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DNA COLLECTION AT BIRTH: A UNIFORM SYSTEM OF IDENTIFICATION

LENA M. CARLUCCI*

INTRODUCTION

Please consider the following three scenarios:

1. Three women get raped at knifepoint in the same Brooklyn neighborhood within a span of four months. After performing a rape kit on the first victim, the police placed the attacker's DNA in the New York State DNA databank, but did not find any matches. Although the attacker was suspected by the NYPD to be associated with a series of muggings the year before, he was never formally arrested.
2. A terrorist attack is successfully launched on lower Manhattan. After diligent search efforts, local authorities are left with the unidentified remains of approximately one thousand people.
3. A three-year-old girl, who was adopted by her parents at birth, gets abducted from a local Long Island playground. Ten years later, the FBI thinks they may have found her.

Since its discovery, deoxyribonucleic acid (DNA) has been used in a variety of ways, most notably in criminal investigations and prosecutions. Every state government, along with the federal government, currently requires individuals to surrender a sample of their DNA in certain situations.¹ The issue of compulsory DNA collection is a very controversial

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¹ See NAT'L CONF. OF ST. LEGISLATURES, STATE LAWS ON DNA DATA BANKS: QUALIFYING OFFENSES, OTHERS WHO MUST PROVIDE SAMPLE (2010), <http://www.ncsl.org/default.aspx?tabid=12737> ("All 50 states require that convicted sex offenders provide a DNA sample, and states are increasingly expanding these policies to include all felons and some misdemeanor [sic] To date, 47 states require that all convicted felons provide a DNA sample to the state's database."); see also COUNCIL FOR RESPONSIBLE GENETICS, NAT'L REPORT, <http://www.councilforresponsiblegenetics.org/dnadata/usa/usa2.html> (last visited March 23, 2011) ("The Federal Bureau of Investigation's (FBI) Combined DNA Index System program (CODIS) enables federal, state and local laboratories to store and compare DNA profiles electronically and

one that is currently being debated on both national and state levels. The central arguments focus on who should be forced to give their DNA to law enforcement, when they should be forced to surrender it, and whether such forced procedures are constitutional. Currently, New York State law requires criminals convicted of all felonies and eighteen specified misdemeanors to surrender their DNA.² Their DNA is then placed in a database in order to connect or eliminate them from investigations into any past or possible future criminal acts.³ Recently, there has been proposed legislation within the state to expand this database in an effort to catch more criminals and prevent a greater number of future crimes. This legislation proposes DNA collection at the time of arrest, rather than at the time of conviction, and mandatory DNA collection in all instances where fingerprinting is necessary.⁴ Critics of mandatory DNA collection argue that such procedures violate citizens' constitutional privacy rights, specifically the Fourth Amendment prohibition against unreasonable searches and seizures.⁵ However, this Note argues that neither the current legislation in New York, nor the proposed legislation currently before the Senate and Assembly, go far enough to adequately meet their objectives,

thereby link serial crimes to each other and identify suspects by matching DNA from crime scenes to convicted offenders or arrestees (where state legislation allows this). All 50 states and the FBI now collect DNA samples, retain the profiles generated from those samples in the databases, and compare the database entries against DNA profiles of biological evidence.”)

² See Jeffrey D. Klein, *DNA Upon Arrest: Catching More Criminals Across NYS*, N.Y. ST. SENATE (Oct. 16, 2009), <http://www.nysenate.gov/print/24656>; see also N.Y. ST. DIV. OF CRIM. JUST. SERVICES, THE NYS DNA DATABANK AND CODIS (2009), <http://criminaljustice.state.ny.us/forensic/dnabrochure.htm> [hereinafter N.Y. STATE DIV. OF CRIM. JUSTICE SERV., CODIS].

³ See Klein, *supra* note 2 (“Once the DNA sample is collected, the information goes into a statewide DNA databank that also connects to a national databank.”); see also N.Y. ST. DIV. OF CRIM. JUST. SERVICES, CODIS, *supra* note 2 (“The individual DNA profiles in these indices are periodically compared with the DNA profiles from crime scene evidence contained in the Forensic Index to determine whether an individual can be identified with crime scene evidence from one or more criminal incidents.”).

⁴ S. 6213, 232d Sess. (N.Y. 2009), available at <http://open.nysenate.gov/legislation/bill/S6213-2009> (explaining that S6213 is a bill currently before the New York State Senate, which proposes to amend the executive law and criminal procedure law to require individuals arrested in connection with a felony to submit a DNA sample); A. 6186 230th Sess. (N.Y. 2009), available at <http://assembly.state.ny.us/leg/?bn=A06186> (proposing an amendment to the law to include DNA collection from anyone arrested for an offense for which fingerprints are “required or permitted to be taken” under New York criminal procedure law).

⁵ See e.g., ANNA C. HENNING, CONG. RES. SERVICE, COMPULSORY DNA COLLECTION: A FOURTH AMENDMENT ANALYSIS I (2008), available at <http://openncrs.com/document/R40077/2008-11-26/> (“[M]any litigants have challenged compulsory collection and the subsequent analysis and storage of DNA as unreasonable searches and seizures under the Fourth Amendment to the U.S. Constitution.”); see also Solomon Moore, *F.B.I. and States Vastly Expand DNA Databases*, N.Y. TIMES, April 19, 2009, available at http://www.nytimes.com/2009/04/19/us/19DNA.html?_r=1 (“[C]riminal justice experts cite Fourth Amendment privacy concerns and worry that the nation is becoming a genetic surveillance society.”).

and that the beneficial uses of DNA technology should be expanded beyond merely detaining criminals and preventing possible crimes. This Note advocates creating a database (first starting on the state level and then expanding nationwide, if possible) where DNA would be collected from every citizen *at birth* and entered into a system that would only be accessible to specific trained government officials and only in a limited number of specified instances.

The first part of this Note will discuss the history of mandatory DNA collection in the United States, focusing primarily on federal and New York State laws, from the founding of such databases to the current laws governing compulsory collection. Part II of this Note will examine the various shortcomings of the current laws, advocating that the proposed New York legislation does not go far enough in resolving some of the major setbacks. Part III of this Note will provide a detailed guide to the mechanics of the proposed DNA database, including how and when DNA should be collected, where it will be stored, what it will be used for, who will have access to it, and when it will be accessible. The fourth and final part of this Note will address anticipated criticisms and explain how this proposed system would be able to pass constitutional muster.

I. THE DEVELOPMENT OF MANDATORY DNA COLLECTION ON THE FEDERAL AND NEW YORK STATE LEVELS

A. *NDIS: The National DNA Index System*

The United States first began collecting and storing DNA profiles when the Federal Bureau of Investigation (“FBI”) created the Combined DNA Index System (“CODIS”) in 1990.⁶ CODIS was developed in order to create “searchable DNA databases” for forensic labs.⁷ It was first started as a “pilot software project,” but federal laws quickly established the FBI’s authority to use it for law enforcement purposes.⁸ In 1994, the DNA

⁶ FED. BUREAU OF INVESTIGATION, CODIS COMBINED DNA INDEX SYSTEM, *available at* http://www.fbi.gov/about-us/lab/codis/codis_brochure; *DNA Analyst Training: The CODIS Software*, NAT’L FORENSIC SCI. TECH. CTR., http://www.nfstc.org/pdi/Subject10/pdi_s10_m02_01.htm.

⁷ DNA.gov, *Combined DNA Index System*, DNA INITIATIVE, <http://www.dna.gov/dna-databases/codis> (last visited March 23, 2011) (CODIS was “developed specifically to enable public forensic DNA laboratories to create searchable DNA databases of authorized DNA profiles.”); *DNA Analyst Training: Introduction*, NAT’L FORENSIC SCI. TECH. CTR., http://www.nfstc.org/pdi/Subject10/pdi_s10_m02_00.htm (last visited March 23, 2011).

⁸ FED. BUREAU OF INVESTIGATION, *supra* note 6; Stephen J. Niezgodza Jr. et al., *The FBI Laboratory’s Combined DNA Index System Program*, PROMEGA, *available at* <http://www.promega.com/geneticid/proc/ussymp/6proc/niezgod.htm>.

Identification Act enabled the FBI to establish the National DNA Index System (“NDIS”).⁹ CODIS allows forensic labs across the country to share DNA data, both from unknown samples taken at crime scenes and samples taken from suspects and criminals, and provides the main database of DNA profiles collected from all participating labs.¹⁰ CODIS currently maintains three database levels; national, state, and local. NDIS stands at the top of the hierarchy, enabling the exchange and comparison of DNA profiles on the national level.¹¹ The system contains an offender index, where samples collected from arrestees and convicted criminals are uploaded, and a forensic index, where samples collected as evidence from crime scenes are uploaded.¹² The system uses computer software to search for potential matches on a weekly basis.¹³ The national database allows law enforcement officials in various jurisdictions to work together and coordinate investigations after they get a “hit.”¹⁴

Since its creation in 1994, the amount of DNA profiles that CODIS stores has increased exponentially, mainly as a result of statutory enactments. The DNA Analysis Backlog Elimination Act was passed by Congress in 2000 and required samples from criminals who were convicted

⁹ FED. BUREAU OF INVESTIGATION, *supra* note 6; DNA.gov, *Federal Legislation on Forensic DNA: Authorizing Legislation*, DNA INITIATIVE, <http://www.dna.gov/statutes-caselaw/federal-legislation/>.

