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# COMPULSORY DNA COLLECTION AND A JUVENILE'S BEST INTERESTS

Kevin Lapp\*

## INTRODUCTION

The federal government and every state but Hawai'i mandates DNA collection from juveniles<sup>1</sup> as a result of some contact with the criminal justice system.<sup>2</sup> A criminal conviction, an adjudication of juvenile delinquency, or an arrest can all trigger mandatory DNA collection. Seized DNA samples are analyzed to produce a DNA profile that is entered into a searchable database through which law enforcement matches individuals and crime scene DNA evidence.<sup>3</sup> A main justification for compulsory DNA collection from juveniles has been the claim that it deters recidivism and promotes rehabilitation.<sup>4</sup> The enacting legislation in several states, for example, includes a finding that DNA databasing is “an important tool in deterring recidivist acts.”<sup>5</sup> Courts have likewise identified “*the fact that*

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<sup>1</sup> Throughout this article, I use “child”, “children”, “juvenile”, and “youth” interchangeably to mean individuals under the age of 18, fully aware that in some states juvenile court jurisdiction cuts off at 16 or 17, and that psychosocial research and developmental science indicate that a person’s brain is not fully developed until the mid-twenties. ELIZABETH SCOTT AND STEINBERG, RETHINKING JUVENILE JUSTICE 44 (2008); Brief for the American Medical Association, et al. as Amici Curiae, at 13-16, *Graham v. Florida*, 560 U.S. 48 (noting that frontal cortex not fully developed until early adulthood).

<sup>2</sup> JULIE E. SAMUELS, ET. AL., COLLECTING DNA FROM JUVENILES, iii (2011) (“every state except Hawaii collects DNA from some category of juveniles . . .”).

<sup>3</sup> See Erin Murphy, *Relative Doubt: Familial Searches of DNA Databases*, 109 MICH. L. REV. 291, 294-97 (2010).

<sup>4</sup> Natalie Ram, *Fortuity and Forensic Familial Identification*, 63 STAN. L. REV. 751, 790 (2011) (“In upholding statutes compelling database inclusion for convicted offenders against Fourth Amendment claims, courts have relied on two rationales: prisoners’ diminished expectations of privacy, and states’ interests in having accurate tools of identification and preventing recidivism.”).

<sup>5</sup> See, e.g., NEB. REV. STAT. § 29-4102 (2010) (“The Legislature finds that DNA data banks are an important tool . . . in deterring and detecting recidivist acts”); LA. REV. STAT. ANN. § 15:602 (1999); R.I. GEN. LAWS ANN. § 12-1.5-2 (1998); N.J.

collection and storage of DNA . . . *has a deterrent and rehabilitative effect*” in upholding the constitutionality of compelled DNA collection from juveniles.<sup>6</sup> DNA collection has also been said to “aid,” “advance” and “further” the deterrent and rehabilitative goals of the juvenile court,<sup>7</sup> and found consistent with the juvenile court’s role as a “protecting parent.”<sup>8</sup> In short, legislatures and courts believe compulsory DNA collection from juveniles to be in the best interests of children.

There is little empirical evidence, however, that compulsory DNA collection deters people from committing crimes or fosters their rehabilitation. While some researchers have found a small reduction in recidivism attributable to deterrence for some offense categories, others insist that no empirical evidence supports the claim that DNA databases deter crime.<sup>9</sup> Whatever specific deterrence DNA databasing may achieve is certainly diminished with respect to juveniles, who are less deterrable than adults.<sup>10</sup> The paucity of evidence for a deterrent

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STAT. ANN. § 53:1-20.28 (1994); ARK. CODE. ANN. § 12-12-1102 (1997); 44 PA. STAT. ANN. § 2302 (2005).

<sup>6</sup> *In re Lakisha M.*, 882 N.E.2d 570, 579 (Ill. 2008) (emphasis added).

<sup>7</sup> *In re Calvin S.*, 58 Cal. Rptr. 3d 559, 563 (Cal. Ct. App. 2007) (the rehabilitative goal of the juvenile court is “aided by DNA testing of juvenile felons”); *Lakisha*, *supra* note 6, at 579 (DNA collection from juveniles “advances, rather than conflicts with, the [deterrence and rehabilitative] goals of our Juvenile Court Act.”); In the Matter of Appeal in Maricopa Cnty. Juvenile Action Nos. JV-512600 & JV-512797, 930 P.2d 496, 501-02 (Ariz. Ct. App. 1996) (DNA collection “further[s] the protective and rehabilitative goals of the juvenile court”).

