NEW YORK STATE LAW ENFORCEMENT COUNCIL

LEGISLATIVE PRIORITIES

2012

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PREFACE

The New York State Law Enforcement Council was formed in 1982 as a legislative advocate for New York's law enforcement community. The Council's members represent the leading law enforcement professionals throughout the state, including the Attorney General of the State of New York, the District Attorneys Association of the State of New York, the New York State Association of Chiefs of Police, the New York State Sheriffs' Association, the New York City Criminal Justice Coordinator, and the Citizens Crime Commission of New York City. Since its inception, the Council has been an active voice and participant in improving the quality of justice and in the continuing effort to provide for a safer New York.

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1. *EXPAND THE STATE DNA IDENTIFICATION INDEX*

In January 2000, a 78-year-old woman was brutally raped in Albany, New York. Later that year, the offender, who remained unknown to investigators, stabbed a 50-year-old woman to death. In 2004, the same perpetrator murdered a 68-year-old man by beating him with a steel bar and then shooting him in the head.[1] The police collected crime scene DNA from each of the three attacks, but were unable to link that evidence with any existing offender DNA profiles. The perpetrator of these heinous crimes, Raymon McGill, was not identified until 2005, when he was required to submit a DNA sample upon conviction for attempted robbery.[2]

The 2000 rape was not McGill's first conviction. In 1999, he was convicted of Petit Larceny, a misdemeanor crime, which at the time did not require DNA submission.[3] Had McGill submitted DNA in connection to his Petit Larceny conviction, he would have been swiftly brought to justice after his rape offense, and the lives of his two subsequent murder victims could have been saved.

Under New York State law, all felons and some misdemeanants are required to provide a DNA sample to the DNA Identification Index upon conviction. Nobody is required to provide a sample on arrest, and many misdemeanants never need to provide a sample, even after they are convicted of a crime. Limiting DNA samples to certain categories of crimes and mandating that samples be incorporated in the databank only after conviction limits the utility of the DNA databank. The New York State Law Enforcement Council supports expansion of New York's DNA Identification Index to include profiles for all crimes upon arrest.

DNA SHOULD BE TAKEN AT ARREST

DNA Profiles Are Analogous to Fingerprints

DNA is the modern-day fingerprint; crimes are solved by matching DNA recovered at a crime scene to DNA taken from known individuals. However, while fingerprints are taken immediately upon a suspect's arrest, law enforcement cannot collect DNA until after conviction or upon a warrant. In the case of a warrant, the DNA collected often cannot be entered into the DNA Identification Index.

It is logical that DNA be added to the information collected by law enforcement at arrest so that DNA, like fingerprints, can be compared against the databank of unsolved crime scene evidence. By taking DNA at arrest, law enforcement can identify arrestees who have committed unsolved crimes. Moreover, by accurately matching a suspect to crime scene evidence, DNA at arrest decreases the likelihood of misguided investigations and ultimately, wrongful convictions.

Just as suspects are entitled under New York State's law to have their fingerprints destroyed or returned to them if they are not subsequently convicted, DNA profiles of arrestees could also be removed from the databank upon acquittal or dropped charges. Similar procedures for expunging profiles from the DNA Identification Index already exist for convicted offenders who later have their convictions overturned.[4]

DNA Profiles Are Used Solely for Identification and Contain No Additional Information

Where an individual's privacy is concerned, the DNA information used by law enforcement is no more invasive than a fingerprint, by design and by law. The DNA profiles contained within the DNA Identification Index are uniquely occurring sets of numbers derived from a few segments of each person's DNA.

The pieces of DNA that are analyzed for the databank were specifically chosen because they are "junk DNA." That means they cannot be used to predict anything about a person's health, appearance, or behavior.

What Is DNA?

DNA, deoxyribonucleic acid, is found in every cell of every person. A single person's DNA contains approximately 3,000,000,000 base pairs. The order and composition of a person's base pairs determines his traits. Scientists create a DNA profile catalogue using less than one-millionth of the total human genome, or 200 base pairs. The pieces of DNA used in the DNA databank were specifically picked for their tendency to be unique among individuals and because they do not determine any known physical or mental traits. They are called "junk DNA."

Individual privacy is protected by existing rules requiring that DNA samples collected by law enforcement only be used to identify and prosecute criminals. The records kept in the DNA Identification Index are never used for other purposes, nor are they shared with other government agencies or companies, except law enforcement officials investigating a criminal case. Any tampering with the DNA sample or non-law enforcement use of the Index is prohibited by law and punishable by up to four years in prison.[5]

BENEFITS OF DNA DATABANK EXPANSION

Taking DNA At Arrest Will Prevent New Crimes and Solve Old Ones

Taking DNA from suspects at arrest will allow law enforcement to match perpetrators to unsolved crimes in the databank. This would provide law enforcement with an invaluable investigative lead in cases that might not have been solved otherwise.

A 2004 Rapist Remains Unidentified for Six Years Despite Multiple Convictions and Arrests

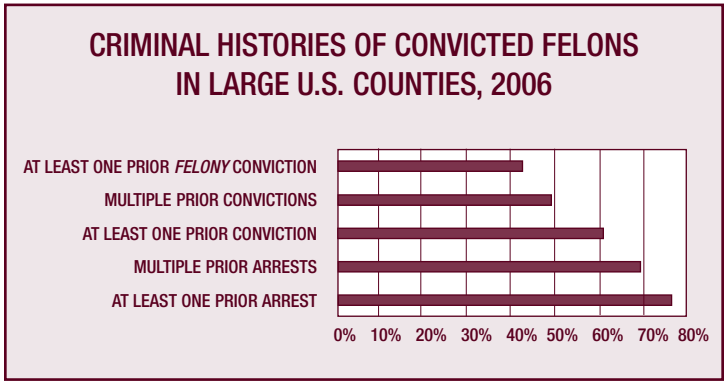
In 2004, Curtis Tucker committed the horrific attempted murder and attempted rape of a 15-year-old girl in her Harlem apartment building. Tucker choked his young victim to unconsciousness several times and violently seized her money and student MetroCard. The victim fought back, falling with her assailant down three flights of stairs. At the bottom of the stairs, he attempted to rape her. Finally, Tucker ran away, evading identification and leaving his victim with permanent injuries to her face.

Tucker was subsequently convicted of two misdemeanor crimes, Criminal Possession of a Weapon in the Fourth Degree and Criminal Contempt in the Second Degree, neither of which currently require DNA submission. In 2010, Tucker was convicted of felony burglary for robbing and assaulting a 74-year-old man who was afflicted with Parkinson's disease. DNA samples submitted as a result of this conviction identified Tucker as the perpetrator of the 2004 rape. Adding all crimes at arrest to the DNA databank would have solved the 2004 attempted rape more swiftly and potentially prevented the 2010 burglary of an elderly man.

People v. Curtis Tucker, New York County

Linking a defendant to an unsolved crime would give judges crucial information when deciding whether to release a defendant on bail. A judge might very well save lives by denying bail to a defendant who is identified as the perpetrator in a DNA cold case.

Studies of criminal histories show that violent felons tend to have a history of prior arrests. Seventy-seven percent of people convicted of violent felonies in large counties have been previously arrested.[6] Collecting DNA at arrest will ensure that the DNA profiles of criminals are in the databank at the outset of their criminal careers.



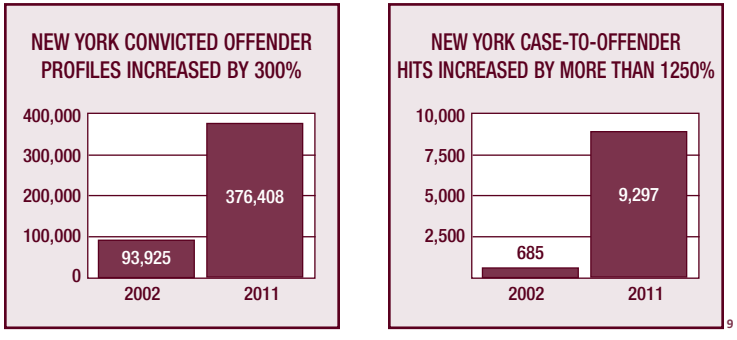
Seventy-seven percent of people convicted of a violent felony in the 75 most populous U.S. counties had a prior arrest. Only 43 percent had a prior felony conviction.[7]

Past Expansions Have Reaped Significant Crime-Solving Benefits

The history of New York's DNA databank indicates that expansion will lead to the earlier apprehension of criminals, many of whom would have continued to commit crimes were they not caught. Between 2002 and 2011, the number of samples in the databank increased by 300 percent. At the same time, the number of case-to-offender hits through the databank increased by 1250 percent.[8]

A case-to-offender "hit" is when a DNA sample that has been entered into the databank matches DNA found at a crime scene.

Increase in Case Hits Outstripped Growth of Convicted Offender Databank from 2002 to 2011



[9]

In 2006, New York added all remaining felonies, some attempted felonies, and 18 misdemeanors to the list of qualifying offenses for the DNA Index.[10] The results of this expansion illustrate the value of taking DNA from people associated with low-level and non-violent offenses. Of the new qualifying offenses, very few were violent or sexual in nature; they included such crimes as Bribery of a Public Servant, Possession of a Forged Instrument, and Falsification of Business Records. For instance, samples collected from persons convicted of Petit Larceny have matched to DNA offender profiles in ***48*** *murder cases* and ***220*** *sexual assaults*.[11]

Convicted Larcenist Identified in Two Cold-Case Rapes, Including the Rape of a 12-Year-Old Girl

In 1996, Richard Thomas approached a couple as they were seated in their car and ordered them out of the vehicle at gunpoint. Thomas then robbed the male victim before locking him in the car's trunk. Thomas subsequently raped and robbed the female victim in a nearby lot before also locking her in the trunk. Law enforcement was unable

to identify Thomas. Nearly a decade later, in February 2004, Thomas attacked a 12-year-old girl as she walked to her school bus. He raped the young girl and stole her lunch money. Again, Thomas evaded identification. However, in 2006, Thomas was convicted of Grand Larceny, which required DNA submission under the 2006 expansion.

Once entered into the system, his DNA matched the DNA collected in the rape kits from the 1996 and 2004 attacks. His victim in the 1996 rape had lobbied the state legislature to expand the DNA databank, unaware that 10 years later, her own case would be solved by this expansion.

People v. Thomas, Queens County

All told, as of December 2011 the DNA databank was responsible for 2,721 convictions.[12] Seventy percent of all hits since the databank's inception occurred during the last four years which speaks to the effectiveness of the 2006 expansions.[13] The results of New York's limited experience in collecting DNA upon conviction of low-level offenses confirm that there is no way to predict which small-time offenders are limiting the scope of their criminal activity and which are interspersing their low-level misdemeanors with violent offenses.

Expanding the DNA Databank Will Safeguard Against Wrongful Convictions and Exonerate the Innocent

In addition to solving crimes, the use of DNA in criminal investigations protects innocent people. If an innocent person is mistakenly identified as the perpetrator, DNA at arrest will help rule out that person's involvement in the crime from the outset. As DNA testing becomes faster, a person mistakenly accused can be exonerated in weeks, rather than in the months and years it previously required.

Taking DNA at arrest will bring investigators closer to their search for the truth, be it that the suspect is innocent or guilty.