¹⁰ FED. BUREAU OF INVESTIGATION, *supra* note 6; DNA.gov, *Combined DNA Index System*, *supra* note 7.

¹¹ FED. BUREAU OF INVESTIGATION, *supra* note 6; DNA.gov, *What is CODIS?*, DNA INITIATIVE, <http://www.dna.gov/solving-crimes/cold-cases/howdatabasesaid/codis>.

¹² DNA.gov, *Combined DNA Index System*, *supra* note 7 (“CODIS uses two indexes to generate investigative leads in crimes for which biological evidence is recovered from a crime scene. The convicted offender index contains DNA profiles of individuals convicted of certain crimes ranging from certain misdemeanors to sexual assault and murder . . . The forensic index contains DNA profiles obtained from crime scene evidence, such as semen, saliva, or blood.”); Fed. Bureau of Investigation, Laboratory Services: Frequently Asked Questions (FAQ) on the CODIS Program and the National DNA Index System,

available at <http://www.fbi.gov/about-us/lab/codis/codis-and-ndis-fact-sheet> [hereinafter Fed. Bureau of Investigation, Lab Services FAQ].

¹³ DNA.gov, *Combined DNA Index System*, *supra* note 7 (“A weekly search is conducted of the DNA profiles in this national database . . . and resulting matches are automatically returned by the software to the laboratory that originally submitted the DNA profile.”); DNA.gov, *Capabilities of CODIS Software*, DNA INITIATIVE, <http://www.dna.gov/dna-databases/software>.

¹⁴ See N.Y. STATE DIV. OF CRIM. JUSTICE SERV., NEW YORK STATE CRIMINAL JUSTICE 2007 CRIMESTAT UPDATE 24 (2008), available at http://search.criminaljustice.ny.gov/search?q=2007+Crimestat+Report&site=dcjs&client=dcjs&proxystylesheet=dcjs&output=xml_no_dtd (follow “NEW YORK STATE CRIMINAL JUSTICE 2007 Crimestat Report” hyperlink) (“A DNA Databank hit is a result of a match between DNA profiles developed from crime scene evidence and a DNA offender profile stored in the DNA Databank. Law enforcement agencies are notified of these hits, which often serve as investigative leads. The law enforcement agency then determines the significance of the evidence in the context of other investigative information when considering criminal charges.”); see DNA.gov, *DNA Database Hits*, DNA INITIATIVE, <http://www.dna.gov/dna-databases/hits>.

of certain qualifying federal offenses and were in custody, on probation, or on supervised release.¹⁵ In the beginning, “qualifying offenses” included only the most violent of crimes, such as sex crimes, murder, and kidnapping, due to the fact that they have high recidivism rates and physical evidence is more likely to be left behind during their commission.¹⁶ In 2001, the Patriot Act expanded the scope of these qualifying offenses to include crimes related to terrorism.¹⁷ In 2004, Congress passed the Justice for All Act, which required that DNA be collected from anyone convicted of a felony.¹⁸ Finally, the DNA Fingerprinting Act of 2005 extended compulsory DNA collection to all persons merely arrested or detained.¹⁹

Each state has the ability to create its own laws regarding compulsory DNA collection and what constitutes as a “qualifying offense” within its borders. Although the federal laws may serve as a model for individual states to follow, most states have not gone as far as the federal government in their requirements. Since federal law mandates DNA collection from people merely detained under authority of the United States, it is broader than most state law requirements. Currently, forty-seven states require DNA from every convicted felon, and all fifty states require it from convicted sex offenders.²⁰ However, an increasing number of states seem to be following the federal standard. By 2009, twenty-one states had passed laws authorizing DNA collection from certain arrestees, and it appears as though many states will be following that lead shortly.²¹

B. The New York State DNA Databank

The New York State DNA Databank, which was authorized by the state

¹⁵ DNA Analysis Backlog Elimination Act of 2000, 42 U.S.C. § 14135 (2000); see *U.S. v. Pool*, 645 F. Supp. 2d 903, 906 n.2 (E.D. Ca. 2009), *aff'd*, 621 F.3d 1213 (9th Cir. 2010).

¹⁶ HENNING, *supra* note 5, at 1; Moore, *supra* note 5.

¹⁷ HENNING, *supra* note 5, at 1; *Pool*, 645 F. Supp. 2d at 906 n.2.

¹⁸ 42 U.S.C. § 14135a(a)(1)(B); see *Pool*, 645 F. Supp. 2d at 906 n.2.

¹⁹ *Pool*, 645 F. Supp. 2d at 906 n.2; HENNING, *supra* note 5, at 4.

²⁰ NAT'L CONF. OF ST. LEGISLATURES, *supra* note 1; see Jennifer Graddy, *The Ethical Protocol for Collecting DNA Samples in the Criminal Justice System*, 59 J. MO. BAR 5 (2003), available at <http://oldsite.mobar.org/9a8264de-6139-4fc3-b5a0-fe8698b58d0b.aspx>.

²¹ NAT'L CONF. OF ST. LEGISLATURES, *supra* note 1; Klein, *supra* note 2. Those states are Alabama, Alaska, Arizona, Arkansas, California, Colorado, Florida, Kansas, Louisiana, Maryland, Michigan, Minnesota, Missouri, New Mexico, North Dakota, South Carolina, South Dakota, Tennessee, Texas, Vermont, and Virginia. NAT'L CONF. OF ST. LEGISLATURES, *supra* note 1. See COUNCIL FOR RESPONSIBLE GENETICS, STATES COLLECTING DNA SAMPLES FROM ARRESTEES (2011), <http://www.councilforresponsiblegenetics.org/dnadata/usa/usa2.html>, for a color-coded map showing which states currently include arrestee profiles in their DNA databases.

legislature in section 995-c of the Executive law, was created in 1994.²² Shortly after becoming operational in August 1999, the New York State DNA Databank got its first “hit” in February 2000, connecting a convicted offender with DNA evidence gathered at a crime scene.²³ There are currently eight different local DNA laboratories in New York, including the State Police Forensic Investigation Center in Albany, which also serves as the official State DNA Forensic Index.²⁴ Each of these local laboratories receives DNA samples collected from suspects and crime scenes, which they maintain in their own databases.²⁵ In turn, these local laboratories upload DNA profiles to the state index at the State Police Forensic Investigation Center in Albany, where they are then routinely compared to profiles from other local labs across New York.²⁶ DNA profiles in the New York State DNA Databank can be uploaded through CODIS to the National DNA Index and compared to other crime scene and offender samples collected throughout the nation.²⁷ By December 31, 2008, there had been 5,815 hits in the New York State DNA Databank, the greatest percentage of which was linked to crimes of sexual assault, followed by burglary, homicide, and robbery.²⁸ 1,341 of those hits were reported to result in

²² See N.Y. STATE DIV. OF CRIM. JUSTICE SERV., CODIS, *supra* note 2; N.Y. State Div. of Crim. Justice Serv., *Governor Patterson Introduces All-Crimes DNA Bill*, EJUSTICE NY INTEGRATED JUST. REP., 2010 Issue 3, at 4, 6, *available at* <http://blog.letdanys.org/wp-content/uploads/2010/09/eJusticeNYIJReport.pdf>.

²³ N.Y. STATE DIV. OF CRIM. JUSTICE SERV., CODIS, *supra* note 2; N.Y. State Div. of Crim. Justice Serv., *supra* note 22, at 5.

²⁴ N.Y. STATE DIV. OF CRIM. JUSTICE SERV., CODIS, *supra* note 2 (providing that the eight public forensic DNA laboratories in New York State are: Erie County Department of Central Police Services Forensic Laboratory, Monroe County Public Safety Laboratory, Nassau County Department of Forensic Genetics DNA Laboratory, New York City Office of the Chief Medical Examiner Department of Forensic Biology, New York State Police Forensic Investigation Center, Onondaga County Center for Forensic Sciences, Suffolk County Crime Laboratory, and the Westchester County Department of Laboratories and Research Division of Forensic Sciences).

²⁵ See N.Y. STATE DIV. OF CRIM. JUSTICE SERV., CODIS, *supra* note 2 (discussing the three different levels of the DNA Index System: local (LDIS), state (SDIS), and national (NDIS)); *see also* Willing, *supra* note 24 (revealing that the local New York State crime labs are even able to store and reference DNA profiles that would be exempted from national databases because of federal laws).

²⁶ See N.Y. STATE DIV. OF CRIM. JUSTICE SERV., CODIS, *supra* note 2; N.Y. State Div. of Crim. Justice Serv., *supra* note 22, at 5.

²⁷ N.Y. STATE DIV. OF CRIM. JUSTICE SERV., NEW YORK STATE CRIMINAL JUSTICE 2008 CRIMESTAT UPDATE 23 (2009), *available at* http://search.criminaljustice.state.ny.us/search?q=crimestat+report+2008&btnG=Search&entqr=0&outp ut=xml_no_dtd&sort=date%3AD%3AL%3Ad1&client=dcjs&ud=1&oe=UTF-8&ie=UTF-8&proxystylesheet=dcjs&site=dcjs (follow “Crimestat Report Cover copy.indd” hyperlink) [hereinafter N.Y. STATE DIV. OF CRIM. JUSTICE SERV., 2008 CRIMESTAT]; *see generally* Fed. Bureau of Investigation, Lab Services FAQ, *supra* note 12 for a discussion of the DNA match search process after a profile is uploaded.