<sup>8</sup> *Maricopa Cnty.*, *supra* note 7, at 501-02.

<sup>9</sup> *Cf.*, SHELDON KRIMSKY AND TONIA SIMONCELLI, GENETIC JUSTICE: DNA DATA BANKS, CRIMINAL INVESTIGATIONS, AND CIVIL LIBERTIES 148 (2011) (“currently there is no empirical evidence to support the often-stated claim that DNA databases deter crime”); *compare with*, AVINASH BHATI, QUANTIFYING THE SPECIFIC DETERRENT EFFECTS OF DNA DATABASES, 57 (2010) (finding 2-3% reductions in recidivism risk attributable to deterrence for robbery and burglary as a result of DNA databasing, but increases in recidivism risk attributable to deterrence for other crime categories).

<sup>10</sup> *Roper v. Simmons*, 543 U.S. 551, 571 (2005) (“the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence”); Christopher Slobogin and Mark R. Fondacaro, *Juvenile Justice: The Fourth Option*, 95 IOWA L. REV. 1, 44 (2009) (“compared to older individuals, adolescents are less risk-averse, more prone to give into peer pressure, less likely to have a stake in life, more present-oriented, less likely to have perspective, and more likely to rush to judgment. All of these traits tend to produce

effect in general, together with juveniles' lesser deterrability, undermine the best-interest rationale for collecting DNA from juveniles. Indeed, to the extent that criminal justice contact has a criminogenic effect on juveniles,<sup>11</sup> making it easier to catch young offenders more quickly and more often (which DNA databasing most certainly does),<sup>12</sup> DNA collection from juveniles could produce unintended, perverse consequences.

Developmental science has played an important role in reshaping criminal justice policy toward juveniles in the last decade. Most notably, the Supreme Court decided a quartet of cases that insist that age matters in the application of criminal law and constitutional rights.<sup>13</sup> Adolescent brain science and psychosocial research played a prominent role in those cases, providing an empirical footing for the idea that children are different from adults and require more protective rules that account for their immaturity and vulnerability. Consistent with this jurisprudence, this Article marshals the evidence regarding juvenile's lesser deterrability to outline a developmental critique of DNA collection from juveniles.

But this Article seeks to go a bit further. It argues that the basis for treating children differently from adults does not reside solely, or

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offenders for whom the deterrent force of the criminal law is likely to be, literally, an afterthought").

<sup>11</sup> Tamar R. Birkhead, *Delinquent by Reason of Poverty*, 38 WASH. U. J.L. & POL'Y 53, 97 (2012) (discussing studies finding criminogenic effect of juvenile court processing); ANTHONY PETROSINO ET AL., FORMAL SYSTEM PROCESSING OF JUVENILES: EFFECTS ON DELINQUENCY, (Campbell Systematic Reviews, 2010) (finding in a comprehensive meta-analysis that juvenile system processing appears not to have a crime control effect but instead appears to increase delinquency across all measures).

<sup>12</sup> See Bhati, *supra* note 9, at 50 ("offenders who have their DNA recorded in a database are likely to be rearrested and reconvicted quicker than" those who were not subject to DNA collection).

<sup>13</sup> *Roper*, 543 U.S. at 551 (unconstitutional to impose capital punishment for crimes committed by someone under the age of eighteen); *Graham v. Florida*, 130 S. Ct. 2011, 2012 (2010) (outlawing life without parole sentences for individuals who committed non-homicide crimes under the age of eighteen); *Miller v. Alabama*, 132 S.Ct. 2455, 2463 (2012) (mandatory life without parole sentences for juveniles violate the Eighth Amendment). That children are different from adults and require different rules is not limited to sentencing; See *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2402 (2011) (age is a relevant factor when deciding whether an individual is in custody for purposes of providing a Miranda warning).

even predominantly, in science.<sup>14</sup> Childhood is more complicated than that. Its contours are not necessarily set by empirical facts or common sense.<sup>15</sup> In the last two decades, childhood studies scholars have critically explored the role of childhood in society.<sup>16</sup> Writing predominantly in the fields of sociology, history, and education, these scholars have shown that in addition to being a natural fact, childhood is a social construct.<sup>17</sup> It is the product of our collective imagination, reflecting prevailing societal priorities and aspirations.

