JUVENILE GENETIC PRIVACY IN NEW YORK: DNA COLLECTION AND MAINTENANCE POST-*FRANCIS O.*

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I. INTRODUCTION

Since the discovery of DNA, society has been warned of the need to protect the privacy of such deeply personal material.[1] However, law enforcement agencies have invaded this privacy since 1987, when the first American was convicted of a crime in a case using DNA evidence.[2] As science and technology continue to develop, DNA has become increasingly prevalent in the criminal justice system.[3] Today, all fifty states and the federal government require that convicted sex offenders, certain classes of convicted felons, and some classes of misdemeanor offenders provide a sample of bodily material upon conviction.[4] These samples are translated into a DNA profile, which is then uploaded to state and local DNA databases that feed into the Federal Bureau of Investigation ("FBI")'s Combined DNA Index System ("CODIS").[5] Law enforcement agencies nationwide have access to CODIS for the purpose of identifying perpetrators of crimes by comparing known DNA profiles to crime scene evidence.[6]

DNA databases serve the government's significant interest in solving crimes efficiently.[7] Furthermore, some scholars argue that storing an individual's DNA profile deters them from committing future crimes due to the increased likelihood that they will be caught.[8] As such, the Supreme Court has held that the government's public safety interest outweighs an individual's privacy interest in their genetic material, thus constitutionally permitting compulsory forensic DNA collection, profiling, and databasing by government agencies.[9] However, modern jurisprudence neglects to distinguish between DNA collection from adults and children, despite precedent stressing the importance of such distinctions.[10]

This Note argues that the compulsory collection and maintenance of juvenile forensic DNA profiles is an unconstitutional violation of the Fourth

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[1] Gabrielle A. Sulpizio, *Your Body, Your DNA: Addressing the Constitutionality of Databanked DNA Under the Fourth Amendment*, 10 CHARLESTON L. REV. 417, 426, 433 (2016).

[2] *Id.* at 417.

[3] *Id.* at 418.

[4] *Id.* at 423.

[5] *Id.* at 424.

[6] *Id.*

[7] Kevin Lapp, *As Though They Were Not Children: DNA Collection from Juveniles*, 89 TUL. L. REV. 435, 448-49 (2014).

[8] Kevin Lapp, *Compulsory DNA Collection and a Juvenile's Best Interest*, 14 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 50, 64-65 (2014).

[9] Maryland v. King, 569 U.S. 435 (2013).

[10] Lapp, *supra* note 7, at 461-62.

Amendment's guarantee against unreasonable searches and seizures.[11] Given that this is primarily an issue of state law, New York will be used as a case study, particularly in light of the recent *Matter of Francis O.* ruling in the First Appellate Department.[12] This Note begins by summarizing the current state of federal and New York state laws regarding DNA collection and databasing, specifically as they pertain to minors.[13] Next, it analyzes the Fourth Amendment concerns regarding juvenile forensic DNA collection and databasing, as well as how this practice undermines the statutory purpose of the juvenile justice system.[14] It then addresses the due process and ethical implications of this issue before turning to possible solutions.[15] This Note contemplates a bill currently before the New York State Assembly that intends to address this issue; however, this Note ultimately rejects this proposal.[16] It also rejects alternative schemes used by other states that limit the number of juvenile DNA samples collected or that otherwise protect juveniles' Fourth Amendment rights.[17] Lastly and most importantly, this Note concludes that, in order to sufficiently protect juveniles' interests, their DNA should not be collected for purposes of maintenance in a DNA database.[18]

II. BACKGROUND

A. Fourth Amendment

The Fourth Amendment protects an individual's right against unreasonable searches and seizures, requiring the government to obtain a warrant or establish probable cause in order to interfere with the individual's property or privacy interests.[19] A warrantless search or seizure is only permissible where there is a special, non-law-enforcement need for the search, or where the government's legitimate law enforcement interest outweighs the individual's interest in being free from intrusion.[20] The United States Supreme Court has recognized select categorical exceptions to the warrant requirement, such as where searches or seizures are performed in

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[11] *Id.* at 443.

[12] Matter of Francis O., 208 A.D.3d 51, 56 (N.Y. 2022).

[13] *See infra* Part III.

[14] *See infra* Part III(A).

[15] *See infra* Part III(C).

[16] *See infra* Part IV(A).

[17] *See infra* Part IV(B).

[18] *See infra* Part V.

[19] U.S. CONST. amend. IV.

[20] Maryland v. King, 569 U.S. at 446 (2013); *see also* Steven Messner, *Law Enforcement DNA Database: Jeopardizing the Juvenile Justice System Under California's Criminal DNA Collection Law*, 28 J. JUV. L. 159, 161-62 (2007).

exempted areas like prisons[21] or incident to an arrest based on probable cause.[22]

An individual can also consent to a Fourth Amendment search or seizure, though their consent must be given knowingly, intelligently, and voluntarily; that is, law enforcement cannot legally coerce an individual to consent.[23] The reasonableness of the individual's consent must be analyzed closely given the fundamentally coercive nature of police encounters.[24] This is especially true with respect to juveniles.[25] The Supreme Court has repeatedly held that the analysis of the reasonableness of a juvenile's consent must account for the juvenile's youth, as age may impact how a reasonable person assesses their freedom to deny consent or leave an encounter.[26]

B. Federal DNA Collection and Databasing

The DNA Identification Act of 1994 established a national DNA databank containing profiles of convicted criminals, unidentified human remains, and crime scene samples.[27] It allows the collection and profiling of DNA samples from individuals arrested or indicted for a crime, while mandating collection and profiling from individuals convicted of qualifying federal offenses, including federal juvenile delinquents.[28] These profiles are then uploaded to the National DNA Index System ("NDIS") and CODIS.[29]

While law enforcement agencies nationwide have access to these databases to search for DNA matches, federal law prohibits their use for non-forensic research or intentional familial searching.[30] Furthermore, it excludes all voluntary DNA samples collected with the consent of the sample subject.[31] The law also provides for expungement—removal from the NDIS and CODIS—where the individual has been discharged from an arrest, acquitted, or their conviction has been overturned.[32] However, expungement is not automatic; the individual must engage in a tedious, lengthy, and

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21 Messner, *supra* note 20, at 161.

22 Cupp v. Murphy, 412 U.S. 291, 295 (1973).

23 Lapp, *supra* note 7, at 487-88.

24 J.D.B. v. North Carolina, 564 U.S. 261, 269 (2011).

25 *Id.* at 268.

26 *Id.*; Bumper v. North Carolina, 391 U.S. 543, 548 (1968); Schneckloth v. Bustamonte, 412 U.S. 218 (1973); *see also* Matter of Daijah D., 86 A.D.3d 521, 522 (N.Y. 2011); People v. K.N., 87 N.Y.S.3d 862 (2018).

27 The DNA Identification Act of 1994, 34 U.S.C. § 12592.

28 Lapp, *supra* note 8, at 50, 56.

29 *Id.*

30 Sulpizio, *supra* note 1, at 417.

31 Stephen Mercer & Jessica Gabel, *Shadow Dwellers: The Underregulated World of State and Local DNA Databases*, 69 N.Y.U. ANN. SURV. AM. L. 639 (2014).