²⁸ N.Y. STATE DIV. OF CRIM. JUSTICE SERV., 2008 CRIMESTAT, *supra* note 27, at 24 (specifying that of the 5,815 hits generated, 2,565 (44%) of them were linked to sexual assaults, 1,766 (30%) to burglaries, 538 (9%) to homicides, 448 (8%) to robberies, and 498 (9%) to various other crimes). This pattern has been consistent throughout the years that DNA has been used. *See, for example*, N.Y. State

convictions.²⁹

C. Current New York State Legislation

Just like any other state, New York is free to define from whom and when a DNA sample must be collected and placed in the state database. According to section 995-c(3) of the New York Executive Law:

Any designated offender subsequent to conviction and sentencing for a crime specified in subdivision seven of section nine hundred ninety-five of this article, shall be required to provide a sample appropriate for DNA testing to determine identification characteristics specific to such person and to be included in a state DNA identification index pursuant to this article.³⁰

When the New York State DNA Databank was first created, law enforcement officials were only authorized to collect samples from criminals convicted of the most violent felonies, such as rape and murder.³¹ However, the law was amended in December 1999, July 2004, and again in June 2006, in order to expand the number of qualifying offenses for which DNA could be collected upon conviction.³² Currently, New York requires DNA collection after an individual is convicted of “any felony defined in the penal law”, the attempt of any such crime “where such attempt is also a felony,” or eighteen specified misdemeanors.³³ These amendments to the

Div. of Crim. Justice Serv., *New York State DNA Databank Breakdown of Investigations Added: Types of Crimes Solved (First 1000 Hits)* (2003), <http://criminaljustice.state.ny.us/forensic/typesofcrimesfirst1000hits.htm>, for a pie chart that breaks down the types of crimes solved using the first 1000 DNA databank hits in New York State.

²⁹ N.Y. STATE DIV. OF CRIM. JUSTICE SERV., 2008 CRIMESTAT, *supra* note 27, at 25. Those 1,341 convictions “represent[ed] 23% of the total hits on the Databank.” *Id.*

³⁰ N.Y. EXEC. LAW § 995-c(3) (Consol. 2011).

³¹ N.Y. STATE DIV. OF CRIM. JUSTICE SERV., NEW YORK STATE CRIMINAL JUSTICE 2009 CRIMESTAT UPDATE 18 (2010), available at http://search.criminaljustice.state.ny.us/search?q=crimestat+report+2009&btnG=Search&entqr=0&sort=date%3AD%3A%3Ad1&output=xml_no_dtd&client=dcjs&ud=1&oe=UTF-8&ie=UTF-8&proxystylesheet=dcjs&site=dcjs (follow “2009 Crimestat Report” hyperlink) [hereinafter N.Y. STATE DIV. OF CRIM. JUSTICE SERV., 2009 CRIMESTAT]; see KATHERINE N. LAPP, *Introduction to BRUCE FREDERICK, JAMES A. GILMER & DAVID J. VAN ALSTYNE, BUREAU OF JUSTICE RESEARCH AND INNOVATION, EXPANDING THE OFFENDER INDEX OF THE NEW YORK STATE DNA DATABANK* (2002), available at http://criminaljustice.state.ny.us/crimnet/ojsa/exp_dna/ (explaining that the report compares proposals to expand New York “State[’s] DNA Data Bank by indexing those offenders convicted of nonviolent felonies and less serious crimes as well.”).

³² N.Y. STATE DIV. OF CRIM. JUSTICE SERV., 2009 CRIMESTAT, *supra* note 31, at 18; N.Y. STATE DIV. OF CRIM. JUSTICE SERV., CODIS, *supra* note 2.

³³ N.Y. EXEC. LAW § 995(1)(7)(f) (Consol. 2011). Specifically, the Executive Law lays out the following misdemeanors for which DNA can be collected:

[A]ssault in the third degree as defined in section 120.00 of the penal law; attempted aggravated assault upon a person less than eleven years old, as defined in section 110.00 and section 120.12 of the penal law; attempted menacing in the first degree, as defined in section 110.00 and section

executive law greatly increased the number of profiles in the databank, as they not only applied to newly convicted offenders, but also applied retroactively to those already in custody or on probation on the date they became effective.³⁴ The Division of Criminal Justice Services works to ensure that DNA samples are collected from all offenders required to give them, a job that used to be done in large part by jails and probation departments.³⁵ Now that the law has been expanded to include many misdemeanor offenses, police officers and court personnel have joined the effort to ensure collection from those offenders not in prison or on probation.³⁶ In 2008 alone, these efforts resulted in the collection of 54,462 DNA samples.³⁷

Due to the increased number of DNA samples being collected, a backlog in processing developed in 2006.³⁸ However, in order to ensure the efficiency of both the databank and criminal prosecutions, many samples were sent to an outside contractor for processing and by the end of 2009, samples were being analyzed at an average rate of thirty-six days.³⁹

120.13 of the penal law; menacing in the second degree as defined in section 120.14 of the penal law; menacing in the third degree as defined in section 120.15 of the penal law; reckless endangerment in the second degree as defined in section 120.20 of the penal law; stalking in the fourth degree as defined in section 120.45 of the penal law; stalking in the third degree as defined in section 120.50 of the penal law; attempted stalking in the second degree, as defined in section 110.00 and section 120.55 of the penal law; forcible touching as defined in section 130.52 of the penal law regardless of the age of the victim; sexual abuse in the third degree as defined in section 130.55 of the penal law regardless of the age of the victim; unlawful imprisonment in the second degree as defined in section 135.05 of the penal law regardless of the age of the victim; attempted unlawful imprisonment in the first degree, as defined in section 110.00 and section 135.10 of the penal law regardless of the age of the victim; criminal trespass in the second degree as defined in section 140.15 of the penal law; possession of burglar's tools as defined in section 140.35 of the penal law; petit larceny as defined in section 155.25 of the penal law; endangering the welfare of a child as defined in section 260.10 of the penal law; endangering the welfare of an incompetent or physically disabled person as defined in section 260.25.

Id. at (f).

³⁴ N.Y. STATE DIV. OF CRIM. JUSTICE SERV., 2009 CRIMESTAT, *supra* note 31, at 18; *see also* Klein, *supra* note 2 (identifying the impact of the new amendments).

³⁵ N.Y. STATE DIV. OF CRIM. JUSTICE SERV., 2009 CRIMESTAT, *supra* note 31, at 19 (noting that probation departments and local jails collected 60% of the total DNA specimens submitted to the DNA Databank in 2009 and State Departments of Corrections contributed another 18% of the specimens submitted).

³⁶ *Id.* Prior to the 2006 amendment to the law, DNA specimens were generally collected by the agency charged with incarceration or supervision of the offender. *Id.* N.Y. EXEC. LAW § 995(1)(7)(c) (Consol. 2011).

³⁷ N.Y. STATE DIV. OF CRIM. JUSTICE SERV., 2009 CRIMESTAT, *supra* note 31, at 19.

³⁸ *Id.* at 22; N.Y. STATE DIV. OF CRIM. JUSTICE SERV., 2007 CRIMESTAT, *supra* note 14, at 22.

³⁹ N.Y. STATE DIV. OF CRIM. JUSTICE SERV., 2009 CRIMESTAT, *supra* note 31, at 22. By comparison, at the end of 2007 and 2008, the respective average processing times for DNA specimens were 210 and 77 days. *Id.*; *see* Howard Safir, *DNA Technology as an Effective Tool in Reducing Crime*, FORENSIC MAGAZINE, October 1, 2007, available at www.forensicmag.com/article/dna-technology-effective-tool-reducing-crime?page=0,2. A "combination of outsourcing and modifying the testing process" increased the ability for processing to be accomplished faster. *Id.*

Additional procedures were also put in place to ensure the integrity and efficiency of the system. For example, samples are removed from the databank if it is discovered that the donor was not convicted of a qualifying offense, or if the sample was not collected and processed according to chain of custody protocol.⁴⁰

D. Proposed New York State Legislation

With the increased number of databank hits and convictions since the expansion of qualifying offenses in 2006, there has been a renewed push to enlarge compulsory DNA collection in New York. Two recent bills, one introduced to the Senate and the other to the Assembly, have proposed amending the executive and criminal procedure laws in an effort to increase the benefits of DNA technology and the state databank.

The first bill, A03267, was introduced to the New York State Assembly in 2007.⁴¹ The main goal of this bill is to amend the executive and criminal procedure laws to require DNA collection from anyone arrested (rather than convicted) of any offense where fingerprinting is required. This includes all felonies, misdemeanors, and loitering charges, according to New York Criminal Procedure Law section 160.10.⁴² The purpose of this bill is to prevent unnecessary crimes committed by recidivist criminals. If DNA is collected for more offenses at the time of arrest, rather than at the time of conviction, more criminals can be apprehended after their first offense.

