

**REPORT ON LEGISLATION BY THE
CRIMINAL COURTS COMMITTEE**

A.404 (M. of A. Gunther)

S.1107 (Sen. Young)

AN ACT to amend the penal law and the correction law, in relation to enacting "The Domestic Violence Protection Act - Brittany's Law"

A.7312-A (M. of A. Titone)

S.64-A (Sen. Young)

AN ACT to amend the penal law, in relation to establishing the crimes of failure to register or verify as a domestic abuse offender in the first and second degrees; to amend the correction law, in relation to enacting "Danielle DiMedici, Jessica Tush and Brittany Passalacqua's Law"; and to amend the criminal procedure law, in relation to domestic abuse offenders

A.6609 (M. of A. Crespo)

S.65 (Sen. Young)

AN ACT to amend the penal law and the correction law, in relation to establishing "Brittany's law"

THESE BILLS ARE OPPOSED

INTRODUCTION

This report is respectfully submitted by the Criminal Courts Committee (“the Committee”) of the New York City Bar Association (“City Bar”). The City Bar is an organization of over 24,000 lawyers and judges dedicated to improving the administration of justice. The members of the Criminal Courts Committee include prosecutors, and criminal defense attorneys who analyze laws and policies that affect the criminal courts in New York.

This report opposes the proposed criminal justice “solution” of creating offender registries with the goal of reducing violent crime and summarizes the aforementioned pending New York State legislation. Each of these Bills is a different version of “Brittany’s Law,” a continuation of longstanding attempts to create a violent offender registry in New York State in the name of promoting public safety. Prior iterations of this Bill calling for a general violent

offender registry have passed overwhelmingly in the New York State Senate, but subsequently die in the New York State Assembly.¹

Briefly, the assertions in each Bill's justification lack any empirical support. There are no empirical data showing that any version of this registry would be effective in deterring violent crime. Each version includes an unreasonably broad category of offenders who would be required to register. The scope of these proposed registries would dilute their questionable effectiveness and prove to be a drain on both judicial and law enforcement resources.

That it was modeled after the Sex Offender Registry Act is telling in this respect, as every study of sex offender registries has found no evidence showing these registries prevent recidivism, other than through a mechanism of re-incarceration for other crimes. In fact, because registries often ostracize offenders from communities, they may increase the rate of re-offense (for the same or other type of offenses) generally. These registries also may deter plea agreements. Finally, law enforcement officials have complained that monitoring thousands of people on registries prevents them from focusing their attention on individuals who pose the highest risk to public safety.

By examining the efficacy of New York's sex offender registry, the clear inspiration for these Bills, key construct flaws in policy are discussed. The Bills' many weaknesses are highlighted and a recommendation for further evidence based research is offered. Each version of the Bill is discussed as well as the rationale for the Committees' opposition.

RESEARCH DOES NOT SUPPORT THE ARGUMENT THAT GENERAL CRIMINAL REGISTRIES ARE EFFECTIVE

Although noting that other more "progressive" states have violent offender registries, the sponsors of these Bills fail to show the effectiveness of such registries on public safety. And after conducting an exhaustive review of current literature, we have found no empirical research examining the effectiveness of violent offender registries. The more "progressive" states cited in the Bills justification memoranda are Montana, Illinois, Indiana, Florida, Kansas, Louisiana, Nevada, and Oklahoma. While we do not discount the merits of these individual states, it would be irresponsible to blindly translate the fact that such registries have been adopted in those jurisdictions as proof of their effectiveness or that such policies necessarily would apply to the needs of New York State.

The justifications for the Bills at issue cite the "Omnibus Sex Offender Registration Act" ("SORA"), New York's sex offender registry, as the model on which the provisions are based. In the intervening 20+ years, sufficient data has been collected to warrant an analysis of this "model" policy. As noted, while we are unaware of studies in which the effectiveness of violent felony offender registries has been examined, we nonetheless believe that a review of the literature studying New York's Sex Offender Registry provides strong support that a violent

¹ Most recently, the Senate passed these three bills on June 14, 2017,

felony offender registry would be ineffective in furthering the stated goals of preventing violent crime.