32 Sulpizio, *supra* note 1, at 430.

potentially costly process to successfully scrub their DNA profile from the database.[33] Federal law does not afford the opportunity for expungement to individuals who are convicted of a crime and complete their sentence.[34]

The Supreme Court has upheld the compulsory collection and profiling of arrestee DNA samples as a permissible exception to the Fourth Amendment's warrant requirement because it occurs incident to an arrest based on probable cause.[35] In *Maryland v. King*, the Court recognized the substantial privacy interest one retains in their genetic material by declaring DNA buccal swabs as "searches" under the Fourth Amendment.[36] However, it found that an individual's reasonable expectation of privacy is diminished upon their arrest, as their detention was presumably predicated on a finding of probable cause.[37] Furthermore, it noted that buccal swabs are minimally intrusive, involving a brief swab of the inner cheek that results in no pain or injury.[38] Based on the totality of the circumstances, the Court held that the government's legitimate interest in efficiently solving and preventing crime outweighs the reduced privacy interests of arrestees, such that the compulsory collection of DNA samples from arrestees is reasonable under the Fourth Amendment.[39] Courts have generally applied this holding to adults and juveniles alike.[40]

Since the *King* decision, courts have also consistently upheld the constitutionality of maintaining DNA profiles in databases indefinitely.[41] While each state operates its own statewide database, the FBI manages CODIS, which maintains samples collected by federal, state, and local law enforcement agencies nationwide.[42] These agencies can then utilize profiles in CODIS to obtain DNA matches in unrelated investigations across the country, a practice which courts repeatedly have found constitutional.[43]

Federal and state courts do not distinguish between adult and juvenile forensic DNA collection, despite the United States Supreme Court's insistence on treating children differently than adults in the application of substantive and procedural criminal law, as well as constitutional rights.[44] For example, in *J.D.B. v. North Carolina*, the Supreme Court considered age

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33 *Id.*

34 *Id.* at 430 n.88.

35 Maryland v. King, 569 U.S. 435 (2013).

36 *Id.* at 463-64.

37 *Id.* at 463.

38 *Id.* at 463-64.

39 *Id.* at 465.

40 Lapp, *supra* note 7, at 461-62.

41 Sulpizio, *supra* note 1, at 418.

42 *Id.* at 424.

43 *Id.*

44 Lapp, *supra* note 7, at 461-62.

as a relevant factor in determining whether a juvenile arrestee's statements to law enforcement were voluntary where they were not informed of their rights.[45] The Court found significant, material differences in terms of maturity, vulnerability, and susceptibility to outside pressure between adults and children, which make children less reasonably aware of their due process rights and thus less able to voluntarily waive these rights.[46] This Note argues that these differences between juveniles and adults exist in the context of DNA collection as well; juvenile DNA collection is more intrusive than adult DNA collection and, therefore, requires a distinct legal scheme that accounts for these vulnerabilities.[47]

C. New York DNA Collection and Databasing

New York state law permits court-ordered DNA tests, provided that the prosecution establishes "(1) probable cause to believe the suspect has committed the crime, (2) a 'clear indication' that relevant material evidence will be found, and (3) the method used to secure it is safe and reliable."[48] The prosecution's need for the DNA evidence must also outweigh the individual's "constitutional right to be free of bodily intrusion."[49] If this high standard is not met, the court may not order the individual to provide a sample for testing.[50] However, if the individual's DNA is already maintained in a databank, such a court order is not necessary to use their pre-existing profile for comparison with crime scene evidence.[51]

New York Executive Law Section 995 ("Executive Law") mandates post-conviction DNA samples from individuals convicted of most felonies or misdemeanors (known as "designated offenders") to be profiled and maintained in the state DNA index system ("SDIS").[52] While the Executive Law protects the confidentiality of these records to a certain extent, a designated offender's DNA profile may be disclosed for use in criminal investigations and proceedings, including for comparison with DNA samples discovered in unrelated investigations.[53] Where an individual's DNA is collected and analyzed in the course of a criminal proceeding that ultimately does not result in a conviction, the individual may apply to the New York

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45 J.D.B. v. North Carolina, 564 U.S. 261 (2011).

46 *Id.* at 274-75; *see also* Lapp, *supra* note 7, at 485-86.

47 Lapp, *supra* note 7, at 478.

48 Matter of Abe A., 56 N.Y.2d 288, 291 (1982).

49 *Id.* at 291.

50 *Id.* at 291 n.39.

51 Sulpizio, *supra* note 1, at 422 n.39, 428 n.74.

52 N.Y. EXEC. LAW § 995 (McKinney 2022); N.Y. EXEC. LAW § 995-c (McKinney 2012) ("Given OCME's responsibilities for testing, storage and sharing of DNA data, the Executive Law clearly applies to an LDIS, like OCME's.").

53 EXEC. § 995-c; N.Y. EXEC. LAW § 995-d (McKinney 1999).

State Supreme Court or applicable trial court for an order to expunge any related DNA records, samples, analyses, or documents.[54]

Notably, the Executive Law directs laboratories analyzing these DNA samples to provide resulting records to the SDIS *only*.[55] While this seems to suggest that the legislature intended the SDIS to be the only forensic DNA database operating in the state, the Executive Law does not expressly prohibit local DNA index systems ("LDIS").[56] This has left a vacuum in the law, allowing New York City's Office of Chief Medical Examiner ("OCME") to operate a highly controversial LDIS, which some courts argue is inconsistent with the Executive Law.[57] Unlike the NDIS, CODIS, and SDIS, the OCME LDIS includes DNA profiles from suspects and arrestees, including children as young as eleven years old.[58] As of 2020, the OCME LDIS contained samples from more than 1,600 minors who had not been convicted of crimes.[59] Nearly half of all crimes investigated in the state were committed in New York City, meaning the OCME LDIS contains a significant amount of profiles that can be searched by law enforcement citywide.[60]

Courts opposing the OCME LDIS interpret the Executive Law's designated offender,[61] confidentiality,[62] and expungement[63] provisions as limiting the SDIS to post-conviction DNA profiles only.[64] In contrast, the OCME LDIS maintains profiles from individuals who have not been convicted.[65] Additionally, there is not a clear avenue to remove one's profile from the OCME LDIS, though many courts have applied the Executive Law's expungement procedures.[66] However, courts in favor of the OCME LDIS note that it is under the purview of the state Commission on Forensic

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54 EXEC. § 995-c(9)(a), (b); *see generally* EXEC. § 995-c.

55 EXEC. § 995-c(5); *see generally* EXEC. § 995-c.

56 N.Y. EXEC. LAW § 995-b (McKinney 1999); EXEC. § 995-c; EXEC. § 995-d.

57 *See, e.g.*, People v. Halle, 55 N.Y.S.3d 634 (2017); *see also* People v. K.M., 41 N.Y.S.3d 875 (2016); *see also* People v. K.N., 87 N.Y.S.3d 862 (2018).

58 Class Action Complaint at 10, Leslie v. City of New York, No. 1:22-cv-02305 (S.D.N.Y. Mar. 21, 2022).

59 Susie Armitage, *Advocates Press New York Lawmakers to Shutter Database Containing Kids' DNA*, THE IMPRINT (Dec. 20, 2020, 11:45 AM), https://imprintnews.org/advocates-new-york-lawmakers-shutter-database-kid-dna/50453.

60 *K.M.*, 41 N.Y.S.3d at 879.

