

NEW YORK STATE LAW ENFORCEMENT COUNCIL

LEGISLATIVE PRIORITIES

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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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*This report was adopted by membership of LEC as of November 2010.



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 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 PROFILES ARE ANALOGOUS TO FINGERPRINTS

DNA Should Be Taken At Arrest

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

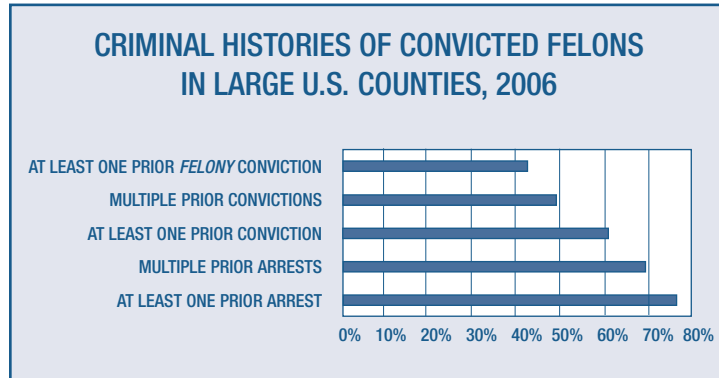
In October 2010, DNA identified Curtis Tucker as the perpetrator in a horrific cold case – a 2004 Attempted Murder and Attempted Rape of a 14-year-old girl in her Harlem apartment building. Tucker choked his young victim to unconsciousness several times and violently seized her money and student MetroCard. 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, leaving her 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. More recently, he was convicted of felony burglary for robbing and assaulting a 74-year-old man who was afflicted with Parkinson's disease. Adding all crimes at arrest to the DNA databank would have solved the 2004 Attempted Rape 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 on arrest will ensure that criminals are in the system at the outset of their criminal careers.



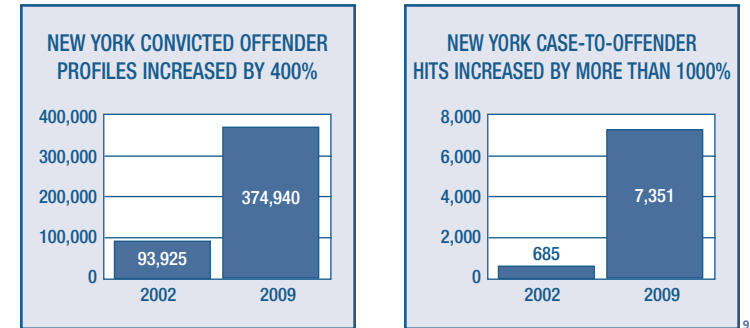
Seventy-seven percent of people convicted of a violent felony in the 75 most populous U.S. counties had a prior arrest. Only 43 percent had a prior felony conviction.⁷

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 2009, the number of samples in the databank increased by 400 percent. At the same time, the number of case-to-offender hits through the databank increased by more than 1000 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 2009



In 2006, New York added all remaining felonies and 18 misdemeanors to the list of qualifying offenses for the DNA Index. 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 *40 murder cases* and *194 sexual assaults*.¹⁰

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 2009 the DNA databank was responsible for 1,595 convictions.¹¹ Sixty percent of all hits since the databank's inception occurred during the three years immediately following the expansion, which speaks to the effectiveness of the 2006 expansions.¹² The results of New York's limited experience in collecting DNA upon the conviction of low-level offenses confirms 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 on 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 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 cleared later 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."¹³

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-four states have already amended their laws to mandate the collection of DNA from some arrestees.¹⁴ Virginia, which in 2003 began collecting DNA from people arrested for violent felonies, has made 621 case-to-arrestee hits as of September 30, 2010.¹⁵

In January 2009, new federal regulations took effect that direct all federal agencies to collect DNA upon arrest.¹⁶ 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.”¹⁷ The first legal challenge to this DNA expansion has strongly supported the authority to collect DNA at arrest:¹⁸ “[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.”¹⁹

SUMMARY

DNA at arrest for all crimes simultaneously clears innocent suspects early in an investigation, holds accountable those 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.albanycountyny.com/press_releases/January_2006/press_releases/012006_murder_S_40.htm.
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>.
9. “2009 Crimestat Report,” N.Y. Div. of Crim. Just. Serv., (June 2010), *available at* <http://criminaljustice.state.ny.us/pio/annualreport/annualreport.htm>.
10. “2006 Expansion Qualifying Offense by Hit Type” N.Y. Div. of Crim. Just. Serv. (January 10, 2011).
11. “2009 Crimestat Report” (June 2010), N.Y. Div. of Crim. Just. Serv., *available at* <http://criminaljustice.state.ny.us/crimnet/ojsa/stats.htm>.
12. *Ibid.*
13. “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.
14. 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.
15. “DNA Databank Statistics” Virginia Department of Forensic Science, (September 30, 2010) *available at* <http://www.dfs.virginia.gov/statistics/index.cfm>.
16. These new regulations amended the DNA Fingerprint Act of 2005 and the Adam Walsh Child Protection and Safety Act of 2006.
17. “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=0900006480511b0.
18. *United States v. Pool*, 2010 U.S. App. LEXIS 19133 (9th Cir. September 14, 2010).
19. “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. PROVIDE TOOLS TO PROTECT VICTIMS AND WITNESSES

