acts, he or she presumptively possesses the requisite probable cause.⁶ However, not only must the bulletin on its face establish probable cause, but the sender must have possessed probable cause at the time the bulletin is dispatched.⁷

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The presumption of probable cause is rebutted only when the defendant can make a specific challenge to the knowledge of the sender.⁸ Thus, if information conveyed to a police officer via a radio transmission from another officer would be sufficient to constitute probable cause, then, absent a specific challenge by the defendant to its reliability, the suppression court may also assume it to be reliable; and the prosecution, upon proving the contents of the transmission, has satisfied its burden of establishing probable cause to make the arrest.⁹ However, although a radio transmission furnishes prima facie probable cause to arrest, this presumption disappears when challenged by a suppression motion which requires the prosecution to demonstrate that the sender had probable cause, or that the independent observations of the officers at the scene of the arrest were sufficient to justify the action taken.¹⁰ In a suppression hearing, the prosecution has no duty to produce the sender of the transmission to establish his or her knowledge.¹¹ Nonetheless, when the police make an arrest based solely on a radio-transmitted description, the prosecution must establish probable cause at a suppression hearing through testimony by the arresting officer concerning the details of the communicated description.¹² While testimony that the person arrested matched the suspect's description is insufficient to meet that burden,¹³ a radio transmission to an officer is sufficient to establish probable cause to stop the defendant if it includes a detailed description of the defendant and his location and indicates that the defendant has committed a crime.¹⁴ When making a probable cause determination, the court may rely on the arresting officer's hearsay testimony alone since there is no need for the prosecution to also produce the undercover officer to support a finding of probable cause.¹⁵

Communications from a police officer with probable cause to arrest the defendant based on the officer's personal observation of a drug sale in progress could be relied on by the second officer who continued surveillance of the defendant and the defendant's customer when they left the first officer's view.¹⁶ Where the knowledge of an officer who later provides information to an arresting officer is based on his first-hand observation of the defendant committing the crime, the prosecution is not required to produce that officer at the suppression hearing, but may rely instead on the testimony of one of the arresting officers in establishing probable cause.¹⁷

An officer was entitled to detain the defendant and the codefendant to determine their involvement in a shooting where the sound of gunshots and the crowd's movement toward the fleeing codefendant provided the transmitting officer with reasonable suspicion to pursue the defendant, after which the apprehending officer was entitled to rely on the information provided by his fellow officer transmitted over the radio.¹⁸

An undercover officer's statement by radio transmission to the arresting officer that he had made a "positive observation" adequately communicated the nature of the conduct he observed, given the arresting officer's testimony that such phrase was commonly used among police officers to indicate an exchange of drugs for money, and that she had understood it to mean that the undercover officer had personally witnessed the exchange.¹⁹

Under the fellow officer rule, the police in another state who had received a report from New York officers to be on the lookout for the defendant at a particular residence had probable cause to arrest the defendant as he drove away from that residence, where the officers who sent the report were acting on a statement given to them by the victim and eyewitness of the attack, such that probable cause could be imputed to the out-of-state officer who was acting at the direction of a New York officer who had the requisite probable cause.²⁰

Evidence was sufficient to establish that there was probable cause to arrest the defendant where the arresting officers were acting pursuant to a radio transmission received from an undercover officer who personally observed the defendant's participation in the drug transaction for which he was arrested.²¹

The radio transmission provided the police with sufficient information to lawfully attempt to stop the automobile and question the defendant where the defendant fled at a high speed and hit another police car, the codefendant then attempted to escape on foot, money was seen blowing out of the car, and a gun was found in plain view by the defendant's feet.²²

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Police officers may similarly rely on computer records in determining whether there is probable cause to arrest someone.²³ However, where the defendants are arrested on the basis of a mistaken police computer record which has not been corrected for three months, police reliance on the records is unreasonable and unacceptable.²⁴

The court held that when the accuracy of a computer printout is challenged but is not disproved by the defense, the fact that the accuracy of the printout is challenged does not establish probable cause at a suppression hearing.²⁵

An arrest made in reliance on the computerized criminal record file of the defendant, which showed as outstanding a parole violation warrant which had, in fact, been executed nine months before and vacated four months before the arrest, was made without probable cause.²⁶

The Appellate Division affirmed a trial judge ruling where the police officers, upon receiving radio description of an armed robber stopped an individual who matched the description. It was observed by the police that he was walking at an angle and that is left bicep was stiff by his side, his left forearm was held to his waist and as such the officer, based on his experience, believed that the individual was carrying a handgun which was later confirmed following a frisk. It was clear to the Appellate Division that reasonable suspicion justified the frisk and as such probable cause followed in the arrest of the defendant.²⁷

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Footnotes

- 1 [People v. Ramirez-Portoreal](#), 88 N.Y.2d 99, 643 N.Y.S.2d 502, 666 N.E.2d 207 (1996); [People v. Miller](#), 242 A.D.2d 896, 662 N.Y.S.2d 886 (4th Dep't 1997).
Ghost officer's observation of defendant in contact with undercover officer followed by undercover officer's prearranged positive buy signal provided probable cause. [People v. Patnelli](#), 276 A.D.2d 256, 713 N.Y.S.2d 727 (1st Dep't 2000).
[People v. Wilkinson](#), 5 A.D.3d 512, 773 N.Y.S.2d 111 (2d Dep't 2004), leave to appeal denied, 2 N.Y.3d 809, 781 N.Y.S.2d 308, 814 N.E.2d 480 (2004).
The fellow officer rule applies whenever an arresting officer indicates that he acted as a result of communication with a fellow officer or another police department, provided that the police as a whole were in possession of information sufficient to constitute probable cause to make the arrest. [People v. Robinson](#), 8 A.D.3d 131, 779 N.Y.S.2d 40 (1st Dep't 2004), leave to appeal denied, 3 N.Y.3d 680, 784 N.Y.S.2d 19, 817 N.E.2d 837 (2004).
- 2 [People v. Lypka](#), 36 N.Y.2d 210, 366 N.Y.S.2d 622, 326 N.E.2d 294 (1975); [People v. Perez](#), 207 A.D.2d 690, 616 N.Y.S.2d 360 (1st Dep't 1994) (probable cause established where defendant matched undercover officer's radioed detailed description, even though arrest was directed by sergeant lacking personal knowledge of facts in the transmission); [People v. Love](#), 204 A.D.2d 97, 610 N.Y.S.2d 958 (1st Dep't 1994), order aff'd, 84 N.Y.2d 917, 620 N.Y.S.2d 809, 644 N.E.2d 1365 (1994) (warrantless entry into hotel room justified where radio transmission described "a man with a gun" in a specific room in a specific hotel, and women in room tried to slam the door shut before the officers could enter); [People v. Washington](#), 87 N.Y.2d 945, 641 N.Y.S.2d 223, 663 N.E.2d 1253 (1996); [People v. Hummer](#), 228 A.D.2d 783, 644 N.Y.S.2d 343 (3d Dep't 1996); [People v. Riley-James](#), 168 A.D.2d 740, 563 N.Y.S.2d 894 (3d Dep't 1990) (all-points bulletin providing description of suspects furnishing probable cause for arrest); [People v. Rowe](#), 146 A.D.2d 720, 537 N.Y.S.2d 64 (2d Dep't 1989).
The fellow officer rule applied where an investigating officer had probable cause to prepare an arrest warrant application based on information provided to him by the victim, and the officer also prepared a departmental memorandum and accompanying profile of defendant stating that a warrant application

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was pending for the arrest of defendant on a menacing charge; and that defendant possessed a gun, and defendant was arrested by fellow officers who had read the memorandum and profile. Because the investigating officer had probable cause to arrest defendant, the arresting officers who read the memorandum and profile were also deemed to have had probable cause. [People v. Miller](#), 242 A.D.2d 896, 662 N.Y.S.2d 886 (4th Dep't 1997).

The police had probable cause to arrest the defendant after responding to a radio run that a black male had committed an assault where the police found a blood-stained knife and handkerchief after the defendant exited the building where a person had been stabbed. [People v. Whitney](#), 167 A.D.2d 254, 561 N.Y.S.2d 754 (1st Dep't 1990).

An arresting officer does not have to possess personal knowledge of the events underlying an arrest provided that he or she acts upon the direction of, or as a result of, a communication with an officer who possesses information sufficient to constitute probable cause. [People v. Robinson](#), 122 A.D.2d 173, 504 N.Y.S.2d 710 (2d Dep't 1986).

The fact that the defendant and his companions matched the radio broadcast description, along with the recovery of tools commonly used for stripping automobiles, sufficiently corroborated the radio broadcast to establish probable cause for the arrest of the defendant and the search of the vehicle. [People v. Ball](#), 121 A.D.2d 551, 503 N.Y.S.2d 847 (2d Dep't 1986).

[People v. Rosario](#), 78 N.Y.2d 583, 578 N.Y.S.2d 454, 585 N.E.2d 766 (1991).

[People v. Wilkinson](#), 5 A.D.3d 512, 773 N.Y.S.2d 111 (2d Dep't 2004), leave to appeal denied, 2 N.Y.3d 809, 781 N.Y.S.2d 308, 814 N.E.2d 480 (2004).

[People v. Perez](#), 207 A.D.2d 690, 616 N.Y.S.2d 360 (1st Dep't 1994) (probable cause established where defendant matched undercover officer's radioed detailed description, even though arrest was directed by sergeant lacking personal knowledge of facts in the transmission); [People v. Love](#), 204 A.D.2d 97, 610 N.Y.S.2d 958 (1st Dep't 1994), order aff'd, 84 N.Y.2d 917, 620 N.Y.S.2d 809, 644 N.E.2d 1365 (1994) (warrantless entry into hotel room justified where radio transmission described "a man with a gun" in a specific room in a specific hotel, and women in room tried to slam the door shut before the officers could enter); [People v. Riley-James](#), 168 A.D.2d 740, 563 N.Y.S.2d 894 (3d Dep't 1990); [People v. Cunningham](#), 135 A.D.2d 725, 522 N.Y.S.2d 626 (2d Dep't 1987) (information supplied to police by radio dispatcher, and female complainant provided officers with probable cause to arrest defendant for burglary and robbery); [People v. Morales](#), 116 A.D.2d 671, 497 N.Y.S.2d 739 (2d Dep't 1986); [People v. Reddick](#), 107 A.D.2d 721, 484 N.Y.S.2d 78 (2d Dep't 1985), order aff'd, 65 N.Y.2d 835, 493 N.Y.S.2d 124, 482 N.E.2d 920 (1985).

Evidence recovered by the police following the defendant's arrest would not be suppressed because a radio transmission to the arresting officer from one of the detectives involved in the investigation provided probable cause for the arrest. [People v. McCloud](#), 182 A.D.2d 835, 583 N.Y.S.2d 15 (2d Dep't 1992).

The police officers were justified in stopping the defendant where the officers verified by personal observation all the information that they had received on a radio call based on an anonymous tip when they saw the defendant approach the car described in the radio call along with another individual who was acting as an apparent lookout. [People v. Sharrieff](#), 117 A.D.2d 635, 497 N.Y.S.2d 959 (2d Dep't 1986).

A police officer had probable cause to arrest the defendant since the radio transmissions alerted the arresting officer that two black males were seen exiting a suspicious looking vehicle in the immediate vicinity of a residence where a burglary was reported to be in progress, and the defendant was subsequently spotted hiding behind a bush in the yard of the specified residence and running to a nearby vehicle after peering out to see if the coast was clear. [People v. Williams](#), 117 A.D.2d 830, 499 N.Y.S.2d 152 (2d Dep't 1986).

[People v. Hummer](#), 228 A.D.2d 783, 644 N.Y.S.2d 343 (3d Dep't 1996); [People v. Jones](#), 110 Misc. 2d 875, 443 N.Y.S.2d 298 (City Crim. Ct. 1981).

[People v. Rosario](#), 78 N.Y.2d 583, 578 N.Y.S.2d 454, 585 N.E.2d 766 (1991); [People v. Hummer](#), 228 A.D.2d 783, 644 N.Y.S.2d 343 (3d Dep't 1996).

Where the transmission furnishes probable cause, the sender's knowledge is imputed to the receiver, who then presumptively possesses probable cause to make the arrest. [People v. McCloud](#), 182 A.D.2d 835, 583 N.Y.S.2d 15 (2d Dep't 1992).

[People v. McCloud](#), 182 A.D.2d 835, 583 N.Y.S.2d 15 (2d Dep't 1992).

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- 9 [People v. Lopez](#), 160 A.D.2d 167, 553 N.Y.S.2d 330 (1st Dep't 1990); [People v. Reddick](#), 107 A.D.2d 721, 484 N.Y.S.2d 78 (2d Dep't 1985), order aff'd, 65 N.Y.2d 835, 493 N.Y.S.2d 124, 482 N.E.2d 920 (1985).
- 10 [People v. Rosario](#), 78 N.Y.2d 583, 578 N.Y.S.2d 454, 585 N.E.2d 766 (1991); [People v. Hummer](#), 228 A.D.2d 783, 644 N.Y.S.2d 343 (3d Dep't 1996); [People v. Gunter](#), 158 A.D.2d 541, 551 N.Y.S.2d 309 (2d Dep't 1990).
- The hearsay telephone communication from the sergeant at the suppression hearing neither sufficed to establish the content of the radio bulletin nor its basis or source which required the suppression of the physical evidence as the fruit of an arrest not predicated upon probable cause. [People v. Sostre](#), 134 A.D.2d 300, 520 N.Y.S.2d 627 (2d Dep't 1987).
- 11 [People v. McCloud](#), 182 A.D.2d 835, 583 N.Y.S.2d 15 (2d Dep't 1992).
- 12 [People v. Garcia](#), 232 A.D.2d 272, 648 N.Y.S.2d 909 (1st Dep't 1996), opinion after grant of reargument, 232 A.D.2d 272, 648 N.Y.S.2d 555 (1st Dep't 1996).
- 13 [People v. Garcia](#), 232 A.D.2d 272, 648 N.Y.S.2d 555 (1st Dep't 1996).
- 14 [People v. Hummer](#), 228 A.D.2d 783, 644 N.Y.S.2d 343 (3d Dep't 1996).
- The arresting officer had probable cause to arrest the defendant and conduct a search incident to the arrest where an undercover officer, who also had probable cause to arrest the defendant, transmitted a radio run with a specific description of the suspect, and the arresting officer subsequently observed the defendant who fit the description of the perpetrator. [People v. Garcia](#), 132 Misc. 2d 350, 503 N.Y.S.2d 972 (City Crim. Ct. 1986).
- 15 [People v. Washington](#), 87 N.Y.2d 945, 641 N.Y.S.2d 223, 663 N.E.2d 1253 (1996).
- 16 [People v. Ballard](#), 232 A.D.2d 296, 648 N.Y.S.2d 571 (1st Dep't 1996).
- 17 [People v. Green](#), 13 A.D.3d 646, 789 N.Y.S.2d 500 (2d Dep't 2004), leave to appeal denied, 4 N.Y.3d 831, 796 N.Y.S.2d 586, 829 N.E.2d 679 (2005) and leave to appeal denied, 4 N.Y.3d 836, 796 N.Y.S.2d 591, 829 N.E.2d 684 (2005) (both arresting officers and officer who sent radio message had jointly encountered defendant on street minutes earlier, and arresting officers had independent knowledge of defendant's physical appearance).
- 18 [People v. Bellamy](#), 228 A.D.2d 230, 643 N.Y.S.2d 561 (1st Dep't 1996).
- 19 [People v. Washington](#), 87 N.Y.2d 945, 641 N.Y.S.2d 223, 663 N.E.2d 1253 (1996).
- 20 [People v. Motter](#), 235 A.D.2d 582, 653 N.Y.S.2d 378 (3d Dep't 1997).
- 21 [People v. Morales](#), 116 A.D.2d 671, 497 N.Y.S.2d 739 (2d Dep't 1986).
- 22 [People v. Christian](#), 118 A.D.2d 793, 500 N.Y.S.2d 161 (2d Dep't 1986).
- 23 [People v. Griffin](#), 116 Misc. 2d 751, 456 N.Y.S.2d 334 (Sup 1982) (computer printout establishing presumptive probable cause); [People v. Jones](#), 110 Misc. 2d 875, 443 N.Y.S.2d 298 (City Crim. Ct. 1981).
- 24 [People v. Jones](#), 110 Misc. 2d 875, 443 N.Y.S.2d 298 (City Crim. Ct. 1981).
- 25 [People v. Griffin](#), 116 Misc. 2d 751, 456 N.Y.S.2d 334 (Sup 1982).
- 26 [People v. Jennings](#), 54 N.Y.2d 518, 446 N.Y.S.2d 229, 430 N.E.2d 1282 (1981).
- 27 [People v. Joyce](#), 58 A.D.3d 476, 872 N.Y.S.2d 8 (1st Dep't 2009), leave to appeal denied, 12 N.Y.3d 818, 881 N.Y.S.2d 25, 908 N.E.2d 933 (2009).

§ 4:11.Illustrations—Probable cause found to exist, 1 Criminal Procedure in New York...

1 Criminal Procedure in New York § 4:11 (2d)

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§ 4:11. Illustrations—Probable cause found to exist

References

West's Key Number Digest

- West's Key Number Digest, [Arrest](#) 63.4(.5)

Where a police officer observed cocaine on the center console of the defendant's vehicle where the vehicle had been properly stopped, the court had the probable cause to determine the arrest of the defendant for possession of illegal narcotics. ([People v. Schwing](#), 14 A.D.3d 867, 787 N.Y.S.2d 715 (3d Dep't 2005)).

In a prosecution for criminal possession of stolen property, the defendant's warrantless arrest was supported by probable cause where: (1) a detective received a call from an individual reporting her charge card missing, and that charges had been made at certain restaurants and a furniture store, and that the store manager told her that a man and woman made the purchase, and that he obtained the man's beeper number and the license plate number of the car the individuals were driving; (2) the detective contacted the store manager who provided a physical description of the man and told the detective that he became suspicious when the individuals refused free delivery and arranged to have the furniture delivered to an apartment where the man accepted the furniture downstairs and refused to allow the delivery persons to bring it into the apartment; (3) where the detective learned that the license plate was to a car registered to a woman who provided a physical description of the defendant and gave him a number for the defendant's beeper which matched the number the man had given the manager, and who told the detective that the defendant had a relative who lived at the address to which the furniture was delivered; (4) the detective spoke to the woman who reported the card as stolen and when told the defendant's name, responded that he was a superintendent of the building in which she lived, and that the last time she saw her credit card was in her apartment; and (5) the detective went to the woman's apartment building and saw a man matching the description he had been given and arrested the defendant and searched him, producing a beeper and credit cards of other residents of the apartment building.¹

The confluence of circumstances and information obtained during the investigation from witnesses regarding the defendant's access to a garage and vacant house damaged in arson fires, his inebriated condition and argumentative disposition earlier in the evening, his two prior arrests for arson, and his plans to purchase the house provided probable cause for the police to arrest the defendant for arson.²

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Footnotes

- 1 [People v. Radoncic, 239 A.D.2d 176, 657 N.Y.S.2d 627 \(1st Dep't 1997\).](#)
- 2 [People v. Letendre, 264 A.D.2d 943, 696 N.Y.S.2d 538 \(3d Dep't 1999\), aff'd, 94 N.Y.2d 939, 709 N.Y.S.2d 497, 731 N.E.2d 153 \(2000\).](#)

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§ 4:12. Illustrations—No probable cause, 1 Criminal Procedure in New York § 4:12 (2d)

1 Criminal Procedure in New York § 4:12 (2d)

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§ 4:12. Illustrations—No probable cause

References

West's Key Number Digest

- West's Key Number Digest, [Arrest](#) 63.4(.5)

Police officers did not have probable cause to arrest a citizen on a drug charge based upon a two-month-old tip from an informant and a determination by the chief of police that the defendant/citizen had lied when she was asked about her prior whereabouts. (See [Travis v. Village of Dobbs Ferry](#), 355 F. Supp. 2d 740 (S.D. N.Y. 2005)).

Police officers' observation of the defendant coming out of an emergency exit at the train station carrying a canvas bag did not provide probable cause to arrest the defendant where no inquiry was made of the defendant as to whether there was an emergency that necessitated his use of that exit, and there was nothing about the defendant's demeanor, or any other circumstances, inconsistent with a legitimate emergency use of the exit.¹

Where a defendant was found in a search incident to a warrantless arrest to be carrying cocaine and a gun, his alleged question in a social club to a female undercover officer asking if she wanted some cocaine was a mere inquiry into the officer's "wishes and desires" that did not provide probable cause to arrest the defendant for criminal sale of a controlled substance, since the defendant may have been trying to strike up a conversation with the officer.²

A police officer's conduct in directing the defendant to stop and show his hands constituted a significant limitation on his freedom unsupported by probable cause, where the stop was based only on the officer's receipt of a radio report concerning an armed robbery being committed by a black man wearing a black jacket, and the officer encountered the defendant several minutes after receiving the report and several blocks away from the scene of the reported robbery.³

Footnotes

- 1 People v. Powell, 242 A.D.2d 500, 662 N.Y.S.2d 314 (1st Dep't 1997).
- 2 People v. Gomcin, 265 A.D.2d 493, 697 N.Y.S.2d 93 (2d Dep't 1999).
- 3 People v. Riddick, 269 A.D.2d 471, 704 N.Y.S.2d 270 (2d Dep't 2000).

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1 Criminal Procedure in New York § 4:13 (2d)

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§ 4:13. Temporary questioning in public places

References

West's Key Number Digest

- West's Key Number Digest, [Arrest](#) 63.4(.5)

A police officer has statutory authority to stop a person in a public place that is located within the officer's geographical area of employment when he or she reasonably suspects that the person is committing, has committed, or is about to commit either (a) a felony or (b) a misdemeanor which is defined in the Penal Law, and may demand the person's name, address, and an explanation of his or her conduct.¹ This so-called "stop and frisk" law was added to the former Code of Criminal Procedure in 1964 and has been continued essentially unchanged in the Criminal Procedure Law.² The statute also gives a peace officer who provides security services for any court of the unified court system the authority to stop a person in or about the courthouse to which the officer is assigned when the officer reasonably suspects that the person is committing, has committed, or is about to commit either (a) a felony or (b) a misdemeanor defined in the Penal Law, and the peace officer may demand the name, address, and an explanation of the conduct of the person stopped.³

Since a stop and frisk is a more obtrusive procedure than a mere request for information or a stop invoking the common-law right of inquiry, it normally must be founded on a reasonable suspicion that the particular person has committed, or is about to commit, a crime.⁴ In considering whether a stop and frisk is justified, the standard to be used is reasonable suspicion, not absolute certainty.⁵ Reasonable suspicion is defined as that quantum of knowledge sufficient to induce an ordinarily prudent and cautious person under the circumstances to believe that criminal activity is at hand.⁶ Rather than a subjective feeling, reasonable suspicion must be founded on articulable facts.⁷ When making such a stop, the police or court officer may search the person for a deadly weapon or instrument if the police or court officer reasonably suspects that there is danger of physical injury.⁸ If a deadly weapon or any instrument is found that is capable of causing serious physical injury, the officer may keep it during the continuation of questioning, and if the officer does not then arrest the individual questioned, the officer must return the item.⁹

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A license and registration check of a vehicle is permissible only when an officer reasonably suspects that a violation of the vehicle and traffic law has occurred or when it is conducted pursuant to nonarbitrary, nondiscriminatory, uniform procedures for detecting violations.¹⁰ In determining the propriety of a police officer stopping a vehicle, the touchstone is whether there are specific and articulable facts which, taken together with rational inferences, warrant the intrusion.¹¹ The Court of Appeals has stated that, although the right to stop a vehicle and the right to stop a pedestrian are analogous, the two types of encounters must be distinguished when the police have less than reasonable suspicion.¹² Therefore, stops of automobiles are legal only pursuant to routine, nonpretextual traffic checks for the enforcement of traffic regulations, or when the officer has at least a reasonable suspicion that the occupants of the vehicle have committed, are committing, or are about to commit a crime.¹³ Thus, the police have the right to stop and question motorists in the course of a routine traffic stop.¹⁴ However, the police were not justified in pulling over a vehicle so that they could ask the driver where a friend of his who was a suspect in an assault could be found.¹⁵ Once a car has been lawfully stopped for a traffic infraction, the police may order the driver out of the vehicle even if there has been no suspicious behavior.¹⁶

Probable cause is not a necessary predicate for all contact between the police and citizens in the course of a criminal investigation.¹⁷

The court has upheld constitutionality of the concept of the stop and frisk law which permits a police officer to detain an individual for questioning prior to the existence of probable cause for arrest.¹⁸ The court stated that the police may, without a search warrant or probable cause to make a lawful arrest, frisk the person of a lawfully detained individual without consent and seize evidence uncovered by the frisk, provided that the officer suspects that he or she is being exposed to danger when stopping to question the citizen.¹⁹ The initial right to stop and inquire will inhere even if the surrounding circumstances do not justify an arrest, and no overt act has to occur.²⁰ The officer must merely have had a reasonable belief that he or she is in danger.²¹ However, absent other circumstances evoking suspicion, the observation of a mere bulge or heavy object in a pocket does not impel a reasonable conclusion that the person is armed.²²

In a case where the defendant contended that the seizure of a pistol was illegal because the arresting detective did not have a warrant and did not have reasonable grounds prior to the search and the arrest to believe that the defendant committed a crime in the officer's presence, the search was valid under the stop and frisk amendment.²³ The detective has at least a reasonably based suspicion that the defendant is committing a crime and is therefore entitled to stop him or her.²⁴ Moreover, the detective was also warranted in suspecting that the defendant possessed a dangerous weapon that threatened the life of the detective as well as others in the immediate vicinity of the defendant.²⁵ Consequently, the seizure of the weapon was proper.²⁶

The U.S. Supreme Court, without passing upon the New York stop and frisk law, indicated that it would uphold a stop and frisk search only where the officer observes unusual conduct that leads the officer reasonably to conclude, in light of experience, that criminal activity may be afoot, and that the persons the officer is dealing with may be armed and presently dangerous. Where in the course of investigating this behavior the officer identifies himself or herself as a police officer and makes reasonable inquiry, and where nothing in the initial stages of the encounter serves to dispel the officer's reasonable fear for his or her own or others' safety, the officer may stop and frisk the individual.²⁷ The Supreme Court further stated that in such cases, the officer is entitled only to conduct a carefully limited search of the outer clothing in an attempt to discover weapons that might be used to assault the officer.²⁸ The Court rationalized this behavior on the part of the police as a means devised to protect them in the face of danger, excluding this conduct from its proscription against unreasonable searches and seizures.²⁹ In conclusion, the Court stated that there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the public officer, where there is reason to believe that the officer is dealing with an armed and dangerous individual, regardless of whether there is probable cause to arrest the individual for a crime.³⁰ The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent person in the circumstances would be warranted in the belief that his or her safety, or that of others, was in danger.³¹ The sole justification of a search in this situation is the protection of the police officer and others nearby, and must be confined in scope to an intrusion reasonably designed to discover guns, knives,

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clubs, or other hidden instruments for the assault of the police officer.³² However, as previously stated, the mere observation of an unidentifiable bulge in a person's pocket is insufficient as a basis for a frisk or search for a revolver.³³

In a U.S. Supreme Court decision involving the New York stop and frisk law, where the officer observed the defendant in the company of several known addicts for a period of several hours but did not see anything pass between the defendant and the other persons, and the officer reached into the defendant's coat pocket and retrieved several glassine envelopes later found to contain heroin, the Court refused to sanction the admission of the narcotic as evidence, since the search was not reasonably limited in scope to the accompaniment of the only goal that might have conceivably justified its inception, which was the protection of the officer by disarming a potentially dangerous man.³⁴

In another case involving New York law, the Court refused to apply the stop and frisk statute because it concluded that for the purpose of the Fourth Amendment, the search was properly incidental to the lawful arrest where the officer had heard strange noises at a door, and believing that somebody sought to force entry, opened the door to investigate the noises and saw two men never seen before tiptoeing about the hallway and then fleeing down the stairs when they saw the police officer.³⁵ The Court stated that it was difficult to conceive a stronger ground for arrest, short of actual eyewitness observation of criminal activity.³⁶ Further, the officer, from what he had seen and the reaction to his own appearance on the scene, had enough basis to make a probable cause arrest, and in effect had done so by seizing the suspect on the stairway.³⁷ Therefore, the frisk was legitimate as an incident of the arrest and could be made either for weapons or for evidence of the crime.³⁸ Additionally, the Court stated that although the frisk was constitutionally permitted only in order to protect the officer, the state was entitled to use any other contraband discovered as a result of a lawful frisk; and the Court ruled that burglary tools discovered while patting down the suspect were admissible in evidence.³⁹

The United States Constitution does not require enforcement officials to get an arrest warrant before making an arrest in public places, even where there is adequate opportunity to obtain a warrant.⁴⁰ The only requirement is that officials have probable cause to believe that the person being arrested committed a felony.⁴¹

There are reasonable grounds on which to stop a cab, remove its occupants, and subject them to a frisk even though the description of the perpetrators of the crime does not precisely match those of the defendant and the companion, where they generally conform to the description, and they are the only people in the vicinity after the crime.⁴²

A police officer, in the absence of any concrete indication of criminality, may approach a private citizen on the street for the purpose of requesting information if the police officer has some articulable reasons sufficient to justify the action.⁴³ The basis for the inquiry need not rest on any indication of criminal activity on the part of the person of whom the inquiry is made.⁴⁴ The stop must not be the product of mere whim, caprice, or idle curiosity.⁴⁵

There are three distinct levels of intrusion.⁴⁶ The first level is the right to approach for the purpose of requesting information.⁴⁷ This minimal intrusion is permissible when there is some objective, credible reason for the interference which is not necessarily indicative of criminality.⁴⁸ However, in the absence of probable cause that an individual has committed a crime, the individual to whom an inquiry is directed has a constitutional right not to respond and may walk or even run away; and the police officer may not pursue, search, or seize the individual.⁴⁹ The second level of intrusion is the police officer's common-law right to inquire.⁵⁰ This stage is activated by a founded suspicion that criminal activity is afoot and carries with it the right to interfere with a citizen to the extent necessary, short of a forcible seizure, to obtain an explanation.⁵¹ The third level encompasses the statutory right provided by the Criminal Procedure Law authorizing a forcible stop and detention of a person when a police officer entertains a reasonable suspicion that the person has committed, is committing, or is about to commit a felony or misdemeanor.⁵² In testing the bona fides of a founded suspicion of criminal activity, a mere hunch or gut reaction is not sufficient.⁵³

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A request for information that involves basic, nonthreatening questions regarding, for instance, identity, address, or destination only has to be supported by an objective, credible reason, which is not necessarily indicative of criminality.⁵⁴ Once the officer asks more pointed questions that would lead the person approached reasonably to believe that he or she is suspected of some wrongdoing and is the focus of the officer's investigation, the officer is no longer merely seeking information.⁵⁵ The encounter has become a common-law inquiry that must be supported by founded suspicion that criminality is afoot.⁵⁶ A citizen has no duty to respond to any police officer's inquiry and is not chargeable for his or her failure to respond.⁵⁷ An inquiry by an officer without at least a reasonable suspicion, based on articulable facts that the person so detained is committing or about to commit a crime, violates his or her Fourth Amendment rights.⁵⁸ Police officers acting on less than probable cause have the right to confront citizens for investigative purposes as long as the encounter is preceded by activity that gives rise to an articulable suspicion that criminal activity has occurred.⁵⁹

An officer's observations of an individual "casing" potential victims for several blocks, the individual's quick exit of a building shortly after entering, and his attempt to hail a cab with money in his hand provided a reasonable suspicion to stop the individual and request information; but such observations did not create probable cause sufficient to warrant an arrest.⁶⁰ However, such observations and a report of a knife-point robbery committed in the building exited by the individual did create probable cause to arrest.⁶¹

A law enforcement official may detain an individual upon reasonable suspicion for questioning for a reasonable and brief period of time under carefully controlled conditions, which are sufficient to protect the individual's Fifth and Sixth Amendment rights.⁶² The reasonableness of a detention for interrogation purposes is measured by standards less than those requiring probable cause for arrest.⁶³ Accordingly, if any reasonable basis exists for suspecting a person of having committed or participated in the commission of a crime, or for attributing to that person some questionable relationship with respect to the crime, the police should not be frustrated in pursuing their investigation to the point of detention and interrogation either on the spot or at the police station so long as the detention and interrogation are not tantamount to an arrest.⁶⁴

Although there must be reasonable suspicion that criminal activity is afoot, suspicion alone does not justify an arrest.⁶⁵ Furthermore, a founded suspicion that criminal activity is afoot must exist before the police may stop and inquire.⁶⁶ The mere purchase of a holster without the presence of additional objective criteria indicating that criminal activity is afoot does not permit further intrusion upon the purchaser, other than mere inquiry by the police; the threshold of impermissible conduct is crossed if a police officer orders the defendant to open his or her coat.⁶⁷ Since courts have acknowledged the general right of police officers to question persons who may possess information about a particular crime, it follows that the power to inquire also includes the power to detain, but it may not be used as a pretext for stopping persons whom the police have no basis for questioning.⁶⁸⁶⁹ Behavior which is susceptible of innocent as well as culpable interpretation will not constitute probable cause.⁷⁰

It is proper for a police officer to approach and inquire as to the identity of the defendant, where the encounter occurs after midnight in an area known for its high incidence of drug activity, and the defendant conspicuously crosses the street to avoid walking past the uniformed officer.⁷¹ An anonymous tip of "men with guns," standing alone, does not justify intrusive police action, and certainly does not rise to the level of reasonable suspicion warranting a stop and frisk.⁷²

There is no deprivation of Fourth Amendment rights where a police officer asks the defendant to go to the police station for questioning so long as it is clear that the defendant does not have to consent, and is free to go about his or her business.⁷³ The blocking of the defendant's car by a police car rises to the level of a detentive stop where the defendant's car is blocked and the defendants can perceive that they are not entirely free to leave the scene, and where an officer approaches their car requesting a driver's license and car registration; since the latter action is more than a mere inquiry, it is an intrusion on their privacy.⁷⁴

The mere use of a weapon to effectuate a temporary detention is not improper where the circumstances indicate that criminal activity is afoot, and the situation may be dangerous.⁷⁵ The precipitate act of a gunpoint stop is justified if the police are acting

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with knowledge that an armed robbery has just taken place.⁷⁶ The court of appeals has held that the police are justified in stopping a van bearing out-of-state license plates which matches a robbery report description as to color and description of occupants, and in approaching the occupants with a drawn revolver, since the robbery report gives reason to believe that if this is the van sought, the occupants might be armed.⁷⁷ Furthermore, the police are justified in ordering the occupants out of the van and frisking them.⁷⁸

Where police officers find themselves in a rapidly developing and dangerous situation presenting an imminent threat to their well-being, they must be permitted to take reasonable measures to assure their safety in making a nonarrest detention, and the taking of safety measures is not necessarily an arrest which must be supported by probable cause.⁷⁹ Therefore, police officers are entitled to handcuff a suspect to make a nonarrest detention in order to insure their own safety without the detention constituting an arrest.⁸⁰

It is well settled that one or two questions asked of a suspect by the police at a crime scene, in order to ascertain transpiring events, does not constitute a custodial interrogation for which a defendant must receive Miranda rights.⁸¹ Statements made prior to Miranda warnings in response to threshold crime scene inquiries, designed to clarify the nature of the situation confronted by the officers who arrive at the scene rather than to elicit inculpatory statements, are admissible and do not constitute custodial interrogation to which Miranda applies.⁸² Thus, where the police approached a robbery scene, and found the defendant who was holding the stolen necklace and who voluntarily and spontaneously explained that he had recovered the necklace from an unapprehended perpetrator, the police officer properly requested a description of the purported robber, and this questioning was designed to clarify the situation and not to elicit inculpatory statements from the defendant.⁸³

Whether the police acted reasonably in initiating a stop and search is a mixed question of law and fact.⁸⁴

The police were entitled to approach the defendant after observing him walking between lanes of traffic, wearing a long winter coat on a hot summer night, and making motions of adjusting an object in the rear of his waistband where a handgun is often hidden.⁸⁵

The police did not have probable cause to arrest a defendant on suspicion of shooting his former girlfriend and her friend based on their knowledge that a drunk witness saw three men running in the direction of an alley around the time of the shootings, that the defendant and two others were loading a cab several hours later to leave the area, and that a gun clip with the same type of bullets used in the shootings were found in the bushes behind that location during that time frame; but the police were not aware of any connection or relationship between the defendant and the victims.⁸⁶

Probable cause was lacking in the warrantless arrest of the defendant, even though a drug seller had been seen walking up the drive next to the apartment building that the defendant subsequently left, and even though the defendant exited the building after the police entered it, where there was no evidence indicating that the apartment building was a crime scene. Inasmuch as the controlled drug sale had occurred on the street a few houses down, the drug seller had not been observed to enter the apartment building, and there was no evidence connecting the defendant to the drug seller.⁸⁷

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Footnotes

1 [McKinney's CPL § 140.50\(1\)](#).
[People v. Middleton](#), 119 A.D.2d 593, 500 N.Y.S.2d 763 (2d Dep't 1986).

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See 33 NY Jur 2d, Crim L § 1822; 34 NY Jur 2d, Crim L § 2036; 5 Am Jur 2d, Arrest §§ 1, 2.

Treatises and Practice Aids

NY Pattern Jury Instructions, PJI 3:5.

Additional References

What circumstances fall within “public safety” exception to requirement that law enforcement officer give person Miranda warnings as to federal constitutional rights before conducting custodial interrogation, 81 L Ed 2d 990.

Law enforcement officer's authority, under federal Constitution, to “stop and frisk” person—Supreme court cases, 32 L Ed 2d 942.

2 McKinney's CPL § 140.50(1).

3 McKinney's CPL § 140.50(2).

The police did not have reasonable grounds to justify the detention and frisk of the defendant since he was merely found standing and arguing with a man in the driveway of the premises which had been burglarized. *People v. Delmonico*, 94 A.D.2d 773, 462 N.Y.S.2d 723 (2d Dep't 1983).

4 *People v. Benjamin*, 51 N.Y.2d 267, 434 N.Y.S.2d 144, 414 N.E.2d 645 (1980).

5 *People v. Rivera*, 78 A.D.2d 327, 434 N.Y.S.2d 681 (1st Dep't 1981).

6 *People v. Cantor*, 36 N.Y.2d 106, 365 N.Y.S.2d 509, 324 N.E.2d 872 (1975).

7 *People v. Jacob*, 202 A.D.2d 444, 608 N.Y.S.2d 508 (2d Dep't 1994) (resemblance of defendant to police department “wanted” poster provided reasonable suspicion to stop and question defendant regarding homicide); *People v. Duncan*, 75 A.D.2d 823, 427 N.Y.S.2d 472 (2d Dep't 1980).

The police were justified in questioning the defendants concerning their whereabouts and asking for a driver's license and the registration of the car since the police had followed the defendants' car after receiving a radio message from the station which indicated that there had been suspicious activities involving the occupants of the vehicle. *People v. Lanahan*, 89 A.D.2d 629, 452 N.Y.S.2d 918 (3d Dep't 1982).

8 McKinney's CPL § 140.50(3).

People v. Wade, 143 A.D.2d 703, 533 N.Y.S.2d 83 (2d Dep't 1988); *People v. Middleton*, 119 A.D.2d 593, 500 N.Y.S.2d 763 (2d Dep't 1986).

9 McKinney's CPL § 140.50(3).

10 *People v. Williams*, 79 A.D.2d 147, 436 N.Y.S.2d 15 (1st Dep't 1981).

11 *People v. Aguirre*, 111 Misc. 2d 586, 444 N.Y.S.2d 501 (Sup 1981).

12 *People v. Spencer*, 84 N.Y.2d 749, 622 N.Y.S.2d 483, 646 N.E.2d 785 (1995).

13 *People v. Spencer*, 84 N.Y.2d 749, 622 N.Y.S.2d 483, 646 N.E.2d 785 (1995).

14 *People v. Jeffries*, 45 A.D.2d 6, 355 N.Y.S.2d 878 (4th Dep't 1974), order aff'd, 38 N.Y.2d 722, 381 N.Y.S.2d 37, 343 N.E.2d 755 (1975).

See *People v. Merola*, 30 A.D.2d 963, 294 N.Y.S.2d 301 (2d Dep't 1968).

15 *People v. Spencer*, 84 N.Y.2d 749, 622 N.Y.S.2d 483, 646 N.E.2d 785 (1995).

16 *People v. Marin*, 80 A.D.2d 541, 436 N.Y.S.2d 292 (1st Dep't 1981).

17 *People v. Chestnut*, 51 N.Y.2d 14, 431 N.Y.S.2d 485, 409 N.E.2d 958 (1980); *People v. Dominquez*, 84 A.D.2d 820, 444 N.Y.S.2d 120 (2d Dep't 1981); *People v. Finlayson*, 76 A.D.2d 670, 431 N.Y.S.2d 839 (2d Dep't 1980).

18 *People v. Rivera*, 14 N.Y.2d 441, 252 N.Y.S.2d 458, 201 N.E.2d 32 (1964).

19 *People v. Rivera*, 14 N.Y.2d 441, 252 N.Y.S.2d 458, 201 N.E.2d 32 (1964).

20 *People v. Rivera*, 14 N.Y.2d 441, 252 N.Y.S.2d 458, 201 N.E.2d 32 (1964).

21 *People v. Rivera*, 14 N.Y.2d 441, 252 N.Y.S.2d 458, 201 N.E.2d 32 (1964).

Reasonable suspicion to stop and question was established where the officer saw the defendant two blocks from a recently burglarized barber shop located in a secluded area. The defendant was holding a bag similar to the one that had been reported stolen. He tried to avoid the officer and dropped the bag when the officer approached. *People v. Youngerman*, 207 A.D.2d 850, 616 N.Y.S.2d 547 (2d Dep't 1994).

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- 22 [People v. Howard](#), 147 A.D.2d 177, 542 N.Y.S.2d 536 (1st Dep't 1989); [People v. Marquez](#), 80 A.D.2d 837, 436 N.Y.S.2d 333 (2d Dep't 1981); [People v. Williams](#), 79 A.D.2d 147, 436 N.Y.S.2d 15 (1st Dep't 1981).
The observations of the police provided them with reasonable suspicion to frisk the defendant and grab the gun from his waistband since the officers had noticed a bulge along the defendant's waistband with an outline that could have been a handle of a gun. [People v. Smith](#), 93 A.D.2d 432, 462 N.Y.S.2d 30 (1st Dep't 1983).
The police conduct was reasonable and did not violate the defendant's legitimate expectations of privacy when the officers, within minutes after receiving a radio report which indicated that a gun had been fired, immediately corroborated the description of the defendants and approached them with their guns drawn and searched the defendant by grabbing the bulge from the exterior part of his coat which turned out to be loaded gun. [People v. Love](#), 92 A.D.2d 551, 459 N.Y.S.2d 122 (2d Dep't 1983).
- 23 [People v. Taggart](#), 20 N.Y.2d 335, 283 N.Y.S.2d 1, 229 N.E.2d 581 (1967).
- 24 [People v. Taggart](#), 20 N.Y.2d 335, 283 N.Y.S.2d 1, 229 N.E.2d 581 (1967).
- 25 [People v. Taggart](#), 20 N.Y.2d 335, 283 N.Y.S.2d 1, 229 N.E.2d 581 (1967).
- 26 [People v. Taggart](#), 20 N.Y.2d 335, 283 N.Y.S.2d 1, 229 N.E.2d 581 (1967); [People v. Clee](#), 89 A.D.2d 188, 455 N.Y.S.2d 8 (1st Dep't 1982) (police officer seizing gun from defendant's pocket reasonable after observing bulge in pocket).
The police had reasonable suspicion to justify their temporary detention of the defendant when they observed the defendant running with a woman's pocketbook and continually looking back in their direction when he was instructed to stop and kept walking at a very fast pace. Furthermore, the seizure of the defendant's gun was proper since the defendant told the officers that he was carrying a gun as well as the hypodermic needles which spilled from a bag the defendant was carrying. [People v. Lopez](#), 94 A.D.2d 627, 462 N.Y.S.2d 28 (1st Dep't 1983).
- 27 [Terry v. Ohio](#), 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).
See [People v. DeJesus](#), 169 A.D.2d 521, 564 N.Y.S.2d 377 (1st Dep't 1991) (search of defendant with guns drawn by police following stop not justified).
- 28 [Terry v. Ohio](#), 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).
- 29 [Terry v. Ohio](#), 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).
- 30 [Terry v. Ohio](#), 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).
- 31 [Terry v. Ohio](#), 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).
- 32 [Terry v. Ohio](#), 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); [People v. Marin](#), 91 A.D.2d 616, 456 N.Y.S.2d 403 (2d Dep't 1982); [People v. Sutton](#), 91 A.D.2d 1051, 458 N.Y.S.2d 653 (2d Dep't 1983).
- 33 [People v. Howard](#), 147 A.D.2d 177, 542 N.Y.S.2d 536 (1st Dep't 1989).
- 34 [Sibron v. New York](#), 392 U.S. 40, 88 S. Ct. 1912, 20 L. Ed. 2d 917 (1968).
- 35 [Peters v. New York](#), 392 U.S. 40, 88 S. Ct. 1912, 20 L. Ed. 2d 917 (1968).
- 36 [Peters v. New York](#), 392 U.S. 40, 88 S. Ct. 1912, 20 L. Ed. 2d 917 (1968).
- 37 [Peters v. New York](#), 392 U.S. 40, 88 S. Ct. 1912, 20 L. Ed. 2d 917 (1968).
- 38 [Peters v. New York](#), 392 U.S. 40, 88 S. Ct. 1912, 20 L. Ed. 2d 917 (1968).
- 39 [Peters v. New York](#), 392 U.S. 40, 88 S. Ct. 1912, 20 L. Ed. 2d 917 (1968).
- 40 [U.S. v. Watson](#), 423 U.S. 411, 96 S. Ct. 820, 46 L. Ed. 2d 598 (1976).
See [People v. De Bour](#), 40 N.Y.2d 210, 386 N.Y.S.2d 375, 352 N.E.2d 562 (1976); [People v. Santiago](#), 64 A.D.2d 355, 409 N.Y.S.2d 716 (1st Dep't 1978).
- 41 [U.S. v. Watson](#), 423 U.S. 411, 96 S. Ct. 820, 46 L. Ed. 2d 598 (1976).
See [People v. De Bour](#), 40 N.Y.2d 210, 386 N.Y.S.2d 375, 352 N.E.2d 562 (1976); [People v. Santiago](#), 64 A.D.2d 355, 409 N.Y.S.2d 716 (1st Dep't 1978).
- 42 [People v. Boyd](#), 78 A.D.2d 225, 434 N.Y.S.2d 221 (1st Dep't 1980).
- 43 [People v. Hollman](#), 79 N.Y.2d 181, 581 N.Y.S.2d 619, 590 N.E.2d 204 (1992); [People v. De Bour](#), 40 N.Y.2d 210, 386 N.Y.S.2d 375, 352 N.E.2d 562 (1976); [People v. Diaz](#), 180 A.D.2d 415, 579 N.Y.S.2d 659 (1st Dep't 1992), order aff'd, 80 N.Y.2d 950, 590 N.Y.S.2d 871, 605 N.E.2d 358 (1992).

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The defendant's actions gave rise to articulable facts justifying an investigatory stop where the police observed the defendant standing outside a car clutching a shoulder bag at 1:30 in the morning, and also noticed that the defendant appeared scared and startled to see them. [People v. Smith](#), 117 A.D.2d 690, 498 N.Y.S.2d 431 (2d Dep't 1986).

44 [People v. De Bour](#), 40 N.Y.2d 210, 386 N.Y.S.2d 375, 352 N.E.2d 562 (1976).

45 [People v. De Bour](#), 40 N.Y.2d 210, 386 N.Y.S.2d 375, 352 N.E.2d 562 (1976).

46 [People v. De Bour](#), 40 N.Y.2d 210, 386 N.Y.S.2d 375, 352 N.E.2d 562 (1976).

47 [People v. Hollman](#), 79 N.Y.2d 181, 581 N.Y.S.2d 619, 590 N.E.2d 204 (1992); [People v. De Bour](#), 40 N.Y.2d 210, 386 N.Y.S.2d 375, 352 N.E.2d 562 (1976).

48 [People v. Acevedo](#), 88 A.D.2d 813, 451 N.Y.S.2d 108 (1st Dep't 1982).

49 [People v. Lawrence](#), 145 A.D.2d 375, 536 N.Y.S.2d 61 (1st Dep't 1988).

50 [People v. De Bour](#), 40 N.Y.2d 210, 386 N.Y.S.2d 375, 352 N.E.2d 562 (1976).

Police had an objective, credible reason to approach the defendant in order to make an inquiry after having observed the defendant, in an area of high drug activity, approaching cars that had pulled over to the curb, talking with the occupants, reaching in with his hands, and then walking away. [People v. Holland](#), 221 A.D.2d 947, 634 N.Y.S.2d 309 (4th Dep't 1995).

51 [People v. Hollman](#), 79 N.Y.2d 181, 581 N.Y.S.2d 619, 590 N.E.2d 204 (1992); [People v. De Bour](#), 40 N.Y.2d 210, 386 N.Y.S.2d 375, 352 N.E.2d 562 (1976); [People v. Smith](#), 207 A.D.2d 759, 617 N.Y.S.2d 1 (1st Dep't 1994) (police had common-law right of inquiry where officer spotted defendant at specific location provided by radio run, which gave detailed description of armed female suspect matching defendant, and officer was justified in grabbing defendant's hand when she reached into her jacket pocket upon seeing the officer); [People v. Wilson](#), 201 A.D.2d 399, 607 N.Y.S.2d 663 (1st Dep't 1994) (although officer could approach defendant to inquire about early morning huddle with two other individuals in front of known drug-dealing location, command to halt and show hands elevated intrusion to common-law right of inquiry requiring a reasonable suspicion of criminal activity); [People v. Diaz](#), 180 A.D.2d 415, 579 N.Y.S.2d 659 (1st Dep't 1992), order aff'd, 80 N.Y.2d 950, 590 N.Y.S.2d 871, 605 N.E.2d 358 (1992).

Mere announcement of "police" by plainclothes officer upon approaching a private citizen, absent more, was not intimidation sufficient to constitute a second level of intrusion. [People v. Giles](#), 223 A.D.2d 39, 647 N.Y.S.2d 4 (1st Dep't 1996).

52 [McKinney's CPL § 140.50\(1\)](#).

[People v. De Bour](#), 40 N.Y.2d 210, 386 N.Y.S.2d 375, 352 N.E.2d 562 (1976); [People v. Cummings](#), 207 A.D.2d 657, 616 N.Y.S.2d 43 (1st Dep't 1994) (call for defendant to stop justified by officer observing defendant flee from bank with money in hand, glancing over his shoulder repeatedly, entering a vestibule to remove his sunglasses and hat, and placing the money in a knapsack); [People v. Mathis](#), 118 A.D.2d 594, 499 N.Y.S.2d 199 (2d Dep't 1986).

Pursuit of the defendant was justified by police observing the defendant in an area known as a "drug supermarket" call to a man exiting a parked car, "over here, over here," by observing the man turn away from the defendant when he appeared to spot the police, by defendant's refusal to approach the police car, and by his subsequent flight. [People v. Sierra](#), 83 N.Y.2d 928, 615 N.Y.S.2d 310, 638 N.E.2d 955 (1994). Following observation of the defendant's conduct in an area of high drug activity giving the police a credible reason to approach the defendant, the defendant's conduct in discarding a bag as the police approached gave the officers reasonable suspicion that the defendant had been engaged in criminal activity so as to justify the defendant's detention. [People v. Holland](#), 221 A.D.2d 947, 634 N.Y.S.2d 309 (4th Dep't 1995).

53 [People v. De Bour](#), 40 N.Y.2d 210, 386 N.Y.S.2d 375, 352 N.E.2d 562 (1976).

54 [People v. Hollman](#), 79 N.Y.2d 181, 581 N.Y.S.2d 619, 590 N.E.2d 204 (1992).

55 [People v. Hollman](#), 79 N.Y.2d 181, 581 N.Y.S.2d 619, 590 N.E.2d 204 (1992).

56 [People v. Irizarry](#), 79 N.Y.2d 890, 581 N.Y.S.2d 649, 590 N.E.2d 234 (1992) (police improperly requesting to search defendant's bag); [People v. Hollman](#), 79 N.Y.2d 181, 581 N.Y.S.2d 619, 590 N.E.2d 204 (1992).

57 [People v. Maksymenko](#), 105 Misc. 2d 368, 432 N.Y.S.2d 328 (City Crim. Ct. 1980), order aff'd, 109 Misc. 2d 171, 442 N.Y.S.2d 699 (App. Term 1981).

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- 58 [People v. Butler](#), 90 A.D.2d 797, 455 N.Y.S.2d 647 (2d Dep't 1982) (sudden movement by defendants as not sufficient basis for detention); [People v. Maksymenko](#), 105 Misc. 2d 368, 432 N.Y.S.2d 328 (City Crim. Ct. 1980), order aff'd, 109 Misc. 2d 171, 442 N.Y.S.2d 699 (App. Term 1981).
But see [People v. Berry](#), 87 A.D.2d 53, 451 N.Y.S.2d 79 (1st Dep't 1982) (knowledge that defendant was trafficker in drugs sufficient to warrant inquiry).
- 59 [People v. Wilson](#), 57 N.Y.2d 786, 455 N.Y.S.2d 585, 441 N.E.2d 1103 (1982); [People v. Valo](#), 92 A.D.2d 1004, 461 N.Y.S.2d 507 (3d Dep't 1983); [People v. Bruce](#), 78 A.D.2d 169, 434 N.Y.S.2d 338 (1st Dep't 1980).
The subsequent arrest of the defendant was justified since the defendant was evasive during the questioning and was only arrested after the police had checked and had been informed that there was an outstanding arrest warrant for the defendant. [People v. Scruggs](#), 90 A.D.2d 520, 455 N.Y.S.2d 22 (2d Dep't 1982).
The police were limited to conducting a frisk for weapons and could not search the opaque bags in the defendant's possession since the police did not have probable cause to arrest at that time. [People v. McNally](#), 89 A.D.2d 971, 454 N.Y.S.2d 122 (2d Dep't 1982).
- 60 [People v. Watkins](#), 228 A.D.2d 163, 645 N.Y.S.2d 2 (1st Dep't 1996).
- 61 [People v. Watkins](#), 228 A.D.2d 163, 645 N.Y.S.2d 2 (1st Dep't 1996).
- 62 [People v. Morales](#), 42 N.Y.2d 129, 397 N.Y.S.2d 587, 366 N.E.2d 248 (1977); [People v. Finlayson](#), 76 A.D.2d 670, 431 N.Y.S.2d 839 (2d Dep't 1980).
- 63 [People v. Tirado](#), 79 A.D.2d 907, 434 N.Y.S.2d 398 (1st Dep't 1981); [People v. Pounds](#), 35 A.D.2d 969, 317 N.Y.S.2d 884 (2d Dep't 1970).
- 64 [People v. Tirado](#), 79 A.D.2d 907, 434 N.Y.S.2d 398 (1st Dep't 1981); [People v. Pounds](#), 35 A.D.2d 969, 317 N.Y.S.2d 884 (2d Dep't 1970).
- 65 [People v. Scruggs](#), 90 A.D.2d 520, 455 N.Y.S.2d 22 (2d Dep't 1982) (police officer's information as justifying stopping and questioning of defendants).
- 66 [People v. Diaz](#), 180 A.D.2d 415, 579 N.Y.S.2d 659 (1st Dep't 1992), order aff'd, 80 N.Y.2d 950, 590 N.Y.S.2d 871, 605 N.E.2d 358 (1992); [People v. Thurman](#), 81 A.D.2d 548, 438 N.Y.S.2d 312 (1st Dep't 1981).
- 67 [People v. Johnson](#), 79 A.D.2d 936, 434 N.Y.S.2d 996 (1st Dep't 1981), order aff'd, 54 N.Y.2d 958, 445 N.Y.S.2d 146, 429 N.E.2d 824 (1981).
- 68 [People v. Cortes](#), 86 Misc. 2d 155, 382 N.Y.S.2d 445 (Sup 1976).
The police, who were in plain clothes and in an unmarked car, were justified in stopping the defendant and making a simple inquiry regarding the contents of a bag in defendant's possession since the defendant, who was alone and walking with the aid of crutches, had been seen repeatedly by the police over a period of two or three hours in a largely deserted area of factories and warehouses which had been closed for the day; and, on the last occasion, the defendant was seen hobbling on crutches and attempting to carry, with difficulty, a newly acquired white plastic bag apparently containing a heavy object. [People v. Daniels](#), 122 A.D.2d 154, 504 N.Y.S.2d 534 (2d Dep't 1986).
- 69 [People v. Cortes](#), 86 Misc. 2d 155, 382 N.Y.S.2d 445 (Sup 1976).
- 70 [People v. Cortes](#), 86 Misc. 2d 155, 382 N.Y.S.2d 445 (Sup 1976).
- 71 [People v. De Bour](#), 40 N.Y.2d 210, 386 N.Y.S.2d 375, 352 N.E.2d 562 (1976).
The police had sufficient articulable reasons to question the defendant after observing him on a street corner in which his companion had fled, the defendant had shifted a bag he was holding behind his back in order to hide it, along with the known high incidence of drug dealing on the particular corner involved. Therefore, the officer's initial inquiry and subsequent conduct was lawful since examination of the contents of the bag was based upon probable cause. [People v. Boyd](#), 91 A.D.2d 1045, 458 N.Y.S.2d 643 (2d Dep't 1983).
- 72 [People v. Benjamin](#), 51 N.Y.2d 267, 434 N.Y.S.2d 144, 414 N.E.2d 645 (1980); [People v. Bond](#), 116 A.D.2d 28, 499 N.Y.S.2d 724 (1st Dep't 1986).
- 73 [People v. Newman](#), 97 Misc. 2d 816, 412 N.Y.S.2d 563 (County Ct. 1979).
There was no interference with the defendant's freedom of movement, and the actions of the police officers did not constitute a stop since the defendant was not prevented from leaving the area. [People v. Lanahan](#), 89 A.D.2d 629, 452 N.Y.S.2d 918 (3d Dep't 1982).

§ 4:13. Temporary questioning in public places, 1 Criminal Procedure in New York §...

- 74 [People v. Thurman](#), 81 A.D.2d 548, 438 N.Y.S.2d 312 (1st Dep't 1981).
- 75 [People v. Mateo](#), 122 A.D.2d 229, 504 N.Y.S.2d 760 (2d Dep't 1986) (officers not acting improperly by displaying weapons during stop).
Police officers were justified in approaching the defendant with their hands on their holstered guns, in positioning themselves on both sides of the defendant, and identifying themselves and asking him to stop when they observed him in a drug-prone area walk away from a group of men clutching something in the armpit of his jacket as he saw the police van approach. The officers' actions constituted a permissible request for information and not an arrest. [People v. Reyes](#), 83 N.Y.2d 945, 615 N.Y.S.2d 316, 638 N.E.2d 961 (1994).
- 76 [People v. Wade](#), 143 A.D.2d 703, 533 N.Y.S.2d 83 (2d Dep't 1988); [People v. Boyd](#), 78 A.D.2d 225, 434 N.Y.S.2d 221 (1st Dep't 1980).
- 77 [People v. Brnja](#), 50 N.Y.2d 366, 429 N.Y.S.2d 173, 406 N.E.2d 1066 (1980); [People v. Perdomo](#), 210 A.D.2d 96, 620 N.Y.S.2d 340 (1st Dep't 1994) (officer justified in drawing weapon when he approached defendant for inquiry where defendant, a passenger in a taxi, emerged from the taxi with a "shiny, silver object, five to six inches long and with a metal finish" in his hand as the officer approached).
- 78 [People v. Brnja](#), 50 N.Y.2d 366, 429 N.Y.S.2d 173, 406 N.E.2d 1066 (1980).
- 79 [People v. Allen](#), 73 N.Y.2d 378, 540 N.Y.S.2d 971, 538 N.E.2d 323 (1989); [People v. Persaud](#), 244 A.D.2d 577, 665 N.Y.S.2d 671 (2d Dep't 1997); [People v. Kellman](#), 205 A.D.2d 477, 614 N.Y.S.2d 12 (1st Dep't 1994) (where he was involved in a rapidly unfolding street encounter, officer was justified in believing that he and his partner were in imminent danger, and it was reasonable for the officer to grab the defendant's hand and seize his gun where the defendant appeared to be tampering with a pay telephone and made a quick hand movement to open his shoulder bag when the officer identified himself).
- 80 [People v. Allen](#), 73 N.Y.2d 378, 540 N.Y.S.2d 971, 538 N.E.2d 323 (1989).
Where the police had reasonable suspicion that defendant was selling and possessing drugs, the handcuffing of defendant during the search of a house for drugs was a reasonable measure designed to assure police safety while detaining defendant. [People v. Persaud](#), 244 A.D.2d 577, 665 N.Y.S.2d 671 (2d Dep't 1997).
- 81 [People v. Maldonado](#), 184 A.D.2d 590, 584 N.Y.S.2d 619 (2d Dep't 1992).
- 82 [People v. Burnett](#), 228 A.D.2d 788, 644 N.Y.S.2d 79 (3d Dep't 1996).
- 83 [People v. Maldonado](#), 184 A.D.2d 590, 584 N.Y.S.2d 619 (2d Dep't 1992).
- 84 [People v. Evans](#), 83 N.Y.2d 934, 615 N.Y.S.2d 313, 638 N.E.2d 958 (1994).
- 85 [People v. Giles](#), 223 A.D.2d 39, 647 N.Y.S.2d 4 (1st Dep't 1996).
- 86 [People v. Baptiste](#), 306 A.D.2d 562, 760 N.Y.S.2d 594 (3d Dep't 2003), leave to appeal denied, 1 N.Y.3d 594, 776 N.Y.S.2d 226, 808 N.E.2d 362 (2004).
- 87 [People v. Davis](#), 195 Misc. 2d 858, 761 N.Y.S.2d 435 (City Ct. 2003).

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§ 4:14. Arrest by peace officer, 1 Criminal Procedure in New York § 4:14 (2d)

1 Criminal Procedure in New York § 4:14 (2d)

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§ 4:14. Arrest by peace officer

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West's Key Number Digest

- West's Key Number Digest, [Arrest](#) 63.3

A peace officer is defined under [CPL 2.10](#) and may officiate an arrest under those circumstances where he or she is authorized to do so. For example in [Hand v. Stray Haven Humane Soc. and S.P.C.A., Inc.](#), 21 A.D.3d 626, 799 N.Y.S.2d 628 (3d Dep't 2005), the officer is authorized under the agriculture and markets law to arrest a defendant for inappropriate treatment of livestock. Therefore, one must always examine the specific authority of the peace officer before determining the validity of the arrest.