61 EXEC. § 995(7); EXEC. § 995-c.

62 EXEC. § 995-c(6); EXEC. § 995-d; *see generally* EXEC. § 995-c; EXEC. § 995-d.

63 EXEC. § 995-c(9); *see generally* EXEC. § 995-c.

64 *See, e.g.*, People v. Halle, 55 N.Y.S.3d 634, 634 (2017); *K.M.*, 41 N.Y.S.3d at 875; People v. K.N., 87 N.Y.S.3d 862, 862 (2018).

65 Class Action Complaint, *supra* note 58, at 10.

66 *See* Matter of Logan C., 2020 N.Y. Misc. LEXIS 4465 (N.Y. Fam. Ct. 2020). *But see* Matter of Francis O., 208 A.D.3d 51, 76 (N.Y. 2022).

Science and is therefore held to the same standards as the SDIS.[67] There is currently legislation pending in the New York Senate Internet and Technology Committee that would explicitly prohibit LDISs, though the same bill died in the committee during the 2019-2020 and 2021-2022 Regular Sessions.[68]

D. New York Family Court Act, Article 3

Article 3 of the New York Family Court Act ("the Act") governs juvenile delinquency proceedings: proceedings in which a respondent under the age of eighteen committed an act that would have constituted a crime if committed by an adult.[69] Because a juvenile delinquency disposition is not a criminal conviction, juvenile delinquents are not designated offenders required to provide post-conviction DNA samples.[70] However, the Act does provide for the court-ordered taking of biological identifying information like fingerprints, blood, and other bodily materials which can be used to create DNA profiles.[71] The Act is silent as to the sealing, destruction, or confidentiality of juvenile DNA records, though it provides for the destruction of a juvenile's other biological identifying information where they are not adjudicated delinquent, or where they are adjudicated delinquent but reach twenty-one years of age with no other convictions or open cases.[72] Family courts have the discretion to issue protective orders limiting the use of a DNA profile to the case at bar and prohibiting its comparison to evidence in other unrelated cases.[73] However, the Act does not provide juvenile delinquents any means to apply to the court for expungement of their DNA profiles.[74]

As previously mentioned, there is not a uniform approach to expunging juvenile delinquents' DNA profiles.[75] Some judges have held that the Executive Law does not apply to family courts at all.[76] For example, in *Matter of Logan C.*, Judge Beckoff found that the Act is the only pertinent

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67 Matter of Samy F. v. Fabrizio, 176 A.D.3d 44 (N.Y. 2019).

68 N.Y. Spons. Memo., 2023 S.B. 998 (Feb. 9, 2023).

69 N.Y. FAM. CT. ACT § 301.2 (McKinney 2022).

70 *Matter of Samy F.*, 176 A.D.3d at 55 ("A youthful offender is not a 'designated offender' mandatorily required to provide DNA."); *Matter of Francis O.*, 208 A.D.3d at 76 (extending the *Samy F.* holding to juvenile delinquents).

71 N.Y. FAM. CT. ACT § 331.3 (McKinney 1983).

72 N.Y. FAM. CT. ACT § 354.1 (McKinney 2022).

73 N.Y. FAM. CT. ACT § 331.5 (McKinney 1983); *see, e.g.,* Matter of Jahsim R., 66 Misc.3d 426 (N.Y. Fam. Ct. 2019). *But see* Matter of Logan C., 2020 N.Y. Misc. LEXIS 4465 (N.Y. Fam. Ct. 2020).

74 *See Matter of Jahsim R.*, 66 Misc.3d 426; *see generally* Matter of John R., 69 Misc.3d 493 (N.Y. Fam. Ct. 2020).

75 Sulpizio, *supra* note 1, at 428, 431, 432 n.95.

76 *Matter of Logan C.*, 2020 N.Y. Misc. LEXIS 4465, at 5.

statute in juvenile delinquency proceedings; he interpreted the Act's silence on the issue of DNA expungement as prohibiting family courts from issuing orders to that effect.[77] He distinguished the case from *Matter of Samy F. v. Fabrizio*, because, while *Samy F.* was a Supreme Court case, *Logan C.* was "governed by the very limited jurisdiction of the Family Court."[78]

In *Samy F.*, the First Department held that "the same discretion afforded to a court under the Executive Law to expunge DNA profiles and related records when a conviction is vacated may also be exercised where, as here, a YO [youthful offender] disposition replaces a criminal conviction."[79] The *Matter of Francis O.* holding further extended this discretion to family courts because, like youthful offenders, juvenile delinquents are not "designated offenders" according to Executive Law Section 995(7) and juvenile delinquency proceedings cannot result in a conviction.[80] The court reasoned that Executive Law Section 995-c(9) grants trial courts the discretion to expunge DNA records; given that family courts are the trial courts for all juvenile delinquency proceedings, they have the discretion to expunge a juvenile delinquent's DNA sample and related records from state and local databases.[81] It conceded that the Act is silent on this issue but found that this silence does not preclude family courts from exercising discretion to expunge juvenile delinquents' DNA profiles.[82] The court's determination of whether to expunge depends on the totality of the circumstances, including the events surrounding the underlying delinquency finding, the extent of the respondent's participation in the underlying offense, the respondent's age, and the circumstances surrounding the respondent's consent to DNA sampling.[83] The *Francis O.* ruling indicates that DNA records of juvenile delinquents *must* be expunged where the sample was collected surreptitiously from a minor without any articulable basis.[84] It further underscored the need to protect minors as a vulnerable population, stating "[a] juvenile delinquent is not and should not be afforded fewer adjudication protections than a youthful offender or an adult in the equivalent circumstances."[85]

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77 *Id.*

78 *Id.*

79 Matter of Samy F. v. Fabrizio, 176 A.D.3d 44, 52 (N.Y. 2019) (alteration in original).

80 Matter of Francis O., 208 A.D.3d 51, 56 (N.Y. 2022).

81 *Id.*

82 *Id.*

83 *Id.* at 58.

84 *Id.*; *see also* Matter of Jahsim R., 66 Misc.3d 426 (N.Y. Fam. Ct. 2019); Matter of John R., 69 Misc.3d 493 (N.Y. Fam. Ct. 2020).

85 *Matter of Francis O.*, 208 A.D.3d at 56.

III. PROBLEMS WITH THE CURRENT LAW

A. Fourth Amendment Concerns

1. Databasing vitiates probable cause

The use of pre-existing DNA profiles in unrelated investigations is inconsistent with the Fourth Amendment's requirement of probable cause.[86] It allows law enforcement to indiscriminately compare any profile to evidence from any crime without satisfying the ordinary requirements of search and seizure.[87] An individual may be connected to a crime solely based on the comparison use of their databased DNA profile without any other showing of criminal wrongdoing prior to the search of their DNA records.[88] Without other evidence of the individual's connection to a crime, law enforcement would not have the requisite probable cause to perform a warrantless search or seizure on the individual.[89] Furthermore, a court could not order the individual to submit to a DNA sample in these circumstances.[90] Therefore, the current DNA database scheme allows law enforcement to search an individual's genetic information an unlimited amount of times for unlimited purposes, unconstitutionally circumventing the Fourth Amendment's probable cause requirement.[91] This is particularly egregious with respect to juveniles, given that their DNA profiles will typically remain databased and accessible by law enforcement longer than adults.[92]

As with everything in the criminal justice system, marginalized populations, namely people of color, disproportionately bear the burden of forensic DNA collection and data banking.[93] Nationwide, DNA is collected from Black people at two and a half times the rate as white people and from Native Americans at one and a half times the rate as white people.[94] This disparity is particularly severe in New York.[95] In 2022, more than eighty percent of individuals arrested by the New York Police Department ("NYPD") were people of color, with Black people alone representing about

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86 Mercer & Gabel, *supra* note 31, at 671.