Certain classes of crimes, by their nature, are designed to strip victims of their sense of self and security. Without disempowering and degrading the affected community, those classes of crimes cannot thrive. Gang violence and domestic violence epitomize this paradigm. Perpetrators seek to inflict not only physical, but also mental and emotional violence against their victims. An integral part of gang and domestic violence is silencing victims and witnesses 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.¹

At the micro level, domestic violence and gang violence threaten and intimidate individuals; at the macro level, they terrorize family units, neighborhoods, and entire communities. Paradoxically, offenders are rewarded for their efforts; once victims and witnesses are threatened and intimidated into keeping silent, perpetrators are free to strike again.

The Law Enforcement Council recommends policy and procedural actions that will reduce incentives for intimidation;

enhance punishments for intimidation; and establish a new cultural norm that restores fundamental rights to individuals and communities.

GANGS INTIMIDATE WITNESSES, STRIP COMMUNITIES OF FUNDAMENTAL RIGHTS

Gang presence, and the pervasive street ethos and concurrent violence that encourage and often enforce a code of silence, are eating away at communities across the state. Over the last decade, it has become apparent that gangs and the violent crimes, drug crimes, and quality of life crimes that typically surround gangs are not confined to New York City.

The outreach efforts of Operation IMPACT, a state initiative to reduce violent crime, indicate that the spread of violent crime in upstate New York is connected to gang operations outside of New York City. Operation IMPACT provides direct support to the 17 counties upstate and on Long Island that account for 80 percent of the crime committed outside of New York City.

In May 2010, 18 members and associates of the Bloods and Latin Kings were arrested and indicted in the city of Newburgh in Orange County, New York. Newburgh, with a population of approximately 29,000, led the state in violent crimes per capita in 2008 and was on track to do so again in 2010.² Of the 16 homicides that occurred in Newburgh over the past two and a half years, gang violence was responsible for all but three of them, including the five murders that occurred since January 2010. In response to the escalation of gang crimes, U.S. Senator Charles Schumer testified to the troubling frequency of the “reports of shootouts in the town streets, strings of robberies and gang assaults with machetes.”³

PERCENTAGE CHANGE IN GANG PROBLEM ESTIMATES FROM 2002 TO 2007

	GANG-PROBLEM JURISDICTIONS	GANGS	GANG MEMBERS
RURAL COUNTIES	+24.1	+64.4	+36.2
SMALLER CITIES	+27.4	+40.9	+34.0
SUBURBAN COUNTIES	+33.2	+17.0	+12.2
LARGER CITIES	+12.1	+15.3	-07
OVERALL ESTIMATE IN STUDY POPULATION	+25.1	+25.5	+7.7

4

The nature of the gangs seen in upstate New York is also changing. While many smaller cities and towns have long had local gangs and crews of loosely organized low-level criminals, these groups are now forming connections to larger gangs with a national presence, which provide better access to guns, drugs, and safe houses.⁵ Not only are gangs known to recruit among vulnerable youths and contribute heavily to drug and gun crime, but they also terrify their communities and escalate violence in a costly and senseless manner.

COOPERATING WITNESSES, VICTIMS TARGETTED

In a Dutchess County prosecution for murder arising out of 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.

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.” 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. Early studies found that nearly 33 percent of witnesses were threatened, and even those that were not threatened feared reprisal.⁷ 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.⁸

DOMESTIC VIOLENCE DESTROYS LIVES, FAMILIES

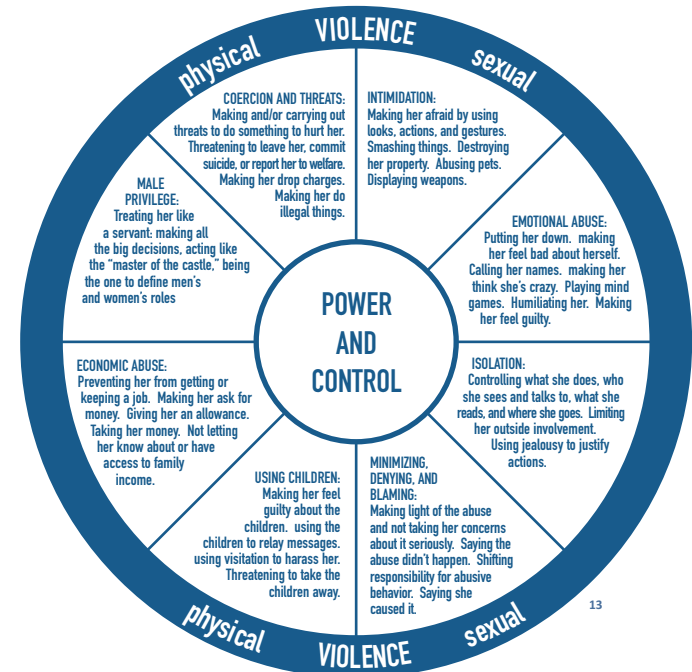
As gang violence decimates the safety and the fabric of community life, domestic violence destroys any sense of safety and control within family life.