Persons who are designated as peace officers by the Criminal Procedure Law have certain powers of arrest.¹ The Criminal Procedure Law contains an extensive list itemizing those individuals who are designated as peace officers, and specific reference should be made to it to determine who is qualified as a peace officer.²

Among the more common positions that are designated as peace officers are the following: constables or police constables of a town or village; the sheriff, under sheriff, and deputy sheriffs of New York City; investigators of the state commission of investigation; officers appointed by the state university pursuant to the Education Law; uniformed enforcement forces of the New York State Thruway Authority; uniformed court officers of the Unified Court System; parole officers or warrant officers in the Division of Parole; probation officers; New York City special patrolmen appointed pursuant to the administrative code of the city of New York; all officers and members of the uniformed force of the New York City Fire Department; and a district ranger, assistant district ranger, or forest ranger employed by the State Department of Environmental Conservation.³

When a peace officer is acting pursuant to special duties, the officer may arrest a person for any offense when he or she has reasonable cause to believe that the person has committed the offense in the officer's presence, and for any crime when he or she has reasonable cause to believe that the person has committed that crime, whether in the officer's presence or otherwise.⁴ The officer acts pursuant to special duties in making an arrest only when the arrest is for an offense defined by statute which the peace officer, by reason of the special nature of particular employment or by express provision of law, is required or authorized to enforce, or when an offense committed, or reasonably believed by the officer to have been committed, in a certain manner or

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place, as to render arrest of the offender by the peace officer under the particular circumstances an integral part of the officer's specialized duties.⁵

Whether or not a peace officer is acting pursuant to special duties, the officer may arrest a person for an offense committed, or believed to have been committed within the geographical area of that peace officer's employment.⁶ The officer may arrest the person for any offense committed in the officer's presence.⁷ The officer may also arrest a person for a felony when the officer has reasonable cause to believe that the person has committed such felony, whether in the officer's presence or not.⁸

If a peace officer is outside of the geographical area of employment, the officer may arrest a person for a felony anywhere in the state when the officer has reasonable cause to believe that the person has committed a felony in the officer's presence, provided that such arrest is made during or immediately after the alleged criminal conduct, or during the alleged perpetrator's immediate flight from the area.⁹

By statutory definition, the geographical area of employment of any peace officer employed as such by any state agency consists of the entire state.¹⁰ The geographical area of employment of any peace officer employed by an agency of a county, city, town, or village consists of the county, city, town, or village as the case may be, and any other place where the officer is, at a particular time, acting in the course of particular duties or employment.¹¹

The geographical area of employment of any peace officer employed by any private organization consists of any place in the state where the officer is, at a particular time, acting in the course of particular duties or employment.¹²

A federal court has stated that an agent of the Bureau of Alcohol, Tobacco, and Firearms is not a peace officer under the Criminal Procedure Law and is not authorized to make an arrest based on reasonable cause.¹³

Special patrolmen licensed through the Administrative Code may, in a proper case, be treated like peace officers, and must give Miranda warnings, and can arrest and search only upon probable cause.¹⁴

It has been held that a police officer from a foreign state, who was not in close pursuit of a suspect and who effects an extraterritorial arrest of that suspect in New York State, is a private citizen for the purpose of Fourth Amendment analysis.¹⁵ However, any out-of-state police officer, not in close pursuit, who invokes the color or authority of his or her office to effect an extrajurisdictional arrest in New York State, is not to be treated as a private citizen for purposes of Fourth Amendment analysis.¹⁶

The Court of Appeals held that a parole officer lacked authority to arrest parolee for not following the officer's order to submit to a urine test. The Court noted that this was a condition of the defendant's parole and the defendant should first obtain a warrant for the arrest and failure to follow the parole officer's order was not an offense that could be independently justified for making a peace officer's arrest when committed in his presence.¹⁷

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Footnotes

1 [McKinney's CPL § 140.25.](#)

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See 34 NY Jur 2d, Crim L §§ 2022 to 2024; 85 NY Jur 2d, Police, Sheriffs, and Related Officers § 17; 5 Am Jur 2d, Arrest §§ 24 to 33, 50, 51.

Treatises and Practice Aids

Lack of probable cause for warrantless arrest, 44 Am Jur Proof of facts 2d 229; NY Pattern Jury Instructions, PJI 3:5.

2 McKinney's CPL § 2.10.

3 McKinney's CPL § 2.10.

A security guard who was employed by the New York Racing Association for 12 years was considered a “peace officer” under the statute which provided the basis for the defendant's conviction for resisting arrest. *People v. Seaman*, 132 Misc. 2d 336, 504 N.Y.S.2d 603 (Dist. Ct. 1986).

4 McKinney's CPL § 140.25(1)(a), (b).

5 McKinney's CPL § 140.25(2)(a), (b).

6 McKinney's CPL § 140.25(3).

7 McKinney's CPL § 140.25(3)(a).

8 McKinney's CPL § 140.25(3)(b).

9 McKinney's CPL § 140.25(4).

10 McKinney's CPL § 140.25(5)(a).

11 McKinney's CPL § 140.25(5)(b).

12 McKinney's CPL § 140.25(5)(c).

13 See McKinney's CPL § 140.25.

Scanlon v. Flynn, 465 F. Supp. 32 (S.D. N.Y. 1978).

14 Administrative Code § 434a-7.0.

People v. Laurence, 100 Misc. 2d 612, 420 N.Y.S.2d 65 (City Crim. Ct. 1979).

15 *People v. La Fontaine*, 159 Misc. 2d 751, 603 N.Y.S.2d 660 (Sup 1993), order aff'd, 235 A.D.2d 93, 664 N.Y.S.2d 587 (1st Dep't 1997), order rev'd on other grounds, 92 N.Y.2d 470, 682 N.Y.S.2d 671, 705 N.E.2d 663 (1998).

16 *People v. La Fontaine*, 159 Misc. 2d 751, 603 N.Y.S.2d 660 (Sup 1993), order aff'd, 235 A.D.2d 93, 664 N.Y.S.2d 587 (1st Dep't 1997), order rev'd on other grounds, 92 N.Y.2d 470, 682 N.Y.S.2d 671, 705 N.E.2d 663 (1998) (holding, a police officer from New Jersey, not in close pursuit of a suspect in New York, may not execute a warrant from that state but may execute a federal warrant extraterritorially in New York State).

17 *People v. Bratton*, 8 N.Y.3d 637, 838 N.Y.S.2d 828, 870 N.E.2d 146 (2007).

1 Criminal Procedure in New York § 4:15 (2d)

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§ 4:15. Arrest by private person

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The Court of Appeals held in [People v. Williams](#), 4 N.Y.3d 535, 797 N.Y.S.2d 35, 829 N.E.2d 1203 (2005), that a housing officer acting outside the scope of his authority may not claim a valid citizen's arrest when he was acting under the cover of his housing peace officer authority. Therefore, the Court of Appeals held that when a valid peace officer/police officer acts outside the scope of his official duty but nevertheless presents himself in a position of authority, such situation can never be considered a valid citizen's or private person's arrest.

Any person, including a police officer, a peace officer, or a private person, may arrest another person for a felony when the person arrested has, in fact, committed that felony, and for any other offense when the person arrested has, in fact, committed such other offense in the presence of the person making the arrest.¹ The presumptive unlawfulness of a warrantless arrest by a private citizen is overcome if it is shown that the person arrested had, in fact, committed an offense in the citizen's presence.²

If the arrest is for a felony, it may be made anywhere in the state.³ If the arrest is for an offense other than a felony, it may be made only in the county in which the offense was committed.⁴

A person not acting as a peace officer or police officer and who makes an arrest may make the arrest at any hour of the day or night.⁵

The person making the arrest must inform the person whom he or she is arresting of the reason for the arrest unless he or she encounters physical resistance, flight, or other factors rendering such procedure impractical.⁶ Justifiable physical force may be used in order to make the arrest pursuant to the Penal Law.⁷

§ 4:15.Arrest by private person, 1 Criminal Procedure in New York § 4:15 (2d)

A person who makes such an arrest, sometimes known as a “citizen's arrest,” must, without unnecessary delay, deliver or attempt to deliver the person arrested to the custody of an appropriate police officer.⁸ An appropriate police officer is one who would be authorized to make the arrest in question as a police officer.⁹

A federal court held that, under New York law, private citizens who make arrests do so at their own peril.¹⁰ If the individual arrested did not, in fact, commit the crime, the person making the arrest is liable, even if the person acts in good faith, or has probable cause to make the arrest.¹¹ In case of an arrest by a private citizen, validity depends on the guilt of the defendant, and no other consideration, such as the reasonableness of the arresting person's belief, is of any significance.¹²

In the absence of an applicable federal statute authorizing a federal agent to make an arrest, the agent's authority to do so is that of a private citizen under state law.¹³

A civilian working with the police must show probable cause for any civilian arrests or searches.¹⁴

If the arrest is for a felony, the appropriate police officer must, upon receiving custody of the arrested person, perform the required recording, fingerprinting, and other preliminary police duties.¹⁵ The police officer must then take the person arrested, on behalf of the arresting person, before an appropriate local criminal court.¹⁶

If the arrest is for an offense other than a Class A, B, C, or D felony or certain Class E felonies, and the police officer having custody of the arrested person is unable to bring the person before the local criminal court with reasonable promptness due to the unavailability of the court, the police officer having custody of the arrested person must issue an appearance ticket without prearrestment bail, or must fix prearrestment bail as provided in the Criminal Procedure Law.¹⁷ The arrested person need not be taken before the local criminal court if the arrest is for an offense other than a Class A, B, C, or D felony or certain Class E felonies, and the police officer may issue and serve an appearance ticket and release the person from custody as prescribed in the Criminal Procedure Law.¹⁸ Prearrestment bail may be fixed as prescribed by the Criminal Procedure Law.¹⁹

Notwithstanding any other provision of the statute, a police officer is not required to take an arrested person into custody or to take any other action prescribed in this section on behalf of the arresting person if the officer has reasonable cause to believe that the arrested person did not commit the alleged offense, or that the arrest is otherwise unauthorized.²⁰

If the person taken into custody is a juvenile offender, the police officer must immediately notify the parent or other person legally responsible for the care of the juvenile offender that the juvenile has been arrested and the location of the facility where the juvenile is being detained.²¹

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Footnotes

1 [McKinney's CPL § 140.30\(1\)](#).
See 13 NY Jur 2d, Bus & Occ § 290; 34 NY Jur 2d, Crim L § 2027; 5 Am Jur 2d, Arrest §§ 34 to 36.
An indictment was invalid despite the claim that the initial arrest by a uniformed town police officer for traffic infractions outside his jurisdiction could be upheld as a citizen's arrest, where the evidence supporting the felony charges in the indictment, and the charge of aggravated unlicensed operation of a vehicle, were gained as a result of the officer acting in his official capacity as a uniformed police officer.

§ 4:15.Arrest by private person, 1 Criminal Procedure in New York § 4:15 (2d)

People v. Graham, 192 Misc. 2d 528, 748 N.Y.S.2d 203 (Sup 2002), order aff'd, 1 A.D.3d 1066, 767 N.Y.S.2d 383 (4th Dep't 2003), leave to appeal denied, 2 N.Y.3d 762, 778 N.Y.S.2d 781, 811 N.E.2d 43 (2004).

Treatises and Practice Aids

Lack of probable cause for warrantless arrest, 44 Am Jur Proof of Facts 2d 229, NY Pattern Jury Instructions, PJI 3:5.

2 Morrello v. Saratoga Harness Racing, Inc., 75 A.D.2d 921, 427 N.Y.S.2d 534 (3d Dep't 1980), order rev'd on other grounds, 53 N.Y.2d 775, 439 N.Y.S.2d 359, 421 N.E.2d 851 (1981).

3 McKinney's CPL § 140.30(2).

4 McKinney's CPL § 140.30(2).

5 McKinney's CPL § 140.35(1).

See 5 Am Jur 2d, Arrest §§ 69 et seq.

Treatises and Practice Aids

Lack of probable cause for warrantless arrest, 44 Am Jur Proof of Facts 2d 229; NY Pattern Jury Instructions, PJI 3:4, 3:5.

6 McKinney's CPL § 140.35(2).

7 McKinney's CPL § 140.35(3).

See McKinney's Penal Law § 35.30(4).

See § 4:3.

8 McKinney's CPL § 140.40(1).

See 31 NY Jur 2d, Crim L §§ 117 to 119; 34 NY Jur 2d, Crim L §§ 2029, 2065, 2067; 5 Am Jur 2d, Arrest § 69;

Treatises and Practice Aids

NY Pattern Jury Instructions, PJI 3:5.

9 McKinney's CPL § 140.40(5)(a).

10 See McKinney's CPL § 140.30.

Scanlon v. Flynn, 465 F. Supp. 32 (S.D. N.Y. 1978).

11 See McKinney's CPL § 140.30.

Scanlon v. Flynn, 465 F. Supp. 32 (S.D. N.Y. 1978).

12 McLoughlin v. New York Edison Co., 252 N.Y. 202, 169 N.E. 277 (1929); People v. Cassone, 20 A.D.2d 118, 245 N.Y.S.2d 843 (1st Dep't 1963), order aff'd, 14 N.Y.2d 798, 251 N.Y.S.2d 33, 200 N.E.2d 214 (1964); Hoffay v. Stanley Dept. Stores, Inc., 68 Misc. 2d 990, 328 N.Y.S.2d 798 (Sup 1971).

13 Scanlon v. Flynn, 465 F. Supp. 32 (S.D. N.Y. 1978).

See U.S. v. Heliczzer, 373 F.2d 241 (2d Cir. 1967); U.S. v. Viale, 312 F.2d 595, 63-1 U.S. Tax Cas. (CCH) P 15473, 11 A.F.T.R.2d 1964 (2d Cir. 1963); U.S. v. Hou Wan Lee, 264 F. Supp. 804 (S.D. N.Y. 1967).

14 People v. Jones, 61 A.D.2d 264, 402 N.Y.S.2d 28 (2d Dep't 1978), judgment aff'd, 47 N.Y.2d 528, 419 N.Y.S.2d 447, 393 N.E.2d 443 (1979); People v. Laurence, 100 Misc. 2d 612, 420 N.Y.S.2d 65 (City Crim. Ct. 1979).

15 McKinney's CPL § 140.40(1).

16 McKinney's CPL § 140.40(1).

17 McKinney's CPL § 140.40(2).

See McKinney's CPL § 140.20(3).

18 McKinney's CPL § 140.40(3).

See McKinney's CPL § 150.20.

19 McKinney's CPL § 140.40(3).

See McKinney's CPL § 150.30.

20 McKinney's CPL § 140.40(4).

21 McKinney's CPL § 140.40(5).

§ 4:16. Investigatory arrests, 1 Criminal Procedure in New York § 4:16 (2d)

1 Criminal Procedure in New York § 4:16 (2d)

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CPL 140.50 describes the point questioning of persons in public places as well as search for weapons under those circumstances. A direction by a police officer who identifies himself and requests an individual to stop does not constitute a seizure within the Fourth Amendment, but instead constitutes a general detention. (See [In Re Jamall C.](#), 19 AD 3rd 144, 797 NYS 2d 13 (1st Dept. 2005)).

The Fourth Amendment of the United States Constitution prohibits unreasonable searches and seizures, and this is applicable to investigatory arrests that are tantamount to detention without probable cause.¹ Where a rape suspect in the state of Mississippi is fingerprinted while detained without probable cause, along with virtually every other young black male in the community, the United States Supreme Court stated that investigatory seizures would subject unlimited numbers of innocent persons to the harassment and ignominy incident to or involved in detention.² The Fourth Amendment is meant to prevent wholesale intrusions upon the personal security of citizens whether those intrusions be termed arrests or investigatory detentions.³

Before a person may be stopped in a public place, a police officer must have reasonable suspicion that the person is committing, has committed, or is about to commit a crime.⁴ To justify an intrusion, the police officer must indicate specific and articulable facts which, along with any logical deductions, reasonably prompted that intrusion since vague or unparticularized hunches will not suffice.⁵ The minimum requirement for a lawful detentive stop is a founded suspicion that criminal activity is afoot.⁶

The momentary inconvenience inevitable in police confrontation for the simple governmental purpose of asking names and current activities outweighs an individual's right to privacy and personal security.⁷

Footnotes

- 1 [Davis v. Mississippi](#), 394 U.S. 721, 89 S. Ct. 1394, 22 L. Ed. 2d 676 (1969).
- 2 [Davis v. Mississippi](#), 394 U.S. 721, 89 S. Ct. 1394, 22 L. Ed. 2d 676 (1969).
- 3 [Davis v. Mississippi](#), 394 U.S. 721, 89 S. Ct. 1394, 22 L. Ed. 2d 676 (1969).
- 4 [McKinney's CPL § 140.50](#).
Arresting detective lacked a reasonable suspicion that the defendant had committed or was about to commit a crime that would justify the forcible detention and frisk of the defendant when the detective observed the defendant walk past an unmarked van and saw that the defendant had a bulge in the center of his waistband which the defendant adjusted several times; but the detective did not indicate that the bulge had the outline of a weapon, and he could not describe the bulge in further detail. [People v. Stevenson](#), 7 A.D.3d 820, 779 N.Y.S.2d 498 (2d Dep't 2004).
- 5 [People v. Cantor](#), 36 N.Y.2d 106, 365 N.Y.S.2d 509, 324 N.E.2d 872 (1975).
- 6 [People v. Cantor](#), 36 N.Y.2d 106, 365 N.Y.S.2d 509, 324 N.E.2d 872 (1975); [People v. Escalante](#), 89 A.D.2d 1019, 454 N.Y.S.2d 465 (2d Dep't 1982) (police officer possessing detailed information from reliable informant permitting questioning of defendant).
See also [People v. Lee](#), 84 Misc. 2d 192, 375 N.Y.S.2d 812 (Sup 1975). In the latter case, it was held that anything more than a brief stop is proscribed in the absence of ascertainable facts from which it might be concluded that the suspect has committed, is committing, or is about to commit a crime.
- 7 [People v. John BB](#), 81 A.D.2d 188, 440 N.Y.S.2d 387 (3d Dep't 1981), order aff'd, 56 N.Y.2d 482, 453 N.Y.S.2d 158, 438 N.E.2d 864 (1982).

§ 4:17. Client interview checklist, 1 Criminal Procedure in New York § 4:17 (2d)

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§ 4:17. Client interview checklist

[References](#)

West's Key Number Digest

- West's Key Number Digest, [Arrest](#) 71.1(1)

The checklist below provides a thumbnail guide to questions you should consider asking your client subsequent to an arrest following a warrantless street search.

1. Where were you when this search happened?
2. What were you doing just before the search?
3. When did you first see the police officer approach?
4. What did you do when you saw him approach?
5. Did you put your hands in your pockets; in your waistband?
6. Where were your hands when you first saw the police?
7. What were the police doing when you first saw them?
8. Were they in a police car or on foot?
9. Were they uniformed or in plain clothes?
10. If they were in a police car, was it a marked car or unmarked?
11. What were you wearing at the time?
12. Did you walk away from the police or start running when they saw you?
13. Did you try to hide anything?

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14. Was anyone else with you at the time?
15. Did any of you try to walk or run away from the police or try to hide anything?
16. When the officer(s) reached you, what did they say?
17. Did they place you under arrest or handcuff you?
18. Did they physically touch or try to restrain you?
19. Did they ask you any questions?
20. What were they, and how did you respond?
21. Did the officers tell you that you didn't have to talk to them?
22. Where were your hands during the questioning?
23. Did you make any sudden or unusual movements during the questioning?
24. Were you nervous or perspiring?
25. Were you looking around or over your shoulder?
26. Were you under the influence of alcohol or any drug?
27. Were you carrying a bag of any kind?
28. Did you have any objects in your coat, pants, or shirt pockets that may have made a bulge?
29. Did you have a weapon on your person?
30. Was any part of it visible to the police?
31. Did you have any drugs on you during the search?
32. What time did the confrontation with the police take place?
33. Describe the area in which the confrontation took place?
34. How good or bad was the lighting in the area?
35. Were there a lot of people around or just a few?
36. Do you know anyone who saw the incident?
37. Would you say that the area in which you were searched was a good neighborhood or a bad one? Is there a lot of crime there? What kind of crime?
38. Did the officers threaten you in any way?
39. Did they have their weapons out?
40. Had they identified themselves as police officers?
41. If they asked you what you were doing in the area, what did you say?
42. If they asked you where you were going, what did you say?
43. If they asked you what you had in your pocket, what did you say?
44. After the officers finished asking their questions, did they frisk you?
45. After the officers frisked you, did they search you?
46. Where did they search? Describe the thoroughness of the search.
47. Did they search in the area of your groin or crotch?

§ 4:17. Client interview checklist, 1 Criminal Procedure in New York § 4:17 (2d)

48. Did the officers find anything; what did they find?
49. Were you arrested after the search?
50. Did you resist the search in any way?
51. If the officers arrested you before the search, how long after the search were you arrested?
52. Did the police say or do anything to suggest that they knew in advance what they would find or where they would find it?
53. Did anyone know you were carrying around the objects that the police found?
54. Who? Was he under investigation for any crime? Has he recently been in police custody? Does he have a criminal record?
55. Was anyone else searched at the scene in addition to you?
56. Did the police find anything on those persons or arrest them?
57. Did anything unusual happen prior to your arrest?
58. Did you consent to the search by the police, or was the search made without your consent?
59. Did you hand the police any objects? What? Why?
60. After the police found objects on your person, did you say anything? Did they ask you anything?
61. Was anything you were carrying searched? With what result?
62. Were you searched again after the police arrested you?
63. When you reached the police station, what items of personal property were taken from you?
64. Did the police say anything about the arrest to you?
65. Is there anything about the search and the arrest that you thought was unfair, that just wasn't right?
66. Did you complain to the police about any of their actions? If so, what did they say in reply?

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1 Criminal Procedure in New York § 4:18 (2d)

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Chapter 4. Arrest without a Warrant

§ 4:18. Client interview checklist—Warrantless search at premises

References

West's Key Number Digest

- West's Key Number Digest, [Arrest](#) 71.1(1)

The checklist below provides a thumbnail guide to questions you should consider asking your client subsequent to an arrest following a warrantless search of a residential premises.

1. What is your current address?
2. Is that an apartment or a single-family home?
3. Did the police search your home or apartment?
4. Did the police search someone else's home or apartment?
5. Did they have a warrant to search your home?
6. Did they show it to you?
7. Who was there during the search? Where do they live?
8. Do you own or rent your home?
9. Who else is on the lease or deed?
10. Who else besides you has a key to your home?
11. Are you married, or do you have a companion?
12. Did they live with you at the time of the search?

§ 4:18. Client interview checklist—Warrantless search at..., 1 Criminal Procedure...

13. If not, did they ever live with you? When did they move out?
14. If not, was any of their property in your home at the time of the search?
15. Do you sublet any portion of the premises?
16. Do you have a roommate?
17. If you have a roommate, do they have the run of the entire premises, or are there areas they may not encroach?
18. What was the date and time of the search?
19. How long did the search last? When did the police leave?
20. Were you arrested before, during, or after the search?
21. How did the police officers get into your home? Did they knock? Did they use force?
22. Did the officers identify themselves as police officers when you opened the door to your home?
23. What was the first thing they said?
24. What did you say to them?
25. Did they tell you why they were there?
26. Did they ask you or anyone else if they could search your home?
27. What did you say?
28. Did you hear someone else in your home consent to the search? How did they do it? What did they say?
29. If someone besides you gave the police consent to search your home, what was their name and their connection to you?
30. Did you have a disagreement with anyone about giving the police consent to search your home? With whom?
31. What was the disagreement about?
32. Did the police have their guns out? Were they in uniform?
33. How many police came into your home? How many were outside of the premises?
34. Were you scared? What were your feelings when you saw the police at your door?
35. Did any police officers threaten you in any way?
36. Did the police search your home?
37. Did the police tell you that you could refuse to let them search your home?
38. What rooms did they search?
39. What rooms didn't they search?
40. Did they search the garage or buildings outside your home on your property?
41. Did they look inside closets, desks, bureau drawers, or closed cabinets?
42. Did you object to their searching any portion of your home?
43. How did you object? What did you say?
44. Did police damage any of your property?
45. Were police holding or restraining you during the search? Were you in handcuffs?
46. If you were in handcuffs, when did the police put them on?

§ 4:18. Client interview checklist—Warrantless search at..., 1 Criminal Procedure...

47. Did the police take any of your property from your home? Did they show you what they took?
48. Please tell me about each item the police took from your home.
49. Did the police find a weapon in your home? Please describe it.
50. Was it your weapon? If not, whose was it?
51. Was the weapon loaded? Did the police also take ammunition? What kind and how much was there?
52. Did you or the owner of the weapon have a license?
53. Did the police find drugs in your house?
54. Where did they find them? What were they? How much did they weigh?
55. Were they your drugs? If not, whose drugs were they?
56. Did the police take anything else from your apartment that could connect you with a crime?
57. What was it?
58. When the police found a weapon or drugs, what did you say to them? Did you tell the police that they were yours?
59. What else did you say to the police after they found evidence of a crime in your home?
60. What did they say to you?
61. Did the police take any photographs? Dust for fingerprints?
62. Were you given a receipt for any of the items that the police took? Do you have it?
63. Is there anything at all that bothers you about the search?
64. Is there anything about the search or things that the officers did that didn't seem legal to you?
65. Did you feel you could say "no" when the police asked to search your home?

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Research References, 1 Criminal Procedure in New York Ch. 6 Refs. (2d)

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Research References

West's Key Number Digest

- West's Key Number Digest, [Constitutional Law](#) 262

Westlaw Databases

- [Charges to the Jury and Requests to Charge in Criminal Case in New York \(CTJNY\)](#)
- [Handling a Criminal Case in New York \(HCCNY\)](#)

Treatises and Practice Aids

- [New York Charges to the Jury § 4:43.70](#)
- [Muldoon, Handling a Criminal Case in New York § 1:56](#)

Law Reviews and Other Periodicals

- [Dyer, Criminal Law—Constitutional Rights of Arrestees at Bail Hearings and After Warrantless Arrests, 79 Mass. L. Rev. 84 \(June, 1994\)](#)

Research References, 1 Criminal Procedure in New York Ch. 6 Refs. (2d)

- [Reina, Criminal Procedure—Arrest—System Providing Probable Cause Determination by Judicial Officer Within Forty-Eight Hours of Warrantless Arrest Is Presumptively Reasonable via Fourth Amendment—County of Riverside v. McLaughlin, 111 S.Ct. 1661 \(1991\), 22 Seton Hall L. Rev. 572 \(1992\)](#)

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1 Criminal Procedure in New York § 6:1 (2d)

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§ 6:1. Procedure after arrest without warrant—By police officer

References

West's Key Number Digest

- West's Key Number Digest, [Arrest](#) 70(1)
- West's Key Number Digest, [Arrest](#) 70(2)
- West's Key Number Digest, [Constitutional Law](#) 262

To protect the accused when there has been a warrantless arrest and the accused has been held in police custody without the initial filing of an accusatory instrument, the police are bound to expeditiously and as quickly as possible provide the defendant with an arraignment before a judge or magistrate.¹

After a police officer makes an arrest without a warrant, the officer must, without unnecessary delay, perform all required recording, fingerprinting, and other preliminary police duties.² Then, without unnecessary delay, the officer must bring the arrested person before a local criminal court and file with the court an appropriate accusatory instrument charging the defendant with the offense or offenses for which the defendant has been arrested.³ The appropriate court is the one specified in the Criminal Procedure Law,⁴ except that if the arrest is for an offense other than a class A, B, C, or D felony or certain class E felonies committed in a town, but not in a village which has a village court, and the town court is not available at that time, the arrested person may be taken before the local criminal court of any village within the town or, any adjoining town, village embraced in whole or in part by the adjoining town, or city of the same county.⁵ If the arrest is for an offense other than a class A, B, C or D felony or certain class E felonies committed in a village having a village court and the village court is not available, the arrested person may be taken before the town court of the town embracing the village or any other village court within the town, or if the town or village court is not available either, before the local criminal court of any adjoining town, village embraced in whole or in part by the adjoining town, or city of the same county.⁶ If the arrest is for an offense committed in a city, and the city court is not available, the arrested person may be brought before the local criminal court of any adjoining town or village, or village court embraced by an adjoining town, within the same county as the city.⁷ If the arrest is for a

§ 6:1.Procedure after arrest without warrant—By police officer, 1 Criminal Procedure in...

traffic infraction or a misdemeanor relating to traffic, the police officer may, instead of taking the arrested person before the local criminal court of the political subdivision or locality in which the offense was allegedly committed, take the defendant before the local criminal court which is located in the same county, but which is the nearest available court by highway travel from the point of arrest.⁸

If the arrest is for an offense other than a class A, B, C or D felony or certain class E felonies, the police officer may follow alternate procedures rather than taking the arrested person before a local criminal court.⁹ The officer may issue and serve an appearance ticket and release the arrested person from custody as provided in the Criminal Procedure Law.¹⁰ Alternatively, the desk officer in charge of the police station, county jail, or police headquarters, or any of his or her superior officers, may fix prearrestment bail and, upon deposit of the bail amount, issue and serve an appearance ticket and release the defendant from custody as prescribed in the Criminal Procedure Law.¹¹

If the arrest is for an offense other than a class A, B, C, or D felony or certain class E felonies, and a local criminal court is unavailable so that the arresting officer is unable to take the defendant before the court with reasonable promptness, either an appearance ticket must be served unconditionally upon the arrested person or prearrestment bail must be fixed.¹² If prearrestment bail is fixed but not posted, the arrested person may be temporarily held in custody.¹³ The defendant must then be brought before a local criminal court without unnecessary delay.¹⁴ A police officer is not required to serve an appearance ticket upon an arrested person or release him or her from custody when the person appears to be under the influence of alcohol, narcotics, or other drugs to the degree that the person may endanger himself, herself, or other persons.¹⁵

If after arresting a person, the officer determines upon further investigation that there is not reasonable cause to believe that the arrested person committed the offense arrested for, or any other offense based upon the conduct in question, the police officer must immediately release the person from custody.¹⁶

Before a police officer serves an appearance ticket upon an arrested person, the person arrested must be fingerprinted if the offense is one specified in the Criminal Procedure Law.¹⁷

If a juvenile offender is arrested without a warrant, the police officer must immediately notify the parent or other person legally responsible for the care of the child or the person with whom the juvenile is domiciled.¹⁸ Notification consists of the information that the juvenile has been arrested and the location of the facility where the juvenile is being detained.¹⁹ However, where the defendant consistently lies about his age and shows identification in support of his contention that he is of majority age, failure by the police to notify the defendant's parents prior to interrogating the defendant would not result in a suppression of an inculpatory statement made at the interrogation.²⁰

When the youth misrepresents any relevant facts that make it impossible to comply with the statute, the police will not be found in dereliction of their statutory duty.²¹

Defendant's own willful misrepresentations concerning his identity and address made it impossible to comply with the requirement that his parent or guardian be notified of his arrest.²²

The statute mandates that the police officer making the arrest take the arrested person, without unnecessary delay, before a magistrate.²³ The practice of turning over the job of delivery of the arrested person to the magistrate to another officer or surrogate arresting officer may cause unnecessary delay.²⁴ In one case, a waiting period of 20 court working hours before arraignment, during which time the defendant is held in a pen located next to the courtroom, is found to be an unnecessary delay, and a confession taken after the delay is not admissible.²⁵ Furthermore, a period of delay over 24 hours in bringing a person who has been arrested without a warrant to a local criminal court for arraignment is presumptively unnecessary and, unless explained, constitutes a violation of the Criminal Procedure Law.²⁶

§ 6:1.Procedure after arrest without warrant—By police officer, 1 Criminal Procedure in...

Violation of the right to be arraigned without unnecessary delay has no effect on the criminal action and does not require dismissal unless it can be shown that the delay itself caused some diminution of or prejudice to the rights of the defendant, such as an extraction of a confession or admission.²⁷

The mandated arraignment without unnecessary delay may be suspended for the time it is necessary for the arresting officer to perform all recording, fingerprinting, and other preliminary police duties required in the particular case.²⁸ However, a construction of the statute requires that a delay to the earliest arraignment of a defendant as a consequence of recording information or performing other preliminary police duties, to be authorized, must be based upon a requirement for those acts.²⁹ The statutory language does not mean that the matter of the earliest possible arraignment is properly left in every instance to the whim and caprice of the officer making a warrantless arrest.³⁰

A prison inmate's due-process rights are violated when the state, in situations where no felony complaint has been filed with the local criminal court, does not notify the inmate of the proposed presentment of a formal proceeding before the grand jury, or that the inmate will have an opportunity to testify after the police have questioned, photographed, and fingerprinted the inmate in connection with the alleged crime.³¹

Where a defendant had been arrested and was not arraigned until 13 hours and he gave a statement that he fired the shots in self defense during that 13 hour detention, the Court held that it was not an unnecessary delay. This is due to the fact that further investigation was necessary as the defendant had initially claimed an alibi that could not be readily verified and police were attempting to locate and interview additional witnesses. In any event, defendant was duly advised of his rights and admittedly waived them in his initial interview with police. Also, he was not continuously interrogated or threatened and he was not deprived of food, water or rest.³²

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Footnotes

- 1 [People v. Martinez](#), 11 Misc. 3d 827, 810 N.Y.S.2d 638 (Sup 2006). See also [People v. Cooper](#), 101 A.D.2d 1, 475 N.Y.S.2d 660 (4th Dep't 1984) (abrogated on other grounds by, [People v. Ramos](#), 99 N.Y.2d 27, 750 N.Y.S.2d 821, 780 N.E.2d 506 (2002)).
- 2 [CPL § 140.20\(1\)](#).
See 8 N.Y. Jur.2d, Auto & Veh § 539; 31 N.Y. Jur.2d, Crim L § 259; 34 N.Y. Jur.2d, Crim L §§ 2064 to 2066, 2068, 2604; 59 N.Y. Jur.2d, False Imp & Mal § 160; [5 Am. Jur.2d, Arrest § 76](#); 21 Am. Jur.2d, Crim L §§ 434, 435, 437.
Treatises and Practice Aids
[NY Pattern Jury Instructions, PJI 3:5](#)
- 3 [CPL § 140.20\(1\)](#).
- 4 [CPL § 100.55](#).
See 34 N.Y. Jur.2d, Crim L §§ 2067, 2176; 21 Am. Jur.2d, Crim L § 409; 41 Am. Jur.2d, Indict §§ 44 et seq.
- 5 [CPL § 140.20\(1\)\(a\)](#).
- 6 [CPL § 140.20\(1\)\(b\)](#).
- 7 [CPL § 140.20\(1\)\(c\)](#).
- 8 [CPL § 140.20\(1\)\(d\)](#).

§ 6:1.Procedure after arrest without warrant—By police officer, 1 Criminal Procedure in...

- 9 CPL § 140.20(2).
10 CPL § 140.20(2)(a).
See CPL § 150.20.
11 CPL § 140.20(2)(b).
See CPL § 150.30.
12 CPL § 140.20(3).
13 CPL § 140.20(3).
14 CPL § 140.20(3).
15 CPL § 140.20(3).
16 CPL § 140.20(4).
17 CPL § 140.20(5).
See § 6:5.
18 CPL § 140.20(6).
People v. Vargas, 169 A.D.2d 746, 564 N.Y.S.2d 486 (2d Dep't 1991).
The police were not under a statutory duty to notify the defendant's parents of his arrest where the defendant was five days short of his 17th birthday when he was arrested outside the house where he lived with his mother. *People v. Pica*, 159 A.D.2d 524, 552 N.Y.S.2d 391 (2d Dep't 1990).
19 CPL § 140.20(6).
People v. Vargas, 169 A.D.2d 746, 564 N.Y.S.2d 486 (2d Dep't 1991); *People v. King*, 116 Misc. 2d 614, 455 N.Y.S.2d 923 (Sup 1982) (juvenile offender's statement in presence of relative as not requiring suppression by failing to properly notify guardian after arrest when inadvertent).
The police failed to comply with the statutory provision since they did not immediately notify the defendant's parents for one-and-one-half hours after the defendant was at the police station, and all other attempts after this delay were rendered insufficient. *People v. Castro*, 118 Misc. 2d 868, 462 N.Y.S.2d 369 (Sup 1983).
20 *People v. Salaam*, 187 A.D.2d 363, 590 N.Y.S.2d 195 (1st Dep't 1992), order aff'd, 83 N.Y.2d 51, 607 N.Y.S.2d 899, 629 N.E.2d 371 (1993).
21 *People v. Abiodun L*, 241 A.D.2d 774, 660 N.Y.S.2d 761 (3d Dep't 1997).
22 *People v. Abiodun L*, 241 A.D.2d 774, 660 N.Y.S.2d 761 (3d Dep't 1997).
23 CPL § 140.20.
24 See *People v. Wynn*, 102 Misc. 2d 785, 424 N.Y.S.2d 664 (Sup 1980).
25 *People v. Wynn*, 102 Misc. 2d 785, 424 N.Y.S.2d 664 (Sup 1980).
26 CPL § 140.20(1).
People ex rel. Maxian on Behalf of Roundtree v. Brown, 77 N.Y.2d 422, 568 N.Y.S.2d 575, 570 N.E.2d 223 (1991).
27 *People v. Wynn*, 102 Misc. 2d 785, 424 N.Y.S.2d 664 (Sup 1980).
28 CPL § 140.20(1).
People v. Cunningham, 97 Misc. 2d 618, 411 N.Y.S.2d 963 (County Ct. 1978).
29 CPL § 140.20(1).
People v. Cunningham, 97 Misc. 2d 618, 411 N.Y.S.2d 963 (County Ct. 1978).
30 CPL § 140.20(1).
People v. Cunningham, 97 Misc. 2d 618, 411 N.Y.S.2d 963 (County Ct. 1978).
31 *People v. Smiley*, 111 Misc. 2d 236, 443 N.Y.S.2d 798 (County Ct. 1981).
32 *People v. Gause*, 38 A.D.3d 999, 830 N.Y.S.2d 859 (3d Dep't 2007).

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1 Criminal Procedure in New York § 6:2 (2d)

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Chapter 6. Procedure after Arrest

§ 6:2. Procedure after arrest without warrant—By peace officer

References

West's Key Number Digest

- West's Key Number Digest, [Arrest](#) 70(1)
- West's Key Number Digest, [Arrest](#) 70(2)
- West's Key Number Digest, [Constitutional Law](#) 262

It is key that the officer facilitating the arrest be a duly designated peace officer by the appropriate authority to enable him or her to conclude an appropriate arrest.¹ In *People v. Williams*,² the Court of Appeals held where a housing authority peace officer exceeded his authority by arresting a defendant and engaging in a search in an area beyond his geographical jurisdiction, they could not argue that the arrest was a civilian or citizen's arrest as they were acting under the color of a peace office of authority. Therefore, the Court suppressed seized evidence and declared the arrest invalid as a matter of constitutional law.

If a warrantless arrest is made by a peace officer other than a police officer, the peace officer must, without unnecessary delay, take the person arrested before a local criminal court as provided in the Criminal Procedure Law,³ and must, without unnecessary delay, file an appropriate accusatory instrument.⁴ If the arrest is for an offense specified in the Criminal Procedure Law,⁵ then the arrested person must be fingerprinted.⁶ The peace officer may perform the required postarrest functions or may enlist the aid of a police officer for the performance of these duties.⁷

If the arrest is for an offense other than a class A, B, C, or D felony or certain class E felonies, and the appropriate local criminal court is not available, the arrested person must be taken to an appropriate police station, county jail, or police headquarters, where the person must be dealt with in the manner prescribed in the Criminal Procedure Law.⁸ In such a case, an appearance ticket must be served unconditionally upon the arrested person, or prearrestment bail must be fixed.⁹ If the prearrestment bail is fixed but not posted, the person arrested must be taken before a local criminal court without unnecessary delay.¹⁰ The statute does not prevent the police officer, to whom the peace officer has turned over the arrested person, from detaining the

§ 6:2.Procedure after arrest without warrant—By peace officer, 1 Criminal Procedure in...

arrested person if the person appears to be under the influence of alcohol, narcotics, or other drug to the degree that there is a danger to the arrestee or other persons.¹¹

If the arrest is for an offense other than a class A, B, C or D felony or certain class E felonies, the arrested person need not be brought before a local criminal court.¹² Instead the police officer, where the officer is specially authorized by law, may issue and serve an appearance ticket upon the arrested person, releasing the arrestee from custody.¹³ Where the peace officer is not specially authorized, the officer may enlist the aid of a police officer to issue and serve an appearance ticket releasing the arrested person from custody.¹⁴

Following a defendant's arrest, simplified informations that are filed with the lower court commence a criminal action in accordance with the statute.¹⁵ The making of an on-the-scene arrest for driving while intoxicated and the subsequent filing of the accusatory instruments pertaining to the arrest are not two separate and distinct legal matters.¹⁶ While the dismissal of the simplified informations halts the criminal action, it has no effect on the defendant's prior arrest, which remains a factual matter of legal significance.¹⁷ The defendant is not discharged following the initial dismissal of the informations pursuant to the Criminal Procedure Law,¹⁸ and the court retains jurisdiction pending the filing of the long-form informations.¹⁹ The defendant's subsequent rearrest is merely the machinery used to bring the defendant before the lower court again for the purpose of arraignment upon the new accusatory instruments.²⁰

If the person arrested is a juvenile, the peace officer must immediately notify the parent or other person legally responsible for the juvenile's care, or the person with whom the juvenile is domiciled, that the juvenile has been arrested and the location of the facility where the juvenile is being detained.²¹

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Footnotes

- 1 [Hand v. Stray Haven Humane Soc. and S.P.C.A., Inc.](#), 21 A.D.3d 626, 799 N.Y.S.2d 628 (3d Dep't 2005).
- 2 [People v. Williams](#), 4 N.Y.3d 535, 797 N.Y.S.2d 35, 829 N.E.2d 1203 (2005).
- 3 [CPL § 100.55](#).
See 34 N.Y. Jur.2d, Crim L §§ 2067, 2176; 21 Am. Jur.2d, Crim L § 409; 41 Am. Jur.2d, Indict §§ 44 et seq.
- 4 [CPL § 140.27\(2\)](#).
See 31 N.Y. Jur.2d, Crim L § 259; 34 N.Y. Jur.2d, Crim L §§ 2022, 2064, 2065, 2068; 59 N.Y. Jur.2d, False Imp. & Mal. § 160; 5 Am. Jur.2d, Arrest §§ 69 et seq.
Treatises and Practice Aids
[Lack of probable cause for warrantless arrest](#), 44 Am. Jur. Proof of Facts 2d 229; NY Pattern Jury Instructions, PJI 3:4, 3:5
- 5 [CPL § 160.10](#).
- 6 [CPL § 140.27\(2\)](#).
- 7 [CPL § 140.27\(2\)](#).
- 8 [CPL § 140.27\(3\)](#).
See [CPL § 140.20\(3\)](#).
- 9 [CPL § 140.20\(3\)](#).
- 10 [CPL § 140.20\(3\)](#).

§ 6:2.Procedure after arrest without warrant—By peace officer, 1 Criminal Procedure in...

11 CPL § 140.20(3).
12 CPL § 140.27(4).
13 CPL § 140.27(4)(a).
14 CPL § 140.27(4)(b).
15 CPL § 140.27(2).
People v. Bock, 77 Misc. 2d 350, 353 N.Y.S.2d 647 (County Ct. 1974).
16 People v. Bock, 77 Misc. 2d 350, 353 N.Y.S.2d 647 (County Ct. 1974).
17 People v. Bock, 77 Misc. 2d 350, 353 N.Y.S.2d 647 (County Ct. 1974).
18 CPL § 140.45.
People v. Bock, 77 Misc. 2d 350, 353 N.Y.S.2d 647 (County Ct. 1974).
19 People v. Bock, 77 Misc. 2d 350, 353 N.Y.S.2d 647 (County Ct. 1974).
20 People v. Bock, 77 Misc. 2d 350, 353 N.Y.S.2d 647 (County Ct. 1974).
21 CPL § 140.27(5).

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§ 6:3. Procedure after arrest without warrant—By private person

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- West's Key Number Digest, [Arrest](#) 70(1)
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[CPL 140.35](#) governs the procedures and limitations that an individual other than one acting as a peace officer or police officer may arrest an individual without a warrant. When we say individual, this includes individuals who are auxillary police officers and work in conjunction with the police department. The arrest authority of an auxillary police officer is the same as a civilian.¹

In *People v. Williams*,² the Court of Appeals ruled that a peace officer unsuccessfully and impermissibly facilitating an arrest outside his official jurisdiction and, therefore, official capacity, could not hide behind the color of law and declare the arrest was a citizen's arrest under [CPL 140.35](#). Therefore, the arrest was declared invalid as a matter of constitutional law.

When a person who is neither a police officer nor a peace officer makes an arrest, the person must, without unnecessary delay, deliver or attempt to deliver the arrested person to the custody of an appropriate police officer, and must file an accusatory instrument without unnecessary delay.³ An appropriate police officer is one who would be authorized to make the arrest in question pursuant to the Criminal Procedure Law.⁴

The private citizen making the arrest may solicit the aid of any police officer.⁵ If the police officer is not an appropriate officer, the officer must assist in delivering the arrested person to the appropriate officer.⁶ If the arrest is for a felony, the appropriate police officer must, upon receiving custody of the arrested person, perform all of the recording, fingerprinting, and other preliminary police duties required in the particular case.⁷ In any event, once the appropriate officer has received custody of the arrested person, the officer must, on behalf of the arresting person, take the arrestee before an appropriate local criminal court.⁸

§ 6:3.Procedure after arrest without warrant—By private person, 1 Criminal Procedure in...

An appropriate local criminal court is one where an accusatory instrument charging the offense in question may properly be filed pursuant to the Criminal Procedure Law.⁹

If the arrest is for an offense other than a class A, B, C or D felony or certain class E felonies, and there is no local criminal court available, the police officer having custody must deal with the arrested person in the same manner as if the officer has arrested the person.¹⁰

If the arrest is for an offense other than a class A, B, C or D felony or certain class E felonies, the appropriate officer may issue and serve an appearance ticket, or the desk officer in charge of the station out of which the appropriate police officer operates may fix prearrestment bail, and upon deposit of the bail, issue and serve an appearance ticket.¹¹

If the police officer has reasonable cause to believe that the arrested person did not commit the alleged offense or that the arrest has been otherwise unauthorized, the officer is not required to take the arrested person into custody.¹²

If a police officer takes an arrested juvenile offender into custody, the police officer must immediately notify the parent or other person legally responsible for the child's care or the person with whom the child is domiciled that the juvenile has been arrested and the location of the facility where the juvenile is being detained.¹³

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Footnotes

- 1 [People v. Rotger](#), 162 Misc. 2d 459, 617 N.Y.S.2d 425 (City Crim. Ct. 1994).
- 2 [People v. Williams](#), 4 N.Y.3d 535, 797 N.Y.S.2d 35, 829 N.E.2d 1203 (2005).
- 3 [CPL § 140.40\(1\)](#).
See 31 N.Y. Jur.2d, Crim L § 259; 34 N.Y. Jur.2d, Crim L §§ 2029, 2065, 2067; 5 Am. Jur.2d, Arrest § 69.
Treatises and Practice Aids
[NY Pattern Jury Instructions, PJI 3:5](#)
- 4 [CPL § 140.40\(6\)\(a\)](#).
See [CPL § 140.10](#).
- 5 [CPL § 140.40\(1\)](#).
- 6 [CPL § 140.40\(1\)](#).
- 7 [CPL § 140.40\(1\)](#).
- 8 [CPL § 140.40\(1\)](#).
- 9 [CPL § 140.40\(6\)\(b\)](#).
See [CPL § 100.55](#).
- 10 [CPL § 140.40\(2\)](#).
- 11 [CPL § 140.40\(3\)\(a\), \(b\)](#).
- 12 [CPL § 140.40\(4\)](#).
- 13 [CPL § 140.40\(5\)](#).

1 Criminal Procedure in New York § 6:4 (2d)

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Chapter 6. Procedure after Arrest

§ 6:4. Procedure after arrest with warrant

References

West's Key Number Digest

- West's Key Number Digest, [Arrest](#) 70(2)
- West's Key Number Digest, [Constitutional Law](#) 262

The United States Supreme Court in [County of Riverside v. McLaughlin](#), 500 US 44 111 S. Ct. 1661 (1991), has determined there is a distinction between an arrest without a warrant and an arrest with a duly authorized warrant. Clearly the fact that a neutral magistrate or judge has previously determined probable cause to arrest the defendant creates a difference in circumstance under federal constitutional law and the issue of the delayed appearance of the defendant is not as serious under situations where warrantless arrests occurs. However, under [CPL 120.90 \(1\)](#), the issue of unreasonable delay is the same whether the arrest is pursuant to a warrant or pursuant to the absence of a warrant. Therefore, the practitioner should be concerned under situations where an arrest concerns irregardless of the issuance of a warrant. [People v. Samuels](#), 49 N.Y.2d 218, 424 N.Y.S.2d 892, 400 N.E.2d 1344 (1980).

If the defendant is arrested pursuant to a warrant of arrest in the county in which it is returnable or in an adjoining county, or if the defendant is arrested for a felony in any other county, the police officer or peace officer appointed by the state university to whom the warrant is issued must, without unnecessary delay, take the defendant before the issuing court.¹ If the police officer or peace officer appointed by the state university is a delegated officer, the officer must, without unnecessary delay, deliver the arrested person to the officer to whom the warrant has been issued, who in turn must take the defendant before the issuing local criminal court.²

If the arrest is for an offense other than a felony, the police officer or peace officer appointed by the state university to whom the warrant is addressed must inform the defendant there is a right to appear before a local criminal court of the county in which the arrest has been made in order to be released on recognizance or to have bail fixed.³ If the defendant wishes to waive this right, the officer should request the defendant to endorse that fact upon the warrant.⁴ Once the endorsement is made, the officer must, without unnecessary delay, take the defendant before the court in which the warrant is returnable.⁵ If the defendant does not wish to assert this right or refuses to make the requested endorsement, the officer must, without unnecessary delay, take the

§ 6:4.Procedure after arrest with warrant, 1 Criminal Procedure in New York § 6:4 (2d)

defendant before a local criminal court of the county of arrest.⁶ The court must release the defendant on recognizance or fix bail for his or her appearance on a specified date in the court in which the warrant is returnable.⁷ If the defendant is in default of bail, the officer must, without unnecessary delay, take the defendant before the court in which the warrant is returnable.⁸

If the defendant is arrested for a nonfelony offense pursuant to a warrant of arrest in a county other than the one in which the warrant is returnable or an adjoining county by a police officer or peace officer appointed by the state university who has been delegated to execute the warrant, the delegated officer may hold the defendant in the county of arrest for a period not to exceed two hours for the purpose of delivering the defendant to the custody of the officer who has been delegated to execute the warrant.⁹ If the delegating officer receives custody of the defendant during that period, the officer must proceed as if the officer has made the arrest and take the defendant before a local criminal court unless the defendant is willing to sign the endorsement on the warrant waiving that right.¹⁰

If the town court in which the arrest warrant is returnable is not available, the arresting officer must take the defendant before any village court embraced in whole or in part by the town or any local criminal court of an adjoining town or city of the same county or any village court embraced in whole or in part by the adjoining town.¹¹ If the village court where the warrant is returnable is not available, the officer must bring the defendant before the town court of the town embracing the village or any other village court within the town or, if the town court or village court is not available either, before the local criminal court of any town or city of the same county which adjoins the embracing town, or before the local criminal court of any village embraced in whole or in part by the adjoining town.¹² If the city court where the warrant is returnable is not available, the officer must bring the defendant before the local criminal court of any adjoining town or village embraced in whole or in part by the adjoining town of the same county.¹³

Before the arrested person is taken before the local criminal court, all necessary fingerprinting and preliminary police duties that are required in the particular case must be performed without unnecessary delay.¹⁴

If a juvenile is arrested pursuant to a warrant of arrest, the police officer or designated peace officer appointed by the state university must immediately notify the parent or other person legally responsible for the child's care or the person with whom the child is domiciled that the juvenile offender has been arrested and the location of the facility where the juvenile is being detained.¹⁵

The violation of the right to an arraignment without unnecessary delay, after an arrest, does not warrant dismissal of the indictment if no facts are shown establishing that during the period of unnecessary delay, there has not been any loss, diminution of, or any prejudice to any rights of the defendant.¹⁶ While there is the distinction between the permissible duration of delay awaiting arraignment after indictment on the one hand, or arrest without indictment on the other hand, that distinction has no reference to the quality of the defendant's rights while awaiting arraignment.¹⁷

The delay of arraignment for no other purpose than to gain time to procure inculpatory statements in the absence of unwaived counsel is unnecessary delay.¹⁸

A prearraignment procedure adopted by the New York City Police Department for budgetary convenience providing that the arresting or complaining officer, instead of waiting with the prisoners for actual arraignment, delegates the task to a surrogate police officer, constitutes an unnecessary delay and is invalid, since the procedure is not authorized by the legislature or the courts.¹⁹

Footnotes

- 1 CPL § 120.90(1), (2).
See 31 N.Y. Jur.2d, Crim L § 259; 34 N.Y. Jur.2d, Crim L §§ 1988, 2059 to 2063; 5 Am. Jur.2d, Arrest §§ 69 et seq.
- Treatises and Practice Aids**
NY Pattern Jury Instructions, PJI 3:5
- 2 CPL § 120.90(1), (2).
3 CPL § 120.90(3).
4 CPL § 120.90(3).
5 CPL § 120.90(3).
6 CPL § 120.90(3).
7 CPL § 120.90(3).
8 CPL § 120.90(3).
9 CPL § 120.90(4).
10 CPL § 120.90(4).
11 CPL § 120.90(5).
12 CPL § 120.90(5).
13 CPL § 120.90(5).
14 CPL § 120.90(6).
15 CPL § 120.90(7).
16 CPL §§ 120.90, 140.20.
People v. Wynn, 102 Misc. 2d 785, 424 N.Y.S.2d 664 (Sup 1980).
17 People v. Wynn, 102 Misc. 2d 785, 424 N.Y.S.2d 664 (Sup 1980).
18 People v. Wynn, 102 Misc. 2d 785, 424 N.Y.S.2d 664 (Sup 1980).
See U.S. v. Middleton, 344 F.2d 78 (2d Cir. 1965); United States v. Klapholz, 230 F.2d 494 (2d Cir. 1956);
McFarlane v. U.S., 231 F. Supp. 191 (S.D. N.Y. 1964); People v. Veitch, 26 A.D.2d 764, 271 N.Y.S.2d
729 (4th Dep't 1966).
19 People v. Wynn, 102 Misc. 2d 785, 424 N.Y.S.2d 664 (Sup 1980).

§ 6:5.Fingerprinting, 1 Criminal Procedure in New York § 6:5 (2d)

1 Criminal Procedure in New York § 6:5 (2d)

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§ 6:5. Fingerprinting

References

West's Key Number Digest

- West's Key Number Digest, [Arrest](#) 68(3)
- West's Key Number Digest, [Arrest](#) 70(1)
- West's Key Number Digest, [Constitutional Law](#) 262

Whether the defendant is arrested with or without a warrant, or whether the defendant has been arraigned on an accusatory instrument by use of a criminal summons or appearance ticket, the defendant is required to have fingerprints taken if the arrest is one which is defined as a felony, a misdemeanor under the Penal Law, a misdemeanor outside of the Penal Law which constitutes a felony if the person had a previous judgment of conviction for a crime, loitering as defined under the Penal Law, or loitering for the purpose of engaging in prostitution as defined in the Penal Law.¹

The fingerprinting procedure must follow arrest or arraignment if arraigned on an accusatory instrument by use of a criminal summons or an appearance ticket.²

If the arresting officer is unable to ascertain a person's identity, or reasonably suspects that the identification given is incorrect, or that the person is being sought by a law enforcement agency for some other offense, the officer may take the fingerprints of an arrested person.³

Whenever fingerprints are required to be taken, the photograph and palm prints of the arrested person may also be taken.⁴ The taking of the fingerprints and submission of available information concerning the arrested person or the defendant and the facts and circumstances of the crime charged must be in accordance with the standards established by the commissioner of the division of criminal justice services.⁵

After the fingerprints have been taken, the police agency must forward two copies of the prints to the division of criminal justice services without unnecessary delay.⁶

§ 6:5.Fingerprinting, 1 Criminal Procedure in New York § 6:5 (2d)

The criminal justice services classifies the fingerprints and searches the records for information concerning any previous record of the defendant including any adjudication as a juvenile delinquent or as a youthful offender and then promptly transmits this information to the forwarding police agency.⁷ This report, if certified, constitutes presumptive evidence of the fact so certified.⁸

If the fingerprints are not sufficiently legible to permit accurate and complete classification, they must be returned and the request made that the defendant's fingerprints be retaken if possible.⁹

The police agency receiving the report of the criminal justice services must promptly transmit that report, or a copy of it, to the district attorney of the county and two copies to the court in which the action is pending.¹⁰

The court then furnishes a copy of the report to the defendant's attorney or to the defendant if the defendant is not represented by counsel.¹¹

There is no authority for taking and retaining the photograph of an individual without probable cause to arrest.¹² All fingerprinting and photographing must be done where a valid arrest has been made, not merely for investigatory purposes.¹³ A defendant's constitutional rights attach when taken to police headquarters where the defendant is not arrested, but is photographed only in the course of an investigation.¹⁴

In addition, an order compelling a defendant to submit to the taking of palm prints, after an arrest for the purpose of investigating the defendant's connection with another crime, does not constitute an unlawful body search under the Fourth and Fifth Amendments of the United States Constitution.¹⁵

Under the Criminal Procedure Law,¹⁶ Upon the termination of a criminal action or proceeding against a defendant in favor of that person, the defendant is entitled to the return of all photographs, palm prints, and fingerprints made in connection with the matter.¹⁷ The purpose of the statute is to grant relief to a defendant who has been completely cleared by the jury of the basic charge which caused the defendant to be photographed and printed regardless of the fact that the same jury finds the defendant guilty of the nonprintable offense.¹⁸ The provisions of the Criminal Procedure Law providing for the fingerprinting of a defendant do not embrace a situation where persons are civilly incarcerated for failure to post a bond to insure future payments of alimony.¹⁹

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Footnotes

- 1 [CPL § 160.10\(1\)\(a\) to \(e\).](#)
See 34 N.Y. Jur.2d, Crim L §§ 2072 to 2074; 59 N.Y. Jur.2d, False Imp & Mal § 160.
A.L.R. Library
[Right of indigent defendant in state criminal case to assistance of fingerprint expert, 72 ALR4th 874](#)
- 2 [CPL § 160.10\(1\).](#)
- 3 [CPL § 160.10\(2\).](#)
- 4 [CPL § 160.10\(3\).](#)

§ 6:5.Fingerprinting, 1 Criminal Procedure in New York § 6:5 (2d)

People v. Steele, 163 Misc. 2d 1060, 623 N.Y.S.2d 471 (Sup 1995) (officer who suspected defendant of involvement in homicide was authorized to take defendant's palm print, even though defendant was arrested by another officer for burglary).

5 CPL § 160.10(4).

6 CPL § 160.20.

See 34 N.Y. Jur.2d, Crim L § 2072.

7 CPL § 160.30(1).

See 34 N.Y. Jur.2d, Crim L § 2075.

8 CPL § 160.30(1).

9 CPL § 160.30(2).

10 CPL § 160.40(1).

11 CPL § 160.40(2).

12 CPL art 160.

People v. Johnson, 88 Misc. 2d 749, 389 N.Y.S.2d 766 (County Ct. 1976).

13 People v. Johnson, 88 Misc. 2d 749, 389 N.Y.S.2d 766 (County Ct. 1976).

14 People v. Johnson, 88 Misc. 2d 749, 389 N.Y.S.2d 766 (County Ct. 1976).

15 People v. Mineo, 85 Misc. 2d 919, 381 N.Y.S.2d 179 (Sup 1976).

16 CPL § 160.50.

See 29 N.Y. Jur.2d, Cts & Jud § 462; 34 N.Y. Jur.2d, Crim L §§ 2075, 2199; 35 N.Y. Jur.2d, Crim L §§ 3241, 3243 to 3245, 3251, 3252, 3254; 59 N.Y. Jur.2d, False Imp. & Mal. § 63.

Treatises and Practice Aids

NY Pattern Jury Instructions, PJI 3:50

Forms

8 Am. Jur. Pleading and Practice Forms, Rev, Criminal Procedure, Forms 441 et seq.

17 People v. Burns, 104 Misc. 2d 415, 428 N.Y.S.2d 588 (City Ct. 1980).

18 People v. Burns, 104 Misc. 2d 415, 428 N.Y.S.2d 588 (City Ct. 1980).

19 CPL §§ 130.60, 160.10.

Hofman v. Malcolm, 71 Misc. 2d 251, 335 N.Y.S.2d 938 (Sup 1972).

See 34 N.Y. Jur.2d, Crim L § 2062.

Research References, 1 Criminal Procedure in New York Ch. 7 Refs. (2d)

1 Criminal Procedure in New York Ch. 7 Refs. (2d)




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Research References

West's Key Number Digest

- West's Key Number Digest, Indictment and Information  11.1
- West's Key Number Digest, Indictment and Information  17
- West's Key Number Digest, Indictment and Information  43

Westlaw Databases

- [Handling a Criminal Case in New York \(HCCNY\)](#)
- [West's McKinney's Forms - Criminal Procedure Law \(MCF-CPL\)](#)

Treatises and Practice Aids

- Muldoon, [Handling a Criminal Case in New York §§ 3:2 to 3:105](#)

Forms

- [West's McKinney's Forms Criminal Procedure Law § 1:1](#)

Research References, 1 Criminal Procedure in New York Ch. 7 Refs. (2d)

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1 Criminal Procedure in New York § 7:1 (2d)

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§ 7:1. Proceedings in local criminal court

References

West's Key Number Digest

- West's Key Number Digest, Indictment and Information 35
- West's Key Number Digest, Indictment and Information 54

CPL 100.05 sets forth the five different forms of an accusatory instrument to be filed in the local criminal court. Each one of these five instruments is critical to the case and must provide sufficient detailed information to provide the defendant with sufficient notice of the charge. (See *People v. Sylla*, 7 Misc. 3d 8, 792 N.Y.S.2d 764 (App. Term 2005), leave to appeal denied, 4 N.Y.3d 857, 797 N.Y.S.2d 431, 830 N.E.2d 330 (2005)).