87 Sulpizio, *supra* note 1, at 427-28.

88 *Id.* at 436.

89 *Id.*

90 *Id.*

91 *Id.* at 436 n.123.

92 Lapp, *supra* note 7, at 478.

93 *See generally* Mercer & Gabel, *supra* note 31, at 686 nos. 304-05.

94 Erin Murphy & Jun H. Tong, *The Racial Composition of Forensic DNA Databases*, 108 CAL. L. REV. 1847, 1851 (2020).

95 *Id.* at 1887.

fifty percent of arrests.[96] It is therefore no surprise that people of color make up the vast majority of DNA profiles in the OCME LDIS, which puts these individuals at greater risk of being identified in an unrelated case.[97] The racially-disproportionate effects of DNA databasing are further compounded by familial searches.[98]

States are increasingly permitting law enforcement to engage in a practice known as familial searching, wherein an individual's databased DNA profile may be used to identify a biological relative whose DNA is not in the database.[99] The New York Commission on Forensic Sciences DNA Subcommittee authorized familial searches in 2017, though the Appellate Division, First Department recently invalidated the regulation, finding it purely a legislative function.[100] This practice increases the scope of the government's intrusion exponentially as it allows law enforcement to use the genetic information of millions of innocent people without their knowledge or consent.[101] Familial searches would effectively make a profiled individual and all of their biological relatives permanent suspects in all investigations in New York City.[102] If familial searches become more widespread and frequent, it could lead to a proliferation in prosecutions of crimes committed years, or even decades, ago.[103] It would also incentivize the NYPD to arrest more people in order to collect and store more DNA profiles, thus building a larger pool of potential familial matches.[104] People of color are already overrepresented in DNA databases, so these marginalized communities would certainly feel the brunt of such a prosecutorial boom.[105] Some studies also suggest that marginalized populations may be more vulnerable to false

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[96] NYPD YTD Arrests - Summary Dashboard, NYC OPENDATA, https://data.cityofnewyork.us/Public-Safety/NYPD-YTD-Arrests-Summary-Dashboard/vfid-uain (last visited Oct. 3, 2023).

[97] Class Action Complaint, *supra* note 58, at 2.

[98] Murphy & Tong, *supra* note 94, at 1859-62.

[99] Sulpizio, *supra* note 1, at 433; *Id.* at 434 ("Congress does not support familial searching.").

[100] *See* Matter of Stevens v. New York State Div. of Crim. Just. Servs., 206 A.D.3d 88 (N.Y. 2022) (finding the authorization and regulation of familial DNA searches an inherently legislative function and invalidating the Commission on Forensic Sciences DNA Subcommittee's formal regulation).

[101] Sulpizio, *supra* note 1, at 433-34.

[102] Class Action Complaint, *supra* note 58, at 15.

[103] *DNA Databases & Human Rights*, FORENSIC GENETIC POL'Y INITIATIVE (2014), http://dnapolicyinitiative.org. [https://replay.perma.cc/static/vendors/replay-web-page/w/id-3efec4fa671/mp_/].

[104] Class Action Complaint, *supra* note 58, at 14.

[105] Murphy & Tong, *supra* note 94, at 1862; *see, e.g.,* Michelle Taylor, *New York Court Shuts Down Familial DNA Matching*, FORENSIC: ON THE SCENE AND IN THE LAB (May 9, 2022), https://www.forensicmag.com/585907-New-York-Court-Shuts-Down-Familial-DNA-Matching (The first familial DNA matching was used in New York to solve a cold case in December 2021, when a Bronx man was arrested in connection with a 1999 murder.).

familial matches, which could lead to wrongful arrests and convictions.[106] Though this investigative tool may aid in efficient crime solving, the government interest does not sufficiently outweigh an individual's Fourth Amendment rights so as to permit a search without probable cause.[107]

2. Increased juvenile interest in DNA

The collection and profiling of a child's forensic DNA sample is less reasonable under the Fourth Amendment than that of an adult given the unique vulnerabilities and considerations of childhood.[108] Children have a heightened privacy interest in their DNA samples simply by virtue of their age–presuming they will live longer after collection than adults–because their DNA profiles may be retained or used by law enforcement for a longer period of time.[109] This increases the intrusive nature of the search as compared to adults.[110] Additionally, modern conceptions of childhood development view children as immature and irrational, requiring protection from the criminal justice system.[111] This further suggests that DNA buccal swabs are more intrusive searches, and therefore less reasonable, with respect to juveniles than adults.[112]

Furthermore, most children who become involved in the juvenile court system are doing so for the first, and only, time.[113] This ignorance may compound the inherently traumatic effects of an arrest on a child whether a DNA sample is collected or not.[114] Given their lack of education and experience in civil society, juveniles are generally less informed about criminal law and constitutional rights, such as the Fourth Amendment's protection against unreasonable searches and seizures.[115] The collection of DNA samples from juveniles is therefore more invasive than from adults, indicating that juveniles should receive greater protection for their genetic information than the law currently provides.[116] The Supreme Court has repeatedly held that the inherent vulnerabilities of youth necessitate different treatment of juveniles in the application of both criminal and constitutional

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106 Murphy & Tong, *supra* note 94, at 1899.

107 Class Action Complaint, *supra* note 58, at 15.

108 Lapp, *supra* note 8, at 74.

109 Lapp, *supra* note 7, at 478.

110 *Id.*

111 Lapp, *supra* note 8, at 74.

112 Lapp, *supra* note 7, at 478.

113 *Id.* at 480-81.

114 Lapp, *supra* note 8, at 78.

115 Lapp, *supra* note 7, at 450.

116 *Id.* at 478.

law.[117] There is no reason this premise should not apply to criminal processes like DNA collection.[118]

3. Decreased government interest in DNA

The government's interest in a juvenile's DNA sample is reduced as compared to an adult's sample.[119] Only about five percent of delinquency cases involve violent offenses, making such crimes a lower priority for law enforcement in the first place.[120] Additionally, most individuals involved in the juvenile court system will not recidivate, with only about five percent persisting with criminal behavior into adulthood.[121] Given that there is little chance a juvenile's DNA profile will aid in the investigation of a past or future crime, the government's interest in obtaining a juvenile's sample is substantially reduced as compared to adults.[122]

The government's interest is further reduced because, while DNA databasing purportedly has a deterrent effect on adult offenders, studies have consistently shown that children are effectively undeterrable.[123] Children have decreased risk perception, meaning they underestimate the risk of getting caught committing a crime; thus, even if they knew their DNA profiles were being maintained in a database, this would likely not increase their calculation of potential risk the way it would for an adult.[124] Additionally, children are much more susceptible to peer influence, so the desire to "fit in" may supersede the risk of being caught committing a crime via a DNA match.[125] Furthermore, children discount the future more than adults do; they cannot accurately perceive the future effects of their present actions as well as adults, so any attempts at deterrence over a long period of time, such as maintaining their DNA profiles, is unlikely to succeed.[126] Thus, while the government may have an interest in collecting an adult's DNA sample for purposes of deterring future crime, this interest does not exist with respect to a juvenile's DNA sample.[127]

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117 *See, e.g.*, J.D.B. v. North Carolina, 564 U.S. 261, 261 (2011).