By taking advantage of the circumstances of the *Doe v Pataki*² federal injunction, which halted New York State's application of SORA's registration requirements to previously sentenced offenders, one study was able to "manipulate" two levels of community notification requirements: those sexual offenders in the community who were required to fulfill notification requirements and those who were not.³ The results of this study indicated that sex offenders who are subject to community notification requirements are twice as likely to be rearrested for subsequent sexual offenses as those who are not subject to such requirements. The study also found that those offenders subject to community notification requirements were 47% more likely to be rearrested for nonsexual offenses than sex offenders who are not subject to the same notification requirements. These findings are notable for two reasons. The first is that these notification requirements *failed to prevent or deter* sexual offenders from sexually reoffending. The second is that these requirements provided a faster pipeline of offenders to return into the criminal justice system, *independent of sexual offending*.

The literature addressing sex offender registries also concludes that the passage of sex offender registries does not result in a decrease in the rates of sex offenses.⁴ Such studies also suggest that sex offender registries might have the opposite effect. One study concluded that community notification laws "may, in fact, increase recidivism among registered offenders by reducing the relative attractiveness of a crime-free life. This finding is consistent with work by criminologists showing that notification imposes social and financial costs on registered sex offenders, perhaps offsetting the relative benefits of forgoing criminal activity."⁵ There has also been documentation of the stigmatization of registered sex offenders, which can lead to protests, threats and even vigilante attacks.⁶

Research further indicates that sex offender registries are ineffective as a law enforcement tool. Speaking anonymously, law enforcement officials told Human Rights Watch that the increased resources committed to monitoring people on registries detract from the police's ability to focus on high-risk offenders.⁷ A child safety advocate also complained that an

² *Doe v Pataki*, 3 F Supp 2d 456, 461 (SDNY 1998).

³ Naomi J. Freeman, *The public safety impact of community notification laws: Rearrest of convicted sex offenders*, 2012, *Crime & Delinquency*, 58(4), 539-564, doi:10.1177/0011128708330852.

⁴ See Amanda Y. Agan, *Sex offender registries: fear without function?*, 54 *J.L. & Econ.* 207, 213-25 (2011).

⁵ J.J. Prescott, & Jonah E. Rockoff, *Do sex offender registration and notification laws affect criminal behavior*, 54 *J.L. & Econ.* 161, 161 (2011); see also Jocelyn Ho, *Incest and sex offender registration: who is registration helping and who is it hurting?*, 14 *Cardozo J. of Law and Gender* 429, 443 (2008) ("Because the punishment for a sex offense never seems to end, the sex offender might feel hopeless in his ability to reform himself.").

⁶ See *id.* at 440.

⁷ Human Rights Watch, *No easy answers: sex offender laws in the US*, 45-46 (2007), available at <http://www.hrw.org/sites/default/files/reports/us0907webwcover.pdf> (all sites last visited Feb. 9, 2018).

“excessively long list” of registered offenders “does not generate enough accurate information to make registration useful to anyone.”⁸ As discussed below, New York’s proposed violent felony offender registry will include tens of thousands of offenders.⁹

OVERVIEW OF A.404/S.1107: A GENERAL, VIOLENT OFFENDER REGISTRY

This version of the Bill is most similar to the prior iterations in that it calls for the creation of a registry, via an amendment to the Correction Law, for those who have been convicted of a violent felony offense under Penal Law § 70.02 as well as those convicted of a class A felony offense, other than those class A offenses defined in Penal Law Article 220.¹⁰ These offenders would be required to report to the New York State Division of Criminal Justice Services (“DCJS”) and failure to register would result in criminal penalties ranging from a class E to class D felony, authorized by the addition of two new amendments to the Penal Law.¹¹