Another bill, S6213, also known as the “DNA Upon Arrest” Bill, was introduced to the New York State Senate in October 2009, by Senator Jeffrey Klein.⁴³ This bill proposed amending section 995 of the Executive

⁴⁰ N.Y. STATE DIV. OF CRIM. JUSTICE SERV., 2009 CRIMESTAT, *supra* note 31, at 21. In 2008, 3,150 (or 5.8%) of the DNA samples collected were removed from the databank after it was determined that the donor was not convicted of a qualifying offense, and 1,575 (or 2.9%) of the DNA samples were removed due to errors in processing them. *Id.*

⁴¹ See A. 3267 228th Sess. (N.Y. 2007), available at http://assembly.state.ny.us/leg/?default_fld=&bn=A03267&term=&Summary=Y&Actions=Y&Text=Y. A03267 was sponsored by Assemblyman Robin Schimminger. *Id.*

⁴² *Id.* A03267 proposes to establish the Commission for Exoneration Review, which would serve to overlook cases where convicted individuals were exonerated through DNA evidence. *Id.*; see John D. Biancamano, *Arresting DNA: The Evolving Nature of DNA Collection Statutes and their Fourth Amendment Justifications*, 70 OHIO ST. L.J. 613, 613 (2008) which notes that Michael Bloomberg, Mayor of New York City, proposed legislation that would require DNA samples from all individuals arrested in the city. *Id.*

⁴³ S. 6213, *supra* note 4; see Klein, *supra* note 2 (stating that Senator Klein was joined in his proposal by John Walsh (host of the popular television show *America's Most Wanted*), Bronx District Attorney Robert Johnson, Representatives from the Crime Victims Treatment Center with St. Luke's Roosevelt Hospital, Safe Horizon, and the Surviving Parents Coalition).

Law to require individuals arrested in connection with a felony to submit a DNA sample, rather than waiting for a conviction, similar to A03267.⁴⁴ The goal of this bill is to save investigation time, prosecution time, and court time, and to help apprehend repeat offenders faster.⁴⁵ Senator Klein urged New York to join numerous other states, and the federal government, which have already passed laws mandating DNA collection upon arrest.⁴⁶

The justification for this proposed bill includes the brutal rape and murder of Carol Nelson by Glen Shoop in Syracuse in 2007.⁴⁷ In 2004, Shoop was arrested for assault, unlawful imprisonment, and menacing, and, in 2005, pled guilty to third degree assault, an offense for which DNA collection was not required.⁴⁸ In 2006, Shoop was arrested for rape, criminal sexual act, and unlawful imprisonment, but was not required to surrender his DNA until he was actually convicted.⁴⁹ He pled guilty to unlawful imprisonment in 2007.⁵⁰ At this time, the police were able to link his DNA to an unsolved rape that occurred in 2000, but it was too late to prevent him from raping and murdering Carol Nelson.⁵¹ Had the law required Shoop to provide his DNA upon either his arrest or conviction for assault in 2004 and 2005, respectively, he would have then been linked to the 2000 rape, his resulting incarceration would have prevented him from committing his subsequent crimes in 2006 and 2007, and Carol Nelson would likely still be alive.

II. INADEQUACIES IN BOTH THE CURRENT AND PROPOSED LEGISLATION

There are numerous flaws in both the current and proposed New York legislation that prohibit our state from successfully attaining the goals the

⁴⁴ S. 6213, *supra* note 4. "Section 2 amends the executive law section 995-c to require that felony arrestees provide a DNA sample to jailor detention facility personnel upon booking following arrest." *Id.*

⁴⁵ *Id.*; Klein, *supra* note 2.

⁴⁶ S. 6213, *supra* note 4; see NAT'L CONF. OF ST. LEGISLATURES, *supra* note 1 (listing the states that have already passed DNA upon arrest legislation).

⁴⁷ S. 6213, *supra* note 4 (describing the rape and murder of Carol Nelson under the "justification" section of the bill); see Klein, *supra* note 2 (quoting William Fitzpatrick, Onondaga County District Attorney, as saying, "[h]ad this law been in place in New York, my constituent Carol Nelson would be alive today and I would not have to explain to her grieving family why Glen Shoop was free to murder her.").

⁴⁸ S. 2857, 234th Sess. (N.Y. 2011), available at <http://open.nysenate.gov/legislation/bill/S2857-2011>. (S. 2857 is the newest posted version of A. 3267, *supra* note 41.)

⁴⁹ S. 6213, *supra* note 4.

⁵⁰ *Id.* (stating that Shoop pled guilty to first degree unlawful imprisonment, which is a felony in New York).

⁵¹ *Id.* "When Shoop's DNA was finally taken and entered into the DNA database due to the unlawful imprisonment conviction, he was linked to both Carol's murder and the 2000 rape." *Id.*

Legislature set out to achieve. The three scenarios at the beginning of this Note highlight the flaws in our current system. This part of the Note shows how neither of the proposed bills would cure these flaws, and introduces potential benefits of a DNA databank that would be impossible under both the current and proposed systems.

In the first scenario, the same man raped three women within a four-month period. Although the attacker was the subject of NYPD investigations, he was never formally arrested. Under current New York law, the rapist's DNA would not be on file in the state databank because he was never convicted of a felony. Thus, the unidentified DNA profile collected from the first victim would not yield a match and the rapist would be free to victimize the other two women. Likewise, even if the proposed legislation were enacted, this man would not be apprehended though a DNA match in this scenario. Since he was never formally arrested, a "DNA upon arrest" law would be of no effect.

In the second scenario, authorities are left with the remains of approximately one thousand people after a devastating terrorist attack. Family members scramble to identify their loved ones and try to attain a sense of closure, but in many situations, this may be impossible. Unless any of the decedents were convicted felons (or under the proposed legislation, had been arrested) their DNA would not be in the databank. Therefore, identifying their bodies would not only be extremely time consuming, but nearly impossible in many situations.⁵² Unless DNA could be extracted from things such as the decedent's hairbrush or toothbrush (which is not always feasible), it is possible that their remains would never be identified.

In the third scenario, the FBI receives a tip that identifies a teenage girl as someone who was kidnapped ten years ago, when she was only three years old. Since the girl was so young when she was abducted, she has no memories of the parents that adopted her right after she was born. Furthermore, since they are not her biological parents, they will not be able to match their own DNA to hers. Therefore, it would be very hard to prove

⁵² See Richard Willing, *About Half of New York Remains Have Been Identified*, USA TODAY, Sept. 11, 2006, available at http://www.usatoday.com/news/nation/2006-09-11-sept11-remains_x.htm (discussing victim identification five years after September 11th and stating that "only 10,933 of the 20,730 body parts recovered were matched to known victims, whereas the other 9,797 body parts remained unidentified. The majority of those that were identified were done so through DNA analysis because other identification techniques, such as fingerprints and dental records, could not be employed on the body parts."); see also *Remains of a Day: Half of New York 9/11 Victims Identified by ME*, 167 CANADIAN MED. ASS'N JOURNAL 910, 910 (2002), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC128417/> (explaining that only half of the presumed victims of 9/11 had been identified by the medical examiner as of publication in 2002).

that this teenager is in fact their adopted daughter.

In each of these three scenarios, neither the current New York laws regarding mandatory DNA collection, nor the proposed legislation, would provide any assistance. These three situations expose some of the flaws in our system and highlight some areas where DNA technology should be put to use. Shortcomings of our current system include the fact that it only targets recidivist criminals, doesn't end the debate over who should be forced to surrender their DNA, therefore promoting a form of inequality, and ignores the other benefits of DNA technology outside the context of criminal investigations.

A. Legislation Only Targets Recidivist Criminals

The first problem with both the current and proposed New York legislation is that it only targets recidivist criminals. Under the current law, New York only collects DNA from criminals after they have been convicted of a felony. If the proposed legislation were adopted, DNA would be collected from individuals upon arrest for any felony, misdemeanor, or loitering charge. Under either statutory scheme, storing these individuals' DNA in the databank would only be beneficial in linking them with a DNA sample they left behind at a second crime scene. Furthermore, the current system only starts to take effect once a suspect has been detained by law enforcement. If a serial rapist attacks twenty different women and leaves DNA at every crime scene, law enforcement will not be able to connect him with these crimes until they have arrested him, collected a DNA sample from him, and obtained a hit from the databank that matched his profile with one from an unsolved crime. Therefore, the current databank does little to help criminal investigations where the offender has only committed one crime, rather than a series of crimes. Additionally, it only provides a benefit after the offender has been apprehended by police.