Like other social constructs, childhood is a category that is “defined, maintained, and regulated by law.”<sup>18</sup> Careful attention to the conception of childhood can, and should, shape how the criminal law regulates children. Few legal scholars, however, have critically explored the implications of childhood as a social construct for the applicability of legal principles to children.<sup>19</sup> Frank Zimring’s path–

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<sup>14</sup> Annette Ruth Appell, *Accommodating Childhood*, 19 CARDOZO J. L. & GENDER 715, 736 (2013) (“Developmental facts do not dictate the contours or boundaries of childhood. Ideology does.”); See Emily Buss, *What the Law Should (and Should Not) Learn from Child Development Research*, 38 HOFSTRA L. REV. 13, 34 n.96, 37–48, 49 & n.144 (2009) (arguing that the law should not “assign rights and responsibilities” in lockstep with “assessments of children’s capacities documented in the scientific research.”).

<sup>15</sup> *J.D.B.*, 131 S. Ct. at 2407 (“officers and judges need no imaginative powers, knowledge of developmental psychology, training in cognitive science, or expertise in social and cultural anthropology to account for a child’s age. They simply need the common sense to know that a 7–year–old is not a 13–year–old and neither is an adult.”).

<sup>16</sup> Barrie Thorne, *Crafting the Interdisciplinary Field of Childhood Studies*, 14 CHILDHOOD 147, 149–50 (2007).

<sup>17</sup> Chris Jenks, *Introduction: Constituting the Child*, in THE SOCIOLOGY OF CHILDHOOD: ESSENTIAL READINGS 10–12 (Chris Jenks ed., 1982); Annette Ruth Appell, *The Pre–Political Child of Child–Centered Jurisprudence*, 46 HOUS. L. REV. 703, 704 (2009) (“childhood . . . is a social construct that is contingent upon time and place”); Beth Colgan, *Constitutional Line Drawing at the Intersection of Childhood and Crime*, 9 STAN. J. C.R. & C.L. 79, 81 (2013) (the divisions between juveniles and adults are “social constructions based on public perceptions regarding the maturity of juveniles to engage in or be responsible for a given action”).

<sup>18</sup> DAVID ARCHARD, CHILDREN: RIGHTS AND CHILDHOOD 33 (2d ed. 2004); Appell, *supra* note 14, at 735.

<sup>19</sup> Appell, *supra* note 14, at 715 (“the legal academy has bestowed scant critical examination on the category of childhood”); Annette Ruth Appell, *The Pre–Political Child of Child–Centered Jurisprudence*, 46 HOUS. L. REV. 703, 726 (2009) (Child–centered jurisprudence has typically “not taken on, in a systematic way, structural

breaking and critical scholarship on juvenile justice has done so for years, without the imprimatur of “childhood studies.”<sup>20</sup> Currently, Annette Ruth Appell is leading the way in bringing the insights and approach of childhood studies to the law, though she has yet to explore the relationship between the concept of childhood and the criminal law at any length.<sup>21</sup> Further engagement with childhood studies amongst children’s rights advocates and scholars will deepen our understanding of the role, and proper shape, of a distinct juvenile justice regime.

This Article seeks to further this important conversation. It identifies the prevailing conception of childhood (as a separate, protected space for those whose development must be guarded and promoted), and explains the role that this conception has in shaping criminal justice policy regarding juveniles. Simply put, the modern conception of childhood demands (even more powerfully, perhaps, than the findings of adolescent brain science) that we not subject juveniles to compulsory DNA collection for purposes of databasing. At the very least, the aggregate collection of genetic data from juveniles cannot be justified as being in their best interests.

The Article focuses on DNA collection following an adjudication of delinquency because of the resonance between the conception of childhood and the juvenile court, which was created to ensure that juveniles were treated separately from and differently than adults.<sup>22</sup> Part I shows how legislatures and courts have embraced an

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questions about why and how the law creates and defines childhood, what purposes this designation serves, and why children are domesticated.”).