A criminal action may only be commenced in a superior court by the filing of a grand jury indictment against a defendant who has never been held by a local criminal court for action of the grand jury.¹

The United States Constitution provides that no person may be held to answer for an infamous crime except on an indictment by the grand jury.² The interpretation of what constitutes an infamous crime varies with public opinion from one age to another.³ The presentation of a matter to the grand jury and the filing of an indictment will be treated in greater detail in later chapters.⁴ “Capital” and “infamous” crimes have been interpreted to refer to crimes punishable for longer than one year or crimes other than misdemeanors.⁵

A criminal action is commenced in a local criminal court when an accusatory instrument is filed.⁶ The types of accusatory instruments which may be used are: an information; a simplified information; a prosecutor's information; a misdemeanor complaint; and a felony complaint.⁷ If more than one accusatory instrument is filed in the same criminal action, the date of commencement of the action is the day on which the first of the instruments is filed.⁸

Where a felony complaint is filed, the only power that the local criminal court has is to determine whether the defendant should be held without bail or recognizance bail or whether bail should be permitted or the defendant released on recognizance pending

§ 7:1.Proceedings in local criminal court, 1 Criminal Procedure in New York § 7:1 (2d)

submission of the matter to the grand jury.⁹ The subject of the felony preliminary hearing will be treated in greater detail in a later chapter.¹⁰

The first sentence of the statute¹¹ must be construed to mean that where successive accusatory instruments are filed in a case, for the purpose of determining when the action is commenced, reference must be made to the filing of the first instrument.¹² However, this meaning only applies in a situation where the first accusatory instrument results in a finding that reasonable cause exists, and the defendant is held to answer pending the handing up of a grand jury indictment.¹³

The term “commencement of action,” as defined in the provisions of the Criminal Procedure Law when a proceeding in a superior court is involved, concerns a proceeding initiated in the local criminal court which has been held for action by the grand jury and the filing of an indictment directly in the supreme court.¹⁴ Therefore, where a case has been dismissed in the criminal court, the proceeding has effectively terminated and any subsequent indictment by the grand jury cannot be considered as emanating from the criminal court.¹⁵

In order to be part of a single criminal action, a second accusatory instrument must void and supersede the initial accusatory instrument by virtue of superior power in the law.¹⁶

Pursuant to a federal court decision, the definition of the commencement of a proceeding for purposes of the Criminal Procedure Law does not necessarily coincide with the counterpart definition for purposes of the law of torts concerning malicious prosecution.¹⁷

The Court of Appeals held that instead of censure, a city court judge should be removed from office for committing 46 defendants into custody without making proper findings before such impositions. While the judge was handling an arraignment and conference calendar, a cell phone went off in the courtroom at which point he engaged in this indiscriminatory behavior when violator failed to identify himself. The Court of Appeals felt that although this was only one incident the conduct was so egregious that removal of the judge from office was the appropriate remedy.¹⁸

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Footnotes

- 1 [CPL § 100.05.](#)
See 31 N.Y. Jur. 2d, Crim. L § 275; 33 N.Y. Jur. 2d, Crim. L § 1411; 34 N.Y. Jur. 2d, Crim. L §§ 2154, 2156; 21 Am. Jur. 2d, Crim. L §§ 408 to 410.
A.L.R. Library
[Limitations on state prosecuting attorney's discretion to initiate prosecution by indictment or by information, 44 ALR4th 401.](#)
- 2 [United States Const. amend V.](#)
- 3 [Mackin v. U.S., 117 U.S. 348, 6 S. Ct. 777, 29 L. Ed. 909 \(1886\).](#)
- 4 See chs. 13 and 16.
- 5 [People v. Dean, 103 Misc. 2d 480, 426 N.Y.S.2d 418 \(County Ct. 1980\), order rev'd, 80 A.D.2d 695, 436 N.Y.S.2d 455 \(3d Dep't 1981\).](#)
- 6 [CPL § 100.05.](#)
- 7 [CPL § 100.05.](#)

§ 7:1.Proceedings in local criminal court, 1 Criminal Procedure in New York § 7:1 (2d)

- 8 CPL § 100.05.
Statute which authorizes the filing of more than one accusatory instrument in the course of the same criminal action limits the time in which a new instrument may be filed only to the extent that the action is deemed commenced when the first of such instruments is filed and, implicitly, so long as the statute of limitations and speedy trial time periods are not violated. *People v. Thomas*, 4 Misc. 3d 57, 781 N.Y.S.2d 397 (App. Term 2004), leave to appeal granted, 3 N.Y.3d 663, 782 N.Y.S.2d 705, 816 N.E.2d 578 (2004) and aff'd, 4 N.Y.3d 143, 791 N.Y.S.2d 68, 824 N.E.2d 499 (2005).
- 9 CPL § 180.10.
31 N.Y. Jur. 2d, Crim. L §§ 49, 60, 261; 34 N.Y. Jur. 2d, Crim. L §§ 2143, 2201, 2202, 2205, 2207; 21 Am. Jur. 2d, Crim. L §§ 411 to 419, 433 et seq.
A.L.R. Library
Right of indigent defendant in state criminal case to assistance of fingerprint expert, 72 ALR4th 874.
Right of indigent defendant in state criminal case to assistance of ballistics experts, 71 ALR4th 638.
Accused's right to assistance of counsel at or prior to arraignment, 5 ALR3d 1269.
Forms
8 Am. Jur. Pl & Pr Forms, Rev, Criminal Procedure, Forms 11 to 16, 41.
- 10 See ch. 12.
- 11 CPL § 100.05.
- 12 *People v. Laskowski*, 72 Misc. 2d 580, 340 N.Y.S.2d 787 (County Ct. 1973).
- 13 *People v. Laskowski*, 72 Misc. 2d 580, 340 N.Y.S.2d 787 (County Ct. 1973).
- 14 CPL § § 1.20(17), 100.05.
People v. Cullen, 99 Misc. 2d 646, 416 N.Y.S.2d 1011 (Sup 1979).
- 15 *People v. Cullen*, 99 Misc. 2d 646, 416 N.Y.S.2d 1011 (Sup 1979).
- 16 *People v. Cullen*, 99 Misc. 2d 646, 416 N.Y.S.2d 1011 (Sup 1979); *People v. Nizza*, 95 Misc. 2d 74, 407 N.Y.S.2d 388 (City Crim. Ct. 1978); *People v. Schildhaus*, 15 Misc. 2d 377, 180 N.Y.S.2d 377 (Spec. Sess. 1958).
- 17 CPL § 100.05.
Rosario v. Amalgamated Ladies' Garment Cutters' Union, Local 10, I.L.G.W.U., 605 F.2d 1228, 101 L.R.R.M. (BNA) 2958, 86 Lab. Cas. (CCH) P 11436, 5 Fed. R. Evid. Serv. 113 (2d Cir. 1979); *Weg v. Lippman*, 63 Misc. 2d 352, 312 N.Y.S.2d 862 (N.Y. City Civ. Ct. 1970).
- 18 *In re Restaino*, 10 N.Y.3d 577, 860 N.Y.S.2d 462, 890 N.E.2d 224 (2008).

1 Criminal Procedure in New York § 7:2 (2d)

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Chapter 7. Commencing Criminal Action in the Local Criminal Court

§ 7:2. Effect of family offense

References

West's Key Number Digest

- West's Key Number Digest, Indictment and Information 58.1

No person may file a criminal accusatory instrument based upon the same criminal transaction which is or has been the subject of a proceeding initiated by or against that person under the Family Court Act,¹ which deals with family offenses.²

The family court and the criminal courts have concurrent jurisdiction over any proceeding concerning acts between spouses, parent and child, or members of the same family or household where the charges are disorderly conduct, harassment, menacing, reckless endangerment, assault in the second degree, assault in the third degree, or attempted assault.³ For the purposes of this section, these offenses are referred to as family offenses.⁴ Incestual rape and sodomy are not within the ambit of designated family offenses.⁵

Members of the same family or household encompasses persons related by consanguinity or affinity, persons legally married to one another, persons formerly married to one another, and persons who have a child in common, regardless of whether the persons have been married or have lived together at any time.⁶

A juvenile delinquency proceeding may be originated in family court by an order of removal, provided that the removal is authorized by statute.⁷ However, the statute⁸ only authorizes the removal to family court of an action against a juvenile who is specifically charged as a juvenile offender.⁹

Before a proceeding is commenced, the complainant should be advised of the procedures available for the institution of family offense proceedings.¹⁰ A person should be advised that there is concurrent jurisdiction with respect to family offenses both in family court and criminal court; that a family court proceeding is a civil proceeding which attempts to stop violence, end family disruption, and obtain protection; and that referrals for counseling or counseling services are available through probation for this

§ 7:2.Effect of family offense, 1 Criminal Procedure in New York § 7:2 (2d)

purpose.¹¹ Further, the person should be advised that the purpose of a criminal court proceeding is to prosecute the offender and may result in the defendant's conviction, and that a proceeding under the Criminal Procedure Law is initiated when the accusatory instrument or family court petition is filed, not at the time of arrest.¹² In addition, the person should be advised that an arrest may precede the commencement of a family court or criminal court proceeding, but an arrest is not a requirement for the commencement of either proceeding.¹³ The chief administrator of the court designates the appropriate probation officers, warrant officers, sheriffs, police officers, district attorneys, or other law enforcement officials to inform any complainant under this section of the procedures, and those officials may not discourage or prevent any person who wishes to file a petition or sign a complaint from having access to any court for that purpose.¹⁴

When a person is arrested for an alleged family offense or an alleged violation of an order of protection or temporary order of protection or arrested pursuant to a warrant issued by the supreme or family court, and the supreme or family court is not in session, that person must be brought before a local criminal court in the county of arrest or in the county in which the warrant is returnable.¹⁵ The local criminal court may issue any order authorized by statute in addition to discharging other arraignment responsibilities.¹⁶ In making such order, the local criminal court must consider the bail recommendation, if any, made by the supreme or family court as indicated on the warrant or certificate of warrant.¹⁷ Unless otherwise requested by the petitioner or complainant, the court, besides scheduling further criminal proceedings, if any, regarding the alleged family offense or violation allegation, must make such matter returnable in the supreme or family court on the next day such court is in session.¹⁸

The family court does not abuse its discretion in transferring to the criminal court a proceeding against a minor on charges of assault against his wife, in view of the absence of criteria which would warrant the retention of family court jurisdiction.¹⁹ These criteria include opportunity for reconciliation between the parties and the preservation of the family unit.²⁰

The family court, not the criminal court, is the appropriate forum for offenses which the defendant commits in attempting to avoid service of a family court warrant.²¹

When a criminal action involving a family offense is pending, the criminal court has the power to issue a temporary order of protection as a condition of any order of recognizance or bail or as a condition of an adjournment in contemplation of dismissal.²² In addition to any other conditions, the court may require that the defendant stay away from the home, school, business, or place of employment of the family or household member or of any designated witness provided that the court makes a determination and states that determination in a written decision or on the record regarding whether to impose a condition pursuant to the statute.²³ However, the failure to make a determination will not affect the validity of the temporary order of protection.²⁴ In making the determination, the court must consider, but will not be limited to the consideration of, whether the temporary order of protection is likely to achieve its purpose in the absence of such a condition, conduct subject to prior orders of protection, prior incidents of abuse, past or present injury, threats, drug or alcohol abuse, and access to weapons.²⁵ The court may also permit parental visits to a child, require that the defendant abstain from offensive conduct against a child or against the family or household member, or require that the defendant refrain from acts of commission or omission tending to make the home not a proper place for the family or household member.²⁶

For good cause shown, the court may issue a temporary order of protection ex parte upon the filing of the accusatory instrument.²⁷ The court may issue or extend a temporary order of protection ex parte or on notice simultaneously with the issuance of a warrant for the arrest of the defendant.²⁸ The temporary order of protection may continue in effect until the day the defendant subsequently appears in court pursuant to the arrest warrant, voluntarily or otherwise.²⁹ The duration of the order must be fixed by the court and, in the case of a felony conviction, may not exceed the greater of five years from the date of conviction; or three years from the date of the expiration of the maximum term of an indeterminate sentence of imprisonment actually imposed; or in the case of a conviction for a class A misdemeanor, may not exceed three years from the date of such conviction; or in the case of a conviction for any other offense, may not exceed one year from the date of conviction.³⁰ For

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purposes of determining the duration of an order of protection, a conviction will be considered to include a conviction that has been replaced by a youthful offender adjudication.³¹

Upon conviction of any of the family offenses, the court may, in addition to any other disposition, including a conditional discharge or youthful offender adjudication, enter an order of protection.³² Where a temporary order of protection is issued, the court must state on the record the reasons for issuing or not issuing an order of protection.³³ The same procedure governing the requirement that a court make a determination concerning whether to issue a temporary order of protection also applies when the court enters an order of protection which requires that the defendant stay away from the home, school, business, or place of employment of the family or household member, the other spouse, or the child.³⁴ The duration of the order must be fixed by the court and, in the case of a felony conviction, must not exceed the greater of five years from the date of the conviction; or three years from the date of the expiration of the maximum term of an indeterminate sentence of imprisonment actually imposed; or in the case of a conviction for a class A misdemeanor, must not exceed three years from the date of the conviction; or in the case of a conviction for any other offense, shall not exceed one year from the date of conviction.³⁵ For purposes of determining the duration of an order of protection, a conviction will be considered to include a conviction that has been replaced by a youthful offender adjudication.³⁶ The order must bear in a conspicuous manner the term “order of protection” or “temporary order of protection” as the case may be.³⁷ However, the absence of that language will not affect the validity of the order.³⁸

A copy of the order of protection or the temporary order of protection is filed by the clerk of the court with the sheriff's office in the county in which the complainant resides or, if the complainant resides within a city, with the police department of that city.³⁹ A copy of the order of protection or temporary order of protection may from time to time be filed by the clerk of the court with any other police department or sheriff's office having jurisdiction of the residence, work place, and school of anyone intended to be protected by the order.⁴⁰ A copy of the order may also be filed by the complainant at the appropriate police department or sheriff's office having jurisdiction.⁴¹ Any subsequent amendment or revocation of the order is filed in the same manner as the order of protection or temporary order of protection.⁴²

A family offense which occurs after issuance of the order of protection is deemed a new offense for which the complainant may elect to file a new accusatory instrument or a family court petition.⁴³

Where an order of protection, temporary order of protection, or warrant has been issued under the statute, the clerk of the court issues a copy of the order of protection or temporary order of protection to the complainant, the defendant, and defense counsel.⁴⁴ The presentation of a copy of the order or a warrant to any peace officer constitutes authority to arrest a person violating the terms of the order and to bring that person before the court.⁴⁵

[Sections 530.12 and 530.13 of the Criminal Procedure Law](#) authorizing local criminal courts to issue temporary orders of protection without first conducting an adversarial evidentiary hearing do not violate due process on their face.⁴⁶

If no warrant, order, or temporary order of protection has been issued, and an act which is alleged to be a family offense is the basis of the arrest, the magistrate will permit the complainant to file a petition, information, or accusatory instrument, and for reasonable cause shown, will hold the respondent or the defendant and admit to, fix, or accept bail, or parole the individual for hearing before the family court or appropriate criminal court as the complainant may choose in accordance with the provisions of the Criminal Procedure Law.⁴⁷

Punishment for contempt for violating an order of protection or a temporary order of protection does not affect a pending criminal action, nor will the sentence upon conviction be reduced or diminished for the crimes or offenses enumerated.⁴⁸

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The statute⁴⁹ empowers the court to issue a temporary order of protection as a condition of a pretrial release in a criminal action involving an assault between a parent and child.⁵⁰ Furthermore, the legislative history of the law compels a court to issue a temporary order of protection as a proper exercise in effectuating the purpose of the legislature.⁵¹

The victims for whose protection the legislation was enacted are set forth in the Family Court Act⁵² and the Criminal Procedure Law.⁵³ The class of parent and child is enumerated without reference to the marital status of the parents.⁵⁴ To deny the child who is a victim of a family offense the protections simply because, as part of a divorce decree, the defendant parent has been granted visitation rights would be clearly contrary to legislative intent.⁵⁵

Every police officer, peace officer, or district attorney investigating a family offense must advise a victim of the availability of a shelter or other services in the community and give the victim written notice of the legal rights and remedies available.⁵⁶ The division of criminal justice services must prepare the form and content of the written notice and distribute copies to the appropriate law enforcement officials pursuant to the Executive Law.⁵⁷

The failure of the statute⁵⁸ to provide for a hearing prior to the issuance of a temporary order of protection does not result in a lack of due process or affect the constitutional aspects of the law.⁵⁹ Furthermore, a defendant, who is the object of the order of protection, may at any time request a hearing for the purpose of determining the merits of the order, even though this procedure is not specifically provided for in the Criminal Procedure Law.⁶⁰

Although a pretrial order of protection is constitutionally justifiable as necessary to effect the state's interest in protecting victims of domestic violence, the continuance of the order is not valid unless the defendant is given an opportunity to be heard.⁶¹ The Criminal Procedure Law provides a mechanism for affording the defendant this right when it states that orders of protection may be made a condition of release on bail.⁶² Therefore, when a defendant seeks to modify the court's bail order, this application falls within the ambit of the hearing provision under the Criminal Procedure Law,⁶³ which gives the defendant an opportunity to be heard.⁶⁴

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Footnotes

- 1 Family Court Act art 8.
- 2 [CPL § 100.07](#).
See 34 N.Y. Jur. 2d, Crim. L § 2155; 48 N.Y. Jur. 2d, Dom Rel § 1820; 21 Am. Jur. 2d, Crim. L § 357.
- 3 [CPL § 530.11\(1\)](#).
See 34 N.Y. Jur. 2d, Crim. L § 2142; 48 N.Y. Jur. 2d, Dom Rel § 1864; 8 Am. Jur. 2d, Bail & R §§ 9, 11, 42, 49.
Trial Strategy
[Excessive Bail](#), 18 Am. Jur. Proof of Facts 2d 149.
- 4 [CPL § 530.11](#).
- 5 [Matter of Patrick B. P.](#), 103 Misc. 2d 1102, 427 N.Y.S.2d 694 (Fam. Ct. 1980).
- 6 [CPL § 530.11\(1\)](#).
- 7 CPL art 725.
- 8 [CPL § 180.75](#).

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See 31 N.Y. Jur. 2d, Crim. L §§ 259 to 262, 266, 268, 269, 271; 34 N.Y. Jur. 2d, Crim. L §§ 2132, 2213 to 2215, 2291; 47 Am. Jur. 2d, Juv. Ct. §§ 19, 20, 23.

Forms

8 Am. Jur. Pl & Pr Forms, Rev, Criminal Procedure, Forms 1 et seq..

9 People v. Mote, 106 Misc. 2d 1090, 432 N.Y.S.2d 1000 (Fam. Ct. 1980).

10 CPL § 530.11(2).

11 CPL § 530.11(2)(a), (b).

12 CPL § 530.11(2)(c), (d).

13 CPL § 530.11(2)(f).

14 CPL § 530.11(2), (3).

15 McKinney's CPL § 530.11(4).

16 McKinney's CPL § 530.11(4).

17 McKinney's CPL § 530.11(4).

18 McKinney's CPL § 530.11(4).

19 People v. Brown, 80 A.D.2d 902, 437 N.Y.S.2d 22 (2d Dep't 1981).

20 People v. Brown, 80 A.D.2d 902, 437 N.Y.S.2d 22 (2d Dep't 1981).

21 People v. Oliver, 75 A.D.2d 590, 426 N.Y.S.2d 569 (2d Dep't 1980).

22 CPL § 530.12(1).

21 N.Y. Jur. 2d, Contpt. § 106; 34 N.Y. Jur. 2d, Crim. L §§ 2142, 2143; 35 N.Y. Jur. 2d, Crim. L § 2751; 8 Am. Jur. 2d, Bail & R §§ 24, 43.

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Forfeiture of bail for breach of conditions of release other than that of appearance, 68 ALR4th 1082.

Trial Strategy

Excessive Bail, 18 Am. Jur. Proof of Facts 2d 149.

23 CPL § 530.12(1)(a).

24 CPL § 530.12(1)(a).

25 CPL § 530.12(1)(a).

26 CPL § 530.12(1)(b), (c), (d).

27 CPL § 530.12(3).

28 CPL § 530.12(4).

29 McKinney's CPL § 530.12(4).

30 CPL § 530.13(4).

See 21 N.Y. Jur. 2d, Contpt. § 106; 34 N.Y. Jur. 2d, Crim. L § 2142.

31 CPL § 530.13(4).

32 CPL § 530.12(5).

33 McKinney's CPL § 530.12(5).

34 CPL § 530.12(5)(a).

35 CPL § 530.12(5).

36 CPL § 530.12(5).

37 CPL § 530.12(6).

38 CPL § 530.12(6).

39 CPL § 530.12(6).

40 CPL § 530.12(6).

41 CPL § 530.12(6).

42 CPL § 530.12(6).

43 CPL § 530.12(7).

44 CPL § 530.12(8).

45 CPL § 530.12(8).

§ 7:2.Effect of family offense, 1 Criminal Procedure in New York § 7:2 (2d)

- 46 People v. Koertge, 182 Misc. 2d 183, 701 N.Y.S.2d 588 (Dist. Ct. 1998).
47 CPL § 530.12(9).
See § 530.11.
48 CPL § 530.12(10).
49 CPL § 530.11.
50 People v. Duignan, 104 Misc. 2d 351, 432 N.Y.S.2d 291 (City Crim. Ct. 1980).
51 People v. Duignan, 104 Misc. 2d 351, 432 N.Y.S.2d 291 (City Crim. Ct. 1980).
See Rankin on Behalf of Bd. of Ed. of City of New York v. Shanker, 23 N.Y.2d 111, 295 N.Y.S.2d 625,
242 N.E.2d 802 (1968).
52 Family Court Act § 812.
53 CPL § 530.11.
54 People v. Duignan, 104 Misc. 2d 351, 432 N.Y.S.2d 291 (City Crim. Ct. 1980).
55 People v. Duignan, 104 Misc. 2d 351, 432 N.Y.S.2d 291 (City Crim. Ct. 1980).
56 CPL § 530.11(6).
57 CPL § 530.11(6).
See Executive Law § 841(9).
58 CPL § 530.12.
59 People v. Faieta, 109 Misc. 2d 841, 440 N.Y.S.2d 1007 (Dist. Ct. 1981).
60 People v. Faieta, 109 Misc. 2d 841, 440 N.Y.S.2d 1007 (Dist. Ct. 1981).
61 People v. Derisi, 110 Misc. 2d 718, 442 N.Y.S.2d 908 (Dist. Ct. 1981).
62 CPL § 530.12(1).
People v. Derisi, 110 Misc. 2d 718, 442 N.Y.S.2d 908 (Dist. Ct. 1981).
63 CPL § 510.20.
See 34 N.Y. Jur. 2d, Crim. L §§ 2129, 2130; 8 Am. Jur. 2d, Bail & R §§ 50 et seq.; 81 Am. Jur. 2d,
Witn. § 6.
Trial Strategy
20 Am. Jur. Trials 465, Defending Minor Felony Cases.
Forms
8 Am. Jur. Pl & Pr Forms, Rev, Criminal Procedure, Form 22.
Additional References
Supreme Court's construction and application of provision of federal constitution's eighth amendment
that excessive bail shall not be required, 95 L Ed 2d 1010.
64 People v. Derisi, 110 Misc. 2d 718, 442 N.Y.S.2d 908 (Dist. Ct. 1981).

§ 7:3. Emergency powers, 1 Criminal Procedure in New York § 7:3 (2d)

1 Criminal Procedure in New York § 7:3 (2d)

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§ 7:3. Emergency powers

References

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- West's Key Number Digest, Indictment and Information -56

When the family court is not in session, and upon the request of the petitioner, a local criminal court may on an ex parte basis issue a temporary order of protection pending a hearing in family court.¹ However, to do so, a sworn affidavit must be submitted alleging that the family court is not in session, that a family offense has been committed, that a family offense petition has been filed or will be filed in family court on the next day the court is in session, and showing good cause.²

Upon appearance in a local criminal court, the court must advise the petitioner that he or she may continue with the proceeding either in family court or, upon the filing of a local criminal court accusatory instrument, in criminal court or both.³ After issuing a temporary order of protection where the petitioner requests that it be returnable in family court, the local criminal court must transfer the matter forthwith to the family court and make the matter returnable in family court on the next day the family court is in session, or as soon thereafter as practicable, but in no event more than four calendar days after issuance of the order.⁴

Upon issuing a temporary order of protection returnable in family court, the local criminal court must immediately forward a copy of the temporary order of protection and sworn affidavit to the family court and must provide the petitioner with a copy of that order.⁵

Any temporary order of protection so issued must be issued to the respondent, and copies must be filed.⁶ The order must plainly state the date that the order expires which, in the case of an order returnable in family court, must be not more than four calendar days after its issuance unless sooner vacated or modified by the family court.⁷

A petitioner requesting a temporary order of protection returnable in family court pursuant to [CPL § 530.12\(3-a\)](#) in a case in which a family court petition has not been filed must be informed that the temporary order of protection expires as provided for herein, unless the petitioner filed a petition pursuant to the Family Court Act⁸ on or before the return date in family court

§ 7:3.Emergency powers, 1 Criminal Procedure in New York § 7:3 (2d)

and the family court issues a temporary order of protection or order of protection as authorized under Article 8 of the Family Court Act.⁹

None of the above provisions limits or restricts the petitioner's right to proceed directly and without court referral in either a criminal or family court, or both, as provided for in the Family Court Act.¹⁰

In addition, at the petitioner's request, a local criminal court may on an ex parte basis modify a temporary order of protection or order of protection which has been issued under provisions of the Family Court Act pending a hearing in family court, provided that a sworn affidavit is submitted alleging that the family court is not in session and showing good cause, including a showing that the existing order is insufficient for the purposes of protection of the petitioner, the petitioner's child or children, or other members of the petitioner's family or household.¹¹

The local criminal court must make the matter regarding the modification of the order returnable in family court on the next day the family court is in session, or as soon thereafter as practicable, and in no event more than four calendar days after issuance of the modified order.¹² The court must immediately forward a copy of the modified order and sworn affidavit to the family court and must provide a copy of the order and affidavit to the petitioner.¹³ Any modified temporary order of protection or order of protection so issued must be issued to the respondent and copies filed as required by the Criminal Procedure Law.¹⁴

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Footnotes

- 1 McKinney's CPL § 530.12(3-a).
- 2 McKinney's CPL § 530.12(3-a).
- 3 McKinney's CPL § 530.12(3-a).
- 4 McKinney's CPL § 530.12(3-a).
- 5 McKinney's CPL § 530.12(3-a).
- 6 McKinney's CPL § 530.12(3-a).
- 7 McKinney's CPL § 530.12(3-a).
- 8 McKinney's Family Court Act § 821(1).
- 9 McKinney's CPL § 530.12(3-a).
- 10 McKinney's CPL § 530.12(3-a).
See McKinney's Family Court Act § 115.
- 11 McKinney's CPL § 530.12(3-b).
- 12 McKinney's CPL § 530.12(3-b).
- 13 McKinney's CPL § 530.12(3-b).
- 14 McKinney's CPL § 530.12(3-b).

§ 7:4. Accusatory instruments—Generally, 1 Criminal Procedure in New York § 7:4 (2d)

1 Criminal Procedure in New York § 7:4 (2d)

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§ 7:4. Accusatory instruments—Generally

References

West's Key Number Digest

- West's Key Number Digest, Indictment and Information 56
- West's Key Number Digest, Indictment and Information 57

Accusatory instruments are to be accorded a fair and not overly restricted or technical reading and will be upheld so long as they serve the fundamental purposes of providing the accused with notice sufficient to prepare a defense in a form sufficiently detailed to prevent a subsequent retrial for the same offense. (See [People v. Prevete](#), 10 Misc. 3d 78, 809 N.Y.S.2d 777 (App. Term 2005). [People v. Casey](#), 95 N.Y.2d 354, 717 N.Y.S.2d 88, 740 N.E.2d 233 (2000)).

Under present law,¹ a criminal action commences with the filing of an accusatory instrument.² An accusatory instrument means an indictment, an indictment order reduced, an information, a simplified information, a prosecutor's information, a superior court information, a misdemeanor complaint, or a felony complaint.³ Every accusatory instrument, regardless of the person designated as the accuser, constitutes an accusation on behalf of the state as plaintiff and must be entitled “the people of the State of New York” against a designated person, known as the defendant.⁴ The accusatory instrument must be sufficient and valid for a court to obtain jurisdiction over the defendant.⁵ A valid accusatory instrument must designate the offense or offenses charged in addition to having factual allegations which must contain a statement of the complainant alleging facts of an evidentiary character supporting or tending to support the charges.⁶ Moreover, the accusatory instrument must precede the issuance of an arrest warrant.⁷

However, if the accusatory instrument is not sufficient on its face and the court is satisfied that on the basis of available facts or evidence it would be impossible to draw and file an accusatory instrument that is sufficient on its face, the court must dismiss the instrument.⁸

The Criminal Procedure Law provides for seven separate accusatory instruments.⁹ One type of accusatory instrument, an information, is a verified written accusation by a person charging one or more other persons with the commission of one or

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more offenses, none of which is a felony.¹⁰ An information must be filed with the local criminal court and may serve as a basis for both commencement of the criminal action and prosecution of the criminal action in the local criminal court.¹¹

A second type of accusatory instrument is a simplified traffic information.¹² The form of this information is prescribed by the Commissioner of Motor Vehicles.¹³ It must designate the offense or offenses charged but contains no factual allegations of an evidentiary nature.¹⁴ It serves as the basis for commencement of a criminal action for traffic offenses as an alternative to charging these offenses by a regular information, and under certain circumstances it may serve as the basis for prosecution of the charges.¹⁵ An investigator in a district attorney's office is a police officer and has the authority to issue a simplified traffic information accusing a person of committing a traffic infraction.¹⁶

A third accusatory instrument is the misdemeanor complaint.¹⁷ This is a verified written accusation by a person, filed with the local criminal court, charging one or more other persons with the commission of one or more offenses, at least one of which is a misdemeanor and none of which is a felony.¹⁸ It serves as the basis for commencement of a criminal action but may serve as a basis for prosecution only where the defendant has waived prosecution by information.¹⁹ The misdemeanor complaint serves merely as the basis for the commencement of a criminal action, permitting court arraignment and temporary control of the defendant's person, where there is no prima facie case at the current time.²⁰ However, it is not designed for prosecution purposes, a defendant is not required to plead to a misdemeanor complaint, and there can not be a trial unless the defendant consents.²¹

When a felony is charged in the local criminal court, the only accusatory instrument permissible is the felony complaint, which is a written verified accusation by a person, filed with the local criminal court, charging one or more other persons with the commission of one or more felonies.²² It serves as a basis for commencement of the action but not as a basis for prosecution.²³

Misdemeanors or petty offenses may also be charged in the local criminal court by use of a prosecutor's information.²⁴ This must be signed by the district attorney or an assistant district attorney and filed with the local criminal court either at the direction of the grand jury, pursuant to the Criminal Procedure Law,²⁵ at the direction of a local criminal court,²⁶ at the district attorney's own instance,²⁷ or at the direction of a superior court.²⁸ The prosecutor's information charges one or more persons with the commission of one or more offenses, none of which is a felony.²⁹ It serves as the basis for prosecution of the criminal action, but it commences a criminal action only where it results from a grand jury direction issued in a case not previously commenced in the local criminal court.³⁰

The grand jury may not direct the filing of a prosecutor's information unless the evidence is both legally sufficient to establish the commission of a crime and gives rise to reasonable cause to believe that the defendant committed the crime.³¹

There are two other simplified informations.³² One is a simplified parks information; the form of this document is prescribed by the Commissioner of Parks and Recreation.³³ The other is a simplified environmental conservation information; this form is prescribed by the Commissioner of Environmental Conservation.³⁴ Each of these simplified informations may charge offenses under its respective regulatory statutes.³⁵

Since a desk appearance ticket is not an accusatory instrument,³⁶ the issuance of a desk appearance ticket must be followed by the filing of an appropriate accusatory instrument³⁷ which then commences the criminal action.³⁸

An accusatory instrument is defective on its face when it does not conform to the requirements of the statute.³⁹ However, the instrument may not be dismissed as defective, but must be amended where the defect or irregularity is of a kind that may be

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cured by an amendment, and the prosecution moves to amend.⁴⁰ Failure to designate the proper statutory section and offense designation is not a mere irregularity and may not be amended.⁴¹

If an accusatory instrument is so radically defective that it will not support a judgment of conviction, the court before which a defendant has been prosecuted upon the instrument has not obtained jurisdiction.⁴² Therefore, a second prosecution upon a corrected instrument would not be barred as double jeopardy.⁴³

The prosecution may reduce an A misdemeanor to a B misdemeanor and decide what charges to bring against a defendant.⁴⁴ The mere act of doing so does not in and of itself prejudice the defendant.⁴⁵ However, the prosecution cannot withhold the actual charge in order to prevent the defense from building a strategy and amend the charge on the eve of trial thereby prejudicing the defendant.⁴⁶

The prosecution did not abuse its prosecutorial privilege or prejudice a defendant by reducing a defendant's charges on the eve of trial from assault and possession of a weapon to attempted assault and attempted possession of a weapon, where the reduction was raised after the case had been adjourned for trial for two weeks, the reduced charges were not so inherently different from the original charges so as to alter defense strategy, the prosecution left ample time before trial for the defense to prepare a proper strategy, and the prosecution did not attempt to hide the true nature of the charges from the defense.⁴⁷

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Footnotes

- 1 CPL § 1.20(17).
- 2 CPL § 1.20(1), (8).
People v. Howard, 106 A.D.2d 663, 482 N.Y.S.2d 917 (2d Dep't 1984); People v. Holcombe, 74 A.D.2d 700, 426 N.Y.S.2d 121 (3d Dep't 1980).
People v. Fysekis, 164 Misc. 2d 627, 625 N.Y.S.2d 861 (City Crim. Ct. 1995).
- 3 CPL § 1.20(1).
People v. Fysekis, 164 Misc. 2d 627, 625 N.Y.S.2d 861 (City Crim. Ct. 1995).
- 4 CPL § 1.20(1).
- 5 People v. Law, 106 Misc. 2d 351, 431 N.Y.S.2d 648 (City Crim. Ct. 1980).
- 6 People v. Law, 106 Misc. 2d 351, 431 N.Y.S.2d 648 (City Crim. Ct. 1980).
- 7 CPL §§ 1.20, 120.10, 120.20.
People v. Howard, 106 A.D.2d 663, 482 N.Y.S.2d 917 (2d Dep't 1984).
- 8 McKinney's Crim. Proc. §§ 120.20(1)(b), 130.30.
- 9 CPL § 100.10.
See 8 N.Y. Jur. 2d, Auto & Veh § 540; 34 N.Y. Jur. 2d, Crim. L §§ 2158 to 2163, 2175; 45A N.Y. Jur., Pol Cont & CL § 177; 21 Am. Jur. 2d, Crim. L § 409; 41 Am. Jur. 2d, Indict §§ 44 et seq.
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Limitations on state prosecuting attorney's discretion to initiate prosecution by indictment or by information, 44 ALR4th 401.
- 10 CPL § 100.10(1).
- 11 CPL § 100.10(1).
- 12 CPL § 100.10(2)(a).
See § 7:7.

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- 13 CPL § 100.10(2)(a).
14 CPL § 100.10(2)(a).
15 CPL § 100.10(2)(a).
16 *People v. Neuschatz*, 88 Misc. 2d 433, 389 N.Y.S.2d 507 (App. Term 1975), order aff'd, 40 N.Y.2d 935,
390 N.Y.S.2d 61, 358 N.E.2d 885 (1976).
17 CPL § 100.10(4).
18 CPL § 100.10(4).
19 CPL § 100.10(4).
People v. Richberg, 125 Misc. 2d 975, 481 N.Y.S.2d 237 (City Crim. Ct. 1984).
20 *People v. Weinberg*, 34 N.Y.2d 429, 358 N.Y.S.2d 357, 315 N.E.2d 434 (1974).
21 *People v. Weinberg*, 34 N.Y.2d 429, 358 N.Y.S.2d 357, 315 N.E.2d 434 (1974).
22 CPL § 100.10(5).
23 CPL § 100.10(5).
24 CPL § 100.10(3).
25 CPL § 100.10(3).
See CPL § 190.70.
26 CPL § 100.10(3).
See CPL §§ 180.50, 180.70.
27 CPL § 100.10(3).
See CPL § 100.50(2).
28 CPL § 100.10(3).
See CPL § 210.20(1-a).
29 CPL § 100.10(3).
30 CPL § 100.10(3).
31 *People v. McClafferty*, 73 Misc. 2d 666, 342 N.Y.S.2d 208 (City Crim. Ct. 1973).
32 CPL § 100.10(b), (c).
33 CPL § 100.10(2)(b).
34 CPL § 100.10(2)(c).
35 CPL § 100.10(2)(b), (c).
36 CPL § 1.20(1).
People v. Fysekis, 164 Misc. 2d 627, 625 N.Y.S.2d 861 (City Crim. Ct. 1995).
37 CPL § 1.20(1), (17).
People v. Fysekis, 164 Misc. 2d 627, 625 N.Y.S.2d 861 (City Crim. Ct. 1995).
38 *People v. Byfield*, 131 Misc. 2d 884, 502 N.Y.S.2d 346 (City Crim. Ct. 1986) (improper service of
appearance ticket insufficient basis for dismissing information); *McClellan v. New York City Transit
Authority*, 111 Misc. 2d 735, 444 N.Y.S.2d 985 (N.Y. City Civ. Ct. 1981).
39 CPL § 100.40.
People v. Pacifico, 105 Misc. 2d 396, 432 N.Y.S.2d 588 (City Crim. Ct. 1980).
People v. McNamara, 78 N.Y.2d 626, 578 N.Y.S.2d 476, 585 N.E.2d 788 (1991).
40 *People v. Pacifico*, 105 Misc. 2d 396, 432 N.Y.S.2d 588 (City Crim. Ct. 1980).
For a discussion of amendments to accusatory instruments, see § 7:11.
41 *People v. Law*, 106 Misc. 2d 351, 431 N.Y.S.2d 648 (City Crim. Ct. 1980).
42 *People v. Redding*, 109 Misc. 2d 487, 440 N.Y.S.2d 512 (City Crim. Ct. 1981).
43 *People v. Redding*, 109 Misc. 2d 487, 440 N.Y.S.2d 512 (City Crim. Ct. 1981).
44 *People v. Burke*, 186 Misc. 2d 278, 715 N.Y.S.2d 603 (City Crim. Ct. 2000).
45 *People v. Burke*, 186 Misc. 2d 278, 715 N.Y.S.2d 603 (City Crim. Ct. 2000).
46 *People v. Burke*, 186 Misc. 2d 278, 715 N.Y.S.2d 603 (City Crim. Ct. 2000).
47 *People v. Burke*, 186 Misc. 2d 278, 715 N.Y.S.2d 603 (City Crim. Ct. 2000).

§ 7:4.Accusatory instruments—Generally, 1 Criminal Procedure in New York § 7:4 (2d)

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1 Criminal Procedure in New York § 7:5 (2d)

Criminal Procedure in New York | September 2019 Update
Hon. Robert G. Bogle


Part 1. Practice and Forms

Chapter 7. Commencing Criminal Action in the Local Criminal Court

§ 7:5. Accusatory instruments—Form and content —Information

References

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For information pursuant to [CPL 100.40 \(1\)](#) to be sufficient on its face, the information must contain nonhearsay allegations of the factual part and/or supporting depositions which will establish every element of the crimes charged. [People v. Griffin](#), 10 Misc. 3d 626, 809 N.Y.S.2d 814 (City Crim. Ct. 2005).

An information must demonstrate reasonable cause to believe that the defendant committed the offense charged and must also establish a legally sufficient case against the defendant.¹ It must contain nonhearsay, factual allegations sufficient to establish a prima facie case as to each charge in the complaint.² For these purposes, “nonhearsay” includes admissible hearsay,³ and refers to that type of evidence that would be admissible at trial.⁴ In order to be sufficient on its face, the information must be subscribed and verified by a complainant having knowledge of the offense charged.⁵

The purpose of an information is to inform the accused of the nature of the charge and acts constituting it so that he or she may prepare for trial and protect himself or herself from being tried for the same offense.⁶ The information must specify the name of the court in which it is filed and the title of the action.⁷ It must be signed at the bottom and verified by the complainant.⁸ The complainant may be any person who has knowledge, whether personal or based upon information and belief, relating to the commission of a crime, and the knowledge which the complainant imparts on the accusatory instrument must relate to the offense or offenses charged.⁹ The information is divided into two parts, the accusatory part and the factual part.¹⁰ The complainant's verification of the instrument is deemed to apply only to the factual part and not to the accusatory part.¹¹

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To be sufficient, an information must contain both an accusatory part which designates the offense charged against the defendant and a factual part which alleges facts of an evidentiary character supporting or tending to support the charges.¹² While an accusatory instrument's citation of the specific statutes under which the defendant is charged may satisfy the accusatory part of the requirements for a jurisdictionally sufficient information, such citations do not satisfy the factual part.¹³ An information is statutorily sufficient on its face when it substantially conforms to the requirements of CPL § 100.15, contains factual allegations which provide reasonable cause to believe that the defendant committed the offense charged, and contains nonhearsay factual allegations establishing, if true, each element of the offense charged and that the defendant committed the same.¹⁴ Failure to establish a prima facie case in an information constitutes a jurisdictional defect that cannot be waived and requires dismissal of the accusatory instrument.¹⁵

The accusatory part must designate the offense or offenses charged and, subject to the rules of joinder applicable to indictments, may charge two or more offenses in separate counts; two or more defendants may be charged in the same instrument provided that all of the defendants are jointly charged with every offense alleged in the information.¹⁶ The ability to join defendants in one information or complaint is much more restrictive than when joining defendants in an indictment since section 200.40 of the Criminal Procedure Law allows two or more defendants to be jointly indicted for one of four reasons, while section 100.15 of the Criminal Procedure Law allows a misdemeanor information or complaint to charge multiple defendants only as long as the defendants are jointly charged with every offense allowed in the information.¹⁷ To illustrate, dismissal was warranted where defendants were charged under one misdemeanor information with two counts of third-degree assault and second-degree harassment and one defendant was further charged with petit larceny.¹⁸ In that case, the court noted that the prosecution could have moved to amend the accusatory instrument or for severance, or superseded the misdemeanor information with two separate misdemeanor informations, one for each defendant.¹⁹

The factual part of the instrument must contain the complainant's statement alleging evidentiary facts supporting or tending to support the charges.²⁰ The factual part of the information must allege facts of evidentiary character, must provide reasonable cause to believe the defendant committed the offense charged, and must, if true, establish every element of the offense charged and the defendant's commission of it.²¹ If there is more than one offense, the factual part should consist of a single factual account applicable to all of the counts of the accusatory part.²² Factual allegations may be based either on personal knowledge or on information and belief.²³ Conclusory allegations are insufficient and render the charging instrument defective.²⁴

Insufficiency in the factual allegations alone, as opposed to a failure to allege every material element of the crime, does not constitute a nonwaivable jurisdictional defect.²⁵

Where an information does not allege sufficient facts, the defect may be cured by a supporting deposition.²⁶ A supporting deposition is a written instrument which accompanies or is filed in connection with an information or other accusatory instrument.²⁷ It must be subscribed (signed at the bottom) and verified by a person other than the complainant of the accusatory instrument.²⁸ It contains factual allegations of an evidentiary nature based either upon personal knowledge or upon information and belief, and these factual allegations must support or tend to support the charges which are contained in the accusatory instrument.²⁹

A document may serve as a supporting deposition to an accusatory instrument, even if it precedes the drafting of the accusatory instrument, provided it: clearly identifies the defendant; states the date, time, and place of occurrence; contains every element of each crime charged in the complaint; indicates that the allegations made are based on the subscriber's personal knowledge and that the subscriber has read the allegations contained in the document and verifies that they are true; and it is verified as statutorily prescribed.³⁰

A domestic incident report can serve as a supporting deposition to an accusatory instrument if the report's factual allegations contain every element of the factual allegations set forth in the accusatory instrument, it is clear from the report that the allegations are based on the complaining witness' personal knowledge, the report clearly indicates that the complainant has read

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the allegations and adopted them as her own, and the report is properly verified.³¹ A domestic incident report signed by the complainant could not be used as a supporting deposition where the date in the report concerning when the incident occurred was different from the date of the occurrence as set forth in the accusatory instrument.³²

Where the court finds that the complainant has not personally read the complaint or had it read to him or her, the presumption of regularity that applies to the filing of a supporting deposition disappears from the case and the supporting deposition becomes insufficient to properly convert the complaint into an information.³³ However, in the absence of a clear indication from the complainant that he or she has not signed the supporting deposition, the supporting deposition is deemed sufficient to convert the complaint into the information.³⁴ A defendant's mere speculation that the complainant might not have read or understood the allegations in the complaint, based on the fact that the telephone company interpreter read the complaint to the complainant in Russian, was insufficient to successfully challenge the propriety of the complainant's supporting deposition and the conversion of the complaint to an information, absent a clear indication from the complainant that she did not read or understand the factual allegations read by the complainant or to her by the interpreter, and in light of the prosecution's unchallenged allegation that the complainant had some ability to read and speak English and the interpreter was merely used as a precaution.³⁵

There is no conflict between the statute³⁶ authorizing a person other than a police officer who may have witnessed a crime to prepare a deposition and the statute³⁷ authorizing a police officer to prepare a deposition to clarify a complaint, since both of these statutes refer to different supporting depositions.³⁸

The verification of the information or of any supporting deposition may be done in one of the following manners: (a) it may be sworn to before the court with which it is filed; (b) it may be sworn to before a desk officer in charge at a police station or police headquarters, or any of his superior officers; (c) if it is filed by a public servant following the issuance of an appearance ticket it may be sworn to before another designated public servant who is authorized to administer the oath; (d) it may bear a form notice that false statements made are punishable as a class A misdemeanor pursuant to the Penal Law,³⁹ and the form notice together with the subscription of the deponent constitute a verification of the instrument.⁴⁰ If a complainant police officer does not sign the instrument in the presence of the desk sergeant, the court must conclude that the information is not properly verified and, therefore, must be dismissed.⁴¹

The court may designate one of the methods of verification to be used in a particular case.⁴²

While the information must be subscribed, this merely requires the deponent's signature be at the conclusion of the statement being verified.⁴³ The signature does not also have to follow the form notice.⁴⁴

The information is sufficient on its face if it meets the standards described in this section and those standards contained in the Criminal Procedure Law.⁴⁵ Further, the allegations of the factual part, together with those of any supporting depositions, provide reasonable cause to believe that the defendant committed the offense charged in the accusatory part of the information, and the nonhearsay allegations of fact included in the information and the supporting depositions establish, if true, every element of the offense charged.⁴⁶ The failure to adhere to the strict requirements under the Criminal Procedure Law for the construction of an information regarding the showing of a prima facie case which requires facial sufficiency of every element of the offense charged and the defendant's commission thereof, supported by verified nonhearsay allegations, is a jurisdictional defect.⁴⁷ In a prosecution for third-degree grand larceny, the information is insufficient on its face where the supporting information and deposition contain no allegation that the defendant intends to commit the crime of issuing a bad check, or that at the time of ordering the checks, the defendant intends or believes that payment would be refused by the drawee upon presentation.⁴⁸ However, the Court of Appeals has held that a hearsay pleading violation of [Criminal Procedure Law § 100.40\(1\)\(c\)](#) in the factual portion of a local criminal court information is not jurisdictional or nonwaivable and, therefore, must be preserved in order to be reviewable as a matter of law on appeal.⁴⁹ Accordingly, a defendant's failure to interpose a timely objection or

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motion before the trial court that addressed alleged hearsay defects in a misdemeanor information charging criminal contempt precluded consideration of the defect on appeal.⁵⁰

An information must be sufficient by itself, without resort to testimony or record of evidence, in order to withstand a motion to dismiss for insufficiency.⁵¹ Certainty and precision must be patent in an information.⁵²

If there is any doubt about the admissibility of hearsay evidence, it should not be used to support an information.⁵³

At any time prior to entering a guilty plea or prior to the commencement of trial, the information may be amended upon application of the people with notice to the defendant providing an opportunity to be heard.⁵⁴ The court may order the amendment of the accusatory part of the information by adding a count charging an offense supported by allegations of the factual part of the information including the supporting depositions.⁵⁵ Furthermore, an amendment of the information to change the statutory citation to properly reflect the renumbered charge is permissible during trial.⁵⁶ If the amendment is granted, the defendant must be allowed a reasonable adjournment.⁵⁷ If there is to be an amendment of an accusatory instrument within the scope of the statute,⁵⁸ there must be strict compliance with the prescriptions of that section.⁵⁹ The statute⁶⁰ is the relevant section for the amendment of a juvenile delinquency petition, since a juvenile delinquency petition is not akin to a prosecutor's information, but is tantamount to an information.⁶¹

An information may be superseded by a prosecutor's information or another information.⁶² If, prior to a guilty plea or commencement of the trial, another information is filed with the local criminal court charging the defendant with an offense which was charged in the first instrument, the first instrument is superseded by the second.⁶³ When the defendant is arraigned on the second instrument, the court must dismiss the count of the first instrument charging the offense.⁶⁴ The Court of Appeals has held that where the defendant is never arraigned on the succeeding information, there is no jurisdictional bar to a conviction on the preceding instrument charging the same crime and no statutory obligation to dismiss the preceding instrument.⁶⁵ The first instrument is not superseded as to any count it contains which is not charged in the second instrument.⁶⁶ The information may also be superseded by a prosecutor's information charging any of the offenses supported pursuant to the standards prescribed in the Criminal Procedure Law.⁶⁷ In that case, the original information is superseded by the prosecutor's information, and when the defendant is arraigned on the latter, the first information is deemed dismissed.⁶⁸ The prosecution may file a new information that alleges additional facts or charges offenses that were not included in a previously filed information but stem from the same criminal transaction.⁶⁹ In so holding, the court stated that the prosecution has absolute freedom to obtain a new grand jury indictment for replacement of one that is pending or any count within it that would presumably and logically contain charges not considered or voted on by the first grand jury based on additional proof of criminal activity.⁷⁰ Accordingly, an original information charging a defendant with third-degree assault did not prevent the state from filing a new information charging the defendant with second-degree harassment on the basis of a single incident, even though the second instrument was not a prosecutor's information, as [section 100.50 of the Criminal Procedure Law](#) did not limit the prosecutor's authority to file more than one information in the course of the same criminal action when the instruments charged different offenses based on different facts and did not limit the prosecutor's authority to provide additional factual detail in the new information.⁷¹

The import of the statute is to exclude felony complaints from one of the class of accusatory instruments which may be superseded by a prosecutor's information.⁷²

When an information is filed in the local criminal court, a copy must immediately be transmitted to the appropriate district attorney either by the clerk of the court or by a police officer or peace officer if the officer is the complainant or has arrested the defendant and brought the defendant before the local criminal court on behalf of the arresting person.⁷³

An information charging a defendant with operating a motor vehicle while under the influence of alcohol with a blood level of .10 percent or more must be supported by a chemical test analysis certificate which is both verified by the person who

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administered the test and which indicates the defendant's blood alcohol level, and the absence of either factor renders the instrument jurisdictionally defective.⁷⁴

An information charging a defendant with possession of an electronic stun gun, whether pursuant to the Penal Law or the Administrative Code, must contain factual allegations that the stun gun was operable, defined as capable of emitting an electronic charge, accompanied by a supporting deposition from the individual who tested the device, and a formal lab analysis or ballistics report is not required.⁷⁵ If the complaint alleges that a deponent and/or informant observed a defendant in possession of a stun gun and that the deponent/informant is a police or court officer, that officer's capacity for correctly identifying a weapon is inherently understood by the officer's professional status so that the basis for the identification need not be stated in the complaint.⁷⁶

An information that alleged that the defendant left four young children of the ages five, seven, 12, and 13 alone for two hours without adult supervision in an apartment that was devoid of food was facially insufficient to charge the offense of endangering the welfare of child, where the allegations did not provide any factual description to establish that the children's physical, mental, or emotional condition was impaired by what may have been a temporary lack of food in the apartment or that leaving noninfant children in the care of their 12- and 13-year-old siblings resulted in their neglect.⁷⁷

A misdemeanor information charging second-degree criminal trespass was not insufficient in alleging, as the sole basis for an inference of criminal conduct, defendant's admission that he was not a resident or an invited guest at the building where a police officer saw him standing on the roof.⁷⁸

The statutory exception for cases arising out of labor disputes was an element of the crime of second-degree criminal contempt, and the count of the accusatory instrument charging second-degree criminal contempt for disobeying a protective order in favor of the child's mother, without indicating whether the case was the result of a labor dispute, was facially insufficient.⁷⁹

In the Court of Appeals case *People v. Jones*,⁸⁰ the Court reiterated the doctrine that the People are obligated to set forth a prima facie case in the information to establish the defendant was justly accused of the offense for which he was charged, in accordance to CPL 100.40(1). In *Jones* the defendant was charged with disorderly conduct and the information simply alleged that the defendant was not moving on a public sidewalk and numerous pedestrians forced to move around him and that the defendant had refused to move. The Court held that where inconvenience for pedestrians is insufficient to support a disorderly conduct charge Penal Law 240.2(5)(5) and as such failed to cause alarm or recklessly create a risk.

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Footnotes

- 1 [People v. Pacifico](#), 105 Misc. 2d 396, 432 N.Y.S.2d 588 (City Crim. Ct. 1980).
[People v. Malon](#), 166 Misc. 2d 423, 633 N.Y.S.2d 697 (City Crim. Ct. 1995) (information charging dismantling of motor vehicles was sufficient); [People v. Lopez](#), 170 Misc. 2d 278, 648 N.Y.S.2d 231 (City Crim. Ct. 1996).
- 2 [People v. Escalera](#), 143 Misc. 2d 779, 541 N.Y.S.2d 707 (City Crim. Ct. 1989).
- 3 [People v. Heller](#), 180 Misc. 2d 160, 689 N.Y.S.2d 327 (City Crim. Ct. 1998).
- 4 [People v. Swinger](#), 180 Misc. 2d 344, 689 N.Y.S.2d 336 (City Crim. Ct. 1998).
- 5 CPL §§ 100.15, 100.40.
[People v. Pacifico](#), 105 Misc. 2d 396, 432 N.Y.S.2d 588 (City Crim. Ct. 1980).

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- 6 CPL § 100.15(3).
See 34 N.Y. Jur. 2d, Crim. L. §§ 2163, 2166, 2169, 2174, 2180; 21 Am. Jur. 2d, Crim. L. § 409; 41 Am. Jur. 2d, Indict §§ 44 et seq.
[People v. Miles](#), 64 N.Y.2d 731, 485 N.Y.S.2d 747, 475 N.E.2d 118 (1984); [People v. Scantlebury](#), 143 Misc. 2d 9, 539 N.Y.S.2d 641 (Dist. Ct. 1989) (simplified traffic information).
An information charging the defendant with storing more than one unregistered vehicle on a residential lot did not contain hearsay pleading defects and, therefore, was not jurisdictionally defective, where the elements of storage and registration could readily be established by the fair implication of the complainant's firsthand observations, and the residential element, as well as ownership, if it were applicable, could be fairly implied from the complainant's duties as the town's code inspector, so that the source or validity of the complainant's knowledge was a matter to be raised as an evidentiary defense at trial and did not need to be specified in the information. [People v. Sikorsky](#), 195 Misc. 2d 534, 759 N.Y.S.2d 836 (App. Term 2002).
- Forms**
8 Am. Jur. Pl & Pr Forms, Rev, Criminal Procedure, Forms 91, 92, 97, 99, 102, 112, 131, 134, 139, 140.
- 7 CPL § 100.15(1).
8 CPL § 100.15(1).
9 CPL § 100.15(1).
10 CPL § 100.15(1).
11 CPL § 100.15(1).
12 [People v. Moorehead](#), 170 Misc. 2d 35, 648 N.Y.S.2d 528 (J. Ct. 1996) (sufficiency of information charging assault).
13 [People v. Frazier](#), 195 Misc. 2d 525, 759 N.Y.S.2d 631 (City Ct. 2003) (accusatory instrument charging second-degree criminal contempt based on alleged violation of no-contact order of protection was not jurisdictionally defective in failing to expressly state that underlying factual assertions did not involve a labor dispute).
14 [People v. Moorehead](#), 170 Misc. 2d 35, 648 N.Y.S.2d 528 (J. Ct. 1996).
15 [People v. Moorehead](#), 170 Misc. 2d 35, 648 N.Y.S.2d 528 (J. Ct. 1996).
16 CPL § 100.15(2).
[People v. McNamara](#), 78 N.Y.2d 626, 578 N.Y.S.2d 476, 585 N.E.2d 788 (1991).
17 [People v. Tejada](#), 180 Misc. 2d 228, 690 N.Y.S.2d 386 (City Crim. Ct. 1997).
18 [People v. Tejada](#), 180 Misc. 2d 228, 690 N.Y.S.2d 386 (City Crim. Ct. 1997).
19 [People v. Tejada](#), 180 Misc. 2d 228, 690 N.Y.S.2d 386 (City Crim. Ct. 1997).
20 CPL § 100.15(3).
[People v. Smith](#), 178 Misc. 2d 350, 678 N.Y.S.2d 872 (City Crim. Ct. 1998).
21 CPL §§ 100.15, 100.40.
[People v. Hurtado](#), 116 Misc. 2d 897, 456 N.Y.S.2d 660 (City Crim. Ct. 1982) (information concerning factual portions of all elements of offense as nonwaivable jurisdictional prerequisite); [People v. Pacifico](#), 105 Misc. 2d 396, 432 N.Y.S.2d 588 (City Crim. Ct. 1980).
Information charging the defendant with resisting arrest was jurisdictionally insufficient in the absence of any allegations that, if true, would establish that the underlying arrest was authorized. [People v. Grabinski](#), 189 Misc. 2d 307, 731 N.Y.S.2d 583 (App. Term 2001).
[People v. Smith](#), 178 Misc. 2d 350, 678 N.Y.S.2d 872 (City Crim. Ct. 1998); [People v. Dang](#), 172 Misc. 2d 274, 658 N.Y.S.2d 820 (City Crim. Ct. 1997).
Factual allegations in an information that the defendant was driving under the influence of alcohol when she struck another vehicle were insufficient to support a charge that the defendant acted recklessly or with criminal negligence. [People v. Figueroa](#), 164 Misc. 2d 814, 625 N.Y.S.2d 839 (City Crim. Ct. 1995); [People v. Lopez](#), 170 Misc. 2d 278, 648 N.Y.S.2d 231 (City Crim. Ct. 1996).
22 CPL § 100.15(3).
23 CPL § 100.15(3).
24 [People v. Figueroa](#), 164 Misc. 2d 814, 625 N.Y.S.2d 839 (City Crim. Ct. 1995).

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- 25 [People v. Grosunor](#), 109 Misc. 2d 663, 440 N.Y.S.2d 996 (City Crim. Ct. 1981).
[People v. Ramos](#), 162 Misc. 2d 745, 622 N.Y.S.2d 859 (City Crim. Ct. 1994) (inability of complainant to recognize complaint on cross-examination went to his credibility and not the jurisdictional sufficiency of the complaint).
- 26 Commission Staff Notes to [CPL § 100.20](#).
See 34 N.Y. Jur. 2d, Crim. L § 2172; 21 Am. Jur. 2d, Crim. L § 409; 41 Am. Jur. 2d, Indict §§ 44 et seq.
- Forms**
8 Am. Jur. Pl & Pr Forms, Rev, Criminal Procedure, Forms 91, 92, 97, 99, 102, 112, 131, 134, 139, 140.
- 27 [CPL § 100.20](#).
- 28 [CPL § 100.20](#).
- 29 [CPL § 100.20](#).
- 30 [People v. Stridiron](#), 175 Misc. 2d 16, 667 N.Y.S.2d 621 (City Crim. Ct. 1997).
- 31 [People v. Stridiron](#), 175 Misc. 2d 16, 667 N.Y.S.2d 621 (City Crim. Ct. 1997).
- 32 [People v. Stridiron](#), 175 Misc. 2d 16, 667 N.Y.S.2d 621 (City Crim. Ct. 1997).
- 33 [People v. Honshj](#), 176 Misc. 2d 170, 671 N.Y.S.2d 934 (City Crim. Ct. 1998).
- 34 [People v. Honshj](#), 176 Misc. 2d 170, 671 N.Y.S.2d 934 (City Crim. Ct. 1998).
- 35 [People v. Honshj](#), 176 Misc. 2d 170, 671 N.Y.S.2d 934 (City Crim. Ct. 1998).
- 36 [CPL § 100.20](#).
- 37 [CPL § 100.25](#).
See 8 N.Y. Jur. 2d, Auto & Veh §§ 540, 541; 34 N.Y. Jur. 2d, Crim. L §§ 2164, 2167, 2173; 85 N.Y. Jur. 2d, Police, Sheriffs, and Related Officers § 17; 21 Am. Jur. 2d, Crim. L § 409; 41 Am. Jur. 2d, Indict §§ 44 et seq.
- Forms**
8 Am. Jur. Pl & Pr Forms, Rev, Criminal Procedure, Forms 91, 92, 97, 99, 102, 112, 131, 134, 139, 140.
- 38 [People v. Quinn](#), 100 Misc. 2d 582, 419 N.Y.S.2d 811 (Police Ct. 1979).
- 39 Penal Law § 210.45.
- 40 [CPL § 100.30\(1\)](#).
See 33 N.Y. Jur. 2d, Crim. L § 1297; 34 N.Y. Jur. 2d, Crim. L § 2174; 21 Am. Jur. 2d, Crim. L § 409; 41 Am. Jur. 2d, Indict §§ 44 et seq.
- Forms**
8 Am. Jur. Pl & Pr Forms, Rev, Criminal Procedure, Forms 91, 92, 97, 99, 102, 112, 131, 134, 139, 140.
- 41 [People v. Ryan](#), 185 Misc. 2d 477, 713 N.Y.S.2d 447 (Dist. Ct. 2000).
- 42 [CPL § 100.30\(2\)](#).
- 43 [People v. Coldiron](#), 79 Misc. 2d 338, 360 N.Y.S.2d 788 (App. Term 1974).
- 44 [People v. Coldiron](#), 79 Misc. 2d 338, 360 N.Y.S.2d 788 (App. Term 1974).
- 45 [CPL § 100.40\(1\)\(a\)](#).
See [CPL § 100.15](#).
- 46 [CPL § 100.40\(1\)](#). This latter requirement that the nonhearsay allegations establish every element of the crime is specifically reenforced by [CPL § 100.15](#), which provides that those allegations may be upon information and belief, but that section does not in any way limit or affect the requirement of [CPL § 100.40\(1\)](#). [CPL § 100.15\(3\)](#).
A domestic violence report that was verified by the victim, but neither filed with nor incorporated by reference into the information charging the defendant with resisting arrest, could not cure a defect consisting of the lack of any allegations in the information that the underlying arrest of the defendant was lawful. [People v. Grabinski](#), 189 Misc. 2d 307, 731 N.Y.S.2d 583 (App. Term 2001).
A misdemeanor information was facially insufficient to sustain a charge of falsely reporting an incident to the police, where the prosecution asserted that the police report was initiated in retaliation for an aggravated harassment complaint brought against the defendant on the previous day but did not plead that the incident at issue did not in fact occur, as required by the statutory language for the crime of falsely reporting an incident. [People v. Torres](#), 188 Misc. 2d 58, 727 N.Y.S.2d 587 (City Crim. Ct. 2001).