DNA Sample Leads to Double-Murder Conviction and Exoneration of Two Innocent Men

The recent conviction of Michael Mosley for a brutal double murder in Rensselaer County illustrates DNA's value both in solving crimes and exonerating the innocent. In 2002, 18-year-old Arica Lynn Schneider and 27-year-old Samuel Holley were stabbed to death in Troy, New York. After hundreds of hours of investigation, two men – Terrence Battiste and Bryan Berry – were indicted for the murders and scheduled to go to trial. One week before their trial was set to begin, Michael Mosley, who had been arrested and convicted for several non-qualifying misdemeanors after the murders, pled guilty to a non-qualifying misdemeanor, but agreed to provide a DNA as part of the plea bargain. Mosley's DNA sample linked to him to the double murder. The innocent men were immediately freed and Mosley was arrested, and later convicted after trial.

People v. Michael Mosley, Rensselaer County

DNA at arrest for all crimes will also help exonerate the innocent. Increasing numbers of convicted criminals are requesting DNA analysis to prove their innocence. In the vast majority of these cases, guilt has been proven beyond a reasonable doubt and DNA would only confirm an individual's guilt. But in the few cases in which DNA evidence would exonerate them, had DNA been taken on arrest they likely never would have been convicted in the first place. Innocent people should not have to endure prison only to be later cleared by DNA because the ability to test their culpability existed but could not be used. Logic dictates

that we should use this technology as early as possible, at arrest, so as to avoid the necessity of post-conviction DNA testing altogether.

DNA Analysis Saves Time and Money

DNA analysis is becoming less expensive. The evolving science of DNA dramatically lessens the amount of time needed to process a profile. Moreover, using DNA profiles reduces the amount of time and resources required to conduct an investigation. A 2008 Department of Justice study on the use of DNA in property crimes found that not only does it identify and lead to the prosecution of twice as many suspects, it is also "more cost-effective in the long run to law enforcement."[14]

The speedy implication or elimination of potential suspects also helps police to focus their investigative efforts and resources more judiciously. As DNA is utilized in a wider variety of cases, the cost of running down futile leads will be significantly reduced. Every day spent focusing on an innocent suspect is a day that could have been spent tracking down the actual criminal.

OTHER JURISDICTIONS HAVE ALREADY BENEFITED FROM TAKING DNA AT ARREST

Twenty-seven states have already amended their laws to mandate the collection of DNA from some arrestees.[15] Virginia, which in 2003 began collecting DNA from people arrested for violent felonies, has made 694 case-to-arrestee hits as of September 30, 2011.[16]

In January 2009, new federal regulations took effect that direct all federal agencies to collect DNA upon arrest.[17] The Department of Justice, when proposing these regulations, noted that "[s]olving crimes by [DNA] furthers the fundamental objectives of the criminal justice system, helping to bring the guilty to justice and protect the innocent, who might otherwise be wrongly suspected or accused, through the prompt and certain identification of the actual perpetrators."[18] Legal challenges to this DNA expansion have strongly supported the authority to collect DNA at arrest: "[T]he court recognized that an individual arrested upon probable cause has a 'diminished expectation of privacy in his own identity,' and that DNA fingerprinting as a law enforcement tool is merely a 'technological progression' from photographs and traditional fingerprints."[20]

SUMMARY

DNA at arrest for all crimes simultaneously clears innocent suspects early in an investigation, holds accountable people who are guilty of a current or previous crime, and prevents future crimes by catching would-be serial criminals before they strike again. At the same time, the process does not step on personal rights or freedoms. The DNA itself contains no physical or genetic characteristics, but merely provides a unique profile for each individual. In the case of an acquittal or dropped charges, suspects would be able to have their samples removed from the databank.

There is no question that expanding entries into the DNA Identification Index to include all crimes at arrest would solve and prevent crimes. DNA at arrest is cost effective, saves lives, and protects the innocent.

1. "Press Release: Raymon McGill Sentencing," Office of the Albany County District Attorney, *available at* http://www.albanycountyda.com/press_releases/January_2006/press_releases/012006_murder_S_40.html.

2. "DNA samples urged in NY misdemeanor plea bargains," *The Troy Record*, *available at* http://www.troyrecord.com/articles/2010/08/20/news/doc4c6e0f922ec11101086520.txt.

3. Ibid. In 1999, no misdemeanor convictions were eligible for DNA collection.

4. N.Y. Exec. Law § 995-c(9)(a).

5. N.Y. Exec. Law § 995-f; N.Y. Penal Law § 70.00(2)(e).

6. Brian A. Reaves, "Violent Felons in Large Urban Counties" U.S. Dep't of Just., (July 2006), *available at* www.ojp.usdoj.gov/bjs/pub/pdf/vfluc.pdf.

7. Ibid.

8. "DNA Databank and Collections: 2009 Crimestat Report" N.Y. Div. of Crim. Just. Serv., (June 30, 2010), *available at* http://criminaljustice.state.ny.us/pio/annualreport/annualreport.htm; "2011 Updated D.N.A. Hits" (Oct 20, 2011) (unpublished statistics provided by N.Y. Div. of Crim. Just. Serv., on file with LEC).

9. Ibid.

10. In 2010, a new strangulation law was enacted, and Penal Law §121.11 Criminal Obstruction of Breathing or Circulation, an A misdemeanor, was added to the list of DNA eligible offenses.

11. "2006 Expansion Qualifying Offense by Hit Type" N.Y. Div. of Crim. Just. Serv. (October 9, 2011).

12. "2009 Crimestat Report" (June 2010), N.Y. Div. of Crim. Just. Serv., *available at* http://criminaljustice.state.ny.us/crimnet/ojsa/stats.htm; "2011 Updated D.N.A. Hits" (Oct 20, 2011) (unpublished statistics provided by N.Y. Div. of Crim. Just. Serv., on file with LEC).

13. Ibid.

14. "Justice Department Evaluation Finds DNA Technology Increases Chances of Arrest" U.S. Dep't of Just., (June 16, 2008), *available at* www.ojp.usdoj.gov/newsroom/pressreleases/2008/nij08020.htm.

15. Alabama Code 1975 § 36-18-25; Alaska Stat. § 44.41.035; Ariz. Rev. Stat. § 13-610; Ark. Code Ann. § 12-12-1006; Cal. Penal Code §§ 296, 297; Col. Rev. Stat. § 16-23-103; Florida Stat. § 47-943.325; Kan. Stat. Ann. § 21-2511; Louisiana Rev. Stat. Ann. §§ 15:609, 15:614; Maryland Public Safety Art. 2-501; Mich. Penal Code § 750.520m; Minn. Stat. Ann. § 299C.105; Missouri Rev. Stat. § 650.055; New Mexico Stat. Ann. § 29-3-10; North Carolina General Stat. § 15A-502a; North Dakota Cent. Code § 31-13-03; Ohio Revised Code § 2901.07(b)(1); South Carolina Code Ann. § 23-3-620; South Dakota Chapter 23-5A-5.2; Tenn. Code Ann. § 40-35-321; Tex. Gov't Code §§ 411.1471; Utah Public Safety Code § 53-10-404; Vermont 20 V.S.A. § 1933; Virginia Code Ann. § 19.2-310.2:1.

16. "DNA Databank Statistics" (October 17, 2011), Virginia Department of Forensic Science, *available at* http://www.dfs.virginia.gov/statistics/index.cfm.

17. These new regulations amended the DNA Fingerprint Act of 2005 and the Adam Walsh Child Protection and Safety Act of 2006.

18. "DNA - Sample Collection Under the DNA Fingerprint Act of 2005 and the Adam Walsh Child Protection and Safety Act of 2006," U.S. Dep't of Just., Federal Register Vol. 73 No. 76 Proposed Rules (Apr. 18, 2008) *available at* www.regulations.gov/fdmspublic/component/main?main=DocumentDetail&o=0900006480511b01.

19. *United States v. Pool*, 2010 U.S. App. LEXIS 19133 (9th Cir. September 14, 2010).

20. "Federal Court In Sacramento Upholds Constitutionality Of Mandatory DNA Collection Of All Individuals Arrested On Federal Felony Charges" U. S. Dep't of Just., (May 7, 2009) *available at* www.justice.gov/usao/cae/press_releases/docs/2009/05-28-09MandatoryDNA.pdf.

2. ENHANCE PENALTIES FOR CRIMES OF DOMESTIC VIOLENCE

An estimated 1.3 million American women are victims of physical assault by an intimate partner each year, and one in four women will experience domestic violence in their lifetime.[1] While a disproportionate number of victims are women, domestic violence does not discriminate. Victims are young and old, male and female, and from all ethnic, religious, and socioeconomic backgrounds. Likewise, perpetrators of such violence include spouses, dating partners, intimate partners, adult children victimizing their dependent parents, and many others who can be categorized under New York Law as "members of the same family or household."[2] Domestic violence is a pervasive problem that damages the fabric of society and inflicts immense pain on its victims.

"Domestic violence is the willful intimidation, physical assault, battery, sexual assault, and/or other abusive behavior perpetrated by an intimate partner against another. It is an epidemic affecting individuals in every community, regardless of age, economic status, race, religion, nationality or educational background. Violence against women is often accompanied by emotionally abusive and controlling behavior, and thus is part of a systematic pattern of dominance and control. Domestic violence results in physical injury, psychological trauma, and sometimes death. The consequences of domestic violence can cross generations and truly last a lifetime."[3]

Society has a duty to combat the horrific daily realities of families living with domestic violence. To appropriately address that duty, lawmakers must craft legislation that achieves the following three goals: signal that domestic violence reports will be dealt with seriously; prevent the escalation of domestic violence; and help victims escape the violence and return to a place of safety.

Currently, New York State law fails to adequately punish domestic violence. A major obstacle is laws that allow repeat offenders to perpetrate patterns of abuse with little repercussions and provide limited protection for victims.

Under current New York Penal Law, unless there is serious physical injury or physical injury caused by a weapon, most domestic violence crimes qualify as misdemeanors or violations. With only low-level charges at their disposal, prosecutors across the state see domestic violence abusers repeatedly cycle through the system, never receiving appropriate punishment and the necessary supervision to ensure they do not continue the pattern of abuse. Unfortunately, misdemeanor and violation convictions also place limits on a judge's ability to implement longer orders of protection to help shield victims from further abuse.

The Law Enforcement Council recommends a felony-level domestic violence offense targeting repeat abusers in order to provide greater protection to victims of domestic violence.

THE IMPACT OF DOMESTIC VIOLENCE IS FAR-REACHING AND POTENTIALLY CATASTROPHIC

Domestic Violence Destroys Lives

Every day New York State's criminal justice system and network of service providers are inundated with cases of domestic violence. The statistics paint a grim picture. New York State courts issued 301,488 orders of protection in 2010. During that same timeframe almost one-quarter of all assaults – a staggering 29,030 – were committed by an intimate partner *in upstate New York alone*.[4] Statewide, 73 intimate partner homicides were reported in 2010.[5]

Statistics only provide a one-dimensional view of this epidemic.

DOMESTIC VIOLENCE IMPACTS REAL LIVES AND REAL FAMILIES.