<sup>20</sup> FRANKLIN E. ZIMRING, *AMERICAN JUVENILE JUSTICE* (2005); FRANK ZIMRING, *THE CHANGING BORDERS OF JUVENILE JUSTICE*, (1982). *See also* Barbara Bennett Woodhouse, *Youthful Indiscretions: Culture, Class Status, and the Passage to Adulthood*, 51 *DEPAUL L. REV.* 743, 743 (2002) (critically exploring the notion of childhood behind the regulation of youth crime, describing an American tendency to differentiate between our own and other people’s children, and excuse the mistakes of our own offspring while labeling other people’s children as delinquents or criminals).

<sup>21</sup> Appell, *supra* note 14, at 769–70 (offering preliminary thoughts in a short section on “youthful offenders”); Appell, *supra* note 17, at 726.

<sup>22</sup> Miriam Van Waters, *Youth In Conflict*, in *THE CHILD, THE CLINIC, AND THE COURT* 217 (1925) (the juvenile court “came into the world to prevent children from being treated as criminals.”); Franklin E. Zimring, *The Punitive Necessity of Waiver*, in *THE CHANGING BORDERS OF JUVENILE JUSTICE* 209–10 (Jeffrey Fagan & Franklin E. Zimring eds., 2000) (the policy of juvenile court is to punish offenders without

empirically unsupportable notion of juveniles' best interests with regard to compulsory DNA collection. Part II then introduces the conception of childhood and the critical role it can and should play in setting juvenile justice policy.

### I. DNA COLLECTION FROM DELINQUENTS

The federal government and 49 states compel DNA collection from juveniles as a result of contact with the criminal justice system.<sup>23</sup> A criminal conviction, an adjudication of juvenile delinquency, or an arrest can all trigger mandatory DNA collection.<sup>24</sup> This Part details the law on DNA collection following a delinquency adjudication in juvenile court. It identifies a best-interest justification present in the animating legislation and case law upholding the practice, grounded in a belief in DNA collection's deterrent and rehabilitative effect on juveniles. It then shows that there is little empirical evidence for such a claim. The available evidence, in fact, more strongly supports the contrary idea that DNA collection has no deterrent or rehabilitative effect on juveniles. It is possible, in fact, that DNA collection increases recidivism and negatively impacts the life-course of juveniles.

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permanently destroying long-term life chances and developmental opportunities). In a forthcoming work, I critically analyze DNA collection from juveniles as a consequence of criminal convictions and arrest, as well as DNA obtained from juveniles via consent. Kevin Lapp, *As Though They Were Not Children: DNA Collection from Juveniles*, 89 *Tulane L. Rev.* -- (forthcoming 2014).

<sup>23</sup> JULIE E. SAMUELS, ET. AL., COLLECTING DNA FROM JUVENILES, iii (2011); 42 U.S.C. § 14135a (2006); 28 C.F.R. § 28.12 (2006) (mandating the collection of DNA from anyone arrested for or facing federal charges, regardless of the charge).

<sup>24</sup> Law enforcement increasingly collects genetic samples via consent-based cheek swabs, sometimes in exchange for dropping or reducing charges. See Elizabeth N. Jones and Wallace Wade, *'Spit and Acquit': Legal and Practical Ramifications of the DA's DNA Gathering Program*, ORANGE COUNTY LAWYER MAGAZINE, Vol. 51, No. 9, September 2009 (describing program that provides for the dismissal of felony drug charges if the individual voluntarily provides law enforcement with a genetic sample for purposes of DNA profiling); Andria Borba, *Police Collect DNA from Middle-Schoolers in Murder Investigation*, L.A. TIMES, Apr. 12, 2012, <http://latimesblogs.latimes.com/lanow/2012/04/police-collect-dna> (describing detectives' visit to Sacramento County middle-school to obtain DNA from juveniles, on their consent, in connection with a murder investigation).

Thirty states and the federal government compel DNA collection from juveniles based on a finding of juvenile delinquency. Federal law has the broadest DNA collection scheme. It mandates DNA collection from anyone (including juveniles) arrested, facing charges or convicted, regardless of the charge.<sup>25</sup> Because federal DNA collection law does not distinguish between cases handled as a criminal or delinquent matter,<sup>26</sup> and because federal law does not require a conviction before DNA collection is required, it does not matter to federal DNA collection whether a juvenile is charged as an adult and found guilty or charged with delinquency. Either way, federal law subjects any juvenile charged or convicted in federal court to compulsory DNA collection.