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- People v. McNamara, 78 N.Y.2d 626, 578 N.Y.S.2d 476, 585 N.E.2d 788 (1991) (informations charging defendants with public lewdness facially defective).
- People v. Payton, 161 Misc. 2d 170, 612 N.Y.S.2d 815 (City Crim. Ct. 1994) (complaint sufficient where it alleged all elements of a single count of menacing in the second degree).
- People v. Niang, 160 Misc. 2d 500, 609 N.Y.S.2d 1017 (City Crim. Ct. 1994) (mens rea element of trademark counterfeiting sufficiently alleged where defendant's knowledge that his watches were not genuine could be inferred from his possession of the watches and their inferior quality).
- People v. McDermott, 160 Misc. 2d 769, 610 N.Y.S.2d 984 (Dist. Ct. 1994) (aggravated harassment in the second degree complaint was jurisdictionally defective where it failed to sufficiently identify the defendant as the person who spoke to the complainant on the telephone).
- Facts showing "forcible compulsion" need not be elicited in an information charging forcible touching in order for the information to be facially sufficient, and the lack of consent can be established directly through the affidavit of the complainant or by circumstantial evidence. People v. Serrano, 5 Misc. 3d 509, 785 N.Y.S.2d 281 (Dist. Ct. 2004).
- 47 CPL §§ 100.15(1), (3), 100.40(1)(c).
- People v. King, 137 Misc. 2d 1087, 523 N.Y.S.2d 748 (City Crim. Ct. 1988) (rejected by, People v. Soler, 144 Misc. 2d 524, 544 N.Y.S.2d 287 (City Crim. Ct. 1989)).
- People v. Wheeler, 162 Misc. 2d 81, 616 N.Y.S.2d 145 (City Crim. Ct. 1994) (accusatory instrument failed jurisdictional requirements where nonhearsay nature of annexed police laboratory reports was not clear on the face of the instruments).
- 48 Conkey v. State, 74 A.D.2d 998, 427 N.Y.S.2d 330 (4th Dep't 1980).
- 49 People v. Casey, 95 N.Y.2d 354, 717 N.Y.S.2d 88, 740 N.E.2d 233 (2000).
- 50 People v. Casey, 95 N.Y.2d 354, 717 N.Y.S.2d 88, 740 N.E.2d 233 (2000).
- 51 People v. Crisofulli, 91 Misc. 2d 424, 398 N.Y.S.2d 120 (City Crim. Ct. 1977).
- 52 People v. Crisofulli, 91 Misc. 2d 424, 398 N.Y.S.2d 120 (City Crim. Ct. 1977).
- 53 People v. Haskins, 107 Misc. 2d 480, 435 N.Y.S.2d 261 (City Crim. Ct. 1981).
- People v. Garcia, 163 Misc. 2d 862, 622 N.Y.S.2d 1019 (City Crim. Ct. 1995) (complaint for aggravated unlicensed operation of a motor vehicle in the second degree was properly converted into information where facts alleged were corroborated by filing of certified copy of defendant's DMV abstract, copies of five conviction notices and license suspensions addressed to defendant with proofs of mailing).
- 54 CPL § 100.45(3).
- See 34 N.Y. Jur. 2d, Crim. L §§ 2157, 2178, 2181; 21 Am. Jur. 2d, Crim. L § 409; 41 Am. Jur. 2d, Indict §§ 44 et seq.
- A.L.R. Library**
- Power of court to make or permit amendment of indictment, 17 ALR3d 1181.
- 55 CPL § 100.45(3).
- 56 People v. Pena, 146 Misc. 2d 767, 552 N.Y.S.2d 543 (City Crim. Ct. 1990).
- 57 CPL § 100.45(3).
- 58 CPL § 100.45(3).
- 59 People v. Harper, 37 N.Y.2d 96, 371 N.Y.S.2d 467, 332 N.E.2d 336 (1975).
- 60 CPL § 100.45(3).
- 61 Matter of Parsons, 108 Misc. 2d 738, 438 N.Y.S.2d 933 (City Fam. Ct. 1981).
- 62 CPL § 100.50.
- See 34 N.Y. Jur. 2d, Crim. L § 2179; 21 Am. Jur. 2d, Crim. L § 409; 41 Am. Jur. 2d, Indict §§ 44 et seq.
- 63 CPL § 100.50(1).
- The prosecution's motion to file a superseding information was denied and did not obviate the failure to supply the supporting depositions that had been demanded by the defendant which required the dismissal of the simplified traffic informations. People v. Origlia, 138 Misc. 2d 286, 524 N.Y.S.2d 163 (City Ct. 1988).
- 64 CPL § 100.50(1).
- 65 People v. Bowman, 84 N.Y.2d 923, 620 N.Y.S.2d 810, 644 N.E.2d 1366 (1994).

§ 7:5.Accusatory instruments—Form and content—Information, 1 Criminal Procedure in...

- 66 CPL § 100.50(1).
67 CPL § 100.50(2).
See CPL § 100.40(1).
68 CPL § 100.50(2).
People v. White, 115 Misc. 2d 800, 454 N.Y.S.2d 792 (City Crim. Ct. 1982) (failing to arraign defendant on superseding information as not warranting motion to set aside verdict and dismiss information).
69 People v. Thomas, 4 N.Y.3d 143, 791 N.Y.S.2d 68, 824 N.E.2d 499 (2005).
70 People v. Thomas, 4 N.Y.3d 143, 791 N.Y.S.2d 68, 824 N.E.2d 499 (2005).
71 People v. Thomas, 4 N.Y.3d 143, 791 N.Y.S.2d 68, 824 N.E.2d 499 (2005).
72 CPL § 100.50.
People v. Thomas, 107 Misc. 2d 947, 436 N.Y.S.2d 153 (Dist. Ct. 1981).
73 CPL § 110.20.
74 People v. Lopez, 170 Misc. 2d 278, 648 N.Y.S.2d 231 (City Crim. Ct. 1996).
75 People v. Dang, 172 Misc. 2d 274, 658 N.Y.S.2d 820 (City Crim. Ct. 1997).
76 People v. Dang, 172 Misc. 2d 274, 658 N.Y.S.2d 820 (City Crim. Ct. 1997).
77 People v. Smith, 178 Misc. 2d 350, 678 N.Y.S.2d 872 (City Crim. Ct. 1998).
78 People v. Heller, 180 Misc. 2d 160, 689 N.Y.S.2d 327 (City Crim. Ct. 1998).
79 People v. Romano, 188 Misc. 2d 368, 728 N.Y.S.2d 868 (City Crim. Ct. 2001) (abrogated by, People v. Feiler, 191 Misc. 2d 390, 742 N.Y.S.2d 526 (Dist. Ct. 2002)) (defect in information curable by amendment).
80 People v. Jones, 9 N.Y.3d 259, 848 N.Y.S.2d 600, 878 N.E.2d 1016 (2007).

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1 Criminal Procedure in New York § 7:6 (2d)

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§ 7:6. Accusatory instruments—Form and content —Felony complaint

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A felony complaint is defined in [CPL 100.10 \(5\)](#) and the sufficiency of a felony complaint is determined under [CPL 100.15](#). As an accusatory instrument, the felony complaint does not enable a defendant to take a plea of guilty in superior court such as the County or Supreme Court. Only a Superior Court information or indictment would enable the defendant to plead guilty under those circumstances. (See [People v. Sterling](#), 27 A.D.3d 950, 811 N.Y.S.2d 212 (3d Dep't 2006)).

The felony complaint is a verified, written accusation charging one or more felonies.¹ It is a sufficient basis to initiate criminal proceedings but is an insufficient basis for prosecution.² If felony charges are subsequently reduced to the misdemeanor level, a defendant is entitled to prosecution by information.³ However, a complaint was not converted to a misdemeanor information by the prosecution's reduction of two felony counts to misdemeanors where one felony count survived.⁴ It must specify the name of the court with which it is filed and the title of the action and must be subscribed (signed at the bottom) and verified by a person who is known as the complainant.⁵ The complainant may be any person who has knowledge, whether personal or based upon information and belief, of the commission of the felony.⁶ The felony complaint must contain an accusatory part and a factual part, but the verification of the instrument is deemed to apply only to the factual part, not to the accusatory part.⁷

The accusatory part must designate the offense or offenses charged.⁸ Two or more felonies may be charged in separate counts and two or more defendants may be charged in the same felony complaint provided that all of the defendants are jointly charged with every offense in the felony complaint.⁹

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The factual part of the felony complaint must contain a statement alleging facts which are evidentiary in character and which support or tend to support the charges.¹⁰ The factual allegations may be based upon personal knowledge or information and belief.¹¹ The statute does not require that the felony complaint specifically state the basis of the allegations warranting a dismissal of the complaint if it remains silent.¹²

If the felony complaint charges a violent felony offense which is defined in the Penal Law,¹³ and the offense is an armed felony as defined in the Criminal Procedure Law,¹⁴ the accusatory part of the felony complaint must designate the offense as an armed felony and the factual part must allege facts evidentiary in character which support or tend to support that designation.¹⁵

A felony complaint is not the accusatory instrument upon which a felony charge is ultimately prosecuted, for that is the function of an indictment.¹⁶ Also, a felony complaint commences a felony action in a local criminal court and is disposed of by holding the defendant for the grand jury, by reducing the charge to a nonfelony, or by dismissing the charge.¹⁷ The statute governing proceedings upon a felony complaint¹⁸ is not unconstitutional for failing to provide that every defendant is entitled to a felony hearing.¹⁹

The court at a felony hearing is required to determine whether there is reasonable cause to believe that the defendant committed any felony.²⁰ The court is not limited to the felony complaint before it at this hearing.²¹ Therefore, the court does not have to deeply concern itself with the specifics set forth in the felony complaint, but rather must concentrate upon the testimony presented during the felony hearing.²²

If the complainant signing the felony complaint does not have sufficient personal knowledge or is not able to allege upon information and belief sufficient additional facts to support all of the elements of the crime charged, then a supporting deposition may be filed.²³ This is a written instrument which is subscribed (signed at the bottom) and verified by a person other than the complainant.²⁴ It contains factual allegations which are evidentiary in character and are based either upon personal knowledge or upon information and belief.²⁵

There is no conflict between the statutes under the Criminal Procedure Law which refer to different supporting depositions.²⁶ The statute concerning the definition, form, and content of a supporting deposition refers to depositions prepared by a person other than the police officer.²⁷ However, the other provision regarding the defendant's right to a supporting deposition refers to depositions prepared by the police officer to clarify the complaint.²⁸

Verification on the felony complaint, a supporting deposition, and proof of service of a supporting deposition must be accomplished in one of the following ways: (a) it may be sworn to before the court with which it is filed; (b) it may be sworn to before a desk officer in charge at the police station or police headquarters, or any of the superior officers; (c) where it is filed by a public servant following the issuance and service of an appearance ticket it may be sworn to before another public servant who is expressly designated as authorized to administer the oath with respect to that instrument; (d) it may also bear a notice to the effect that false statements made are punishable as a class A misdemeanor pursuant to the Penal Law.²⁹ This form notice, together with the subscription of the deponent, constitute a verification of the instrument.³⁰

The court may direct that a particular instrument be verified in a particular manner as prescribed in the statute.³¹ The failure to place above the deponent's signature the form notice advising the deponent of criminal liability under the Penal Law³² does not render the verification of the information defective.³³ While the information must be subscribed, this merely requires that the deponent's signature be at the conclusion of the statement being verified, but it does not require the signature to also follow the form notice.³⁴

§ 7:6.Accusatory instruments—Form and content—Felony..., 1 Criminal Procedure...

There is no provision in the Criminal Procedure Law to allow the district attorney, on the attorney's own volition, without any direction from the court, to replace a felony complaint with a prosecutor's information.³⁵ Felony complaints are excluded from the class of accusatory instruments which may be superseded by a prosecutor's information.³⁶

In order for an information in a local criminal court to be sufficient on its face, the allegations of the factual part of the information, together with those of the supporting depositions, must provide reasonable cause to believe that the defendant committed the offense charged.³⁷ Furthermore, the nonhearsay allegations of the factual part of the information, including the supporting depositions must, if true, be sufficient to establish every element of the offense charged.³⁸

By contrast to an information, there is no requirement that a felony complaint demonstrate a legally sufficient case.³⁹ The sufficiency requirements of the felony complaint and information differ because the information is not only the charge but is often the instrument upon which the defendant is prosecuted for a misdemeanor or petty offense.⁴⁰ Unlike a felony complaint, the filing of an information is not followed by a preliminary hearing and grand jury proceeding, and the people are not required to present actual evidence establishing a prima facie case before pleading or trial.⁴¹

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Footnotes

- 1 CPL § 100.10(5).
People v. LeBlanc, 165 Misc. 2d 882, 630 N.Y.S.2d 840 (City Crim. Ct. 1995).
- 2 CPL § 100.10(5).
- 3 CPL § 170.65.
People v. Franco, 109 Misc. 2d 695, 440 N.Y.S.2d 961 (City Crim. Ct. 1981).
See 34 N.Y. Jur. 2d, Crim. L. §§ 2179, 2182, 2194, 2217; 21 Am. Jur. 2d, Crim. L. §§ 443 et seq.
- 4 *People v. LeBlanc*, 165 Misc. 2d 882, 630 N.Y.S.2d 840 (City Crim. Ct. 1995) (speedy trial issue).
- 5 CPL § 100.15(1).
- 6 CPL § 100.15(1).
- 7 CPL § 100.15(1).
- 8 CPL § 100.15(2).
- 9 CPL § 100.15(2).
- 10 CPL § 100.15(3).
- 11 CPL § 100.15(3).
- 12 *People v. Ferro*, 77 Misc. 2d 226, 353 N.Y.S.2d 854 (Dist. Ct. 1974).
- 13 Penal Law § 70.02.
- 14 CPL § 1.20(41).
- 15 CPL § 100.15(4).
- 16 *People v. Ferro*, 77 Misc. 2d 226, 353 N.Y.S.2d 854 (Dist. Ct. 1974).
- 17 *People v. Ferro*, 77 Misc. 2d 226, 353 N.Y.S.2d 854 (Dist. Ct. 1974).
- 18 CPL § 180.10.
- 19 *People v. Morano*, 111 A.D.2d 273, 489 N.Y.S.2d 108 (2d Dep't 1985).
- 20 *People v. Dixon*, 75 N.Y.2d 833, 552 N.Y.S.2d 907, 552 N.E.2d 155 (1990) (police officer's hearsay statements not providing probable cause for felony complaint and issuance of arrest warrant); *People v. Ferro*, 77 Misc. 2d 226, 353 N.Y.S.2d 854 (Dist. Ct. 1974).

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21	People v. Ferro, 77 Misc. 2d 226, 353 N.Y.S.2d 854 (Dist. Ct. 1974).
22	People v. Ferro, 77 Misc. 2d 226, 353 N.Y.S.2d 854 (Dist. Ct. 1974).
23	CPL § 100.20.
24	CPL § 100.20.
25	CPL § 100.20.
26	CPL §§ 100.20, 100.25. People v. Quinn, 100 Misc. 2d 582, 419 N.Y.S.2d 811 (Police Ct. 1979).
27	CPL § 100.20. People v. Quinn, 100 Misc. 2d 582, 419 N.Y.S.2d 811 (Police Ct. 1979).
28	CPL § 100.25. People v. Quinn, 100 Misc. 2d 582, 419 N.Y.S.2d 811 (Police Ct. 1979).
29	CPL § 100.30(1).
30	CPL § 100.30(1).
31	CPL § 100.30(2).
32	Penal Law § 210.45.
33	CPL § 100.30(1)(d). People v. Coldiron, 79 Misc. 2d 338, 360 N.Y.S.2d 788 (App. Term 1974).
34	People v. Coldiron, 79 Misc. 2d 338, 360 N.Y.S.2d 788 (App. Term 1974).
35	See CPL § 100.50.
36	CPL § 100.50. People v. Thomas, 107 Misc. 2d 947, 436 N.Y.S.2d 153 (Dist. Ct. 1981).
37	CPL § 100.40(1)(b).
38	CPL § 100.40(1)(c).
39	See CPL § 100.40(4).
40	Commission Staff Notes to CPL § 100.40.
41	Commission Staff Notes to CPL § 100.40.

1 Criminal Procedure in New York § 7:7 (2d)

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§ 7:7. Accusatory instruments—Form and content —Misdemeanor complaint

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The misdemeanor complaint must specify the name of the court in which it is filed and the title of the action.¹ It must also be subscribed (signed at the bottom) and verified by the person known as the complainant.² The complainant may be any person having knowledge, whether personal knowledge or upon information and belief, of the commission of the offense charged.³ The misdemeanor complaint must contain an accusatory part and a factual part, and verification is deemed to apply only to the factual part.⁴

The accusatory part must designate the offense or the offenses charged as they would in the case of an indictment.⁵ Two or more offenses may be charged in separate counts and two or more defendants may be charged in the same misdemeanor complaint provided that all defendants are charged with all the same charges alleged in the misdemeanor complaint.⁶ The factual part of the instrument must contain a statement alleging facts of evidentiary character which support or tend to support the charges.⁷ If there has been more than one offense charged, the factual portion should consist of a single factual account which relates to all of the offenses charged in the accusatory part.⁸ The factual part may be based upon either personal knowledge or information and belief.⁹

There is no express statutory requirement that a criminal court misdemeanor accusatory instrument must set forth geographical jurisdiction.¹⁰

An accusatory instrument alleging misdemeanor violations comports with the statutory requirements of an information under the Criminal Procedure Law when the instrument does not contain hearsay, but does contain a factual pattern of sufficient

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particularity which, if true, supports the allegations.¹¹ The failure of a district attorney to check the designated boxes denominated misdemeanor complaint or misdemeanor information does not render an otherwise valid information void.¹²

A felony complaint is facially sufficient if the factual allegations state facts that are of an evidentiary character that support or tend to support the charges so as to provide reasonable cause to believe that the defendant committed the offense charged in the complaint.¹³ There is no requirement that the complaint be supported by nonhearsay factual allegations establishing every element of the offense and the defendant's commission of that offense.¹⁴

The misdemeanor complaint may have a supporting deposition attached to it or filed in connection with it.¹⁵ The supporting deposition is a written instrument subscribed and verified by a person other than the complainant which contains factual allegations of an evidentiary character based upon either a person's knowledge or information and belief supplementing the allegations contained in the misdemeanor complaint.¹⁶

A trial court was not required to make an inquiry as to whether jurisdictional requirements had been met, upon receipt of a faxed, signed deposition without a correct jurat or caption in support of a complaint charging a defendant with operating a motor vehicle while under the influence of alcohol or drugs, and upon the defendant's motion to dismiss the complaint, since the applicable rule did not prohibit the acceptance of faxed signatures and the defendant did not allege that there was no original or that he properly requested the original and it was not provided.¹⁷ Further, any error in the trial court's acceptance of the faxed, signed deposition did not warrant reversal of the defendant's conviction, as the jurat or caption was not required on the supporting deposition.¹⁸

Verification on the misdemeanor complaint, a supporting deposition, and proof of service of the supporting deposition may be accomplished by the affiant going before the court in which it is filed and swearing to the truth of the contents; or it may be sworn to before a desk officer in charge at the police station or police headquarters or any of the superior officers; or where it is filed by a public servant following the issuance and service of an appearance ticket, it may be sworn to before another designated public servant who is authorized to administer the oath; or it may contain a notice that false statements made therein are punishable as a class A misdemeanor pursuant to the Penal Law.¹⁹ If the document contains this type of notice, the subscription by the deponent constitutes a verification of that instrument.²⁰ Any one of these methods of verification is valid unless the court in which the document is filed directs otherwise and prescribes a particular method of verification.²¹

The misdemeanor complaint is sufficient on its face if it meets the statutory requirements contained in the Criminal Procedure Law.²² Further, the allegations of the factual part, including any supporting depositions, must provide reasonable cause to believe that the defendant committed the offense charged in the accusatory part of the instrument.²³ This should be contrasted with the requirement that an information, in order to be sufficient on its face, must contain nonhearsay allegations in the factual part that, if true, would support every element of the offense charged.²⁴ Thus, the misdemeanor complaint may rest on hearsay allegations.²⁵ The failure to adhere to the strict requirements under the Criminal Procedure Law for the construction of an information regarding the showing of a prima facie case which requires facial sufficiency of every element of the offense charged and the defendant's commission of the offense, supported by verified, nonhearsay allegations, is a jurisdictional defect.²⁶ It is incumbent upon the courts to insure that when a defendant is charged solely upon the allegations of a complaining witness under 12 years of age, every element of the offense and the defendant's commission are sufficiently supported by verified, nonhearsay allegations.²⁷ However, the court can make a finding that the complaint is an information when the child's allegations form only one part of the charges and the witnesses cannot be sworn, or if there are other competent witnesses who can verify the hearsay portions of the complaint or circumstantial evidence exists that verifies the hearsay portions of the complaint.²⁸

Once a court determines that there are sufficient factual indicia to question whether a complaint and/or a supporting deposition was adequately translated to a non-English-speaking complainant, the court has the discretion to order the filing of a certificate of interpretation, which determination by the court may be based on the uncontradicted representations of the parties or

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if there is a factual dispute that the court is unable to resolve after a hearing.²⁹ Once the court orders the filing of a certificate of interpretation with respect to a complaint or supporting deposition, that filing is imperative since it is based on a determination that there is sufficient evidence to question the legitimacy of the complainant's verification and, therefore, the court's jurisdiction.³⁰ If the complaint or supporting deposition is never adequately translated to the complainant, the court must hold that the misdemeanor complaint was never converted.³¹

A certificate of interpretation indicating that a criminal complaint had been translated into complainants' native tongue prior to their signing of corroborating affidavits was necessary where complainants did not speak or read English and the translation was not conducted by an official interpreter recognized by the court, and where the corroborating affidavits the prosecution served and filed were defective or insufficient in that the affidavits, signed and sworn to by the complainants indicated that they had read the accusatory instrument and the contents thereof were true, but absent a signed statement by a person providing that he or she had translated the complaint in complainants' naive tongue prior to complainants' signing of the corroborating affidavits, the affidavits were defective.³²

A misdemeanor complaint falls within the category of a provisional pleading serving the exclusive purpose of providing a court with temporary jurisdiction over the defendant.³³ The misdemeanor complaint may not be used as an instrument to prosecute the defendant unless the defendant waives prosecution by information.³⁴ A superseding information must be filed unless the defendant consents to waive the filing.³⁵ Since the complaint is intended to serve only to assure temporary control over the defendant's person, its conversion to an information is an essential task which, when done, establishes the course not only of all significant pretrial proceedings but of the trial itself.³⁶ However, the prosecution cannot answer ready for trial until it has converted a misdemeanor complaint into a jurisdictionally sufficient information, and none of the exclusions listed under the speedy trial statute³⁷ will apply until conversion has been completed.³⁸

A superseding information may not be used as a vehicle for consolidation under the language of the statute,³⁹ since this clearly limits the scope of a superseding information to the facts and allegations of the original information.⁴⁰ The word "information" is used in the singular throughout the statute and as a result cannot be construed to permit discretionary joinder.⁴¹

If a defendant who has been arraigned on a misdemeanor complaint decides to waive prosecution by information and consents to be prosecuted upon the misdemeanor complaint, the defendant is required either at the date of the waiver or later to enter a plea to the complaint.⁴² Otherwise, the defendant is not required to enter a plea to the misdemeanor complaint since it must be superseded or replaced by an information unless the defendant specifically waives this requirement.⁴³ If the misdemeanor complaint is supplemented by a supporting deposition and the instruments together satisfy the requirement for a valid information, the misdemeanor complaint is deemed to have been converted to a replacing information.⁴⁴ A child witness under 12 years of age cannot convert a misdemeanor complaint into an information by signing a deposition containing a form notice warning which meets the requirements of the Criminal Procedure Law.⁴⁵ In addition, a supporting deposition signed by any witness under 16 years of age pursuant to the Criminal Procedure Law will not convert a misdemeanor complaint into an information.⁴⁶ Therefore, where the complaint rests solely on the allegations of a child less than 12 years of age, the witness must swear before the court with which it is filed in order to verify the complaint.⁴⁷

The information which replaces the misdemeanor complaint does not have to charge the same offense, but at least one of the counts must charge an offense which is based upon the conduct alleged to have taken place by the misdemeanor complaint.⁴⁸

The supporting deposition is not "mere surplusage."⁴⁹ It is an indispensable part of an accusatory instrument, changing it from a misdemeanor complaint, upon which a defendant may not ordinarily be prosecuted, into an information, upon which a defendant may be prosecuted.⁵⁰ Thus, an information lacking a supporting affidavit or deposition has been held to be

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jurisdictionally defective,⁵¹ and a second prosecution for the same offense based upon a corrected instrument is not barred as double jeopardy.⁵²

A misdemeanor complaint can be transformed into a facially sufficient information by factual allegations contained in a supporting deposition, such that essential elemental facts need not all be contained within the factual portion of the complaint.⁵³ Any divergence between the facts contained in the body of the complaint and the supporting deposition is insignificant provided the nonhearsay allegations taken from either or both the complaint and the deposition make out the elements of the crime charged.⁵⁴ The supporting deposition that accompanies or is filed in connection with the accusatory instrument is not required to refer to the instrument or to have “precise factual symmetry with the instrument.”⁵⁵ Moreover, the deposition is not limited to restating the facts as contained in the complaint and may contain additional facts to support the charges in the accusatory instrument.⁵⁶

A domestic incident report (DIR) may be received as a supporting deposition to an accusatory instrument.⁵⁷ If the elements of the crime or crimes charged are established by facts contained in the DIR and the DIR is reasonably referable to the incident alleged in the accusatory instrument, the facts in the DIR may be determinative of the sufficiency of the accusatory instrument as an information.⁵⁸ To illustrate, a DIR that contained facts of an assault different from those in the accusatory instrument, but that alleged similar facts that occurred in the same date, time and place, reasonably referred to the same incident, so as to constitute a supporting deposition containing nonhearsay factual allegations that established all elements of the offenses charged in the accusatory instrument and, therefore, was sufficient to convert the accusatory instrument into an information.⁵⁹

A misdemeanor complaint is not designed for prosecution purposes, and a defendant is not required to plead to a misdemeanor complaint and cannot be tried unless the defendant consents.⁶⁰

A right to be prosecuted by information may be waived.⁶¹ However, in the absence of an effective admonition of the right to be prosecuted by information, a waiver of consent to prosecution by misdemeanor complaint cannot be presumed.⁶²

If the defendant is in the sheriff's custody pursuant to an order of the local criminal court, the court must release the defendant if the misdemeanor complaint has not been replaced by an information within five days, not including Sunday, unless the defendant has waived prosecution by information or the court finds that there is good cause why the order of release should not issue.⁶³ Good cause consists of some compelling facts or circumstance which precludes the replacement of the misdemeanor complaint by an information or a prosecutor's information.⁶⁴ The day that a defendant is taken into custody, unless it precedes the day of arraignment or is a Sunday, is included within the five-day period within which a misdemeanor complaint must be converted to an information, or the defendant will be released on his or her own recognizance.⁶⁵

The prosecution could use a simplified information to commence a prosecution for selling alcohol to a minor in violation of the Alcoholic Beverage Control Law where the content of the simplified information conformed in substance to the requirements of a misdemeanor complaint.⁶⁶

Recognizing the district attorney's nearly unfettered discretion in determining how and when to prosecute, including the right to reduce charges, while voicing its displeasure with last minute reductions, the court granted the prosecution's motion to reduce class A misdemeanors of third-degree assault with class B misdemeanors of attempted third-degree assault made only after the case was called to begin trial and rejected the defendant's argument to extend the Batson-like race issues to the prosecution's motion and require the prosecution to provide race-neutral reasons for reducing the charges.⁶⁷

A misdemeanor complaint alleging that a deponent/police officer observed the defendant in possession of an electronic stun gun is facially sufficient and does not have to set forth the officer's basis for concluding that the device was an electronic stun

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gun since the deponent's status as a police officer confers on the officer an inherent ability to draw that conclusion given an officer's training and expertise in the area of weapons.⁶⁸

The failure to annex a copy of a relevant protection order to an information charging the defendant with criminal contempt rendered it defective as an information because of its hearsay nature, but it was sufficient on its face to qualify as a misdemeanor complaint since it contained a detective's verified statement indicating the index number, date, and source of the protection order and further indicated that the defendant had been advised and served with a copy of the protection order before the events giving rise to the charges.⁶⁹

Allegation that defendants failed to display a massage license was insufficient to make out a prima facie case of unlicensed practice of massage. Here the allegation should have included that the defendants were actually unlicensed and as such was essential to the charge under the [New York State Education Law 6512](#). The information was insufficient on its face.⁷⁰

A trial court upheld the sufficiency of an information to the charge of theft of services where two individuals used the same turnstile at the same time while only one individual paid the fare, thus "doubling up." Under a fair reading of the information, one or the other person could be charged with the offense, which is a violation of [Penal Law 165.15\(5\)](#).⁷¹

Where a police officer's expertise was relied upon for sufficiency of a misdemeanor complaint and the officer indicated that based on his experience the defendant's vehicle contained heroin and marijuana, then laboratory reports were not necessary to satisfy the prima facie case and therefore, satisfied the law as a sufficient accusatory instrument.⁷²

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Footnotes

- 1 [CPL § 100.15\(1\)](#).
- 2 [CPL § 100.15\(1\)](#).
- 3 [CPL § 100.15\(1\)](#).
- 4 [CPL § 100.15\(1\)](#).
- 5 [CPL § 100.15\(2\)](#).
- 6 [CPL § 100.15\(2\)](#).
- 7 [CPL § 100.15\(3\)](#).
[People v. Dumas](#), 68 N.Y.2d 729, 506 N.Y.S.2d 319, 497 N.E.2d 686 (1986) (misdemeanor complaints charging defendant with sale and possession of marijuana facially insufficient as no evidentiary facts showing basis for conclusion that substance sold was marijuana).
[People v. Born](#), 166 Misc. 2d 757, 634 N.Y.S.2d 915 (J. Ct. 1995).
An information alleging that the police officer observed the defendant smoking a marijuana cigar, and that the defendant placed the cigar behind his back as the officer approached, broke it into small pieces and threw it into a patch of mulch, was sufficient to charge him with the crime of obstructing government administration, since the alleged conduct demonstrated the defendant's intent to prevent the officer from retrieving the marijuana, and also with the crime of attempted tampering with physical evidence, since the defendant could have contemplated, upon seeing the officer approach, that an arrest and prosecution for drug possession was about to be commenced and that the cigar would be used as evidence. [People v. Mercedes](#), 194 Misc. 2d 731, 756 N.Y.S.2d 735 (City Crim. Ct. 2003).
- 8 [CPL § 100.15\(3\)](#).
- 9 [CPL § 100.15\(3\)](#).

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10 People v. Born, 166 Misc. 2d 757, 634 N.Y.S.2d 915 (J. Ct. 1995).
11 People v. Patterson, 185 Misc. 2d 519, 708 N.Y.S.2d 815 (City Crim. Ct. 2000).
12 CPL art 100.
13 People v. Gittens, 103 Misc. 2d 309, 425 N.Y.S.2d 771 (City Crim. Ct. 1980).
14 People v. Gittens, 103 Misc. 2d 309, 425 N.Y.S.2d 771 (City Crim. Ct. 1980).
15 People v. Black, 270 A.D.2d 563, 705 N.Y.S.2d 696 (3d Dep't 2000).
16 People v. Black, 270 A.D.2d 563, 705 N.Y.S.2d 696 (3d Dep't 2000).
17 CPL § 100.20.
18 CPL § 100.20.
19 People v. Dalton, 176 Misc. 2d 211, 673 N.Y.S.2d 828 (App. Term 1998).
20 See McKinney's CPL § 100.15.
21 People v. Dalton, 176 Misc. 2d 211, 673 N.Y.S.2d 828 (App. Term 1998).
22 CPL § 100.30(1)(a) to (d).
CPL § 100.30(1)(d).
CPL § 100.30(2).
CPL § 100.40(4)(a).
See CPL § 100.15.
23 State, by not providing the complaining witness' name, failed to meet the requirements of the defendant's right of confrontation and failed to allow the court to have before it a facially sufficient accusatory instrument and could have met the requirements by filing and serving a proper superseding information at any time naming the first complainant but, instead, waited until 90 days had elapsed before attempting to supersede accusatory information. *People v. Quinones*, 190 Misc. 2d 648, 739 N.Y.S.2d 889 (Sup 2002).
CPL § 100.40(4)(b).
Misdemeanor complaints charging the defendant with the sale and possession of marijuana were facially insufficient, since each complaint only contained a conclusory statement that the defendant sold marijuana, but in neither case were there any evidentiary facts showing the basis for the conclusion that the substance sold was actually marijuana. *People v. Dumas*, 68 N.Y.2d 729, 506 N.Y.S.2d 319, 497 N.E.2d 686 (1986).
A determination of whether a charge of resisting arrest had to be dismissed against the defendant, following a finding that the misdemeanor complaint was insufficient as to form to support the charge of disorderly conduct, required a hearing to determine whether the officer had reasonable or probable cause to make the arrest for disorderly conduct to determine whether the arrest was authorized; the fact that the complaint lacked a legally and factually sufficient basis for a disorderly conduct charge was not dispositive because the appropriate inquiry was whether the officer had a belief that reasonable or probable cause existed to arrest the defendant for disorderly conduct, and it was possible that the officer had reasonable cause to arrest the defendant for disorderly conduct but failed to prepare an adequate complaint. *People v. Dailey*, 196 Misc. 2d 649, 765 N.Y.S.2d 741 (J. Ct. 2003).
24 CPL § 100.40(1)(c).
People v. de Roos, 118 Misc. 2d 445, 462 N.Y.S.2d 99 (City Crim. Ct. 1983) (information insufficient as not specifying with particularity hearsay basis of deponent's knowledge); *People v. Hurtado*, 116 Misc. 2d 897, 456 N.Y.S.2d 660 (City Crim. Ct. 1982).
People v. Casey, 181 Misc. 2d 744, 698 N.Y.S.2d 404 (App. Term 1999), order aff'd, 95 N.Y.2d 354, 717 N.Y.S.2d 88, 740 N.E.2d 233 (2000).
25 *People v. Pinto*, 88 Misc. 2d 303, 387 N.Y.S.2d 385 (City Ct. 1976).
People v. Born, 166 Misc. 2d 757, 634 N.Y.S.2d 915 (J. Ct. 1995).
26 CPL §§ 100.15(1), (3), 100.40(1)(c).
People v. King, 137 Misc. 2d 1087, 523 N.Y.S.2d 748 (City Crim. Ct. 1988) (rejected by, *People v. Soler*, 144 Misc. 2d 524, 544 N.Y.S.2d 287 (City Crim. Ct. 1989)).
27 *People v. Pierre*, 140 Misc. 2d 623, 533 N.Y.S.2d 170 (City Crim. Ct. 1988) (rejected by, *People v. Soler*, 144 Misc. 2d 524, 544 N.Y.S.2d 287 (City Crim. Ct. 1989)).
The failure to attach the victim's supporting deposition to the felony complaint charging the defendant with rape and endangering the welfare of a child did not make the complaint facially insufficient, where

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the complaint otherwise complied with statutory requirements and the deposition was not required.
People v. Black, 270 A.D.2d 563, 705 N.Y.S.2d 696 (3d Dep't 2000).
28 People v. Pierre, 140 Misc. 2d 623, 533 N.Y.S.2d 170 (City Crim. Ct. 1988) (rejected by, People v. Soler,
144 Misc. 2d 524, 544 N.Y.S.2d 287 (City Crim. Ct. 1989)).
29 People v. Camacho, 185 Misc. 2d 31, 711 N.Y.S.2d 283 (City Crim. Ct. 2000).
30 People v. Camacho, 185 Misc. 2d 31, 711 N.Y.S.2d 283 (City Crim. Ct. 2000).
31 People v. Camacho, 185 Misc. 2d 31, 711 N.Y.S.2d 283 (City Crim. Ct. 2000).
32 People v. Banchs, 173 Misc. 2d 415, 661 N.Y.S.2d 450 (City Crim. Ct. 1997).
33 People v. Smith, 128 Misc. 2d 733, 491 N.Y.S.2d 236 (City Crim. Ct. 1985).
34 CPL § 100.10(4).
35 CPL §§ 100.50, 170.65.
36 People v. Richberg, 125 Misc. 2d 975, 481 N.Y.S.2d 237 (City Crim. Ct. 1984); People v. Thompson,
111 Misc. 2d 521, 444 N.Y.S.2d 378 (City Crim. Ct. 1981), order aff'd, 120 Misc. 2d 444, 467 N.Y.S.2d
348 (App. Term 1983).
37 CPL §§ 30.30(4), 100.10(1), (4).
38 People v. Richberg, 125 Misc. 2d 975, 481 N.Y.S.2d 237 (City Crim. Ct. 1984).
39 CPL § 100.50.
40 People v. Cunningham, 74 Misc. 2d 631, 345 N.Y.S.2d 903 (City Crim. Ct. 1973).
41 People v. Cunningham, 74 Misc. 2d 631, 345 N.Y.S.2d 903 (City Crim. Ct. 1973).
42 CPL § 170.65(3).
43 CPL § 170.65(1), (3).
44 CPL § 170.65(1).
45 CPL §§ 100.20, 100.30(1)(d).
People v. Pierre, 140 Misc. 2d 623, 533 N.Y.S.2d 170 (City Crim. Ct. 1988) (rejected by, People v. Soler,
144 Misc. 2d 524, 544 N.Y.S.2d 287 (City Crim. Ct. 1989)).
46 CPL §§ 100.20, 100.30(1)(d).
People v. Pierre, 140 Misc. 2d 623, 533 N.Y.S.2d 170 (City Crim. Ct. 1988) (rejected by, People v. Soler,
144 Misc. 2d 524, 544 N.Y.S.2d 287 (City Crim. Ct. 1989)).
47 CPL § 100.30(1)(a), (2).
People v. Pierre, 140 Misc. 2d 623, 533 N.Y.S.2d 170 (City Crim. Ct. 1988) (rejected by, People v. Soler,
144 Misc. 2d 524, 544 N.Y.S.2d 287 (City Crim. Ct. 1989)).
48 CPL § 170.65(2).
49 People v. Redding, 109 Misc. 2d 487, 440 N.Y.S.2d 512 (City Crim. Ct. 1981).
50 People v. Redding, 109 Misc. 2d 487, 440 N.Y.S.2d 512 (City Crim. Ct. 1981).
51 People v. Redding, 109 Misc. 2d 487, 440 N.Y.S.2d 512 (City Crim. Ct. 1981).
52 People v. Redding, 109 Misc. 2d 487, 440 N.Y.S.2d 512 (City Crim. Ct. 1981).
53 People v. Modica, 187 Misc. 2d 635, 724 N.Y.S.2d 825 (City Crim. Ct. 2001).
54 People v. Modica, 187 Misc. 2d 635, 724 N.Y.S.2d 825 (City Crim. Ct. 2001).
55 People v. Modica, 187 Misc. 2d 635, 724 N.Y.S.2d 825 (City Crim. Ct. 2001).
56 People v. Modica, 187 Misc. 2d 635, 724 N.Y.S.2d 825 (City Crim. Ct. 2001).
57 People v. Modica, 187 Misc. 2d 635, 724 N.Y.S.2d 825 (City Crim. Ct. 2001).
58 People v. Modica, 187 Misc. 2d 635, 724 N.Y.S.2d 825 (City Crim. Ct. 2001).
59 People v. Modica, 187 Misc. 2d 635, 724 N.Y.S.2d 825 (City Crim. Ct. 2001).
60 CPL § 170.65(1), (3).
People v. Weinberg, 34 N.Y.2d 429, 358 N.Y.S.2d 357, 315 N.E.2d 434 (1974).
61 CPL § 170.65(1), (3).
People v. Weinberg, 34 N.Y.2d 429, 358 N.Y.S.2d 357, 315 N.E.2d 434 (1974).
62 People v. Weinberg, 34 N.Y.2d 429, 358 N.Y.S.2d 357, 315 N.E.2d 434 (1974).
63 CPL § 170.70.

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- See 34 N.Y. Jur. 2d, Crim. L. §§ 2137, 2183.
- 64 CPL § 170.70.
- 65 CPL § 170.70.
People ex rel. Neufeld on Behalf of Garcia v. McMickens, 70 N.Y.2d 763, 520 N.Y.S.2d 744, 514 N.E.2d 1368 (1987).
- 66 People v. Kaid, 165 Misc. 2d 489, 629 N.Y.S.2d 617 (City Crim. Ct. 1995).
- 67 People v. Potter, 172 Misc. 2d 409, 658 N.Y.S.2d 790 (City Crim. Ct. 1997).
- 68 People v. Dang, 172 Misc. 2d 274, 658 N.Y.S.2d 820 (City Crim. Ct. 1997).
- 69 People v. Casey, 181 Misc. 2d 744, 698 N.Y.S.2d 404 (App. Term 1999), order aff'd, 95 N.Y.2d 354, 717 N.Y.S.2d 88, 740 N.E.2d 233 (2000).
- 70 People v. Pao Fun, 2007 WL 1976108 (N.Y. City Crim. Ct. 2007).
- 71 People v. Lang, 14 Misc. 3d 869, 831 N.Y.S.2d 862 (City Crim. Ct. 2007).
- 72 People v. Kalin, 12 N.Y.3d 225, 878 N.Y.S.2d 653, 906 N.E.2d 381 (2009).

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1 Criminal Procedure in New York § 7:8 (2d)

Criminal Procedure in New York | September 2019 Update
Hon. Robert G. Bogle



Part 1. Practice and Forms

Chapter 7. Commencing Criminal Action in the Local Criminal Court

§ 7:8. Accusatory instruments—Form and content —Simplified information

References

West's Key Number Digest

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- West's Key Number Digest, Indictment and Information  54

A simplified information is defined under [CPL 1.20 \(5\)](#). A simplified information is a written accusation by a police officer or other authorized public servant of certain violations or misdemeanors. A simplified information has different and lesser requirements for facial sufficiency than a misdemeanor information and is not required to have factual allegations of an evidentiary nature whether hearsay or nonhearsay as defined under [CPL 100.10\(2\)\(a\)](#). When a supporting deposition is requested, it can be based on hearsay or nonhearsay so long as it provides reasonable cause to believe that the defendant committed the charge or offenses. (See [CPL 100.25 \(2\)](#); [People v. DeRojas](#), 180 Misc. 2d 690, 693 N.Y.S.2d 404 (App. Term 1999)). It is significant to note that many misdemeanors such as driving while intoxicated or driving with a suspended driver's registration, although they are considered vehicle traffic offenses, are still nonetheless classified as misdemeanors. Therefore, it is important to keep in mind that the simplified information can charge individuals with vehicle misdemeanors as well as infractions or petty offenses yet the standard is lower and less arduous than the standard required for a misdemeanor complaint.

The Criminal Procedure Law provides for three different types of simplified informations: the simplified traffic information; simplified parks information; and simplified environmental conservation information.¹

The simplified traffic information charges one or more traffic infractions and/or misdemeanors relating to traffic and must be in a form prescribed by the Commissioner of Motor Vehicles.² However, the offense charged in the simplified traffic information should be stated with such accuracy that the defendant knows the offense he or she has allegedly committed.³ Furthermore, the defendant must also be informed of the nature of the acts allegedly committed, not only for the purpose of preparing a defense but also to preclude reprosecution for the same offense.⁴

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The simplified traffic information has been treated as the original pleading conferring jurisdiction, and it has been held sufficient to confer jurisdiction after a guilty plea or after going to trial.⁵ The courts have tacitly acknowledged this alternative statutory scheme for securing jurisdiction in vehicle traffic matters.⁶ It is designed to provide an uncomplicated form for handling the large volume of traffic infractions and petty offenses for which it is principally used.⁷

A comparison of the sections of the statute setting forth the definition and the requirements of a simplified traffic information,⁸ with those of an information⁹ reveal that the two accusatory instruments are separate, unrelated entities and that a simplified traffic information is not an information of a lower category.¹⁰ It appears that the use of the term “information” in describing a simplified traffic information may be misleading.¹¹

A simplified information cannot be superseded by an information since a superseding information may only be substituted for a prosecutor's information or misdemeanor complaint.¹²

In order for an information to be valid, every element of the offense charged and the defendant's commission of it be supported by nonhearsay allegations and must be verified in accordance with the Criminal Procedure Law.¹³ A simplified traffic information is issued at the scene of the traffic infraction and is sufficient on its face unless a demand is made for a supporting deposition.¹⁴ The 30-day period in which the defendant must make such a demand is not extended or revived when an attorney appears after the period has expired.¹⁵ This applies to environmental conservation informations, as well.¹⁶ A court simply does not have the power to direct service of a deposition when the request is made late.¹⁷ A defendant's failure to make a timely request is a waiver of that right, in which case the prosecution can go to trial on the simplified information alone without a supporting deposition.¹⁸ Additionally, there is no requirement that the supporting deposition establish every element of the crime by nonhearsay allegations.¹⁹ Rather, the simplified traffic information and supporting deposition are sufficient if based upon either personal knowledge or information and belief.²⁰ A supporting deposition for a simplified traffic information, to the extent that it is based on information and belief, must contain a statement of the source of that information and belief.²¹ A defendant's motion to dismiss a simplified traffic information as facially insufficient was properly denied.²² The defendant argued that no statutory authority existed for the use of a simplified traffic information as a pleading in the criminal courts of New York City, and that while the Criminal Procedure Law specifically authorizes the use of simplified informations for traffic infractions and misdemeanors relating to traffic, it must be in a brief or simplified form prescribed by the Commissioner of Motor Vehicles.²³ The court rejected these arguments, concluding that the uniform traffic summons and complaint by the City of New York remained an appropriate charging instrument despite changes in regulations governing traffic infractions, and that the uniform complaint form for traffic infractions serves both as a simplified traffic information in criminal court and as a complaint in the bureau of traffic violations.²⁴

The simplified parks information charges a person with the commission of one or more offenses other than a felony for which the parks information may be issued pursuant to the Parks and Recreation Law and the Navigation Law.²⁵ The actual form is one prescribed by the Commissioner of Parks and Recreation.²⁶

The simplified environmental conservation information charges a person with the commission of one or more offenses other than a felony for which such an information may be issued pursuant to the Environmental Conservation Law and which is in a form prescribed by the Commissioner of Environmental Conservation.²⁷

None of the simplified informations contain factual allegations but are merely statements of the time, place, and date of the offense with a short allegation of what the offense is and a specification as to the violated section of the statutory law.²⁸ Therefore, the significant difference between the simplified information and all of the other accusatory instruments is that no factual allegations are set forth.²⁹

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A defendant charged by a simplified information is, upon a timely request, entitled as a matter of right to have filed with the court and served on the defendant or the defendant's attorney, a supporting deposition of the complainant police officer or public servant containing factual allegations, based on personal knowledge or information and belief, providing reasonable cause to believe that the defendant committed the offense or offenses charged.³⁰ To be timely, the defendant's request must be made before entry of a guilty plea to the charge specified and before commencement of trial, but not later than 30 days after the date the defendant is directed to appear in court as such date appears on the simplified information and on the appearance ticket.³¹ A request mailed to the court must be mailed within this 30-day period.³² If a request is made, the court must order the complainant police officer or public servant to serve a copy of the supporting deposition on the defendant or the defendant's attorney within 30 days of receipt of the request, or at least five days before trial, whichever is earlier, and to file the supporting deposition with the court together with proof of service.³³

However, where the defendant is issued an appearance ticket in conjunction with the offense charged in the simplified information and the appearance ticket fails to provide the notice required by statute, a request for a supporting deposition is timely when made no later than 30 days after entry of the defendant's plea of not guilty when the defendant has been arraigned in person, or written notice to the defendant of the right to receive a supporting deposition when a plea of not guilty has been submitted by mail.³⁴

When at least one of the offenses charged in a simplified information is a misdemeanor, the court may, upon motion of the defendant, for good cause shown and consistent with the interest of justice, permit the defendant to request a supporting deposition beyond the 30-day request period, but not after 90 days have elapsed from the date that appears on the simplified information and the appearance ticket issued pursuant thereto directing the defendant to appear in court.³⁵ The statute specifies the exact language which must be on the appearance ticket notifying the defendant of the right to a supporting deposition and the time within which the defendant must make the request.³⁶

It is the responsibility of the court to order the complainant police officer to prepare and file a supporting deposition with the court, and failure to so order in advance of trial calls for dismissal of the information.³⁷ Once the deposition is ordered by the court, it becomes the police officer's responsibility to see that the deposition is filed with the court and served upon the defendant.³⁸ Furthermore, the district attorney's office is not responsible for preparing supporting depositions, and therefore neither the trial court nor the police officer complainant should rely upon that office for the preparation and filing of supporting depositions.³⁹

Once a supporting deposition is requested, the police officer should personally prepare and file the supporting deposition with the trial court and should serve a copy of the deposition on either the defendant or the defendant's attorney a reasonable time before the day of trial.⁴⁰ Although personal service is not required under the Criminal Procedure Law, in the absence of personal service, there should be proof that a copy was in fact served upon the defendant or sent to the defendant's attorney.⁴¹

The supporting deposition is a written instrument which accompanies or is filed with the simplified information.⁴² It contains factual allegations of an evidentiary character based either on personal knowledge or on information and belief, which supplement those allegations of the accusatory instrument or tend to support the charge or charges which are contained in the instrument.⁴³ The supporting deposition must contain facts set forth in a plain and concise manner which provide a reasonable cause to believe that the defendant committed every necessary element of the offense charged.⁴⁴ Reasonable cause to believe that a person has committed an offense exists when evidence or information which appears reliable reveals facts or circumstances which are collectively of such weight and persuasiveness as to convince a person of ordinary intelligence, judgment, and experience that it is reasonably likely that the offense was committed and that the accused committed it.⁴⁵ The pleading sufficiency requirements for the supporting deposition are identical to the pleading sufficiency requirements for the factual part of a misdemeanor complaint.⁴⁶ The failure to provide a supporting deposition in a traffic infraction case cannot be looked upon as a mere technical defect.⁴⁷

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There is a rational basis for the reasonable-cause standard of review when evaluating the facial sufficiency of simplified traffic informations charging vehicle and traffic law misdemeanors, since the simplified information is designed to provide an uncomplicated form of handling a large volume of traffic infractions and petty offenses for which it is principally used and the high volume of traffic misdemeanors supplies a rational basis justifying the application of this standard of review.⁴⁸ The statute establishing the reasonable-cause standard of review does not violate equal protection, especially where the statute incorporates the guarantee of the supporting deposition upon demand and provides the motorist with fair notice of the conduct which will result in prosecution.⁴⁹ While the requirements for facial sufficiency of a simplified information are less than those for an information, the requirements are sufficient to insure that the motorist is adequately informed of the specific conduct to be prosecuted and the fact that the statute incorporates different standards does not violate due process.⁵⁰

The failure to provide a supporting deposition after a timely request has been made requires the dismissal of the simplified information, provided the motion is made in writing and upon notice to the prosecution.⁵¹ However, charges in a local criminal court may be prosecuted by a sufficient long-form information after a prior simplified information, charging the same offenses, has been dismissed for failure to supply the supporting depositions required by the Criminal Procedure Law.⁵²

The simplified information is sufficient on its face if it substantially conforms to the requirements that are prescribed by law;⁵³ however, when the filing of a supporting deposition is ordered by the court pursuant to the Criminal Procedure Law,⁵⁴ the failure of the complainant police officer or public servant to comply with the order renders the simplified information insufficient on its face.⁵⁵

The statute permitting simplified informations does not apply to a defendant charged with selling alcohol to a minor in violation of the Alcoholic Beverage Control Law.⁵⁶ However, the prosecution may use a simplified information to commence a prosecution for that offense provided the content of the simplified information conforms in substance to the requirements of a misdemeanor complaint.⁵⁷ Where the original simplified traffic information was dismissed for failure to timely serve and file a supporting deposition, the court abused its discretion in permitting the motorist to be tried based on a new simplified information and supporting deposition inasmuch as such conduct represented a disregard for the interests of judicial economy and rendered the defense of traffic matters impracticable.⁵⁸

The failure of the officer, who stopped the defendant's vehicle and issued a traffic information for speeding, to supply a supporting deposition on the defendant's request rendered the information insufficient on its face, giving the court no jurisdiction to hear the case, despite the fact that the officer who initially observed the defendant speeding and then radioed to the officer who issued the traffic information did provide the defendant with a supporting deposition.⁵⁹

In *People v. Fernandez*,⁶⁰ the Court of Appeals held that where a defendant was charged under an insufficient information complaint that omitted certain elements necessary for this type of an accusatory instrument. However, it would be satisfactory as a simplified traffic information. The accusatory instrument included items such as the defendant's name, address, date of birth, sex and license information, the vehicle description and vehicle registration as well as a brief description of the offense of aggravated license operation of a motor vehicle under [VTL 511](#). The Court of Appeals noted that a simplified information under [CPL 100.10\(2\)](#) is a stream line instrument designed for the expeditious processing of traffic violations. It is a short written accusatory instrument signed by the police officer and filed with the criminal court, and evidentiary facts are not required. Such documents require merely a fair and not overly restrictive or technical reading of the document. Also, a simplified information need only substantially conform to the requirements of the Commissioner of Motor Vehicles pursuant to [CPL 100.20](#). As for the improper title, the Court of Appeals noted that the Commissioner of Motor Vehicle does not require a simplified traffic information to use any title at all, pursuant to [15 N.Y.C. R.R. 122.2](#). Accordingly, the Court found the accusatory instrument sufficient and denied the motion to dismiss.

Footnotes

- 1 CPL § 100.10(2)(a), (b), (c).
People v. Kaid, 165 Misc. 2d 489, 629 N.Y.S.2d 617 (City Crim. Ct. 1995).
- 2 CPL § 100.10(2)(a).
- 3 People v. Scantlebury, 143 Misc. 2d 9, 539 N.Y.S.2d 641 (Dist. Ct. 1989).
- 4 People v. Scantlebury, 143 Misc. 2d 9, 539 N.Y.S.2d 641 (Dist. Ct. 1989).
- 5 People v. Curtis, 166 Misc. 2d 753, 634 N.Y.S.2d 981 (J. Ct. 1995).
- 6 People v. Curtis, 166 Misc. 2d 753, 634 N.Y.S.2d 981 (J. Ct. 1995).
- 7 People v. Curtis, 166 Misc. 2d 753, 634 N.Y.S.2d 981 (J. Ct. 1995).
- 8 CPL §§ 1.20(5)(b), 100.10(2)(a), 100.25.
- 9 CPL §§ 1.20(4), 100.10(1), 100.15.
- 10 People v. Baron, 107 Misc. 2d 59, 438 N.Y.S.2d 425 (App. Term 1980).
- 11 People v. Baron, 107 Misc. 2d 59, 438 N.Y.S.2d 425 (App. Term 1980).
- 12 People v. Quarles, 168 Misc. 2d 638, 639 N.Y.S.2d 661 (City Ct. 1996).
People v. Kaid, 165 Misc. 2d 489, 629 N.Y.S.2d 617 (City Crim. Ct. 1995).
- 13 CPL §§ 100.15, 100.40.
See CPL § 100.30.
- 14 CPL § 100.25.
People v. Sperling, 165 Misc. 2d 1024, 631 N.Y.S.2d 221 (Dist. Ct. 1995).
- 15 People v. Sperling, 165 Misc. 2d 1024, 631 N.Y.S.2d 221 (Dist. Ct. 1995).
- 16 People v. Malone, 166 Misc. 2d 54, 631 N.Y.S.2d 223 (Dist. Ct. 1995).
- 17 People v. Malone, 166 Misc. 2d 54, 631 N.Y.S.2d 223 (Dist. Ct. 1995).
- 18 People v. Malone, 166 Misc. 2d 54, 631 N.Y.S.2d 223 (Dist. Ct. 1995).
- 19 See CPL § 100.25(2).
- 20 CPL § 100.25(2).
People v. Baron, 107 Misc. 2d 59, 438 N.Y.S.2d 425 (App. Term 1980).
People v. Quarles, 168 Misc. 2d 638, 639 N.Y.S.2d 661 (City Ct. 1996).
People v. Born, 166 Misc. 2d 757, 634 N.Y.S.2d 915 (J. Ct. 1995).
- 21 People v. Lesnak, 165 Misc. 2d 706, 630 N.Y.S.2d 459 (Dist. Ct. 1995).
- 22 People v. Gindi, 166 Misc. 2d 672, 630 N.Y.S.2d 863 (City Crim. Ct. 1995).
- 23 People v. Gindi, 166 Misc. 2d 672, 630 N.Y.S.2d 863 (City Crim. Ct. 1995).
- 24 People v. Gindi, 166 Misc. 2d 672, 630 N.Y.S.2d 863 (City Crim. Ct. 1995).
- 25 CPL § 100.10(2)(b).
- 26 CPL § 100.10(2)(b).
- 27 CPL § 100.10(2)(c).
- 28 CPL § 100.10(2)(a), (b), (c).
- 29 See CPL § 100.10.
- 30 McKinney's CPL § 100.25(2).
See People v. Quarles, 168 Misc. 2d 638, 639 N.Y.S.2d 661 (City Ct. 1996).
- 31 McKinney's CPL § 100.25(2).
- 32 McKinney's CPL § 100.25(2).
- 33 McKinney's CPL § 100.25(2).
- 34 McKinney's CPL § 100.25(2).
See McKinney's CPL §§ 100.25(4), 150.10(2).

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35 McKinney's CPL § 100.25(3).
36 See McKinney's CPL § 100.25(4).
37 People v. Origlia, 138 Misc. 2d 286, 524 N.Y.S.2d 163 (City Ct. 1988) (simplified traffic informations);
People v. Zagorsky, 73 Misc. 2d 420, 341 N.Y.S.2d 791 (County Ct. 1973) (rejected by, People v. Pregent,
142 Misc. 2d 344, 537 N.Y.S.2d 424 (City Ct. 1988)).
38 People v. Zagorsky, 73 Misc. 2d 420, 341 N.Y.S.2d 791 (County Ct. 1973) (rejected by, People v. Pregent,
142 Misc. 2d 344, 537 N.Y.S.2d 424 (City Ct. 1988)).
39 People v. Zagorsky, 73 Misc. 2d 420, 341 N.Y.S.2d 791 (County Ct. 1973) (rejected by, People v. Pregent,
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40 People v. Zagorsky, 73 Misc. 2d 420, 341 N.Y.S.2d 791 (County Ct. 1973) (rejected by, People v. Pregent,
142 Misc. 2d 344, 537 N.Y.S.2d 424 (City Ct. 1988)).
People v. Noblett, 172 Misc. 2d 826, 660 N.Y.S.2d 517 (County Ct. 1997).
41 People v. Zagorsky, 73 Misc. 2d 420, 341 N.Y.S.2d 791 (County Ct. 1973) (rejected by, People v. Pregent,
142 Misc. 2d 344, 537 N.Y.S.2d 424 (City Ct. 1988)).
42 CPL § 100.20.
43 CPL § 100.20.
People v. Quarles, 168 Misc. 2d 638, 639 N.Y.S.2d 661 (City Ct. 1996).
44 People v. Hust, 74 Misc. 2d 887, 346 N.Y.S.2d 303 (County Ct. 1973).
People v. Born, 166 Misc. 2d 757, 634 N.Y.S.2d 915 (J. Ct. 1995).
45 People v. Born, 166 Misc. 2d 757, 634 N.Y.S.2d 915 (J. Ct. 1995).
46 People v. Born, 166 Misc. 2d 757, 634 N.Y.S.2d 915 (J. Ct. 1995).
47 People v. Hust, 74 Misc. 2d 887, 346 N.Y.S.2d 303 (County Ct. 1973).
48 People v. Quarles, 168 Misc. 2d 638, 639 N.Y.S.2d 661 (City Ct. 1996).
49 People v. Quarles, 168 Misc. 2d 638, 639 N.Y.S.2d 661 (City Ct. 1996).
50 People v. Quarles, 168 Misc. 2d 638, 639 N.Y.S.2d 661 (City Ct. 1996).
51 People v. Gutterson, 93 Misc. 2d 1105, 403 N.Y.S.2d 998 (J. Ct. 1978); People v. Key, 87 Misc. 2d 262,
391 N.Y.S.2d 781 (App. Term 1976), judgment aff'd, 45 N.Y.2d 111, 408 N.Y.S.2d 16, 379 N.E.2d 1147
(1978); People v. Hust, 74 Misc. 2d 887, 346 N.Y.S.2d 303 (County Ct. 1973); People v. Zagorsky, 73
Misc. 2d 420, 341 N.Y.S.2d 791 (County Ct. 1973) (rejected by, People v. Pregent, 142 Misc. 2d 344,
537 N.Y.S.2d 424 (City Ct. 1988)).
People v. Brady, 196 Misc. 2d 993, 768 N.Y.S.2d 157 (Dist. Ct. 2003).
52 McKinney's CPL § 100.25(2).
People v. Nuccio, 78 N.Y.2d 102, 571 N.Y.S.2d 693, 575 N.E.2d 111 (1991).
53 CPL § 100.40(2).
People v. Quarles, 168 Misc. 2d 638, 639 N.Y.S.2d 661 (City Ct. 1996).
54 CPL § 100.25(2).
55 CPL § 100.40(2).
56 People v. Kaid, 165 Misc. 2d 489, 629 N.Y.S.2d 617 (City Crim. Ct. 1995).
57 People v. Kaid, 165 Misc. 2d 489, 629 N.Y.S.2d 617 (City Crim. Ct. 1995).
58 People v. Rosenfeld, 163 Misc. 2d 982, 626 N.Y.S.2d 352 (App. Term 1994).
59 People v. Noblett, 172 Misc. 2d 826, 660 N.Y.S.2d 517 (County Ct. 1997).
60 People v. Fernandez, 20 N.Y.3d 44, 956 N.Y.S.2d 443, 980 N.E.2d 491 (2012).

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1 Criminal Procedure in New York § 7:9 (2d)

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§ 7:9. Accusatory instruments—Form and content —Prosecutor's information

References

West's Key Number Digest

- West's Key Number Digest, Indictment and Information  17
- West's Key Number Digest, Indictment and Information  75

Perhaps the most infrequently used local accusatory instrument is the prosecutor's information, which is prepared by the district attorney and filed in a local criminal court. The prosecutor's information is defined under [CPL 1.20\(6\)](#), and none of the charges in the prosecutor's information can be felonies.

A prosecutor's information is a written accusation by a district attorney or an assistant district attorney which is filed with a local criminal court.¹ It may be filed under four circumstances, the first being at the direction of a grand jury under the Criminal Procedure Law.²

When the grand jury determines that evidence has been presented to it which is legally sufficient to show that the defendant committed an offense other than a felony, the grand jury must, through its foreman or acting foreman, file a direction with the court by which it was impanelled directing the district attorney to file a prosecutor's information charging the offense in the local criminal court.³ The direction must be signed by the foreman or the acting foreman and must contain a plain and concise statement of the conduct constituting the offense to be charged.⁴ The court in which the direction is filed must, unless the direction is insufficient on its face, issue an order approving the direction and ordering the district attorney to file a prosecutor's information.⁵

A grand jury may not direct the filing of a prosecutor's information, unless the evidence is both legally sufficient to establish the commission of a crime, and gives rise to reasonable cause to believe that the defendant committed the crime.⁶

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The second circumstance under which a prosecutor's information may be filed is at the direction of a local criminal court pursuant to the Criminal Procedure Law.⁷ This relates to the reduction of a felony charge after the local criminal court has examined the circumstances of the felony complaint.⁸ The basis for this reduction will be discussed in detail in a chapter devoted to proceedings on a felony complaint.⁹

The third situation in which a prosecutor's information may be filed is at the district attorney's own instance, in which case it serves as a basis for a prosecution but not as a basis for commencement of a criminal action.¹⁰ The prosecutor's information may serve as the basis for the commencement of a criminal action only where it results from a grand jury direction issued in a case not previously commenced in a local criminal court.¹¹

The fourth situation in which a prosecutor's information may be filed is at the direction of a superior court pursuant to the Criminal Procedure Law.¹² The superior court will authorize a prosecutor's information charging a petty offense filed in the appropriate local criminal court after the court, based upon evidence presented to the grand jury, establishes that the most serious lesser included offense for which the defendant may be charged is a petty offense.¹³

The prosecutor may file a prosecutor's information as a superseding information.¹⁴ It must be filed with the local criminal court and should charge any offense which is supported by the allegations of the factual part of the original information and/or any supporting depositions which may accompany the original information.¹⁵ The original information is then superseded by the prosecutor's information and upon the defendant's arraignment on the prosecutor's information, the first information is deemed dismissed.¹⁶ However, the prosecution's information is improperly filed when it is based on factual allegations that were not a part of the original information.¹⁷ Therefore, in a prosecution charging theft of services, an information filed on the eve of trial charging the offense of criminal trespass was improper where there were no trespass-related allegations in the original accusatory instrument.¹⁸ This newly charged crime coming as the case was in the process of being sent out for a jury trial constituted a change in the theory of prosecution and was a violation of the fundamental tenets of notice and due process.¹⁹ The prosecutor's information is jurisdictionally defective if the original information it supersedes and any supporting depositions do not contain factual allegations that establish, if true, every element of the crime charged and the defendant's commission of each element.²⁰

There is no provision in the Criminal Procedure Law allowing the district attorney, without any direction from the court, to replace a felony complaint with a prosecutor's information.²¹ In addition, the import of the statute²² is to exclude felony complaints from one of the class of accusatory instruments which may be superseded by a prosecutor's information.²³

The prosecutor's information must contain the name of the local criminal court with which it is filed and the title of the action and must be subscribed by the district attorney by whom it is filed.²⁴ The term "district attorney" here includes a district attorney, an assistant district attorney, or a special district attorney, and, where appropriate, the attorney general, an assistant attorney general, a deputy attorney general, or a special deputy attorney general.²⁵

A juvenile delinquency petition is not akin to a prosecutor's information but is tantamount to an information.²⁶ Therefore, the statute governing the amendment of an information²⁷ is the relevant section for amendment of a juvenile delinquency petition.²⁸

The prosecutor's information should be in the form prescribed for an indictment pursuant to the Criminal Procedure Law.²⁹ That section provides that there must be a statement in each count that the district attorney accuses the defendant of having committed a designated offense; that the offense charged was committed in a designated county; the approximate date on which the offense was committed or a designated period of time within which it was committed; a plain and concise factual statement which, without allegations of an evidentiary nature, asserts facts supporting every element of the offense charged and the defendant's

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commission of the crime with sufficient precision to clearly apprise the defendant of the conduct which is the subject of the accusation; and the signature of the district attorney.³⁰

These requirements serve three purposes: to provide the accused with fair notice of the nature of the charge against him or her so that the accused may prepare an answer and defense to the charge; to ensure that the crime for which the defendant is tried before the petit jury is in fact the crime with which the defendant was charged; and to identify the criminal conduct with sufficient specificity so that the defendant, if convicted, may raise a double jeopardy claim as a bar to subsequent prosecution for the same conduct.³¹ When a defendant is charged with a crime that is perpetrated by the commission of a single act and time is not a substantive element of the crime charged, the allegation as to the approximate date or designated period of time when the act was committed must be reasonably specific given the circumstances of the particular case.³² When a crime may be committed by multiple acts over time and may be characterized as a continuing crime the count in the charging instrument may properly allege that the single offense was committed over a significant period of time.³³ A crime is a continuing crime if by its nature it may be committed either by one act or by multiple acts and readily permits characterization as a continuing offense over a period of time.³⁴ Whether multiple acts may be charged as a continuing crime is determined by referring to the language in the penal statute to see if the statutory definition of the crime necessarily contemplates a single act.³⁵ The offense of second-degree harassment may be characterized as a continuing offense over time.³⁶ Accordingly, an information charging the defendant with second-degree harassment and alleging that “on or about and between” a six-month period the defendant made a series of telephone calls with the intent to harass, annoy, and threaten the complainant was not defective for lack of specificity because it did not identify the particular dates on which the calls were made.³⁷

The prosecutor's information must in one or more counts allege the offense or offenses charged in a plain and concise statement of the conduct constituting each such offense.³⁸

The prosecutor's information must substantially conform to the requirements of Criminal Procedure Law in order to be sufficient on its face.³⁹ There is no requirement that the prosecutor's information be verified or that the allegations of the prosecutor's information be nonhearsay.⁴⁰ The essential requirement is that the allegations contain a statement that the defendant committed each of the necessary elements of the crime or crimes charged.⁴¹

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Footnotes

- 1 CPL § 100.10(3).
- 2 CPL § 100.10(3).
- 3 CPL § 190.70(1).
See 34 N.Y. Jur. 2d, Crim. L. § 2252; 38 Am. Jur. 2d, Grand J § 30; 41 Am. Jur. 2d, Indict §§ 25 to 27.
- Forms**
8 Am. Jur. Pl & Pr Forms, Rev, Criminal Procedure, Forms 114 to 119
- 4 CPL § 190.70(2).
- 5 CPL § 190.70(3).
- 6 *People v. McClafferty*, 73 Misc. 2d 666, 342 N.Y.S.2d 208 (City Crim. Ct. 1973).
- 7 CPL § 100.10(3).
See CPL §§ 180.50, 180.70.
- 8 CPL §§ 180.50(3), 180.70(2), (3).