Domestic violence is a pervasive problem. In New York City alone, there were 61 family-related homicides last year. Nationally, an estimated 1.3 million women are victims of physical assault by an intimate partner each year, and one in four women will experience domestic violence in her lifetime.⁹ 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 reported being physically and/or sexually abused by a dating partner.¹⁰ Vulnerable populations are also recurring targets of domestic violence. Nearly 50 percent of homeless women and children have been victims of domestic violence, and it is estimated that anywhere between 3.3 million and 10 million children witness domestic violence annually.¹¹

“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.”¹²

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 that most people consider to be a place of safety. In depriving their victim of this sanctuary, the abuser often seeks to

dominate and eliminate the victim's sense of agency. Perversely, 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 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 perpetrated against women by intimate partners are reported to the police.¹⁴ What makes the under-reporting of these crimes even more dangerous is that domestic violence is frequently part of an escalating

pattern of abuse. 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 an abuser who beats a woman while she is pregnant is three times more likely to try to kill her. Every year, one in three women who is a victim of homicide has been murdered by her partner.¹⁵

Perpetrators of violence depend upon a victim's silence as they continue to terrorize their victims and their community. According to the New York City Mayor's Office to Combat Domestic Violence, 66 percent of domestic violence victims who have been killed had prior incidences of abuse which were never reported to the police.

It is critical to encourage victims of domestic violence to come forward about their assault and testify against their abusers in order to break the cycle of violence. However, all too often, domestic violence abusers successfully use intimidation and threats to prevent their victims from pursuing prosecution.

LEGISLATION MUST ADDRESS REAL CASES OF INTIMIDATION

Under current New York State laws, criminals have much to gain and little to lose by interfering with state or local investigations.

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.¹⁶

The three statutes that sound like they should counteract witness intimidation and obstruction of justice – Obstruction of Governmental Administration in the Second Degree, Obstruction of Governmental Administration in the First Degree, and Tampering with a Witness¹⁷ – 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. Given the relatively low penalties for violating this statute, it is unsurprising that a defendant on trial for a high-level felony offense, such as murder, would engage in witness intimidation.

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 in the Fourth Degree, 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 testi-

fyng, but the authorities have not yet become involved in the case, prosecutors would be unable to charge this person under state law. 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 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. Troublingly, this discrepancy in wording between the two statutes provides an inanimate object with more protection than a person.

These statutory shortcomings play out in very real and dangerous ways in communities plagued by gangs and domestic violence.

POLICY AND PROCEDURAL CHANGES ARE NEEDED

Raise Penalties for Witness Tampering and Intimidation

When witness intimidation is allowed to flourish, the harmful effects are clear. In New York State, 14 witnesses were murdered between 2000 and 2007; 19 witnesses in New York City were murdered between 1980 and 2007.¹⁸ 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.

Under current New York law, both witness tampering and witness intimidation are at a maximum E felonies if no physical injury results to the victim.¹⁹ 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 certainly can

lead to violence, even if they don't know for certain that it will.

A defendant charged with a high-level felony has little to lose by attempting to dissuade witnesses from testifying against him. Gang members are more than willing to risk an E felony or misdemeanor tampering or intimidating 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, which carries a term of life in prison.

Paradoxically, Bribing a Witness, which does not place the witness in fear of injury, carries a higher penalty than the base-level offenses for Witness Tampering and Victim and Witness Intimidation.²⁰ New York should raise its penalties for both Witness Tampering and Victim and Witness Intimidation in order to take these perverse incentives away from violent, dangerous defendants.

Encourage Communities to Fight Back Against Witness Intimidation

When witnesses are afraid to step forward and report crimes, it enables criminals to continue their unlawful acts. 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 witnesses through a multifaceted approach, includ-

ing public forums and an education campaign featuring signs on buses and billboards.²¹

Funding domestic violence outreach and support services will also help empower victims to escape abuse. As many victims of domestic violence live with their abusers, coming forward against their abuser can mean losing a home and financial support. Organizations such as Safe Horizons operate both emergency shelters for crisis situations and longer-term housing, where women can live for several months. Safe Horizons offers comprehensive services including counseling, housing assistance, life skills and parenting courses, childcare, and medical aid.²² Moreover, it helps victims to leave their abusers permanently through its Job Readiness Program, which provides practical assistance to help women in its shelters find employment.

Approaching the problem of witness and victim intimidation through community outreach and legislation will reinforce the success of both initiatives and will more comprehensively protect witnesses and victims, particularly in gang and domestic violence-related crimes.

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 can also provide critical steps toward ensuring that they are not further victimized by offenders who think that they can use intimidation and threats to sidestep the law.

