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CPL § 170.30: The Power to Dismiss Criminal Charges for Want of Prosecution Does Not Inhere in the Judiciary

Steven G. Yudin

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it is submitted that a plaintiff's awareness of the mere presence of the device should not bar application of the discovery rule.

The *Martin* decision, while not the best solution, does provide some certainty to an area plagued with uncertainties.⁴² Nevertheless, the equities support adoption of the more progressive discovery rule in cases of implanted or inserted devices as forcefully as in cases where foreign objects are negligently left in the body.

Vincent W. Crowe

CRIMINAL PROCEDURE LAW

CPL § 170.30: The power to dismiss criminal charges for want of prosecution does not inhere in the judiciary

Fundamental to every court is the power to regulate its activities in the interests of judicial efficiency and the preservation of

979. Almost 4 years later, the pin broke. *Id.* The pin was labeled "akin" to a foreign object and the plaintiff's knowledge of its insertion was deemed insufficient to prevent extension of the discovery rule. *Id.* at 67, 312 N.Y.S.2d at 980. Alternatively, the court held that the action was timely because there was no injury until the prosthesis broke. *Id.* Whereas the plaintiff in *Lindsey* may have been expected to recognize a cause and effect relationship between discomfort in her pelvic area and the Dalkon Shield, it is submitted that the plaintiff in *Martin* was not equally apprised of a causal link between the implanted valve and the head pains he suffered. As has been stated, "insidious diseases are no respecters of jurisdictional boundaries." McLaren, *supra* note 2 at 268.

It has been noted, in fact, that judicial enactment of a discovery rule in situations of implanted or inserted devices would be "entirely appropriate . . . in the absence of legislative mandate." Flanagan v. Mount Eden Gen. Hosp., 24 N.Y.2d 427, 435, 248 N.E.2d 871, 876, 301 N.Y.S.2d 23, 29, *cert. denied*, 396 U.S. 837 (1969); *see also* Hamilton v. Turner, 377 A.2d 363, 364 (Del. Super. Ct. 1977). In *Hamilton*, a discovery rule was applied in a case involving a defective intrauterine device where although plaintiff experienced discomfort, plaintiff did not connect discomfort to presence of the device. 377 A.2d at 364.

⁴² *See supra* note 2 and accompanying text. The *Martin* court rightfully preserved the plaintiff's cause of action, and several courts have reached the same result. *See, e.g.*, Klein v. Dow Corning Corp., 661 F.2d 998, 999 (2d Cir. 1981). In *Klein*, a woman sued for injuries suffered when a prosthesis burst in her breast. *Id.* The fact that the suit was brought 14 years after surgical implantation did not bar the suit, since the court held that the action accrued at the moment the prosthesis burst. *Id.*; *see also* Kristeller v. A.H. Robins, Inc., 560 F. Supp. 831, 833 (N.D.N.Y. 1983) (noting inequity of running statute before injury); Bailey v. A.H. Robins, Inc., 560 F. Supp. 833, 834 (N.D.N.Y. 1983) (accrual at onset of pelvic inflammation allegedly caused by Dalkon Shield).

judicial independence.⁴³ Toward these ends, courts traditionally have maintained control of their calendars through the exercise of their inherent authority.⁴⁴ Moreover, the judiciary has extended

⁴³ See *Link v. Wabash R.R.*, 370 U.S. 626, 630-31 (1962) (inherent power is necessary to achieve orderly and expeditious disposition of cases); 7 RULING CASE LAW § 62, at 1033 (McKinney 1915) (courts are vested with intrinsic power to ensure proper administration of justice) [hereinafter cited as 7 R.C.L.]. According to Federal District Judge Jim R. Carrigan of the District of Colorado, inherent powers include:

all powers reasonably required to enable a court to perform efficiently its judicial functions, to protect its dignity, independence and integrity, and to make its lawful actions effective. These powers are inherent in the sense that they exist because the court exists