Twenty-three-year-old SARAH COIT was murdered by her boyfriend Raul Barrera in April 2011; when a domestic dispute in their shared apartment turned violent, Barrera grabbed a knife and stabbed Coit multiple times in the face and torso, causing her death.

DENISE KENNY admitted to friends that she wanted to leave her husband, Michael, but that he would not let her. One day in March 2011, Michael Kenny stabbed Denise to death in a midtown hair salon; he then stole the money from the register and fled the scene.

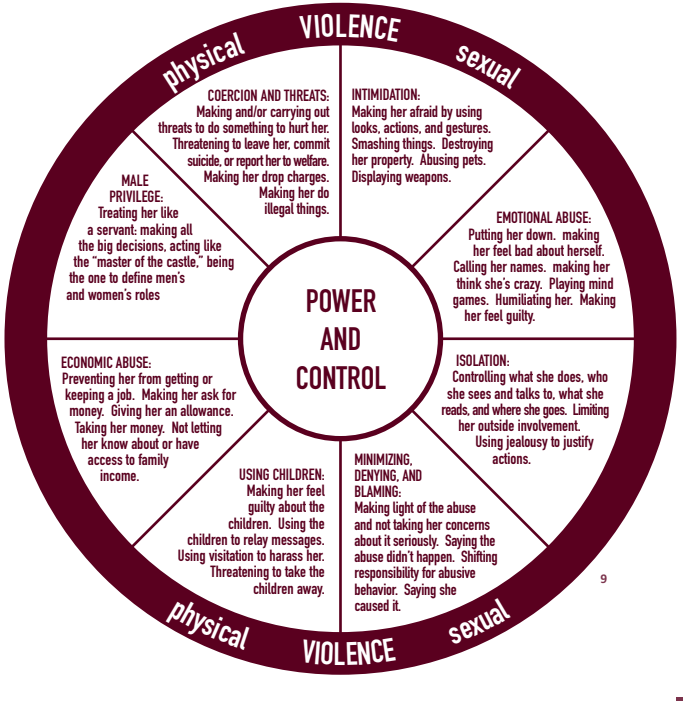
On the night of her death in August 2010, MASSIELLE ABREU called police to report that her estranged husband, Reynaldo Lebron, had violated a restraining order that required him to stay away from Abreau. Lebron showed up at her apartment and shot her to death in front of their children.

These are only a handful of cases all occurring in a short timeframe in just New York County. For these victims, the abuse escalated to homicide. For most victims, the abuse is chronic.

Domestic violence affects people of all ages; however, young women are the most frequent victims of these attacks. Approximately one in five female high school students have reported being physically and/or sexually abused by a dating partner.[6] Almost 1,100 young people under 21-years-old filed family offense petitions in New York Courts in 2010.[7] Vulnerable populations are also frequent targets of domestic violence. Nearly 50 percent of homeless women and children have been victims of domestic violence, and it is estimated that nationwide, between 3.3 million and 10 million children witness domestic violence annually.[8]

Disenfranchising Victims, Destroying Families

Victims of domestic violence are brutalized by a person whom they know and with whom they share their lives. Violence has been brought into a part of their lives which many people consider to be a place of safety. In depriving their victims of this sanctuary, the abuser seeks to dominate and eliminate the victim's sense of agency. Perversely, the perpetrators often make their victims feel as though the violence is the victim's fault. This cycle of abuse and control makes domestic violence victims particularly vulnerable to



intimidation and threats aimed to prevent them from contacting police and pursuing the prosecution of their abuser.

Instances of domestic violence remain some of the most chronically under-reported crimes. Only approximately one-quarter of all physical assaults, one-fifth of all rapes, and one-half of all stalkings perpetuated against females by intimate partners are reported to the police.[10]

DOMESTIC VIOLENCE STATISTICS

- 38% of battered women will be victimized again within 6 months.
- 66% of domestic violence victims who have been killed had prior incidents of abuse that were never reported to the police.[11]

What makes the under-reporting of these crimes even more dangerous is that domestic violence is frequently part of an escalating pattern of abuse. Troublingly, what starts out as a low-level offense can quickly escalate into a deadly crime. According to the New York City Mayor's Office to Combat Domestic Violence, 38 percent of battered women will be victimized again within six months and 66 percent of domestic violence victims who have been killed had prior incidents of abuse which were never reported to the police. Every year, one-third of all female homicide victims are murdered by an intimate partner.[12]

Eroding Communities and Public Safety

No population is immune to domestic violence. Although some populations are more vulnerable to abuse, domestic violence cuts across racial, ethnic, and socioeconomic lines. And when the fabric of our communities is torn, the impact is far reaching. Domestic violence is not only a public health crisis, but a public safety crisis. Beyond the immediate danger faced by victims and their families, there is a very real danger to those who attempt to intervene on behalf of victims, as was evidenced last year.

Two Law Enforcement Officers Killed in the Line of Duty Responding to Domestic Violence Calls in 2011

In March 2011, Officer Alain Schaberger, responding to a domestic violence in Kings County alleging that a man had threatened to kill his ex-girlfriend, was attempting remove the perpetrator, George Villanueva from his home. It was not the first such call that police responded to involving Villanueva; he had more than two dozen prior arrests and a prison record. On March 13, during a confrontation with Villanueva, Officer Schaberger went over a railing and down a flight of cement stairs; the officer hit his head on the cement and broke his neck, ending his life. Shaberger, who was engaged to be married, served 10 years on the police force and was a veteran of the United States Navy.

In July 2011, Sheriff Deputy Kurt Wyman, was shot and killed while responding to a domestic violence incident in Oneida County. Deputy Wyman arrived at the scene of a domestic disturbance when the suspect barricaded himself in his garage with a shotgun. While police negotiators attempted to convince the subject to surrender, the man opened fire on police, killing Deputy Wyman. Deputy Wyman, a husband and a father, served with the Oneida County Sheriff's Department for four years and was a U.S. Marine Corps veteran.

The Law Enforcement Council supports legislation to enact a felony-level charge for offenders who repeatedly engage in domestic violence offenses. This charge would recognize the seriousness of domestic abuse and hold repeat offenders responsible for the harm they inflict on their families and the community. It would also provide a longer order of protection which extends the period during which the offender must stay away from the victim – or face police intervention.

On April 21, 2009, Scott Francis was arrested for physically assaulting his girlfriend. The two engaged in a verbal altercation that quickly turned violent – with Francis grabbing his girlfriend by the neck, strangling her, and punching her multiple times in the face. He was arrested and charged with Assault in the Third Degree, a misdemeanor offense, and subsequently released on bail. Three days later, Francis again accosted his girlfriend, pushed her, and threatened to kill her. This time he was charged with a misdemeanor Criminal Contempt for violating an order of protection. Francis subsequently pled guilty to two lesser misdemeanor charges and was sentenced to 60 days in jail. Shortly after his release from prison, Francis yet again violated an order of protection and assaulted his girlfriend, punching her in the face. After this third violent incident, Francis was finally convicted of multiple counts, including the felony offense Criminal Contempt in the First Degree, and sentenced to one and one-third to four years in prison.

People v. Scott Francis, New York County

Penalize Repeat Domestic Violence Offenders

The New York County case of Scott Francis is an example of an escalating pattern of abuse and the statutory limitations to combating domestic violence. A felony-level charge for repeatedly engaging in domestic violence is essential to combating pervasive patterns of abuse. If an offender is convicted of two or more qualifying offenses against a member of the same family or household within a five-year time period, there should be an option to charge that offender with an E felony.

There are three direct benefits driving this proposal. It would provide greater probationary oversight of offenders, enhanced legal protections for victims, and if necessary, result in more serious prison sentences for repeat offenders.

Provide Oversight of Offenders

A felony-level charge for repeat domestic abusers will guarantee enhanced terms of probation. While terms of probation resulting from misdemeanor convictions are limited to three years, felony convictions carry at a minimum five years of probation.[13] The proposed felony-level domestic violence charge would trigger a lengthier period of probation for repeat offenders. This enhanced period of supervision would be a benefit to offenders, victims, and the community as a whole. Probation provides the support and supervision necessary to help ensure an end to reoccurring patterns of domestic abuse.

In 2010, there were 5,260 domestic violence-related cases handled by local probation departments in New York State.[14]

Protect Victims

A felony-level charge for repeat domestic abusers will enable judges to impose longer orders of protection to better protect families from continued violence. Orders of protection resulting from convictions for felony-level family offenses are almost twice as long as those resulting from misdemeanor convictions.[15] Even if a defendant has multiple misdemeanor arrests and convictions in the past, or if the defendant has made threats against the victim, a judge cannot exceed the maximum limit of a two-year-long order of protection for a B misdemeanor or a five-year-long order of protection for an A misdemeanor. Providing a felony-level charge for repeat domestic abusers will allow judges the discretion to issue an eight-year-long order of protection that will help stem the cycle of domestic abuse.

In 2010, New York State courts issued 301,488 orders of protection resulting from incidents of domestic violence.[16]

Create the Option of Potential for Serious Prison Time

Finally, perpetrators of domestic violence would risk enhanced prison sentences if they exhibit a continued pattern of abuse. An enhanced felony charge will send a message to abusers and victims that the criminal justice system does not tolerate recurring acts of domestic violence. When incarceration is necessary and appropriate, these felony offenders would have better access to re-entry and rehabilitative programs. It is critical that some options for intervention exist so that offenders and victims can be reached *before* the abuse escalates to serious physical violence – or homicide in the worst-case scenario.

From 2007 through 2011, in New York County alone, there were 685 individuals convicted of 2 or more domestic violence offenses. Of those 685 defendants, 281 – or 41% – were charged with felony-level assault at some point.

SUMMARY

The Law Enforcement Council supports a felony-level charge for offenders who repeatedly engage in domestic abuse. Creating a felony-level charge for repeat domestic violence offenders is not simply about jail time; it is a concerted effort to break the cycle of domestic violence while providing families with the safety that they deserve. It is an effective crime prevention strategy.

1. Patricia Tjaden & Nancy Thoennes, *Full Report of the Prevalence, Incidence, and Consequences of Intimate Partner Violence Against Women: Findings from the National Violence Against Women Survey, at iv* (2000), U.S. Dep't of Just., NCJ 183781, *available at* http://www.ojp.usdoj.gov/nij/pubs-sum/183781.htm; Domestic Violence Resource Center, *available at* http://www.dvrc-or.org/domestic/violence/resources/C61/.

2. Criminal Procedure Law §530.11(1) "[M]embers of the same family or household" with respect to a proceeding in the criminal courts shall mean the following: (a) persons related by consanguinity or affinity; (b) persons legally married to one another; (c) persons formerly married to one another regardless of whether they still reside in the same household; (d) persons who have a child in common, regardless of whether such persons have been married or have lived together at any time; and (e) persons who are not related by consanguinity or affinity and who are or have been in an intimate relationship regardless of whether such persons have lived together at any time.

3. National Coalition Against Domestic Violence, *available at* www.ncadv.org/files/DomesticViolenceFactSheet(National).pdf

4. New York State Office for the Prevention of Domestic Violence "New York State Domestic Violence Dashboard Project 2010 Data," *available at* http://opdv.state.ny.us/statistics/nydata/2010/index.html.