118 Lapp, *supra* note 7, at 488.

119 Lapp, *supra* note 8, at 51.

120 Lapp, *supra* note 7, at 450.

121 *Id.* at 450-51.

122 *Id.* at 479.

123 Lapp, *supra* note 8, at 51.

124 *Id.* at 67-68.

125 *Id.*

126 *Id.*

127 *Id.* at 65.

4. Coercion/voluntariness of consent

The current law fails to protect juveniles from providing "voluntary" consent to a DNA sample in the face of law enforcement influence.[128] While many interactions with law enforcement are inherently coercive in nature,[129] juveniles are considerably more vulnerable to these influences because of their ignorance to their constitutional rights and susceptibility to pressure from authority figures.[130] Children are therefore more likely to misunderstand their freedoms in law enforcement encounters.[131] This opens the door for law enforcement to obtain new evidence from juveniles, such as a DNA sample, by persuading or pressuring them to consent to an otherwise impermissible search or seizure.[132] Children are also less able to comprehend the future impacts of their present choices, leading some to prioritize ending a police encounter, perhaps by providing a requested DNA sample, without considering the long-term impacts of their actions.[133] Therefore, the ideal rectifying law would prohibit or prevent law enforcement from collecting and profiling DNA samples from juveniles on a purported "voluntary" consent basis.[134]

B. Statutory Purpose

The compulsory collection and indefinite maintenance of child offenders' DNA profiles is inconsistent with the rehabilitation and confidentiality goals of the juvenile court system.[135]

1. No fresh start/rehabilitation

Family courts have the unique obligation to "consider the needs and best interests of the respondent" and afford youths adjudicated as juvenile delinquents a fresh start.[136] They prioritize rehabilitation over punishment in order to make a positive impact on the respondents' lives and prevent further

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[128] According to the Complaint, the NYPD Detective Guide encourages officers to surreptitiously collect peoples' DNA, even where the individual expressly refuses to consent to a sample. The City of New York and NYPD are currently being sued by plaintiffs without any criminal convictions whose DNA was collected, analyzed, and maintained in the OCME LDIS without their knowledge or consent. *See* Class Action Complaint, *supra* note 58, at 4-6.

[129] Mercer & Gabel, *supra* note 31, at 662.

[130] Lapp, *supra* note 8, at 67-68; Lapp, *supra* note 7, at 485-86.

[131] J.D.B. v. North Carolina, 564 U.S. 261, 271-72 (2011).

[132] Lapp, *supra* note 7, at 485-86.

[133] *Id.*

[134] *Id.*

[135] Lapp, *supra* note 8, at 51; Joy Radice, *The Juvenile Record Myth*, 106 GEO L.J. 365, 384-85 (2018).

[136] N.Y. FAM. CT. ACT § 301.1 (McKinney 1983); Matter of Francis O., 208 A.D.3d 51, 61 (N.Y. 2022).

entanglement with the court system.[137] However, databasing juvenile delinquents' DNA profiles has no rehabilitative effect because it does nothing to help individuals make better choices or discern right from wrong.[138] In fact, it may have the reverse effect.[139]

As previously mentioned, about ninety-five percent of youths age out of their insubordinate, criminal behavior upon adulthood.[140] However, studies indicate that involvement with the juvenile justice system is inherently criminogenic, meaning involved children are more likely to behave criminally in the future.[141] A preexisting DNA profile allows law enforcement to identify and apprehend these children more quickly and more frequently, therefore increasing their involvement with the justice system and compounding its criminogenic effect.[142] This cycle may produce a cohort of repeat juvenile offenders who are more likely to have continued court involvement in the future and into adulthood.[143] In this way, storing a juvenile's DNA profile may in fact increase recidivism, rather than decrease it.[144]

Furthermore, perpetually maintaining juvenile DNA profiles may further entangle these youths in the family and criminal court systems, preventing them from starting anew after a juvenile delinquency adjudication.[145] By maintaining their information in a DNA databank in perpetuity, juveniles' profiles are forever available to law enforcement for comparison with DNA evidence in unrelated cases.[146] Therefore, a juvenile with court involvement may be retroactively implicated in a past crime, even after their case has closed, solely based on their databased DNA profile.[147] On the other hand, an individual with no adult court involvement may be linked to a crime based on DNA collected when they were a juvenile.[148] This undermines the juvenile justice system's goal of providing individuals the

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[137] Matter of Jahsim R., 66 Misc.3d 426, 430 (N.Y. Fam. Ct. 2019) ("The overriding intent of the juvenile delinquency article is to empower the Family Court to intervene and positively impact the lives of troubled young people while protecting the public.").

[138] Lapp, *supra* note 8, at 63.

[139] *Id.* at 78.

[140] Lapp, *supra* note 7, at 474.

[141] Lapp, *supra* note 8, at 52 n.11, 78 n.135.

[142] *Id.* at 78-79.

[143] *Id.* at 79.

[144] *Id.* at 78.

[145] Matter of Francis O., 208 A.D.3d 51, 61 (N.Y. 2022).

[146] Lapp, *supra* note 7, at 476.

[147] *Id.* at 476-77.

[148] *Id.*

opportunity to rid themselves of their youthful wrongdoings and start anew after court involvement.[149]

2. Contrary to confidentiality provision

Allowing a juvenile's DNA profile to be included in a DNA databank, like the OCME LDIS, vitiates the Executive Law's and the Act's confidentiality protections and prevents the child from starting fresh after adjudication.[150] As previously discussed, the Act is silent regarding the expungement of DNA profiles, though it does provide such a process for other biological identifying information, like fingerprints.[151] Extending these confidentiality provisions to a juvenile's DNA profile would be consistent with courts' past reliance on the similarities between fingerprinting and DNA sampling.[152]

The New York SDIS is compatible with this reading of the Act, as it is only authorized to maintain the profiles of convicted designated offenders.[153] However, the OCME LDIS indiscriminately maintains all DNA samples collected in New York City, regardless of age or outcome of the case.[154] This means that, if an NYPD officer surreptitiously collects a DNA sample from a child arrestee, that child's DNA profile will be continuously compared to profiles from any investigation in the city indefinitely.[155] The indiscriminate databasing and continuous use of non-designated-offender DNA violates the Executive Law and disrupts the otherwise fresh start juveniles are entitled to receive after court involvement.[156] The effect of the OCME LDIS is particularly egregious where the juvenile's involvement begins and ends with a single police encounter.[157]

3. Barely satisfies stated statutory purpose of solving crime

While the legislature's stated primary purpose for collecting and maintaining DNA profiles is to aid in the solving of crimes,[158] there is very

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149 FAM. § 301.1; *Matter of Francis O.*, 208 A.D.3d at 61.

150 EXEC. § 995-d; FAM. § 301.1; N.Y. FAM. CT. ACT § 375.1 (McKinney 2010); N.Y. FAM. CT. ACT § 375.2 (McKinney 2021).

151 FAM. § 354.1(2).

152 Maryland v. King, 569 U.S. 435, 459-60 (2013); Lapp, *supra* note 7, at 460. *But see* Peter A. Chow-White & Troy Duster, *Do Health and Forensic DNA Databases Increase Racial Disparities?*, 8 PLOS MED. 1 (Oct. 2011).

153 Class Action Complaint, *supra* note 58, at 2, 11.

154 Class Action Complaint, *supra* note 58, at 10.

155 *Id.* at 1.