Convicted offenders mandated to enroll in the proposed registry would be classified into three levels of notification by a sentencing court corresponding to perceived re-offense risk levels of low, moderate, or high.¹² The sentencing court would act upon a recommendation by a newly created, governor-appointed five-member board of “experts in the field of the behavior and treatment of violent felony offenders.” No further clarification of the credentials of these proposed board members is provided. Upon passage of this Bill, the board shall be responsible for developing guidelines and procedures to assess the risk of a repeat offense by a violent felony offender which threatens public safety. The Bill requires these guidelines to consider an extensive list of risk factors including criminal history, mental abnormality, substance use, use of a weapon, victim knowledge, etc.¹³ The board is then required to deliver a recommendation, confidential to the public, of risk level to the sentencing court within 60 days of offender release.

These levels will determine the amount of information regarding the offender that will be disseminated by DCJS to law enforcement agencies and the general public. Any entity receiving such information will be permitted to disseminate this information at their discretion. Information regarding those registered offenders in the top two tiers will be made available on

⁸ *Id.* at 45.

⁹ It is also worth noting that the public already has access to information about the convictions of many offenders. The website of the Department of Corrections and Community Supervision (<http://nysdoccslookup.doccs.ny.gov/>) includes “all conviction, sentence and other information about offenders currently and previously incarcerated with the Department” dating back to the early 1970s. This information stays online for at least five years after the individual completes all post-release requirements. (N.Y. Corr. Law, Art. 2, § 9.)

¹⁰ Criminal possession of a controlled substance in the first degree (Penal Law § 220.21) and second degree (Penal Law § 220.18); and Operating as a major trafficker (Penal Law § 220.77).

¹¹ *cf.* Correction Law § 168-t (authorizing the penalties for failing to register as a sex offender).

¹² The duration of registration is “only” ten years across all levels.

¹³ See Appendix, *infra*, for full list.

the internet for the general public. This information includes the offender's name, picture, address, and place of employment.

As an initial matter, the term "violent felony" under Penal Law § 70.02 refers to over 100 offenses, including several that do not require the actual commission of violence. For instance, the following are considered "violent felonies" in New York: intimidating a victim or witness, burglary of a dwelling (whether or not someone is home at the time of the burglary), and falsely reporting an incident. As such, this Bill, by design, would *significantly* burden the agencies tasked with its implementation.

It is likely that the greatest, and most disabling, costs of the Bill would be those imposed on the court system. The Bill will require the immediate registration of all violent felony offenders who are currently incarcerated, on parole or post-release supervision, or serving a sentence of probation or a conditional discharge for a violent felony. As a point of reference, in 2015, more than 7,000 people were convicted of violent felonies in New York.¹⁴

Each violent felony offender would require an assessment by the Board and a court hearing to determine his or her risk level. Because the hearing would occur in the county where the offense was committed, the court of conviction, incarcerated offenders would have to be transported from prison facilities throughout the state to that county, where they would be housed in local jails until the hearing's completion. In addition, as discussed above, each offender is constitutionally entitled to legal representation at the hearing, as well as an appeal - both of which are extremely costly. Furthermore, the State's limited judicial and prosecutorial resources would be burdened by the hearings. And, there will be additional strain on the court system as a result of the criminal prosecution of offenders who fail to adhere to the registration requirements.

An unintended consequence may also be that this Bill may reduce the number of criminal defendants who plead guilty to violent felony offenses, given that a plea would result in mandatory registration. It is already more difficult to secure these pleas since violent felonies carry longer periods of post-release supervision and carry the potential for enhanced sentencing for future crimes. Therefore, by adding another consequence to a conviction for a violent felony, this Bill could increase the number of these cases that go to trial and add even more stress to a court system that depends on guilty pleas to function. Indeed, in 2015, 8,308 of the 12,297 violent felony dispositions in New York State were disposed of by guilty plea.¹⁵

It is difficult to foresee all of the hidden costs - financial and otherwise - of implementation of the Bill. However, we are certain that they will be myriad. For instance, the stigmatization of offenders would make it harder for them to find employment and housing and to pursue education. And offenders' inability to reintegrate into society could lead to a

¹⁴ Division of Criminal Justice Services, New York State Felony Processing Report Indictment through Disposition January – December 2015, Table 8, *available at* <http://www.criminaljustice.ny.gov/crimnet/ojsa/nys-felony-process-report2015.pdf>.