J. CRATSLY, *INHERENT POWERS OF THE COURTS* 2 (1980).

Inherent powers are not expressly provided for by rules or statutes, but rather are derived from traditional usage. *Shotkin v. Westinghouse Elec. & Mfg. Co.*, 169 F.2d 825, 826 (10th Cir. 1948); see Note, *Judicial Financial Autonomy and Inherent Power*, 57 CORNELL L. REV. 975, 976 n.5 (1972) (inherent power is implied power that may be exercised by any branch of government to perform more effectively its duties despite the absence of any specific constitutional grant or legislative enactment). The doctrine of inherent powers is "implicit in the very nature [of the concept] of separation of powers." Stern, *The Judiciary is Failing to Protect the Courts*, 18 JUDGES J. 16, 20 (1979). Indeed, since the nascent judiciary was contemplated as the least powerful of the three branches of government, see THE FEDERALIST No. 78, at 504 (A. Hamilton) (Bicentennial ed. 1976), inherent authority has been exercised as a protective measure against improper interference by the other branches, and as a means to secure the freedom and independence that each branch of the government is afforded. See Stern, *supra*, at 19-20; see also *Knox County Council v. State ex rel. McCormick*, 217 Ind. 493, 496, 29 N.E.2d 405, 407-08 (1940) (judiciary has inherent power to do what is necessary to carry out its functions as a coordinate branch of government).

The judicial authority to compel financial appropriations from other government branches exemplifies the inherent power doctrine. Note, *The Courts' Inherent Power to Compel Legislative Funding of Judicial Functions*, 81 MICH. L. REV. 1687, 1687-88 (1983); see *O'Coins, Inc. v. Treasurer of Worcester*, 362 Mass. 507, 513, 287 N.E.2d 608, 612 (1972) (inherent power of the judiciary to procure fiscal appropriations prevents neutralization of judicial powers). Courts also have exerted inherent authority over a wide range of non-fiscal concerns. See, e.g., *Illinois v. Allen*, 397 U.S. 337, 343-47 (1970) (inherent power to remove disruptive defendant from courthouse); *Ex parte Peterson*, 253 U.S. 300, 312, 314 (1920) (inherent authority to appoint auditor to clarify issues before the court and make tentative findings thereon); *Reid v. Prentice-Hall, Inc.*, 261 F.2d 700, 701 (6th Cir. 1958) (inherent power to dismiss civil action in interest of orderly administration of justice); *Wells v. Gilliam*, 196 F. Supp. 792, 795 (E.D. Va. 1961) (inherent power to prescribe rules necessary to regulate proceedings and facilitate judicial administration); *Watson v. Williams*, 36 Miss. 331, 341 (1858) (inherent power to impose fines and imprison persons for contempt); *People v. Oskroba*, 305 N.Y. 113, 117, 111 N.E.2d 235, 236-37 (1953) (inherent authority to suspend sentence).

⁴⁴ See FED. R. CRIM. P. 50(a) advisory committee note. Rule 50(a), which provides that criminal proceedings are to be accorded, as far as is practicable, preferential treatment over civil proceedings, is actually a restatement of the "inherent residual power of the court over its own calendars." *Id.*; see 3A C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL 2D § 831, at 239 (1982); see also *United States v. Correia*, 531 F.2d 1095, 1098 (1st Cir. 1976) (axiomatic that court has inherent power to control its own docket); *United States v. Lockwood*, 382 F. Supp. 1111, 1113 (E.D.N.Y. 1974) (federal rules were adopted pursuant to

the reach of this authority so that a pending criminal proceeding may be dismissed for "failure of prosecution."⁴⁶ Recently, however, in *People v. Douglass*,⁴⁶ the Court of Appeals rejected this exercise of inherent authority, holding that the power to dismiss criminal charges for want of prosecution does not necessarily inhere in judicial institutions.⁴⁷

judiciary's inherent authority over its calendars); *People v. Cangiano*, 40 App. Div. 2d 528, 529, 334 N.Y.S.2d 550, 551 (2d Dep't 1972) (trial court maintains inherent power with respect to calendar control).

The intrinsic authority of the judiciary to exercise control over its calendar extends to civil proceedings as well. *See, e.g.*, *Link v. Wabash R.R.*, 370 U.S. 626, 629-31 (1962); *Kenney v. California Tanker Co.*, 381 F.2d 775, 777 (3d Cir. 1967) (admiralty), *cert. denied*, 390 U.S. 904 (1968); *Plachte v. Bancroft, Inc.*, 3 App. Div. 2d 437, 438, 161 N.Y.S.2d 892, 893 (1st Dep't 1957). *But see* *Cohn v. Borchard Affiliations*, 25 N.Y.2d 237, 248-49, 250 N.E.2d 690, 695, 303 N.Y.S.2d 633, 640-41 (1969) (power to dismiss complaints for undue delay was a legislative grant and not a product of the court's inherent power).