156 Lapp, *supra* note 7, at 476.

157 *Id.*

158 Nicholas v. Goord, 430 F.3d 652, 668 (2d Cir. 2005); EXEC. § 995-c.

little empirical proof that doing so actually accomplishes this goal.[159] A 2000 study in England and Wales proved that DNA was only collected from less than one percent of recorded crimes;[160] while this number is slightly higher in New York, the NYPD only reported collecting and analyzing usable DNA evidence in 6.7% of cases between 1996 and 2003.[161] Law enforcement agencies seldom release statistical analysis on the use of DNA in solving crimes, so it is difficult to precisely quantify the efficacy of this type of evidence. However, this historical data indicates that there is very little practical use for collecting and maintaining DNA profiles in databanks because there is often little to no usable crime scene DNA evidence to compare it to.[162]

Moreover, there is evidence that collecting too many DNA profiles may actually inhibit databanks from helping solve crimes.[163] When England and Wales began collecting and storing DNA profiles from everyone arrested for any offense, regardless of whether they were ultimately charged or convicted, their DNA database experienced an extraordinary increase in the number of profiles stored.[164] Law enforcement believed that more stored DNA profiles would result in an increased likelihood of crimes being prosecuted; however, they did not actually experience such an increase in criminal prosecutions.[165] This was because most individuals whose profiles were maintained would never commit another crime, so their profiles would never help solve other crimes.[166] While an increase in stored DNA profiles does allow for more DNA comparisons, such indiscriminate collection practices caused an increase in false matches, resulting in increased costs to the state to effectuate accurate DNA matches without any improvement in the ability to prosecute cases.[167] There is also evidence suggesting that expanding the amount of samples collected could cause significant delays in uploading profiles to databases, decreasing the chances an offender will be promptly identified and apprehended.[168]

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[159] David A. Schroeder & Michael D. White, *Exploring the Use of DNA Evidence in Homicide Investigations: Implications for Detective Work and Case Clearance*, 12 POLICE Q. 319 (2009).

[160] *DNA Databases & Human Rights*, *supra* note 103.

[161] Schroeder & White, *supra* note 159 at 326.

[162] *DNA Databases & Human Rights*, *supra* note 103; *see also* Mercer & Gabel, *supra* note 31, at 674-75.

[163] Sulpizio, *supra* note 1, at 440-41.

[164] *DNA Databases & Human Rights*, *supra* note 103.

[165] *Id.*

[166] *Id.*

[167] Sulpizio, *supra* note 1, at 441.

[168] JULIE E. SAMUELS, ALLISON M. DWYER, ROBIN HALBERSTADT & PAMELA LACHMAM, COLLECTING DNA FROM JUVENILES, URB. INSTITUTE (Apr. 2011).

The expansive, and ultimately less effective, DNA database created in England and Wales should serve as a warning against overly broad databasing in the United States, as "widening the net" of databased individuals did not help solve more crimes.[169] This indicates that the intended governmental purposes of DNA databanks—to aid in the solving of crimes—may be better served by maintaining a database narrowly tailored to those most likely to reoffend, which would exclude juveniles.[170]

C. Process Concerns

1. Inconsistent application across the state

As previously discussed, the Executive Law and the Act are not applied uniformly across New York state with respect to DNA evidence in juvenile delinquency proceedings.[171] While the Appellate Division, First Department has found that the Executive Law's expungement provisions extend to youthful offenders and juvenile delinquents, the Second, Third, and Fourth Departments have yet to rule on this issue.[172] Some family courts in those departments refuse to apply the Executive Law to delinquency proceedings, thus leaving juvenile delinquents in those jurisdictions with no means to apply for expungement of their DNA records.[173] This ambiguity in the law with respect to juvenile DNA expungement leads to disparate interpretations across the state and the subsequent depriving of some New York children the rights the First Department has guaranteed to children in their jurisdiction.[174]

This interpretation of the Executive Law also deprives juveniles of a procedural right guaranteed to adults, which is inconsistent with the Supreme Court's repeated demands that juveniles be afforded the same procedural safeguards as adults.[175] Given that the juvenile justice system is intended to rehabilitate offenders rather than punish, it is entirely illogical to deprive them of a right that adult offenders have, especially one which is so vital to a juvenile's ability to start fresh.[176] Family courts that refuse to apply the

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169 H.M. Wallace, A.R. Jackson, J. Gruber & A.D. Thibedeau, *Forensic DNA Databases–Ethical and Legal Standards: A Global Review*, 4 EGYPTIAN J. FORENSIC SCIS., 57, 58 (2014).

170 Sulpizio, *supra* note 1, at 441. Lapp, *supra* note 8, at 77-78.

171 EXEC. § 995-c; EXEC. § 995-d; *see* Matter of Francis O., 208 A.D.3d 51 (N.Y. 2022). *Contra* Matter of Logan C., 2020 N.Y. Misc. LEXIS 4465 (N.Y. Fam. Ct. 2020).

172 *See* Matter of Samy F. v. Fabrizio, 176 A.D.3d 44; *see also Matter of Francis O.*, 208 A.D.3d at 76. *Contra Matter of Logan C.*, 2020 N.Y. Misc. LEXIS 4465.

173 *See Matter of Logan C.*, 2020 N.Y. Misc. LEXIS 4465.

174 Radice, *supra* note 135, at 375.

175 *Id.* at 380.

176 Messner, *supra* note 20, at 170-72.

Executive Law to juvenile delinquency proceedings are failing in their role as "protective parent."[177]

2. Tedious/expensive

Even in courts that will exercise discretion to expunge DNA profiles, applying for such discretionary expungement is an added burden on parties that decreases actual access to expungement.[178] Most states, including New York, do not require that juveniles or their parents be notified of their rights regarding their DNA profiles.[179] Therefore, many juveniles are not aware that expungement is a possibility.[180] When individuals know of the Executive Law's expungement provision, the inconsistent application of the Executive Law by family courts across the state may discourage parties from applying, out of fear of wasting resources on an application that may ultimately result in a denial.[181]

Despite consistent application of the Executive Law in family courts in the First Department, roadblocks to expungement still persist.[182] The application process must be initiated by the respondent, requiring the juvenile to navigate the court's complicated filing systems.[183] Time and financial constraints may also prevent an individual from pursuing expungement.[184] These constraints may include outstanding court obligations,[185] burdensome attorney's fees, lack of affordable transportation, and insufficient childcare or time off from work to make the necessary court appearances.[186] Even if a juvenile knows of their rights and has the resources to pursue expungement, the process often takes months, or even years, leading parties to eventually

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[177] Lapp, *supra* note 8, at 51. In the juvenile justice system, the state acts in the place of a parent to protect and reform delinquent children to reintegrate into society. Radice, *supra* note 135, at 391. Family courts inherently inhibit these rehabilitative goals by failing to expunge juvenile DNA records because it prevents these youths from achieving a fresh start and opens the door for future court involvement based on indiscriminate DNA profile comparisons. Radice, *supra* note 135, at 396.

[178] Sulpizio, *supra* note 1, at 430.

[179] Texas is the only state that requires an acquitted individual be informed of their right to apply for discretionary expungement. *Id.* at 431-32.

[180] Elizabeth E. Joh, *The Myth of Arrestee DNA Expungement*, 164 U. PA. L. REV. ONLINE 51, 58 (2015).

[181] Sulpizio, *supra* note 1, at 431-32.

[182] *See generally* Joh, *supra* note 180, at 51 (discussing roadblocks to expungement).