¹⁵ *See id.*

dependence on government assistance as well as a need to live in shelters. Additionally, the property values of homes located near the residence of an offender may decrease. Indeed, homes close to a registered sex offender sell for approximately \$5,500 less than comparable homes.¹⁶

OVERVIEW OF A.7312-A/S.64-A: A DOMESTIC ABUSE OFFENDER REGISTRY

This version of the Bill creates a new category of “Domestic Abuse Offenses” and calls for the creation of a mechanism mandating registration for those convicted of these offenses. The Bill defines “Domestic Abuse Offenses” as those who commit, against a member of the family or household:¹⁷ disorderly conduct not in a public place, criminal obstruction of breathing or blood circulation, strangulation in the first degree, strangulation in the second degree, harassment in the first degree, harassment in the second degree, aggravated harassment in the second degree, stalking in the first degree, stalking in the second degree, stalking in the third degree, stalking in the fourth degree, criminal mischief, menacing in the second degree, menacing in the third degree, reckless endangerment, assault in the second degree, assault in the third degree, or attempted assault. Similar to the proposal in A.404/S.1107, this Bill creates two new Penal Law crimes for failing to register as an offender, a class E and class D felony.

The fact that the Bill includes Disorderly Conduct as an offense should raise red flags for a few reasons. Firstly, Penal Law § 220.40, Disorderly Conduct, is not even a crime, it is a violation. Secondly, it is an offense that, by design, is public in nature, and whether there is a victim is not even an element of the offense.¹⁸ The vagueness here invites litigation as courts, defendants, and prosecutors attempt to define the contours of whether a person is disorderly within, or towards, members of the same family or household. Thirdly, Disorderly conduct is a “catch-all offense” that could potentially balloon the size of the registry towards an unmanageable number.¹⁹ Finally, including this charge may reduce the number of criminal defendants who plead guilty to resolve their misdemeanor complaints, straining judicial resources in a manner more harmful than discussed earlier in this report in regards to violent felony offender pleas.

Interestingly, unlike the sex offender registry, and the previously discussed violent offender registry proposal, the ultimate decision of whether an offender is required to register as a domestic abuse offender is completely in the discretion of the court. This Bill removes the necessity of a board entirely. Further, there are no risk levels or corresponding levels of registration. Simply put, the proposed statute authorizes the court, in its sole discretion, to

¹⁶ See Amanda Y. Agan, n. 4 *supra*.

¹⁷ Family and household is defined to include: persons related by consanguinity or affinity; persons legally married to one another; persons formerly married to one another regardless of whether they still reside in the same household; persons who have a child in common; persons who are or have been in an intimate relationship; and persons residing together continually or at regular intervals.

¹⁸ See generally *Provost v City of Newburgh*, 262 F3d 146, 157 (2d Cir 2001).

¹⁹ See e.g. M. Chris Fabricant, *Rethinking criminal defense clinics in "Zero-Tolerance" policing regimes*, 36 NYU Rev L & Soc Change 351, 359 (2012).

impose a registration period of between five to ten years (with all of the attendant personal, familial, judicial, law enforcement and community burdens of such registration) or, if a permanent order of protection exists, permanent registration.

Registered offenders' information would be made available in the identical manner to those offenders in the top two tiers of the violent offender registry discussed earlier. This information includes the offender's name, picture, address, and place of employment made available online and through a telephone hotline.