⁴⁶ *See* *United States v. Salzmann*, 417 F. Supp. 1139, 1171 (E.D.N.Y.), *aff'd*, 548 F.2d 395 (2d Cir. 1976). "The inherent residual power derived from common law of a court to control its own dockets enables courts to dismiss cases for failure to prosecute." *Id.* Indeed, Rule 48(b) of the Federal Rules of Criminal Procedure, which grants the judiciary authority to dismiss criminal proceedings where there has been unnecessary delay in bringing a defendant to trial, *see* FED. R. CRIM. P. 48(b), "is a restatement of the inherent power of the court to dismiss a case for want of prosecution." FED. R. CRIM. P. 48(b) advisory committee note; *see* *United States v. Dreyer*, 533 F.2d 112, 113 n.1 (3d Cir. 1976); *United States v. Research Found.*, 155 F. Supp. 650, 654 (S.D.N.Y. 1957); 3A C. WRIGHT, *supra* note 44, § 814, at 209 (1982); *see also* *United States v. McLemore*, 447 F. Supp. 1229, 1237 (E.D. Mich. 1978) ("Rule 48(b) confers no new power on federal courts, but is a codification of the power inherent in all courts to dismiss for want of prosecution"). The rule supplements the constitutional right to speedy trial by permitting dismissals in some instances even in the absence of a constitutional deprivation. *See, e.g.*, *United States v. Rowbotham*, 430 F. Supp. 1254, 1256 (D. Mass. 1977) (rule imposes more stringent standard of "tolerable delay" than does the sixth amendment); *United States v. Mark II Elec. Inc.*, 283 F. Supp. 280, 283 (E.D. La. 1968) (Rule 48(b) is broadly construed to protect compelling public interests not necessarily of constitutional proportions).

New York courts have also recognized inherent authority to dismiss a criminal proceeding for "failure of prosecution." *See, e.g.*, *People v. Daniel P.*, 94 App. Div. 2d 83, 90, 463 N.Y.S.2d 838, 843 (2d Dep't 1983); *People v. Bell*, 95 Misc. 2d 360, 363-64, 407 N.Y.S.2d 944, 946-47 (N.Y.C. Crim. Ct. Queens County 1978); *People v. Nizza*, 92 Misc. 2d 823, 826, 402 N.Y.S.2d 95, 97 (N.Y.C. Crim. Ct. Kings County 1977).

Courts do not, however, possess absolute discretion to dismiss criminal prosecutions. *See* Note, *Protective Orders Against the Press and the Inherent Powers of the Courts*, 87 YALE L.J. 342, 351-64 (1977). Inherent power to restrain a defendant from practicing law, for example, may be exercised only when it is necessary and prudent. *See* *Washington State Bar Ass'n v. Washington Ass'n of Realtors*, 41 Wash. 2d 697, 701, 251 P.2d 619, 622 (1952). Moreover, conduct beyond the purview of the court may not be subject to judicial mandates based upon inherent authority. *See, e.g.*, *Walker v. Superior Court*, 155 Cal. App. 2d 134, 138, 317 P.2d 130, 134 (Cal. Dist. Ct. App. 1957) (court not empowered to compel witness to speak outside of court).

⁴⁶ 60 N.Y.2d 194, 456 N.E.2d 1179, 469 N.Y.S.2d 56 (1983).

⁴⁷ *Id.* at 197, 456 N.E.2d at 1180, 469 N.Y.S.2d at 57.

In *Douglass*, the Court of Appeals consolidated eight New York City Criminal Court cases that had been dismissed by the lower courts.⁴⁸ Although the factual circumstances in each of these actions are distinguished by the criminal acts committed, each was dismissed for the failure of the People to prosecute.⁴⁹ Specifically, the proceedings were dismissed on the dates set for trial because the respective prosecutors failed to furnish the court with the supporting depositions necessary to convert the misdemeanor complaints into informations.⁵⁰ Despite recognition that the statutory time period under the New York Speedy Trial Act had not elapsed,⁵¹ the Appellate Term affirmed, holding that each of the dismissals was a proper exercise of the inherent power of the courts to control and manage their processes.⁵² In so ruling, the Appellate Term specifically noted that the dismissals were neither founded upon speedy trial grounds, nor warranted in "furtherance of justice."⁵³

On appeal, the Court of Appeals reinstated the misdemeanor

⁴⁸ *Id.*

⁴⁹ *Id.* at 196-99, 456 N.E.2d at 1180-81, 469 N.Y.S.2d at 57-58.