B. Legislation Promotes a Form of Inequality

Another flaw in the current and proposed New York legislation is that it promotes a form of inequality by only forcing certain classes of individuals to surrender their DNA, such as those convicted of felonies, or those placed under arrest. Furthermore, critics argue that DNA databanks "exacerbate racial disparities in the criminal justice system" because African Americans, for example, make up an estimated 40% of the samples in the federal database, even though they only make up about 12% of the

population.⁵³ The demographics of the DNA databases reflect the criminal population.⁵⁴ However, since there are concerns that people of color are more likely than whites to be suspected of crimes, and therefore stopped, searched, and arrested more often, critics argue that their DNA profiles are being “over-represented” in the databanks, which in turn serves only to “intensify existing racial inequality.”⁵⁵ Since minorities come into contact with law enforcement more often than whites, and therefore supply more of the DNA profiles in the databanks, the concern is that these minorities are more likely to be connected to DNA evidence from a crime scene.⁵⁶ Rather than solving any of these issues, the proposed legislation is likely to further fuel the debate over who should be forced to surrender their DNA. If this legislation is passed, there will undoubtedly be more proposals to further expand the databank in the future, especially considering how many times the law has been amended in the last decade alone.⁵⁷

C. Legislation Only Uses The DNA Databank in the Criminal Context

The last, and probably most significant, shortcoming in the legislation on compulsory DNA collection is that it fails to take into account the fact that the DNA databank could be put to a number of other beneficial uses outside of the criminal investigations/prosecutions context. Currently, our mandatory DNA laws and advanced DNA databank are only being utilized to apprehend and imprison criminals and deter future crimes. However,

⁵³ Moore, *supra* note 5.

⁵⁴ See *id.* (discussing how one former prosecutor stated that DNA demographics reflect the criminal population); see also *U.S. v. Sczubelek*, 402 F.3d 175, 199 (3d Cir. 2005) (explaining that DNA samples could be taken from groups that share demographic characteristics which would suggest a higher likelihood of criminal behavior).

⁵⁵ Sujatha Byravan, *Racism by Other Means*, THE HINDU (August 9, 2006), available at <http://www.thehindu.com/2006/08/09/stories/2006080908351100.htm>. “In such a racially biased system, the DNA of people of colour [sic] – who are stopped, searched, tried, convicted, and penalised [sic] more often – would obviously be over-represented in the expanding forensic DNA databanks, and this would intensify existing racial inequality.” *Id.*; see *Our Right to Privacy, Unless Guilty of a Crime*, THE INDEPENDENT, (Feb. 28, 2008), available at <http://www.independent.co.uk/opinion/leading-articles/leading-article-our-right-to-privacy-unless-guilty-of-a-crime-788492.html> for a discussion on how ethnic minorities are vastly over-represented in DNA databases in the U.K.

⁵⁶ See GENETICS AND PUB. POLICY CTR., JOHN HOPKINS UNIVERSITY, DNA, FORENSICS AND THE LAW (2007), available at http://www.dnapolicy.org/policy.issue.php?action=detail&issuebrief_id=42 (explaining that [critics] “argue that since only those who come into contact with law enforcement are entered into databases, disparate arrest and conviction practices will result in a disproportionate number of minorities being included in the databases.”); see also *Jones v. Murray*, 962 F.2d 302, 314 (4th Cir. 1992) (stating that DNA testing of minorities would likely increase the likelihood of solving crimes).

⁵⁷ See N.Y. State Div. of Crim. Justice Serv., CODIS, *supra* note 2 (noting the expansions in December 1999, July 2004, and June 2006); see also N.Y. State Div. of Crim. Justice Serv., DNA HITS BY LAW EXPANSION AS OF MAY 2007, <http://criminaljustice.state.ny.us/forensic/graphics/databankhits.jpg> (last visited Mar. 24, 2011) (graphing the DNA hits in each year the laws were expanded).

DNA has proven very valuable for identification purposes after tragedies such as 9/11 and the recent earthquake in Haiti.⁵⁸ Nevertheless, thousands of human remains have yet to be identified because there is no DNA available to match with that of missing persons. Although DNA can be collected on a voluntary basis in these non-criminal contexts, it may be too late to procure a sample by the time it is actually needed. Therefore, mandatory collection of DNA outside of the criminal context would be beneficial in these circumstances, and would ensure that as many people as possible would be identified.

III. PROPOSED SOLUTION: DNA COLLECTION AT BIRTH

This Note proposes that a solution to the inadequacies of the compulsory DNA legislation would be to create a database where DNA is required to be collected from every citizen shortly after birth. Such a database would first be created on the New York state level, followed by the national level if technologically feasible.

A. The Mechanics of a "DNA at Birth" Databank

Ideally, DNA collection would become a routine administrative task performed by health care professionals, just as certain procedures are employed after birth to ensure a newborn's health. After a doctor or nurse collects the DNA sample by either setting aside some of the blood already drawn from the newborn for other standard testing,⁵⁹ or by performing a mere cheek swab, they would send it to the local forensic laboratory for analysis and entry into the state database. All health care professionals would have to undergo training to ensure proper collection and storage of the DNA sample and to ensure that secure chain of custody procedures are followed. For those children not born in a hospital, the state would require the parents to procure a sample in order to obtain a birth certificate.

⁵⁸ See Willing, *supra* note 24 (stating that 53% of the remains from September 11th had been identified by DNA alone); Elizabeth Cohen & John Bonifield, *DNA Testing Confirms Haitian Couple Are Parents of Baby Sent to U.S.*, CNN.COM (Mar. 17, 2010), available at <http://www.cnn.com/2010/HEALTH/03/17/haiti.baby.jenny/index.html> (describing how DNA testing was used to confirm the parentage of an injured baby girl sent to the United States after the Haitian earthquake).

⁵⁹ See N.Y. STATE DEP'T OF HEALTH, GENETIC TESTING AND SCREENING IN THE AGE OF GENOMIC MEDICINE, http://www.health.ny.gov/regulations/task_force/reports_publications/screening.htm [hereinafter GENETIC TESTING AND SCREENING] (describing the newborn screening process in New York State); see also WADSWORTH CENTER: NY ST. DEP'T OF HEALTH, NEWBORN SCREENING PROGRAM, <http://www.wadsworth.org/newborn> [hereinafter NEWBORN SCREENING PROGRAM] (stating that newborns in New York are screened for disorders by testing a sample of blood obtained by pricking the baby's heel, usually on the day they are discharged from the hospital).

Under this proposed model, DNA would still be collected from arrestees, unless their DNA was already on file. However, no adults or living children would be forced to surrender their DNA, although they may do so on a voluntary basis. The DNA at Birth legislation would take effect on a certain day after being enacted, and DNA would be collected at birth only from children born on that day forward. Therefore, DNA collection at birth would be a phased-in process that would become normalized as time went on. Ten years after a person dies, their DNA profile would be deleted from the system.

This proposed database would only be used for identification purposes. Similar to the procedures currently in place, the forensic analysts would only use “junk DNA” in creating the DNA profiles that would be placed in the database.⁶⁰ “Junk DNA” is the portion of DNA that researchers have concluded contains only “non-genic” information that is not “responsible for trait coding.”⁶¹ This means that the profiles stored in the database would not contain any information about the individual’s physical or medical characteristics, and would be strictly used for identification only. Although DNA has the potential to reveal certain distinguishing characteristics, the use of “junk DNA” in such databases eliminates that risk because its only known function is for “the analysis of identifying markers.”⁶²

The DNA databank would be monitored by highly trained and skilled officials. Only authorized personnel would be able to access the information contained in the databank. Furthermore, those authorized to access the information contained in the databank would only be able to do so in very limited circumstances, such as in criminal investigations, criminal trials, and identity confirmation.

B. Benefits of a “DNA at Birth” Databank

Creating a DNA database where samples are collected from every citizen at birth would mend many of the flaws in the current system and enable the benefits of DNA technology to be put to use. Such a system would resolve

⁶⁰ See Henning, *supra* note 5, at 2 (explaining the process the FBI uses to create DNA profiles); U.S. v. Kincade, 379 F.3d 813, 818 (9th Cir. 2004) (noting that the Bureau for DNA analysis only analyzes 13 markers (or loci) that are found on what is known as “junk DNA,” which is “non-genic stretches of DNA not presently recognized as being responsible for trait coding.”).

⁶¹ Kincade, 379 F.3d at 818.

⁶² Nicholas v. Goord, 430 F.3d 652, 670 (2d. Cir. 2005). “Although science may someday be able to unearth much more information about us through our junk DNA, that capability does not yet exist, and, more importantly, the New York Statute prohibits such analysis.” *Id.*

the problems posed by the three scenarios listed at the beginning of this Note in a way that neither the current nor the proposed legislation could.

In the first situation, the attacker's DNA would have linked him to the first rape, and he would have been apprehended before being able to commit the next two rapes. If DNA were collected at birth we would be able to identify criminals after their first offense, rather than waiting for them to commit a second crime and linking them together. Furthermore, it may serve to deter many more people from committing crimes altogether since the potential that they would be caught after their first offense would be much greater if their DNA profile was already on file.

In the second situation, all the human remains that could be analyzed for DNA could be matched to DNA profiles already in the databank. Therefore, most of the bodies could be identified. In the third and final scenario, all that would need to be done to ascertain whether the teenager was the same girl who went missing ten years earlier would be to match her DNA to the little girl's DNA that was collected at birth and stored in the databank. Both of these situations highlight the fact that if DNA was collected at birth, its identification quality could be used for more than just criminal investigations. In addition to identifying bodily remains and missing children, DNA collection at birth would greatly decrease the need for paternity suits because there would be no need to legally compel someone to give their DNA.

Lastly, if DNA were collected from citizens at birth, it would virtually eliminate government discretion and the debate over deciding which individuals must provide samples. If every single citizen's DNA were collected, there would be no need for continued pushes to amend the law to include more "qualifying offenses" and there would be no more arguments that the law unfairly burdens certain classes of individuals more than others.