OVERVIEW OF A.6609/S.65: A DOMESTIC VIOLENCE FELONY OFFENDER REGISTRY

Utilizing a similar framework to A.7312-A/S.64-A, this Bill would instead create a new category of "Domestic Felony Offenders" who would require registration. On its face, this Bill is a perverse compromise of A.404/S.1107 and A.7312-A/S.64-A. Here, any felony offense committed by an individual – violent or otherwise – against a member of his or her family or household²⁰ would require the individual to register, and the individual would be informed of this duty at sentencing. Unlike A.7312-A/S.64-A, there is no hearing mechanism, and the court would have no discretion in determining whether an offender would be required to register. In addition, the duration of registration would be for twenty years and there would be no statutory mechanism to remove oneself from the registry earlier, nor appeal the determination that one is required to register. Without a hearing requirement, or mechanism to appeal, the Committee cannot foresee how the imposition of additional registration requirements, independent of criminal sentence, would even be constitutional.²¹

Perhaps as a trade-off to the due-process deficiencies, the information gathered in this registry would not be made as freely available as the other two Bills. There would be no internet registry and the general public would only have access to offender information through the special telephone line. However, the difficulty of obtaining this information, versus using the pre-existing, public, Department of Corrections and Community Supervision ("DOCCS") online database,²² would appear to undermine any claimed effectiveness in establishing the registry in the first place.

THERE IS NO EMPIRICAL EVIDENCE TO SUPPORT THE EFFECTIVENESS OF A DOMESTIC VIOLENCE REGISTRY

As with the violent offender registry bills previously discussed, the Bills' sponsors' memoranda in support of a domestic violence registry cite to "several states which have some form of a Domestic Abuse offender registry." However, after undertaking a legal research survey, we could find no such registry in effect. Indeed, while several states have proposed and

²⁰ See n. 17, *supra*.

²¹ See generally *Doe v Pataki*, 3 F Supp 2d 456, 461 [SDNY 1998].

²² See n. 9, *supra*.

rejected similar registries,²³ have researched domestic violence registries,²⁴ or have created a registry to track orders of protection,²⁵ none have successfully enacted a domestic violence registry of this scale. A private enterprise, the National Domestic Violence Registry (“NDVR”) has established its own nationwide registry of crowd-sourced entries verified by court record searches. However, this registry includes a disclaimer that, because of its inherent design limitations, it is incomplete and is no replacement for an individual’s own evaluation—an admonition which undercuts the utility of having a registry at all.²⁶

The absence of similar registries limits any empirically based conclusions of effectiveness. However, The New York State Coalition Against Domestic Violence (“NYSCADV”), a statewide nonprofit organization dedicated to reducing domestic violence in New York and ensuring that services focus on victim safety and offender accountability, has cautioned against the creation of domestic violence registries. Indeed, the organization has released three memoranda opposing each version of this Bill.²⁷ Specifically, the NYSCADV challenges the notion that such a registry would be effective. For example, in New York City, of the 75 family-related homicides in 2010, 77% of those cases had no known prior police contact and 96% had no current order of protection—meaning a significant portion of those who commit acts of domestic violence would not have been previously identified through a domestic violence offender registry, once again undermining the justification for such a registry in the first place.

The NYSCADV memoranda also noted that such a registry would instead create harmful, unintended consequences for victims and their families. Their concerns include creating a false sense of security for victims, privacy concerns for both the offender and victim, magnification of inherent racial disparities in the criminal justice system, unnecessary use of funds, and a disincentive for victims to call 911. Voicing similar concerns as the NYSCADV, Technology Safety, a blog managed by the National Network to End Domestic Violence, has also published a

²³ Alabama, Tennessee, and Texas, for example have considered a similar Bill (*see* Bill Young, WAAY 31 News, WAAY-31 I-Team explores the idea of a domestic violence registry, Nov. 7, 2017, *available at* <http://www.waaytv.com/content/news/WAAY-31-I-Team-explores-the-idea-of-a-domestic-violence-registry-455896993.html>; Elise Preston, WREG News, *WREG asks if Domestic Violence Registry is Needed*, Feb. 11, 2016, *available at* <http://wreg.com/2016/02/11/wreg-asks-if-domestic-violence-registry-is-needed/>; *see also* Melissa Vega, FOX 29 News, *Texas Lawmaker pushes for Domestic Violence Registry Bill*, Dec. 8, 2016, *available at* <http://foxsanantonio.com/news/local/texas-lawmaker-pushes-for-domestic-violence-registry-Bill>).