⁵⁰ *Id.* at 197, 456 N.E.2d at 1180, 469 N.Y.S.2d at 57. Under the Criminal Procedure Law, a misdemeanor complaint may serve as the basis for commencing a criminal action, but it may not, absent a waiver, serve as an instrument upon which a prosecution will be undertaken. CPL § 100.10(4) (1981); see 60 N.Y.2d at 197 n.1, 456 N.E.2d at 1180 n.1, 469 N.Y.S.2d at 57 n.1; R. PITLER, NEW YORK CRIMINAL PRACTICE UNDER THE CPL § 6.9, at 287 (1972). Instead, a defendant is entitled to have the misdemeanor complaint preceded by an information. *Id.* § 3.13, at 166. An information is an accusatory instrument that charges a defendant with the commission of one or more non-felony offenses, and serves both to afford the defendant adequate notice of the charges, and to provide a means by which a prosecution may be commenced. *Id.* § 6.2, at 280. Supporting depositions and allegations are necessary to satisfy the accusatory and factual portions of the information, as well as to convert the complaint into a formal information. *Id.* § 6.3-4, at 281-82; see CPL § 170.65(1) (1982).

⁵¹ See CPL § 30.30 (1981 & Supp. 1983-1984). The speedy trial requirements in § 30.30 provide that in misdemeanor cases, a motion to dismiss a criminal charge on speedy trial grounds must be granted where the People are not ready for trial within either 60 or 90 days of the commencement of the criminal action, depending upon the length of the applicable sentence. *Id.* § 30.30(1)(b)-(c). In the eight cases consolidated by the Court of Appeals in *Douglass*, the criminal court judges had dismissed the respective charges within periods of time ranging from less than 1 month to slightly less than 3 months. See 60 N.Y.2d at 197-99, 456 N.E.2d at 1180-81, 469 N.Y.S.2d at 57-58.

In addition to the statutory mandates, the right to a speedy trial is one that is guaranteed by the sixth amendment to the Constitution. See U.S. CONST. amend. VI; see also *Barker v. Wingo*, 407 U.S. 514, 515 (1972) ("right to a speedy trial . . . imposed by . . . the Fourteenth Amendment on the States").

⁵² 60 N.Y.2d at 199, 456 N.E.2d at 1181, 469 N.Y.S.2d at 58.

⁵³ *Id.*; see *supra* note 51. Section 170.40 of the CPL permits dismissals of criminal proceedings when warranted in the "furtherance of justice." CPL § 170.40(1) (1982); see *id.* § 30.30 (1981 & Supp. 1983-1984); *infra* note 67.

complaints and remitted the cases to the Criminal Court of the City of New York, holding that the courts below had no authority, either inherent or statutory, to dismiss the charges for "failure to prosecute" or for "calendar control."⁵⁴ Judge Jasen, writing for a unanimous court, reasoned that judicial tribunals at common law possessed no inherent power that would justify the dismissal of criminal proceedings.⁵⁵ The Court noted that at common law, criminal dismissals were accomplished only by entry of a *nolle prosequi* by the Attorney General.⁵⁶ Furthermore, the Court determined that the legislature had specifically, as well as exhaustively, addressed the issue of dismissal of misdemeanor complaints with the enactment of section 170.30 of the New York Criminal Procedure Law.⁵⁷ Judge Jasen concluded that the all-inclusive nature of

⁵⁴ 60 N.Y.2d at 196-97, 456 N.E.2d at 1180, 469 N.Y.S.2d at 57.

⁵⁵ *Id.* at 203, 456 N.E.2d at 1183, 469 N.Y.S.2d at 60. Although the Court conceded that trial courts maintain inherent power to control their calendars, Judge Jasen stated that such power does not extend to authorize dismissals of criminal proceedings. *Id.* at 200-01, 456 N.E.2d at 1182-83, 469 N.Y.S.2d at 59-60. The Court further noted that the power to dismiss judicial proceedings was first vested in trial courts only after the abolishment of the *nolle prosequi* order and the enactment of the Code of Criminal Procedure in 1881. *Id.* at 204, 456 N.E.2d at 1184, 469 N.Y.S.2d at 61. See generally *infra* note 56 (*nolle prosequi*). Section 671 of the Code of Criminal Procedure provided that a court may order an indictment to be dismissed in the interest of furthering justice. 60 N.Y.2d at 203-04, 456 N.E.2d at 1184, 469 N.Y.S.2d at 61. According to the Court, this was "the first time that the courts of this State were given the power to dismiss a criminal proceeding on their own motion without the approval of either the Attorney General or the District Attorney." *Id.* at 204, 456 N.E.2d at 1184, 469 N.Y.S.2d at 61. Thus, Judge Jasen concluded that, at no point in time did the courts have inherent authority to dismiss, *sua sponte*, a criminal prosecution. *Id.*