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1. Healey, Kerry "Victim and Witness Intimidation: New Developments and Emerging Responses" National Institute of Justice *Research in Action* (1995).
 2. "Agents Swarm Newburgh in Raids Against Gangs" *The New York Times* (May 13, 2010), available at <http://www.nytimes.com/2010/05/14/nyregion/14newburgh.html>.
 3. "In Newburgh, Gangs and Violence Reign" *The New York Times* (May 11, 2010), available at <http://www.nytimes.com/2010/05/12/nyregion/12newburgh.htm?pagewanted=2>.
 4. "Office of Juvenile Justice and Delinquency Prevention Fact Sheet" U.S. Dep't of Just. Office of Justice Programs, (April 2009), available at <http://www.iir.com/nygc/publications/2007-survey-highlights.pdf>.
 5. John Doherty, "Big-Time National Gangs Hooking up with Local Crews," *Albany Times Herald-Record* (June 17, 2007), available at www.recordonline.com/apps/pbcs.dll/article?AID=/20070617/NEWS/706170331.
 6. Whitman, Julie L., and Davis, Robert C., "Snitches Get Stitches: Youth, Gangs, and Witness Intimidation in Massachusetts," National Center for Crime Victims (2007) available at www.ncvc.org.
 7. Connick, Elizabeth and Davis, Robert C., "Examining the Problem of Witness Intimidation," *Judicature* (1983) referenced in Whitman and Davis, "Snitches."
 8. Healey, Kerry, "Victim and Witness Intimidation: New Developments and Emerging Responses," National Institutes of Justice (1995).
 9. 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/>.
 10. "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/>.
 11. Sharmila Lawrence, *Research Findings That Can Inform Policies on Marriage and Child Well-Being*, National Center for Children in Poverty - Domestic Violence and Welfare Policy (2002).
 12. National Coalition Against Domestic Violence, available at [www.ncadv.org/files/DomesticViolenceFactSheet\(National\).pdf](http://www.ncadv.org/files/DomesticViolenceFactSheet(National).pdf).
 13. *Ibid.*

14. "Domestic Violence Facts" National Coalition against Domestic Violence, *available at* <http://www.ncadv.org/files/DomesticViolenceFactSheet%28National%29.pdf>. Patricia Tjaden & Nancy Thoennes, "Extent, Nature and Consequences of Intimate Partner Violence: Findings from the National Violence Against Women Survey," National Institute of Justice and the Centers of Disease Control and Prevention (2000).
15. "Domestic Violence: The Facts" *available at* <http://www.safehorizon.org/index/what-we-do-2/domestic-violence--abuse-53/domestic-violence-the-facts-195.html>.
16. Brendan O'Flaherty and Rajiv Sethi, "Witness Intimidation" Discussion Paper No.:0708-07: Columbia University Department of Economics (October 2007).
17. N.Y. Penal Law §§195.05, 195.07, 215.10, 215.15.
18. Senator John L. Sampson, "Memorandum of 2007 N.Y. Senate Bill 2493," (2007) (creating witness protection program).
19. 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. Penal Law §§ 215.11, 215.15.
20. N.Y. Penal Law § 215.00.
21. Leah George, "You Bet I Told' Campaign Underway," YNN News (Jan. 5, 2008), *available at* www.rnews.com/print.cfm?id=57057.
22. "Domestic Violence and Abuse" Safe Horizons, *available at* <http://www.safehorizon.org/index/what-we-do-2/domestic-violence--abuse-53.html>.

3. CREATE A NEW FELONY OFFENSE OF ENDANGERING THE WELFARE OF A CHILD

Late Christmas Eve, Traci Leach brought her young children, ages 2 and 11, with her as she visited a crack house. The children were left outside on the landing as the 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 am 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 am 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

Unfortunately, for children like these, New York's criminal statutes often 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 pun-

ishable 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 child 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 proposed 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 Aggravated 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, Florida, California, Delaware, Texas, Georgia, Illinois, and Iowa have all recognized that a misdemeanor penalty is inadequate in these situations.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

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 Code make this a challenging charge in many cases of child abuse for three reasons.

First, the definition of “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 “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 legally *reckless* acts of people in positions of trust to the child. This 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 observe.

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

The proposed felony endangering statute applies to a person charged with any duty or responsibility for the health, education, welfare, supervision, or care of the 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.

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 that 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 the viciousness and sadism with which they were carried out distinguish them from acts of misdemeanor-level endangering.

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 guilty of a felony.

In 2009, of the 46,428 reports of child abuse and neglect in New York City, more than 34 percent had at least one prior report.¹¹

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.

Special Education Teacher Leaves Own Child at Home Alone Every Day for Two Years

On May 1, 1992, an anonymous tip led the police to the home of a special education teacher in Middle Village, Queens. Inside the house, they found piles of garbage and a dead cat on the dining room floor. They also found a two-year-old little boy wearing seven diapers and infested with ticks. The child purred like a cat and did not know how to use his thumbs. It became apparent that the child had not had any interaction with anyone except his mother. Investigators learned that the defendant had given birth to the boy at home and had kept his existence a secret ever since, leaving him alone in the house every day with bottles of milk to drink and multiple diapers wrapped around him. Child development experts who examined the boy said that as a result of his life-long isolation, he had severe developmental delays. It required months in foster care before the child began to eat solid foods, speak, and exhibit increased development. The only charge possible upon arrest was Endangering the Welfare of a Child, an A misdemeanor.