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6. "Domestic Violence Fact Sheet" Mayors Office to Combat Domestic Violence, *available at* http://www.nyc.gov/html/ocdv/html/publications/publications.shtml; Lorelei A. Mucci, MPH; and Jeanne E. Hathaway, MD, MPH, "Dating Violence Against Adolescent Girls and Associated Substance Use, Unhealthy Weight Control, Sexual Risk Behavior, Pregnancy, and Suicidality," Journal of the American Medical Association, Vol. 286, No. 5, 2001, Domestic Violence Resource Center, *available at* http://www.dvrc-or.org/domestic/violence/resources/C61/.

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13. N.Y. Penal Law §§ 65.00 (2)(a)(i), (b)(i).

14. "New York State Domestic Violence Dashboard Project: 2010 Data," New York State Office for the Prevention of Domestic Violence, *available at* http://opdv.state.ny.us/statistics/nydata/2010/nys2010data.pdf.

15. Criminal Procedure Law §530.12 (5).

16. "New York State Domestic Violence Dashboard Project: 2010 Data," New York State Office for the Prevention of Domestic Violence, *available at* http://opdv.state.ny.us/statistics/nydata/2010/nys2010data.pdf.

3. *PROVIDE TOOLS TO SHUT DOWN GANGS; PROTECT AND EMPOWER VICTIMS AND WITNESSES*

Gangs, with their attendant violence and pervasive, ruthlessly enforced street ethos of silence, are ripping apart communities across the state. Gang violence is no longer a problem only found in big cities; the geographical distribution, structure, and related criminal activities undertaken by gangs have changed dramatically in the last decade. New York State needs a unified, multipronged approach to relieving our communities of the burden of gang violence.

The Law Enforcement Council recommends policy and procedural actions that will penalize common types of gang violence; enhance punishments for witness intimidation and obstruction of governmental administration; and establish a cultural norm that restores fundamental rights to individuals and communities.

GANG VIOLENCE IS PERVASIVE ACROSS NEW YORK STATE

IN YONKERS, 65 individuals were convicted as part of a long-term investigation into drug and gun running by members of the Elm Street Wolves and the Cliff Street Gangsters. Three gang members have also been charged in the murder of 20-year-old man who was caught in the crossfire of gunplay between the two rival gangs.

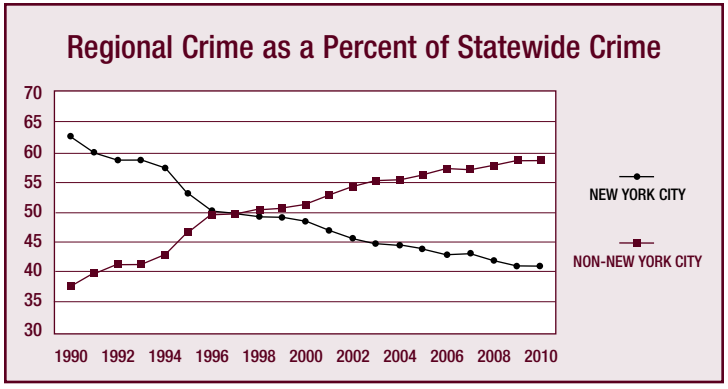
IN NEWBURGH, 78 members of the Bloods and Latin Kings were implicated in a takedown that resulted from an 18-month FBI-led Safe Streets Task Force investigation. As part of the investigation, undercover agents made over 100 drug buys that exceeded five kilograms of cocaine.

IN ROCHESTER, 28 members of a gang called the "Chain Gang" or "Wolfpack" were charged under the federal racketeering laws. They faced charges ranging from drug trafficking to murder and attempted murder. All 28 gang members have been convicted.

IN ALBANY, more than 40 people were held or sought in connection with Bloods' gang activity in three sweeping indictments in 2010. According to reports, authorities "seized eight handguns, a rifle, an assault rifle, about $65,000, six pounds of marijuana, one ounce of bulk heroin worth as much as $25,000 on the street, one ounce of bulk cocaine worth as much as $4,000, approximately four bundles of heroin worth about $800 and numerous small bags of cocaine, a digital scale and drug packaging." Additional charges ranged from attempted murder to enterprise corruption.[1]

IN MANHATTAN, 14 members of the 137th Street Crew, armed with semi-automatic handguns, were charged with conducting an illicit narcotics trafficking business in a residential, cultural and commercial neighborhood. The defendants were charged with conspiracy to commit narcotics and weapons offenses, and in the case of certain defendants, attempted murder, attempted assault, firearms possession, and narcotics sale. All 14 people charged were convicted of various crimes.

These instances, which represent the tip of the iceberg, evidence the contemporary nature and geographic scope of gang violence. While the 137th Street Gang is a very localized criminal group in Northern Manhattan, for instance, the Albany gang is led by a member who was part of the national Bloods' network. All around the state, gangs are involved in violent crimes as well as drug and gun trafficking. Indeed, over the last decade, upstate New York has experienced an increasing percentage of the state's violent crime, a portion of which is directly attributable to gangs.



[2]

In a disturbing trend, gang violence has become increasingly random; innocent victims are seriously harmed in petty disagreements or caught in lethal gunfire. In October 2011, 34-year-old Zurana Horton was killed, and 31-year-old Unique Armstead and 11-year-old Cheanne McKnight were shot, when they were caught in a mid-day rooftop firefight between members of 8 Block and Young Guns gangs. Horton used her body to shield children from the gunfire that erupted as school was ending for the day in Brownsville, Brooklyn.

GANGS RELY ON VIOLENCE, INTIMIDATION, TAMPERING

If you commit a crime, you will usually escape punishment if no one testifies against you. So you have an interest in keeping witnesses from testifying. If criminals often succeed in deterring testimony, however, the criminal justice system withers, and laws can be broken with impunity. Witness intimidation is a fundamental threat to the rule of law.[3]

Witness Intimidation

While the sheer numbers and the types of crimes in the high-profile cases outlined above are attention grabbing, they do not and cannot capture some of the more insidious crimes that serve as the backbone for gang violence. An integral part of gang violence, for instance, is silencing victims, witnesses, and entire communities through intimidation and threats of violence.

Witness intimidation commonly takes two mutually reinforcing forms.

- *Case-specific intimidation* – threats or violence intended to discourage a particular person from providing information to police or from testifying in a specific case.
- *Community-wide intimidation* – acts that are intended to create a general sense of fear and an attitude of non-cooperation with police and prosecutors within a particular community.[4]

When witness intimidation is allowed to flourish, the harmful effects are clear. In New York State, 14 witnesses were murdered between 2000 and 2007, and 19 witnesses in New York City were murdered between 1980 and 2007.[5] Certainly many

others have been threatened with a similar fate and have either not reported it or have declined to testify as a result of threats.

Paradoxically, offenders are rewarded for their efforts; once victims and witnesses are threatened and intimidated into keeping silent, perpetrators are free to strike again.

Cooperating Witness, Victims Targeted

In a Dutchess County murder prosecution arising from a street shooting, the prosecutor was careful not to disclose the identity of the witnesses during the pendency of the case. At the time of jury selection, the prosecutor, as required by law, disclosed the names of the witnesses. Upon announcement of the names, three associates of the defendant, one of whom was a relative, stood up, looked at the prosecutor and left the courtroom. Defense counsel then informed the court that he had previously represented a witness and had a conflict of interest and had to withdraw from the case. The case was then adjourned for several weeks. The prosecutor promptly tried to contact the witnesses. He was unable to reach one of them. He soon learned that the witness had been followed and shot in his car. The shooter was a relative of the defendant. The gun used in the shooting was found in the relative's car. After the shooting, all of the witnesses in the case refused to cooperate. The prosecutor, faced with a much weakened case, had to accept a plea to a lesser offense.

Under current New York law, witness intimidation is, at a maximum, an E felony if no physical injury results to the victim.[6] And, of course, witness intimidation can be all too effective with just the threat of physical injury. The widely acknowledged occurrences of violent retribution against witnesses make it clear to prospective witnesses that a threat frequently leads to violence, even if they don't know for certain that it will.

Ironically, bribing a witness, which does not place the witness in fear of injury, carries a higher penalty than the base-level offenses for intimidating a witness.[7] New York should raise its penalties for witness intimidation in order to take these completely illogical incentives away from violent, dangerous defendants.

A defendant charged with a high-level felony has little to lose by intimidating witnesses from testifying against him. Gang members are more than willing to risk an E felony or misdemeanor intimidation charge, which could result in less than one year in prison, in order to avoid being convicted of a more serious charge such as Murder in the First Degree, an A-I felony that carries a term of life in prison.

Witness Tampering; Obstructing Governmental Administration

Much like witness intimidation, criminals have a perverse incentive to engage in witness tampering and obstruction of governmental administration, two classes of crimes that are hard to prosecute but go a long way toward ensuring that a defendant will not be convicted for their violent crime.

The three statutes that sound like they should counteract witness tampering and obstruction of justice – Obstruction of Governmental Administration in the Second Degree, Obstruction of Governmental Administration in the First Degree, and Tampering with a Witness[8] – are not strong enough to deter the

pervasive tactics used to prevent witness cooperation.

Take, for instance, Obstructing Governmental Administration in the Second Degree. While it specifically prohibits "releasing a dangerous animal" with the intent that the animal will impede governmental administration, it fails to explicitly prohibit something as basic as enticing someone to halt the progression of a governmental investigation. And even if someone were to be charged under this statute, the most severe penalty is a misdemeanor, which is the same punishment imposed for jumping a subway turnstile.

The only available felony, Obstructing Governmental Administration in the First Degree, solely applies to "interfering with a telecommunications system thereby causing serious physical injury to another person." In short, if you interfere in a government investigation, but do not cause *physical injury by interfering with a telecommunications system*, the most you could be charged with is a *misdemeanor*.

The third law that sounds like it should apply, Tampering with a Witness, is also severely limited. Under this statute, it is necessary for an "action or proceeding" to have been initiated before the tampering could have occurred. In other words, if a person who witnessed a crime is coerced into not testifying, but the authorities have not yet become involved in the case, prosecutors would be unable to charge the persuader under the tampering statute. Because of the way the law is worded, someone could effectively prevent the prosecution of a crime without fear of being held responsible for this interference. The current requirement that an investigation must have already commenced in order for witness tampering to have occurred is aberrational from the rules regarding evidence tampering, which prohibit tampering with physical evidence in either a current or prospective investigation. This discrepancy in wording between the two statutes provides an inanimate object with more protection than a person.

Straightforward crimes need to exist in that category. It should not be legal to intentionally obstruct the administration of law or prevent a public servant from performing an official function. Moreover, it should be a felony level crime to induce someone to refrain from communicating information about a crime to law enforcement.

Gang Assault

Under New York State Penal Law, there are two specific crimes involving gang violence: Gang Assault in the First Degree, a B felony, and Gang Assault in the Second Degree, a C felony.[9] Both of these laws hinge on the causation of "serious physical injury," which is defined as "physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ." The only difference between Gang Assault in the First and Second Degrees is that for the higher level crime, the offender must have *intended* to cause serious physical injury whereas for the lower charge the offender must have *intended* to cause "physical injury." "Physical injury" is a much lower standard that involves the "impairment of physical condition or substantial pain."