State laws vary in the scope of their collection from juveniles following an adjudication of delinquency. Of the thirty states that collect DNA from juveniles processed in the juvenile justice system,<sup>27</sup> twenty-five collect from those juveniles adjudicated delinquent for legally specified qualifying offenses regardless of the punishment

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<sup>25</sup> 42 U.S.C. § 14135a(a)(1)(A) (2006). Federal law initially prohibited DNA profiles of arrestees from being placed in CODIS. 42 U.S.C. § 14132(a)(1)(C) (2000) (amended 2006). In 2006, Congress significantly expanded DNA collection authorization to include arrestees. Adam Walsh Child Safety and Protection Act of 2006, Pub. L. No. 109–248, § 155, 120 Stat. 587, 611 (2006) (codified as amended at 42 U.S.C. § 14135a(a)(1)(A) (2006)). The Department of Justice issued a final rule in 2008 that directs federal agencies to collect DNA samples from individuals (including juveniles) who are arrested, facing charges, or convicted, regardless of the underlying charge or offense. 28 C.F.R. § 28.12(b) (2011). The final rule was effective January 9, 2009. 28 C.F.R. § 28.12(c).

<sup>26</sup> Contrary to popular assumption, there are federal delinquency matters. The Federal Juvenile Delinquency Act provides that federal courts can handle cases involving acts committed by those under 18 provided that the U.S. attorney certifies to the U.S. District Court that (1) the juvenile court or court of a state does not have jurisdiction or refuses to assume jurisdiction, (2) the state does not have available programs or services adequate for the needs of the juveniles, or (3) the offense charged is a felony crime of violence or specified drug offense and there is substantial federal interest in the case. 18 U.S.C. § 5032 (2006).

<sup>27</sup> Alabama, Alaska, Arkansas, Arizona, California, Colorado, Florida, Illinois, Iowa, Kansas, Louisiana, Ohio, Oregon, Pennsylvania, Massachusetts, Minnesota, Kentucky, Maine, Michigan, Montana, New Hampshire, New Jersey, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, Wisconsin. This excludes states that have “Youthful Offender” laws if the juvenile is processed exclusively in state criminal court.

imposed.<sup>28</sup> Five states require a qualifying adjudication plus a qualifying sentence.<sup>29</sup> Twenty states collect following an adjudication for any felony offense,<sup>30</sup> with sixteen of those collecting for additional select misdemeanors.<sup>31</sup> Ten collect for select felony adjudications,<sup>32</sup> with five of those collecting for additional select misdemeanors.<sup>33</sup> All told, twenty-one states mandate DNA collection from juveniles adjudicated delinquent for certain misdemeanors.<sup>34</sup>

#### DNA Collection Following Adjudication of Delinquency

|                    | <b>Felony Adjudication</b>                                 | <b>Misdemeanor Adjudication</b>    |
|--------------------|--|------------------------------------|
| <b>Federal Law</b> | All felonies   | All misdemeanors                   |
| <b>State Law</b>   | 20 states = all felonies<br>10 states = subset of felonies | 21 states for certain misdemeanors |

DNA collection from juveniles adjudicated delinquent either tracks collection from adults convicted in criminal court, or is narrower.<sup>35</sup>

<sup>28</sup> Alabama, Alaska, Arkansas, Arizona, Colorado, Florida, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Montana, New Hampshire, Ohio, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah, Virginia, Washington, and Wisconsin.

<sup>29</sup> California, Illinois, Massachusetts, New Jersey, and Texas.

<sup>30</sup> Alaska, Arizona, California, Colorado, Florida, Illinois, Iowa, Kansas, Louisiana, Massachusetts, Minnesota, Ohio, Oregon, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Washington, Virginia.

<sup>31</sup> Alaska, Arizona, California, Colorado, Florida, Illinois, Iowa, Kansas, Louisiana, Ohio, Oregon, Pennsylvania, South Carolina, South Dakota, Utah, Washington.