IV. CONSTITUTIONAL CONCERNS

It is obvious that such a controversial proposal will be met with rigorous opposition. In order for a system like this to succeed, it must be able to pass constitutional muster. Since courts have already declared that the extraction and analysis of tissue and blood samples for DNA constitutes a search, a DNA at Birth law would have to withstand Fourth Amendment prohibitions against unreasonable searches and seizures.⁶³ Therefore,

⁶³ See Henning, *supra* note 5, at 6. "[A]lthough the [Supreme] Court views the drawing of blood as

collecting DNA at birth would need to be considered “reasonable” in order for it to satisfy the requirements of the Fourth Amendment.

A. CONSTITUTIONALITY OF OTHER SUSPICIONLESS SEARCH PROGRAMS

The Fourth Amendment protects against unreasonable searches and seizures, which basically refers to those searches not premised on probable cause and a warrant.⁶⁴ Collecting DNA from infants is a search not based on either probable cause or a warrant, so it classifies as a suspicionless search program. Since searches conducted without a basis of individualized suspicion are normally considered unreasonable, there are very limited circumstances in which courts will allow suspicionless search programs.⁶⁵ Collecting DNA at birth would need to fall into one of these exceptions to be considered constitutional.

One category of cases dealing with the constitutionality of suspicionless searches involves challenges to mandatory drug testing programs. These cases are worth discussing because their analysis under the Fourth Amendment will be analogous to the constitutional analysis of a DNA at Birth program. Courts have used different methods for determining the reasonableness of suspicionless searches, but they generally use the Special Needs test with drug-testing programs since these programs are usually not “designed to serve the ordinary needs of law enforcement.”⁶⁶ The Special Needs test has two prongs: The court must first determine that the search is “justified by a special need beyond the ordinary needs of normal law enforcement,” and second, that the search is reasonable in comparison to the special need.⁶⁷ Three factors to consider in the balancing test for

a greater intrusion than fingerprinting, both activities now qualify as searches.” *Id.* at n.39. In 2005, the Second Circuit held that invasive measures of collecting DNA for analysis constitutes a Fourth Amendment search. *Nicholas*, 430 F.3d at 658; *see also* U.S. CONST. amend. IV which guarantees “the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.”

⁶⁴ U.S. CONST. amend. IV.; *see Arizona v. Hicks*, 480 U.S. 321, 326–27 (1987) for an example of the Supreme Court’s application of the Fourth Amendment.

⁶⁵ *See City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000) (“A search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing.”); *U.S. v. Amerson*, 483 F.3d 73, 78–79 (2d Cir. 2007) (“[S]uspicionless searches . . . are highly disfavored since they dispense with the traditional rule that a search, if it is to be deemed reasonable, must be either supported by a warrant based on probable cause, or justified by evidence establishing individualized suspicion of criminal misconduct.”).

⁶⁶ *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 666 (1989) [hereinafter *Von Raab*]. “[W]here a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual’s privacy expectations against the Government’s interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context.” *Id.* at 665–66.

⁶⁷ *Amerson*, 483 F.3d at 80 (analyzing the 2004 DNA Act under the two prongs of the Special

determining reasonableness are: (1) the degree of government intrusion, (2) the individual's privacy interest, and (3) the nature of the government's needs and the program's efficacy in meeting those needs.⁶⁸

The United States Supreme Court upheld the constitutionality of a suspicionless drug-screening program in *National Treasury Employees Union v. Von Raab*.⁶⁹ In that case, the United States Customs Service implemented a drug-testing program where any employee seeking a job involving drug interdiction, carrying a firearm, or handling classified material, was required to submit to a urinalysis test.⁷⁰ The Supreme Court held that the suspicionless drug testing of those employees who would be dealing with illegal drugs or carrying a firearm was a reasonable search under the Fourth Amendment. The government's compelling interest, of ensuring that drug users are not promoted to positions maintaining our nation's borders or protecting the citizenry, was held to outweigh the privacy expectations of such employees, which are diminished by the very nature of the government responsibility their jobs entail.⁷¹

The Supreme Court upheld the constitutionality of another suspicionless drug-testing program in *Board of Education v. Earls*.⁷² In that case, a school district implemented a program where every middle and high school student who participated in extracurricular activities was required to submit a urine sample for analysis.⁷³ The Court held that this program was reasonable in light of the school board's interest in preventing drug use among students, the diminished privacy expectation of students choosing to participate in extracurricular activities, the minimally intrusive method of collecting urine samples, and the reasonably effective means of addressing the problem.⁷⁴

Although the Supreme Court upheld the constitutionality of the suspicionless programs in *Earls* and *Von Raab*, there are many cases where courts have held that drug-testing programs are searches that violate the

Needs test as it applies to convicted felons on probation); *id.* at 84 n.10 ("The need is 'special' in the context of the *Fourth Amendment*, not because it is necessarily or likely to be more important than other needs, but because the normal presumption that warrants and probable cause are needed is not present.").

⁶⁸ *Id.* at 83–84 (quoting *Cassidy v. Chertoff*, 471 F.3d 67, 75 (2d Cir. 2006); *Palmieri v. Lynch*, 392 F.3d 73, 81 (2d Cir. 2004).

⁶⁹ *Von Raab*, 489 U.S. at 679.

⁷⁰ *Id.* at 660–61.

⁷¹ *Id.* at 679. The Court remanded on the issue of whether the drug tests were reasonable for those employees who would be handling "classified" material because the record proved insufficient for this decision. *Id.*

⁷² *Bd. of Educ. v. Earls*, 536 U.S. 822 (2002).

⁷³ *Id.* at 826.

⁷⁴ *Id.* at 837–38.

Fourth Amendment. In *Ferguson v. City of Charleston*, the Court held that performing urine testing on pregnant women in order to determine if they were using cocaine was unconstitutional.⁷⁵ This program did not pass the Special Needs test because the primary purpose of the program was to “use the threat of arrest and prosecution” to force women into rehabilitation.⁷⁶ The Court found that the immediate objective of the program was to produce evidence of illegal drug use that would be turned over by hospital personnel to law enforcement officials, which the Court held was an ordinary law enforcement purpose, and not one that justified dispensing with the warrant and probable cause requirement.⁷⁷ Similarly, in *Tannahill v. Lockney Independent School District*, the court held that drug testing of all students in grades seven through eleven was unconstitutional because there was no evidence that drug use was a particular problem among the students and therefore found no demonstrated special need.⁷⁸ Furthermore, the court held that the students in this case did not have a diminished expectation of privacy since every student was subjected to drug testing, rather than only student athletes or those involved in extracurricular activities.⁷⁹

A program where DNA is collected at birth can be distinguished from these last two cases because of the special need of such a program and the diminished privacy expectation of newborns with regard to their DNA profile, which will be discussed in the next subsection. Similar to the suspicionless drug testing programs in *Von Raab* and *Earls*, the government does have a compelling non-law enforcement interest in collecting individual’s DNA, and such a program would be effective in serving a government need beyond the normal needs of law enforcement.

B. THE SPECIAL NEEDS TEST IN DNA-RELATED CASES

Nearly every court that has heard a DNA collection case has upheld the search programs created by both state and federal DNA laws, using either a totality of the circumstances balancing test or the Special Needs test.⁸⁰ The

⁷⁵ *Ferguson v. City of Charleston*, 532 U.S. 67 (2001).

⁷⁶ *Ferguson*, 532 U.S. at 84.

⁷⁷ *See id.* (“Given the primary purpose of the Charleston program, which was to use the threat of arrest and prosecution in order to force women into treatment, and given the extensive involvement of law enforcement officials at every stage of the policy, this case simply does not fit within the guarded category of ‘special needs.’”).

⁷⁸ *Tannahill v. Lockney Indep. Sch. Dist.*, 133 F. Supp. 2d 919, 924 (N.D. Tex. 2001).

⁷⁹ *Id.* at 929.

⁸⁰ *See Henning*, *supra* note 5, at 1 (“Although they have reached their conclusions using different analytical approaches, federal and state courts have generally upheld compulsory DNA collection as non-violative of the Fourth Amendment.”); *see also* *U.S. v. Amerson*, 483 F.3d 73, 78 (2d Cir. 2007) (“[C]ourts have nearly unanimously upheld the suspicionless-search programs created by state and

Second Circuit has used the Special Needs test.⁸¹

New York federal courts have already determined that DNA indexing is considered a special need.⁸² In *Nicholas v. Goord*, the Second Circuit upheld the constitutionality of New York compulsory DNA laws as applied to felons on probation, noting that although the laws are put in place to help police solve crime, DNA is not always collected as evidence or in association with any ongoing criminal investigation.⁸³ Therefore, the court concluded that “[b]ecause the state’s purpose in conducting DNA indexing is distinct from the ordinary ‘crime detection’ activities associated with normal law-enforcement concerns, it meets the special-needs threshold.”⁸⁴ Two years later, in *United States v. Amerson*, the Second Circuit further held that DNA collection constitutes a special need “because the ‘special’ law enforcement activity of creating and maintaining a DNA index fulfills important purposes that could not be achieved by reliance on ‘normal’ law enforcement methodology.”⁸⁵ A program that collects DNA from citizens at birth, and not just from arrestees and convicts, would more likely fill the requirements of a “special need,” in order to dispense with the probable cause and warrant requirement, because these DNA searches would be completely outside the criminal context. DNA collection at birth is a purely suspicionless program. Since it would be pushed even further outside the realm of “normal law enforcement” it logically follows that such a program would be considered a special need, even more so than current DNA collection.