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- 9 See ch 12.
- 10 CPL § 100.10(3).
See CPL § 100.50(2).
- 11 CPL § 100.10(3).
- 12 CPL § 100.10(3).
See CPL § 210.20(1-a).
- 13 CPL § 210.20(1-a).
- 14 CPL § 100.50(1).
- 15 CPL § 100.50(2).
People v. Pratt, 164 Misc. 2d 498, 625 N.Y.S.2d 869 (City Crim. Ct. 1995).
- 16 CPL § 100.50(2).
People v. Pratt, 164 Misc. 2d 498, 625 N.Y.S.2d 869 (City Crim. Ct. 1995).
- 17 People v. Pratt, 164 Misc. 2d 498, 625 N.Y.S.2d 869 (City Crim. Ct. 1995).
- 18 People v. Pratt, 164 Misc. 2d 498, 625 N.Y.S.2d 869 (City Crim. Ct. 1995).
- 19 People v. Pratt, 164 Misc. 2d 498, 625 N.Y.S.2d 869 (City Crim. Ct. 1995).
- 20 People v. Inserra, 4 N.Y.3d 30, 790 N.Y.S.2d 72, 823 N.E.2d 437 (2004) (information charging the defendant with criminal contempt of the order of protection did not fail to allege violation by omitting the statement that the protected person was at home when the defendant banged on the door, as the protection order prohibited the defendant from going near the person's home, regardless of whether she was present).
- 21 People v. Thomas, 107 Misc. 2d 947, 436 N.Y.S.2d 153 (Dist. Ct. 1981).
- 22 CPL § 100.50.
- 23 People v. Thomas, 107 Misc. 2d 947, 436 N.Y.S.2d 153 (Dist. Ct. 1981).
- 24 CPL § 100.35.
- 25 CPL § 1.20(32).
- 26 Matter of Parsons, 108 Misc. 2d 738, 438 N.Y.S.2d 933 (City Fam. Ct. 1981).
- 27 CPL § 100.45(3).
- 28 Matter of Parsons, 108 Misc. 2d 738, 438 N.Y.S.2d 933 (City Fam. Ct. 1981).
- 29 CPL § 100.35.
See CPL § 200.50.
- 30 CPL § 200.50(4) to (7), (9).
See 31 N.Y. Jur. 2d, Crim. L § 262; 32 N.Y. Jur. 2d, Crim. L §§ 441, 599, 613; 34 N.Y. Jur. 2d, Crim. L §§ 2263, 2265, 2266; 41 Am. Jur. 2d, Indict §§ 44 et seq.
An information did not adequately allege the charge of attempting to evade or defeat the tax on cigarettes or tobacco products, where there was no factual allegation that the 24-hour period during which the defendant could have paid the use tax after purchasing the products had passed before the items were seized. People v. Tracy, 1 Misc. 3d 308, 764 N.Y.S.2d 585 (City Ct. 2003).
- Forms**
8 Am. Jur. Pl & Pr Forms, Rev, Criminal Procedure, Forms 112 to 118
- 31 People v. Shack, 86 N.Y.2d 529, 634 N.Y.S.2d 660, 658 N.E.2d 706 (1995).
- 32 People v. Shack, 86 N.Y.2d 529, 634 N.Y.S.2d 660, 658 N.E.2d 706 (1995).
- 33 People v. Shack, 86 N.Y.2d 529, 634 N.Y.S.2d 660, 658 N.E.2d 706 (1995).
- 34 People v. Shack, 86 N.Y.2d 529, 634 N.Y.S.2d 660, 658 N.E.2d 706 (1995).
- 35 People v. Shack, 86 N.Y.2d 529, 634 N.Y.S.2d 660, 658 N.E.2d 706 (1995).
- 36 People v. Shack, 86 N.Y.2d 529, 634 N.Y.S.2d 660, 658 N.E.2d 706 (1995).
- 37 People v. Shack, 86 N.Y.2d 529, 634 N.Y.S.2d 660, 658 N.E.2d 706 (1995).
- 38 CPL § 100.35.
- 39 CPL § 100.35.
- 40 See CPL § 100.35.
- 41 CPL § 100.35.

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§ 7:10. Accusatory instruments—Allegations upon information and belief

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- West's Key Number Digest, Indictment and Information  71.3

An accusatory instrument should provide at minimum reasonable cause and should specifically indicate the source of the knowledge by which the officer bases his or her accusation. It is significant to note that nonhearsay allegations are required for almost all accusatory instruments with the clear exception of the simplified traffic information. [People v. Lesnak, 165 Misc. 2d 706, 630 N.Y.S.2d 459 \(Dist. Ct. 1995\)](#). A court may infer “reasonable cause” from the information contained in the supporting deposition. For example, in *Lesnak*, a defendant clearly had “reason to know” his license was suspended, where his driving abstract had listed 29 suspensions. [People v. Rodriguez, 165 Misc. 2d 684, 630 N.Y.S.2d 205 \(City Crim. Ct. 1995\)](#).

Although there is no requirement that an allegation based upon information and belief state the source of the information, such a statement is necessary to provide the reasonable cause required before interference with a person's liberty is permitted.¹ Accordingly, a misdemeanor complaint based upon information and belief which does not disclose the source of the information is not sufficient on its face within the meaning of the Criminal Procedure Law.²

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Footnotes

§ 7:10.Accusatory instruments—Allegations upon information..., 1 Criminal Procedure...

- 1 People v. Pleva, 96 Misc. 2d 1020, 410 N.Y.S.2d 261 (Dist. Ct. 1978).
2 CPL § 100.40(4).
 People v. Pleva, 96 Misc. 2d 1020, 410 N.Y.S.2d 261 (Dist. Ct. 1978).
 See also People v. James, 4 N.Y.2d 482, 176 N.Y.S.2d 323, 151 N.E.2d 877 (1958) (decided prior to
 enactment of CPL).
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§ 7:11. Accusatory instruments—Filing, 1 Criminal Procedure in New York § 7:11 (2d)

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- West's Key Number Digest, Indictment and Information  11.1
- West's Key Number Digest, Indictment and Information  42
- West's Key Number Digest, Indictment and Information  43

The accusatory instrument must conform with one of the five types of accusatory instruments listed under [CPL 100.05](#) if it is to be considered a properly filed instrument for purposes of the court obtaining jurisdiction over a defendant. (See [People v. Scott](#), 3 N.Y.2d 148, 164 N.Y.S.2d 707, 143 N.E.2d 901 (1957)). If the instrument filed is not one of the five authorized accusatory instruments as listed, then the action can be dismissed by the court. (See [Shirley v. Schulman](#), 78 N.Y.2d 915, 573 N.Y.S.2d 456, 577 N.E.2d 1048 (1991)).

However, one court has held that the placement of the wrong return court on the appearance ticket is not grounds for dismissal if the accusatory instrument is eventually filed in the proper court, even if the defendant has been inconvenienced by appearing in the wrong court on several occasions. [People v. Coore](#), 149 Misc. 2d 864, 566 N.Y.S.2d 992 (City Ct. 1991).

The local criminal court accusatory instrument may be filed with a district court of a particular county if the offense occurred in that county.¹ In New York City, the local criminal court accusatory instrument may be filed with the New York City Criminal Court.² Any local criminal court accusatory instrument may be filed with the city court of the particular city where an offense charged in the instrument has been allegedly committed.³

Pursuant to the statute, a felony complaint cannot be filed with the village court when the felony is committed within a city of a particular county.⁴ As a result, a village court does not have jurisdiction to issue an arrest warrant for a felony committed within a city.⁵

§ 7:11. Accusatory instruments—Filing, 1 Criminal Procedure in New York § 7:11 (2d)

All accusatory instruments except felony complaints may be filed with the town court of a particular town when an offense charged was allegedly committed anywhere in the town other than in a village having a village court.⁶ If there is a village court, and the offense occurred in the village, then the accusatory instrument may be filed with the village court.⁷

A felony complaint may be filed with any town court or village court of a particular county when the felony charged has been allegedly committed in some town of the county.⁸ The court need not be that of the town or village in which the felony has been allegedly committed.⁹ This provision does not apply to city courts.¹⁰

An information, a simplified information, a misdemeanor complaint, or a felony complaint, which include all accusatory instruments except a prosecutor's information, may be filed with a judge of a superior court sitting as a local criminal court when an offense charged was allegedly committed in a county in which the judge is then present and either resides or is currently holding, or has been assigned to hold, a term of superior court.¹¹

The statute also provides that if another section of law permits the filing of an accusatory instrument in another court, this section does not prohibit the same, and further, that if an accusatory instrument may be filed in two or more local criminal courts, then the accusatory instrument may be filed in any one of them, but not in more than one.¹²

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Footnotes

- 1 [CPL § 100.55\(1\)](#).
See 34 N.Y. Jur. 2d, Crim. L §§ 2067, 2176; 21 Am. Jur. 2d, Crim. L § 409; 41 Am. Jur. 2d, Indict §§ 44 et seq.
- 2 [CPL § 100.55\(2\)](#).
- 3 [CPL § 100.55\(3\)](#).
- 4 [People v. Beard](#), 77 Misc. 2d 927, 353 N.Y.S.2d 999 (County Ct. 1974).
- 5 [People v. Beard](#), 77 Misc. 2d 927, 353 N.Y.S.2d 999 (County Ct. 1974).
- 6 [CPL § 100.55\(4\)](#).
- 7 [CPL § 100.55\(5\)](#).
- 8 [CPL § 100.55\(6\)](#).
- 9 [CPL § 100.55\(6\)](#).
- 10 [People v. Chrysler](#), 287 A.D.2d 7, 733 N.Y.S.2d 452 (2d Dep't 2001).
- 11 [CPL § 100.55\(7\)](#).
- 12 [CPL § 100.55\(8\), \(9\)](#).

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§ 7:12. Accusatory instruments—Amending

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CPL 100.50 (1) authorizes the People to file “another information” prior to the entry of a guilty plea or commencement of a trial, and it does not impose any restriction on the type of crimes that may be included in a new information. In [People v. Thomas](#), 4 N.Y.3d 143, 791 N.Y.S.2d 68, 824 N.E.2d 499 (2005), the Court of Appeals held that since a new crime may be charged and that new facts may be alleged in support of any additional offenses, and nothing in CPL 100.50(2) restricts the People's ability to provide additional factual detail in a new information. However, the court added that it was the legislative intent in enacting CPL 100.50(1) that prosecutors be able to allege an information that includes triable crimes based on factual allegations that are not included in the original information. (See [People v. Graves](#), 12 Misc. 3d 516, 2006 WL 1023949 (N.Y. City Crim. Ct. 2006)).

When an accusatory instrument is defective on its face because it does not conform to the statutory requirements, it may not be dismissed as defective, but must be amended where the defect or irregularity is of a kind that may be cured by amendment, and the prosecution moves to amend.¹ The prosecution may apply to the court for permission to amend the accusatory part of an information by adding any count charging an offense which is supported by the allegations of the factual part of the information and/or any supporting depositions which may accompany it.² In addition, an amendment of the information to change the statutory citation to properly reflect the renumbered charge is permissible during trial.³ The motion must be made on notice to the defendant and must provide the defendant with an opportunity to be heard.⁴ If the motion is granted, the defendant must be accorded a reasonable adjournment as necessitated by the amendment.⁵

Like indictments and prosecutor's informations, informations can be amended with respect to time, place, and names of persons, but unlike indictments and prosecutor's informations, informations are not subject to limitations which bar amendment for the purpose of the addition of counts or curing the legal insufficiency of factual allegations.⁶ The state could properly amend an information charging the defendant with harassment and aggravated harassment to include additional factual details regarding alleged harassment.⁷

§ 7:12.Accusatory instruments—Amending, 1 Criminal Procedure in New York § 7:12 (2d)

A prosecutor's information may be amended in the same way in which indictments may be amended as provided in the Criminal Procedure Law.⁸

A simplified traffic information can only be amended to cure amendable defects and cannot be superseded by an information.⁹

If there is severance of counts in the accusatory instrument, or severance of defendants for trial purposes, the rules governing severance of counts of an indictment, severance of defendants for trial purposes, and consolidation of indictments for trial purposes will apply to informations, prosecutor's informations, and misdemeanor complaints as provided in the Criminal Procedure Law.¹⁰

The provisions of the Criminal Procedure Law¹¹ governing motions and orders for bills of particulars with respect to indictments apply to informations, misdemeanor complaints, and prosecutor's informations.¹² The failure to state the proper statutory section and offense designation in an accusatory instrument is not a mere irregularity, and is not amendable.¹³

The statute¹⁴ is the relevant section for amending a juvenile delinquency petition, since a juvenile delinquency petition is not akin to a prosecutor's information, but is tantamount to an information.¹⁵

In *People v. Urbacz*,¹⁶ the Court of Appeals held that there was nothing improper where a New York City District Attorney within the City of New York reduced a class A misdemeanor of aggravated harassment to a Class B misdemeanor level of aggravated harassment in the Second Degree. By reducing such charge within the City of New York pursuant to CPL 340(2) the defendant would not be able to obtain a jury trial and as such defense counsel objected to the reduction. The Court of Appeals however, indicated that reduction of charges is a prosecutor's discretion and can be utilized to promote judicial efficiency but also can reflect the criminal background or prior relationships with the victim or victim's own wishes as well as the facts underlying the charges. The Court of Appeals indicated that those were sufficient and legally acceptable grounds for the reduction of the charges and the allegation of an attempt to deny the defendant a jury trial was held to be without merit.

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Footnotes

- 1 CPL §§ 100.40, 170.35(1)(a).
People v. Pacifico, 105 Misc. 2d 396, 432 N.Y.S.2d 588 (City Crim. Ct. 1980).
- 2 CPL § 100.45(3).
See 34 N.Y. Jur. 2d, Crim. L §§ 2157, 2178, 2181; 21 Am. Jur. 2d, Crim. L § 409; 41 Am. Jur. 2d, Indict §§ 44 et seq.
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Power of court to make or permit amendment of indictment, 17 ALR3d 1181.
- 3 *People v. Pena*, 146 Misc. 2d 767, 552 N.Y.S.2d 543 (City Crim. Ct. 1990).
- 4 CPL § 100.45(3).
- 5 CPL § 100.45(3).
People v. Vega, 225 A.D.2d 890, 639 N.Y.S.2d 511 (3d Dep't 1996).
- 6 *People v. Kurtz*, 175 Misc. 2d 980, 670 N.Y.S.2d 1008 (City Crim. Ct. 1998).
- 7 *People v. Kurtz*, 175 Misc. 2d 980, 670 N.Y.S.2d 1008 (City Crim. Ct. 1998).

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- 8 CPL § 100.45(2).
See CPL § 200.70.
- 9 People v. Baron, 107 Misc. 2d 59, 438 N.Y.S.2d 425 (App. Term 1980).
For a discussion of the distinctions between simplified traffic informations and informations, see § 7:7.
- 10 CPL § 100.45(1).
See CPL §§ 200.20, 200.40.
- 11 CPL § 200.95.
See 34 N.Y. Jur. 2d, Crim. L. §§ 2157, 2276; 41 Am. Jur. 2d, Indict §§ 159 et seq.
- Forms**
- 8 Am. Jur. Pl & Pr Forms, Rev, Criminal Procedure, Forms 81, 82.
- 12 CPL § 100.45(4).
- 13 People v. Law, 106 Misc. 2d 351, 431 N.Y.S.2d 648 (City Crim. Ct. 1980).
- 14 CPL § 100.45(3).
- 15 Matter of Parsons, 108 Misc. 2d 738, 438 N.Y.S.2d 933 (City Fam. Ct. 1981).
- 16 People v. Urbaez, 10 N.Y.3d 773, 856 N.Y.S.2d 520, 886 N.E.2d 142 (2008).

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§ 7:13. Consent to prosecute organized crime

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- West's Key Number Digest, Indictment and Information  71.4(1)

When a grand jury proceeding concerns a possible charge of enterprise corruption, or when an accusatory instrument includes a count charging a person with enterprise corruption,¹ the affected district attorneys are the district attorneys otherwise empowered to prosecute any of the underlying acts of criminal activity in a county with jurisdiction over the offense of enterprise corruption where: (a) there has been substantial and significant activity by the particular enterprise; (b) conduct occurred constituting a criminal act specially included in the pattern of criminal activity charged in an accusatory instrument and not previously prosecuted; or (c) the particular enterprise has its principal place of business.²

A grand jury proceeding concerning a possible charge of enterprise corruption may be instituted only with the consent of the affected district attorneys.³ Should the possibility of a charge of enterprise corruption develop after a grand jury proceeding has been instituted, the consent of the affected district attorneys shall be sought as soon as is practical, and an indictment charging a person with enterprise corruption may not be voted on by a grand jury without such consent.⁴ When it is impractical to obtain the consent of the affected district attorneys prior to the filing of an accusatory instrument charging a person with enterprise corruption, the consent must be secured within 20 days.⁵ When the prosecutor is a deputy attorney general in charge of the statewide organized crime task force, the consent required by the affected district attorneys shall be in addition to that required by the Executive Law.⁶

Within 15 days after the arraignment of any person on an indictment charging a person with the crime of enterprise corruption, a prosecutor shall provide a copy of the indictment to those district attorneys whose consent was required, and shall notify the court and a defendant of those district attorneys whose consent the prosecutor has secured.⁷ The court shall then review the indictment and the grand jury minutes, notify any district attorney whose consent should have been but was not obtained, and direct that a prosecutor provide the district attorney with the portion of the indictment and grand jury minutes that are

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relevant to a determination whether that district attorney is an “affected district attorney” empowered to prosecute the offense of enterprise corruption.⁸

The failure to obtain the consent from any district attorney shall not be grounds for dismissal of an accusatory instrument or for any other relief upon the motion of a defendant in the criminal action.⁹

Upon motion of a district attorney whose consent was required but not obtained, a court may not dismiss the accusatory instrument or any count thereof but may grant any appropriate relief which may include, but is not limited to: (a) ordering that any money forfeited or the proceeds from the sale of any other property forfeited in a criminal action by a defendant had the forfeiture action been prosecuted in the county of a district attorney be paid in whole or in part to the county of the district attorney; or (b) upon the consent of a defendant, ordering the transfer of the prosecution, or any part thereof, to a district attorney or to any other prosecutor with jurisdiction.¹⁰ However, prior to ordering any transfer of the prosecution, a court shall provide to those district attorneys who have previously consented to the prosecution an opportunity to intervene and be heard concerning the transfer.¹¹

A district attorney whose consent was required but not obtained may seek the forfeiture of a defendant's property or the transfer of the prosecution by a pretrial motion in the criminal action based on an indictment charging the crime of enterprise corruption.¹² Such relief must be sought within 45 days of the receipt of notice from a court to any district attorney whose consent to prosecute was not obtained.¹³

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Footnotes

- 1 [Penal Law §§ 460.00 et seq.](#) (Organized Crime Control Act).
See 34 N.Y. Jur. 2d, Crim. L. §§ 2145, 2152; 35 N.Y. Jur. 2d, Crim. L. §§ 3106, 3153 to 3156; 4 Am. Jur. 2d, A&E §§ 364, 366 to 368; 8 Am. Jur. 2d, Bail & R §§ 36, 38.
See also Criminal Law in New York, 4th §§ 2:19 et seq. (3rd Ed).
- 2 [8 Am. Jur. Pl & Pr Forms, Rev, Criminal Procedure, Forms 431, 432.](#)
- 3 [Penal Law § 460.60\(1\).](#)
- 4 [Penal Law § 460.60\(2\).](#)
- 5 [Penal Law § 460.60\(2\).](#)
- 6 [Penal Law § 460.60\(3\).](#)
- 7 [Penal Law § 460.50\(4\).](#)
[See Exec Law § 70-a7.](#)
- 8 [Penal Law § 460.60\(5\).](#)
- 9 [Penal Law § 460.60\(5\).](#)
- 10 [Penal Law § 460.60\(6\).](#)
- 11 [Penal Law § 460.60\(6\).](#)
- 12 [Penal Law § 460.60\(7\).](#)
- 13 [Penal Law § 460.60\(7\).](#)

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West's Key Number Digest

- West's Key Number Digest, [Criminal Law](#)  261(1)

Westlaw Databases

- [Handling a Criminal Case in New York \(HCCNY\)](#)

Treatises and Practice Aids

- Muldoon, [Handling a Criminal Case in New York §§ 4:1 to 4:20](#)

Law Reviews and Other Periodicals

- Barkai, [Accuracy Inquiries for All Felony and Misdemeanor Pleas: Voluntary Pleas but Innocent Defendants?](#), 126 U. Pa. L. Rev. 88 (November, 1977)
- Silbert, Newman, and Kalser, [The Use of Closed Circuit Television for Conducting Misdemeanor Arraignments in Dade County, Florida](#), 38 U. Miami L. Rev. 657 (July, 1984)

Research References, 1 Criminal Procedure in New York Ch. 8 Refs. (2d)

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1 Criminal Procedure in New York § 8:05 (2d)

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§ 8:05. Bail Reform Act of 2019

References

The newly enacted Bail Reform Act of 2019, which takes effect on January 1, 2020, has significantly changed the various start dates for several statutory clocks.

The new CPL Article 245 (discovery), [CPL 710.30](#) (statement/identification notices) and [CPL 30.30](#) (speedy trial) will each have different triggering dates. Specifically:

1. Under the discovery statute (Art. 245), the DA's 15-day (or 45-day) period to provide discovery start to run upon defendant's *arraignment on any accusatory instrument*, including a misdemeanor complaint or felony complaint.
2. Under the statement/identification notice statute (710.30), the DA's 15-day period to give notices starts to run upon defendant's *arraignment on an information or indictment*.
3. Under the "speedy trial" statute (30.30), the clock starts to run upon *filing of any accusatory instrument*, including a misdemeanor complaint or felony complaint.
4. But for DATs (which will be more common given the new bail reforms), the 30.30 clock starts to run *on the date when the defendant first appears* in court in response to the DAT (see 30.30 [5][b]) (for discovery in DAT cases, the DA's clock to provide discovery will still begin when defendant is *arraigned on a complaint*).

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§ 8:1. Violation and misdemeanor arraignment procedures

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- West's Key Number Digest, [Criminal Law](#) 261(1).

It is clear that under any circumstance whether it be a serious felony or misdemeanor or minor local ordinance violation, the judge must inform the defendant at the time of arraignment of his or her right to counsel and that he or she may seek an adjournment for the purpose of obtaining counsel. ¹ The Court of Appeals in *Matter of Bauer* ² went so far as to remove a judge of a city court where he failed to advise the defendant of these particular rights.

“Arraignment” is defined in the Criminal Procedure Law as the occasion upon which a defendant against whom an accusatory instrument has been filed appears before the court in which the criminal action is pending for the purpose of having such court acquire and exercise control over the defendant's person with respect to the accusatory instrument and of setting the course of further proceedings in the action. ³

After an information, a simplified information, a prosecutor's information, or a misdemeanor complaint has been filed in the local criminal court, the defendant must be arraigned. ⁴ In almost all cases the defendant must appear personally at the arraignment. ⁵

There are two situations where it is not necessary that the defendant appear in person. ⁶ The first situation is where a simplified information has been filed and there is a procedure provided by law which applies to all offenses charged in that simplified information if followed. ⁷ This procedure is found in the Vehicle and Traffic Law and provides for a guilty plea by first class, registered, or certified mail, or by an authorized agent. ⁸ The statute provides that the Commissioner of Motor Vehicles will prescribe the form to be used. ⁹ A not-guilty plea may also be entered within 48 hours of the issuance of the ticket by registered or certified mail, return receipt requested or by first class mail. ¹⁰

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The second situation in which the defendant need not personally appear is where the defendant's appearance has been required by a summons or an appearance ticket.¹¹ In this case the court has the discretion, for good cause shown, to permit the defendant to appear by counsel instead of in person.¹² A defendant who has been issued a desk appearance ticket cannot be arraigned when he or she appears in response to that ticket unless an accusatory instrument has been filed.¹³

Where the defendant is personally present at the arraignment, the court must immediately inform the defendant or cause the defendant to be informed in the court's presence of the charges against him or her and must furnish the defendant with a copy of the accusatory instrument.¹⁴

Upon the arraignment, unless the court intends to make a final disposition of the action immediately thereafter, the court must issue a securing order either releasing the defendant on recognizance or fixing bail pursuant to the Criminal Procedure Law.¹⁵

If the court has permitted the defendant to be absent from the courtroom and to appear by attorney only pursuant to the Criminal Procedure Law,¹⁶ the court must release the defendant on his or her own recognizance.¹⁷ Thus, where the court has permitted the defendant to appear by attorney based upon the fact that a summons or an appearance ticket has been issued, the defendant must be released on recognizance at the time of arraignment.¹⁸

Notwithstanding any other provision of law to the contrary, a local criminal court may not, at arraignment or within 30 days of arraignment on a simplified traffic information charging a violation of the Vehicle and Traffic Law involving the operation of a motor vehicle while under the influence of alcohol or drugs,¹⁹ and upon which a notation has been made that someone other than the person charged was killed or suffered serious physical injury,²⁰ accept a plea of guilty to a violation of any provision of the Vehicle and Traffic Law prohibiting the operating of a motor vehicle while under the influence of alcohol or drugs, nor to any other traffic infraction arising out of the same incident, nor to any other traffic infraction, violation, or misdemeanor where the court is aware that the offense was charged pursuant to an accident involving death or serious physical injury, except upon written consent of the district attorney.²¹

A defendant is arraigned under the statute²² where the defendant appears before the court in which the criminal action is pending, at which time the court acquires and exercises control over the defendant's person.²³ Subsequently, the court informs the defendant of the charges, gives the defendant his or her rights, and sets bail.²⁴ The district attorney's later motion for an adjournment and eventual assignment to a public defender further comport with the statutory procedures, at which time the defendant is considered arraigned.²⁵ A plea does not have to be entered at the time of an arraignment because this requirement is not contained within the statutory definition of "arraignment."²⁶ Further, any change in a criminal charge following the original arraignment is deemed to have been made as of the date of filing of the original accusatory instrument, since there can be only one criminal action against the accused arising out of a particular incident.²⁷

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Footnotes

- 1 CPL 170.10 in general.
- 2 *In re Bauer*, 3 N.Y.3d 158, 785 N.Y.S.2d 372, 818 N.E.2d 1113 (2004).
- 3 CPL § 1.20(9).

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- 4 CPL § 170.10(1).
See 7 N.Y. Jur. 2d, Auto & Veh. § 159; 8 N.Y. Jur. 2d, Auto & Veh. § 543; 31 N.Y. Jur. 2d, Crim L § 49;
34 N.Y. Jur. 2d, Crim L §§ 2137, 2184 to 2187, 2206; 21 Am. Jur. 2d, Crim L §§ 433 et seq.
- A.L.R. Library**
Right of indigent defendant in state criminal case to assistance of ballistics experts, 71 ALR4th 638.
- Forms**
8 Am. Jur. Pl & Pr Forms, Rev, Criminal Procedure, Forms 31, 32, 41.
- 5 CPL § 170.10(1).
6 CPL § 170.10(1)(a), (b).
7 CPL § 170.10(1)(a).
8 VTL § 1805.
9 VTL § 1805.
10 VTL § 1806.
11 CPL § 170.10(1)(b).
12 CPL § 170.10(1)(b).
13 People v. Fysekis, 164 Misc. 2d 627, 625 N.Y.S.2d 861 (City Crim. Ct. 1995).
14 CPL § 170.10(2).
15 CPL § 170.10(7).
See CPL § 530.20.
16 CPL § 170.10(1)(b).
17 CPL § 170.10(7).
18 CPL § 170.10(7).
19 McKinney's VTL § 1192(2) to (4).
20 McKinney's VTL § 1192(12).
21 McKinney's CPL § 170.10(8).
22 CPL § 1.20(9).
23 People ex rel. Kehoe v. Harkness, 84 Misc. 2d 927, 376 N.Y.S.2d 992 (Sup 1975), judgment aff'd, 50
A.D.2d 1010, 376 N.Y.S.2d 950 (3d Dep't 1975).
24 People ex rel. Kehoe v. Harkness, 84 Misc. 2d 927, 376 N.Y.S.2d 992 (Sup 1975), judgment aff'd, 50
A.D.2d 1010, 376 N.Y.S.2d 950 (3d Dep't 1975).
25 People ex rel. Kehoe v. Harkness, 84 Misc. 2d 927, 376 N.Y.S.2d 992 (Sup 1975), judgment aff'd, 50
A.D.2d 1010, 376 N.Y.S.2d 950 (3d Dep't 1975).
26 CPL § 1.20(9).
People ex rel. Kehoe v. Harkness, 84 Misc. 2d 927, 376 N.Y.S.2d 992 (Sup 1975), judgment aff'd, 50
A.D.2d 1010, 376 N.Y.S.2d 950 (3d Dep't 1975).
27 CPL § 1.20(16), (17).
People v. McBride, 126 Misc. 2d 272, 482 N.Y.S.2d 203 (City Ct. 1984).

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§ 8:2. Violation and misdemeanor arraignment procedures—Defendant's rights

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The arraignment of a defendant must be pursuant to statute; the defendant must be arraigned in the presence of a judge or pursuant to an exceptional statutory provision such as an appearance ticket or summons which explains the defendant's rights. The court cannot short circuit this process by providing the defendant with a letter indicating that he may be represented by an attorney and may ask for an adjournment before trial to seek an attorney. Circumstances such as that have been held unacceptable by the Appellate Term.¹

The defendant has certain basic rights at the time of the arraignment, and the court is required to inform the defendant of those rights if he or she is not represented by counsel.² The defendant has a right to the aid of counsel at the arraignment and at every subsequent stage of the action.³ If the defendant is without an attorney at the arraignment, the defendant has the following rights: an adjournment to obtain counsel; to communicate, free of charge, by letter or by telephone, for the purpose of obtaining counsel and to inform a relative or friend that he or she has been charged with an offense; and to have counsel assigned by the court if the defendant is financially unable to obtain the same unless he or she is charged with a traffic infraction or infractions only.⁴

Not only must the court advise the defendant of these specific rights, the court must also allow the defendant the opportunity to exercise those rights and must take such affirmative action that is necessary to effectuate them.⁵ In addition, if the defendant's motor vehicle operator's license or vehicle registration is in jeopardy because of the possibility of conviction for a traffic infraction or a misdemeanor relating to traffic, the court must inform the defendant of that fact, and that a plea of guilty to such an offense constitutes a conviction to the same extent as a verdict of guilty after trial.⁶ If the accusatory instrument is a simplified traffic information, the court must inform the defendant of the right to a supporting deposition to be filed as provided in the Criminal Procedure Law.⁷ If the accusatory instrument is a misdemeanor complaint, the court must advise the defendant

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that he or she may not be prosecuted on the misdemeanor complaint or be required to enter a plea unless the defendant consents and, for purposes of prosecution, unless the defendant consents otherwise, the misdemeanor complaint will have to be replaced and superseded by an information.⁸

The requirement for notifying the defendant of his or her rights at arraignment may be satisfied by printing a statement advising the defendant of those rights upon an appearance ticket or a criminal summons, provided that the defendant appears for arraignment in response to the appearance ticket or the criminal summons.⁹ The only specific right which may not be communicated to the defendant by this printed notice form is the right to have a misdemeanor complaint replaced by an information.¹⁰

If the defendant is only charged with a traffic infraction and indicates to the court a desire to proceed without the assistance of counsel, the court must permit the defendant to do so.¹¹ If, on the other hand, the defendant is charged with a misdemeanor or higher charge, the court must permit the defendant to proceed without the aid of counsel only if the court is satisfied that the defendant has made the decision with knowledge of its significance.¹² If the court is not so satisfied, the court may not proceed until the defendant is provided with counsel, either of the defendant's own choosing or by assignment.¹³ If the defendant waives the right to counsel, whether charged with an infraction, misdemeanor, or higher crime, the court must inform the defendant that there is no waiver of the right to counsel at further proceedings, and that the defendant has all of the rights of which the court has previously informed him or her at all subsequent stages of the proceeding.¹⁴

Although not required, it is advisable for the court to inform the defendant who is not represented by counsel that the time which the defendant consents to delay for purposes of making motions or of obtaining an attorney is chargeable to the defendant.¹⁵

The constitutional and statutory right of a defendant to the assistance of counsel at every stage of a criminal case is not limited to the situation where a defendant already has an attorney.¹⁶ It also includes a reasonable time to obtain counsel.¹⁷ A defendant is entitled to the assistance of an attorney at any critical stage of the prosecution.¹⁸ Generally, the critical stage commences upon the filing of an accusatory instrument.¹⁹ However, certain other procedures, such as a court order of removal, are sufficiently judicial in nature to permit implication of the right to assistance of counsel.²⁰ In any of these situations, if an attorney has entered the proceedings, the right to counsel may be waived only in counsel's presence, and with counsel's acquiescence.²¹

Similarly, where the investigatory state of a prosecution has concluded and formal judicial proceedings have commenced, whether by indictment or arraignment, the right to counsel may be waived only in the presence of counsel.²²

Unless the right to counsel is waived under circumstances evincing a conscious and voluntary act, it will not be effective since laymen, even laymen with experience in criminal law, are not likely to know precisely what rights are being waived.²³

In addition, even though the right to assistance of counsel may not be foisted upon the defendant, courts are under an obligation before accepting a waiver of this right to carefully ascertain that the waiver is executed by the defendant acting competently, intelligently, and with an understanding of the consequences.²⁴ To determine the effectiveness of the waiver of counsel, the court is obligated to make a sufficiently searching inquiry for it to be reasonably assured that the defendant appreciates the dangers and disadvantages of the waiver.²⁵ This determination must depend upon the particular facts of each case, including the background, experience, and conduct of the defendant.²⁶ Absent extraordinary circumstances, delay in arraignment is but one factor to be considered on the issue of involuntariness of a defendant's statement.²⁷ A conviction cannot stand where the record is devoid of any such inquiry.²⁸

A delay in arraignment may be warranted where the police are investigating a defendant's possible involvement in an unrelated crime when they were unaware of this unrelated crime at the time of the initial arrest.²⁹ Thus, where defendant's arraignment was being delayed while the police investigated allegations of an additional crime, and where the defendant confessed during

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this delay period and after having received his Miranda rights, it was held that the delay in arraignment was not calculated to deprive the defendant of his right to counsel.³⁰

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Footnotes

- 1 [People v. Rios](#), 9 Misc. 3d 1, 801 N.Y.S.2d 113 (App. Term 2005).
- 2 [CPL § 170.10](#).
- 3 [CPL § 170.10\(3\)](#).
- 4 [CPL § 170.10\(3\)](#).
- 5 [CPL § 170.10\(4\)\(a\)](#).
- 6 [CPL § 170.10\(4\)\(b\)](#).
- 7 [CPL § 170.10\(4\)\(c\)](#).
[People v. Presti](#), 115 Misc. 2d 550, 454 N.Y.S.2d 393 (Dist. Ct. 1982) (receiving copy of supporting deposition on day of trial as timely).
See [CPL § 100.25](#).
- 8 [CPL § 170.10\(4\)\(d\)](#).
- 9 [CPL § 170.10\(5\)](#).
- 10 [CPL § 170.10\(5\)](#).
- 11 [CPL § 170.10\(6\)](#).
- 12 [CPL § 170.10\(6\)](#).
[People v. Grune](#), 164 Misc. 2d 1047, 631 N.Y.S.2d 218 (App. Term 1995).
- 13 [CPL § 170.10\(6\)](#).
- 14 [CPL § 170.10\(6\)](#).
- 15 See [CPL § 30.30\(4\)\(f\)](#).
- 16 [People v. Waterman](#), 9 N.Y.2d 561, 216 N.Y.S.2d 70, 175 N.E.2d 445, 90 A.L.R.2d 726 (1961); [People v. Blasingame](#), 65 A.D.2d 455, 412 N.Y.S.2d 153 (2d Dep't 1978).
- 17 [People v. Waterman](#), 9 N.Y.2d 561, 216 N.Y.S.2d 70, 175 N.E.2d 445, 90 A.L.R.2d 726 (1961); [People v. Koch](#), 299 N.Y. 378, 87 N.E.2d 417 (1949); [People v. McLaughlin](#), 291 N.Y. 480, 53 N.E.2d 356 (1944); [People v. Blasingame](#), 65 A.D.2d 455, 412 N.Y.S.2d 153 (2d Dep't 1978).
- 18 [People v. Settles](#), 46 N.Y.2d 154, 412 N.Y.S.2d 874, 385 N.E.2d 612 (1978).
- 19 [People v. Settles](#), 46 N.Y.2d 154, 412 N.Y.S.2d 874, 385 N.E.2d 612 (1978).
See [People v. Blake](#), 35 N.Y.2d 331, 361 N.Y.S.2d 881, 320 N.E.2d 625 (1974).
- 20 [People v. Settles](#), 46 N.Y.2d 154, 412 N.Y.S.2d 874, 385 N.E.2d 612 (1978); [People v. Coleman](#), 43 N.Y.2d 222, 401 N.Y.S.2d 57, 371 N.E.2d 819 (1977).
- 21 [People v. Settles](#), 46 N.Y.2d 154, 412 N.Y.S.2d 874, 385 N.E.2d 612 (1978); [People v. Hobson](#), 39 N.Y.2d 479, 384 N.Y.S.2d 419, 348 N.E.2d 894 (1976); [People v. Arthur](#), 22 N.Y.2d 325, 292 N.Y.S.2d 663, 239 N.E.2d 537 (1968); [People v. Donovan](#), 13 N.Y.2d 148, 243 N.Y.S.2d 841, 193 N.E.2d 628 (1963).
- 22 [People v. Settles](#), 46 N.Y.2d 154, 412 N.Y.S.2d 874, 385 N.E.2d 612 (1978); [People v. Blake](#), 35 N.Y.2d 331, 361 N.Y.S.2d 881, 320 N.E.2d 625 (1974).
- 23 [People v. Bevilacqua](#), 45 N.Y.2d 508, 410 N.Y.S.2d 549, 382 N.E.2d 1326 (1978).
See [People v. Hobson](#), 39 N.Y.2d 479, 384 N.Y.S.2d 419, 348 N.E.2d 894 (1976).
- 24 [People v. Witenki](#), 15 N.Y.2d 392, 259 N.Y.S.2d 413, 207 N.E.2d 358 (1965); [People v. Simmons](#), 95 Misc. 2d 497, 408 N.Y.S.2d 204 (City Crim. Ct. 1978); [People v. Betillo](#), 53 Misc. 2d 540, 279 N.Y.S.2d 444 (Sup 1967).

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- 25 People v. Grune, 164 Misc. 2d 1047, 631 N.Y.S.2d 218 (App. Term 1995).
26 Johnson v. Zerbst, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461, 146 A.L.R. 357 (1938); People v. Simmons, 95 Misc. 2d 497, 408 N.Y.S.2d 204 (City Crim. Ct. 1978); People v. Lynch, 2 Misc. 2d 217, 155 N.Y.S.2d 572 (County Ct. 1955), order rev'd on other grounds, 2 A.D.2d 854, 155 N.Y.S.2d 849 (2d Dep't 1956).
27 People v. Dobranski, 112 A.D.2d 541, 491 N.Y.S.2d 478 (3d Dep't 1985).
28 People v. Grune, 164 Misc. 2d 1047, 631 N.Y.S.2d 218 (App. Term 1995).
29 People v. Lopez, 185 A.D.2d 285, 585 N.Y.S.2d 797 (2d Dep't 1992).
30 People v. Lopez, 185 A.D.2d 285, 585 N.Y.S.2d 797 (2d Dep't 1992).

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§ 8:3. Corporate defendants

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- West's Key Number Digest, [Criminal Law](#) 261(1)

Corporations, just as individuals, can be charged under the criminal law and as such shall be arraigned in accordance with the principles set forth in [CPL 600.10](#) and [600.20](#). Corporations. Although they cannot be incarcerated, corporations can be fined in a substantial amount that may reach in the tens of thousands of dollars. ¹

At all stages of a criminal action, a corporate defendant must appear by counsel. ² If, at the time the corporate defendant is required to enter a plea to the accusatory instrument, it defaults by failing to appear, the court may enter a plea of guilty and impose a sentence. ³

The requirement for securing the appearance of the corporate defendant provides for personal service of the process of the court upon an officer, director, managing or general agent, cashier or assistant cashier of the corporation, or any other agent of the corporation authorized by appointment or by law to receive the process. ⁴ Thus, service of an appearance ticket on the secretary of state as provided for in the Business Corporation Law ⁵ satisfies due process for acquiring jurisdiction over a corporation in a criminal action, as the secretary of state is authorized by law to receive service. ⁶ However, the statutory requirement that corporate defendants must appear by counsel has been held unconstitutional on the ground that it denies them equal protection under the law. ⁷ The court determined that the statute did not serve a compelling state interest, as required to survive a strict scrutiny analysis under the equal protection clause. That no compelling interest was served by an attorney appearance requirement imposed on corporations, which were persons under the equal protection clause, was evidenced in part by the fact that the requirement had been relaxed somewhat in civil cases. ⁸

Service by mail is not sufficient and will not entitle the court to enter a guilty plea by default. ⁹ The same standards of due process which apply to the entry of a default judgment in a civil action must be held to apply in a criminal case. ¹⁰ Thus, a

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defendant corporation convicted in absentia was entitled to have a criminal default judgment vacated on the ground that it did not receive actual notice of the prosecution, when the notice was served on the secretary of state, even though the defendant's failure to receive notice was due, at least in part, to its own negligence in failing to update its address with the secretary of state.¹¹ As long as defendant's failure to receive actual notice of the pending criminal proceeding was not the result of a deliberate attempt to avoid such notice, the default would be vacated.¹²

The phrase "by delivery thereof" as used in the statute¹³ requires personal delivery to one of the specified agents of the corporation.¹⁴ Absent proof of personal delivery on one of the agents of the corporation, the court may not proceed under the Criminal Procedure Law and enter a plea of guilty and impose sentence.¹⁵

The provision of the Criminal Procedure Law governing the rights of a defendant arraigned on a criminal court instrument expressly provides that it does not apply to the arraignment of corporate defendants.¹⁶ Therefore, a court is not required to instruct an arraigned corporate defendant as to its rights either generally or particularly.¹⁷

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Footnotes

- 1 [People v. Causeway Const. Corp.](#), 169 Misc. 2d 70, 649 N.Y.S.2d 630 (App. Term 1996).
- 2 [CPL § 600.20](#).
[People v. Erin Const. Corp.](#), 136 Misc. 2d 807, 519 N.Y.S.2d 466 (City Crim. Ct. 1987), judgment aff'd as modified, 147 Misc. 2d 158, 560 N.Y.S.2d 728 (App. Term 1990).
See 15 N.Y. Jur. 2d, Bus Rel § 1092; 34 N.Y. Jur. 2d, Crim L §§ 2125, 2364.
- 3 [CPL § 600.20](#).
[People v. Erin Const. Corp.](#), 136 Misc. 2d 807, 519 N.Y.S.2d 466 (City Crim. Ct. 1987), judgment aff'd as modified, 147 Misc. 2d 158, 560 N.Y.S.2d 728 (App. Term 1990) (arraignment court authorized to enter guilty plea and impose sentence when newly substituted corporate defendant failed to appear through counsel).
- 4 [CPL § 600.10\(1\)](#).
See 15 N.Y. Jur. 2d, Bus Rel § 1092; 34 N.Y. Jur. 2d, Crim L § 2124; 19B Am. Jur. 2d, Corp § 2144.
- 5 [McKinney's Bus Corp L § 304\(a\)](#).
- 6 [People v. New York Paving, Inc.](#), 155 Misc. 2d 934, 591 N.Y.S.2d 318 (City Crim. Ct. 1992).
- 7 [People v. NYTAC Corp.](#), 5 Misc. 3d 304, 783 N.Y.S.2d 775 (Dist. Ct. 2004).
- 8 [People v. NYTAC Corp.](#), 5 Misc. 3d 304, 783 N.Y.S.2d 775 (Dist. Ct. 2004).
- 9 [People v. Eica Const. Corp.](#), 85 Misc. 2d 1026, 381 N.Y.S.2d 377 (Dist. Ct. 1975).
- 10 [People v. Eica Const. Corp.](#), 85 Misc. 2d 1026, 381 N.Y.S.2d 377 (Dist. Ct. 1975).
- 11 [People v. Sage Realty Corp.](#), 155 Misc. 2d 832, 590 N.Y.S.2d 660 (City Crim. Ct. 1992).
- 12 [People v. Sage Realty Corp.](#), 155 Misc. 2d 832, 590 N.Y.S.2d 660 (City Crim. Ct. 1992).
- 13 [CPL § 600.10](#).
- 14 [People v. Eica Const. Corp.](#), 85 Misc. 2d 1026, 381 N.Y.S.2d 377 (Dist. Ct. 1975).
- 15 [People v. Eica Const. Corp.](#), 85 Misc. 2d 1026, 381 N.Y.S.2d 377 (Dist. Ct. 1975).
- 16 [McKinney's CPL § 170.10\(9\)](#).
[People v. Erin Const. Corp.](#), 136 Misc. 2d 807, 519 N.Y.S.2d 466 (City Crim. Ct. 1987), judgment aff'd as modified, 147 Misc. 2d 158, 560 N.Y.S.2d 728 (App. Term 1990).

§ 8:3.Corporate defendants, 1 Criminal Procedure in New York § 8:3 (2d)

17 [People v. Erin Const. Corp.](#), 136 Misc. 2d 807, 519 N.Y.S.2d 466 (City Crim. Ct. 1987), judgment aff'd as modified, 147 Misc. 2d 158, 560 N.Y.S.2d 728 (App. Term 1990).

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Chapter 8. Arraignment in Local Criminal Court

§ 8:4. Felony complaint arraignment procedures

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If a felony complaint is not legally sufficient, a court is without authority to properly proceed with the arraignment of a defendant. Only if the facial insufficiency is cured can the judge continue with the process.¹

The procedures which must be followed upon arraignment of a felony complaint are different, to some extent, than those procedures followed for arraignment in the local criminal court on nonfelony offenses.² The court must first inform the defendant or cause the defendant to be informed in the court's presence of the charge or charges against him or her and that the primary purpose of the proceeding upon the felony complaint is to determine whether the defendant is to be held for action of a grand jury with respect to those charges.³ The court must also furnish the defendant with a copy of the felony complaint.⁴

In addition, the court must inform the defendant that there is a right to a prompt hearing on the issue of whether there is sufficient evidence to warrant the court in holding the defendant for action of the grand jury, but that this right may not be waived.⁵

The court must also inform the defendant that there is a right to the aid of counsel at the arraignment and at every subsequent stage of the action, and further, if the defendant appears at the arraignment without an attorney there also is the right to adjournment for the purpose of obtaining counsel, as well as the right to communicate free of charge, by letter or by telephone, for the purpose of obtaining counsel and informing a relative or friend that an offense has been charged, and to have counsel assigned by the court in any case where the defendant is financially unable to obtain an attorney.⁶

The defendant may proceed without counsel if the court is satisfied that the decision has been made with full knowledge of its significance.⁷ If the court is not satisfied that the defendant understands the significance of proceeding without counsel, the court may not proceed until the defendant is provided with counsel either of the defendant's own choosing or by assignment.⁸ If the defendant proceeds at the arraignment without counsel, the right to counsel is not waived at later proceedings, and the

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court must inform the defendant that the right to an attorney continues, as well as all of the rights which were specified above, and that these rights may be exercised at any stage of the action.⁹

Unless the court intends to immediately dismiss the felony complaint and terminate the action, the court must issue a securing order as provided in the Criminal Procedure Law,¹⁰ either releasing the defendant on recognizance, fixing bail or committing the defendant to the custody of the sheriff for future appearance in such action.¹¹ In general, when a securing order is issued committing the custody of a principal to the sheriff, it is the sheriff who will be called upon to transport the principal to the appropriate jail.¹² Similarly, when the court requires the attendance of a principal committed to the custody of the sheriff, the court in which attendance is required may compel such attendance by directing the sheriff to produce the principal.¹³

An arraignment constitutes the commencement of a criminal proceeding, and therefore police are not at liberty to elicit statements from a defendant before there has been an opportunity to obtain legal counsel.¹⁴

A criminal defendant under indictment and in custody may not waive the right to counsel unless it is done in the presence of an attorney.¹⁵

Once an indictment is returned against a particular defendant, the character of the police function shifts from investigatory to accusatory.¹⁶ For this reason, the warnings which are sufficient to comply with the strictures against testimonial compulsion do not satisfy the higher standard with respect to a waiver of the right to counsel.¹⁷

To insure the right to counsel, once an indicted defendant is taken into custody, the police are duty bound to arraign the defendant with all reasonable dispatch so that counsel may be appointed if necessary.¹⁸

Defendant's placement in police custody for more than 20 hours before being arraigned was justified by the expansion of the authorities' investigation into defendant's possible involvement in several unrelated crimes, including the stolen car that defendant was arrested for driving was linked to several recent robberies, and a codefendant's confession implicating defendant in the instant felony murder.¹⁹

Individuals who give timely notice reasonably prior to the prosecution's presentation of evidence and prior to the Grand Jury vote on an indictment are entitled to testify before the vote. However, the Appellate Division has held that where defendant was not arraigned on the felony complaint until after the Grand Jury voted, the district attorney had no obligation to notify the defendant of the Grand Jury proceeding until after the Grand Jury voted. However, in the case at bar, the district attorney, pursuant to CPL 190.50, stated that if the defendant wished to testify before the Grand Jury, he could provide written notice to the district attorney and re-open the proceedings. The defendant and his attorney were totally silent as to this option.²⁰

In *People v. Small*,²¹ the Court of Appeals held that any prearraignment delay arising out of failure to arraign defendant between the Friday on which a warrant was obtained for his arrest and the following Monday did not implicate his constitutional rights; since defendant was already detained on another charge and his arrest was authorized by a warrant, he would have been in custody until that Monday regardless of whether he was arraigned sooner based on the arrest warrant under CPL 120.90.

In *People v. Jin Cheng Lin*,²² the court held that in a murder prosecution arising from defendant's confession—made following his arrest for a lesser but related crime and after several hours of questioning across three days—to brutally killing his former girlfriend and her brother, a compelling case existed that the police were intentionally dilatory in delaying defendant's arraignment by more than 28 hours in violation of CPL 140.20(1), but it could not be said, based on the totality of the circumstances and as a matter of law, that his confession was involuntary. Nor was the record devoid of support for the Appellate Division's determination of the underlying factual questions regarding defendant's detainment and interrogation in favor of upholding the hearing court's denial of his suppression motion. As there is no per se “ongoing investigation” exception to the clear statutory mandate that a person subject to a warrantless arrest be arraigned without unnecessary delay, delay for

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investigatory purposes is one factor to consider in assessing the voluntariness of a confession. Here, given the inordinate length of time between defendant's arrest and arraignment and the unsupported claims of an investigatory need to continue the questioning following his arrest, the record lacked support for a finding that the delay was necessary. Nevertheless, defendant was not subjected to the type of deprivations and psychological pressure characteristic of cases where a coercive environment impacted the voluntariness of a confession. Though defendant spent most of the time in a windowless room, his basic human needs were provided for; the interrogations were intermittent with breaks; and he was informed of his rights early during the interrogation process.

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Footnotes

- 1 [Fitzpatrick v. Rosenthal](#), 29 A.D.3d 24, 809 N.Y.S.2d 729 (4th Dep't 2006), leave to appeal denied (N.Y. May 11, 2006).
- 2 See [CPL §§ 170.10, 180.10](#).
- 3 [CPL § 180.10\(1\)](#).
See 31 N.Y. Jur. 2d, Crim L §§ 49, 60, 261; 34 N.Y. Jur. 2d, Crim L §§ 2143, 2201, 2202, 2205, 2207; 21 Am. Jur. 2d, Crim L §§ 411 to 419, 433 et seq.
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[Right of indigent defendant in state criminal case to assistance of fingerprint expert](#), 72 ALR4th 874.
[Right of indigent defendant in state criminal case to assistance of ballistics experts](#), 71 ALR4th 638.
[Accused's right to assistance of counsel at or prior to arraignment](#), 5 ALR3d 1269.
- Forms**
[8 Am. Jur. Pl & Pr Forms, Rev, Criminal Procedure, Forms 11 to 16, 41](#).
- 4 [CPL § 180.10\(1\)](#).
- 5 [CPL § 180.10\(2\), \(4\)](#).
[People v. Frazier](#), 202 A.D.2d 985, 609 N.Y.S.2d 722 (4th Dep't 1994) (where preliminary hearing had been scheduled, but prior to its commencement defense counsel requested an adjournment and the indictment was filed during the adjournment, the defendant was not denied his statutory right to a prompt hearing).
- 6 [CPL § 180.10\(3\), \(4\)](#).
- 7 [CPL § 180.10\(5\)](#).
- 8 [CPL § 180.10\(5\)](#).
- 9 [CPL § 180.10\(5\)](#).
- 10 [CPL § 530.20\(2\)](#).
- 11 [CPL § 180.10\(6\)](#).
- 12 [Matter of Delaney](#), 75 A.D.2d 642, 427 N.Y.S.2d 284 (2d Dep't 1980).
- 13 [CPL §§ 510.50, 550.10\(2\)\(a\)](#).
- 14 [People v. Buxton](#), 44 N.Y.2d 33, 403 N.Y.S.2d 487, 374 N.E.2d 384 (1978); [People v. Meyer](#), 11 N.Y.2d 162, 227 N.Y.S.2d 427, 182 N.E.2d 103 (1962); [People v. Blasingame](#), 65 A.D.2d 455, 412 N.Y.S.2d 153 (2d Dep't 1978); [People v. Dunbar](#), 62 A.D.2d 1132, 404 N.Y.S.2d 464 (4th Dep't 1978).
- 15 [People v. Settles](#), 46 N.Y.2d 154, 412 N.Y.S.2d 874, 385 N.E.2d 612 (1978).
See [People v. Blake](#), 35 N.Y.2d 331, 361 N.Y.S.2d 881, 320 N.E.2d 625 (1974); [People v. Babcock](#), 91 Misc. 2d 921, 399 N.Y.S.2d 103 (County Ct. 1977).
- 16 [People v. Settles](#), 46 N.Y.2d 154, 412 N.Y.S.2d 874, 385 N.E.2d 612 (1978).
- 17 [People v. Settles](#), 46 N.Y.2d 154, 412 N.Y.S.2d 874, 385 N.E.2d 612 (1978).

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- 18 People v. Settles, 46 N.Y.2d 154, 412 N.Y.S.2d 874, 385 N.E.2d 612 (1978); People v. Alex, 265 N.Y.
192, 192 N.E. 289, 94 A.L.R. 1033 (1934); People v. Mummiani, 258 N.Y. 394, 180 N.E. 94 (1932).
19 People v. Marshall, 244 A.D.2d 508, 664 N.Y.S.2d 456 (2d Dep't 1997).
20 People v. Lyons, 40 A.D.3d 1121, 837 N.Y.S.2d 706 (2d Dep't 2007).
21 People v. Small, 26 N.Y.3d 253, 22 N.Y.S.3d 383, 43 N.E.3d 740 (2015).
22 People v. Jin Cheng Lin, 26 N.Y.3d 701, 27 N.Y.S.3d 439, 47 N.E.3d 718 (2016).
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Chapter 10. Dismissal of Accusatory Instrument and Adjournment in Contemplation of Dismissal

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Chapter 10. Dismissal of Accusatory Instrument and Adjournment in Contemplation of Dismissal

§ 10:1. Motion to dismiss accusatory instrument

References

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- West's Key Number Digest, Indictment and Information  144

A motion to dismiss an accusatory instrument is governed under [CPL 170.30](#), [170.35](#), and [170.40 of the Criminal Procedure Law](#). Each of these sections are in turn governed under [170.45 of the CPL](#) which indicates that procedural rules for any motion made in the criminal courts should first examine the [CPL 210.45](#) of the Criminal Procedure Law. [People v. Coleman](#), 305 A.D.2d 1031, 758 N.Y.S.2d 878 (4th Dep't 2003).