²⁴ *See e.g.* Amanda Gordon, Connecticut’s Office of Legislative Research, *Domestic Violence Registries*, June 27, 2011, *available at* <https://www.cga.ct.gov/2011/rpt/2011-R-0196.htm>.

²⁵ *See e.g.* New Jersey, NJ Stat Ann 2C:14-20.

²⁶ “It is important that you do your homework to judge for yourself whether this person is a person of good moral character and has no violent, harassing [*sic*] or predatory tendencies” (National Domestic Violence Registry Disclaimer, *available at* <http://www.domesticviolencedatabase.net/search-registry>).

²⁷ Available for download at <https://www.nyscadv.org/what-we-do/>.

post outlining similar concerns surrounding the creation of such registries.²⁸ Notably, they included the danger of victim-blaming after an offense, i.e. “Why didn’t you check the registry?”

CONCLUSION

The Committee recognizes the seriousness of violent crime; however, passage of any of these Bills is unlikely to adequately affect or diminish the incidence of violence in New York State. As noted, studies have shown that registries fail to reduce crime rates and, by inhibiting offenders’ ability to reintegrate into the community, may even increase them. Moreover, any version of this law will be extremely costly both in actual financial costs and burdens that will be placed on the criminal justice system to conduct the many thousands of risk-level determination hearings and implement and enforce these Bills, to say nothing of the inevitable lawsuits challenging these registries.

Should the Legislature still wish to pursue the creation of such a registry – and convince stakeholders and the public of its proposed effectiveness – it is clear that a robust, thorough, empirical study is warranted.

For these reasons, the Committee oppose the Bills.

Criminal Courts Committee
Kerry Ward, Chair

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²⁸ Tech Safety, *Thinking Critically About Domestic Violence Offender Registries*, May 4, 2016, available at <https://www.techsafety.org/blog/2016/5/4/thinking-critically-about-domestic-violence-offender-registries>.

APPENDIX

Excerpt from A.404/ S1107 (NYS 2017 at p. 10) listing risk assessment guidelines used.

5. The board shall develop guidelines and procedures to assess the risk of a repeat offense by such violent felony offender and the threat posed to the public safety. Such guidelines shall be based upon, but not limited to, the following:

(a) criminal history factors indicative of high risk of repeat offense, including: (i) whether the violent felony offender has a mental abnormality;

(ii) whether the violent felony offender's conduct was found to be characterized by repetitive and compulsive behavior, associated with drugs or alcohol;

(iii) whether the violent felony offender served the maximum term;

(iv) whether the violent felony offender committed the violent felony offense against a child;

(v) the age of the violent felony offender at the time of the commission of the first violent offense;

(b) other criminal history factors to be considered in determining risk, including:

(i) the relationship between such violent felony offender and the victim;

(ii) whether the offense involved the use of a weapon, violence or infliction of serious bodily injury;

(iii) the number, date and nature of prior offenses;

(c) conditions of release that minimize risk of re-offense, including but not limited to whether the violent felony offender is under supervision; receiving counseling, therapy or treatment; or residing in a home situation that provides guidance and supervision;

(d) physical conditions that minimize risk of re-offense, including but not limited to advanced age or debilitating illness;

(e) whether psychological or psychiatric profiles indicate a risk of recidivism;

(f) the violent felony offender's response to treatment;

(g) recent behavior, including behavior while confined;

(h) recent threats or gestures against persons or expressions of intent to commit additional offenses; and

(i) review of any victim impact statement.