The next step in evaluating the constitutionality of a DNA at Birth program under the Special Needs test is to assess whether it is reasonable. The Second Circuit has determined reasonableness by balancing the government’s interest in implementing the program against the level of intrusion the program poses on the individual.⁸⁶ Although every U.S.

federal DNA indexing laws.”); *U.S. v. Kincade*, 379 F.3d 813, 830–31 (9th Cir. 2004).

⁸¹ The Second Circuit, along with the Seventh Circuit, has used the Special Needs test in evaluating the constitutionality of DNA laws. *See Amerson*, 483 F.3d at 78; *U.S. v. Hook*, 471 F.3d 766, 773 (7th Cir. 2006). The Third, Fourth, Fifth, Ninth, and Eleventh Circuits have used the totality of the circumstances balancing test. *See U.S. v. Sczubelek*, 402 F.3d 175, 184 (3d Cir. 2005); *Padgett v. Donald*, 401 F.3d 1273, 1280 (11th Cir. 2005); *Kincade*, 379 F.3d at 832; *Groceman v. U.S. Dep’t of Justice*, 354 F.3d 411, 413 (5th Cir. 2004); *Jones v. Murray*, 962 F.2d 302, 310–11 (4th Cir. 1992).

⁸² *See Nicholas v. Goord*, 430 F.3d 652, 669 (2d. Cir. 2005); *see also Amerson*, 483 F.3d at 82.

⁸³ *Nicholas*, 430 F.3d at 669. “Although the DNA samples may eventually help law enforcement identify the perpetrator of a crime, at the time of collection, the samples in fact provide no evidence in and of themselves of criminal wrongdoing, and are not sought for the investigation of a specific crime.” (internal citations and quotation marks omitted. *Id.*)

⁸⁴ *Id.*

⁸⁵ *Amerson*, 483 F.3d at 82.

⁸⁶ *See id.* at 80; *Roe v. Marcotte*, 193 F.3d 72, 77 (2d Cir.1999).

Circuit court that has heard compulsory DNA cases has upheld at least some version of federal or state laws on the issue, those cases have only questioned the constitutionality of collection as applied to criminals.⁸⁷ Therefore, a different and much stronger analysis will be required to uphold a program where DNA is collected at birth.

1. Degree of Government Intrusion

Analyzing the degree of governmental intrusion imposed on the individual by collecting a DNA sample would be the same regardless of whether DNA is collected from arrestees, convicted criminals, or newborns. Although there are different methods of obtaining a DNA sample, courts have consistently held that taking a blood sample is minimally intrusive.⁸⁸ Although the Supreme Court has never heard a DNA collection case, it has held that a blood test is minimally intrusive: “[T]he intrusion occasioned by a blood test is not significant, since such ‘tests are a commonplace in these days of periodic physical examinations and experience with them teaches that the quantity of blood extracted is minimal, and that for most people the procedure involves virtually no risk, trauma, or pain.’”⁸⁹ If a blood test is considered minimally intrusive, then it logically follows that a mere cheek swab, the other most common way of obtaining a DNA sample, is even less physically intrusive. In addition, taking a DNA sample shortly after birth might not impose any additional intrusions into an individual’s life. Since the health status of newborns is routinely checked after birth, subjecting their already existing blood sample to one more test would pose no additional burden.⁹⁰ Furthermore, in *Nicholas*, the Second Circuit concluded that the physical intrusion imposed by a blood sample or cheek swab is “far outweighed by the government’s strong interests in obtaining . . . the uniquely effective identifying information that DNA provides.”⁹¹

⁸⁷ See *Henning*, *supra* note 5, at 9 (explaining that although the United States Supreme Court has yet to hear a DNA collection case, eight of the circuit courts “have upheld the 2004 version of the federal DNA collection law, which authorized collection and analysis of DNA from people convicted of any felony, certain sexual crimes, and crimes of violence.”); see also *Amerson*, 483 F.3d at 79 (noting that the Supreme Court denied certiorari in a case challenging the 2004 federal DNA collection law).

⁸⁸ See *Amerson* 483 F.3d at 84 (referencing the Supreme Court’s previous findings that blood testing was minimally intrusive); *Nicholas*, 430 F. 3d at 669 (noting that the Supreme Court has “long maintained” that the intrusion created by taking a blood sample was minimal).

⁸⁹ *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 625 (1989) (quoting *Schmerber v. California*, 384 U.S. 757, 771 (1966)).

⁹⁰ See GENETIC TESTING AND SCREENING, *supra* note 59 (listing the tests given to newborns soon after birth); NEWBORN SCREENING PROGRAM, *supra* note 59 (stating a number of things newborns are tested for from “one tiny sample of blood . . . obtained by pricking the baby’s heel”).

⁹¹ 430 F.3d at 669.

2. Individual's Privacy Interest in Their DNA

The greatest hurdle to implementing a DNA at Birth law is the individual's privacy interest in their DNA. The constitutionality of current compulsory DNA laws has been upheld in light of the fact that arrestees, inmates, and probationers have a diminished expectation of privacy in their identity since they have willingly subjected themselves to the criminal justice system by committing a voluntary criminal act.⁹² Undoubtedly, this reasoning cannot be translated to the privacy interest of an innocent newborn, but it may still be argued that infants (or more accurately the infant's parents) likewise have a diminished expectation of privacy in their DNA profiles.

As legal guardians, parents have the right to make decisions on their child's behalf and to ensure that their child's constitutional rights are not violated. Parents might have a diminished expectation of privacy in their child's DNA profile in light of the fact that inclusion in a government database would benefit them if their child ever went missing or needed to be identified for some reason. When parents consider the advantages of having their child's DNA on file, they may be more accepting of the process. Additionally, over the last fifty years or so, we have recognized fewer privacy interests due to profound technological developments (such as email, Facebook, Twitter, credit reports, public information databases, online medical records, etc.) so it is possible that in the future people will no longer have a socially recognized expectation of privacy in their DNA profiles.

One major reason why parents should have a diminished expectation of privacy in their child's DNA is the Newborn Screening Saves Lives Act of 2007, passed by President Bush in 2008.⁹³ This Act authorized the federal government to collect, screen, and store DNA from newborns for health and genetic research purposes.⁹⁴ Genetic screening of newborns, which began in the 1960s, has saved thousands of lives from diseases that may have otherwise remained undetected.⁹⁵ Today, every state has its own

⁹² See *Amerson*, 483 F.3d at 84 (The "[a]ppellants' status as probationers, and their associated diminished expectation of privacy make [the] physical intrusion [imposed by DNA collection] even less invasive."); Solomon Moore, *F.B.I. and States Vastly Expanding Databases of DNA*, N.Y. TIMES, Apr. 19, 2009, at A1 ("Courts have generally upheld laws authorizing compulsory collection of DNA from convicts and ex-convicts under supervised release, on the grounds that criminal acts diminish privacy rights.")

⁹³ S. 1858, 110th Cong. § 2 (2008).

⁹⁴ *Id.*

⁹⁵ Elizabeth Cohen, *The Government Has Your Baby's DNA*, CNN HEALTH, February 4, 2010, <http://www.cnn.com/2010/HEALTH/02/04/baby.dna.government/index.html> (stating that screening has

individual guidelines for collecting, storing, and analyzing DNA samples.⁹⁶ New parents are often unaware of this process since it is authorized by the federal government and can be done without their consent.⁹⁷ Depending on which state a mother gives birth in, her child's DNA will be stored in a state laboratory anywhere from a period of three months (such as in Alabama) to indefinitely (such as in California).⁹⁸ In New York, these DNA samples are kept and stored for twenty-seven years.⁹⁹ Since every child's DNA is already collected and used by the government for research purposes, there is a diminished expectation of privacy in infant DNA. Thus, using it for identification purposes as well poses no additional physical intrusion.

Another privacy concern associated with granting the government access to DNA profiles is the fear that it will reveal information about individuals' sex, race, genetic defects, and other genetic predispositions. Opponents are primarily concerned that information regarding genetic diseases or disorders will be used to discriminate against certain individuals, such as in the context of health care. In response to this concern, it should be noted that the current procedures only allow the analysis of DNA for identifying markers, otherwise known as "junk DNA."¹⁰⁰ Therefore, these databanks only contain DNA profiles that can be used for identification purposes; no physical or genetic information can be accessed. This means that the storage of DNA in these databanks cannot be used to discriminate against anyone. Furthermore, current law requires that the information be kept confidential and only accessible to authorized personnel. There are criminal penalties in place if anyone intentionally discloses these records to unauthorized entities, tampers with the samples, or uses the information for

saved "countless newborns"); see Jeffrey R. Botkin, M.D., *Newborn Screening for Nontreatable Disorders: Assessing the New Criteria for Newborn Screenings*, 19 HEALTH MATRIX 163, 163 (2009) (discussing the remarkable success of newborn screening in preventing irreparable damage to infants).