The defendant may move to dismiss an accusatory instrument, other than a felony complaint, after arraignment.¹ The motion must be made in the local criminal court on one of the following grounds:

- (a) The accusatory instrument is defective within the meaning of the Criminal Procedure Law;²
- (b) The defendant has received immunity from prosecution;
- (c) The prosecution is barred by reason of a previous prosecution pursuant to the Criminal Procedure Law;³
- (d) The prosecution is untimely pursuant to the statute of limitations as prescribed in the Criminal Procedure Law;⁴
- (e) The defendant has been denied a right to a speedy trial;
- (f) There is some other jurisdictional or legal impediment to conviction; or
- (g) Dismissal is required in the furtherance of justice.⁵

A court lacks jurisdiction to entertain a motion to dismiss on behalf of a defendant who has not been arraigned.⁶

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The statute⁷ requires that a motion to dismiss be granted⁸ where the people are not ready for trial within six months of the commencement of the criminal action, if the defendant is accused of a felony, and 90 days of commencement if the defendant is accused of a misdemeanor.⁹ Delays chargeable to the defendant are excluded when computing the passage of time.¹⁰

All of the motions, except the motion that the defendant has been denied the right to a speedy trial, should be made within the time limit provided in the Criminal Procedure Law.¹¹ That statute provides for a 45-day time period within which to file motions after the arraignment and before the commencement of trial.¹² The court may fix additional time upon application of the defendant made prior to the entry of judgment.¹³

The appellate division has held that the time period provided for in the statute¹⁴ is a maximum period within which the defendant must make pretrial motions.¹⁵ The trial court may set a shorter period of time within which the defendant must make the motions.¹⁶ It is not an abuse of discretion to set a period of 18 days within which to make those motions, if the prosecution offers to deliver the grand jury minutes, and the laboratory reports within five days.¹⁷

The motion to dismiss, on the grounds that the defendant has been denied the right to a speedy trial, should be made prior to the commencement of trial or the entry of a guilty plea.¹⁸

A motion to dismiss an information on constitutional grounds should be addressed to the court before trial.¹⁹ Also, a pretrial motion to dismiss is the proper method for challenging the validity of an indictment.²⁰

At the time the motion to dismiss is made, the defendant should raise every ground upon which he or she intends to challenge the accusatory instrument.²¹ If the defendant fails to do so, a subsequent motion based upon a ground which was not raised in the first instance may be summarily denied.²² However, the court, in the interest of justice and for good cause shown, may in its discretion, entertain and dispose of a subsequent motion on the merits.²³ A motion to dismiss an information upon the grounds of denial of a speedy trial and in the interest of justice must be made in writing and upon reasonable notice to the people.²⁴

Under the statute,²⁵ the dismissal of an information does not prevent reinstatement of an information, or even a new prosecution.²⁶ Therefore, if a new information can be implemented after the dismissal, there is no bar to a felony prosecution based upon the same act, as long as the original dismissal was not on constitutional grounds.²⁷

The procedural rules prescribed in the Criminal Procedure Law,²⁸ with respect to the making, consideration of, and disposition of, a motion to dismiss an indictment, are also applicable to a motion to dismiss an accusatory instrument in the local criminal court.²⁹

The failure to serve a supporting deposition renders a simplified traffic information insufficient on its face and subject to a motion to dismiss.³⁰ However, the motion must be made in writing and upon reasonable notice to the state, and should generally be made before commencement of trial; but in no event can the court entertain the motion once the sentence has been imposed.³¹ In addition, where a defendant fails to make a timely written motion to dismiss an information, and is subsequently tried and found guilty upon proof establishing all the elements of the crime, the defendant may not raise a defect on an appeal from the judgment of conviction.³²

The section of the statute requiring the replacement of a complaint by an information³³ has been interpreted to require replacement within a reasonable time period after arraignment.³⁴

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When a defendant receives a simplified traffic information and makes a timely request for a supporting deposition, the defendant is entitled to the supporting deposition prior to trial, and the failure to provide it mandates a dismissal.³⁵

The court, on a motion to dismiss a simplified information on the ground that it is not sufficient on its face pursuant to the Criminal Procedure Law,³⁶ must amend the simplified information rather than dismiss it, if the defect or irregularity is of the kind that may be cured by amendment, and the people move to amend.³⁷

It is an abuse of discretion for a trial court to allow a trial to proceed without first disposing of a defendant's motion to dismiss, since the prosecutor should have the opportunity to correct any deficiency before proceeding with trial.³⁸ Where a defendant waives an indictment and consents to be prosecuted by a superior court information, he or she does not concede that there is sufficient evidence to sustain the information.³⁹ Therefore, a motion to dismiss the information under the statute⁴⁰ is proper, even though the defendant chooses to proceed by information rather than indictment.⁴¹

The mere fact that the grand jury determines that there is no basis to proceed on felony charges does not mandate dismissal of a misdemeanor information based on the same acts.⁴²

Although the state may commence a new prosecution of traffic offenses by a long information even where a simplified traffic information has been dismissed for the failure to provide a supporting deposition, the state cannot cure the defect in a simplified information prosecution by making use of the supersedure rule to file a long-form information superseding the simplified information.⁴³

There is no right to appeal from an intermediate order denying dismissal of an indictment.⁴⁴

The prior dismissal of an information charging a defendant with falsifying business records in the second degree required dismissal of the count of a second information charging the defendant with the same crime, where the prosecution did not make any substantial changes from the way the count was pleaded in the first information, and did not proceed by way of a motion to reargue or a notice of appeal.⁴⁵

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Footnotes

- 1 [CPL § 170.30.](#)
See 34 NY Jur 2d, Crim L §§ 2193, 2196; 21 Am Jur 2d, Crim L §§ 448 et seq.
Defendant's oral motion to dismiss a misdemeanor complaint should not have been considered since it was made before arraignment. [People v. Gonzalez](#), 184 Misc. 2d 262, 708 N.Y.S.2d 564 (App. Term 2000).
Forms
[8 Am Jur Pl & Pr Forms, Rev, Criminal Procedure, Forms 91, 92, 97 to 102, 112 to 119, 131 to 140.](#)
- 2 [CPL § 170.35.](#)
- 3 [CPL § 40.20.](#)
- 4 [CPL § 30.10.](#)
- 5 [CPL § 170.30\(1\)\(a\) to \(g\).](#)

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- 6 [People v. Fysekis](#), 164 Misc. 2d 627, 625 N.Y.S.2d 861 (City Crim. Ct. 1995) (court lacked jurisdiction where no accusatory instrument had been issued by return date of desk appearance ticket).
- 7 [CPL § 30.30](#).
See 31 NY Jur 2d, Crim L §§ 79, 80, 82; 34 NY Jur 2d, Crim L § 2311; 64 NY Jur 2d, [Hab Corp §§ 41, 42](#); 1A Am Jur 2d, Crim L §§ 854, 855.
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[Continuances at an instance of state public defender of appointed counsel over defendant's objections as excuse for denial of speedy trial](#), 16 ALR4th 1283.
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[Prejudice Resulting from Unusual Delay in Trial](#), 7 Am Jur Proof of Facts 2d 477.
- 8 Under [CPL § 170.30](#).
- 9 [CPL § 30.30\(1\)](#).
- 10 [CPL § 30.30\(4\)](#).
- 11 [CPL § 170.30\(2\)](#).
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[People v. Dean](#), 74 N.Y.2d 643, 542 N.Y.S.2d 512, 540 N.E.2d 707 (1989) (motion to dismiss conviction made over three months after arraignment was untimely).
See 33 NY Jur 2d, Crim L § 1654; 34 NY Jur 2d, Crim L §§ 2188, 2196, 2273, 2287, 2311, 2327; 35 NY Jur 2d, Crim L § 2983; 56 Am Jur 2d, [Motions §§ 6 to 8, 11 to 13, 23 to 26](#).
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[Power of state trial court in criminal case to change venue on its own motion](#), 74 ALR4th 1023.
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[5 Am Jur Trials 27](#), [Pretrial Procedures and Motions in Criminal Cases](#).
- 13 [CPL § 255.20\(1\)](#).
- 14 [CPL § 255.20](#).
- 15 [People v. Broome](#), 78 A.D.2d 718, 432 N.Y.S.2d 558 (3d Dep't 1980).
- 16 [People v. Broome](#), 78 A.D.2d 718, 432 N.Y.S.2d 558 (3d Dep't 1980).
- 17 [People v. Broome](#), 78 A.D.2d 718, 432 N.Y.S.2d 558 (3d Dep't 1980).
- 18 [CPL § 170.30\(2\)](#).
- 19 [People v. Maksymenko](#), 105 Misc. 2d 368, 432 N.Y.S.2d 328 (City Crim. Ct. 1980), order aff'd, 109 Misc. 2d 171, 442 N.Y.S.2d 699 (App. Term 1981).
- 20 [People v. Danylocke](#), 150 A.D.2d 480, 541 N.Y.S.2d 84 (2d Dep't 1989).
- 21 [CPL § 170.30\(3\)](#).
- 22 [CPL § 170.30\(3\)](#).
- 23 [CPL § 170.30\(3\)](#).
- 24 [People v. De Rosa](#), 84 Misc. 2d 316, 375 N.Y.S.2d 777 (App. Term 1975), order aff'd, 42 N.Y.2d 872, 397 N.Y.S.2d 780, 366 N.E.2d 868 (1977).
- 25 [CPL § 170.30](#).
- 26 [People v. Morning](#), 102 Misc. 2d 750, 424 N.Y.S.2d 610 (County Ct. 1979); [Krum v. Hogan](#), 69 Misc. 2d 656, 330 N.Y.S.2d 680 (Sup 1972).
See [People v. Bell](#), 95 Misc. 2d 360, 407 N.Y.S.2d 944 (City Crim. Ct. 1978); [People v. Ackrish](#), 92 Misc. 2d 431, 400 N.Y.S.2d 684 (Sup 1977).
- 27 [People v. Morning](#), 102 Misc. 2d 750, 424 N.Y.S.2d 610 (County Ct. 1979); [People v. Ackrish](#), 92 Misc. 2d 431, 400 N.Y.S.2d 684 (Sup 1977).
- 28 [CPL § 210.45](#).
See 31 NY Jur 2d, Crim L § 261; 34 NY Jur 2d, Crim L §§ 2132, 2196, 2197, 2214, 2287 to 2289, 2291; 41 Am Jur 2d, [Indict §§ 279, 280](#).
- Forms**
[8 Am Jur Pl & Pr Forms, Rev, Criminal Procedure, Forms 91 et seq.](#)

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29 CPL § 170.45.
See 34 NY Jur 2d, Crim L § 2196; 21 Am Jur 2d, Crim L §§ 448 et seq.

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8 Am Jur Pl & Pr Forms, Rev, Criminal Procedure, Forms 91, 92, 97 to 102, 112 to 119, 131 to 140.

30 People v. Fattizzi, 98 Misc. 2d 288, 413 N.Y.S.2d 804 (App. Term 1978).

31 People v. Fattizzi, 98 Misc. 2d 288, 413 N.Y.S.2d 804 (App. Term 1978).

32 People v. Willett, 213 N.Y. 368, 107 N.E. 707 (1915); People v. Grimsley, 60 A.D.2d 980, 401 N.Y.S.2d 643 (4th Dep't 1978); People v. Fattizzi, 98 Misc. 2d 288, 413 N.Y.S.2d 804 (App. Term 1978); People v. Key, 87 Misc. 2d 262, 391 N.Y.S.2d 781 (App. Term 1976), judgment aff'd, 45 N.Y.2d 111, 408 N.Y.S.2d 16, 379 N.E.2d 1147 (1978).

33 CPL § 170.65(1).

34 People v. Smith, 103 Misc. 2d 640, 426 N.Y.S.2d 952 (City Crim. Ct. 1980).

35 CPL §§ 100.10(2), 100.25.
People v. Baron, 107 Misc. 2d 59, 438 N.Y.S.2d 425 (App. Term 1980).
The state's failure to timely serve and file supporting depositions in response to the request of a defendant charged by a simplified traffic information, which renders the information for which they were demanded defective, divests the district court of jurisdiction to proceed on the simplified traffic information that cannot be cured by the untimely service of the supporting deposition. *People v. Green*, 192 Misc. 2d 296, 745 N.Y.S.2d 656 (Dist. Ct. 2002).
A defendant was not entitled to a supporting deposition, where she properly requested the deposition within 30 days of the return date stated on the appearance ticket but failed to submit a written plea within 48 hours, and was not arraigned, as required for the court to obtain jurisdiction over her and thereby trigger her right to the supporting deposition. *People v. Ney*, 191 Misc. 2d 185, 742 N.Y.S.2d 506 (City Ct. 2002).

36 CPL § 100.40.

37 CPL §§ 170.30(1)(a), 170.35(1)(a).
People v. Baron, 107 Misc. 2d 59, 438 N.Y.S.2d 425 (App. Term 1980).

38 People v. Kurtz, 51 N.Y.2d 380, 434 N.Y.S.2d 200, 414 N.E.2d 699 (1980).

39 People v. Burke, 105 Misc. 2d 722, 432 N.Y.S.2d 832 (Sup 1980).

40 CPL § 210.20.

41 People v. Burke, 105 Misc. 2d 722, 432 N.Y.S.2d 832 (Sup 1980).

42 People v. Bachety, 112 Misc. 2d 957, 447 N.Y.S.2d 847 (Dist. Ct. 1982).

43 People v. Green, 192 Misc. 2d 296, 745 N.Y.S.2d 656 (Dist. Ct. 2002).

44 People v. Young, 149 A.D.2d 916, 540 N.Y.S.2d 392 (4th Dep't 1989).
See CPL § 450.10.

45 People v. Hankin, 177 Misc. 2d 116, 675 N.Y.S.2d 792 (City Crim. Ct. 1998), rev'd on other grounds, 182 Misc. 2d 1003, 701 N.Y.S.2d 778 (App. Term 1999).

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Part 1. Practice and Forms

Chapter 10. Dismissal of Accusatory Instrument and Adjournment in Contemplation of Dismissal

§ 10:2. Motion to dismiss accusatory instrument— Defective accusatory device

References

West's Key Number Digest

- West's Key Number Digest, Indictment and Information  144.1(1)

CPL 170.35 governs the grounds where an accusatory instrument may be dismissed based upon the fact that it is defective. The document that is the accusatory instrument must be within its four corners a sufficient instrument, and the court may not take independent testimony to make the document sufficient. *Fitzpatrick v. Rosenthal*, 29 A.D.3d 24, 809 N.Y.S.2d 729 (4th Dep't 2006), leave to appeal denied, 6 N.Y.3d 715 (2006).

The motion to dismiss an accusatory instrument on the ground that it is defective, provided for in the Criminal Procedure Law,¹ is available under certain specified circumstances.² The first of these is where the accusatory instrument is not sufficient on its face pursuant to the requirements of the Criminal Procedure Law.³ If the accusatory instrument is defective on its face and the people move to amend it in order to cure the defect or irregularity, and the defect or irregularity is of a kind that may be cured by amendment, the accusatory instrument may not be dismissed as defective, but must instead be amended.⁴ The type of amendments contemplated by the statute is limited to matters of time, place, names of persons, and the like.⁵ A defendant is not entitled to dismissal of an information on the grounds that the accusatory instrument is defective under the Criminal Procedure Law⁶ where the defendant has not indicated in motion papers the nature of the defect, and the people have indicated their intention to amend the complaint to reflect a change in the charges.⁷

Not every defect in an accusatory instrument is jurisdictional.⁸ Some defects which have been held nonjurisdictional include the failure to verify an information properly, and the failure to place a check mark in the box on the district attorney's office form for a "misdemeanor complaint" or "misdemeanor information."⁹ Similarly, a misdemeanor complaint that is facially valid will

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not be dismissed as defective because it is supported by an affidavit containing only hearsay evidence.¹⁰ However, the majority of courts have held that an information without a supporting deposition confers no jurisdiction upon a court.¹¹

A second ground for dismissal of the accusatory instrument as defective is where the allegations demonstrate that the court does not have jurisdiction of the offense charged.¹²

A third ground for challenging the accusatory instrument is that the statute defining the offense charged is unconstitutional, or otherwise invalid.¹³

The factual part of an information must contain nonhearsay allegations that, if true, establish every element of the offense charged and the defendant's commission of the offense.¹⁴ However, a statement that constitutes an exception to the hearsay rule and that is attested to directly by the complainant is competent evidence when reviewing the sufficiency of an information.¹⁵ An accusatory instrument charging the defendant with third-degree assault was jurisdictionally defective, where the details relayed through a police officer who spoke with the victim about the incident were not properly considered in ruling on the sufficiency of the accusatory instrument, and without them the instrument failed for lack of any meaningful facts.¹⁶ Specifically, the court rejected the prosecution's argument that the victim's statements to the police constituted a "prompt outcry" that is an exception to the hearsay rule, pointing out that the exception is limited to sex offenses, and that the outcry must be made at the first suitable opportunity.¹⁷ In the instant case, the victim's complaint that the defendant struck her in the face with his fist did not satisfy the criteria for the prompt outcry hearsay exception, where the victim made the complaint the day after the incident and in the context of a police response to the victim's apparent suicide attempt.¹⁸

Where the prosecution charges a defendant under an acting in concert theory, it must establish that the defendant shared the intent or purpose of the principal actors, being cognizant that mere presence at the scene of a crime is an insufficient predicate for a finding of shared intent.¹⁹ Accordingly, an information alleging that the defendant held open a door for an individual who then walked inside the building and purchased a controlled substance was insufficient to establish that the defendant acted in concert with the other defendants to sell or possess the substance, absent allegations that the defendant's act of opening the door was anything more than a courtesy to a stranger.²⁰

An information filed as a replacement for a misdemeanor complaint pursuant to another section of the Criminal Procedure Law,²¹ which does not satisfy the requirements stated in that section, may be challenged by a motion to dismiss the complaint under this section.²²

[Section 140.45 of the Criminal Procedure Law](#) requires a local criminal court to sua sponte inspect an accusatory instrument for facial sufficiency during an arraignment that follows a warrantless arrest, and if the pleading and facts indicate a fundamental deficiency, the court must dismiss the case regardless of whether any motion to dismiss has been made.²³ In so holding, the reasoning has been that because a local criminal court must inspect the accusatory instrument promptly after the arrest, and exercise its dismissal power in the event that the instrument is defective, the prosecution is not entitled to demand motion papers or an opportunity to prepare a written response, and may present only such facts or evidence as may be available to them at the arraignment.²⁴

With respect to a prosecutor's information filed at the direction of a grand jury, grounds for dismissal as defective exist where the offense or offenses charged are not among those authorized by the grand jury direction.²⁵

A prosecutor's information may also be dismissed upon motion where it is filed by the district attorney, and the factual allegations of the original information, which underlie the prosecutor's information, together with any supporting depositions, are not legally sufficient to support the charge in the prosecutor's information.²⁶ Facts contained in a bill of particulars may not be used to supplement the facts in a facially insufficient information.²⁷ Because an information must contain nonhearsay factual

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allegations sufficient to establish a prima facie case, a prosecutor's hearsay statements stated in a bill of particulars cannot provide the factual allegations necessary to cure a deficient information.²⁸ Similarly, in view of the statutory requirements that the court confine its factual analysis of an information's sufficiency to the information itself and any depositions filed in support of that accusatory instrument,²⁹ a court should not consider factual information contained in a bill of particulars that cures defective allegations contained in an accusatory instrument on a motion to dismiss.³⁰

The failure to supply a supporting deposition to a defendant either before the day of trial, or a reasonable period before trial, requires that a motion to dismiss made on the day of trial be granted; and it is not proper at that time to grant an adjournment for the purpose of preparing a supporting deposition.³¹

For an examination of the requirements for a prosecutor's information, or an information replacing a misdemeanor complaint, the reader should refer to the discussion of the specific types of accusatory instruments set forth in this treatise.³²

Although New York has jurisdiction over a charge of criminal contempt based on an allegation of a violation of an out-of-state protective order arising from the defendant's behavior in New York, the accusatory instrument must show that the defendant was afforded due process in the other state before the protective order was granted so as to enable a New York court to extend full faith and credit to the out-of-state decree.³³

A bare allegation in an information that the defendant had agreed to engage in specified sexual conduct with an undercover officer in exchange for money failed to indicate how the defendant manifested mutual assent, or the ability and intent on her part to agree with anyone to do anything, and therefore, failed to sufficiently charge the defendant with prostitution.³⁴

A misdemeanor complaint and its supporting deposition sufficiently set forth a factual basis for the charge of unlicensed general vending, where the complaint and deposition alleged that on a specific date and time, in a specific location, the defendant displayed and offered for sale video tapes, showed and hawked merchandise to several people, including the arresting officer, and was unable to produce a vending license.³⁵ In that case, the court did not properly exercise its authority to dismiss the complaint, absent grounds on which to base a finding that it would be impossible to draw and file a complaint that would be sufficient on its face, such that the court should have allowed the complaint to be amended.³⁶

A misdemeanor complaint charging a defendant with failure to register as a sex offender that alleged that the defendant was provided with and signed a Sex Offender Registration Act form that expressly notified him of his registration obligation, and that the defendant subsequently failed to register was sufficient, even though it failed to allege facts required to support "injured forum" jurisdiction.³⁷ However, the courts are divided as to whether the offense is a strict liability crime or whether the charging instrument must allege that the defendant knowingly and intentionally failed to register.³⁸ The courts also appear to be divided as to whether the absence of an allegation of the actual date by which a defendant was required to register, alone, renders the accusatory instrument defective.³⁹

An accusatory instrument that charged the defendant with criminal contempt, expressly stated that the defendant was specifically informed in open court of the contents of the court order and conduct it prohibited, was not defective because reference to labor disputes was not noted on the face of the accusatory instrument, where the defendant was served with the accusatory instrument which, on its face, indicated that he had violated a court order of protection, and attached to the instrument was the supporting deposition of the complaining witness which confirmed that she possessed exactly that referenced order of protection at the time of the alleged violation, and attached to those first two documents was a copy of the order of protection at issue complete with the defendant's signature at the bottom of the page next to the acknowledgment that the defendant was advised in court of the issuance of the order.⁴⁰

The essential elements of second-degree criminal contempt are that a lawful court order was in effect and was clearly expressed, that the defendant had knowledge of its provision, and that he intentionally disobeyed it, such that an allegation in an information

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that the defendant's name appeared on a protective order he was charged with violating was insufficient to establish that he had knowledge of its provision; and the information should have been dismissed.⁴¹

An information charging a defendant with driving while impaired by drugs was legally sufficient although the results of defendant's urine test were not included. The Court noted, however, that included with the information was the supporting deposition of the arresting officer who described his professional training in the identification of drugs and his prior experience in drug arrests which stated that the officer had observed the defendant driving the vehicle there was a strong order of marijuana emanating from inside the vehicle, that a partially burned marijuana cigarette was recovered from inside the automobile in plain view and lastly that the defendant had watery and blood shot eyes and slurred speech and that the defendant had also failed a field test.⁴²

The Court of Appeals ruled that a conclusory statement in an accusatory information that an object recovered from a defendant was a gravity knife does not alone meet the reasonable cause requirement for a defendant to be charged with criminal possession of a weapon in the fourth degree. The Court noted that an arresting officer should at the very least explain briefly in the court information that based on his training and experience how he formed the belief that the object observed in defendant's possession was a gravity knife. Here the accusatory instrument contained no factual basis for the officer's conclusion that the knife was a gravity knife as opposed to any type of knife that does not fit the definition of a per se weapon as defined in Penal Law § 265.⁴³

In *People v. Suber*,⁴⁴ the Court of Appeals held that a defendant's admission need not be corroborated in order to establish a prima facie case sufficient for an accusatory instrument such as an information. The defendant, a level 3 sex offender was charged under [Correction Law § 168-f\[3\]](#) with not disclosing two changes of addresses, which he was required, to file with local law enforcement within 90 days of moving. The Court of Appeals held there was no requirement as far as the information was concerned with corroborating the defendant's statements that his residence had moved to several locations and thus did not affect the jurisdictional validity of the misdemeanor information.

In *People v. Jackson*,⁴⁵ the Court of Appeals examined the sufficiency of an accusatory instrument where a defendant was charged with criminal possession of marijuana in the fifth degree and the issue was, whether or not he was in a "public place" and that the marijuana was "open to public view." In *Jackson* the police officer pulled over the defendant's vehicle for a traffic infraction. Upon approaching the vehicle the officer detected a strong odor of marijuana and saw the defendant holding a ziplock bag of marijuana in his hand. The Court of Appeals held that under [§ 240.00\(1\) of the New York State Penal Law](#), a "public place" is designated as a "highway" and therefore, as the defendant was in the vehicle on a "highway," it was sufficiently established that the defendant was in a "public place." The Court of Appeals added that there was no difference whether or not the defendant was in a car or riding a bike. As to the second issue of "open to public view," the Court of Appeals, in affirming the Appellate Term, determined that the observation of the marijuana was open to public view, where the accusatory instrument alleged that upon approaching the vehicle the officer smelled a strong odor of marijuana emanating from inside the vehicle and observed the defendant holding a quantity of marijuana in his hand open to public view. The Court of Appeals concluded that since the officer was standing outside the vehicle and saw the substance in the ziplock bag these allegations support the inference that any other member of the public would also see the marijuana from the same vantage point. Therefore, the marijuana was in an un concealed area that would have been visible to a passerby or other motorists. Accordingly, the Court of Appeals affirmed.

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Footnotes

1 [CPL § 170.30\(1\)\(a\)](#).

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- 2 CPL § 170.35.
3 CPL § 170.35(1)(a).
See CPL § 100.40.
For a more detailed discussion of the requirement that an accusatory instrument be sufficient on its face, the practitioner should refer to the sections relating to each of the types of accusatory instruments in Ch. 7 of this treatise.
Accusatory instrument charging the defendant with criminal possession of a hypodermic instrument was facially sufficient, where the allegation that the detective observed the defendant holding two hypodermic needles was sufficient to establish that the defendant knowingly possessed a hypodermic instrument, and the prosecution was not required to show that he did not purchase the instruments at a pharmacy. *People v. Lobianco*, 2 Misc. 3d 419, 766 N.Y.S.2d 807 (City Crim. Ct. 2003) (discusses that in determining whether certain facts should be pled in the accusatory instrument, the courts have focused on whether the language in question is an exception or a proviso).
- 4 CPL § 170.35(1)(a).
People v. Cobb, 2 Misc. 3d 237, 768 N.Y.S.2d 295 (City Crim. Ct. 2003) (defects could be cured by amendment or jurisdictionally valid superceding information).
- 5 CPL § 170.35(1)(a).
People v. Parris, 113 Misc. 2d 1066, 450 N.Y.S.2d 721 (City Crim. Ct. 1982).
- 6 CPL § 100.40.
7 *People v. Hicks*, 85 Misc. 2d 649, 381 N.Y.S.2d 794 (City Crim. Ct. 1976).
8 *People v. Redding*, 109 Misc. 2d 487, 440 N.Y.S.2d 512 (City Crim. Ct. 1981).
9 *People v. Redding*, 109 Misc. 2d 487, 440 N.Y.S.2d 512 (City Crim. Ct. 1981).
10 *People v. DeLeon*, 157 Misc. 2d 62, 595 N.Y.S.2d 909 (City Crim. Ct. 1993).
11 *People v. Redding*, 109 Misc. 2d 487, 440 N.Y.S.2d 512 (City Crim. Ct. 1981).
- 12 CPL § 170.35(1)(b).
13 CPL § 170.35(1)(c).
14 *People v. Rizzo*, 189 Misc. 2d 649, 735 N.Y.S.2d 916 (Dist. Ct. 2001).
People v. Inserra, 2 Misc. 3d 21, 770 N.Y.S.2d 818 (App. Term 2003), leave to appeal granted, 2 N.Y.3d 741, 778 N.Y.S.2d 467, 810 N.E.2d 920 (2004) and rev'd on other grounds, 4 N.Y.3d 30, 790 N.Y.S.2d 72, 823 N.E.2d 437 (2004).
- 15 *People v. Rizzo*, 189 Misc. 2d 649, 735 N.Y.S.2d 916 (Dist. Ct. 2001).
16 *People v. Rizzo*, 189 Misc. 2d 649, 735 N.Y.S.2d 916 (Dist. Ct. 2001).
17 *People v. Rizzo*, 189 Misc. 2d 649, 735 N.Y.S.2d 916 (Dist. Ct. 2001).
18 *People v. Rizzo*, 189 Misc. 2d 649, 735 N.Y.S.2d 916 (Dist. Ct. 2001).
19 *People v. Hatchett*, 196 Misc. 2d 892, 768 N.Y.S.2d 123 (City Crim. Ct. 2003).
20 *People v. Hatchett*, 196 Misc. 2d 892, 768 N.Y.S.2d 123 (City Crim. Ct. 2003).
- 21 CPL § 170.65.
22 CPL § 170.35(2).
23 *People v. Machado*, 182 Misc. 2d 194, 698 N.Y.S.2d 416 (City Crim. Ct. 1999).
24 *People v. Machado*, 182 Misc. 2d 194, 698 N.Y.S.2d 416 (City Crim. Ct. 1999).
- 25 CPL § 170.35(3)(a).
26 CPL § 170.35(3)(b).
27 *People v. Alejandro*, 70 N.Y.2d 133, 517 N.Y.S.2d 927, 511 N.E.2d 71 (1987).
People v. Figueroa, 164 Misc. 2d 814, 625 N.Y.S.2d 839 (City Crim. Ct. 1995).
People v. Pelt, 157 Misc. 2d 90, 596 N.Y.S.2d 301 (City Crim. Ct. 1993).
- 28 *People v. Alejandro*, 70 N.Y.2d 133, 517 N.Y.S.2d 927, 511 N.E.2d 71 (1987).
People v. Figueroa, 164 Misc. 2d 814, 625 N.Y.S.2d 839 (City Crim. Ct. 1995).
- 29 McKinney's CPL §§ 100.15(1), 100.20, 100.40(1)(c).
30 *People v. Pelt*, 157 Misc. 2d 90, 596 N.Y.S.2d 301 (City Crim. Ct. 1993).

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- 31 [People v. Zagorsky](#), 73 Misc. 2d 420, 341 N.Y.S.2d 791 (County Ct. 1973) (rejected by, [People v. Pregent](#),
142 Misc. 2d 344, 537 N.Y.S.2d 424 (City Ct. 1988)).
- 32 See Ch. 7.
- 33 [People v. Hadley](#), 172 Misc. 2d 697, 658 N.Y.S.2d 814 (City Crim. Ct. 1997).
- 34 [People v. A.S.](#), 179 Misc. 2d 569, 685 N.Y.S.2d 573 (City Crim. Ct. 1998).
- 35 [People v. Gonzalez](#), 184 Misc. 2d 262, 708 N.Y.S.2d 564 (App. Term 2000).
- 36 [People v. Gonzalez](#), 184 Misc. 2d 262, 708 N.Y.S.2d 564 (App. Term 2000).
- 37 [People v. Patterson](#), 185 Misc. 2d 519, 708 N.Y.S.2d 815 (City Crim. Ct. 2000).
- 38 [People v. Patterson](#), 185 Misc. 2d 519, 708 N.Y.S.2d 815 (City Crim. Ct. 2000); [People v. Manson](#), 173
Misc. 2d 806, 661 N.Y.S.2d 773 (City Crim. Ct. 1997) (intentional and knowing failure to register must
be alleged in complaints); [People v. Peterson](#), N.Y.L.J., p. 32 (April 29, 1999) (S. Ct. Kings Co. 1999)
(intentional and knowing failure to register must be alleged).
- 39 [People v. Cobb](#), 2 Misc. 3d 237, 768 N.Y.S.2d 295 (City Crim. Ct. 2003) (failure to allege actual date
does not render accusatory instrument defective).
But cf. [People v. Armfield](#), 189 Misc. 2d 556, 734 N.Y.S.2d 817 (City Crim. Ct. 2001); [People v. Manson](#),
173 Misc. 2d 806, 661 N.Y.S.2d 773 (City Crim. Ct. 1997).
- 40 [People v. Feiler](#), 191 Misc. 2d 390, 742 N.Y.S.2d 526 (Dist. Ct. 2002).
- 41 [People v. Inserra](#), 2 Misc. 3d 21, 770 N.Y.S.2d 818 (App. Term 2003), leave to appeal granted, 2 N.Y.3d
741, 778 N.Y.S.2d 467, 810 N.E.2d 920 (2004) and rev'd, 4 N.Y.3d 30, 790 N.Y.S.2d 72, 823 N.E.2d
437 (2004).
- 42 [People v. Hill](#), 16 Misc. 3d 176, 834 N.Y.S.2d 840 (City Crim. Ct. 2007).
- 43 [People v. Dreyden](#), 15 N.Y.3d 100, 905 N.Y.S.2d 542, 931 N.E.2d 526 (2010).
- 44 [People v. Suber](#), 19 N.Y.3d 247, 946 N.Y.S.2d 552, 969 N.E.2d 770 (2012).
- 45 [People v. Jackson](#), 18 N.Y.3d 738, 944 N.Y.S.2d 715, 967 N.E.2d 1160 (2012).

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Chapter 10. Dismissal of Accusatory Instrument and Adjournment in Contemplation of Dismissal

§ 10:3. Motion to dismiss accusatory instrument— Dismissal in interest of justice

References

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The court must review the statutory factors under [CPL 170.40](#) before an action is dismissed in the interest of justice. [People v. McConnell](#), 11 Misc. 3d 57, 812 N.Y.S.2d 742 (App. Term 2006). In [People v. Berrus](#), 1 N.Y.3d 535, 770 N.Y.S.2d 691, 802 N.E.2d 1089 (2003), the New York Court of Appeals ruled that [CPL 170.40](#) applies to both significant and minor cases alike and held that a simplified traffic information still must be reviewed upon the statutory grounds when a motion is made to dismiss in the furtherance of justice.

An accusatory instrument may be dismissed in the interest of justice.¹ A dismissal in the furtherance of justice depends solely upon the justice that would be served by such a disposition, and does not depend upon the legal or factual merits of the charge, or even the guilt or innocence of the accused.² The court is concerned solely with the principles of justice.³ The motion must be made pursuant to the Criminal Procedure Law.⁴ Even though as a matter of law there may be no basis for dismissal on any ground specified in the statute, the court has judicial discretion where dismissal is required by the existence of some compelling factor, consideration, or circumstance clearly demonstrating that conviction or prosecution of the defendant upon the accusatory instrument would constitute an injustice.⁵ Stated another way, a compelling factor is present if denial of the motion to dismiss would be an abuse of discretion so severe as to shock the conscience.⁶ The court must consider, to the extent applicable, the following in determining whether the compelling factor, consideration, or circumstance exists:

- (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;

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- (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 dismissal on the safety or welfare of the community;
- (h) The impact of dismissal upon the public's confidence 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.⁷
- (j) However, when deciding a motion to dismiss in the interest of justice, the court is not required to engage in a point-by-point catechistic discussion of all 10 statutory factors and, instead, the court must consider the factors individually and collectively in making a value judgment that is based on striking a sensitive balance between the interests of the individual and those of the state.⁸

An order dismissing an accusatory instrument in the interest of justice may be issued upon motion of the people, the court itself, or the defendant.⁹ A dismissal of charges in the interest of justice is less available in felony cases than in misdemeanor cases.¹⁰ In any event, the motion should be granted only where a defendant has demonstrated by a preponderance of the credible evidence that a compelling reason exists to warrant dismissal in the interest of justice.¹¹ In considering the motion, the court must examine and consider the merits of the defendant's application given the factors enumerated in [Section 170.40 of the Criminal Procedure Law](#), and balance the interests of the defendant, the complainant, and the community.¹² Upon issuing an order to dismiss, the court must set forth its reasons on the record.¹³ In dismissing in the interest of justice an information which charges the defendant with illegally obtaining unemployment insurance benefits, the court may find that the prosecutor's actions in circumventing the defendant's state constitutional right to counsel constitutes a compelling factor justifying a dismissal of the charges.¹⁴ The appellate division reversed the lower court's decision dismissing the indictment because the conduct of the attorney general's office in discussing the case with a defendant in the absence of counsel does not warrant the dismissal of the indictment, since it is not considered exceptionally serious misconduct under the statute.¹⁵

While an offer of an adjournment in contemplation of dismissal¹⁶ is inadmissible in any trial, a court may consider the fact of such an offer at a hearing on a motion for dismissal of an information in the interest of justice.¹⁷

The court will deny an application for dismissal in the interest of justice based on a finding that a 15-year-old charged with incestuous rape and sodomy cannot be allowed to be free from the court's supervision to participate in a voluntary treatment program supervised only by the individual's parents.¹⁸

While dismissal of an information in the interest of justice is entirely discretionary with the court, this discretion is neither absolute nor uncontrolled.¹⁹ Instead, the discretion of the court should be founded only on fully deliberated considerations.²⁰ Thus, in a motion brought by the defendant, a lifelong drug user convicted of possession of a hypodermic needle, the court weighed the seriousness and circumstances of the offense; the extent of harm caused; the purpose and effect of imposing upon the defendant a sentence authorized for the offense; and the impact of a dismissal upon the confidence of the public in the criminal justice system in granting a dismissal in the interest of justice.²¹

A defense raised by the defendant, or other evidence that may tend to negate the people's proof at trial, does not fall within the meaning of the "evidence of guilt" factor under the statute.²² This merely raises an issue that is to be litigated at trial,

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rather than to be determined by a judge on a pretrial motion.²³ A motion to dismiss in the interest of justice is not intended to be a substitute for a trial.²⁴

The fact that an accused has no prior criminal record is insufficient to justify dismissal in the interest of justice.²⁵ The fact that an accused is infected with the HIV virus did not warrant automatic dismissal in the interest of justice of felony charges of possession of cocaine with intent to sell, where the defendant was undergoing treatment and was not yet so incapacitated to be unable to commit further offenses.²⁶

The defendant's status as a police officer whose duties included risking her life in undercover drug operations was not a compelling factor warranting the dismissal of drunk-driving charges in the interest of justice.²⁷

Dismissal of charges against a corporation's owner was not required by the existence of some compelling factor, consideration, or circumstance clearly demonstrating that the prosecution or conviction of the owner would constitute or result in an injustice, even though the prosecution and the owner moved to dismiss in satisfaction of corporate guilty pleas, where the corporate substitution would render the court powerless to impose a sentence of imprisonment, and where the file contained several sworn depositions reciting factual allegations bearing on the owner's guilt.²⁸

A driving-while-intoxicated charge against a probably-intoxicated truck driver was dismissed in the interest of justice where: the defendant was seated in his friend's house when an officer peered through the window and advised the defendant and his host that the defendant's truck had to be moved immediately; in response, the defendant drove the truck to the corner, made a three-point turn, and drove back toward his host's house; the officer then stopped the truck, questioned the defendant concerning whether he had been drinking, arrested him, transported him to the police station, and performed a chemical breath test which revealed a reading of 0.13. In doing so, the court relied on the following circumstances: the defendant did not drink and voluntarily drive but rather operated it at the arresting officer's command, and did not speed or operate the vehicle erratically or drive for any meaningful distance; no individual or property was harmed; the defendant's favorable history and character, which included a clean driving record and exemplary employment as a truck driver since 1973; the arresting officer's questionable conduct in directing an apparently impaired or intoxicated individual to operate a motor vehicle; and the harsh consequences to the defendant, who would lose his job, with no significant benefit to society if the defendant was prosecuted.²⁹

A defendant who was charged with endangering the welfare of a child was not entitled to a dismissal of the action in the furtherance of justice, even though the extent of the harm caused by the defendant's actions consisted of an allegation that the child was merely scared; that the defendant did not have a prior criminal record and that the defendant claimed the charge was partially based on a false allegation, where the offence was inherently serious; that the case against the defendant was strong; that the purpose of imposing sentence was deterrence; and that dismissal would affect the safety and welfare of young children and would cause the public to lose confidence in the criminal justice system.³⁰

Reciting the law that the requisite element of intent need only be charged in the accusatory part of the accusatory instrument since intent is an operation of the mind, and, because intent cannot be the subject of a nonhearsay allegation, it is necessary only that there be alleged evidentiary facts from which intent may be inferred, such that the court found that the defendant's conduct in attending an electrician's licensing examination on four occasions, coupled with both his unauthorized removal of pages from the test booklet and the concealment of the same before exiting the examination location, evinced an intent to steal property from the owner so as to support an inference of requisite intent sufficient to establish the facial sufficiency of the information charging petit larceny.³¹

The interest of justice warranted the dismissal of an information charging the defendant with obstruction of governmental administration and disorderly conduct premised on the defendant's actions during an anti-war demonstration, where the defendant was only 17 years old, did not have a criminal record, was an honor student, and was actively involved in community groups. The information did not necessarily support the obstruction charge. The seriousness and extent of harm stemming from disorderly conduct actions were minor, since the conduct consisted of lying on the ground, which caused pedestrians to have to walk around the defendant, and where the defendant had already been wrongfully placed in custody.³²

On appeal, the Appellate Term held that dismissal of a simplified traffic information for leaving the scene of an accident could not be upheld upon dismissal in the interest of justice grounds where the dismissal order did not reveal that the court below had considered the factors set forth in [CPL 170.40](#).³³ See also *People v. Berrus*.³⁴

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Footnotes

- 1 [CPL § 170.30](#).
- 2 [People v. Eubanks](#), 108 Misc. 2d 108, 436 N.Y.S.2d 953 (City Crim. Ct. 1981), order rev'd on other grounds, 114 Misc. 2d 1097, 454 N.Y.S.2d 768 (App. Term 1982).
[People v. Watson](#), 182 Misc. 2d 644, 700 N.Y.S.2d 651 (City Crim. Ct. 1999).
- 3 [People v. Joseph P.](#), 106 Misc. 2d 1075, 433 N.Y.S.2d 335 (J. Ct. 1980).
- 4 [CPL § 170.30](#).
- 5 [CPL § 170.40](#).
See 34 NY Jur 2d, Crim L §§ 2193, 2195, 21 Am Jur 2d, Crim L §§ 448 et seq.
- Forms**
8 Am Jur Pl & Pr Forms, Rev, Criminal Procedure, Forms 91, 92, 97 to 102, 112 to 119, 131 to 140.
- 6 [People v. A.T.](#), 155 Misc. 2d 637, 589 N.Y.S.2d 980 (City Crim. Ct. 1992).
- 7 [CPL § 170.40\(1\)](#).
It was error for the appellate court to treat a case as a calendar control dismissal as a matter of law, since although the conclusion could have been reached that the trial court impermissibly dismissed the information for the failure to prosecute or as a method of calendar control, it was equally apparent that the facts supporting the sua sponte dismissal in the interest of justice were before the trial court. If the court considered the factors listed in the statute, then it would not have been an abuse of discretion to affirm the dismissal despite the fact that such factors were not enumerated on the record. [People v. Henriquez](#), 68 N.Y.2d 679, 505 N.Y.S.2d 596, 496 N.E.2d 685 (1986).
Factors to be considered in dismissing a case in the interest of justice include the nature of crime, the available evidence of guilt, the prior record of the defendant, punishment already suffered by the defendant, the purpose and effect of further punishment, any prejudice resulting to the defendant by the passage of time, and the impact on the public interest of a dismissal. [People v. Izsak](#), 99 Misc. 2d 543, 416 N.Y.S.2d 1004 (City Crim. Ct. 1979).
See [People v. Watson](#), 182 Misc. 2d 644, 700 N.Y.S.2d 651 (City Crim. Ct. 1999).
- 8 [People v. Gragert](#), 1 Misc. 3d 646, 765 N.Y.S.2d 471 (City Crim. Ct. 2003).
- 9 [CPL § 170.40\(2\)](#).
- 10 [People v. Pender](#), 156 Misc. 2d 325, 593 N.Y.S.2d 447 (Sup 1992).
- 11 [People v. Watson](#), 182 Misc. 2d 644, 700 N.Y.S.2d 651 (City Crim. Ct. 1999).
- 12 [People v. Watson](#), 182 Misc. 2d 644, 700 N.Y.S.2d 651 (City Crim. Ct. 1999).
- 13 [CPL § 170.40\(1\)](#).
[People v. Boyer](#), 116 Misc. 2d 931, 459 N.Y.S.2d 344 (County Ct. 1981), order rev'd on other grounds, 58 N.Y.2d 122, 459 N.Y.S.2d 734, 446 N.E.2d 419 (1983).
The trial court did not abuse its discretion when it dismissed informations in the interest of justice since it was not established that the court did not consider all the factors under the statutory provision. [People v. Rickert](#), 58 N.Y.2d 122, 459 N.Y.S.2d 734, 446 N.E.2d 419 (1983).
While dismissal may have been warranted, the record did not indicate that the town justice considered the factors set out in the statute, and the Court of Appeals reversed the order of the county court and

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reinstated the simplified traffic information. *People v. Berrus*, 1 N.Y.3d 535, 770 N.Y.S.2d 691, 802 N.E.2d 1089 (2003).

14 *People v. Eubanks*, 108 Misc. 2d 108, 436 N.Y.S.2d 953 (City Crim. Ct. 1981), order rev'd on other grounds, 114 Misc. 2d 1097, 454 N.Y.S.2d 768 (App. Term 1982).

15 CPL § 170.40(1)(e).

16 *People v. Eubanks*, 114 Misc. 2d 1097, 454 N.Y.S.2d 768 (App. Term 1982).

17 For a discussion of adjournment in contemplation of dismissal, see § 10:5.

18 *People v. Joseph P.*, 106 Misc. 2d 1075, 433 N.Y.S.2d 335 (J. Ct. 1980).

19 *Matter of Patrick B. P.*, 103 Misc. 2d 1102, 427 N.Y.S.2d 694 (Fam. Ct. 1980).

People v. Izsak, 99 Misc. 2d 543, 416 N.Y.S.2d 1004 (City Crim. Ct. 1979).

See *People v. Wingard*, 33 N.Y.2d 192, 351 N.Y.S.2d 385, 306 N.E.2d 402 (1973); *People v. Burke*, 79 Misc. 2d 46, 359 N.Y.S.2d 397 (Dist. Ct. 1974).

20 *People v. Izsak*, 99 Misc. 2d 543, 416 N.Y.S.2d 1004 (City Crim. Ct. 1979).

21 *People v. A.T.*, 155 Misc. 2d 637, 589 N.Y.S.2d 980 (City Crim. Ct. 1992).

22 CPL § 170.40.

People v. Prunty, 101 Misc. 2d 163, 420 N.Y.S.2d 703 (City Crim. Ct. 1979).

23 *People v. Prunty*, 101 Misc. 2d 163, 420 N.Y.S.2d 703 (City Crim. Ct. 1979).

24 *People v. Prunty*, 101 Misc. 2d 163, 420 N.Y.S.2d 703 (City Crim. Ct. 1979).

25 CPL § 210.40.

People v. Varela, 106 A.D.2d 339, 483 N.Y.S.2d 13 (1st Dep't 1984).

See 31 NY Jur 2d, Crim L § 266; 34 NY Jur 2d, Crim L §§ 2281, 2286; 41 Am Jur 2d, Indict §§ 284, 285.

Forms

8 Am Jur Pl & Pr Forms, Rev, Criminal Procedure, Forms 111 et seq.

26 *People v. Pender*, 156 Misc. 2d 325, 593 N.Y.S.2d 447 (Sup 1992).

27 *People v. Figueroa*, 164 Misc. 2d 814, 625 N.Y.S.2d 839 (City Crim. Ct. 1995).

28 *People v. Shaughnessy*, 168 Misc. 2d 53, 642 N.Y.S.2d 487 (Dist. Ct. 1996).

29 *People v. Asche*, 175 Misc. 2d 639, 669 N.Y.S.2d 788 (Dist. Ct. 1998).

30 *People v. Watson*, 182 Misc. 2d 644, 700 N.Y.S.2d 651 (City Crim. Ct. 1999).

31 *People v. Martinez*, 191 Misc. 2d 505, 743 N.Y.S.2d 821 (City Ct. 2002).

32 *People v. Gragert*, 1 Misc. 3d 646, 765 N.Y.S.2d 471 (City Crim. Ct. 2003).

33 *People v. Asher*, 2007 WL 1732775 (N.Y. App. Term 2007).

34 *People v. Berrus*, 1 N.Y.3d 535, 770 N.Y.S.2d 691, 802 N.E.2d 1089 (2003).

1 Criminal Procedure in New York § 10:4 (2d)

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Chapter 10. Dismissal of Accusatory Instrument and Adjournment in Contemplation of Dismissal

§ 10:4. Motion to dismiss prosecutor's information in local criminal court

References

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- West's Key Number Digest, Indictment and Information  144.1(1)

As is the case with other accusatory instruments, a motion to dismiss a prosecutor's information can be made under 170.30 or on grounds of defect under 170.35 or in the interest of justice under 170.40. All provisions are included under the Criminal Procedure Law.

In addition to the remedy of dismissal of a prosecutor's information in the local criminal court, the defendant has an additional motion that may be made at any time after arraignment in the local criminal court upon a prosecutor's information, which was filed at the direction of a grand jury, and before the entry of a guilty plea or commencement of trial.¹ The motion is made in the local criminal court where the prosecutor's information is filed.²

The statute authorizing the district attorney to apply for an adjournment of the proceedings in the local criminal court, in order to present the misdemeanor charge to the grand jury for prosecution by indictment in a superior court, does not violate the concept of due process as being vague, uncertain, or ambiguous.³ Rather, the language is so unmistakably clear as to remove all doubt as to the legislative declaration that the criminal court, upon application, must adjourn its proceedings for a reasonable amount of time pending grand jury action.⁴ Furthermore, the statute is not unconstitutional under the provisions of the United States and New York Constitutions guaranteeing equal protection of the law to all persons charged with a crime.⁵ The statute does not discriminate against any person on the basis of race, creed, color, or any other discriminatory standard.⁶

This statute is not a mandatory statute restricting the grand jury's powers, such that it does not preclude a grand jury from indicting a defendant even if the district attorney has not requested an adjournment for that purpose.⁷

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The motion is made by the defendant on the ground that the evidence before the grand jury is not legally sufficient to support the charge, or the grand jury proceeding was defective.⁸ The criteria to be applied in determining the motion are the same criteria prescribed in the Criminal Procedure Law⁹ governing the disposition of a motion to dismiss an indictment on the grounds of insufficiency of grand jury evidence, or of a defective grand jury proceeding.¹⁰

In addition, if applicable, the general procedural rules to be followed in determining a motion to dismiss an indictment, as set forth in another provision of the Criminal Procedure Law,¹¹ may also be considered for purposes of disposition of the motion.¹² The criteria for determining this motion is discussed in greater detail in later chapters covering motions to dismiss an indictment.¹³

If the court dismisses the prosecutor's information, the court may, upon application of the people, and in the court's discretion, authorize the people to resubmit the charge or the charges to the same or another grand jury.¹⁴ Unless the court authorizes it, the charge or charges may not be resubmitted to a grand jury.¹⁵

A defendant's proper remedy after a grand jury has directed a prosecutor's information to be filed is a motion to dismiss the information in the court that impaneled the grand jury under the statute.¹⁶

Defects which may exist in the proceedings prior to the filing of a prosecutor's information may be presented for consideration by the lower court upon a motion to dismiss the information.¹⁷

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Footnotes

- 1 CPL § 170.50(1).
See 34 NY Jur 2d, Crim L § 2197; 35 NY Jur 2d, Crim L § 3072; 21 Am Jur 2d, Crim L §§ 448 et seq.
Forms
8 Am Jur Pl & Pr Forms, Rev, Criminal Procedure, Forms 91, 92, 97 to 102, 112 to 119, 131 to 140.
- 2 CPL § 170.50(1).
- 3 CPL § 170.20(2).
People v. Butor, 75 Misc. 2d 558, 348 N.Y.S.2d 89 (County Ct. 1973).
See 34 NY Jur 2d, Crim L § 2189; 21 Am Jur 2d, Crim L § 357.
- 4 CPL § 170.20(2).
People v. Butor, 75 Misc. 2d 558, 348 N.Y.S.2d 89 (County Ct. 1973).
- 5 CPL § 170.20(2).
People v. Butor, 75 Misc. 2d 558, 348 N.Y.S.2d 89 (County Ct. 1973).
- 6 CPL § 170.20(2).
People v. Butor, 75 Misc. 2d 558, 348 N.Y.S.2d 89 (County Ct. 1973).
- 7 People v. Miterko, 186 Misc. 2d 337, 717 N.Y.S.2d 843 (Sup 2000).
- 8 CPL § 170.50(1)(a), (b).
- 9 CPL §§ 210.30, 210.35.
- 10 CPL § 170.50(2).
- 11 CPL § 210.45.
- 12 CPL § 170.50(2).

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13 See Chs. 26, 37, and 38.
14 CPL § 170.50(3).
15 CPL § 170.50(3).
16 CPL § 170.50.
People v. Grant, 82 Misc. 2d 695, 370 N.Y.S.2d 398 (City Crim. Ct. 1975).
17 People v. CAI Adjustors Inc., 84 Misc. 2d 221, 375 N.Y.S.2d 554 (City Crim. Ct. 1975).

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1 Criminal Procedure in New York § 10:5 (2d)

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Chapter 10. Dismissal of Accusatory Instrument and Adjournment in Contemplation of Dismissal

§ 10:5. Adjournment in contemplation of dismissal

References

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- West's Key Number Digest, Indictment and Information  144

Under [CPL 170.55](#), courts are possessed of the authority to grant adjournments in contemplation of dismissal. However, it should be noted at the onset of our discussion that courts may impose conditions on the adjournments of contemplation of dismissal and are not obligated to grant unconditional adjournments in contemplation of dismissal. [Powell v. Page](#), 8 Misc. 3d 988, 800 N.Y.S.2d 497 (Sup 2005).

The legislature has provided a unique and useful tool, an adjournment in contemplation of dismissal, for reaching a just conclusion to a case that the prosecution considers marginal, or where there is some other appropriate reason for dismissing a charge in the local criminal court; yet it is desired that some control be maintained over the defendant and the charge for a limited period of time.¹ There are two distinct situations in which the adjournment in contemplation of dismissal is applied.² One relates to cases involving marijuana only,³ and the other applies to all offenses in the local criminal court other than felonies.⁴

Upon or after arraignment upon an information, a simplified information, a prosecutor's information, or a misdemeanor complaint, the court may, before the entry of a plea of guilty or commencement of a trial, on motion of the people or the defendant, and with the consent of the other party, or upon the court's own motion, and with the consent of both the people and the defendant, order that the action be adjourned in contemplation of dismissal.⁵ As a general rule, the state's consent to a request for an adjournment in contemplation of dismissal is required,⁶ but a court always has the independent discretion to grant or deny an application for any adjournment in contemplation of dismissal.⁷

The adjournment in contemplation of dismissal is an adjournment without a date ordered with the view to dismissal of the accusatory instrument in furtherance of justice.⁸ Upon issuing the order, the court must release the defendant on recognizance.⁹ Upon application of the People, made at any time not more than six months after the issuance of an adjournment in contemplation of dismissal, the court may restore the case to the calendar upon a determination that dismissal

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of the accusatory instrument would not be in furtherance of justice, and the action must thereupon proceed.⁹ A court may restore a case to the calendar only if it finds that dismissal of the accusatory instrument would not be in furtherance of justice, and when the People seek restoration of a previously adjourned case, they must affirmatively bear the burden of convincing the court that the interests of justice require that the case not be dismissed.¹⁰ Once a case has been adjourned, the People are required to prove the existence of some compelling factor before the case will be restored to the calendar.¹¹ If the case is not restored within six months, at the expiration of that period, the accusatory instrument is deemed to have been dismissed by the court in the furtherance of justice.¹² The court may, as a condition of an adjournment in contemplation of dismissal, require the defendant to perform services for a public or not-for-profit corporation, association, institution, or agency.¹³ This condition may be imposed only where the defendant has consented to the amount and conditions of the service; the court may not impose conditions in excess of the length of the adjournment.¹⁴ The court may also, as a condition of an adjournment in contemplation of dismissal, where a defendant is under 21 years of age and is charged with a misdemeanor or misdemeanors other than operating a motor vehicle while under the influence of alcohol or drugs pursuant to the Vehicle and Traffic Law,¹⁵ in which the record indicates the consumption of alcohol by the defendant may have been a contributing factor, require the defendant to attend an alcohol awareness program established pursuant to the Mental Hygiene Law.¹⁶

The granting of an adjournment in contemplation of dismissal should not be considered a conviction or an admission of guilt.¹⁷ No person is to suffer any disability or forfeiture as a result of such an order.¹⁸ Upon the dismissal of the accusatory instrument, the arrest and prosecution is considered a nullity, and the defendant should be restored to the status prior to the arrest and prosecution.¹⁹

Although there is no inherent right to an adjournment in contemplation of dismissal, a defendant may not be compelled to relinquish all rights upon its acceptance.²⁰ Therefore, a prosecutor may not condition the adjournment in contemplation of dismissal upon matters extraneous to the criminal process involving the defendant's civil rights, or matters exercising certain constitutional rights.²¹ While a defendant may offer to waive the right to pursue civil remedies, the prosecutor may not obtain this waiver by making the defendant the proverbial "offer he or she cannot refuse."²² The court must examine the adjournment in contemplation of dismissal arrangement on a case-by-case basis to insure that a defendant has not unwittingly entered into an unconstitutional agreement.²³ Once prosecutors have determined that a matter merits dismissal, the defendant's inability, due to indigency, to complete restitution payments is an illegitimate basis for reversing their decision to dismiss.²⁴ A judge's decision in granting an adjournment in contemplation of dismissal is proper, notwithstanding the refusal of the district attorney to consent, where the district attorney is refusing to consent to the adjournment unless the defendants waive their rights to pursue civil remedies against the arresting officers.²⁵ Therefore, the motion to dismiss in the interest of justice is granted by the court without the full consent of the district attorney.²⁶

The court may, in connection with an adjournment in contemplation of dismissal, issue a temporary order of protection as provided in another section of the Criminal Procedure Law,²⁷ requiring the defendant to observe certain specified conditions of conduct.²⁸ Where the local criminal court information, simplified information, prosecutor's information, or misdemeanor complaint charges a crime or violation between the spouses or between parent and child, or between members of the same family or household as the term "members of the same family or household" is defined in another section of the Criminal Procedure Law,²⁹ the court may, as a condition of an adjournment in contemplation of a dismissal order, require that the defendant participate in an educational program addressing the issues of spousal abuse and family violence.³⁰

Among the criteria that may be examined by the court in determining the question of the discretionary grant of an adjournment in contemplation of dismissal are the defendant's character and background, the alleged offense, the defendant's record of prior criminal involvement, and whether the controversy between the parties might more appropriately be decided in another forum, e.g., a pending civil suit or one to be initiated subsequently.³¹

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The statute requires the consent of “the people”³² who are represented in the criminal courts either by the attorney general or the district attorney. This representation is exclusive.³³ However, the statute governing criminal proceedings is but one of three instances where an adjournment in contemplation of dismissal is authorized by a procedural statute.³⁴ Juvenile delinquency proceedings³⁵ and child abuse proceedings³⁶ are the others. In neither of the other two instances in which adjournments in contemplation of dismissal are permitted does the law require any consent, other than that of the petitioning, or prosecuting party in person, as opposed to the public legal officer charged with presenting the petition.³⁷ Therefore, one court has found that the discretion vested in the attorney general or district attorney by the statute³⁸ is a special recognition of the unique, nonreviewable discretion which both those prosecuting officers possess under the law, rather than a positive requirement that it be their consent exclusively which is required to support an application for adjournment in contemplation of dismissal.³⁹ Where the prosecutor does not insist on these prerogatives and consents, by nonappearance, in a cause of which the prosecutor is held to be “aware,” such as a private prosecution by the Internal Revenue Service of a group of tax protesters for allegedly trespassing upon facilities of the IRS, the prosecutor is deemed also to consent to the court's recognition of the litigant as the ultimate party in interest.⁴⁰ Under these circumstances, a joint application to adjourn in contemplation of dismissal will be approved.⁴¹

The statute is clearly applicable to simplified traffic informations.⁴²

An adjournment in contemplation of dismissal pursuant to the Criminal Procedure Law is not a termination favorable to a defendant for purposes of a malicious prosecution action.⁴³ By consenting to the adjournment in contemplation of dismissal, the person concedes that he or she was doing something wrong, and the arrest is considered conclusively lawful in its inception.⁴⁴

Because the court has the discretion to grant or deny an application that the matter be adjourned in contemplation of dismissal, or to grant or deny the state's application to restore the matter to calendar, the court also has the authority to grant a defendant's application to restore an action to the calendar if allowing the action to proceed would be in the furtherance of justice.⁴⁵ The defendant must articulate a valid reason.⁴⁶ What constitutes a sufficient reason for doing so depends on the particular facts and circumstances of the case.⁴⁷ A defendant's change of mind is not sufficient.⁴⁸ The court has considered such factors as whether the defendant misunderstood the mechanism for adjournment in contemplation of dismissal, whether there was undue pressure placed on the defendant to accept the adjournment, or whether the prosecution conditioned its offer on the defendant's waiver of any constitutional rights.⁴⁹ Where a defendant who was charged with resisting arrest and disturbing the peace changed his mind and wished to bring a civil action for malicious prosecution, false arrest, and false imprisonment, such a reason was an insufficient basis for the court to exercise its discretion and restore the action to the calendar.⁵⁰

That part of the statute governing adjournments in contemplation of dismissal that requires court permission before restoring a case to the calendar does not prevent a grand jury from exercising its power to indict a defendant whose case has been adjourned in contemplation of dismissal.⁵¹

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Footnotes

- 1 See CPL §§ 170.55, 170.56.
People v. Meyerson, 165 Misc. 2d 476, 628 N.Y.S.2d 934 (City Crim. Ct. 1995).
- 2 See CPL §§ 170.55, 170.56.
- 3 CPL § 170.56.

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- 4 CPL § 170.55.
5 CPL § 170.55(1).
See 34 NY Jur 2d, Crim L § 2198; 59 NY Jur 2d, False Imp & Mal § 63; 21 Am Jur 2d, Crim L §§
512 et seq.
6 People v. Joseph P., 106 Misc. 2d 1075, 433 N.Y.S.2d 335 (J. Ct. 1980).
7 People v. Joseph P., 106 Misc. 2d 1075, 433 N.Y.S.2d 335 (J. Ct. 1980).
8 CPL § 170.55(2).
9 McKinney's CPL § 170.55(2).
10 People v. Meyerson, 165 Misc. 2d 476, 628 N.Y.S.2d 934 (City Crim. Ct. 1995).
People v. Verardi, 158 Misc. 2d 1039, 602 N.Y.S.2d 318 (City Crim. Ct. 1993).
11 People v. Meyerson, 165 Misc. 2d 476, 628 N.Y.S.2d 934 (City Crim. Ct. 1995).
People v. Verardi, 158 Misc. 2d 1039, 602 N.Y.S.2d 318 (City Crim. Ct. 1993).
12 CPL § 170.55(2).
13 CPL § 170.55(6).
14 CPL § 170.55(6).
15 VTL § 1192.
16 CPL § 170.55(7).
See Mental Hygiene Law § 19.07(6-a).
17 CPL § 170.55(8).
People v. Meyerson, 165 Misc. 2d 476, 628 N.Y.S.2d 934 (City Crim. Ct. 1995).
18 CPL § 170.55(8).
People v. Meyerson, 165 Misc. 2d 476, 628 N.Y.S.2d 934 (City Crim. Ct. 1995).
19 CPL § 170.55(8).
20 People v. Wilmot, 104 Misc. 2d 412, 428 N.Y.S.2d 568 (City Crim. Ct. 1980).
21 People v. Wilmot, 104 Misc. 2d 412, 428 N.Y.S.2d 568 (City Crim. Ct. 1980).
22 People v. Wilmot, 104 Misc. 2d 412, 428 N.Y.S.2d 568 (City Crim. Ct. 1980).
23 People v. Cunningham, 106 Misc. 2d 326, 431 N.Y.S.2d 785 (City Crim. Ct. 1980).
24 People v. Cunningham, 106 Misc. 2d 326, 431 N.Y.S.2d 785 (City Crim. Ct. 1980).
25 Kurlander v. Davis, 103 Misc. 2d 919, 427 N.Y.S.2d 376 (Sup 1980).
26 People v. Wilmot, 104 Misc. 2d 412, 428 N.Y.S.2d 568 (City Crim. Ct. 1980).
27 CPL § 530.12.
28 CPL § 170.55(3).
29 CPL § 530.11(1).
30 CPL § 170.55(4).
31 People v. Pomerantz, 76 Misc. 2d 766, 351 N.Y.S.2d 613 (City Crim. Ct. 1974).
32 CPL § 170.55.
33 County Law § 927; Executive Law § 63(1).
34 CPL § 170.55; See Family Court Act §§ 749, 1039.
35 Family Court Act § 749.
36 Family Court Act § 1039.
37 See Family Court Act §§ 749, 1039.
38 CPL § 170.55.
39 People v. Birnberg, 112 Misc. 2d 870, 447 N.Y.S.2d 597 (City Crim. Ct. 1981).
40 People v. Birnberg, 112 Misc. 2d 870, 447 N.Y.S.2d 597 (City Crim. Ct. 1981).
41 People v. Birnberg, 112 Misc. 2d 870, 447 N.Y.S.2d 597 (City Crim. Ct. 1981).
42 CPL § 170.55(1).
People v. Ruggieri, 100 Misc. 2d 585, 419 N.Y.S.2d 869 (City Ct. 1979).
43 CPL § 170.55.

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44 Hollender v. Trump Village Co-op., Inc., 84 A.D.2d 574, 443 N.Y.S.2d 437 (2d Dep't 1981), order modified, 58 N.Y.2d 420, 461 N.Y.S.2d 765, 448 N.E.2d 432 (1983).
People v. Meyerson, 165 Misc. 2d 476, 628 N.Y.S.2d 934 (City Crim. Ct. 1995).

45 Hollender v. Trump Village Co-op., Inc., 84 A.D.2d 574, 443 N.Y.S.2d 437 (2d Dep't 1981), order modified, 58 N.Y.2d 420, 461 N.Y.S.2d 765, 448 N.E.2d 432 (1983).

46 People v. Meyerson, 165 Misc. 2d 476, 628 N.Y.S.2d 934 (City Crim. Ct. 1995).

47 People v. Meyerson, 165 Misc. 2d 476, 628 N.Y.S.2d 934 (City Crim. Ct. 1995).

48 People v. Meyerson, 165 Misc. 2d 476, 628 N.Y.S.2d 934 (City Crim. Ct. 1995).

49 People v. Meyerson, 165 Misc. 2d 476, 628 N.Y.S.2d 934 (City Crim. Ct. 1995).

50 People v. Meyerson, 165 Misc. 2d 476, 628 N.Y.S.2d 934 (City Crim. Ct. 1995).

51 People v. Miterko, 186 Misc. 2d 337, 717 N.Y.S.2d 843 (Sup 2000).

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1 Criminal Procedure in New York § 10:6 (2d)

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§ 10:6. Adjournment in contemplation of dismissal —Marijuana cases

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[Section 170.56 of the New York State Criminal Procedure Law](#) governs cases of adjournment in contemplation of dismissal concerning marijuana cases. However, this section is strictly and exclusively limited to cases concerning marijuana and not the other matters of adjournment in contemplation of dismissal which are more generally governed under 170.55. [People v. Yaghoubi](#), 10 Misc. 3d 406, 802 N.Y.S.2d 913 (Dist. Ct. 2005).

A special procedure has been provided by the legislature for adjournment in contemplation of dismissal of cases involving marijuana.¹ An adjournment in contemplation of dismissal under this section of the statute is a singular application of the law, which no other defendant receives even under the companion section of the statute,² which applies to crimes other than drug-related ones.³ If the sole remaining counts charge a violation of the Penal Law relating to the possession of marijuana, and the charge is based upon an accusatory instrument other than a felony complaint, the court, upon motion of the defendant, may order all proceedings suspended and the action adjourned in contemplation of dismissal.⁴ If the court finds that the adjournment would not be necessary or appropriate, and sets forth, on the record, the reasons for those findings, the court may dismiss the accusatory instrument in the furtherance of justice.⁵ Neither remedy is available to the defendant, however, if the defendant has previously been granted an adjournment in contemplation of dismissal; previously been granted a dismissal under this section; previously been convicted of any offense involving controlled substances; previously convicted of a crime, and the district attorney does not consent; or has previously been adjudicated a youthful offender on the basis of any act involving a controlled substance, and the district attorney does not consent.⁶

§ 10:6.Adjournment in contemplation of..., 1 Criminal Procedure...