⁵⁶ 60 N.Y.2d at 201, 456 N.E.2d at 1182-83, 469 N.Y.S.2d at 59-60. A *nolle prosequi* is a "formal entry on the record by the prosecuting officer by which he declares that he will not prosecute the case further." BLACK'S LAW DICTIONARY 945 (5th ed. 1979). A *nolle prosequi* could be entered without court consent and has the effect of withdrawing the indictment or information. 3 WHARTON'S CRIMINAL PROCEDURE § 518, at 419 (C. Torcia 12th ed. 1975). The power to enter a *nolle prosequi* was not statutorily vested in the judiciary. 60 N.Y.2d at 200, 456 N.E.2d at 1181, 469 N.Y.S.2d at 58. Under English common law, only the Attorney General, as representative of the crown, had the power to enter a *nolle prosequi*. See L. ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 337 (1972); 3 WHARTON'S CRIMINAL PROCEDURE, *supra*, § 518, at 419.

⁵⁷ 60 N.Y.2d at 204-06, 456 N.E.2d at 1184-85, 469 N.Y.S.2d at 61-62. Section 170.30 of the CPL provides in relevant part:

1. After arraignment upon . . . a misdemeanor complaint, the local criminal court may, upon motion of the defendant, dismiss such instrument or any court thereof upon the ground that:
 - (a) It is defective, within the meaning of section 170.35; or
 - (b) The defendant has received immunity from prosecution for the offense charged, pursuant to sections 50.20 or 190.40; or
 - (c) The prosecution is barred by reason of a previous prosecution, pursuant to

section 170.30 necessarily precludes dismissals for "failure of prosecution" and "calendar control."⁵⁸

The *Dougllass* Court, in concluding that courts may not dismiss misdemeanor complaints for lack of prosecution based upon the inherent power of the judiciary to control its calendars, acted contrary to the predominant view that such authority does, in fact, inhere in both state and federal courts.⁵⁹ According to the Court,

section 40.20; or

(d) The prosecution is untimely, pursuant to section 30.10; or

(e) The defendant has been denied the right to a speedy trial; or

(f) There exists some other jurisdictional or legal impediment to conviction of the defendant for the offense charged; or

(g) Dismissal is required in furtherance of justice, within the meaning of section 170.40.

CPL § 170.30(1) (1982).

⁵⁸ 60 N.Y.2d at 205-06, 456 N.E.2d at 1184-85, 469 N.Y.S.2d at 61-62. In light of the fact that "failure to prosecute" and "calendar control" are not among the seven specific grounds enumerated in § 170.30 for dismissal of misdemeanor complaints, the Court concluded that the lower courts acted entirely without authorization in dismissing the complaints. *Id.* at 206, 456 N.E.2d at 1185, 469 N.Y.S.2d at 62.

⁵⁹ See *Ex parte Altman*, 34 F. Supp. 106, 108 (S.D. Cal. 1940). "The right to enter a *nolle prosequi* or to dismiss a prosecution . . . lies exclusively with the United States Attorney. . . . But it is not questioned that the Court, in the exercise of its jurisdiction, has the inherent power to order a dismissal for failure to prosecute." *Id.* Indeed, while the power to enter a *nolle prosequi* may have vested only in the prosecutorial officer, such power is nonetheless "directly subject to the inherent power of the Court." *United States v. Krakowitz*, 52 F. Supp. 774, 782 (S.D. Ohio 1943). This power has been recognized repeatedly by many federal circuits and district courts. See, e.g., *United States v. Novelli*, 544 F.2d 800, 803 (5th Cir. 1977); *United States v. Judge*, 425 F. Supp. 499, 503 (D. Mass. 1976); *United States v. Salzmann*, 417 F. Supp. 1139, 1171 (E.D.N.Y.), *aff'd*, 548 F.2d 395 (2d Cir. 1976); see also *supra* note 45.