Plainly put, there is no charge for a gang assault in which the

gang *intends* to cause "physical injury" and *succeeds* in causing "physical injury." It is an undisputable fact that gang assaults are often motivated by initiation rituals or in furtherance of other gang interests. But this gap in the law means that regardless of the degree of physical injury these acts *intend* to cause, if they only cause physical injury, and do not achieve serious physical injury, the existing Gang Assault statutes cannot be applied.

A simple solution is to add a new D felony crime Gang Assault in the Third Degree. This law would apply to a gang of three or more people who intentionally cause physical injury to another person.

COMMUNITIES FIGHT BACK AGAINST GANG VIOLENCE AND WITNESS INTIMIDATION

Building Bridges Between Communities and Law Enforcement

The much needed statutory changes proposed above would provide law enforcement and prosecutors with the tools to punish gang activity. Perhaps as important, if not more so, is providing communities with the tools needed to end gang violence at the grass roots level.

When witnesses are afraid to step forward and report crimes, it enables criminals to continue their unlawful acts. The National Center for Victims of Crime, in its report *Snitches Get Stitches* discovered through interviews of young people that "being labeled a snitch carries a price, not just of potential violence, but of ostracism by neighbors and peers."[10] It has evolved from an underground street code to a social norm, publicized by musicians and sports figures who perpetuate the undermining of basic rights. Intense societal pressure has spread so that not only are *witnesses* discouraged from providing information to law enforcement, *victims* are now less willing to report crimes committed against them. This is problematic both for communities and law enforcement. One study found that nearly 33 percent of witnesses were threatened, and even those that were not threatened feared reprisal.[11] Another study found that more than 50 percent of prosecutors in large jurisdictions reported that victim and witness intimidation was a major problem in trying cases.[12]

Especially in communities where gangs are prevalent and access to support services is scant, residents often fear retribution or stigmatization if they come forward. The code of silence is so pervasive that even the victims of gang crimes are reluctant to cooperate with law enforcement. In order to help fight this fear, additional state funding should be provided for public education campaigns like the "You Bet I Told" program, spearheaded in January 2008 by a Rochester church. "You Bet I Told" seeks to reverse the negative perception of witness cooperation through a multifaceted approach, including public forums and an education campaign featuring signs on buses and billboards.[13]

Crisis Intervention: At-Risk Youth

Another novel initiative that is being evaluated for replication around the state is the hospital-based Rochester Youth Violence Partnership. The conceptual framework of this program is based on several key assumptions:

- A child should never be shot or stabbed.
- A gunshot or stab injury, when it occurs in a child, is frequently asso-

ciated with high-risk behaviors or failures of proper adult supervision.

• A structured, organized and coordinated response on the part of the hospital, in partnership with specialized governmental and community resources, must work to prevent repeat episodes of violent injury.

With this strategy in mind, the program aims to reach young people who visit the trauma center because of a stab or gunshot wound, regardless of severity, to assess additional needs and resources that youth requires in order to prevent future involvement in violent episodes. Part of the assessment requires them to watch a video prior to discharge designed to help them and their families understand the risks for further injury. This program also seeks to recruit broad based community support for a multidisciplinary approach to intervention once at-risk status is identified. Since young people who are victims of gunshot and knife wounds are clearly at risk of, or already affiliated with, gang activity, this initiative seeks to provide them with the needed support structure to make positive choices.

SUMMARY

Witness intimidation and a pervasive code of silence erode the basic rights of victims and irrevocably harm our communities. Yet while there are many societal influences that discourage crime victims and witnesses from coming forward, there are few tools available to build bridges to witnesses and victims and to punish those who tamper with their basic right both to be served by the criminal justice system and to be protected by law enforcement. Increasing the penalties for witness intimidation and tampering, as well as strengthening the language of these statutes, will provide witnesses and victims with the protection that they deserve. It will also help to ensure that they are not further victimized by offenders who think that they can use intimidation and threats to sidestep the law. Providing a base-level crime for when a gang member intentionally cause physical injury will serve notice to gang members that they will be held accountable for their crimes.

Finally, approaching the problems of gang involvement and wide scale witness intimidation through community outreach and education will serve as catalyst for the underlying change needed to combat gang violence.

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4. Healey, Kerry "Victim and Witness Intimidation: New Developments and Emerging Responses: National Institute of Justice *Research in Action* (1995).

5. Senator John L. Sampson, "Memorandum of 2007 N.Y. Senate Bill 2493," (2007) (creating witness protection program).

6. N.Y. Penal Law §§ 215.11, 215.15 A tampering charge "protects those who have acquired witness status," while the statutes criminalizing intimidation of a victim or witness were "meant to protect victims prior to them actually becoming witnesses in a criminal proceeding." People v. Sajous, 173 Misc. 2d 55, 58 (Dist. Ct. Nassau County 1997). N.Y.

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4. ESTABLISH PENALTIES FOR NON-CONTROLLED PRESCRIPTION DRUG DIVERSION

If you walk down 157th Street in Manhattan on any given day, you can witness a distinct pattern of activity. A number of people – as many as six to 10 – are hanging out near the subway station on the corner. A non-descript individual carrying a bag emerges from a nearby pharmacy. He is approached by one of the men. Another man comes over and takes something from the person with the pharmacy bag. He checks to see if the item is in good condition. The money man comes over and pays the seller, while the person holding the goods walks away. The seller counts money as he leaves the scene.

A second seller emerges from the subway. Some of the players have changed; some remain the same. There is a constant stream of people organizing and making sales, pocketing and delivering goods, and recruiting new buyers and sellers.

Sometimes the deals are done right in the street, other times the crew ducks into a nearby pizza parlor. A surveillance camera mounted on the corner catches all of the action, but it is not a deterrent. Last year, this type of surveillance culminated in Operation Fraud Way, an investigation that uncovered over $1 million worth of drugs in a stash house.[1]

Yet, in that case, as in many others, the buyers, sellers, runners, and organizers are largely immune from criminal charges. The reason: they aren't fencing stolen jewelry or buying and selling illegal narcotics: they are dealing non-controlled prescription drugs.

Diversion is a pathway through which pharmaceutical drugs get to patients either through the grey or the black market.

The Human Resources Administration's Bureau of Fraud Investigation, which is responsible for these Medicaid fraud investigations in New York City, estimates that 95% of what is found in these stash houses is actually non-controlled prescription drugs. In the recovery of $1 million in drugs, in other words, a mere $50,000 worth are narcotic drugs that are eligible for serious criminal sanctions. Moreover, because the balance of the prescription drugs – upwards of $950,000 worth – are non-controlled substances, many elements of these large scale buying and reselling operations are not crimes under New York State Penal Law. Even if an individual is caught in the act of buying one or two bottles of drugs, it would only be the misdemeanor crime of Criminal Diversion of Prescription Medications and Prescriptions in the Fourth Degree.[2]

$4 MILLION WORTH OF PILLS WERE RECOVERED IN A RAID ON A YONKERS APARTMENT. MERE POSSESSION OF NON-CONTROLLED PRESCRIPTIONS IS NOT A CRIME, REGARDLESS OF QUANTITY.

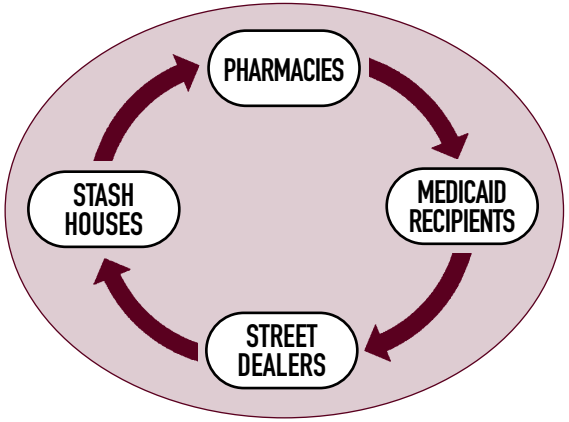
Despite the fact that Medicaid paid more than $1,000 for each bottle of medication, the street buyer only pays $100 for that same bottle, making the sale a very low level offense. And simply possessing the drugs, no matter how large the stash, is not against the law.

BACKGROUND

There is a rapidly expanding underground market in non-controlled prescription medications. Unlike psychotropic drugs and opiod pain relievers, which are controlled prescription drugs that can be abused and lead to addiction, non-controlled prescription drugs are not used recreationally. Rather, non-controlled substance prescription medications are used to treat chronic conditions such as AIDS, asthma, and certain psychoses, among others.

Non-controlled Substance Medications.
Non-controlled substance medications are prescribed to treat medical conditions such as high blood pressure, diabetes, and bacterial infections. Prescriptions for non-controlled substances are not subject to some of the same limitations as controlled substance prescriptions. Examples include: metoprolol (ie; Lopressor®), metformin (ie; Avandamet®), and amoxicillin (ie; Augmentin®).[3]

In a non-controlled prescription drug scheme, these medications – some of the most expensive on the market – are paid for using Medicaid and sold on the street for a fraction of their actual value. The purchasers of these medications bring the drugs to a stash house where they are collected and re-sold back to unscrupulous pharmacies or shipped overseas. The drugs are then dispensed to both legitimate and fraudulent patients.



Prescription drug diversion is not only happening at the street level. From 2006 to 2010, reported thefts of prescription drug shipments have quadrupled. In 2009, as much as $184 million worth of pharmaceuticals were stolen in the United States.[4] In a single 2010 heist, $75 million of pharmaceuticals were taken from an Eli Lilly and Company warehouse in Connecticut.

These non-controlled pharmaceuticals are not stolen for personal use. They are instead repackaged and sold to unscrupulous pharmacies, overseas distributors, and online distributors for personal financial gain. Non-controlled prescription drug diversion is a full time, large scale operation. In New York City, the Human Resources Administration has calculated more than $35 million in indentified Medicaid fraud dollars resulting from false prescriptions and prescription drug diver-

sion schemes. Ninety-five percent of those identified Medicaid fraud dollars are the result of non-controlled prescription drug diversion.

More than 2,600 people have been arrested through their targeted stings. Successful investigations over the last 10 years have resulted in $77 million of cost avoidance to Medicare.

Corruption at all Levels: Pharmacist Indicted

In a case that shows how large-scale some of these schemes are, Patrick Alcindor, a pharmacist, was indicted in November 2010 for stealing more than $1.8 million from Medicaid. Alcindor stands accused of purchasing prescriptions from patients: He would offer a small sum for the prescription slip, bill Medicaid as if he filled the prescription, but never provide the patient with any medication. As part of the investigation, an undercover police officer sold prescriptions, which were written out on legitimate prescription pads, to Alcindor for AIDS medications such as Truvada®, Zyprexa®, Reyataz®, and Procrit®. He also billed Medicaid for refills that were never dispensed. The investigation uncovered that Alcindor never even stocked the pharmaceuticals that he billed Medicaid for.

People v. Patrick Alcindor, New York County

IMPACT

Non-controlled prescription drug diversion has many severe consequences, ranging from public health risks to the financial impact on society.

Health of the Person who Unwittingly Buys the Drugs

There is a real potential for detrimental health impacts on patients who unwittingly purchase diverted non-controlled prescription drugs from licensed pharmacists at legitimate pharmacies. The diverted drugs are stored at warehouses, in apartments, or in back rooms with no quality control over the storage or maintenance of the medication. They may be sold well past their expiration date; be stored in climates that alter the effectiveness of the medication; or even be tampered with and repackaged for sale.