- People v. Piccininni, Queens County

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.¹²

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.

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 helpless citizens – our children – before they fall victim to more serious crimes.

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. "New York City Child Welfare Indicators Annual Report 2009" New York City Administration for Children's Services, (2010), available at http://www.nyc.gov/html/acs/downloads/pdf/stats_annual_indicators.pdf.

12. Jill Goldman, 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 of Child Abuse and Neglect, (2003)

available at <http://www.childwelfare.gov/pubs/usermanuals/foundation/foundationf.cfm>.

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. Florida Title XLVI, Ch. 827.03; California Penal Code §§ 273a, 273d; Delaware Title 11, Chapter 5 § 1102; Texas Penal Code Title V, Ch. 22 § 22.041; Georgia Code § 16-5-70; Illinois ILCS Chapter 720, Act 5 §12-21.6; Iowa Title XVI, Subtitle 1, § 726.6.

5. N.Y. Penal Law §10.00(10).

4. REMOVE LOOPHOLES THAT ALLOW PUBLIC CORRUPTION TO FLOURISH

The corrupt actions committed by public officials, frequently featured in newspaper headlines and prime time newscasts, damage the strength and integrity of our governments and the civic vitality of our communities. When people look on public officers and the institutions they serve as laughable, not laudable, the effects are far-reaching. And when the public perceives that law enforcement is powerless to punish public officers for their transgressions, it looks as though being a public officer provides a free pass for corrupt activity.

“Self-dealing politicians have betrayed the public trust. Given the regularity of scandals, investigations and convictions of elected officials in this state, it is no wonder that the public believes there is one set of rules for the powerful and another for everyone else.”¹

The Law Enforcement Council recommends a multi-pronged approach to discourage and, where necessary, punish behavior that is antithetical to the basic responsibilities inherent to public service. First, provide county prosecutors with the power to try corruption cases locally, rather than out-sourcing corruption cases to federal prosecutors. Second, bring the Penal Law Bribery of Public Servants in line with the other bribery laws in New York State. Third, prevent sponsors and their relatives from having a financial interest in or receiving a benefit from a grant. Fourth,

enhance financial reporting requirements and campaign finance laws to close loopholes.

New York State Not Equipped with Tools Available to Federal Prosecutors

“It has been embarrassing that we have so often had to rely on federal prosecutors to deter and punish corruption here in New York...At a time when there is a glaring crisis of confidence in state government, this is the first of a series of actions we must undertake to restore the public's faith in government.”

- Assemblymember Marcus Molinaro²

Public corruption cases often cannot be prosecuted locally because New York State simply does not have the tools available at the state level that prosecutors have at the federal level. This leads to the over-federalization of state and local corruption enforcement.

For nearly a decade, former Assemblyman Anthony S. Seminerio lobbied legislative colleagues and government officials on behalf of clients of a company he created called Marc Consultants. He took more than \$1 million in payments from people and organizations doing business with the state. In one instance, he promoted the interests of Jamaica Hospital Medical Center and did not divulge receiving payments in excess of \$300,000, from the hospital. In return, Seminerio helped the hospital to secure state funding and he lobbied other officials to sup-

port Jamaica Hospital Medical Center's efforts to take over other hospitals. Other charges included extorting payments from the Jamaica Chamber of Commerce and accepting hundreds of thousands of dollars to persuade hospitals to hire a specific medical transportation company.

Federal prosecutors, not county or state prosecutors, brought this case, which resulted in a six-year sentence.

U.S. JUSTICE DEPARTMENT PUBLIC INTEGRITY UNIT CASE LOAD					
	2006	2007	2008	2009	TOTALS
STATE OFFICIALS					
CHARGED	101	128	144	93	466
CONVICTED	116	85	123	102	426
AWAITING TRIAL AS OF 12/31	37	65	61	57	220
LOCAL OFFICIALS					
CHARGED	291	284	287	270	1132
CONVICTED	241	275	246	257	1019
AWAITING TRIAL AS OF 12/31	141	127	127	148	543

Consistently high numbers of local and state officials are prosecuted federally, instead of locally. The reason so many cases are prosecuted federally instead of locally is evident when you look at the New York State Penal Law charge Scheme to Defraud, which is a very limited statute.⁴ To meet the threshold of Scheme to Defraud, the offender must be a government insider who, as part of an ongoing course of conduct, defrauds the state or political subdivision of property, resources, or services in excess of \$1,000. Lesser amounts or one-time actions do not apply. Actions by non-

public servants who attempt to defraud public servants do not qualify. Finally, the law does not criminalize schemes that have corruption as their object.

Cases that do not fit the narrow Scheme to Defraud fact pattern had been prosecuted federally under the Honest Services Law.⁵ Yet in June of 2010, this federal law, which defined Scheme or Artifice to Defraud as “a scheme or artifice to deprive another of the intangible right of honest services,” was found unconstitutionally vague by the Supreme Court.⁶ It is critical that New York State act swiftly to enact a well-crafted statute that will apply to cases that are now being given a free pass.