[183] Radice, *supra* note 135, at 419.

[184] *See generally* Jessica Feierman, Naomi Goldstein, Emily Haney-Caron & Jaymes Fairfax Columbo, *Debtors' Prison for Kids? The High Cost of Fines and Fees in the Juvenile Justice System*, JUV. L. CTR. (2016).

[185] *Id.* at 7. Americans hold over $27 billion in court debt nationally. Gus Tupper, Akua Amaning & Jaboa Lake, *Fines and Fees Are a Barrier to Criminal Record-Clearing*, CTR. FOR AM. PROGRESS (Nov. 30, 2021), https://www.americanprogress.org/article/fines-and-fees-are-a-barrier-to-criminal-record-clearing.

[186] Tupper, Amaning & Lake, *supra* note 185.

lose touch with their attorneys or abandon their applications.[187] These persistent barriers to expungement suggest the need for reform in the law.

IV. POTENTIAL SOLUTIONS

The following bills and laws from across the nation represent examples of statutory schemes that, while failing to adequately protect juveniles' genetic privacy, provide a unique aspect of protection currently missing in New York law. This Note proposes that the ideal statute would combine aspects from these examples to eliminate the OCME LDIS, exclude all juveniles from databasing, provide for automatic expungement of DNA records, and protect against coercion by law enforcement.[188]

A. New York S.B. 998 and S.B. 3104 ("the Bills")

New York Senate Bill 998 ("Bill 998") was introduced during the 2021-2022 Regular Sessions to amend Executive Law Section 995-c to include more explicitly, and thus better protect, juvenile delinquents.[189] Bill 998 would amend subsection 9(b) to enumerate juvenile delinquents as a class of individuals who can apply to the court for expungement of their DNA profiles.[190] It would additionally grant the ability to expunge to any "court that had jurisdiction over the matter," which would clarify whether family courts may exercise this power.[191] These changes would clarify the previously discussed split in the courts and effectively codify the *Francis O.* holding, [192] extending relief to juvenile delinquents in the Second, Third, and Fourth Departments. Bill 998 would also add subsection 3(c), which states "No persons other than designated offenders shall be required to provide a DNA sample for inclusion in the DNA identification index."[193] There is no question that juvenile delinquents are not designated offenders.[194] Thus, their DNA profiles would presumably not be uploaded to the index in the first place.[195] Finally, Bill 998 specifies that the SDIS is the only DNA index authorized by state law, which would invalidate the controversial OCME LDIS operating in New York City.[196]

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187 Sulpizio, *supra* note 1, at 429.

188 *See infra* Part IV(C).

189 S.B. 998, 2023 Leg., 246th Sess. (N.Y. 2023).

190 *Id.*

191 *Id.*

192 Matter of Francis O., 208 A.D.3d 51, 76 (N.Y. 2022).

193 S.B. 998.

194 EXEC. § 995(7); Matter of Samy F. v. Fabrizio, 176 A.D.3d 44, 55 (N.Y. 2019); *Matter of Francis O.*, A.D.3d at 56.

195 S.B. 988.

196 *Id.*

New York Senate Bill 3104 ("Bill 3104") extends further protections to juveniles by amending the Act to explicitly name DNA profiles as records which should remain confidential.[197] Bill 3104 directs law enforcement agencies to expunge juvenile DNA profiles in three circumstances: (1) where, subsequent to arrest, the agency chooses not to proceed with the case; (2) where the delinquency action ends in the juvenile's favor; and (3) where the probation department terminates a case.[198] It also prohibits law enforcement from using these profiles in any other proceeding, meaning they would be excluded from the SDIS.[199] Finally, Bill 3104 provides explicit factors that the court should consider when deciding whether to grant expungement to an adjudicated juvenile delinquent.[200]

Together, the Bills would improve upon the current state of juvenile genetic privacy in New York.[201] Most notably, the Bills would standardize the law across the state, exclude juvenile arrestees and delinquents from the SDIS, and prohibit the overly-expansive OCME LDIS.[202] This would prevent a considerable number of juveniles from being unnecessarily profiled without a finding of criminal guilt, therefore preserving their presumption of innocence and privacy.[203] This will be especially influential with respect to youths unnecessarily and discriminatorily detained by law enforcement where a case is never pursued.[204] However, after Bill 998 failed during the 2019-2020 session, the Bills died in committee during the 2021-2022 session.[205]

Even if the Bills were passed, they would not go far enough to protect the interests of all juveniles because they exclude minors tried in criminal court.[206] In *Roper v. Simmons*, the Supreme Court held that sentencing a criminal defendant to death for a crime committed when he was under eighteen years old was prohibited under the Eighth and Fourteenth Amendments.[207] This suggests that the Supreme Court's prior commitment to treating juvenile delinquents differently than adults in the criminal context extends to those juveniles tried in criminal court as well; children still deserve

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197 S.B. 3104, 2023 Leg., 246th Sess. (N.Y. 2023).

198 *Id.*

199 *Id.*

200 *Id.*

201 S.B. 3104; S.B. 988.

202 S.B. 3104; S.B. 988.

203 Class Action Complaint, *supra* note 58, at 1.

204 *Id.* at 5.

205 N.Y. Spons. Memo., 2023 S.B. 998 (Feb. 9, 2023); N.Y. Spons. Memo., 2023 S.B. 3104 (Feb. 9, 2023).

206 S.B. 998; S.B. 3104.

207 Roper v. Simmons, 543 U.S. 551 (2005).

specialized treatment under the criminal law, even when tried as adults.[208] While the criminal law does not intend to rehabilitate offenders as the juvenile delinquency law does, all offenders under the age of eighteen have the same heightened privacy interests, given the extended utility of their DNA profiles by virtue of their life expectancy.[209] This Note proposes that all minors should therefore be excluded from DNA databases, except those convicted of the most serious offenses.

The Bills also fail to address the issue of coercion that is present in juveniles' contact with law enforcement.[210] As previously discussed, children are less knowledgeable about their rights, more susceptible to influence by authority figures, and more likely to acquiesce to law enforcement demands to end the interaction than adults.[211] Therefore, while the Bills may prevent a juvenile DNA sample from being included in the SDIS, they do not protect young people detained by law enforcement from involuntarily consenting to a sample. They also do not prevent law enforcement from collecting and using as evidence a sample that was obtained surreptitiously during detention.[212] As such, a juvenile may still be found to have committed an offense based on DNA evidence that was improperly obtained. Therefore, it is insufficient that the Bills merely exclude juvenile delinquents from mandatory DNA collection and databasing without addressing coercive DNA sampling.

B. State Examples

Statutes in other states contain admirable features that, if adopted, would improve juveniles' genetic privacy in New York. However, it does not appear that any one state combines all these features, leaving holes in protection in each statute.

Delaware, for example, provides for automatic expungement in most cases: where the case is terminated in the juvenile's favor, where they are adjudicated for minor drug or alcohol charges, or where they have gone three years since adjudication without any subsequent offenses.[213] However, these provisions only apply to minors in family court, not those tried in criminal court.[214] Additionally, it appears that a juvenile's DNA profile may be maintained in the state database during the pendency of a delinquency

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208 *Id.*

209 People v. K.N., 87 N.Y.S.3d 862, 872 (2018).

210 Mercer & Gabel, *supra* note 31, at 662 n.148.

211 Lapp, *supra* note 7, at 485-86.

212 Armitage, *supra* note 59.

213 DEL. CODE ANN. tit. 10, § 1017 (West 2022).

214 *Id.*

proceeding.[215] The gaps in this scheme leave certain children, those tried in criminal court, vulnerable to the long-term consequences of data banked DNA.