After a 2010 heist in which 129,000 vials of insulin were stolen, the FDA attempted a recall. But only 2% of the vials, which hadn't been stored in a temperature-controlled environment, were recovered. Some turned up in a Texas medical center where the altered chemical compound caused patients who used it to develop unsafe blood-sugar levels.[5] This was a relatively rare case because authorities knew there was a massive theft and attempted to intervene. More commonly, the theft is undetected and neither authorities nor patients know that the medicine is potentially tainted.

Timothy Fagan, a 16-year-old Long Island resident, was taking the prescription drug Epogen® to treat anemia after a liver transplant. The dose of Epogen® he took was from an illegally diverted batch that was relabeled and improperly stored in the back room of a strip club before being resold to a national wholesaler and dispensed by the pharmacy the Fagan family used. Because of the improper storage, the chemical compound was altered, and once injected into Fagan, caused him painful spasms.

Health of the Person who Sold their Prescription Drugs

While the lion's share of people participating in these schemes have no underlying medical condition requiring a prescription for the non-controlled drug they are dispensed, there are legitimate patients who either sell their drugs for money or have their drugs stolen.

A New York Times exposé chronicling prescription drug diversion operations in northern Manhattan showed patients, both fraudulent and legitimate, leaving a pharmacy only to be accosted by dealers asking "What do you have?"[6] If it is a prescription, and the individual is willing to sell, the transaction happens almost immediately. In some cases, chronically ill patients are not taking their medications and instead are selling them on the street for relatively small sums of money. They risk developing serious, life-threatening symptoms that will either require more extreme procedures such as amputation of a limb, in the case of diabetes, or accelerated demise, in the case of HIV/AIDS.

"By taking advantage of a program intended to assist New Yorkers who cannot afford to pay for medical care, the defendant victimized not only the neediest members of our community but also all New York taxpayers."[7]

- *District Attorney Cyrus R. Vance Jr,.* commenting on the indictment of Patrick Alcindor, a Manhattan pharmacist who allegedly stole more than $1.8 million from Medicaid over the course of nearly one year.

Cost to Society

In 2010, more than 4.7 million New Yorkers were enrolled in Medicaid: 3 million in New York City and more than 1.7 million upstate.[8] The program spent $52 billion in 2010, including federal, state and local dollars.[9]

Medicaid pays huge sums of money for medications that are dispensed under fraudulent circumstances. For example, an unscrupulous pharmacy charges Medicaid for a prescription. Medicaid reimburses the pharmacy at the amount specified by the drug company. But that unscrupulous pharmacy is not buying the medication from a pharmaceutical company; they are buying it from the underground market at a fraction of the cost, and pocketing the balance from the Medicaid payment. In many instances Medicaid has already paid for this medicine on an earlier occasion when it was legitimately dispensed to a sick person who subsequently sold the medicine on the street.

HIV/AIDS DRUG	MEDICAID EXPENDITURE	STREET VALUE (DRUG DEALER)	PHARMACY BLACK MARKET VALUE
KALETRA®	$730 per bottle	$65 per bottle	$365 per bottle
TRUVADA®	$920 per bottle	$80 per bottle	$460 per bottle
ATRIPLA®	$1500 per bottle	$150 per bottle	$750 per bottle

[10]

A FREE PASS

Non-controlled prescription drug diversion is a new phenomenon. Because this illicit practice did not even exist in 1995 when the Prescription Drug Diversion laws were enacted as part of Medicaid reform in New York State, the people who drafted the laws simply could not have contemplated the large-scale illegal

market in non-controlled prescription drugs that has emerged in recent years. Article 178 of the Penal Law, which criminalizes drug diversion, was designed for prescription narcotics and is therefore ill-suited to combat the diversion of non-controlled medications. Moreover, the law is constructed in such a way that the higher level penalties for repeatedly engaging in criminal diversion only apply if the prior conviction is for Criminal Diversion in the Fourth Degree, a misdemeanor. In other words, if the first offense was a misdemeanor, the second offense qualifies as a felony, but if the first offense was a felony, the second offense does not qualify as a felony. Finally, because the evolution of the crime has been so rapid, the existing statutory framework allows many elements of non-controlled diversion to go unchecked.

Take, for instance, the following scenarios:

The Drug Runner

A runner is in possession of five sealed bottles without individualized prescription labels, each containing 30 pills, of different AIDS medications. He does not have HIV/AIDS and was not picking up the pills for another individual with HIV/AIDS. The value of the medication is more than $5,000 based on comparable Medicaid billing.

There are currently no crimes to charge the drug runner with.

The Street-level Buyer

A defendant purchased two bottles of Viagra® from an undercover agent on three separate occasions within a 30-day period. The investigation led to a search warrant for the defendant's stash house, where hundreds of bottles of prescription medication, including the Viagra®, were found. None of the bottles had individualized prescription labels. The estimated value of the stash was $500,000.

The only available charge is Attempted Criminal Diversion of Prescription Medication in the Fourth Degree, a B misdemeanor.[11]

The Crooked Doctor

A physician prescribed more than $700,000 worth of AIDS medication to people who did not have AIDS. The doctor billed Medicaid $20 for each visit from Medicaid clients. The Medicaid clients submitted the prescription to the pharmacy and the pharmacy billed Medicaid for the medication. In the last step of the scheme, the Medicaid clients sold the AIDS medication to a middleman on the street for cash.

While prosecutors were able to charge the doctor with falsifying business records based on his attempts to cover up his crime, and Grand Larceny for the large sums of money stolen, under current law, the only charges that apply to the loss to Medicaid dollars is Health Care Fraud in the Fifth Degree, an A misdemeanor.[12]

In stark contrast, it is a class C felony to sell a prescription for a controlled substance. The people involved in non-controlled prescription drug diversion are well aware of the disparity in penalties, and typically deal primarily or exclusively in non-controlled drugs as a means of making large sums of money with little or no risk of criminal sanctions if they are caught.

SOLUTIONS

Non-controlled prescription drug diversion is an organized,

ongoing criminal enterprise. The law must recognize that these crimes are not isolated incidents, but instead are elements of a course of conduct. Adding an element of repeat offenses will hold people accountable for engaging in non-controlled prescription drug enterprises, while keeping penalties appropriately low for isolated incidents.

Penalties for Repeated Sales, Unlawful Possession of Large Quantities of Non-controlled Medications, and Fraud

It should be a crime under the Penal Law for a doctor to knowingly and intentionally write, and for a pharmacist to knowingly and intentionally dispense, prescription medication to a patient who has no medical need for such medication. This fraudulent activity is dangerous and costly and should not be ignored. Penalties for this type of crime should be heightened for serial offenders, who make their living violating the central tenants of their professions by fraudulently prescribing and dispensing prescriptions for non-existent ailments.

Buying and possessing large quantities of non-controlled prescription medication, without legitimate medical or other reason to do so, only occurs as part of money-making diversion enterprises. These enterprises should be subject to the same type of sanctions as controlled-substance prescription medication diversion. These sanctions rightfully would not apply to the common scenario in which a teenager gives a friend or a sibling an antibiotic. Nor do they target the situation in which someone gives another person one tablet of a controlled subject, which is already illegal but punished as a low level offense. Non-controlled prescription drug diversion is an organized criminal course of conduct in which Medicaid fraud dovetails with falsifying business records, tax evasion, and other crimes with an end result that includes the improper storage and reselling of corrupt drugs to unsuspecting patients. It must be treated accordingly.

SUMMARY

Non-controlled prescription drug diversion, a relatively new category of drug dealing, has grown exponentially in the last few years. The impact of non-controlled prescription drug diversion is far reaching. Medicaid is losing massive sums of money through fraudulent prescriptions written for some of the most expensive drugs. Equally important, this practice threatens catastrophic consequences to public health as a result of the buying and selling of drugs that are improperly stored, sold past their expiration date, tampered with, and unsafe.

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1. New York City Human Resources Administration Department of Social Services, "NYC Efforts to Combat Prescription Drug Diversion" (March 2010).
2. N.Y. Penal Law §178.10.
3. Information published online by the New York State Department of Health, *available at* http://www.health.ny.gov/professionals/patients/medicines/.
4. AP Business Wire "Precription drug heists on the rise" Matthew Perrone March 17, 2010.
5. "Are You Buying Illegal Drugs?" New York Times April 1, 2010 Katherine Eban and J. Aaron Graham.
6. "Not so far from the pharmacy, a different sort of drug deal," New York Times May 6, 2011 Michael Wilson.
7. District Attorney Cyrus R. Vance, Jr., quoted in a press release announcing the indictment of a Manhattan physician for prescribing hundreds of thousands of medication for patients with non-existent ailments as part of a Medicaid scheme. *Available at* http://manhattanda.org/press-release/district-attorney-vance-announces-indictment-18-million-medicaid-fraud-scam.
8. New York State Medicaid Administration November 2010 Report *available at* http://www.health.ny.gov/health_care/docs/2010-11_medicaid_admin_report.pdf.
9. Ibid.
10. New York City Human Resources Administration Department of Social Services, "NYC Efforts to Combat Prescription Drug Diversion" (March 2010).
11. N.Y. Penal Law §110/178.10.
12. N.Y. Penal Law §177.05.

5. *CREATE A NEW FELONY OFFENSE OF ENDANGERING THE WELFARE OF A CHILD*

Late Christmas Eve, Traci Leach brought her young children, ages two and 11, with her as she visited a crack house. The children were left outside on the landing as their mother disappeared inside the house. Leach eventually left the crack house and brought her children to buy ice cream at a bodega. In a nearby park, where Leach had taken her children to eat the ice cream, she told the children that she had to make a phone call. She then left her children alone in the park – it was approximately 3 a.m. and 35 degrees outside. In the dead of this cold night, the children were left to wait. As the hours passed, and their mother still had not returned, the children began to search for her in the park and nearby areas. They returned to the crack house and continued to wander the neighborhood alone. Noting the frigid temperature, the bodega owner from whom they purchased the ice cream allowed the children to stay inside his store to keep warm. Night turned into dawn, and their mother was still nowhere to be found. Eventually, at 7:15 a.m. on Christmas day, the police noticed the wandering children and brought them to the precinct. Sadly, for these children, spending the night alone on the streets, in dangerously cold weather, was merely a part of the sustained pattern of abuse, neglect, and abandonment that they experienced at the hand of their mother.[1]

New York's criminal statutes fail to adequately address this type of abuse - where the only charge available to prosecutors is Endangering the Welfare of a Child, an A misdemeanor.[2] An A misdemeanor is punishable by up to one year in jail, but typically individuals convicted of an A misdemeanor receive much shorter sentences, often only conditional discharge or probation. The Penal Law needs to protect innocent young victims; justice is not done when a person in a position of trust subjects a child to gross abuse and neglect and only receives a misdemeanor penalty.

The felony-level charge supported by the Law Enforcement Council would cover cases that involve behaviors that are too harmful to the child to be treated as a misdemeanor, but which do not rise to the level of a class B felony assault. Aggravated Endangering the Welfare of a Child, a class E felony, would penalize a person in a position of trust who knowingly acts in a way likely to be injurious to the child's physical, mental, or emotional welfare. The charge requires that one of two aggravating factors be present: the offender has previously been convicted of a crime in which the victim was a minor, or the conduct includes acts that cause the child extreme pain or which are carried out in an especially vicious or sadistic manner.