With respect to New York, the Court of Appeals had not directly addressed the issue of a court's inherent power to dismiss criminal charges for lack of prosecution. References have been made by the Court, however, which lend support to its recognition of these powers. See *People v. Rickert*, 58 N.Y.2d 122, 126, 446 N.E.2d 419, 420, 459 N.Y.S.2d 734, 735 (1983); *People v. Johnson*, 38 N.Y.2d 271, 279 n.4, 342 N.E.2d 525, 531 n.4, 379 N.Y.S.2d 735, 743 n.4 (1975). In *Rickert*, the Court reversed an order of the Syracuse City Court dismissing, in the interest of justice, an information charging the defendant with a misdemeanor. 58 N.Y.2d at 126, 446 N.E.2d at 420, 459 N.Y.S.2d at 735. Referring to § 170.40 of the CPL, which provides for dismissals in furtherance of justice, the Court stated, "the inherent power it bespeaks has ancient roots." *Id.* In *Johnson*, the Court, in upholding dismissals of criminal charges pursuant to § 30.30 of the CPL, noted that in order to alleviate the tremendous congestion in the New York judicial system, courts should make more active use of their inherent power over calendar control. 38 N.Y.2d at 279 n.4, 342 N.E.2d at 531 n.4, 379 N.Y.S.2d at 743 n.4.

Other New York courts have signaled their approval of judicial exercises of inherent authority to dismiss criminal cases. See, e.g., *People v. Ortiz*, 99 Misc. 2d 1069, 1077, 418 N.Y.S.2d 517, 523 (N.Y.C. Crim. Ct. Bronx County 1979) (inherent power of judiciary to control its calendar by dismissing criminal proceedings for want of prosecution is premised on actual or implied abandonment of prosecution and not on statutory authority); *People v.*

the fact that the power to withdraw criminal charges at common law was statutorily vested exclusively in the Attorney General⁶⁰ necessarily implied that the judiciary lacked authority, either statutory or inherent, to dismiss criminal proceedings.⁶¹ It is suggested that the reasoning of the Court is flawed by the erroneous premise that statutory and inherent powers are mutually exclusive. Indeed, the compatibility of these sources of authority is reflected by the unique nature of inherent power⁶² and its recurrent employment by the judiciary.⁶³

While it is contended that the Court erred in denying the existence of inherent judicial authority to dismiss misdemeanors for failure to prosecute, it is suggested that the actual utility of such authority is, in any event, of little relevance when considered against the background of present New York law. The Criminal Procedure Law, which is now replete with provisions under which

Bell, 95 Misc. 2d 360, 364, 407 N.Y.S.2d 944, 947 (N.Y.C. Crim. Ct. Queens County 1978) (dismissal for failure to prosecute is within the inherent power of the court to do what is reasonably required to promote efficient judicial operations); *see also supra* note 45 (Rule 48(b) of the Federal Rules of Criminal Procedure). *But see* People v. Senise, 111 Misc. 2d 477, 478, 444 N.Y.S.2d 535, 536 (N.Y.C. Crim. Ct. Queens County 1981) (criminal court is a legislative creature, empowered to act only as it is authorized by statute).

⁶⁰ 60 N.Y.2d at 201, 456 N.E.2d at 1182-83, 469 N.Y.S.2d at 59-60. The power of the Attorney General (or District Attorney) to dismiss indictments pursuant to *nolle prosequi* orders was absolute and could be exercised even in the face of court disapproval. *See* United States v. Woody, 2 F.2d 262, 262-63 (D. Mont. 1924); United States v. Schumann, 27 F. Cas. 984, 985 (C.C.D. Cal. 1866) (No. 16,235); L. ORFIELD, *supra* note 56, at 339-40; *supra* note 56. Rule 48(a) of the Federal Rules of Criminal Procedure modified the common-law rule regarding *nolle prosequi* orders by permitting the filing of such orders only by "leave of court." FED. R. CRIM. P. 48(a); *see* United States v. Cowan, 524 F.2d 504, 512 (5th Cir. 1975) (modification of common-law rule provides courts with "discretion broad enough to protect the public interest in the fair administration of criminal justice"), *cert. denied*, 425 U.S. 971 (1976).

⁶¹ 60 N.Y.2d at 204, 456 N.E.2d at 1184, 469 N.Y.S.2d at 61.