In short, existing state law does not really help anti-corruption efforts in the manner it was intended, and existing federal law has failed to pass constitutional muster because of its vague language. Clearly articulating the standard of conduct required of public servants in New York State statutes will enhance accountability and keep proceedings at the local level.

Bribery Laws are Inconsistent, Provide Free Pass to Public Officials

When most people think of bribery, they think of surreptitiously exchanging money, goods, or services with the intention of receiving a benefit in return. For instance, offering a “kickback” for a building contract, giving money to a sports figure to “throw” a match, or offering money to a government official to “cover up” an issue. Yet, as New York law has been interpreted by the courts, the definition of bribery is not uniform across these categories.

In the key case regarding bribery of a public officer, a hotel employee put cash in the pocket of a building inspector with the

intent that the inspector would ignore any infractions. The hotel employee, Bac Tran, was convicted initially of bribery. However, that conviction was reversed on appeal absent evidence that the defendant understood that the cash would have an effect on the inspector. The court ruled that in cases of bribery of a public officer, an exchange element has to exist. In other words, it is only a crime if the money is given in an explicit exchange for something from the other party. Simply giving money or services is not enough without a clear agreement.⁷

The requirement that an exchange of understanding occur in order to prove a bribery charge is both inconsistent with the laws in other states and inconsistent with other New York laws. The way the law is written and interpreted in *People v. Tran* relies on “agreement or understanding” language that is generally reserved for bribe *receiving*, not *bribing*. For example, Sports Bribe Receiving defines the offense as when “being a sports official, he solicits, accepts or agrees to accept any benefit from another person *upon an agreement or understanding* that he will perform his duties improperly.”⁸

The common language for *bribing*, as seen in Federal law, relies on the intent of the individual offering the bribe: “Whoever . . . corruptly gives, offers or promises anything of value to any public official . . . with intent to influence any official act [is guilty of a felony].”⁹ This “intent to influence” formulation can be found in bribery laws in many other states¹⁰ as well as all of the other New York State bribery laws.¹¹ In New York, a person is guilty of Bribing a Labor Official, for instance, “when, *with intent to influence* a labor official in respect to any of his acts, decisions or duties as such labor official, he confers, or offers or agrees to confer, any benefit upon him.”¹²

Simply rooting the Bribery Involving Public Servants laws in an “intent to influence” would harmonize public servant bribery with New York’s other bribery laws – namely Commercial Bribery, Sports Bribery, and Labor Bribery, in which the “intent to influence” formulation is used. As it stands today, those who bribe public officials are less likely to be prosecuted than those who bribe athletes.

Prevent Sponsors and their Relatives from having a Financial Interest in or Receiving a Benefit from a Grant

In 2010, in response to several pay-to-play scandals, the legislature enacted a series of ethics laws that set the stage for comprehensive reform. The ethics laws require businesses and entities that lobby state government to disclose payments made to lawmakers for any purpose. In addition, lawmakers are required to disclose their outside income – income not derived from their position in the Senate or Assembly.

Recognizing that the legislation was a first step, but by no means a comprehensive reform, Governor Paterson said, “While there are some good aspects of the ethics bill passed today by the Legislature, it does not go far enough to address the underlying issues that have caused the people of New York to lose faith and trust in their government.”

The conviction of former State Senator Efrain Gonzalez illustrates the type of situation that occurs with alarming frequency.

Ex-Bronx Senator Efrain González Jr. was one of the longest serving state senators in New York. In 2006, he was indicted on charges that he directed grants, also referred to as “member items” to not-for-profit organizations in the Bronx that employed

his girlfriend and family members. In addition, he siphoned the funding from the non-profit and used it to pay for personal expenses, including rent for an apartment in the Dominican Republic, jewelry, college tuition for his daughter, and tickets to sporting events.

González ultimately pled guilty in federal court to misappropriating \$200,000 in state funding from local non-profits for personal use.

If the very people who allocate money are eligible to receive that money, it creates a perverse incentive. Lawmakers and their family members should not be eligible to benefit from member-items. This would prohibit elected officials from funneling government grants to friends and supporters.

FINANCIAL DISCLOSURE AND CAMPAIGN FINANCE

Campaign Finance

Campaign finance laws require candidates to report contributions from supporters. However, there is no provision in the law that dictates record keeping regarding the personal loans a candidate may make to their own campaign. In other words, if a candidate receives a large “personal” gift, and they then choose to take that money and loan it to their political campaign, the paper trail does not include the original donor.

This is important because candidates' contributions and loans to their own campaigns are not subject to contribution limits. Thus candidates and donors can circumvent campaign contribution limits and reporting requirements in a very simple way, without being held accountable.