Notably, New York already has enhanced felony charges for Endangering the Welfare of an Elderly or Mentally Disabled Person. There is even a statute which makes Aggregated Cruelty Against an Animal a felony-level offense.[3] It is unjustifiable that those who repeatedly endanger children are subject to more lenient penalties than those who abuse animals. This gross inequity should not be allowed to persist.

Among other states, California, Delaware, Florida, Georgia, Illinois, Iowa, Ohio, Pennsylvania, and Texas, have all recognized that a misdemeanor penalty is inadequate to protect children from gross neglect.[4] Child endangerment is a grave offense wherever it occurs, and the children of New York State deserve no less protection than those living in other states.

CURRENT STATUTORY FRAMEWORK DOES NOT APPLY TO CASES FREQUENTLY SEEN BY PROSECUTORS

Child Abuse Is Hard to Fit Into Existing Penal Law Definitions

Under current statutes, in order to prosecute child abuse as a felony, prosecutors must prove the *intentional* infliction of *serious physical injury* or the causation of physical injury with the use of a *dangerous weapon*. The nuances of the New York State Penal Law make this a challenging charge in many cases of child abuse for three reasons.

First, "serious physical injury" is defined as "physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted impairment of the function of any bodily organ."[5] In most cases of child abuse, however, particularly in the earlier stages of abuse, the actions do not result in a telltale "serious physical injury." In many of these cases, children may be put in danger through abandonment or neglect or subjected to other physical or emotional cruelties that do not fall under the Penal Law definition of "serious physical injury."

Second, to meet the lower threshold of intentionally causing "physical injury," which is defined as "impairment of physical condition or substantial pain,"[6] the abuser must have used a "deadly weapon" or a "dangerous instrument."[7] While knives, guns and automobiles qualify, hands, fists, and feet do not qualify as "deadly weapons" under the Penal Law definitions; abuse inflicted by hitting, kicking, or punching frequently falls through the gap in the law.

Third, the law currently focuses on the *intentional* infliction of harm. Under New York State law, a criminal act is "intentional" if the actor's "conscious objective" is to "engage in the criminal act."[8] Conversely, a person acts "recklessly" if he or she "is aware of and consciously disregards" a substantial risk that can arise from these actions.[9] However, the vast majority of child abuse results from actions of a person in a position of trust that fall under the legal definition of "reckless." The standard of recklessness means that the caretaker may not intend the injury, but nonetheless consciously disregards the risk of injury, and that disregard is a gross deviation from the standard of conduct that a reasonable person would exhibit.

This leaves prosecutors two options: a B felony, a high-level felony punishable by a minimum of five years in prison,[10] or an A misdemeanor, a low level charge that garners little or no jail time. There is no available middle ground that appropriately addresses the nature of these crimes.

Enhance Penalties for Persons in a Position of Trust with Prior Child Abuse Convictions

A sound felony endangering statute would apply to a person charged with any duty or responsibility for the health, education, welfare, supervision, or care of a child. This requirement recognizes the increased danger and isolation faced by a child when his or her abuser is an adult to whom the child would otherwise turn for help. Persons in a position of trust should be the first people to recognize that a child is being endangered, but when they are the abuser, the child must hope that outsiders will intervene. A staggering 75 percent of adults abusing children are the parents of the victim.[11]

When child abuse leads to death or serious injury, investigators often find that these tragic endings were preceded and foreshadowed by a pattern of cruel acts which did not cause lasting injury. Seven-year-old Nixzmary Brown suffered a multitude of abuses

before she died at the hands of her mother and stepfather in January 2006, including being tied with bungee cords and duct tape and being forced to eat cat food, urinate in a litter box, and sleep standing up. Not one of these acts on its own would have sustained a felony-level charge of assault, but each display a viciousness and sadism that distinguish them from acts of misdemeanor-level endangering.

Nearly 15 percent of victims of child abuse are re-victimized within six months.[12]

People in a position of trust with prior convictions for crimes against children – such as Endangering the Welfare of a Child, Assault, Rape and Sexual Abuse – should not be entitled to misdemeanor treatment for a subsequent endangering conviction. Rather, caretakers who commit endangering, and have been previously convicted of one or more crimes against a child, should be held fully responsible with a felony-level charge.

In 2010, of the 46,967 reports of child abuse and neglect in New York City, more than 35 percent of the victims had been the subject of at least one prior report. [13]

Enhance Penalties for Persons in a Position of Trust Who Cause a Child Extreme Pain or Act in an Especially Vicious or Sadistic Manner

Abusive acts can cause extreme physical pain or be carried out in an especially vicious or sadistic manner against children without causing the kind of serious physical injury required for felony-level assault. Duct taping and strapping a special needs child to a seat for an extended period of time, disciplining a child by making her stand outside in freezing weather at night in only underwear and a t-shirt, or hanging a child by the wrists in a darkened closet are all real-life examples of cruelty to children that cause extreme pain without necessarily resulting in serious physical injury.

Serial Neglect and Abuse by Father, Stepmother End in Murder by Stepbrother

Erin Maxwell's young life was mired in chaos and neglect. As early as 2003, when she was only six years old, the county was alerted to some concerning issues. The Oswego County Department of Social Services received the first state central register (SCR) report in July 2003; the report alleged that Erin's father beat her with a belt, locked her in a closet for long periods of time, withheld food, and left Erin in the care of an older stepbrother who was incapable of providing adequate care. Erin's teachers noted that she was filthy and that her clothes reeked of cat urine. Several reports and home visits followed, all containing the same basic allegations. By 2006, when Erin was nine years old, a teacher reported that Erin scavenged the garbage cans for - and hoarded - any food she could come by. In a letter to the school counselor seeking help, it was suggested that there was animal hoarding in the home and that rats, drawn by the filthy conditions, bit Erin while she slept locked in her room. Yet despite numerous home and school visits, there was never sufficient evidence to prove physical injury or use of a deadly weapon, actions that would have led to serious felony charges.

On August 20, 2008, Erin was found dead in her home. She lay

strangled with a rope; sexual trauma was listed as a contributing factor in her death. Garbage and three-foot-high piles of animal feces littered the house. More than 100 cats were removed from the dwelling. Erin's stepbrother was charged with her murder. Her father and stepmother, however, could only be charged with a misdemeanor for Endangering the Welfare of a Child despite the deplorable conditions they forced her to live in, the egregious acts of serial abuse they committed, and the environment that led to her eventual death at the hands of her stepbrother.

People v. Lynn Maxwell and Lindsey Maxwell, Oswego County

A child living in New York should not have to wait for help until he or she suffers permanent injury or death. A felony endangering statute would provide law enforcement with a valuable tool to protect children at the onset of abuse, rather than at the tragic end.

Scientists have linked victims of child abuse with cognitive problems such as learning disabilities, poor impulse control, lower academic achievement, depression, and delayed brain development. In addition, victims are more likely than children who were not abused to engage in criminality throughout their lifetime.[14] Indeed, victims of child abuse are 59 percent more likely to be arrested as juveniles than non-victims and 30 percent more likely to be arrested for violent crimes as adults.[15]

SUMMARY

The Law Enforcement Council recommends adding an Aggravated Endangering the Welfare of a Child statute in order to address circumstances in which a child's welfare is seriously threatened by a person entrusted with that child's care. Current law does not adequately hold parents and other caretakers accountable when they repeatedly abuse their charges, place their children in grave danger, or act in a particularly vicious or sadistic manner.

The current endangering misdemeanor penalizes parents and guardians who fail to take actions to prevent their children from abuse, neglect or delinquency, but it provides no enhanced penalty for parents and guardians who take active roles in abusing their children. When children are abused by those who are responsible for their care, the psychological and emotional toll is great.

New York needs enhanced sanctions so that law enforcement can effectively intervene on behalf of our most vulnerable citizens – our children – before they fall victim to more serious crimes.

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1. *People v. Traci Leach*, New York County.
2. The depraved indifference standard interpreted by the Court of Appeals has made it nearly impossible to charge Reckless Endangerment in the First Degree, a D felony, in these cases.
3. N.Y. Agriculture and Markets Law § 353-a.
4. California Penal Code §§ 273a, 273d; Delaware Title 11, Chapter 5 § 1102; Florida Title XLVI, Ch. 827.03; Georgia Code § 16-5-70; Illinois ILCS Chapter 720, Act 5 §12-21.6; Iowa Title XVI, Subtitle 1, § 726.6; Ohio ORC 2912.22; Pennsylvania PACS§4304; Texas Penal Code Title V, Ch. 22 § 22.041.
5. N.Y. Penal Law §10.00(10).
6. N.Y. Penal Law §10.00(9).
7. N.Y. Penal Law §§10.00(11), (12).
8. N.Y. Penal Law § 15.05(1).
9. N.Y. Penal Law § 15.05(3).
10. B felonies include Manslaughter in the First Degree, Aggravated Sexual Abuse in the First Degree, and Kidnapping in the Second Degree.
11. The Center for the Prevention of Child Abuse, "Child Abuse Fact Sheet," *available at* www.preventchildabusedutchess.org/statistics.php.
12. Ibid.
13. "New York City Child Welfare Indicators Annual Report 2010" p. 10 New York City Administration for Children's Services, (2011), *available at* http://www.nyc.gov/html/acs/downloads/pdf/City-Council-Annual-Report-2010.pdf
14. Goldman, Jill, et al., "A Coordinated Response to Child Abuse and Neglect: The Foundation for Practice," U.S. Dep't of Health and Human Services, Admin. For Children and Families, Children's Bureau, Office on Child Abuse and Neglect, (2003) *available at* http://www.childwelfare.gov/pubs/usermanuals/foundation/foundationf.cfm.
15. The Center for the Prevention of Child Abuse, "Child Abuse Fact Sheet," *available at* www.preventchildabusedutchess.org/statistics.php.

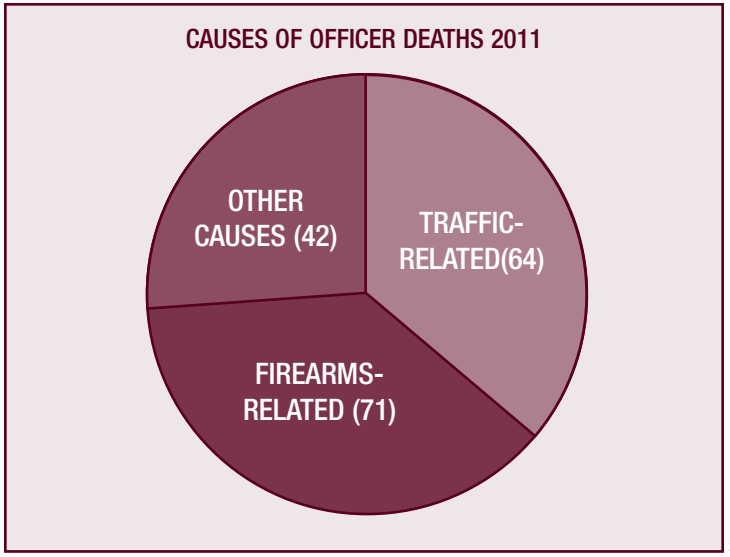
6. *ENHANCE PROTECTIONS FOR POLICE OFFICERS*

Police officers across New York State serve as the front line protecting public safety 24 hours a day, seven days a week. Their ability to safeguard our cities, towns, and villages stems not only from tactical training and firearms expertise, but also from the respect that the vast majority of civilians afford the law enforcement community. Unfortunately, when an officer confronts a suspect who does not respect the badge and therefore fails to heed police authority, police and civilians are put in unnecessary danger.