⁶² *See* 7 R.C.L., *supra* note 43, § 62, at 1034. By virtue of their unique nature, inherent powers necessarily exist independent from and alongside of jurisdictional legislation:

The difference between the jurisdiction of courts and their inherent powers is too important to be overlooked. In constitutional governments, their jurisdiction is conferred by the provisions of the constitutions and of statutes enacted in the exercise of legislative authority. That, however, is not true with respect to such powers as are necessary to the orderly and efficient exercise of jurisdiction. Such powers, from both their nature and their ancient exercise, must be regarded as inherent. They do not depend upon express constitutional grant, nor in any sense upon the legislative will.

Id.; *see supra* note 43.

⁶³ *See supra* notes 45 & 59; *cf.* United States v. Bowe, 698 F.2d 560, 566 (2d Cir. 1983) (Criminal Justice Act does not repeal or displace inherent authority to do what is reasonably necessary for proper judicial administration).

courts may justifiably dismiss misdemeanor counts,⁶⁴ was designed both to promote efficient and expedient justice and to accord the judiciary significant discretion to dismiss non-felony complaints.⁶⁵ It therefore appears that, regardless of whether the Criminal Procedure Law was intended to circumvent the inherent powers of the judiciary or merely to complement them, its broad scope renders the judicial exercise of inherent authority virtually academic.⁶⁶

It is submitted that the lower courts in *Douglass* could have grounded the dismissals not merely upon their inherent authority,

⁶⁴ See CPL §§ 30.20, 30.30 (1981 & Supp. 1983-1984), 170.30, 170.40 (1982). In the event of the prosecution's failure to commence criminal proceedings within statutory time constraints, the court is properly justified in granting a motion for dismissal. *Id.* § 30.30 (1981 & Supp. 1983-1984). While § 30.30 protects criminal defendants by ensuring expediency in prosecution, § 30.30(4)(g) excuses periods of delay occasioned by exceptional circumstances when the prosecutor otherwise has exercised due diligence, *id.* § 30.30(4)(g) (1981). It is worthy to note that docket congestion has been rejected as an exceptional circumstance that would justify prosecutorial unreadiness under § 30.30. *People v. Brothers*, 50 N.Y.2d 413, 415, 407 N.E.2d 405, 405, 429 N.Y.S.2d 558, 558-59 (1980).

In addition, the CPL spells out seven grounds upon which motions for dismissal may be granted. CPL § 170.30 (1982); see *supra* note 57. With respect to charges that may be dismissed when warranted in "furtherance of justice," CPL § 170.30(1)(g) (1982), the CPL provides specific criteria that courts are required, if applicable, to examine. *Id.* § 170.40. These factors include the seriousness and circumstances of the offense; the extent of harm caused by the offense; the evidence of guilt; the character and history of the defendant; any serious prosecutorial misconduct; the purpose and effect of imposing sentence; the impact a dismissal would have on the public confidence; the attitude of the victim; and any other relevant factors. *Id.* § 170.40(a)-(f), (h)-(j). Moreover, prejudice resulting to the defendant from the passage of time has been noted as an important dismissal consideration. *People v. Clayton*, 41 App. Div. 2d 204, 208, 342 N.Y.S.2d 106, 110 (2d Dep't 1973); *People v. Izsak*, 99 Misc. 2d 543, 547, 416 N.Y.S.2d 1004, 1007 (N.Y.C. Crim. Ct. N.Y. County 1979); see also *People v. Stern*, 83 Misc. 2d 935, 938, 372 N.Y.S.2d 932, 935 (N.Y.C. Crim. Ct. N.Y. County 1975) (basic principles of justice should be determining factors as to whether a dismissal should be granted in the interest of justice).

⁶⁵ See, e.g., *People v. Johnson*, 38 N.Y.2d 271, 276, 342 N.E.2d 525, 529, 379 N.Y.S.2d 738, 740 (1975) (speedy trial requirement both ensures fair treatment of accused and promotes efficiency in the judicial system); *People v. Boyer*, 105 Misc. 2d 877, 891, 430 N.Y.S.2d 936, 947 (Syracuse City Ct. 1980) (dismissals in the furtherance of justice must reach a balance between safeguarding the interests of the public and those of each defendant); *People v. Izsak*, 99 Misc. 2d 543, 547, 416 N.Y.S.2d 1004, 1007 (N.Y.C. Crim. Ct. N.Y. County 1979) (purpose of the discretionary power of the court under CPL § 170.40 is to allow "the letter of the law gracefully and charitably to succumb to the spirit of justice" (quoting *People v. Davis*, 55 Misc. 2d 656, 659, 286 N.Y.S.2d 396, 400 (Sup. Ct. N.Y. County 1967))); *People v. Burke*, 79 Misc. 2d 46, 47, 359 N.Y.S.2d 397, 398 (Dist. Ct. Suffolk County 1974) (dismissal under CPL § 170.40 is entirely discretionary with the court).