The recent verdict of “not guilty” in the case above confirmed that individuals who give unlimited “personal” gifts or loans to can-

didates and the candidates who transfer that money into their campaigns are not violating the law as it is currently written and understood. Under this interpretation of the law, campaign contribution limits serve no purpose because a candidate can accept so-called “personal” gifts or loans of any amount and then transfer that gift or loan into their campaign coffers. A system that allows a clear and unfettered path around campaign finance rules not only violates the spirit of the Election Laws, it is also inherently unfair to the other candidates who choose to obey the Election Law.

“[S]tatistics tells us that there's a mounting cost to electioneering, and that money buys more than votes - it buys influence.”¹³

Several changes should be made to the Election Law to clarify that such transactions are prohibited. One change would be to amend the Election Law to require that every candidate for public office and their spouse or domestic partner report any gifts or loans the candidate receives during the campaign and during the 12 months preceding their announced candidacy for office. This would allow the public, the press, and the candidates' opponents an opportunity to discover whether any so-called “personal” gifts or loans were actually given to the candidate in connection with the election.

Financial Disclosure

The financial disclosure requirements in the Public Officers Law and the Judiciary Law are powerful measures intended to reduce the possibility of corrupt activities. Current provisions in the law permit

the redaction of the categories of value or monetary amounts on the annual statements of financial disclosure filed by public officials and certain candidates for public office in all three branches of state government. The law should be changed to require disclosure of the categories of value to the public. In other words, exact amounts would not be revealed, but the public would be able to ascertain basic categories of monetary amounts in question.

Financial disclosure should also require disclosure of relationships with non-profit organizations. Such disclosure would permit the public to learn where a public official's income actually is coming from, and would make it far more difficult for officials to hide improper financial dealings.

Campaign finance rules should include reporting by every candidate for public office and their spouse or domestic partner on gifts or loans during the 12 months preceding their announced candidacy for office. This would prevent loans intended for campaign use from being disguised as personal gifts.

These changes would allow the public to monitor the sources and values of outside income earned by elected officials.

SUMMARY

There is no question that a sea-change is necessary in order to reverse the tacit acceptance of corruption of public servants. It is nonsensical that the bribery laws are written and interpreted in a way that treats public officers with kid gloves. It is similarly perplexing that lawmakers and their families and allies can sidestep the law to funnel tax dollars into their own pockets. It is unjust that financial disclosure laws allow personal gifts to be converted into campaign dollars in flagrant disregard of campaign finance laws. And,

finally, it undermines the authority of New York's local and state officials when cases need to be moved to the federal arena because state laws are inadequate to deter and prosecute the behaviors discussed above. In order to ensure that lawmakers are committed to improving the state of New York, there needs to be laws that identify and punish elected officials who seek to abuse the public trust. There is too much important work to get done in New York to afford corrupt officials a place at the table.

It is time for comprehensive ethics reform to end the corruption of public servants that erodes the public's faith in elected officials and undermines communities' civic engagement.

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1. Then-Senator Eric Schneiderman quoted on the eve of Reform Day in Albany when announcing the introduction of the Public Corruption Prevention and Enforcement Act (S.7707), accessed 11/3/2010 at http://media-newswire.com/release_1118559.html.
 2. "Assemblyman co-sponsors 'Public Corruption Prevention and Enforcement Act'" May 19, 2010 Press Release available at <http://assembly.state.ny.us/mem/Marcus-Molinaro/story/38132/>.
 3. "Report to Congress on the Activities and Operations of the Public Integrity Section for 2009" available at www.justice.gov/criminal/pin/docs/arpt--2009.pdf.
 4. N.Y. Penal Law §195.20.
 5. 18 U.S.C. § 1346.
 6. *United States v. Skilling*, 561 U.S. ___ (2010).
 7. *People v. Tran*, 80 N.Y.2d 170 (1992).
 8. N.Y. Penal Law §180.45(2).
 9. 18 U.S.C. 201(b)(1)(A).
 10. See Michigan, Utah, Arizona, West Virginia, Louisiana, Kentucky, Virginia, Idaho, Alabama.
 11. See N.Y. Penal Law Article 180.
 12. N.Y. Penal Law §180.15.
 13. Alan Markow "Campaign Spending Doesn't Guarantee Victory, But It Does Boost The Clout Of Special Interests Accessed" California Independent Voter Network, October 22, 2010, available at <http://www.caivn.org/>.

5. ENHANCE PROTECTIONS FOR POLICE OFFICERS

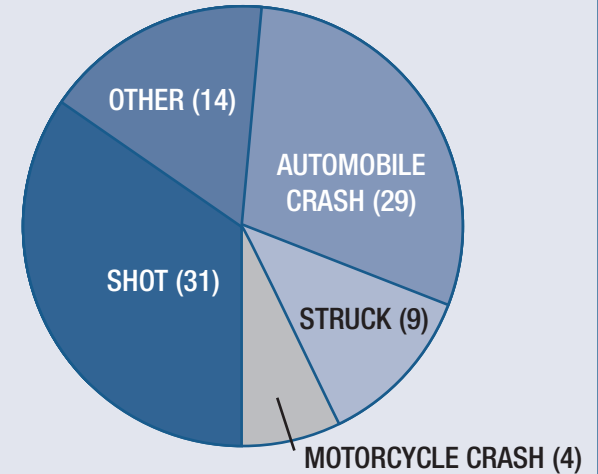
Police officers across New York State serve as the front line protecting public safety 24 hours a day, seven days a week. Their ability to safeguard our cities, towns, and villages stems not only from tactical training and firearms expertise, but also from the respect that the vast majority of civilians 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 the first half of 2010, 87 officers died in the line of duty across the nation, an increase of 42.6 percent from the same time period in 2009.¹ Traffic-related incidents were the most common causes of officer's job-related deaths nationally.²

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.