Current laws fail to address the threat to police and public safety from those who flout the authority of police officers.

In 2011, 177 officers died in the line of duty across the nation, an increase of 16 percent from 2010.[1] New York State lost 11 law enforcement officers – nine more fatalities than in 2010.

Because a single officer fatality in the line of duty is one too many, the Law Enforcement Council urges the passage of laws that will establish penalties for those who flagrantly flout law enforcement authority. In particular, these penalties should apply when individuals: fail to heed or obey a police officer's lawful command; subject police officers to unwanted physical contact while they are performing their official duties; or attempt, while driving, to elude a police officer's order to pull over and comply.



[2]

CREATE A VIOLATION FOR INDIVIDUALS WHO FAIL TO COMPLY WITH POLICE OFFICERS' LAWFUL COMMANDS, RISKING INJURY TO OFFICERS AND OTHERS

The ability of police officers to effectively carry out their responsibilities relies on the authority and respect commanded by the badge and uniform. When suspects disregard an officer's authority, it is important that a legal remedy exists. Otherwise, individuals have nothing to lose from failing to comply with an officer's lawful orders.

When suspects flee in response to a command to stop, and officers are forced to chase down suspected criminals, they risk injuring themselves or bystanders. Defendants who proactively prevent police from doing their jobs through force or intimidation can

be charged with Obstructing Governmental Administration in the Second Degree, an A misdemeanor.[3] However, individuals who willfully ignore the lawful commands (for example, commands to stop or identify themselves) issued by police officers are not subject to any penalties.

Police Officer Falls to Death in Chasing Suspect

Police Officer William Rivera of the 78th Precinct in Brooklyn died November 24, 2004, from the injuries he sustained while chasing a suspected burglar. In the midst of the rooftop chase, he lost his footing and fell 20 feet to the ground, breaking both of his legs. Rivera, who was 35, later died of complications from his injuries.

Enhance Penalties for Individuals Who Subject Police Officers to Unwanted Physical Contact

New York should provide an enhanced harassment statute for people who subject police officers to unwanted physical contact. Enhanced penalties already exist when defendants assault and cause serious physical injury to police officers.[4] New York also provides stronger penalties under its aggravated harassment laws when certain categories of victims are subjected to unwanted physical contact without further injury. For example, Aggravated Harassment of a Correctional Employee by an Inmate is a class E felony when the inmate throws bodily substances at the employee in order to "harass, annoy, threaten or alarm" him.[5] Similarly, harassment involving unwanted physical contact is an A misdemeanor when the defendant is motivated by bias against a protected group.[6]

However, people who strike, kick, shove, or spit on police officers – so long as they do not cause physical injury – are not subject to anything more serious than a violation.[7] Take, for instance, the police officer in Troy, New York, when responding to a report of an unwanted guest. When they arrived on the scene, police found the suspect hiding behind a vehicle. After receiving several different names and birthdates from the suspect in answer to their request for identification, the suspect shoved the officer and spit in his face. That physical contact, which included saliva in the face of a uniformed officer, constitute nothing more than Harassment in the Second Degree, a violation. Under New York law, a violation is not a criminal charge.

It is not uncommon for police officers to be subject to these types of behaviors. The enhanced protections that the Penal Law provides for aggravated harassment against some specific groups should be extended to police officers.

Officer Dies in Pursuit of Motor Vehicle:

On July 17, 2000, Officer John M. Kelly, a member of the New York City Police Department's Auto-Larceny Unit, was working a red-light enforcement detail when he stopped a motorcycle with stolen license plates. The operator fled on the motorcycle and Officer Kelly pursued the suspect. Officer Kelly died after he lost control of his unmarked cruiser and collided with a utility pole.

Penalize Drivers Who Flee Police Officers and Fail to Stop Without Breaking Other Traffic Laws

Suspects who flee police officers on New York State highways and roads represent a major challenge to public safety. Traffic inci-

dents were the leading cause of officer deaths, killing 64 officers nationwide in 2011.[8]

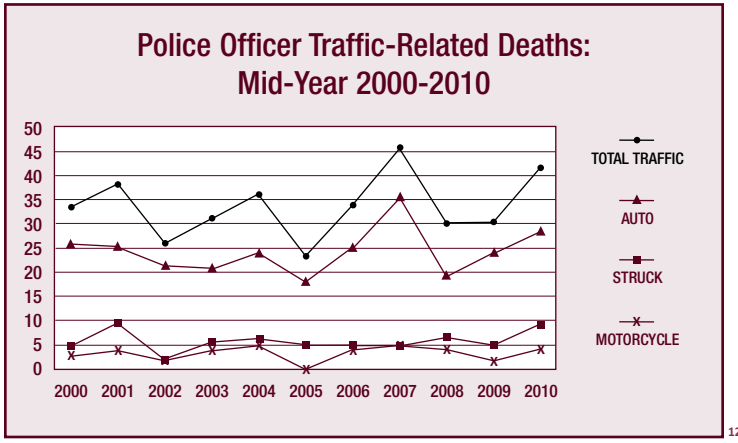
New York State Police Trooper Dies in High Speed Pursuit; Leaves Legacy:

New York State Trooper Craig Todeschini was killed in an automobile accident that occurred while he was pursuing a motorcycle that was traveling in excess of 100 miles per hour in Onondaga County. Trooper Todeschini pursued the motorcycle for approximately two miles before his Chevy Tahoe patrol vehicle left the roadway and struck a tree.

The "Trooper Craig Todeschini Bill," which created the crime of Fleeing from a Police Officer, became law in November 2006. The law makes it illegal to flee from the police in New York State while driving recklessly or at speeds in excess of 25 miles per hour above the speed limit.

In addition to the law bearing his name, Trooper Todeschini, age 25, left behind his wife, Kristi, who was expecting their first child.[9]

When introducing “Craig's Bill” the Senate Majority Leader said, “A husband, a father, a son, a brave law enforcement officer, was killed because a driver refused to pull over and caused a tragic high speed chase… We need tougher penalties to make drivers think twice about fleeing an officer and putting innocent lives in danger.” Enacted in 2006, the law, crafted to prevent this type of tragedy, is narrow in scope; it only punishes drivers that flee police officers by driving recklessly or at speeds 25 miles per hour or more above the speed limit.[10] If the driver was otherwise obeying traffic laws, failure to pull over when directed to by a police officer is only an infraction under the Vehicle and Traffic Law. Much like a violation, an infraction is not a criminal charge.[11] Yet even at normal or slightly above-normal highway speeds, suspects who flee can cause dangerous accidents, harming police officers, other drivers, and themselves. We should not wait for the death of another dedicated officer to enact appropriate legislation.



[12]

Many of the people who died as a result of police pursuits in the past 10 years were innocent drivers and passengers sharing the road with the police and the fleeing suspects. There were a total of 46 fatalities in the last decade that resulted from police pursuits: 13 of those who died were riding in uninvolved vehicles and four were not in a vehicle, compared to 29 who died while riding in a police vehicle or a chased vehicle.[13] Clearly, these chases not only threaten the lives and well-being of suspected criminals and officers in pursuit, but they also represent a deadly menace to innocent drivers, cyclists, and pedestrians who must share the road.

New York Motor Vehicle Traffic Fatalities Involving Police Pursuit 2000-2010					
YEAR	OCCUPANT OF POLICE VEHICLE	OCCUPANT OF CHASED VEHICLE	OCCUPANT OF OTHER VEHICLE	NON-OCCUPANT	ANNUAL TOTAL
2000	1	3	2	1	7
2001	0	2	6	1	9
2002	0	2	0	0	2
2003	0	0	2	0	2
2004	0	3	2	0	5
2005	0	2	0	0	2
2006	0	5	1	1	7
2007	0	5	0	0	5
2008	0	2	0	0	2
2009	1	3	0	1	5
2010	0	2	0	1	3
TOTAL	2	29	13	5	49

[13]

Bystander Felled After Suspect Refuses to Stop

On New Year's Eve in 2004, David Scaringe was making last-minute preparations to celebrate the holiday and make wedding plans with his girlfriend, Karen Jabonaski. He ran out to his car, which was parked on Lark Street in Albany, when he was caught in the crossfire of a police pursuit.

The suspect, Daniel Reed, initially stopped at the command of police officers. When asked to remove his hands from the steering wheel, Reed instead sped toward them. After a foot and automobile chase, an officer fired his weapon to stop the vehicle. One of those shots ricocheted off of an automobile and hit David Scaringe, puncturing his lung, triggering massive hemorrhaging, and killing him.[14]

The Law Enforcement Council supports the creation of a Penal Law misdemeanor for those who fail to heed police orders to stop their vehicle regardless of how fast or how recklessly the offender is driving.

SUMMARY

It is the responsibility of the State Legislature to ensure that our state, county, and municipal police departments have the authority and protections to safeguard their officers. The existing laws do not afford sufficient protections to police officers, and thereby to the entire community. Swift action by the State Legislature on the above proposals will have a significant impact on the safety of New York's law enforcement officers and the civilians they serve.

1. "Preliminary 2011 Fatalities Statistics," National Law Enforcement Officers Memorial Fund Bulletin (January 3, 2012), *available at* http://www.nleomf.org/facts/officer-fatalities-data/.
2. Ibid.
3. N.Y. Penal Law § 195.05.
4. N.Y. Penal Law § 120.08.
5. N.Y. Penal Law § 240.32.
6. N.Y. Penal Law § 240.30(3).
7. N.Y. Penal Law § 240.26.
8. "Preliminary 2011 Fatalities Statistics," National Law Enforcement Officers Memorial Fund Bulletin (October 21, 2011), *available at* http://www.nleomf.org/facts/officer-fatalities-data/.
9. The Officer Down Memorial Page, Inc., *available at* www.odmp.org.
10. N.Y. Penal Law §§ 270.25, 270.30, 270.35.
11. N.Y. Veh. & Traf. Law §§ 1101, 1102.
12. Spence, Berneta, et al., "Law Enforcement Officer Deaths 2011: Mid-Year Report," National Law Enforcement Officers Memorial Fund Bulletin (July 2011), *available at* http://www.nleomf.org/assets/pdfs/reports/2011-Mid-Year-Report.pdf.
13. "Fatalities in Motor Vehicle Traffic Crashes Involving Police in Pursuit, 1982-2009," National Center for Statistics and Analysis, National Highway Traffic Safety Administration, (August 19, 2010) (unpublished statistical report, on file with LEC).
14. Lyons, Brendon, "Deadly Pursuit Costly for City," Times Union (January 6, 2005) *available at* http://timesunion.com.

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ONE HOGAN PLACE
NEW YORK, NY 10013
212.335.8927
212.335.3808 F

WWW.NYSLEC.ORG

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