In contrast, Hawaii excludes all juveniles, whether in family or criminal court, from mandatory DNA collection.[216] However, its state DNA databank does not exclude juveniles, suggesting a juvenile DNA sample obtained through consent could be included in the databank.[217] Hawaii law also allows widespread sharing of DNA records with other law enforcement agencies,[218] and explicitly permits the operation of local databanks.[219] Finally, it requires all individuals, regardless of age, to apply for expungement of DNA records, a burden which the Delaware statute alleviates with respect to juveniles.[220]

New Hampshire was the first state to voluntarily cease the compulsory collection of juvenile delinquent DNA samples, but, like Delaware, this does not apply to children tried in criminal court.[221] It also protects the confidentiality of virtually all delinquency records, regardless of the media upon which they are retained; this presumably includes biological samples and profiles maintained in DNA databases.[222] However, like New York's confidentiality provisions, the New Hampshire statute provides law enforcement and investigators access to these records.[223] Therefore, the DNA profiles of children tried in New Hampshire criminal courts are still able to be compared to evidence from unrelated investigations.[224]

Texas has quite a broad DNA collection mandate that extends to juvenile delinquents adjudicated for conduct constituting a felony.[225] Expungement of DNA profiles is also purely discretionary and upon application.[226] However, unlike other states, Texas protects children from coercive law enforcement tactics by requiring that a minor's waiver of any constitutional rights must be made voluntarily, in writing or otherwise recorded, with attorney advice, and with full understanding of their rights and consequences of waiver.[227]

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215 *Id.*

216 HAW. REV. STAT. ANN. § 844D-31 (West 2005).

217 HAW. REV. STAT. ANN. § 844D-23 (West 2005).

218 HAW. REV. STAT. ANN. § 844D-91 (West 2005).

219 HAW. REV. STAT. ANN. § 844D-55 (West 2005).

220 HAW. REV. STAT. ANN. § 844D-71 (West 2005); DEL. CODE ANN. tit. 10, § 1017A (West 2021).

221 N.H. REV. STAT. ANN. § 651-C:2 (2015); Samuels, *supra* note 168, at 7-8, n.5.

222 N.H. REV. STAT. ANN. § 169-B:35 (2015); N.H. REV. STAT. ANN. § 170-G:8-a (2015).

223 § 169-B:35; § 170-G:8-a.

224 § 169-B:35; § 170-G:8-a.

225 TEX. GOV'T CODE ANN. § 411.148 (West 2015); TEX. FAM. CODE ANN. § 54.0409 (West 2017).

226 TEX. GOV'T CODE ANN. § 411.151 (West 2023).

227 TEX. FAM. CODE ANN. § 51.09 (West 1997).

While none of these examples represent the ideal statute on their own, they each contain elements that, when combined, could adequately protect the heightened privacy interests of juveniles. This Note proposes that New York should incorporate these identified elements in crafting their own statute regarding juvenile DNA collection and databasing for the protection of juvenile privacy rights.

C. Proposal

New York should adopt a new statutory scheme that adequately protects the privacy rights of all juveniles while addressing the other, broader issues with DNA databasing discussed below. The ideal statute would expressly prohibit the operation of LDISs and only authorize the SDIS, as Bill 998 proposes.[228] This would eliminate the various concerns caused by the OCME LDIS's storage of juvenile DNA profiles.[229] The ideal statute would also draw from Texas's informed consent mandate, requiring that a juvenile be notified of their rights and speak with counsel before they can waive their rights and voluntarily consent to a search or seizure.[230] This would address the issue of juvenile DNA samples being obtained through coercion. Where a juvenile's DNA is collected during the course of a proceeding, it should be automatically expunged at the end of the case, as the Delaware statute suggests.[231] Finally, like Hawaii, the ideal statute would apply to juveniles in family court and criminal court alike.[232] Though such a statute would surely be met with political pushback, as indicated by the failures of the Bills, these provisions are all necessary to adequately protect the privacy rights of juveniles.

V. CONCLUSION

As this Note displays, current legal regimes governing the collection, maintenance, and use of forensic DNA samples raise numerous questions with respect to Fourth Amendment rights.[233] Most notably, DNA databases allow an individual's DNA to be compared to evidence in unrelated criminal investigations without probable cause to believe that the individual committed a crime.[234] Local DNA databases that operate outside of federal and state statutory schemes are even more invasive, giving law enforcement access to DNA profiles from a wide variety of individuals, even those without

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228 S.B. 3104; S.B. 998.

229 Class Action Complaint, *supra* note 58.

230 § 51.09.

231 tit. 10, § 1017.

232 tit. 38, § 844D-31.

233 Sulpizio, *supra* note 1, at 417.

234 Mercer & Gabel, *supra* note 31, at 671.

criminal records.[235] These concerns are amplified when the sampled individual is a minor because their DNA profile will be maintained in the database longer, they are less likely to recidivate than adult offenders, and they are more susceptible to coercion by law enforcement.[236]

Perpetually maintaining a juvenile's profile in a DNA database is additionally in conflict with the juvenile justice system's goal of rehabilitation and the Act's confidentiality provision.[237] This legal landscape is further complicated by ambiguity as to whether the Executive Law applies to family courts in the state.[238] The First Department allows respondents in juvenile delinquency proceedings to apply for expungement of their DNA profiles under Executive Law Section 995-c(9).[239] However, courts in other departments find that the Act is the only pertinent statute, leaving these juveniles without any means to remove their DNA profiles from databases.[240] Even where expungement is available, the tedious and expensive process still precludes many individuals from ever applying for expungement.[241]

Though members of the New York State Legislature have attempted to amend the law through the Bills, both have failed to make it out of the committee stage.[242] If the Bills were enacted, they would still fail to protect juveniles tried as adults and do nothing to address coercion by law enforcement.[243] However, the Bills could adequately protect the privacy rights of juveniles if combined with laws enacted in other states like Texas,[244] Hawaii,[245] and Delaware.[246] While such a statute would likely encounter political resistance, these protections should nonetheless be pursued in order to protect juveniles from being endlessly entangled in the criminal justice system based on their DNA profiles.[247]

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235 *Id.* at 671.

236 Lapp, *supra* note 7, at 474.

237 FAM. § 301.1; Matter of Francis O., 208 A.D.3d 51, 79 (N.Y. 2022).

238 *Matter of Francis O.*, 208 A.D.3d at 51. *Contra* Matter of Logan C., 2020 N.Y. Misc. LEXIS 4465 (N.Y. Fam. Ct. 2020).

239 Matter of Samy F. v. Fabrizio, 176 A.D.3d 44 (N.Y. 2019); *Matter of Francis O.*, 208 A.D.3d at 51.

240 *See Matter of Logan C.*, 2020 N.Y. Misc. LEXIS 4465.

241 Joh, *supra* note 180, at 58.

242 N.Y. Spons. Memo., 2023 S.B. 998 (Feb. 9, 2023); N.Y. Spons. Memo., 2023 S.B. 3104 (Feb. 9, 2023).

243 S.B. 998; S.B. 3104.

244 § 51.09.

245 § 844D-31.

246 tit. 10, § 1017.

247 Lapp, *supra* note 7, at 476.