⁹⁶ See NATIONAL NEWBORN SCREENING & GENETICS RESOURCE CENTER, LABORATORY SPECIMEN INFORMATION FOR NEWBORN SCREENING IN THE U.S. IN 2010, <http://nnsis.uthscsa.edu/xreports.aspx?XREPORTID=18&FORMID=43&FCLR=1> (comparing the various state guidelines); Cohen, *supra* note 96 (describing some of the differing guidelines).

⁹⁷ Cohen, *supra* note 96; see generally Newborn Screening Saves Lives Act, S. 1858, 110th Cong. § 2 (2008) (authorizing state screening procedures under federal law).

⁹⁸ NATIONAL NEWBORN SCREENING & GENETICS RESOURCE CENTER, *supra* note 97; Cohen, *supra* note 96.

⁹⁹ NATIONAL NEWBORN SCREENING & GENETICS RESOURCE CENTER, *supra* note 97; Julia Davis, *Government's DNA-mining is Out of Control, California Stores Genetic Profile Samples Indefinitely*, EXAMINER, Feb. 6, 2010, <http://www.examiner.com/homeland-security-in-los-angeles/government-s-dna-mining-is-out-of-control-california-stores-genetic-profile-samples-indefinitely>.

¹⁰⁰ *Nicholas v. Goord*, 430 F.3d 652, 670 (2d. Cir. 2005). "Although DNA indexing has the potential to be broadly revealing, the New York statute as written does not provide for sensitive information to be analyzed or kept in its database. Rather, it provides only for the analysis of identifying markers." *Id.* See N.Y. EXEC. LAW § 995-f.

an unauthorized purpose.¹⁰¹ Critics suggest that in the future researchers may discover that “junk DNA” does in fact contain the kind of sensitive information that would allow the government to discriminate against certain people and significantly intrude on their privacy.¹⁰² It should be noted, however, that this ability does not exist in today’s world, and even if researchers were to make such a discovery, the current New York statute prohibits and criminalizes DNA use for any unauthorized purpose.¹⁰³

Finally, a system where DNA is collected at birth might even serve to *increase* privacy for some people. DNA databanks have proved dispositive in exonerating some individuals who have been wrongfully accused.¹⁰⁴ Therefore, people who can be eliminated from a criminal investigation at its outset, without undergoing more serious intrusions in their future, will experience an actual increase in privacy.¹⁰⁵

C. Government’s Needs and Program’s Efficacy in Meeting Those Needs

In order for such a system to be constitutional under the Fourth Amendment, the government’s interests in implementing a DNA at Birth program would need to outweigh individual privacy interests, and the program must be effective in meeting the government’s needs. Since we are discussing a hypothetical proposal, rather than a program currently in place, it will be impossible to assess the program’s efficacy in meeting the government’s needs. Nevertheless, there are several interests that are capable of discussion.

If DNA were collected at birth and stored in a state or national database, law enforcement would be able to rapidly and accurately solve crimes right after they occurred, rather than waiting for the perpetrator to commit

¹⁰¹ N.Y. EXEC. LAW § 995-f (2011); *Nicholas*, 430 F.3d at 670.

¹⁰² See Henning, *supra* note 5, at 14 (“Fourth Amendment challenges might gain legal traction if researchers discover that junk DNA does in fact contain clues which reveal sensitive biological or medical information.”); Elizabeth E. Joh, *Reclaiming “Abandoned” DNA: The Fourth Amendment and Genetic Privacy*, 100 NW. U. L. REV. 857, 870 (2006).

¹⁰³ N.Y. EXEC. LAW § 995-f (2011); *Nicholas*, 430 F.3d at 670.

¹⁰⁴ See Klein, *supra* note 2 (“[This] bill, mandating the taking of DNA samples at arrest for certain designated offenses, will not only aid immeasurably in convicting the guilty, it will also exonerate the innocent.”) (quoting William Fitzpatrick, Onondaga County District Attorney); Patrick McGeehan, *New York Plan for DNA Data in Most Crimes*, N.Y. TIMES (May 14, 2007), available at <http://www.nytimes.com/2007/05/14/nyregion/14dna.html>.

¹⁰⁵ See *U.S. v. Amerson*, 483 F.3d 73, 86–87 (2d Cir. 2007) (positing that DNA profiles have the “potential to provide a net gain in privacy for the individuals who are required to provide samples. Having DNA on file may very well help exculpate such individuals by avoiding misidentification and, thus, preventing more serious invasions of their privacy in the future.”); see also Charles J. Nerko, *Assessing Fourth Amendment Challenges to DNA Extraction Statutes After Samson v. California*, 77 FORDHAM L. REV. 917, 936 (2008) (quoting *Amerson* on this point).

another offense. The governmental interest in deterring and preventing crime is therefore very high. Such a system would also prevent innocent people from becoming suspects in the first place. In other situations, it would exonerate the wrongfully accused.

Outside of the criminal context, the government has a strong interest in identifying bodily remains, such as those left after the attacks on 9/11, or in the wake of natural tragedies such as the recent earthquake in Haiti. Also, there would be a significant decrease in the need for paternity suits, which would save much government time and expense.

D. Fiscal Implications of a DNA At Birth Program

Although not a constitutional concern, the fiscal implications of a DNA at Birth program is a major issue that needs to be addressed before such a system could ever be seriously considered. This figure can be calculated using the following mathematical equation:

$$\text{Estimated Annual Cost of DNA upon Arrest in NY} = \quad X.$$

$$\text{Annual Number of Arrestees in NY} \quad \text{Annual Number of Births in NY}$$

According to Bill A06186, currently before the New York State Assembly, the projected cost of collecting DNA from every arrestee/at all instances when fingerprints are taken in New York for one year is \$55–\$65 million per year.¹⁰⁶ For the purpose of calculating a DNA at Birth program, this number was averaged to \$60 million. According to the New York State Division of Criminal Justice Services 2008 Crimestat Report, the number of fingerprint transactions associated with arrests in New York for 2008 was 587,598.¹⁰⁷ According to the vital statistics of New York State, published by the NYS Department of Health, the number of births in New York in 2007 was 252,662.¹⁰⁸ After putting these numbers into the equation above, it can be determined that the approximate cost for maintaining a DNA at Birth database for one year in New York would be approximately \$26 million.¹⁰⁹

While this figure may seem daunting at first, it is important to keep in

¹⁰⁶ A. 6186, *supra* note 4 (projecting the cost for the 2008–09 collection year).

¹⁰⁷ N.Y. State Div. of Crim. Justice Serv., 2008 Crimestat, *supra* note 27, at 44.

¹⁰⁸ NYS DEPT. OF HEALTH, VITAL STATISTICS OF NYS 2007, TABLE 4A: LIVE BIRTH SUMMARY BY MOTHER'S RACE/ETHNICITY, NEW YORK STATE 2007, *available at* http://www.health.state.ny.us/nysdoh/vital_statistics/2007/table04a.htm. The number of births for 2007 were used in the cost analysis because at the time of writing, New York's vital statistics for 2008 had not yet been released publicly.

¹⁰⁹ This number is rounded up from \$25,795,390.

mind that it is about half of the projected cost for the annual DNA-upon-arrest legislation. In all reality, a DNA-upon-arrest law will likely get passed in New York since similar laws have been passed in fifteen other states in 2008 alone, and therefore, collecting DNA at birth definitely seems like a more economically feasible endeavor.¹¹⁰ Furthermore, the potential benefits of such a system would outweigh the high cost, because it would lead to reduced expenditures in other areas of law enforcement.¹¹¹ Since such a program is likely to both deter criminal acts and solve other crimes at a much higher rate, it would lead to a decrease in costs associated with criminal investigations, prosecutions, and imprisonments.¹¹² Since DNA evidence often provides conclusive proof of criminality, time and money spent on other modes of investigation and prosecution would be greatly reduced.¹¹³

CONCLUSION

As federal and state governments are continuing to propose and enact legislation that would expand the current compulsory DNA collection laws, more cases are being brought before our courts to determine their constitutionality. It only seems natural that in the future a proposal for DNA collection at birth will be seriously considered. Although such a system initially seems very controversial, it is necessary for people to keep an open mind and consider the potential benefits such a system would present to our society. In order for the wonderful capabilities of our advanced DNA technology to be truly put to use, samples should be collected from every citizen shortly after birth.

¹¹⁰ See Nat'l Conf. of St. Legislatures, *supra* note 1; Moore, *supra* note 5.

¹¹¹ John P. Cronan, *The Next Frontier of Law Enforcement: A Proposal for Complete DNA Databanks*, 28 AM. J. CRIM. L. 119, 154 (2009); see Klein, *supra* note 2.

¹¹² Cronan, *supra* note 112, at 154; see generally Moore, *supra* note 5.

¹¹³ Cronan, *supra* note 112, at 154. "Complete databanks would solve many crimes almost instantaneously, making other costly investigative techniques, such as police interrogations, witness interviews, line-ups, and non-DNA laboratory tests, extraneous. Similarly, because these crimes would be solved so quickly, investigations would require less time and resources, thereby relieving the department's budget." *Id.*