CAUSES OF OFFICER DEATHS: MID-YEAR 2010



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 exist. 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.⁴ 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.

SUSPECTS ENDANGER POLICE OFFICERS' SAFETY BY FAILING TO HEED LAWFUL COMMANDS

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.⁵ 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.⁶ Similarly,

harassment involving unwanted physical contact is an A misdemeanor when the defendant is motivated by bias against a protected group.⁷

However, people who strike, kick, or shove police officers – so long as they do not cause serious physical injury – are not subject to anything more serious than a violation.⁸ Under New York law, a violation is not a criminal charge. The enhanced protections that the Penal Law provides for aggravated harassment against some specific groups should be extended to police officers.

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 – and growing – challenge to public safety. Traffic incidents are the leading cause of officer deaths, killing 42 officers in the first six months of 2010. This is a 35 percent increase in traffic-related fatalities from the 2009 mid-year total and a 40 percent increase from the mid-year figure for 2008.⁹

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.

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

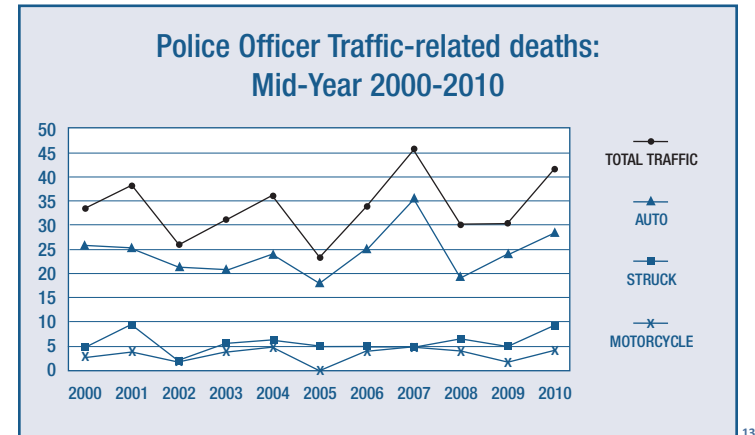
New York State Trooper Craig Todeschini was killed in an automobile accident that occurred while he was pursuing a motorcycle that was traveling in excess of 100 miles per hour in Onondaga County. Trooper Todeschini pursued the motorcycle for approximately two miles before his Chevy Tahoe patrol vehicle 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.¹⁰

When introducing "Craig's Bill" then-Senate Majority Leader Joseph L. Bruno 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.¹¹ 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.¹² 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.



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 civilian fatalities in the last decade: 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. 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.

Traffic Related Deaths 2000-2009

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
TOTAL	2	27	13	4	46

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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.¹⁵

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. Berneta Spence, et al., "Law Enforcement Officer Deaths 2010: Mid-Year Report," National Law Enforcement Officers Memorial Fund Bulletin (July 2010), *available at* http://www.nleomf.org/assets/pdfs/reports/2010_MidYear_Report.pdf.

2. *Ibid.*

3. *Ibid.*

4. N.Y. Penal Law § 195.05.

5. N.Y. Penal Law § 120.08.

6. N.Y. Penal Law § 240.32.

7. N.Y. Penal Law § 240.30(3).

8. N.Y. Penal Law § 240.26.

9. Berneta Spence, et al., "Law Enforcement Officer Deaths 2010: Mid-Year Report," National Law Enforcement Officers Memorial Fund Bulletin (July 2010), *available at* http://www.nleomf.org/assets/pdfs/reports/2010_MidYear_Report.pdf.

10. The Officer Down Memorial Page, Inc., *available at* www.odmp.org.

11. N.Y. Penal Law §§ 270.25, 270.30, 270.35.

12. N.Y. Veh. & Traf. Law §§ 1101, 1102.

13. Berneta Spence, et al., "Law Enforcement Officer Deaths 2010: Mid-Year Report," National Law Enforcement Officers Memorial Fund Bulletin (July 2010), *available at* http://www.nleomf.org/assets/pdfs/reports/2010_MidYear_Report.pdf.

14. "Fatalities in Motor Vehicle Traffic Crashes Involving Police in Pursuit, 1982-2009" Nat'l Ctr. for Statistics and Analysis, Nat'l Highway Traffic Safety Admin., (August 19, 2010) (unpublished statistical report, on file with LEC).

15. Brendon Lyons, "Deadly Pursuit Costly for City," Times Union (January 6, 2005) *available at* <http://timesunion.com>.

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