The district attorney's consent has been held not to be required for an adjournment in contemplation of dismissal under the statute governing marijuana cases,⁷ even where the defendant has been granted a prior adjournment in contemplation of dismissal under the section governing nondrug-related crimes.⁸

Upon adjourning the action in contemplation of dismissal, the court must set and specify appropriate conditions for the adjournment.⁹ The conditions may include placing the defendant under the supervision of any public or private agency.¹⁰ At any time prior to dismissal, the court may modify the conditions to extend or reduce the term of the adjournment, except that the total period of the adjournment may not exceed 12 months.¹¹ If the defendant violates any condition fixed by the court, the court may revoke the order and restore the case to the calendar, and the prosecution must proceed.¹² If the case is not restored to the calendar during the period fixed by the court, the accusatory instrument is considered to have been dismissed in the furtherance of justice.¹³

At the time of the dismissal of the charges, the court must order all official records and papers relating to the defendant's arrest and prosecution, whether on file with the court, a police agency, or the New York State Division of Criminal Justice Services, be sealed; and they shall not be made available to any person, public, or private agency, without court order, for the purpose of determining whether in subsequent proceedings, the person qualifies under this section for a dismissal or adjournment in contemplation of dismissal.¹⁴

When an order is granted dismissing the charges and sealing the records, the arrest and prosecution are deemed a nullity, and the defendant should be restored, in the law's sight, to the status occupied before the arrest and prosecution.¹⁵

If the defendant is arraigned in a superior court on an indictment where the sole remaining counts are the same as those set forth above, this section is available to the defendant upon motion in the superior court.¹⁶ An adjournment in contemplation of dismissal under the statute involving marijuana cases is not a dismissal on the merits, nor is it a conviction.¹⁷ Rather, it is a remedy offered to first offenders accused of marijuana possession, and affords them an opportunity not given to them by other provisions of law to get back the original records of an arrest, as well as all other evidence that they were ever arrested.¹⁸

Adjournment in contemplation of dismissal under the section dealing with possession of marijuana requires that all records be sealed so that they may not be made available to any person, public, or private agency.¹⁹ The court may not enjoin or order police officers not to testify as to the events of the arrest; however, they may not use any of the reports, records, or papers relating to the arrest.²⁰

The language of the statute makes it clear that the only one who is entitled to an adjournment in contemplation of dismissal is a person who has a clean record, is in trouble for the first time on a drug-related charge, and the sole dangerous drug involved is marijuana.²¹ This is a technical procedure which can only be met by a strict application of the conditions found in the statute.²²

The adjournment in contemplation of dismissal, in cases involving marijuana, does not determine the action, but is a nullification of an arrest in criminal proceedings by operation of law.²³

In *People v. Abramo*,²⁴ the Court denied the application for an adjournment in contemplation of dismissal under CPL 170.56 where the defendant was charged in three separate informations with selling marijuana in violation of Penal Law 221.40 on three separate occasions at a university campus. The Court held that the defendant engaged in a pattern of behavior on multiple occasions thus committing the violation numerous times and should not be considered as a first time offender. Merely because he was not arrested after the first sale the Court concluded, did not entitle him to the benefits of CPL 170.56.

Footnotes

- 1 CPL § 170.56.
See 33 NY Jur 2d, Crim L § 1470; 34 NY Jur 2d, Crim L §§ 2199, 2290.
- 2 CPL § 170.55.
- 3 *People v. Mann*, 83 Misc. 2d 442, 372 N.Y.S.2d 902 (Dist. Ct. 1975).
- 4 CPL § 170.56(1).
- 5 CPL § 170.56(1).
- 6 CPL § 170.56(1).
A defendant may not be granted an adjournment in contemplation of dismissal in cases involving marijuana without the district attorney's consent, where the defendant has been granted a prior adjournment in contemplation of dismissal under the statute. CPL §§ 170.55, 170.56. *People v. Ford*, 104 Misc. 2d 458, 428 N.Y.S.2d 612 (City Crim. Ct. 1980).
- 7 CPL § 170.56(1)(a).
- 8 CPL § 170.55.
People v. Ford, 104 Misc. 2d 458, 428 N.Y.S.2d 612 (City Crim. Ct. 1980).
- 9 CPL § 170.56(2).
- 10 CPL § 170.56(2).
- 11 CPL § 170.56(2).
- 12 CPL § 170.56(2).
- 13 CPL § 170.56(2).
- 14 CPL § 170.56(3).
CPL § 160.50(1)(d) provides that records of a person in whose favor a criminal action has terminated shall be made available to the person accused or to the person's designated agent, and shall also be made available to a prosecutor in any proceeding in which the accused has moved for an order pursuant to CPL § 170.56, adjournment in contemplation of dismissal in cases involving marijuana.
- 15 CPL § 170.56(4).
- 16 CPL § 210.46.
- 17 *People v. Campo*, 71 Misc. 2d 6, 335 N.Y.S.2d 199 (City Ct. 1972).
- 18 *People v. Campo*, 71 Misc. 2d 6, 335 N.Y.S.2d 199 (City Ct. 1972).
- 19 *People v. A*, 99 Misc. 2d 295, 415 N.Y.S.2d 919 (Crim. Ct. 1978).
- 20 *People v. A*, 99 Misc. 2d 295, 415 N.Y.S.2d 919 (Crim. Ct. 1978).
- 21 CPL § 170.56.
People v. Mann, 83 Misc. 2d 442, 372 N.Y.S.2d 902 (Dist. Ct. 1975).
- 22 *People v. Mann*, 83 Misc. 2d 442, 372 N.Y.S.2d 902 (Dist. Ct. 1975).
- 23 *Kushner v. De La Rosa*, 72 Misc. 2d 319, 338 N.Y.S.2d 645 (Sup 1972).
- 24 *People v. Abramo*, 16 Misc. 3d 306, 834 N.Y.S.2d 846 (Dist. Ct. 2007).

1 Criminal Procedure in New York § 10:7 (2d)

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§ 10:7. Adjournment in contemplation of dismissal —Misdemeanor cases in superior court

References

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On or after the arraignment in a superior court on an indictment where the sole remaining count or counts charge a misdemeanor offense, and before the entry of a plea of guilty or commencement of a trial, the court, on motion of the prosecution or the defendant and with the other party's consent, or on the court's own motion with the consent of both parties, may order that all proceedings be suspended and the action adjourned in contemplation of dismissal. ¹

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Footnotes

¹ [McKinney's CPL § 210.47](#).
See [McKinney's CPL § 170.55](#).

1 Criminal Procedure in New York § 10:8 (2d)

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§ 10:8. Adjournment in contemplation of dismissal —Referring selected felonies to dispute resolution

References

West's Key Number Digest

- West's Key Number Digest, Indictment and Information  144

Upon or after arraignment in a local criminal court upon a felony complaint, or upon or after arraignment in a superior court pursuant to an indictment or superior court information, and before final disposition, the court, with the consent of the prosecution and of the defendant, and with reasonable notice to the victim and an opportunity for the victim to be heard, may order that the action be adjourned in contemplation of dismissal for the purpose of referring the action to a community dispute center.¹ However, the court may not order any action adjourned in contemplation of dismissal if the defendant is charged with a Class A felony, a violent felony offense, any drug offense involving the possession and sale of controlled substances, a felony upon the conviction of which the defendant must be sentenced as a second felony offender, a second violent felony offender or a persistent violent felony offender, or a felony upon the conviction of which the defendant may be sentenced as a persistent felony offender.²

“Victim of a felony” means any person alleged to have sustained physical or financial injury to the person or property as a direct result of the crime or crimes charged in a felony complaint, superior court information, or indictment.³

Upon issuing an order adjourning an article in contemplation of dismissal, the court must release the defendant on his or her own recognizance and refer the action to a dispute resolution center which must advise the district attorney as to whether the charges against the defendant have been resolved no later than 45 days after the action has been referred to the center.⁴ If the defendant has agreed to pay a fine, restitution, or reparation, the district attorney must be advised every 30 days as to the status of the fine, restitution, or reparation.⁵ Upon application of the prosecution made at any time, but not more than six months after the issuance of an order adjourning an action in contemplation of dismissal, the court may restore the action to the calendar upon a determination that dismissal of the accusatory instrument would not be in the furtherance of justice.⁶

§ 10:8.Adjournment in contemplation of dismissal—Referring..., 1 Criminal Procedure...

Where the defendant has agreed to pay a fine, restitution, or reparation, but has not paid such fine, restitution, or reparation, upon application of the prosecution made at any time not more than one year after the issuance of an order adjourning an action in contemplation of dismissal, the court may restore the action to the calendar upon a determination that the defendant has failed to pay the fine, restitution, or reparation.⁷

If an action has not been restored to the calendar within six months, or where the defendant has agreed to pay a fine, restitution, or reparation but has not paid such fine, restitution, or reparation within one year of the issuance of an order adjourning the action in contemplation of dismissal, the accusatory instrument shall be considered to have been dismissed by the court in furtherance of justice at the expiration of the six-month or one-year period.⁸ Upon dismissal of an action, the arrest and prosecution shall be deemed a nullity, and the defendant shall be restored to the status he or she occupied before the arrest and prosecution.⁹ All papers and records relating to the action that has been dismissed shall be subject to the sealing provisions of the Criminal Procedure Law.¹⁰

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Footnotes

- 1 CPL § 215.10.
- 2 CPL § 215.10.
- 3 CPL § 215.20.
- 4 CPL § 215.30.
- 5 CPL § 215.30.
- 6 CPL § 215.30.
- 7 CPL § 215.30.
- 8 CPL § 215.40.
- 9 CPL § 215.40.
- 10 CPL § 215.40.
See CPL § 160.50.

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1 Criminal Procedure in New York § 10:9 (2d)

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§ 10:9. Procedure upon dismissal—Return of fingerprints, photographs, and sealing of arrest record

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A key consideration whenever any records of arrest are sealed is the fact that a prosecutor is unable to use those records in further matters, particularly when making sentence recommendations at subsequent court proceedings on new charges. This was the situation the New York Court of Appeals faced in [Katherine B. v. Cataldo](#), 5 N.Y.3d 196, 800 N.Y.S.2d 363, 833 N.E.2d 698 (2005). In *Katherine B.*, the prosecution attempted to use sealed records of prior criminal actions that were terminated in favor of the defendant for purposes of making sentence recommendations. However, the court ruled that as the prior action was dismissed in favor of the defendant, such sealing of records under CPL 160.5 controlled that the prosecutor was unable to use these matters in the subsequent sentencing proceeding.

If the action terminates in favor of the defendant, the record of the action or proceeding must be sealed, and identifying information, including fingerprints and photographs, must be returned.¹ Also, all official records and papers must be sealed and not be made available to any person or agency, whether public or private.² A report of the termination of the action or proceeding in favor of the accused is sufficient notice of sealing to the Commissioner of the Division of Criminal Justice Services unless the report also indicates that the court directed that the record not be sealed in the interest of justice.³ Where the court has determined that sealing is not in the interest of justice, the clerk of the court must include notification of that determination in any report to the Division of Criminal Justice of the disposition of the action or proceeding.⁴ Termination of a criminal action in favor of the accused generally means a dismissal of the entire accusatory instrument or a verdict of complete acquittal.⁵ Several other orders dismissing the action are included, and for more particularity, counsel should examine the statute.⁶ This

§ 10:9.Procedure upon dismissal—Return of fingerprints,...., 1 Criminal Procedure...

statutory provision creates a privilege to insure that one who is charged but not convicted of an offense suffers no stigma as the result of having once been the subject of an unsustained accusation, and it imposes a continuing obligation on the court to shield the official records from disclosure.⁷

The dismissing court seals the record itself without any motion on the part of defense counsel.⁸ The court's action in sealing the record is mandatory, unless a motion is made by the district attorney upon five-days' notice to the defendant or the defendant's attorney, or the court itself makes its own motion again upon five-days' notice to the defendant or his or her attorney.⁹ If no motion is made, or if it is denied once made, the record of the action or proceeding must be sealed, and the clerk of the court must immediately notify the Commissioner of the Division of Criminal Justice Services and the heads of all appropriate police departments and other law enforcement agencies that the action has been terminated in favor of the accused, and unless the court has directed otherwise, that the record of the action or proceeding has been sealed.¹⁰ All photographs of the defendant, and the photographic plate or proof, and all palm prints and fingerprints taken of the defendant, and all duplicates and copies must be returned to the defendant or the defendant's attorney.¹¹ If fingerprints are to be retained under the statute, it is incumbent upon the state to demonstrate on the record the need for the retention, and the court must make findings accordingly.¹² The Court of Appeals was presented with the issue of whether suppression of in-court identification testimony is required where there has been a violation of the statute which requires that all photographs of the defendant are to be returned to the defendant or his or her attorney.¹³ Although the statutorily conferred right to the return of one's photograph serves important purposes and protects important interests, the infringement on that right does not implicate constitutional considerations such as to require the sanction of suppression.¹⁴ To require the remedy of suppression for a violation of this statute, without more, would impermissibly expand the exclusionary rule and would be inappropriate particularly where the violation has no bearing on the reliability of the identification process and no relevance to the determination of the defendant's guilt or innocence at trial.¹⁵

If any police department or the criminal justice services has transmitted copies of the prints to any United States governmental agency, they must immediately request the United States governmental agency to return the prints to the forwarding agency so that they may then be returned to the defendant.¹⁶ In addition, all official records and papers on file with the Division of Criminal Justice Services, or any court, police agency, or prosecutor's office must be sealed and not be made available to any person or public or private agency.¹⁷ "Official records and papers" include judgments and court orders but not published opinions, decisions, or records and briefs on appeal.¹⁸

The records must be made available to the accused person or to any designated person.¹⁹ In addition, the records will be made available to a prosecutor in any proceeding where the accused has moved for an order dismissing the action in contemplation of dismissal, when the charge involves the possession of marijuana under the Criminal Procedure Law.²⁰ Further, the information will be made available to a law enforcement agency upon an ex parte motion in any superior court if the agency demonstrates to the court's satisfaction that justice requires the availability of the records.²¹ Courts have interpreted this provision as applying only when the criminal justice or government agency is seeking to unseal records for use in a criminal investigation, the reasoning that the statute's language permitting an ex parte application strongly suggests the legislature's concern for protecting the confidentiality of criminal investigations with the need for an ex parte motion not being the same when the records are being used in a civil proceeding.²² In addition, when the accused has made an application for a license to possess guns, the information may be made available to any state or local officer with the responsibility for the issuance of the license.²³ The statute also requires that the records be made available to any prospective employer of a person applying for employment as a police officer or peace officer as long as every such person is furnished with a copy of all records obtained and afforded an opportunity to explain the records.²⁴

The fact that a residential eviction will be based on acts that would constitute a crime does not transform a housing court proceeding into a criminal case to support unsealing the records pursuant to the law enforcement agency's exception to the rule requiring the sealing of all records following the dismissal of a criminal case.²⁵ The court erred in granting the prosecution an order unsealing criminal records for use in an eviction proceeding pending in housing court where the prosecution failed to show a compelling need for those records sufficient to justify the extraordinary remedy of unsealing the records where it was

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not shown that the information in the records could not be obtained through other means, including testimony of the officers who executed the search warrant, and where the special prosecutor could have brought the issue to the court's attention before the criminal case was sealed.²⁶

The records must also be made available to the State Division of Parole when the accused is on parole supervision as a result of conditional release, or a parole release granted by the State Board of Parole, and the arrest, which is the subject of the inquiry, is one which occurred while the accused was under supervision.²⁷ The probation department responsible for the supervision of the accused must also be provided with the records when the arrest, which is the subject of the inquiry, is one which occurred while the accused was under supervision.²⁸

Even if the action is not terminated completely in the defendant's favor, when the criminal action terminates with the defendant's conviction for a traffic offense, or a violation other than loitering for the purposes of prostitution, or where a driving while intoxicated charge is reduced to a driving while ability is impaired charge, the clerk of the court where the criminal action or proceeding was terminated must immediately notify the Commissioner of the Division of Criminal Justice Services and the heads of all appropriate police departments and other law enforcement agencies that the action has been terminated by a conviction.²⁹ A report of the termination of the action or proceeding by conviction of a traffic violation or a violation other than a violation of loitering or loitering for the purposes of prostitution or the violation of operating a motor vehicle while ability is impaired will be sufficient notice of sealing to the Commissioner of the Division of Criminal Justice Services unless the report also indicates that the court directed that the record not be sealed in the interest of justice.³⁰ Where the court has determined that sealing is not in the interest of justice, the clerk of the court will include notification of that determination in any report to the Division of Criminal Justice Services of the disposition of the action or proceeding.³¹ Either the district attorney or the judge may make a motion giving the defendant five-days' notice and showing why the interest of justice would be served by the refusal to seal the record of the action or proceeding.³²

In addition, relief under the statute is not to be automatically denied to a petitioner who has a criminal record, without the further showing that the interests of justice require the denial.³³ Although the extent of one's past criminal record may be one factor among others in determining whether the requested relief should be granted, that factor standing alone does not automatically preclude the type of relief covered by the statute.³⁴ Rather, each court must proceed on a case-by-case basis and consider all factors presented before granting or denying the requested relief that photographs and fingerprints, as well as official records relating to the arrest or prosecution, be returned.³⁵

The broad and general purpose of the statute regarding the return of every photograph and fingerprint, after a criminal proceeding has been terminated in the defendant's favor, is to protect the rights of privacy and enhance the fundamental principles of the "presumption of innocence" of an accused.³⁶ The provisions of the statute directing the forthwith return of the photos, with certain "interest of justice" exceptions, should be read in conjunction with another provision of the Criminal Procedure Law³⁷ and the Executive Law.³⁸ A rational and logical reading of these sections shows that it was designed to place a successful defendant in the same position occupied prior to arrest.³⁹ The statutory scheme was intended to remove the stigma of the alleged criminal activity and its adverse effect on an accused, thereby affording protection to the accused in the pursuance of employment, education, professional licensing, and insurance opportunities.⁴⁰ However, it was never intended to immunize a defendant from the operation of a law enforcement official's investigatory display of a photograph in contravention of the statute.⁴¹ A proper recognition of the legislative purpose behind the record-sealing provision strongly opposes an interpretation that would encompass forensic evidence collected prior to the institution of any criminal proceeding and having no probative value.⁴²

The word "forthwith" under the statute does not require instantaneous delivery of the material, since a rational reading of the statute dictates that compliance should be measured by whether the governmental agency returned the photograph and sealed the record within a reasonable amount of time and in a reasonable manner.⁴³

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A waiver of the right to the return of fingerprints in exchange for the dismissal of all charges is inherently coercive and constitutes an impermissible condition which is inconsistent with the purpose and thrust of the statute.⁴⁴

When a criminal action or proceeding is terminated against a person by the entry of a waiver of a hearing pursuant to [Vehicle and Traffic Law § 1192\(10\)\(c\)](#), the court or the clerk of the court must immediately notify the Commissioner of the Division of Criminal Justice Services and the heads of all appropriate police departments and other law enforcement agencies that a waiver has been entered and that the record of the action be sealed when the person reaches the age of 21 or three years from the date of commission of the offense, whichever is the greater period of time.⁴⁵ At the expiration of such period, the Commissioner and the heads of all appropriate police departments and other law enforcement agencies must return to the defendant any photographs or fingerprints taken of the defendant and seal all official records and papers, as required by, and in accordance with, provisions of the Criminal Procedure Law.⁴⁶

Where a person under the age of 21 is referred by the police to the Department of Motor Vehicles for action pursuant to [Vehicle and Traffic Law §§ 1192-a or 1194-a](#), and a finding in the motorist's favor is rendered, the Commissioner of the Department of Motor Vehicles must, no later than three years from the date of the commission of the offense or when such person reaches the age of 21, whichever period of time is greater, notify the Commissioner of the Division of Criminal Justice Services and the heads of all appropriate law enforcement agencies that such finding was rendered; and, upon receipt of such notice, those agencies must return to the defendant any photographs or fingerprints taken of the defendant and seal all official records and papers, as required by, and in accordance with, provisions of the Criminal Procedure Law,⁴⁷ except that if no such notice is received, then those agencies must, after three years from the date of the commission of the offense or when the person reaches the age of 21, whichever is the greater period of time, return to the defendant any photographs or fingerprints taken of the defendant and seal all official records and papers, as required by, and in accordance with, provisions of the Criminal Procedure Law.⁴⁸ Records which the prosecution moved to retain unsealed following the dismissal of time-barred Medicaid fraud charges against the defendant were not official records under the statute requiring the sealing of all official records upon the termination of a criminal prosecution in a defendant's favor.⁴⁹ Various bank and Medicaid service-provider records were not created as part of the investigation or litigation of the fraud charges, but were maintained as part of the business of banking and of providing health care services.⁵⁰ Moreover, the interests of justice test under the statute providing for the sealing of official records indicates that the records, many of which could not be duplicated, should remain unsealed where they were necessary to prove in a civil case to recover funds that the defendant had wrongfully obtained funds from New York's Medicaid system.⁵¹

Medicaid claim forms, Medicaid remittance statements, and Medicaid payment checks pertaining to the defendant's contractual relationships with the State Department of Social Services, and used in the arrest and prosecution of the defendant for larceny and for offering a false statement for filing, were not required to be sealed following the defendant's acquittal, where the documents were created in the regular course of business prior to the commencement of the criminal proceeding; the documents were not records of the prosecutor, court, or police agency; and where the documents were innocuous on their face.⁵²

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Footnotes

- 1 [CPL § 160.50\(1\)](#).
See 29 NY Jur 2d, Cts & Jud § 462; 34 NY Jur 2d, Crim L §§ 2075, 2199; 35 NY Jur 2d, Crim L §§ 3241, 3243 to 3245, 3251, 3252, 3254; 59 NY Jur 2d, False Imp & Mal § 63; 45 NY Jur, Per & Lic § 14.5.
[People v. White](#), 169 Misc. 2d 89, 642 N.Y.S.2d 492 (Sup 1996).
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§ 10:9.Procedure upon dismissal—Return of fingerprints,...., 1 Criminal Procedure...

Right of exonerated arrestee to have fingerprints, photographs, or other criminal identification or arrest records expunged or restricted, 46 ALR3d 900.

Forms

NY Pattern Jury Instructions, PJI 3:50; 8 Am Jur Pl & Pr Forms, Rev, Criminal Procedure, Forms 441 et seq.

2 CPL § 160.50(1)(c).

Where the criminal action had not terminated in favor of the defendant, the record could not be sealed, since only after the time to file a notice of appeal has expired may a case which has been dismissed be considered to have terminated in favor of the defendant. The court further stated that if the state could establish that they did, in fact, file a timely notice of appeal, the records should not have been sealed and could be unsealed when notice is given to the defendant. *Matter of Blount*, 116 Misc. 2d 975, 456 N.Y.S.2d 970 (Sup 1982).

3 CPL § 160.50(2).

4 CPL § 160.50(2).

5 CPL § 160.50(3).

6 CPL § 160.50(3).

7 *People v. Anthony R.*, 170 Misc. 2d 626, 651 N.Y.S.2d 1009 (County Ct. 1996).

8 See CPL § 160.50.

9 CPL § 160.50(1).

10 CPL § 160.50(1).

11 CPL § 160.50(1)(a).

12 CPL § 160.50(1).

People v. Joseph P., 106 Misc. 2d 1075, 433 N.Y.S.2d 335 (J. Ct. 1980).

13 McKinney's CPL § 160.50(1)(a).

People v. Patterson, 78 N.Y.2d 711, 579 N.Y.S.2d 617, 587 N.E.2d 255 (1991).

14 McKinney's CPL § 160.50(1)(a).

People v. Patterson, 78 N.Y.2d 711, 579 N.Y.S.2d 617, 587 N.E.2d 255 (1991).

15 McKinney's CPL § 160.50(1)(a).

People v. Patterson, 78 N.Y.2d 711, 579 N.Y.S.2d 617, 587 N.E.2d 255 (1991).

16 CPL § 160.50(1)(b).

17 CPL § 160.50(1)(c).

18 CPL § 160.50(1)(c).

19 CPL § 160.50(1)(d).

20 CPL § 160.50(1)(d).

See CPL §§ 170.56, 210.46.

21 CPL § 160.50(1)(d).

Matter of Blount, 116 Misc. 2d 975, 456 N.Y.S.2d 970 (Sup 1982) (prosecutor as not constituting law enforcement agency to unseal court records by ex parte application).

People v. Canales, 174 Misc. 2d 387, 664 N.Y.S.2d 228 (Sup 1997).

22 *People v. Canales*, 174 Misc. 2d 387, 664 N.Y.S.2d 228 (Sup 1997).

23 CPL § 160.50(1)(d).

24 CPL § 160.50(1)(d).

25 *People v. Canales*, 174 Misc. 2d 387, 664 N.Y.S.2d 228 (Sup 1997).

26 *People v. Canales*, 174 Misc. 2d 387, 664 N.Y.S.2d 228 (Sup 1997).

27 CPL § 160.50(1)(d).

28 CPL § 160.50(1)(d).

29 CPL § 160.55(1).

See 35 NY Jur 2d, Crim L § 3251.

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§ 10:9.Procedure upon dismissal—Return of fingerprints,...., 1 Criminal Procedure...

Right of exonerated arrestee to have fingerprints, photographs, or other criminal identification or arrest records expunged or restricted, 46 ALR3d 900.

Forms

8 Am Jur Pl & Pr Forms, Rev, Criminal Procedure, Forms 441 et seq.

30

CPL § 160.55(2).

People v. Roe, 165 Misc. 2d 554, 628 N.Y.S.2d 997 (Sup 1995).

31

CPL § 160.55(2).

32

CPL § 160.55.

33

CPL § 160.50.

People ex rel. Phoenix v. District Attorney of Onondaga County, 95 Misc. 2d 573, 407 N.Y.S.2d 790 (County Ct. 1978).

34

People ex rel. Phoenix v. District Attorney of Onondaga County, 95 Misc. 2d 573, 407 N.Y.S.2d 790 (County Ct. 1978).

35

People ex rel. Phoenix v. District Attorney of Onondaga County, 95 Misc. 2d 573, 407 N.Y.S.2d 790 (County Ct. 1978).

36

CPL § 160.50(1)(a).

People v. Anderson, 97 Misc. 2d 408, 411 N.Y.S.2d 830 (Sup 1978).

37

CPL § 160.60.

See 35 NY Jur 2d, Crim L §§ 3250, 3256.

38

Executive Law § 296(14).

39

People v. Anderson, 97 Misc. 2d 408, 411 N.Y.S.2d 830 (Sup 1978).

40

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See Menard v. Mitchell, 430 F.2d 486 (D.C. Cir. 1970).

People v. McGurk, 229 A.D.2d 895, 645 N.Y.S.2d 923 (3d Dep't 1996); People v. White, 169 Misc. 2d 89, 642 N.Y.S.2d 492 (Sup 1996).

41

People v. London, 124 A.D.2d 254, 508 N.Y.S.2d 262 (3d Dep't 1986); People v. Anderson, 97 Misc. 2d 408, 411 N.Y.S.2d 830 (Sup 1978).

42

People v. McGurk, 229 A.D.2d 895, 645 N.Y.S.2d 923 (3d Dep't 1996).

43

CPL § 160.50(1)(a).

People v. Anderson, 97 Misc. 2d 408, 411 N.Y.S.2d 830 (Sup 1978).

44

CPL § 160.50.

People v. Ricci, 113 Misc. 2d 103, 448 N.Y.S.2d 610 (City Ct. 1980).

45

McKinney's CPL § 160.55(5)(a).

46

McKinney's CPL § 160.55(5)(a).

See McKinney's CPL § 160.50(1)(a), (b), (c).

47

McKinney's CPL § 160.55(5)(b).

See McKinney's CPL § 160.50(1)(a), (b), (c).

48

McKinney's CPL § 160.55(5)(c).

See McKinney's CPL § 160.50(1)(a), (b), (c).

49

People v. Roe, 165 Misc. 2d 554, 628 N.Y.S.2d 997 (Sup 1995).

50

People v. Roe, 165 Misc. 2d 554, 628 N.Y.S.2d 997 (Sup 1995).

51

People v. Roe, 165 Misc. 2d 554, 628 N.Y.S.2d 997 (Sup 1995).

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- West's Key Number Digest, [Bail](#) 39 to 97(1)

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- [West's McKinney's Forms - Criminal Procedure Law \(MCF-CPL\)](#)
- [New York Practice Series - Criminal Law \(NYPRAC-CRIM\)](#)

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- Muldoon, [Handling a Criminal Case in New York](#) §§ 4:22 to 4:81
- Greenberg, Marcus, Fahey, and Cary, [New York Criminal Law](#) § 25:25
- [West's McKinney's Forms Criminal Procedure Law](#) §§ 520:14, 520:15, 530:14 to 530:31

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- Buro, [Bail—Defining Sufficient Sureties: The Constitutionality of Cash-Only Bail. State v. Briggs, 666 N.W.2D 573 \(Iowa 2003\), 35 Rutgers L.J. 1407 \(Summer, 2004\)](#)

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- Helland and Tabarrok, [The Fugitive: Evidence on Public Versus Private Law Enforcement from Bail Jumping](#), 47 J.L. & Econ. 93 (April, 2004)

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1 Criminal Procedure in New York § 11:05 (2d)

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§ 11:05. Bail Reform Act of 2019

References

The newly enacted Bail Reform Act of 2019, which takes effect on January 1, 2020, drastically reduces the use of cash bail through mandatory release, and provides additional procedural and due process safeguards.

The bill has a mandatory Desk Appearance ticket (DAT) provision that provides court notifications for everything up to an E Felony. At the arrest phase, the bill mandates that an arresting officer must issue a Desk Appearance Ticket in all cases except those where the arrest is for a Class A, B, C, or D felony or a violation of some sex offenses, escape and bail jumping. There are circumstances where the police are not required to issue DATs even on eligible case, for example, if the court can issue an order of protection or suspend/revoke a driver's license. The arrestee “may” provide contact information to receive court notifications, including a phone number or e-mail address.

The bill has a mandatory release or release with non-monetary conditions for almost all misdemeanors and non-violent felonies. All person charged with misdemeanors (except sex offenses and DV contempt), non-violent felonies, robbery in the second and burglary in the second, must be released on their own recognizance unless it is demonstrated and the court makes a determination that the principal poses a risk of flight to avoid prosecution. Otherwise, they must be released with non-monetary conditions (pre-trial services) that are the least restrictive condition(s) that will reasonably assure the principal's return to court.

For all other charges the system will largely remain the same. When charged with a “qualifying offense” the court may release the person on his or her own recognizance or under non-monetary conditions, fix bail, or if the offense is a qualifying felony, the court may remand the person. The offenses that qualify for money bail or remand are: violent felony offenses (except Rob 2 [aided] and Burg 2 [of a dwelling]); felony witness intimidation; felony witness tampering; Class A felonies other than drugs (except a “director of a drug organization” under 220.77); some felony sex offenses under 70.80; incest involving children; terrorism charges except 490.20; conspiracy to commit Class A felony under PL 125; and misdemeanor contempt (still not remand eligible, continue to be eligible for bail as under current law).

Money bail now has additional protections from abuse. If monetary bail is set on a person charged with a qualifying offense, the court must set it in three forms including either *unsecured* or *partially secured* security bond. When setting money bail, the court must consider the principal's financial circumstances, ability to post bail without posing an undue hardship, and the principal's ability to obtain a secured, unsecured or partially secured bond. Courts will now have to issue on-the-record findings to justify their determination.

New options will be available to courts to aid people in returning to court instead of using money bail. In all instances, the court or a designated pre-trial service agency will notify all people ROR'd or released with conditions of all court appearances in advance by text messages, telephone call, e-mail or first-class mail. Prior to issuing a bench warrant for a failure to appear for a scheduled court date, the court will provide 48 hours' notice to the principal or principal's counsel that the principal is required to appear in order to give him or her the opportunity to voluntarily appear, unless the failure to appear was “willful.”

§ 11:05.Bail Reform Act of 2019, 1 Criminal Procedure in New York § 11:05 (2d)

Additionally, electronic monitoring will be available for a limited subset of cases, but will be placed behind rigorous due process protections. Electronic monitoring is considered incarceration for 180.80 and 170.70 purposes, and may only be imposed for 60 days with the option of continuing only upon a de novo review before a court. Electronic monitoring must also be at the least restrictive means to ensure return to court and be “unobtrusive to the greatest extent possible.”

As the implementation of the law progresses, there will be additional updates here as time goes forward.

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1 Criminal Procedure in New York § 11:1 (2d)

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§ 11:1. Purpose and function

References

West's Key Number Digest

- West's Key Number Digest, [Bail](#) 39 to 42

The traditional right to freedom before conviction is necessary to allow for the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Unless the right to bail before trial is preserved, the presumption of innocence would soon lose its meaning. The right to release before trial is conditioned upon an adequate assurance that the accused will stand trial and submit to sentence if found guilty.¹ Bail has historically been considered as a security device, the purpose of which is to guarantee the defendant's presence at trial.²

The practice of admission to bail, as it evolved in Anglo-American law, is not a device for keeping persons in jail upon mere accusation until it is found convenient to give them a trial. On the contrary, the spirit of the procedure is to enable persons accused of crimes to stay out of jail until a court has found them guilty. Without this privilege, even those wrongly accused are punished by a period of imprisonment while awaiting trial and are handicapped in consulting counsel, searching for evidence and witnesses, and preparing a defense. While admission to bail always involves a risk that the accused will take flight, such a calculated risk is part of the price of our system of justice. Each accused should be accorded any benefits due to a good record, and a bad record should prejudice only those who are guilty of misdeeds. The first fixing of bail is a serious exercise of judicial discretion. However, because it is often done in haste, the defendant may be taken by surprise, or counsel may have just been engaged or, for other reasons, the bail is fixed without the full inquiry and consideration which the matter deserves.³

The United States Supreme Court has considered the issue of the amount of bail which may properly be required of an indigent defendant.⁴ Recognizing that to continue to demand a substantial bond which the defendant is unable to secure raises considerable problems for the equal administration of the law, the Supreme Court has held that an indigent defendant is denied equal protection of the law if the defendant is denied an appeal on equal terms with other defendants, solely because of indigence, and that it would be unconstitutional to fix excessive bail to assure that a defendant will not gain his or her freedom.⁵ However, in the case of an indigent defendant, the fixing of bail, even in a modest amount, may have the practical effect of denying the defendant's release.⁶

§ 11:1.Purpose and function, 1 Criminal Procedure in New York § 11:1 (2d)

The Criminal Procedure Law provides a method by which the indigent defendant may be released, while still giving some assurance to the court of the defendant's return at a later date. Since the indigent is often unable to provide sufficient cash or property to fully secure a bond, the legislature has provided for the partially secured and the unsecured bail bond.⁷ This bond may be in one of two forms. The first form is an appearance bond for which the defendant alone is the obligor, and the second form is a surety bond for which another person is the obligor on the defendant's behalf.⁸ These will be treated in detail in subsequent sections of this chapter.⁹

While there is no constitutional guarantee of the right to be admitted to bail in New York,¹⁰ the constitutional prohibition of deprivation of liberty without due process applies to bail procedures.¹¹ The bail provisions pursuant to the Criminal Procedure Law are constitutional.¹²

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Footnotes

- 1 Adapted from the opinion of Chief Justice Vinson in *Stack v. Boyle*, 342 U.S. 1, 72 S. Ct. 1, 96 L. Ed. 3 (1951).
- 2 *People v. Torres*, 112 Misc. 2d 145, 446 N.Y.S.2d 969 (N.Y. Sup 1981).
- 3 Adapted from the concurring opinion of Justice Frankfurter in *Stack v. Boyle*, 342 U.S. 1, 72 S. Ct. 1, 96 L. Ed. 3 (1951).
- 4 See *Stack v. Boyle*, 342 U.S. 1, 72 S. Ct. 1, 96 L. Ed. 3 (1951).
- 5 See *Stack v. Boyle*, 342 U.S. 1, 72 S. Ct. 1, 96 L. Ed. 3 (1951).
- 6 *Bandy v. U.S.*, 81 S. Ct. 197, 5 L. Ed. 2d 218 (U.S. 1960).
- 7 CPL § 520.10(1).
- 8 CPL § 520.10(1).
For a discussion of prearrestment bail as a condition of the issuance of an appearance ticket, see § 3:5.
- 9 See §§ 11:2 et seq.
- 10 *People ex rel. Klein v. Krueger*, 25 N.Y.2d 497, 307 N.Y.S.2d 207, 255 N.E.2d 552 (1969); *People v. Boop*, 91 Misc. 2d 231, 397 N.Y.S.2d 573 (County Ct. 1977).
- 11 *People v. Boop*, 91 Misc. 2d 231, 397 N.Y.S.2d 573 (County Ct. 1977).
- 12 CPL art 500.
People v. Figueora, 43 A.D.2d 648, 349 N.Y.S.2d 811 (3d Dep't 1973).

§ 11:2.Right to bail, 1 Criminal Procedure in New York § 11:2 (2d)

1 Criminal Procedure in New York § 11:2 (2d)

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§ 11:2. Right to bail

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Although a defendant has the right to seek release on his or her own recognizance or bail, and while public policy favors release pending a determination of guilt or innocence, a defendant does not have an absolute constitutional right to bail.¹

The United States Constitution guarantees that excess bail shall not be required.² This does not necessitate that bail be provided in every case. A majority of state constitutions guarantee the right to bail in all state cases except for capital offenses. However, there is no guarantee of a right to bail under the New York State Constitution. The New York State Constitution, is similar to the United States Constitution by providing only that excessive bail shall not be set.³ The constitutional right of an accused person pursuant to the state provision and the United States Constitution can only be violated if the bail is excessive, not because it is denied.⁴

The mechanics of the bail procedure begin with the requirement that the court make a securing order. This is an order of the court committing the principal, who may be a defendant, or a material witness to the custody of the sheriff, and fixes bail, or releases the principal on his or her own recognizance.⁵ When a principal initially comes under the control of the court and a future court appearance is required, the court must make a securing order, which releases the principal on personal recognizance, fixes bail or commits the principal to the custody of the sheriff.⁶ If the securing order is revoked or otherwise terminated, but the principal's attendance is required for a future proceeding, a replacement securing order must be issued.⁷ When the court revokes or otherwise terminates a securing order which committed the principal to the custody of the sheriff, the court must give written notification to the sheriff of the revocation or termination of the securing order.⁸

When bail is accepted by the state in lieu of the defendant's physical incarceration, the defendant is in effect remanded to the surety's custody.⁹

§ 11:2.Right to bail, 1 Criminal Procedure in New York § 11:2 (2d)

If an action in local criminal court charges the defendant with an offense which is less than a felony, the court must order recognizance or bail.¹⁰ An incarcerated defendant against whom a misdemeanor complaint is pending is entitled to release on recognizance upon the state's failure to replace that complaint with an information within five days, excluding Sunday.¹¹ When the defendant is charged in local criminal court with a felony upon a felony complaint, the court may, in its discretion, order recognizance or bail.¹² However, if the defendant is charged with a class A felony or apparently has two previous felony convictions, a city court, town court, or village court may not order recognizance or bail.¹³

Recognizance or bail on a felony charge, whatever the level of felony, may not be set by the local criminal court, unless the district attorney has been heard on the matter or the district attorney has not appeared after being given notice and a reasonable opportunity to be heard.¹⁴ The court must be furnished with a report by the division of criminal justice services concerning the defendant's criminal record, or with a police department report of the defendant's prior arrest record.¹⁵ If neither report is available the court, with the district attorney's consent, may dispense with this requirement; except that in an emergency, consent will not be required if the court, for reasons stated on the record, deems it unnecessary.¹⁶ A copy of the report of the criminal justice services or the report of the police department shall be made available to the attorney for the defendant or to the defendant if not represented by counsel.¹⁷

The termination of the application for recognizance or bail is not discretionary in all cases.¹⁸ In some circumstances the application must be granted as a matter of law, in others the application must be denied, and in some cases the granting or denial is a matter of judicial discretion.¹⁹

When an action in superior court charges the defendant with offenses which are less than felony grade, the court must order recognizance or bail.²⁰

The federal courts have stated that there is no constitutional distinction between requiring excessive bail and denying bail altogether in the absence of legitimate reasons.²¹ It is left to the courts to fix the amount of bail in all cases where it is a matter of right and in those instances where the court exercises its discretion favorably.²² However, under the Eighth Amendment where bail is fixed in either instance, it must not be excessive, and further, where bail is not a matter of right, the court may not arbitrarily or unreasonably deny bail.²³

A defendant does not have a constitutional right to bail after conviction.²⁴ However, once the state legislature elects to permit bail after conviction, it must do so in a nonarbitrary manner.²⁵

The defendant's pretrial release is affected by situations including the necessity to ensure the defendant's response to the processes of the court, to protect potential witnesses from the defendant and to protect the community from a dangerous defendant.²⁶

There are two reasons under the policy of the law favoring bail. First, there is a presumption that the prisoner is innocent.²⁷ Second, the policy of the law favors the defendant's release pending determination of guilt or innocence, and justifies the defendant's detention before conviction only if some legitimate purpose of the criminal process requires it.²⁸

Footnotes

- 1 People v. Mohammed, 171 Misc. 2d 130, 653 N.Y.S.2d 492 (Sup 1996).
2 US Const amend VIII.
3 NY Const art I, § 5.
4 People v. Ackerson, 166 Misc. 130, 1 N.Y.S.2d 427 (County Ct. 1937).
See also People ex rel. Deliz v. Warden of City Prison (Tombs) in City of New York, 260 A.D. 155, 21
N.Y.S.2d 435 (1st Dep't 1940).
5 CPL § 500.10(5).
6 CPL § 510.10.
7 CPL § 510.10.
8 CPL § 510.10.
9 People v. Public Service Mut. Ins. Co., 37 N.Y.2d 606, 376 N.Y.S.2d 421, 339 N.E.2d 128 (1975).
10 CPL § 530.20(1).
Matter of LaBelle, 79 N.Y.2d 350, 582 N.Y.S.2d 970, 591 N.E.2d 1156 (1992) (judge's failure to set bail
in nonfelony cases without legal justification warranting censure).
11 CPL § 1170.70.
People v. Matthews, 110 Misc. 2d 863, 443 N.Y.S.2d 122 (City Crim. Ct. 1981).
12 CPL § 530.20(2).
13 CPL § 530.20(2)(a).
14 CPL § 530.20(2)(b).
15 CPL § 530.20(2)(b).
16 CPL § 530.20(2)(b).
17 CPL § 530.20(2)(b).
18 CPL § 510.30(1).
19 CPL § 510.30(1).
20 CPL § 530.40(1).
21 U. S. ex rel. Goodman v. Kehl, 456 F.2d 863 (2d Cir. 1972).
22 U. S. ex rel. Covington v. Coparo, 297 F. Supp. 203 (S.D. N.Y. 1969).
23 U. S. ex rel. Covington v. Coparo, 297 F. Supp. 203 (S.D. N.Y. 1969).
24 Gold v. Shapiro, 62 A.D.2d 62, 403 N.Y.S.2d 906 (2d Dep't 1978), judgment aff'd, 45 N.Y.2d 849, 410
N.Y.S.2d 68, 382 N.E.2d 767 (1978).
25 Brown v. Wilmot, 572 F.2d 404 (2d Cir. 1978); People v. Fikaris, 101 Misc. 2d 460, 421 N.Y.S.2d 179
(Sup 1979).
26 People ex rel. Shaw v. Lombard, 95 Misc. 2d 664, 408 N.Y.S.2d 664 (County Ct. 1978).
27 People ex rel. Lobell v. McDonnell, 296 N.Y. 109, 71 N.E.2d 423 (1947); People v. Maldonado, 95 Misc.
2d 113, 407 N.Y.S.2d 393 (City Crim. Ct. 1978).
28 People v. Maldonado, 95 Misc. 2d 113, 407 N.Y.S.2d 393 (City Crim. Ct. 1978); People v. Terrell, 62
Misc. 2d 673, 309 N.Y.S.2d 776 (Monroe County Ct. 1970).

1 Criminal Procedure in New York § 11:3 (2d)

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§ 11:3. Court's discretion in setting bail

References

West's Key Number Digest

- West's Key Number Digest, [Bail § 42](#)
- West's Key Number Digest, [Bail § 46.1](#)

Before determining the appropriate amount of bail, a court must first determine whether or not bail should be fixed, and whether the defendant should be permitted to remain at liberty under any circumstances.¹ Both of these decisions are within the sound discretion of the judge before whom the bail application is made.² The local criminal court has the discretion to provide bail to a defendant charged with a felony of Grade B or lower, unless it appears that the defendant has two previous felony convictions.³ If the defendant is charged with a Class A felony or appears to have two previous convictions, there is no discretion in the local criminal court to set bail.⁴ In all other felony situations, the discretion of the local criminal court is limited by the statute requiring that the district attorney have notice and opportunity to be heard on the matter, and the court must also have a division of criminal justice services criminal record check or a local police department criminal record check before bail may be set.⁵ If neither of these records are available the court may dispense with the requirement, either upon the district attorney's consent, or if the district attorney does not consent, the court must state on the record the reasons why the court deems the consent unnecessary.⁶ If the court has been furnished with a criminal record check by the criminal justice services, or a local police arrest record check, the court must provide a copy of it to the defendant's attorney or to the defendant.⁷

In certain circumstances, a superior court judge may order bail in an action which is still pending in the local criminal court.⁸ The superior court must be sitting in the same county in which the local criminal court is located.⁹ The superior court has the discretion, upon application of a defendant, to order recognizance or bail when the local criminal court lacks authority to issue an order pursuant to the Criminal Procedure Law.¹⁰ The superior court also has discretion to set bail where the local criminal court has denied an application for recognizance or bail or has fixed bail which is excessive.¹¹ Where bail is excessive, the superior court has the power to vacate the order of the local criminal court and release the defendant on personal recognizance, or the court may fix bail in a lesser amount or in a less burdensome form.¹² The discretion of the superior court judge to fix

§ 11:3.Court's discretion in setting bail, 1 Criminal Procedure in New York § 11:3 (2d)

bail when a felony has been charged in local criminal court is limited, as the district attorney must have an opportunity to be heard and the court must have been furnished with a criminal record report by the division of criminal justice services or a local police arrest record.¹³

When the Criminal Procedure Law was originally adopted, the requirement of a division of criminal justice services criminal record check or a local police arrest record check was not waivable. An amendment now provides that a local criminal court may waive that requirement with the district attorney's consent, or in an emergency situation, upon compelling reasons stated on the record.¹⁴ However, no provision has been made to allow for the waiving of a records check in the situation where a superior court has the discretion to set bail in a matter still pending in local criminal court. It appears that the requirement to have one of the stated criminal record checks is mandatory before bail may be set by a superior court for a felony still pending in local criminal court.¹⁵ The defendant may make only one application to the superior court for an order of recognizance or bail.¹⁶

When a felony grade action is pending in the superior court, the court has discretion to order recognizance or bail.¹⁷ If bail or recognizance has been ordered by the local criminal court, and the indictment has resulted from an order of the local criminal court holding the defendant for action of the grand jury, or the indictment has been filed at the time that a felony complaint charging the same conduct was pending in the local criminal court, the superior court may issue an order continuing the recognizance or bail which has been set by the local criminal court.¹⁸

An order of the superior court continuing bail fixed by a local criminal court, which order is issued without hearing bail applications and without considering the statutory criteria, is not a discretionary release determination and, therefore, the superior court, as a court of concurrent jurisdiction, can modify the order without showing a change of circumstances.¹⁹ A local criminal court's securing order of recognizance or bail is not binding on the superior court when making its initial securing order; rather, the superior court makes a de novo determination of the defendant's bail or liberty status, unencumbered by any prior local criminal court determination.²⁰ If a court exercises its discretion in making a securing order pursuant to CPL § 510.10, its decision must be based on a consideration of the factors and criteria provided in CPL § 510.30.²¹ When the defendant first comes before the court at the arraignment stage a first or initial release determination order is made in compliance with CPL § 510.10 and 510.30.²² If the defendant is indicted, the process is repeated at the superior court arraignment where that court is not required to adopt as its own the local criminal court's securing order, although it may direct the continuing effectiveness of the order.²³ At the time the superior court makes its initial securing order, the fact that the defendant made bail in the amount ordered by the local criminal court and has returned to court, that the amount of bail is sufficient and reasonable is not binding on the superior court and is merely a factor which may be considered.²⁴

The fact that the superior court's initial securing order continued the \$1,000 bail set by the local criminal court at the defendant's arraignment did not preclude the superior court from subsequently amending that decision and increasing the amount of bail to \$3,500, since the superior court's conduct in continuing the local criminal court's securing order of bail without hearing bail applications and without considering the requisite statutory criteria did not constitute a discretionary release determination pursuant to CPL § 510.10 which could not, absent a change in circumstances, be disturbed by the superior court as a court of concurrent jurisdiction.²⁵

After the defendant has been convicted of either a class A felony or any Class B or Class C felony defined in Article 130 of the Penal Law committed or attempted to be committed against a person less than 18 years of age, the superior court may not order recognizance or bail, or permit the defendant to remain at liberty pursuant to an existing order, but must remand the defendant to the custody of the sheriff.²⁶

Where the defendant is charged with a felony, the discretion of the superior court to order recognizance or bail is limited by the requirements that the district attorney must be provided with an opportunity to be heard on the matter and the court must have a division of criminal justice services criminal record report or a local police arrest record.²⁷

§ 11:3.Court's discretion in setting bail, 1 Criminal Procedure in New York § 11:3 (2d)

The court, in determining the amount of bail to be required, has discretion, but this discretion is not totally unfettered.²⁸ Sound discretion and judgment of the court, depending on the circumstances of the case, are other concepts to be used in fixing bail.²⁹ Normally, the amount of bail to be required of a prisoner must be no more than is necessary to guarantee the prisoner's presence at trial.³⁰ The reasonableness of the amount is to be determined, under the circumstances surrounding each particular prisoner, by properly striking a balance between a need for a tie to the jurisdiction, and the right to freedom from unnecessary restraint before conviction.³¹

In determining how much bail an accused should be required to give, there is a latitude between a figure which is clearly not adequate, and one which is clearly excessive.³² There is no statutory requirement that the court take the defendant's resources into account, reflecting the policy that the defendant is not entitled to such bail as he can provide, but to an opportunity to make it in a reasonable amount.³³ Likewise, the statute also does not require that bail be fixed in an amount that is within the means of a defendant.³⁴ The fact that bail is fixed within the defendant's means does not necessarily make the amount reasonable, just as the fact that a defendant cannot make bail does not necessarily render the amount excessive.³⁵

The grant or denial of bail in felony cases lies within the discretion of the trial judge.³⁶ A federal court has stated that the fact that a defendant is charged with murder is not a sufficient reason, by itself, for the denial of bail.³⁷ The preventive detention which can be effected through the denial of bail requires rare and extraordinary circumstances.³⁸ To justify the denial of bail there must be clear and convincing evidence that actual peril is imminent.³⁹

An order fixing bail is nonappealable and therefore is not reviewable by the Supreme Court, Appellate Division, on direct appeal from a judgment of conviction.⁴⁰ However, an order fixing bail may properly be reviewed in a habeas corpus proceeding, where it appears that either constitutional or statutory standards proscribing excessive bail have been violated.⁴¹

The court did not abuse its discretion by increasing a defendant's bail after a mistrial due to a hung jury, where the defendant charged with the criminal sale of a controlled substance knew that the jury vote was 11 to one for conviction, he had a prior criminal record, and, if convicted, he faced a mandatory sentence of up to nine years.⁴² Further, the court acted properly by rejecting bail posted by individuals who had no relationship to the defendant, although there may have been other factors that would inure to the defendant's benefit with regard to whether he would return to court, where the petitioner failed to show that the sureties would ensure his appearance for all future court dates, given the total lack of a relationship between the defendant and the sureties.⁴³

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Footnotes

- 1 [People v. Torres, 112 Misc. 2d 145, 446 N.Y.S.2d 969 \(Sup 1981\).](#)
- 2 [People v. Torres, 112 Misc. 2d 145, 446 N.Y.S.2d 969 \(Sup 1981\).](#)
- 3 [People v. Mohammed, 171 Misc. 2d 130, 653 N.Y.S.2d 492 \(Sup 1996\).](#)
- 4 [CPL § 530.20\(2\)\(a\).](#)
- 5 [CPL § 530.20\(2\)\(a\).](#)
- 6 [CPL § 530.20\(2\)\(b\).](#)
- 7 [CPL § 530.20\(2\)\(b\).](#)

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- 8 CPL § 530.30(1).
9 CPL § 530.30(1).
10 CPL § 530.30(1)(a).
See CPL § 530.20.
11 CPL § 530.30(1)(b), (c).
12 CPL § 530.30(1)(c).
13 CPL § 530.30(2).
14 CPL § 530.20(2).
15 CPL § 530.30(2).
16 CPL § 530.30(3).
17 CPL § 530.40(2).
18 CPL § 530.40(2).
19 *People v. Mohammed*, 171 Misc. 2d 130, 653 N.Y.S.2d 492 (Sup 1996).
20 *People v. Mohammed*, 171 Misc. 2d 130, 653 N.Y.S.2d 492 (Sup 1996).
21 *People v. Mohammed*, 171 Misc. 2d 130, 653 N.Y.S.2d 492 (Sup 1996).
22 *People v. Mohammed*, 171 Misc. 2d 130, 653 N.Y.S.2d 492 (Sup 1996).
23 *People v. Mohammed*, 171 Misc. 2d 130, 653 N.Y.S.2d 492 (Sup 1996).
24 *People v. Mohammed*, 171 Misc. 2d 130, 653 N.Y.S.2d 492 (Sup 1996).
25 *People v. Mohammed*, 171 Misc. 2d 130, 653 N.Y.S.2d 492 (Kings Sup 1996).
26 CPL § 530.40(3).
27 CPL § 530.40(4).
28 *People ex rel. Lobell v. McDonnell*, 296 N.Y. 109, 71 N.E.2d 423 (1947); *People v. Maldonado*, 95 Misc. 2d 113, 407 N.Y.S.2d 393 (City Crim. Ct. 1978); *People ex rel. LaForce v. Skinner*, 65 Misc. 2d 884, 319 N.Y.S.2d 10 (Monroe Sup. 1971).
29 *People ex rel. Rothensies v. Searles*, 229 A.D. 603, 243 N.Y.S. 15 (3d Dep't 1930); *People v. Maldonado*, 95 Misc. 2d 113, 407 N.Y.S.2d 393 (City Crim. Ct. 1978).
30 *People v. Maldonado*, 95 Misc. 2d 113, 407 N.Y.S.2d 393 (City Crim. Ct. 1978).
31 *People ex rel. Lobell v. McDonnell*, 296 N.Y. 109, 71 N.E.2d 423 (1947); *People v. Maldonado*, 95 Misc. 2d 113, 407 N.Y.S.2d 393 (City Crim. Ct. 1978).
32 *U.S. v. Weiss*, 233 F.2d 463 (7th Cir. 1956); *People v. Maldonado*, 95 Misc. 2d 113, 407 N.Y.S.2d 393 (City Crim. Ct. 1978).
33 *People v. Mohammed*, 171 Misc. 2d 130, 653 N.Y.S.2d 492 (Kings Sup 1996).
34 *People v. Mohammed*, 171 Misc. 2d 130, 653 N.Y.S.2d 492 (Kings Sup 1996).
35 *People v. Mohammed*, 171 Misc. 2d 130, 653 N.Y.S.2d 492 (Kings Sup 1996).
36 *U. S. ex rel. Diller v. Greco*, 426 F. Supp. 375 (S.D. N.Y. 1977).
37 *Matter of Wilson*, 89 Misc. 2d 1046, 393 N.Y.S.2d 275 (Onondaga Fam. Ct. 1977).
See *People v. Terrell*, 62 Misc. 2d 673, 309 N.Y.S.2d 776 (County Ct. 1970).
38 *Matter of Wilson*, 89 Misc. 2d 1046, 393 N.Y.S.2d 275 (Onondaga Fam. Ct. 1977); *People ex rel. LaForce v. Skinner*, 65 Misc. 2d 884, 319 N.Y.S.2d 10 (Monroe Sup 1971); *People v. Melville*, 62 Misc. 2d 366, 308 N.Y.S.2d 671 (City Crim. Ct. 1970).
39 *Matter of Wilson*, 89 Misc. 2d 1046, 393 N.Y.S.2d 275 (Onondaga Fam. Ct. 1977); *People ex rel. LaForce v. Skinner*, 65 Misc. 2d 884, 319 N.Y.S.2d 10 (Monroe Sup 1971); *People v. Melville*, 62 Misc. 2d 366, 308 N.Y.S.2d 671 (City Crim. Ct. 1970).
40 *People v. Wolcott*, 111 A.D.2d 943, 490 N.Y.S.2d 40 (3d Dep't 1985).
41 CPLR 7010(b).
People v. Wolcott, 111 A.D.2d 943, 490 N.Y.S.2d 40 (3d Dep't 1985).
See § 52:10, scope of collateral review upon habeas corpus petition challenging a bail decision.
42 *People v. Baker*, 188 Misc. 2d 821, 729 N.Y.S.2d 580 (N.Y. Sup 2001).
43 *People v. Baker*, 188 Misc. 2d 821, 729 N.Y.S.2d 580 (N.Y. Sup 2001).

§ 11:3.Court's discretion in setting bail, 1 Criminal Procedure in New York § 11:3 (2d)

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1 Criminal Procedure in New York § 11:4 (2d)

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§ 11:4. Court's discretion in setting bail—Criteria to be applied

References

West's Key Number Digest

- West's Key Number Digest, [Bail § 42.5](#)
- West's Key Number Digest, [Bail § 49\(1\)](#)

According to statute, the court must examine the bail posted to determine whether it complies with the order fixing bail.¹ Once an application for bail is granted and an amount set, the bail offered must comply with the requirements of the bail statute before it can be accepted by the court.² If the bail fails to comply with the order or if some factor or circumstance requires or authorizes disapproval thereof, the bail must be disapproved.³ Therefore, in a bail source hearing it is proper to require an initial showing by the prosecution of reasonable cause to conduct the inquiry, and an ultimate burden of persuasion by the defendant to show by a preponderance of the evidence that the bail arrangement offered conforms with public policy requirements.⁴

In setting bail or ordering recognizance, the court must consider the kind and degree of control or restriction that is necessary in order to secure a principal's court attendance when required.⁵ In determining this the court must, on the basis of available information, take into account:

- (i) the principal's character, reputation, habits, and mental condition;
- (ii) the principal's employment and financial resources;
- (iii) the principal's family ties and length of residence in the community;
- (iv) the principal's criminal record;
- (v) the principal's record of previous adjudication as a juvenile delinquent or youthful offender;

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- (vi) the principal's previous record in responding to court appearances when required or with respect to flight to avoid criminal prosecution;
- (vii) if the principal is the defendant, the weight of the evidence in the pending criminal action and any other factor indicating the probability or improbability of conviction.⁶ In the case of an application for bail or recognizance pending an appeal, the merit or lack of merit of the appeal;
- (viii) if the principal is the defendant, the sentence which may be or has been imposed upon conviction.⁷

Absent from the statutory bail factors is the factor of community safety, that is, the likelihood that defendant will commit future crimes given defendant's past conduct, and whether defendant's release poses an unusual risk to specific persons or the public in general.⁸ This factor is referred to as "preventive detention" and may be imposed only in rare and extraordinary cases where the proof of danger is clear and convincing.⁹ In an unusual case where the threat to the community existed by reason of a situation wholly unrelated to the pending marijuana charge, that being the danger to the community arising by virtue of defendant's anger toward a certain corporation and union officials, the court determined that denial of bail was appropriate based on the prosecution's having established that defendant's release to the community would pose a clear and present danger to specific individuals.¹⁰

Where the principal is a defendant appealing from a judgment of conviction, the court must also consider the likelihood of the ultimate reversal of the judgment.¹¹ A determination that the appeal is palpably without merit justifies, but does not require, a denial of the application, regardless of any determination of the other factors required to be considered by the statute.¹²

The scheme of setting bail applies to any principal. A principal is defined as a defendant in a criminal action, a person adjudged a material witness, or any other person so involved in the action that the law may compel that person to appear before the court.¹³ Among the conditions under which a defendant is released from custody pending trial is the assurance that the defendant will stand trial and submit to sentence if found guilty.¹⁴

The nature of the offense charged against the defendant, the probability of conviction, and the severity of the possible sentence which may be imposed, all increase the risk of flight and should be considered in making a determination as to whether to grant bail.¹⁵

The state must make a showing of factual matters to support the factors on which they rely in their argument for a particular amount of bail.¹⁶

A federal court held that the presumption of innocence standard is not contradicted by the consideration of the weight of evidence by the court in its determination whether or not to grant pretrial release on bail.¹⁷ Furthermore, the judicial branch rightly may consider whether the executive branch is willing, or wishes to accept, a foreign government's assurances that a foreign defendant will be available for trial in making this decision.¹⁸

In determining whether or not the denial of bail or fixation of bail violates the constitutional or statutory standard prohibiting excessive bail, or the arbitrary refusal of bail, the habeas court should consider the relevant criteria under decisional law and the Criminal Procedure Law¹⁹ including, among other things, the nature of the offense, the penalty which may be imposed, the probability of the willing appearance of the defendant or flight to avoid punishment, the defendant's pecuniary and social condition, the defendant's general reputation and character, and the apparent nature and strength of the proof as bearing on the probability of the defendant's conviction.²⁰

Footnotes

- 1 People v. McIntyre, 168 Misc. 2d 556, 640 N.Y.S.2d 386 (Kings Sup 1996).
2 People v. McIntyre, 168 Misc. 2d 556, 640 N.Y.S.2d 386 (Kings Sup 1996).
3 People v. McIntyre, 168 Misc. 2d 556, 640 N.Y.S.2d 386 (Kings Sup 1996).
4 People v. McIntyre, 168 Misc. 2d 556, 640 N.Y.S.2d 386 (Kings Sup 1996).
5 CPL § 510.30(2).
6 CPL § 510.30(2).
7 CPL § 510.30(2).
People ex rel. Benton by Weintraub v. Warden: New York City House of Detention for Men, East
Elmhurst, New York 11370, 118 A.D.2d 443, 499 N.Y.S.2d 738 (1st Dep't 1986).
8 People v. Bosco, 175 Misc. 2d 166, 668 N.Y.S.2d 331 (Schen. County Ct. 1997).
9 People v. Bosco, 175 Misc. 2d 166, 668 N.Y.S.2d 331 (Schen. County Ct. 1997).
10 People v. Bosco, 175 Misc. 2d 166, 668 N.Y.S.2d 331 (Schen. County Ct. 1997).
11 CPL § 510.30(2)(b).
12 CPL § 510.30(2)(b).
13 CPL § 1500.10(1).
14 Whitley v. Cioffi, 74 A.D.2d 230, 427 N.Y.S.2d 23 (1st Dep't 1980).
15 State ex rel. Rosenthal v. Wolfson, 65 A.D.2d 113, 410 N.Y.S.2d 846 (1st Dep't 1978), judgment rev'd
on other grounds, 48 N.Y.2d 230, 422 N.Y.S.2d 55, 397 N.E.2d 745 (1979).
16 People ex rel. Lobell v. McDonnell, 296 N.Y. 109, 71 N.E.2d 423 (1947); People v. Vasquez, 76 Misc.
2d 5, 348 N.Y.S.2d 1007 (City Crim. Ct. 1973).
17 U.S. v. Kostadinov, 721 F.2d 411 (2d Cir. 1983).
18 U.S. v. Kostadinov, 721 F.2d 411 (2d Cir. 1983).
19 CPL § 510.30.
20 People ex rel. Klein v. Krueger, 25 N.Y.2d 497, 307 N.Y.S.2d 207, 255 N.E.2d 552 (1969); People ex rel.
Zinzow v. Harkness, 48 A.D.2d 746, 368 N.Y.S.2d 79 (3d Dep't 1975).