⁶⁶ See *supra* note 64. The conclusion that the expansive CPL renders the judicial exercise of inherent authority academic appears to gain force from the view that CPL §§ 170.30(g) and 170.40 codify the judiciary's inherent power to dismiss criminal actions. See *People v. Rickert*, 58 N.Y.2d 122, 126, 446 N.E.2d 419, 420, 459 N.Y.S.2d 734, 735 (1983) ("the inherent power [CPL § 170.40] bespeaks has ancient roots").

but, alternatively, upon the reasoning that dismissals were warranted in the furtherance of justice under section 170.30(1)(g) of the CPL. Indeed, the *Douglass* Court noted that such a dismissal is warranted when a court, upon consideration of enumerated statutory factors, concludes that continued prosecution would prove unjust.⁶⁷ It is therefore suggested that in circumstances demonstrating failure to prosecute, section 170.30(1)(g) of the CPL may be invoked by trial courts as a viable ground for dismissal.⁶⁸

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CPL § 220.10: The People may not withdraw consent to a negoti-

⁶⁷ 60 N.Y.2d at 206, 456 N.E.2d at 1185, 469 N.Y.S.2d at 62.

⁶⁸ See *People v. Wingard*, 33 N.Y.2d 192, 196, 306 N.E.2d 402, 404, 351 N.Y.S.2d 385, 387-88 (1973); *People v. Kitt*, 93 App. Div. 2d 77, 78, 460 N.Y.S.2d 799, 800 (1st Dep't 1983); *People v. Fagg*, 86 Misc. 2d 1046, 1047, 385 N.Y.S.2d 743, 744 (Ontario County Ct. 1976). In *Wingard*, the Court, in noting that the power to dismiss an information pursuant to CPL § 170.40 lies within the discretion of the trial judge, held that the failure of the prosecutor to appear in court on the date set for trial caused an unexcusable imposition on both court time and on the defendants. 33 N.Y.2d at 196, 306 N.E.2d at 404, 351 N.Y.S.2d at 387-88. In that such behavior was "inconsistent with an intention on the part of the People to diligently prosecute the defendants," the Court affirmed the trial judge's dismissal of the informations in the furtherance of justice pursuant to CPL § 170.40. *Id.* at 196, 306 N.E.2d at 404, 351 N.Y.S.2d at 388. In a similar vein, the court in *Kitt* concluded that although "failure to prosecute" is not an enumerated ground for dismissal under the Criminal Procedure Law, it nevertheless constitutes a cause for seeking dismissals and therefore should be governed by the Criminal Procedure Law. 93 App. Div. 2d at 78, 460 N.Y.S.2d at 800. Moreover, in *Fagg*, the court remarked that "[a]n example of a dismissal in the interests of justice is when a court dismisses for failure of the district attorney in timely prosecuting a charge, although that failure does not amount to a denial of a speedy trial." 86 Misc. 2d at 1047, 385 N.Y.S.2d at 744 (quoting R. PFTLER, *supra* note 50, § 8.13, at 403).

Further support for the view that dismissals in the "furtherance of justice" may be based upon failure of prosecution is found in a decision by the Court of Appeals. In *People v. Singer*, 44 N.Y.2d 241, 376 N.E.2d 179, 405 N.Y.S.2d 17 (1978), the Court stated that "unreasonable delay in prosecuting a defendant constitutes a denial of due process of law," and that "the [s]tate due process requirement of a prompt prosecution is broader than the right to a speedy trial guaranteed by statute." *Id.* at 253, 376 N.E.2d at 186, 405 N.Y.S.2d at 25 (quoting *People v. Staley*, 41 N.Y.2d 789, 791, 364 N.E.2d 1111, 1113, 396 N.Y.S.2d 339, 341 (1977)). It is submitted that the *Singer* decision incorporates a recognition that circumstances exist that will justify dismissals for want of prosecution even though the time constraints of the speedy trial statute have not been violated.