§ 11:5.Revocation, 1 Criminal Procedure in New York § 11:5 (2d)

1 Criminal Procedure in New York § 11:5 (2d)

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§ 11:5. Revocation

References

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- West's Key Number Digest, [Bail](#) 73(1)

Under the former Criminal Code, a judge who released a defendant on bail was authorized to revoke the order where the bail was discretionary with the court.¹ Thus, such power was only available when the charge was a felony. Under the Criminal Procedure Law, at any time in the course of a criminal action that a defendant is at liberty as a result of an order of recognizance or bail, the court may review such order.² The court may issue a bench warrant, if necessary, to require the defendant to appear before the court; and upon such appearance, the court, for good cause shown, may revoke the order of recognizance or bail.³ Under this provision, revocation of bail for good cause shown must be based on some factor that has a material bearing upon the probability of the defendant's future attendance, which must be determined in a summary hearing.⁴ If the defendant is entitled to recognizance or bail as a matter of right, the court must issue another order; but if the defendant is not so entitled, the court may either issue an order of bail or recognizance or commit the defendant to the custody of the sheriff.⁵ The statute provides that a court may revoke bail or recognizance of a defendant already charged with a felony, where there is reasonable cause to believe that, while at liberty on a prior charge, the defendant committed a class A felony, or a violent felony, or intimidated a victim or witness.⁶ The statute also requires a hearing for revocation motions and limits the duration of an order of revocation.⁷ The amendment does not repeal the existing power of the court to revoke bail for good cause, which is inherent in the court. Rather, it is intended to expand a court's power to revoke bail in a limited class of cases solely because of the probability that the defendant has committed a felony, even if (1) there is no reasonable correlation between the fact of the new arrest and the criteria for determining bail status set forth in the statute,⁸ (2) it does not appreciably change the court's view of the likelihood of future appearance, and (3) it does not constitute "good cause" for revocation for any other reason.⁹

Revocation of bail pursuant to [CPL § 530.60\(1\)](#) based on good cause provides for the revocation of bail with only a summary hearing, whereas revocation of bail pursuant to [CPL § 530.60\(2\)](#) based on a finding of reasonable cause to believe that defendant committed a violent felony offense requires the holding of a formal hearing before bail can be revoked.¹⁰ Although the facts that affect revocation of bail for good cause without a formal hearing may include the filing of additional violent felony charges

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against a defendant, the filing of such charges against a defendant who has been released previously upon the first filed felony charges does not constitute a per se ground for a change of bail status under CPL § 530.60(1) without a formal hearing.¹¹ Accordingly, where the prosecution's application for revocation of defendant's bail was based solely on the ground that he had allegedly committed violent felony offenses following his initial release, revocation was based on CPL § 530.60(2) and defendant was entitled to a formal hearing.¹²

The statute provides that when bail or recognizance is ordered, the court must inform the principal that his or her release is conditional and that the court may revoke the order of release in accordance with the Criminal Procedure Law¹³ if the principal commits a subsequent felony while at liberty.¹⁴ This notice provision has been viewed as merely a warning of an additional penalty for future violation of the law.¹⁵

Just as the initial determination to set bail in a particular amount, to remand, or to release without security must have a reasonable basis and is reviewable, so is a decision to revoke.¹⁶ Thus, new evidence, or additional circumstances not presented to the court upon the making of its initial bail determination, is a sufficient basis for the court to entertain an application for a superseding order altering a defendant's bail status.¹⁷ In reviewing bail, the court must consider this new evidence in the light of the same principles governing the initial decision to grant bail, including the statutorily mandated bail criteria of the Criminal Procedure Law.¹⁸ "Good cause" under the statute is not synonymous with new information; rather, it is much more broad, encompassing any substantial reason why bail should be revoked, or should not have been granted.¹⁹

The court may not summarily revoke bail upon the allegation that the defendant violated a condition set at the time of release on bail, since the proper procedure is to require the defendant to appear before the court, by a bench warrant if necessary, and for the court to review the allegations.²⁰

Hospitalization is a valid excuse for the nonappearance of a defendant who is free on bail.²¹ A threat made by a defendant to a witness, after bail has been fixed, is sufficient to warrant a decision revoking bail.²²

A subsequent arrest by itself, without evidence of the underlying crime, has never per se constituted good cause for revocation of bail.²³ However, revocation of bail is proper based on a finding that, while at liberty pending trial on an original charge, the defendant has "probably committed" the crime for which he or she has been rearrested, in light of the seriousness of the crimes with which the defendant is charged concerning the possession and sale of cocaine, and the probability of conviction.²⁴

Federal courts discussing bail have stated that the same principles that apply to the discretionary denial of bail also apply to the discretionary revocation of bail.²⁵ Therefore, if the moving party in a bail revocation motion can demonstrate good cause for the motion, the judge may revoke bail in accordance with the principles set forth under the Criminal Procedure Law.²⁶ Although the trial judge is accorded discretionary power during trial to revoke bail where this drastic relief is essential to insure the orderly progress of an ongoing trial,²⁷ this power must be exercised with circumspection,²⁸ and does not extend to situations involving revocation of bail before trial.²⁹

The defendant's constitutional right to bail is not converted to the status of a privilege which can be revoked in the name of public benefit.³⁰

Evidence of a chain of related criminal acts furnished good cause to believe that the acts would have a material bearing upon the probability of the defendants' future attendance and, therefore, justified revocation of the defendants' bail, where the defendants engaged in post-bail criminal conduct and performed acts which, at the very least, intimidated two confidential witnesses, and one of these acts involving a van with altered license plates led to a criminal charge in a second indictment.³¹

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Footnotes

- 1 See Code of Criminal Procedure § 553(2).
- 2 CPL § 530.60.
- 3 CPL § 530.60.
- 4 *People v. McDonnell*, 177 Misc. 2d 610, 677 N.Y.S.2d 700 (Sup 1998).
See *McKinney's CPL § 530.60(1)*.
- 5 CPL § 530.60.
- 6 CPL § 530.60(2)(a).
- 7 CPL § 530.60(2)(a).
People v. Bailey, 118 Misc. 2d 860, 462 N.Y.S.2d 94 (Bronx Sup 1983) (72 hours between request for
bail revocation hearing and hearing is not denial of due process).
- 8 CPL § 510.30.
- 9 *People v. Torres*, 112 Misc. 2d 145, 446 N.Y.S.2d 969 (N.Y. Sup 1981).
- 10 *People v. McCullough*, 174 Misc. 2d 418, 664 N.Y.S.2d 712 (Monroe Sup 1997).
- 11 *People v. McCullough*, 174 Misc. 2d 418, 664 N.Y.S.2d 712 (Monroe Sup 1997).
- 12 *People v. McCullough*, 174 Misc. 2d 418, 664 N.Y.S.2d 712 (Monroe Sup 1997).
- 13 CPL § 530.60(2).
- 14 CPL § 510.30(3).
- 15 *People v. Torres*, 112 Misc. 2d 145, 446 N.Y.S.2d 969 (N.Y. Sup 1981).
- 16 *People v. Torres*, 112 Misc. 2d 145, 446 N.Y.S.2d 969 (N.Y. Sup 1981).
- 17 *People v. Torres*, 112 Misc. 2d 145, 446 N.Y.S.2d 969 (N.Y. Sup 1981).
People ex rel. Lazer on Behalf of Palmieri v. Warden, New York County Men's House of Detention, 79
N.Y.2d 839, 580 N.Y.S.2d 183, 588 N.E.2d 81 (1992).
- 18 CPL § 510.30.
People v. Torres, 112 Misc. 2d 145, 446 N.Y.S.2d 969 (N.Y. Sup 1981).
- 19 *People v. Torres*, 112 Misc. 2d 145, 446 N.Y.S.2d 969 (N.Y. Sup 1981).
- 20 *People ex rel. Shaw v. Lombard*, 95 Misc. 2d 664, 408 N.Y.S.2d 664 (Monroe County Ct. 1978).
- 21 *People v. Thomas*, 75 Misc. 2d 490, 348 N.Y.S.2d 324 (Queens Sup 1973).
- 22 *People v. Gruttola*, 72 Misc. 2d 295, 339 N.Y.S.2d 178 (City Crim. Ct. 1972).
- 23 *People v. Torres*, 112 Misc. 2d 145, 446 N.Y.S.2d 969 (N.Y. Sup 1981).
- 24 *People ex rel. Ortiz v. Commissioner of Corrections of City of New York*, 76 A.D.2d 818, 429 N.Y.S.2d
26 (1st Dep't 1980).
- 25 *U. S. ex rel. Diller v. Greco*, 426 F. Supp. 375 (S.D. N.Y. 1977); *People ex rel. LaForce v. Skinner*, 65
Misc. 2d 884, 319 N.Y.S.2d 10 (Monroe Sup 1971).
- 26 CPL § 510.30.
U. S. ex rel. Diller v. Greco, 426 F. Supp. 375 (S.D. N.Y. 1977).
- 27 *Gavino v. MacMahon*, 499 F.2d 1191 (2d Cir. 1974).
See *Fernandez v. U.S.*, 81 S. Ct. 642, 5 L. Ed. 2d 683 (U.S. 1961).
- 28 *Gavino v. MacMahon*, 499 F.2d 1191 (2d Cir. 1974); *U.S. v. Bentvena*, 288 F.2d 442 (2d Cir. 1961).
- 29 *Gavino v. MacMahon*, 499 F.2d 1191 (2d Cir. 1974).
- 30 *People v. Vasquez*, 76 Misc. 2d 5, 348 N.Y.S.2d 1007 (City Crim. Ct. 1973).
- 31 *People v. McDonnell*, 177 Misc. 2d 610, 677 N.Y.S.2d 700 (Queens Sup 1998).

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§ 11:6. Bench warrant, 1 Criminal Procedure in New York § 11:6 (2d)

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§ 11:6. Bench warrant

References

West's Key Number Digest

- West's Key Number Digest, [Criminal Law](#) 263

Under the Criminal Procedure Law, at any time in the course of a criminal action that a defendant is at liberty as a result of an order of recognizance or bail, the court may review such order.¹ The court may issue a bench warrant, if necessary, to require the defendant to appear before the court; and upon such appearance, the court, for good-cause shown, may revoke the order of recognizance or bail.² A bench warrant issued by a superior court, by a district court, by the New York City criminal court or by a superior court judge sitting as a local criminal court may be executed anywhere in the state.³ A bench warrant issued by a city court, a town court or a village court may be executed in the county of issuance or any adjoining county, or anywhere else in the state upon the written endorsement of a local criminal court of the county where the defendant is to be taken into custody.⁴ When so endorsed, the warrant is deemed the process of the endorsing court as well as that of the issuing court.⁵

A bench warrant may be addressed to any police officer whose geographical area of employment embraces either the place where the offense charged was allegedly committed or the locality of the court by which the warrant is issued, or any uniformed court officer for a court in the City of New York, the County of Nassau, the County of Suffolk or the County of Westchester that is part of the unified court system of the state for execution in the building where the court officer is employed or in the immediate vicinity.⁶

The bench warrant must be executed in the same manner as a warrant of arrest as provided in the Criminal Procedure Law.⁷ Following the arrest, the executing police officer or court officer must, without unnecessary delay, bring the defendant before the court where the warrant is returnable.⁸ However, if the court where the bench warrant is returnable is a city, town, or village court, and the court is not available, and the bench warrant is addressed to a police officer, the executing police officer must, without unnecessary delay, bring the defendant before an alternate local criminal court.⁹ Furthermore, if the court in which the bench warrant is returnable is a superior court, and the court is not available, the executing police officer may bring

§ 11:6.Bench warrant, 1 Criminal Procedure in New York § 11:6 (2d)

the defendant to the local correctional facility of the county where the court sits, to be detained there until not later than the commencement of the next session of the court occurring on the next business day.¹⁰

A court which issues a bench warrant may attach to the warrant a summary of the basis for the warrant.¹¹ In any case, where a defendant arrested upon a bench warrant is brought before a local criminal court other than the court where the warrant is returnable, the local criminal court must consider the summary before issuing a securing order with respect to the defendant.¹² Additionally, a bench warrant may be executed by any officer to whom it is addressed or any other police officer delegated to execute it under circumstances prescribed in the Criminal Procedure Law.¹³ The issuing court may authorize the delegation of the warrant.¹⁴ Where the issuing court has so authorized, a police officer to whom a bench warrant is addressed may delegate another police officer to whom it is not addressed to execute the warrant as the officer's agent when there is reasonable cause to believe that the defendant is in a particular county other than the one where the warrant is returnable, and the geographical area of employment of the delegated officer embraces the locality where the arrest is to be made.¹⁵ The police officer to whom the bench warrant is addressed may inform the delegated officer, by telecommunication, mail or any other means, of the issuance of the warrant, of the offense charged in the underlying accusatory instrument and of all other pertinent details, and may request the delegated officer to act as his or her agent in arresting the defendant pursuant to the bench warrant.¹⁶ Upon such request, the delegated police officer is to the same extent as the delegating officer, authorized to make the arrest pursuant to the bench warrant within the geographical area of the delegated officer's employment.¹⁷ The delegated police officer, after arresting the defendant, must without unnecessary delay deliver the defendant or cause him to be delivered to the custody of the delegating police officer, who must then without unnecessary delay bring the defendant before the court where the bench warrant is returnable.¹⁸

A bench warrant may also be executed by an officer of the state division of parole or a probation officer when the person named within the warrant is under the supervision of the division of parole or a department of probation and the probation officer is authorized by the probation director.¹⁹ The warrant must be executed upon the same conditions and in the same manner as is otherwise provided for execution by a police officer.²⁰

The Appellate Division has held a case where police took a defendant into custody on an outstanding bench warrant for an unrelated charge and was still entitled to question the defendant about a separate homicide in absence of counsel upon defendant's waiver of counsel even if counsel had been appointed to represent the defendant on the separate charge. The Court further noted that any delay in bringing the defendant before the Court after he was taken into custody on an outstanding bench warrant would not preclude the use of the statements made by the defendant regarding another crime, absent any showing that the defendant's statement was not voluntary.²¹

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Footnotes

- 1 CPL § 530.60.
- 2 CPL § 530.60.
See also § 11:5.
- 3 CPL § 530.70(1).
- 4 CPL § 530.70(1).
- 5 CPL § 530.70(1).
- 6 CPL § 530.70(2).

§ 11:6.Bench warrant, 1 Criminal Procedure in New York § 11:6 (2d)

7	CPL § 530.70(2).
8	CPL § 530.70(2).
9	CPL § 530.70(2).
10	CPL § 530.70(2).
11	CPL § 530.70(2-1).
12	CPL § 530.70(2-a).
13	CPL § 530.70(3).
14	CPL § 530.70(4).
15	CPL § 530.70(4).
16	CPL § 530.70(5).
17	CPL § 530.70(5).
18	CPL § 530.70(5).
19	CPL § 530.70(6).
20	CPL § 530.70(6).
21	People v. Garcia, 40 A.D.3d 541, 837 N.Y.S.2d 84 (1st Dep't 2007).

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§ 11:7. Recognizance and authorized forms of bail

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West's Key Number Digest

- West's Key Number Digest, [Bail](#) 54.1

If an application for recognizance or bail is made, it must be determined by a securing order which either grants the application and releases the principal on personal recognizance, or grants the application and fixes bail, or denies the application and commits the principal to, or retains the principal in, the custody of the sheriff. ¹

Recognizance is a term which means release on one's own recognizance and is commonly referred to as ROR. It is defined in the Criminal Procedure Law as the releasing of a principal on recognizance when, having acquired control over the person, the court permits the principal to be at liberty during the pendency of the criminal action or proceeding involved, upon condition that the principal will appear whenever attendance may be required, and will at all times be amenable to the orders and processes of the court. ² An incarcerated defendant against whom a misdemeanor complaint is pending is entitled to release on recognizance upon a failure of the state to replace that complaint with an information within five days, excluding Sunday. ³ The purpose of this statutory provision is to protect the defendant's right to prosecution by information only and, more specifically, to guarantee that a defendant will not be deprived of his or her liberty beyond a reasonable, finite period if the prosecution has violated that right. ⁴

A nonhearsay corroboration of one count in a multicount misdemeanor complaint is sufficient to warrant the retention of the defendant, for purposes of the statute requiring that a defendant in custody on a misdemeanor complaint be released on his or her own recognizance unless the complaint is replaced by an information. ⁵

Upon ordering release on personal recognizance, the court must direct the principal to appear in the criminal proceeding involved whenever attendance in court may be required, and at all times, to be amenable to the orders and processes of the court. ⁶ If the principal is in custody of the sheriff or free upon bail, then the court must direct that the principal be discharged from custody or that bail be exonerated. ⁷

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The only authorized forms of bail are as follows: (a) cash bail; (b) an insurance company bail bond; (c) a secured surety bond; (d) a secured appearance bond; (e) a partially secured surety bond; (f) a partially secured appearance bond; (g) an unsecured surety bond; (h) an unsecured appearance bond; and (i) credit card or similar device.⁸

The definitions of the types of bail bonds are provided by statute.⁹ Cash bail means an amount of money designated in an order fixing bail, posted with the court by a principal or another person on the principal's behalf, upon the condition that such money will become forfeit if the principal does not comply with the direction of the court.¹⁰ An insurance company bail bond is a surety bond, executed in the form prescribed by the superintendent of insurance, in which the surety-obligor is a corporation licensed by the superintendent of insurance to engage in the business of executing bail bond.¹¹

A secured surety bond can be best understood by noting the statutory definition of a surety; a surety is an obligor who is not a principal.¹² An obligor is one who executes a bail bond on behalf of a principal and assumes the undertaking described in the bail bond.¹³ The principal may be an obligor.¹⁴ A surety bond is a bail bond in which the obligor is a surety or if there are more than one, the obligors are sureties.¹⁵ The principal may be one of the obligors on a secured surety bond so long as there is some other person who is also an obligor and a surety.¹⁶ A secured appearance bond is somewhat different in that in an appearance bond only the obligor is the principal.¹⁷

In both the secured surety bond and the secured appearance bond, the security to which the statute refers is either personal property or real property.¹⁸ Personal property must not be exempt from execution and must have a value equal or greater than the total amount of the undertaking over and above all liabilities and encumbrances.¹⁹ If the security is real property it must have a value of at least twice the total amount of the undertaking.²⁰ The value of the real estate is determined by dividing the last assessed value of the property by the last given equalization rate or in a special assessing unit as defined in the Real Property Tax Law,²¹ the appropriate class ratio established pursuant to such law of the assessing municipality where the property is situated and by deducting from the resulting figure the total amount of any liens or encumbrances upon the property.²²

A partially secured surety bond or a partially secured appearance bond bears the same characteristics of a fully secured surety bond or a fully secured appearance bond, except that the security involved is the deposit of a sum of money which does not exceed 10% of the total amount of the undertaking.²³ For example, the court could set bail in the amount of \$500 and yet permit the filing of a partially secured surety bond or a partially secured appearance bond where the obligor would deposit with the court only \$50, and yet assume the obligation to pay the total sum of \$500 should the principal fail to appear.

Other methods of posting bond are an unsecured surety bond or an unsecured appearance bond, which are bail bonds, other than insurance company bail bonds, which are not secured by any deposit of money or lien upon property.²⁴ The unsecured appearance bond would be identical to these, except the obligor is also the principal. These latter methods are available to a court aware that a defendant is indigent and that the requiring of cash bail or of a high premium insurance company bond would keep the defendant in jail pending trial of the criminal matter.

In fixing bail, the court may designate the amount of bail without designating the form in which it may be post.²⁵ If the court fails to designate in which form the bail may be posted, then it may be posted in the form of an unsecured surety bond or an unsecured appearance bond.²⁶ The court may direct that the bail be posted in any one of two or more forms and may, in the alternative, designate different amounts varying with each form. For example, the court might designate a \$1,000 insurance company bail bond, or a \$500 cash bail.

A prosecutor's actions in conversing ex parte in camera with the court regarding whether or not bail should be denied is disapproved of except in the most unusual circumstance.²⁷

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The failure to file a misdemeanor information within the five-day statutory period following the arrest required a pretrial detainee's release on his own recognizance, even though the information was filed on the sixth day, where there was no showing that the defendant waived prosecution by information and consented to be prosecuted upon a misdemeanor complaint, that the defendant consented to any adjournment beyond the five-day period for the filing of the information, or that there was good cause why the order of release should not have been issued. ²⁸

The court acted properly by rejecting bail posted by individuals who had no relationship to the defendant, although there may have been other factors that would inure to the defendant's benefit with regard to whether he would return to court, where the petitioner failed to show that the sureties would ensure his appearance for all future court dates, given the total lack of a relationship between the defendant and the sureties. ²⁹

In *People v. ex. rel. McManus v. Horn*,³⁰ the Court of Appeals held that a defendant is entitled under CPL § 520.10(2)(d) to have two alternate forms of bail designated. In *McManus* the defendant, after violating an order of protection and having additional charges placed against him, had bail set at \$20,000 CASH ONLY. Thereafter, the People moved to increase the bail to \$50,000 CASH ONLY. The defendant McManus commenced a CPLR Article 70 action for a writ of habeas corpus requesting a second form of bail to be imposed as a bond. The Court of Appeals noted there are two methods of fixing bail, the first under CPL § 520.10(2)(a) is where the judge simply states an amount and does not designate what form or forms that the bail may be posted, thus allowing the defendant to use a variety of means. The second is under CPL § 520.10, where a Court may direct that the bail be posted in any one of two or more forms specified in subdivision 1, designating in the alternative different amounts varying within different forms of bail. The Court of Appeals noted that although the word "may" is used, it does not permit a court to limit bail to once specific form. The Court of Appeals affirmed that the "may" word is used to designate either the more general fixing of bail or the more specific fixing of bail to limit the options to two choices. Accordingly, the Court of Appeals held that bail must be established under two or more forms and not one, in accordance with the statute.

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Footnotes

- 1 CPL § 510.40(1).
- 2 CPL § 500.10(2).
- 3 CPL § 170.70.
People v. Matthews, 110 Misc. 2d 863, 443 N.Y.S.2d 122 (City Crim. Ct. 1981).
- 4 *People ex rel. Alvarez v. Warden, Bronx House of Detention*, 178 Misc. 2d 254, 680 N.Y.S.2d 153 (Sup 1998).
- 5 *People ex rel. Ortiz v. Commissioner, New York City Dept. of Correction*, 253 A.D.2d 688, 678 N.Y.S.2d 91 (1st Dep't 1998), order aff'd, 93 N.Y.2d 959, 694 N.Y.S.2d 340, 716 N.E.2d 175 (1999).
- 6 CPL § 510.40(2).
- 7 CPL § 510.40(2).
- 8 CPL § 520.10(1).
- 9 CPL § 500.10.
- 10 CPL § 500.10(10).
- 11 CPL § 500.10(16).
- 12 CPL § 500.10(12).
- 13 CPL § 500.10(11).
- 14 CPL § 500.10(11).
- 15 CPL § 500.10(15).

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- 16 CPL § 500.10(15).
17 CPL § 500.10(14).
18 CPL § 500.10(17)(a).
19 CPL § 500.10(17)(a), (b).
20 CPL § 500.10(17)(b).
21 Real Prop Tax Law art 18.
22 CPL § 500.10(17)(b).
23 CPL § 500.10(18).
24 CPL § 500.10(19).
25 CPL § 520.10(2)(a).
26 CPL § 520.10(2)(a).
27 People ex rel. Rosner v. Warden, Bronx House of Detention for Men, 53 A.D.2d 519, 384 N.Y.S.2d 175 (1st Dep't 1976).
28 People ex rel. Alvarez v. Warden, Bronx House of Detention, 178 Misc. 2d 254, 680 N.Y.S.2d 153 (Sup 1998).
29 People v. Baker, 188 Misc. 2d 821, 729 N.Y.S.2d 580 (N.Y. Sup 2001).
30 People ex rel. McManus v. Horn, 18 N.Y.3d 660, 944 N.Y.S.2d 448, 967 N.E.2d 671 (2012).

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§ 11:8. Posting bail—Cash

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Where the court has fixed bail, regardless of whether the court has specified cash bail or not, cash in the designated amount may be posted at any time after the principal has been committed to the custody of the sheriff.¹ The cash bail may be deposited with the county treasurer of the county in which the criminal action or proceeding is pending, or if the action is pending in the City of New York with the commissioner of finance, or with the court which issued the order, or the sheriff into whose custody the principal has been committed.² Upon proof of the deposit of the designated amount, the principal must be released immediately.³

The person posting cash bail must complete and sign a form which states: (1) the name, residential address and occupation of each person posting cash bail; (2) the title of the criminal action or proceeding involved; (3) the offense(s) which is the subject of the action or proceeding involved, and the status of such action or proceeding; (4) the principal's name and the nature of the principal's involvement in or connection with the action or proceeding; (5) that the person(s) posting cash bail undertakes that the principal will appear in the action or proceeding whenever required and will at all times render himself or herself amenable to the orders and processes of the court; (6) the date of the principal's next appearance in court; (7) an acknowledgment that the cash bail will be forfeited if the principal fails to comply with any requirement or order of process to appear in court; and (8) the amount of money posted as cash bail.⁴

Money posted as cash bail is and remains the property of the person posting it unless forfeited to the court.⁵

Footnotes

- 1 CPL § 520.15.
- 2 CPL § 520.15.
- 3 CPL § 520.15.
- 4 CPL § 520.15(2).
- 5 CPL § 520.15(3).

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§ 11:9. Posting bail—Bail bonds

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A bail bond is a written undertaking, executed by one or more obligors, which states that the principal, while at liberty as a result of an order fixing bail and the posting of the bail bond, will appear in a designated criminal action or proceeding when attendance is required, and will otherwise be amenable to the orders and processes of the court.¹ If the principal fails to do so, the obligor must pay to the state the amount of money designated in the order fixing bail.²

The bail bond must be submitted to the court by the obligor or obligors in the amount fixed by the court, and must be executed in the form prescribed by statute.³ In addition, accompanying justifying affidavits of each obligor must be executed in the form prescribed by statute.⁴

An obligor is a person who executes a bail bond on behalf of a principal and thereby assumes the undertaking described in the bail bond.⁵ The principal may be an obligor, but may not be the surety.⁶ The principal is a defendant in a criminal action, a material witness, or other person so involved, and may by law be compelled to appear before a court for the purpose of having the court exercise control over his or her person to secure future attendance.⁷

When a bail bond is to be posted in satisfaction of bail fixed for a defendant charged by information or simplified information or prosecutor's information with one or more traffic infractions and no other offense, the defendant may submit to the court, with its consent, an insurance company bail bond covering the amount of bail fixed by the court, and executed in the form prescribed by the superintendent of insurance.⁸

The form that the bail bond must take is prescribed by the statute and must be subscribed and sworn to by each obligor and must state:

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- (a) the name, residential address and occupation of each obligor;
- (b) the title of the criminal action or proceeding involved;
- (c) the offense or offenses which are the subjects of the action or proceeding and the status of such action or proceeding;
- (d) the name of the principal and the nature of his or her involvement in, or connection with, such action or proceeding;
- (e) that the obligor, or the obligors jointly and severally undertake that the principal will appear in such action or proceeding whenever required and will at all times be amenable to the orders and processes of the court;
- (f) that in the event that the principal does not comply with any such requirement, order or process, the obligor or obligors will pay to the people of the State of New York the designated sum of money fixed by the court.⁹

The bail bond must be accompanied by a justifying affidavit which is subscribed and sworn to by each of the obligors and must state the obligor's name, residential address and occupation.¹⁰ An affidavit justifying an insurance company bail bond must state the amount of premium paid to the obligor, and all security and promises of indemnity received by the surety obligor in connection with its execution of the bond, and the name, occupation and residential and business addresses of every person who has given any such indemnifying security or promise.¹¹

An affidavit which justifies a secured bail bond must state every item of personal property deposited and all real property pledged as security, the value of each item and the nature and amount of every lien or encumbrance on the property.¹²

An affidavit justifying a partially secured bail bond or unsecured bail bond must state the place and nature of the obligor-affiant's business or employment, the length of time so engaged, income during the past year, and average income over the put five year.¹³

A bail bond posted in the course of a criminal action is effective and binding upon the obligor until the imposition of sentence or other termination of the action, regardless of whether the action is dismissed in the local criminal court after an indictment on the same charge or charges by a superior court, and regardless of whether the action is partially conducted or prosecuted in a court or courts other than the one in which the action has been pending when the bond was posted, unless prior to termination the order of bail is vacated or revoked or the principal is surrendered, or unless the terms of the bond expressly limit its effectiveness to a lesser period.¹⁴

However, the effectiveness of the bond may only be limited to a lesser period if the obligor or obligors submit notice of the limitation to the court and the district attorney not less than 14 days before effectiveness end.¹⁵

The legislature intended to create a presumption that a bail bond posted in a criminal action is a "consolidated bail bond" under the statute, effective not only in the court in which the bail bond was posted, but throughout all remaining proceedings in the action, regardless of where those proceedings occur.¹⁶ Furthermore, the legislature, by enacting the word "period" under the statute, intended its ordinary meaning to be a portion of time of any length characterized by some recurring phenomenon or other cyclic occurrence.¹⁷ Therefore, the surrender of the principal by the surety is not a necessary condition in order to terminate liability prior to the conclusion of the criminal proceeding.¹⁸

In addition, a surety-obligor on a consolidated bail bond can terminate its liability prior to the conclusion of the criminal proceeding by including a clause in the bond which expressly limits the effectiveness of the bond to a specific period of time.¹⁹

When the terms of the bail bond have been satisfied, the surety's obligation terminates automatically by operation of law.²⁰ Therefore, the surety is not estopped from asserting the limits of its contractual liability in the bail bond against the state by allowing the principal to remain at liberty after the period of limitation expires since a surety is not responsible for the principal's

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failure to appear in court after the court has erroneously permitted the principal to remain at liberty beyond the terms of the bail bond, and the surety does not have to notify the state or the court that its liability is about to end pursuant to the terms of the bond.²¹

A bail bond is security which seeks to assure the defendant's appearance in court in a criminal proceeding, and when bail is accepted by the state in lieu of the defendant's physical incarceration, the defendant is in effect remanded to the surety's custody.²²

The statute defining security for bail bond provides that nonexempt personal property may be used as security if its net value is equal to or greater than the total amount of the undertaking,²³ while for real property to be used as security, its net value must be at least twice the total amount of the undertaking.²⁴ The Court of Appeals has held this double equity requirement to be constitutional.²⁵

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Footnotes

- 1 CPL § 500.10(13).
- 2 CPL § 500.10(13).
- 3 CPL § 520.20(1).
- 4 CPL § 520.20(4).
- 5 CPL § 500.10(11).
- 6 CPL § 500.10(12).
- 7 CPL § 500.10(1).
- 8 CPL § 520.20(1)(b).
- 9 CPL § 520.20(2).
- 10 CPL § 520.20(4)(a).
- 11 CPL § 520.20(4)(a).
- 12 CPL § 520.20(4)(b).
- 13 CPL § 520.20(4)(c), as amended by 1981 Session Laws ch 145 § 1.
- 14 CPL § 520.20(3).
- 15 CPL § 520.20(3), as amended by 1981 Session Laws ch 268 § 1.
- 16 CPL § 520.20(3).
People v. Stuyvesant Ins. Co., 98 Misc. 2d 210, 413 N.Y.S.2d 843 (Sup 1979).
- 17 CPL § 520.20(3).
People v. Stuyvesant Ins. Co., 98 Misc. 2d 210, 413 N.Y.S.2d 843 (Sup 1979).
- 18 *People v. Stuyvesant Ins. Co.*, 98 Misc. 2d 210, 413 N.Y.S.2d 843 (Sup 1979).
- 19 *People v. Stuyvesant Ins. Co.*, 98 Misc. 2d 210, 413 N.Y.S.2d 843 (Sup 1979).
- 20 *People v. Stuyvesant Ins. Co.*, 98 Misc. 2d 210, 413 N.Y.S.2d 843 (Sup 1979).
See *People v. Herman*, 140 Misc. 699, 251 N.Y.S. 394 (Gen. Sess. 1931).
- 21 *People v. Stuyvesant Ins. Co.*, 98 Misc. 2d 210, 413 N.Y.S.2d 843 (Sup 1979).
See *People v. Public Service Mut. Ins. Co.*, 49 Misc. 2d 875, 268 N.Y.S.2d 624 (Sup 1966); *People v. Public Service Mut. Ins. Co.*, 40 Misc. 2d 341, 243 N.Y.S.2d 256 (Sup 1963).
- 22 *People v. Public Service Mut. Ins. Co.*, 37 N.Y.2d 606, 376 N.Y.S.2d 421, 339 N.E.2d 128 (1975).

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23 CPL § 500.10(17)(a).

24 CPL § 500.10(17)(b).

25 People ex rel. Hardy, on Behalf of Miller v. Sielaff, 79 N.Y.2d 618, 584 N.Y.S.2d 742, 595 N.E.2d 817 (1992).

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§ 11:10. Examination of sufficiency of bail

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A procedure is established by statute in order to examine the sufficiency of a bail bond.¹ After the posting of a bail bond and the justifying affidavit or affidavits, the court may conduct an inquiry for the purpose of determining the reliability of the obligors, the value and sufficiency of any security offered, and whether any feature of the undertaking contravenes public policy;² provided that before undertaking an inquiry of a person posting cash bail the court, after application of the district attorney, must have had reasonable cause to believe that the person posting cash bail is not in rightful possession of money posted as cash bail or that the money constitutes the fruits of criminal or unlawful conduct.³ Any matter stated or required to be stated in the justifying affidavits may be inquired into, as well as any other matters which are appropriate to the determination, which include but are not limited to the following:

- (a) the background, character and reputation of any obligor, and in the case of an insurance company bail bond, the qualifications of the surety obligor and its executing agent;
- (b) the source of any money or property deposited as security and whether any such money or property constitutes the fruit of criminal or unlawful conduct;
- (c) the source of any money or property delivered or agreed to be delivered to any obligor as indemnification on the bond, and whether any such money or property constitutes the fruits of criminal or unlawful conduct;
- (d) the background, character and reputation of any person who has indemnified or agreed to indemnify any obligor upon the bond; and whether any such indemnitor, not being licensed by the superintendent of insurance in accordance with the insurance law, has within a period of one month prior to the indemnity transaction given indemnification or security for like purpose in more than two cases not arising out of the same transaction;⁴
- (e) the source of any money posted as cash bail, and whether that money constitutes the fruits of criminal or unlawful conduct; and⁵

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(f) the background, character and reputation of the person posting cash bail.⁶

At a surety hearing, the defendant bears the ultimate burden of persuading the court by a preponderance of the evidence that the money or property posted as collateral is not the fruit of unlawful or criminal conduct.⁷

At the time of the inquiry the court may examine, under oath or otherwise, the obligors and any other persons who may possess material information; the district attorney has a right to attend such inquiry, to call witnesses and examine any witnesses in the proceeding; and the court may, upon application of the district attorney, adjourn the proceeding for a reasonable period to allow the district attorney to investigate the matter.⁸ However, where inquiry into an area specified in the statute is foreclosed on erroneous legal grounds, the rights of the district attorney are abrogated and a determination precluded.⁹ Therefore, since the prosecution does not have the right to appeal from an order setting bail, a special proceeding for an order by way of mandamus is appropriate.¹⁰

At the conclusion of the hearing, the court must issue an order either approving or disapproving the bail.¹¹

The fact that bail has not yet been posted for a defendant does not preclude, as premature, the state's application for a sufficiency hearing in the event that a bail bond or cash bail is posted since the court is statutorily authorized to conduct an inquiry into whether the purpose of bail would be achieved by posting, and allowing a defendant's release before a sufficiency hearing, which could occur if application is not made until after posting bail, might not further its purpose.¹²

The statute is directed primarily toward the obligor rather than the underlying indemnification, except to the extent of any public policy question.¹³ Thus, a court is empowered under the Criminal Procedure Law to inquire into the relationship between the third-party indemnitor and the principal to determine if the posting of the bond violates a public policy.¹⁴ Accordingly, where the evidence at a surety hearing led to the conclusion that the defendant or an associate had either bribed or threatened the third-party indemnitor into posting collateral, the bail bond was not allowed.¹⁵ In cases where a bail bond rather than cash is posted, the scope of such an inquiry is limited to an examination of the qualifications and trustworthiness of the surety-obligor.¹⁶ However, an inquiry into the source of the collateral pledged to secure issuance of a bail bond is not prohibited.¹⁷ In fact, the state expressly allows the court to inquire into the source of collateral delivered to the obligor as indemnification on the bond.¹⁸ Also, case law indicates that the hearing court's scope of inquiry extends to investigation of the underlying indemnification on a bail bond.¹⁹ Where no satisfactory explanation is provided for the source of the collateral, inquiry into the source of the cash contributed as collateral is both relevant and obligatory.²⁰ Moreover, such inquiry is appropriate even absent a claim of irregularity by the obligor and even if the case constitutes only a portion of the collateral.²¹ Without such an inquiry the court cannot determine with any degree of certainty if an otherwise legitimate obligor is being unwittingly used as a front to conceal illicit sources of cash in contravention of public policy.²² To limit the inquiry to the good faith auspices of the bail bond company would defeat the statute's purpose.²³

The court must probe the relationships between the indemnitors in pledging the collateral as such considerations are crucial from a public policy standpoint.²⁴ Bail is set with a view to exert sufficient pressure on the defendant to ensure the defendant's return to court, the assumption being that a defendant has an incentive to appear if his or her assets or those of a family member are put at risk if the defendant absconds.²⁵ A bail arrangement fails to meet the state's public policy interest in providing this incentive for the defendant to appear where neither the defendant nor a close relative put his or her own assets at risk and the prospect of loss to the third party indemnitors is not likely to provide incentive for the defendant to return.²⁶ A second essential public policy consideration is the indemnitor's motive for putting up the collateral.²⁷ While the motive for a family member to do so is readily understandable, when virtual strangers to the defendant put up substantial assets the court must question their motives.²⁸

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The state's offer of proof supported its application for a sufficiency hearing where it contained several specific allegations of defendant's association and contact with known members of organized crime.²⁹

The court could consider an indemnitor's motive in posting bond and to review the source of the money used to pay the premium for the bond at the bail sufficiency hearing, since public policy required the court to be able to examine the nature of the relationship between the end indemnitor and the defendant, and the extent to which the collateral posted would deter the defendant from fleeing.³⁰

In *Gevorkyan v. Judelson*, 29 N.Y.3d 452, 58 N.Y.S.3d 253, 80 N.E.3d 999 (2017), the Court of Appeals held that a bail bond company defined as a “bail business” under *New York Insurance Law (NYIL) § 6801(a)(1)* may not retain its “premium or compensation” as described under NYIL § 6804(a) and must return the “premium or compensation” to the appropriate party where the bond posted pursuant to *CPL 520.20* is denied at a bail-sufficiency hearing conducted pursuant to *CPL 520.30*. Here, the bond was set at \$2 million and the premium at issue was \$120,560. The Court added that the sum should be returned here, particularly since the premium had not been earned under either the NYIL or CPL, and the defendant who was the subject of the bond was never admitted to bail, thus the bail bond company endured no risk.

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Footnotes

- 1 CPL § 520.30(1).1.
- 2 CPL § 520.30(1).1.
People v. McIntyre, 168 Misc. 2d 556, 640 N.Y.S.2d 386 (Sup 1996).
- 3 CPL § 520.30(1).
- 4 CPL § 520.30(1).1.
- 5 CPL § 520.30(1).
- 6 CPL § 520.30(1).
- 7 *People v. Esquivel*, 158 Misc. 2d 720, 601 N.Y.S.2d 541 (Sup 1993).
- 8 CPL § 520.30(2).1.
- 9 *Johnson v. Crane*, 171 A.D.2d 537, 568 N.Y.S.2d 22 (1st Dep't 1991).
- 10 *Johnson v. Crane*, 171 A.D.2d 537, 568 N.Y.S.2d 22 (1st Dep't 1991).
- 11 CPL § 520.30(8).1.
- 12 *People v. Pullara*, 172 Misc. 2d 63, 656 N.Y.S.2d 832 (County Ct. 1997).
- 13 *Barnes v. Cohen*, 45 A.D.2d 837, 358 N.Y.S.2d 1 (1st Dep't 1974) (overruled on other grounds by, *Johnson v. Crane*, 171 A.D.2d 537, 568 N.Y.S.2d 22 (1st Dep't 1991)).
- 14 *People v. Esquivel*, 158 Misc. 2d 720, 601 N.Y.S.2d 541 (N.Y. Sup 1993).
People v. Agnello, 183 Misc. 2d 694, 705 N.Y.S.2d 525 (Sup 2000).
- 15 *People v. Esquivel*, 158 Misc. 2d 720, 601 N.Y.S.2d 541 (Sup 1993).
- 16 *People v. McIntyre*, 168 Misc. 2d 556, 640 N.Y.S.2d 386 (Sup 1996).
Where the obligor for a bail bond is an insurance company licensed by the superintendent of insurance to engage in the business of executing bail bonds, inquiry regarding the value and sufficiency of the bond is usually confined to qualifications of the surety-obligor and its executing agent. *People v. Martinez*, 166 Misc. 2d 781, 635 N.Y.S.2d 424 (Sup 1995).
- 17 *People v. McIntyre*, 168 Misc. 2d 556, 640 N.Y.S.2d 386 (Sup 1996).
- 18 *People v. McIntyre*, 168 Misc. 2d 556, 640 N.Y.S.2d 386 (Sup 1996).
- 19 *People v. McIntyre*, 168 Misc. 2d 556, 640 N.Y.S.2d 386 (Sup 1996).

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- 20 People v. McIntyre, 168 Misc. 2d 556, 640 N.Y.S.2d 386 (Sup 1996).
- 21 People v. McIntyre, 168 Misc. 2d 556, 640 N.Y.S.2d 386 (Sup 1996).
- 22 People v. McIntyre, 168 Misc. 2d 556, 640 N.Y.S.2d 386 (Sup 1996).
- 23 People v. McIntyre, 168 Misc. 2d 556, 640 N.Y.S.2d 386 (Sup 1996).
- 24 People v. McIntyre, 168 Misc. 2d 556, 640 N.Y.S.2d 386 (Sup 1996).
- 25 People v. McIntyre, 168 Misc. 2d 556, 640 N.Y.S.2d 386 (Sup 1996).
- 26 People v. McIntyre, 168 Misc. 2d 556, 640 N.Y.S.2d 386 (Sup 1996).
- 27 People v. McIntyre, 168 Misc. 2d 556, 640 N.Y.S.2d 386 (Sup 1996).
- 28 People v. McIntyre, 168 Misc. 2d 556, 640 N.Y.S.2d 386 (Sup 1996).
- 29 People v. Pullara, 172 Misc. 2d 63, 656 N.Y.S.2d 832 (County Ct. 1997).
- 30 People v. Agnello, 183 Misc. 2d 694, 705 N.Y.S.2d 525 (Sup 2000).

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1 Criminal Procedure in New York § 11:11 (2d)

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§ 11:11. Transfer of bail from local court to superior court

References

West's Key Number Digest

- West's Key Number Digest, [Bail](#) 77(1)
- West's Key Number Digest, [Criminal Law](#) 101(3)

Cash bail received by the local criminal court in a criminal proceeding may be transferred to the superior court upon arraignment of the defendant in the superior court, by order of the superior court and upon request of the defendant.¹

If there is an overage, the superior court must order it be paid over to the person who posted the cash bail in the local criminal court and, if there is a deficiency, the accused must post additional bail as directed by the superior court.²

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Footnotes

¹ CPL § 520.40.

² CPL § 520.40.

§ 11:12.Forfeiture, 1 Criminal Procedure in New York § 11:12 (2d)

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§ 11:12. Forfeiture

References

West's Key Number Digest

- West's Key Number Digest, [Bail](#) 77(1)

The section of the statute which establishes the factors to be considered in setting bail ¹ does not provide for automatic forfeiture of bail by a defendant who commits other crimes. ² If the principal, without sufficient excuse, fails to appear when required or is not otherwise amenable to the orders and process of the criminal court, the court must enter such facts upon the minutes and the bail bond or cash bail may be forfeited. ³ If the principal does appear at any time before the final adjournment of the court and has a satisfactory excuse, the court may direct the forfeiture to be discharged upon terms which are just. ⁴

The court has held that inclusion of the word "voluntarily" in the section of the Penal Law governing bail jumping ⁵ does not eliminate the grace period, present in predecessor statutes, which reasonably limits the scope of the nonintentional crime. ⁶ The purpose of this construction is to make certain when the crime is committed, rather than leaving the determination to the fortuitous event of arrest. ⁷

If the forfeited bail consists of a bail bond, the district attorney must proceed against the obligor who executed the bond within 120 days after the adjournment of the court. ⁸ The procedure to be followed by the district attorney in proceeding against the obligor is to prepare an order, to be signed by the court, which forfeits the bail bond. ⁹ This order and the bail bond are filed with the clerk of the court who docket them in the proper book; the clerk then enters a judgment against the obligor for the amount of the penalty in the bond; the bond and a certified copy of the order of the court forfeiting the bond constitutes the judgment roll; the judgment is a lien on the real estate of the obligor from the time of the entry of the judgment; an execution may be issued to collect the amount of the bail bond in the same form and with the same effect as a judgment in an action upon a debt in favor of the state. ¹⁰ Failure to proceed against a surety within the time prescribed by statute precludes recovery on the bond. ¹¹

§ 11:12.Forfeiture, 1 Criminal Procedure in New York § 11:12 (2d)

There are special rules which apply to certain local criminal courts when bail is forfeited on an accusatory instrument other than a felony complaint.¹² If the bail consists of a bail bond, the financial officer of the city, town or village must promptly commence an action for the recovery of the sum of money specified in the bond, and upon collection, the financial officer must transfer the money to the treasurer or financial officer of the municipality.¹³ Any amount recovered, unless otherwise provided by law, shall be the property of the city, town or village in which the offense charged is alleged to have been committed.¹⁴ If the bail consists of cash held by a city court, the court must pay the forfeited bail to the treasurer or other financial officer of the city; and unless otherwise provided by law, it becomes the property of the city.¹⁵ If the bail is cash held by a town court or a village court, the court must pay the forfeited bail to the state comptroller on or before the 10th day of the month immediately following the forfeiture; but this forfeited bail, unless otherwise provided by law, is the property of the town or village in which the offense charged was committed.¹⁶

When a single amount of bail is posted for more than a single offense charged, and the town or village justice court does not attribute a specific amount of bail to each offense, and forfeited bail for at least two of the offenses would be the property of different governmental entities, the entire amount of forfeited bail will be the property of the town or village in which the offenses charged are alleged to have been committed.¹⁷ However, when forfeited bail for at least one of the offenses would be the property of the state, the entire amount of forfeited bail will be the property of the state.¹⁸

Under the statute,¹⁹ forfeiture of bail is not mandated by law to take effect when the defendant's nonappearance is entered on the minutes of the court, and a stay of execution does not postpone or extend the date of the forfeiture for purposes of the statute of limitations.²⁰

The district attorney's failure to file the certified copy of the order of forfeiture of the bail bond did not affect the validity of the order or warrant vacatur of the order as void ab initio where the issuing court had jurisdiction and did not act ultra vires or illegally in setting or accepting the bond or imposing the forfeiture; such conduct on the part of the district attorney did not support the surety's request for remission of the forfeiture.²¹

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Footnotes

- 1 CPL § 510.30.
- 2 *People ex rel. Ortiz v. Commissioner of Corrections of City of New York*, 76 A.D.2d 818, 429 N.Y.S.2d 26 (1st Dep't 1980).
- 3 CPL § 540.10(1).
- 4 CPL § 540.10(2).
- 5 Penal Law § 215.57.
- 6 *People v. Shurn*, 50 N.Y.2d 914, 431 N.Y.S.2d 448, 409 N.E.2d 923 (1980).
- 7 *People v. Shurn*, 50 N.Y.2d 914, 431 N.Y.S.2d 448, 409 N.E.2d 923 (1980).
- 8 CPL § 540.10(2).
- 9 CPL § 540.10(3).
- 10 CPL § 540.10(3).
- 11 *People v. Schonfeld*, 74 N.Y.2d 324, 547 N.Y.S.2d 266, 546 N.E.2d 395 (1989).
- 12 CPL § 540.20 (applicable to city, town, and village courts).
- 13 CPL § 540.20(1).

§ 11:12.Forfeiture, 1 Criminal Procedure in New York § 11:12 (2d)

14	CPL § 540.20(1).
15	CPL § 540.20(2)(a).
16	CPL § 540.20(2)(b).
17	CPL § 540.20(2)(b).
18	CPL § 540.20(2)(b).
19	CPL § 540.10.
20	People v. Brown, 96 Misc. 2d 127, 408 N.Y.S.2d 927 (Queens Sup 1978).
21	People v. Santiago, 175 Misc. 2d 268, 668 N.Y.S.2d 878 (Westchester County Ct. 1998).

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§ 11:13. Bail jumping, 1 Criminal Procedure in New York § 11:13 (2d)

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§ 11:13. Bail jumping

[References](#)

West's Key Number Digest

- West's Key Number Digest, [Bail](#) 97(1)

The gravamen of the offense of bail jumping is the failure of the defendant to appear when required.¹ The different degrees and grade classifications of the various bail jumping sections are determined by the nature of the underlying charges as to which the defendant fails to appear.²

Bail jumping in the second degree is committed when a person, by court order, has been released from custody or allowed to remain at liberty, either on bail or on the person's own recognizance, on the condition that the person will later appear personally in connection with the charge of committing a felony, and when he or she fails to appear personally on the required date or voluntarily within 30 days thereafter.³ The bail jumping statute has been construed to permit the court, on the calendared date, to stay the issuance of a bench warrant and adjourn the matter to another date, thereby nullifying the "required" date element of the offense of bail-jumping.⁴ The court reasons that "required date" implies a legislative recognition of the calendar court's discretion in the overall scheduling of criminal litigation, and that the statute contemplates not only the court's establishing the required date, but also the court's discretionary authority prior to that date to amend its own requirement.⁵ Accordingly, a defendant's nonappearance on a scheduled court date, excused by a judicial stay of the execution of a bench warrant, did not constitute a failure to appear on the required date within the meaning of the bail-jumping statute, and his involuntary appearance within 30 days after his unexcused failure to appear on a rescheduled date negated the "required" date element of the offense.⁶

When a person is convicted of bail jumping committed after an arraignment and while the defendant is released on recognizance or bail in connection with a pending indictment or information charging one or more felonies, at least one of which the defendant is subsequently convicted, and if an indeterminate sentence of imprisonment is imposed in each case, the sentences shall run consecutively unless the court, in the interest of justice, orders the sentences to run concurrently if it finds mitigating circumstances that bear directly upon the manner in which the crime was committed.⁷

§ 11:13.Bail jumping, 1 Criminal Procedure in New York § 11:13 (2d)

For purposes of the statute of limitations, the crime of bail jumping is not a continuous offense since the crime is complete and the statute of limitations begins to run 30 days after a defendant fails to appear in court and the defendant's fugitive status does not toll the five-year limitations period.⁸

Where a criminal proceeding on a drug-related felony charge against the defendant when he was under 16 years of age was never transferred to family court, the criminal court never lost jurisdiction and the defendant could, therefore, be convicted of the bail jumping charge after turning 16 years old for refusing to appear when directed on the underlying drug charge, even though the defendant was under 16 when admitted to bail, since the defendant had claimed to be 19 when charged with the drug offense and did not admit to his true age until he appeared on the bail jumping charge.⁹

A conviction for bail jumping in the second degree did not violate due process according to the Appellate Division despite a claim the defendant had not been warned at the time he entered his plea that he could be prosecuted for jail jumping if he failed to appear in court on the required time and date. The existence of the bail jumping statute, the Court held, provide the defendant with sufficient notice under the law.¹⁰

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Footnotes

- 1 [People v. Shannon](#), 127 Misc. 2d 1073, 129 Misc. 2d 289, 488 N.Y.S.2d 348 (Queens Sup 1985), judgment aff'd, 127 A.D.2d 863, 512 N.Y.S.2d 242 (2d Dep't 1987) and order aff'd, 128 A.D.2d 1029, 512 N.Y.S.2d 342 (1st Dep't 1987).
- 2 [People v. Shannon](#), 127 Misc. 2d 1073, 129 Misc. 2d 289, 488 N.Y.S.2d 348 (Queens Sup 1985), judgment aff'd, 127 A.D.2d 863, 512 N.Y.S.2d 242 (2d Dep't 1987) and order aff'd, 128 A.D.2d 1029, 512 N.Y.S.2d 342 (1st Dep't 1987).
- 3 [McKinney's Penal Law § 215.56](#).
- 4 [People v. Coppez](#), 93 N.Y.2d 249, 689 N.Y.S.2d 692, 711 N.E.2d 970 (1999).
- 5 [People v. Coppez](#), 93 N.Y.2d 249, 689 N.Y.S.2d 692, 711 N.E.2d 970 (1999).
- 6 [People v. Coppez](#), 93 N.Y.2d 249, 689 N.Y.S.2d 692, 711 N.E.2d 970 (1999).
- 7 [Penal Law § 70.25\(2c\)](#).
- 8 [CPL § 30.10\(2\)\(b\)](#); [Penal Law § 215.56](#).
- 9 [People v. Barnes](#), 130 Misc. 2d 1058, 499 N.Y.S.2d 343 (N.Y. Sup 1986).
- 10 [People v. Holmes](#), 89 N.Y.2d 838, 652 N.Y.S.2d 725, 675 N.E.2d 460 (1996).

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§ 11:14. Surrender of defendant

References

West's Key Number Digest

- West's Key Number Digest, [Bail](#) 97(1)

An obligor may surrender the principal at any time before the forfeiture of a bail bond; and the defendant may also personally surrender to the court in which the case is pending, or to the sheriff to whose custody the defendant was committed at the time of giving bail.¹

The method by which surrender of the defendant is accomplished is that a certified copy of the bail bond is delivered to the sheriff who then detains the defendant in custody in the same manner as in a commitment.² The sheriff must acknowledge the surrender by a certificate in writing and must immediately notify the court in which the case is pending that the surrender has been made.³

After surrender, the court, upon five days' notice to the district attorney, must order that bail be exonerated.⁴

For the purpose of surrendering the defendant, an obligor may take the defendant into custody at any place within the state; or the obligor may, by a written authority endorsed on a certified copy of the bail bond, empower any person over 20 years of age to take the defendant into custody.⁵

At any time before the forfeiture of cash bail, the defendant may personally surrender, or the person who posted bail for the defendant may surrender the defendant, either to the court or to the sheriff, and the court must order a return of the money to the person who posted it, upon production of the certificate of the sheriff showing that the defendant has surrendered to the sheriff, and upon a notice of five days to the district attorney.⁶

The surrender of the principal prior to termination of the criminal proceedings is an alternative means of ending a surety's liability under the Criminal Procedure Law distinct from limiting the effectiveness of the bail bond by its express terms.⁷

§ 11:14.Surrender of defendant, 1 Criminal Procedure in New York § 11:14 (2d)

Therefore, the surrender of the principal by the surety is not a necessary condition in order to terminate liability prior to the conclusion of the criminal proceeding.⁸

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Footnotes

- 1 CPL § 530.80(1).
- 2 CPL § 530.80(1)(a).
- 3 CPL § 530.80(1)(a).
- 4 CPL § 530.80(1)(b).
- 5 CPL § 530.80(2).
- 6 CPL § 530.80(3).
- 7 CPL § 520.20(3).
- 8 *People v. Stuyvesant Ins. Co.*, 98 Misc. 2d 210, 413 N.Y.S.2d 843 (Sup 1979).

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§ 11:15. Remission of forfeiture

References

West's Key Number Digest

- West's Key Number Digest, [Bail](#) 79

Within one year after the forfeiture of bail, an application may be made for remission of the forfeiture.¹ If the forfeiture has been ordered by a superior court the application must be made to that court, and if the forfeiture has been ordered by a local criminal court the application must be made to a superior court in that county, unless the local criminal court is a district court in which case the application may be made either to that district court or to a superior court in the county.² The application for remission must give at least five days' notice to the district attorney, and copies of affidavits and supporting papers must also be served.³ The court may grant the application and remit all or part of the forfeiture upon terms which are just, but the application may be granted only upon payment of the costs and expenses which have been incurred in the proceeding for the enforcement of the forfeiture.⁴ Remission for forfeiture of bail is within the discretion of the court and should only be granted under exceptional circumstances and to promote the ends of justice.⁵

The application for remission of the bail forfeiture must be made within the one-year statute of limitations and the court may only consider affidavits and papers that were submitted prior to the running of the statute. Papers submitted subsequent to the one-year period may not cure a defective application.⁶ This one-year statute of limitations does not apply where the bail is illegally accepted or where the forfeiture is claimed to be void or illegal.⁷

Events which take place after the day set for appearance cannot excuse the principal's failure to appear on that date, thus the principal's subsequent death is not an excuse for the failure to appear.⁸ The applicant, in order to show severe hardship as a basis for remission of the forfeited bail, must allege and prove that the failure to remit the collateral will cause destitution to a family, will deprive children of support and education, or will deprive creditors of their just debts.⁹

§ 11:15.Remission of forfeiture, 1 Criminal Procedure in New York § 11:15 (2d)

Since a surety has no vested right to a remission of bail after forfeiture except as allowed by statute, the terms of the statute must be strictly complied with and cannot be waived by a concession by the district attorney.¹⁰

The people have the right to insist on a forfeiture of bail when the defendant has violated terms of freedom that have been granted.¹¹ However, the correlative duty on the state is to consent to exoneration of bail when common sense and simple fairness dictate no other course.¹²

Practice Tip:

While a defendant's hospitalization can be a sufficient excuse for his nonappearance and therefore constitute grounds for remission of a forfeiture of bail, a detailed and explicit affidavit by the defendant or a medical affidavit or certificate must be submitted showing that the illness was a disabling one or that it made the appearance hazardous.¹³

The interest of justice required remission of forfeited bail under the circumstances, where the surety's tardiness in bringing its initial motion for remission was innocently based on misleading information provided by the clerk's office concerning the date of forfeiture, the surety's reliance on defense counsel's earlier hearsay affirmation about the cause for defendant's initial failure to appear was a technical defect, and the prosecution failed to show prejudice from the grant of this relief.¹⁴

The Appellate Division reversed an order of the County Court where it held that forfeiture of an \$80,000 security bond was improper and thus should be vacated due to the fact that the bond only properly covered the first indictment of the defendant for which he was acquitted and not the second indictment in which he absconded before trial. The Court held there is a distinction between vacating an order of forfeiture and a denial of remission of bail which is directed at the discretion of the Court and requires consideration as to willingness of the defendant's non appearance and other forfeiture issues.¹⁵

In [Matter of EBIC Insurance Company, Surety, By Eatman](#), 59 Misc. 3d 357, 68 N.Y.S.3d 841 (Sup 2017) the trial judge forfeited bail on January 11, 2016, with a certified copy of the court order sent to the surety with notice that a motion to be made for remittance be made no later than the expiration of the one-year statute of limitations under [CPL 540.30\(2\)](#). A motion to vacate the forfeiture and remittance of bails was made August 14, 2017, a full eight months after the statute of limitations had expired. The trial court then considered if the one-year statute of limitations under [CPL 540.30\(2\)](#) is in violation of federal and New York State Constitutional due process consideration.

The court noted that it has been held that remission of forfeiture of a bail bond is considered an “Act of Grace” which the legislature may take away if it no longer deems it serves its continued purpose. Remission is purely statutory and its provisions must be strictly construed. The act of remission is not a “claim of relief as of right,” and therefore, the right of the one seeking remission is balanced against the stronger interests of the state.

The court added “thus, as a limited statutorily created right, bail remission due process considerations are set at minimum when balanced against far more significant state interests. The legislature limited remission to a one-year period because the State's interest may become irreparably damaged. This is particularly significant as the county treasurer would no longer be able to release the bail as it would no longer be in the county's possession. Indeed, one Appellate Division has declared that the one-year limited period is jurisdictional in nature and cannot be waived as a result.” (See [People v. Cotto](#), 265 A.D.2d 190, 696

§ 11:15.Remission of forfeiture, 1 Criminal Procedure in New York § 11:15 (2d)

N.Y.S.2d 141 (1st Dep't 1999)). In conclusion, the court found CPL 540.30(2) constitutional under both the federal and New York State Constitutions and therefore found no grounds to vacate the forfeiture or remit bail.

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Footnotes

- 1 CPL § 540.30.
2 CPL § 540.30(1).
3 CPL § 540.30(2).
4 CPL § 540.30(2).
People v. Lee, 179 A.D.2d 829, 579 N.Y.S.2d 159 (2d Dep't 1992) (application for remission of forfeiture not timely).
5 People v. Scalise, 105 A.D.2d 869, 482 N.Y.S.2d 362 (3d Dep't 1984) (denial of application was proper where accused left state under assumed name with falsified documents and without notifying his wife as to his intentions).
6 People v. Public Service Mut. Ins. Co., 37 N.Y.2d 606, 376 N.Y.S.2d 421, 339 N.E.2d 128 (1975).
The issue regarding the remission of the forfeited bail was not properly raised by the defendant on appeal from his judgment of conviction because the matter was civil in nature and could not be brought up for review by the defendant's notice of appeal from the criminal conviction. People v. Baron, 133 A.D.2d 833, 520 N.Y.S.2d 205 (2d Dep't 1987).
7 People v. Salabarría, 121 A.D.2d 438, 503 N.Y.S.2d 411 (2d Dep't 1986) (absence of court directive requiring defendant's appearance in court renders forfeiture of bail for defendant's nonappearance illegal).
8 People v. Midland Ins. Co., 97 Misc. 2d 341, 411 N.Y.S.2d 521 (Bronx Sup 1978).
9 People v. Midland Ins. Co., 97 Misc. 2d 341, 411 N.Y.S.2d 521 (Bronx Sup 1978).
10 CPL § 540.30.
People v. Public Service Mut. Ins. Co., 37 N.Y.2d 606, 376 N.Y.S.2d 421, 339 N.E.2d 128 (1975); People v. Cohen, 245 N.Y. 419, 157 N.E. 515 (1927); People v. Martin, 225 A.D. 572, 233 N.Y.S. 643 (1st Dep't 1929); People v. Grundy, 218 A.D. 541, 218 N.Y.S. 420 (1st Dep't 1926); People v. Midland Ins. Co., 97 Misc. 2d 341, 411 N.Y.S.2d 521 (Bronx Sup 1978); Application of White, 41 Misc. 2d 994, 246 N.Y.S.2d 891 (Kings Sup 1964).
11 People v. Alvarez, 94 Misc. 2d 334, 404 N.Y.S.2d 509 (Queens Sup 1978).
12 People v. Alvarez, 94 Misc. 2d 334, 404 N.Y.S.2d 509 (Queens Sup 1978).
13 Indemnity Ins. Co. of North America v. People, 133 A.D.2d 345, 519 N.Y.S.2d 244 (2d Dep't 1987).
14 People v. Valenzuela, 241 A.D.2d 320, 660 N.Y.S.2d 13 (1st Dep't 1997) (collateral on bond was \$10,000 from defendant's brother and brother's family home).
15 Seneca Ins. Co. v. People, 40 A.D.3d 1151, 834 N.Y.S.2d 581 (3d Dep't 2007).

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