<sup>32</sup> KY. REV. STAT. § 17.170 (West 2009); ME. REV. STAT. tit. 25 § 1574 (2012); MICH. COMP. LAWS ANN. § 803.225a (West 1997); N.H. REV. STAT ANN. § 651-C:2 (West 2010); N.J. STAT. ANN. § 53:1-20.20 (West 2013); ALA. CODE § 36-18-25 (West 2009); ARK. CODE ANN. § 12-12-1006 (West 2011); MONT. CODE ANN. § 44-6-103 (West 1995); TENN. CODE ANN. § 40-35-321 (West 1995); WIS. STAT. ANN. § 973.047 (West 2010).

<sup>33</sup> KY. REV. STAT. § 17.170 (West 2009); MICH. COMP. LAWS ANN. § 803.225a (West 1997); N.H. REV. STAT ANN. § 651-C:2 (2010); N.J. STAT. ANN. § 53:1-20.20 (West 2013).

<sup>34</sup> Most are sexual or violent offenses. See SAMUELS, *supra* note 23, at 7 Fig. 1 (26 states list sexual offenses as qualifying offense, 13 states list violent offenses, and 6 states list property offenses).

<sup>35</sup> For several years, Wisconsin uniquely permitted a DNA collection regime from juveniles that was, in one regard, broader than DNA collection from adults. The

For example, Florida makes no distinction in its treatment of adults and juveniles, requiring DNA collection from “any person, including juveniles and adults” arrested for, convicted of or found delinquent of a felony offense.<sup>36</sup> California’s DNA collection law treats equally adults and juveniles convicted of or adjudicated delinquent for any felony offense, but exempts juveniles from the law’s collection mandate for those arrested or charged with any felony offense.<sup>37</sup> Hawai’i stands alone in completely exempting juveniles from compulsory DNA collection.<sup>38</sup>

There is no available data on how many juveniles have been compelled to provide a genetic sample for purposes of DNA profiling. A back-of-the-envelope estimate can be made based on a variety of figures. According to a 2011 Urban Institute report, ten states that provided data had a total of over 121,000 DNA profiles as of the end of 2008 that came from individuals who were juveniles at the time of collection, representing 6.2% of all DNA profiles uploaded by these states.<sup>39</sup> Taking that ratio as a baseline, 6.2% of the current CODIS DNA profile database would be approximately 800,000 juvenile profiles.<sup>40</sup>

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Wisconsin statute required a juvenile adjudicated delinquent of fourth-degree sexual assault to provide a DNA sample even though neither adults nor juveniles waived into adult court and convicted of the same offense are required to provide a DNA sample. *In re S.M.L.*, 705 N.W.2d 906, \*5 (Wis. Ct. App. 2005) (rejecting an Equal Protection challenge to the state’s DNA collection law which mandates collection for juveniles convicted of a certain misdemeanor sex offense but did not compel collection from adults or juveniles waived into criminal court who were convicted of the same offense because the “state’s authority to control children is greater than the scope of its authority over adults”). The law was amended in 2005 to treat juveniles and adults the same. WIS. STAT. ANN. § 938.34 (West 2005).

<sup>36</sup> FLA. STAT. ANN. § 943.325 (West 2013) (defining “qualifying offender” as “any person, including juveniles and adults” arrested for, convicted of or found delinquent of a felony offense in Florida or any similar offense in another jurisdiction).

<sup>37</sup> CAL. PENAL CODE ANN. § 296 (West 2004).

<sup>38</sup> HAW. REV. STAT. § 844D-31 (LEXIS 2006) (“Any person, except for any juvenile, who is convicted of, or pleads guilty or no contest to, any felony offense . . . shall provide buccal swab samples . . .”).

<sup>39</sup> See SAMUELS, *supra* note 23, at 17.

<sup>40</sup> *CODIS-NDIS Statistics*, LABOR SERVICES (Jan. 2014), <http://www.fbi.gov/about-us/lab/biometric-analysis/codis/ndis-statistics> (indicating 10,971,392 offender profiles, 1,892,952 arrestee profiles and 559,705 forensic profiles as of May 2014 in the National DNA Index System).

An estimate of how many juveniles are subject to compulsory DNA collection annually can also be made from a variety of data sources. The number of federal delinquency matters is quite small. According to one recent study, federal courts handled 152 juveniles in 2008, and 156 juveniles were admitted to federal prison jurisdiction in 2008.<sup>41</sup> States, however, are the biggest suppliers of DNA profiles. Some estimate that 200,000 youth under 18 are charged in criminal court per year, with approximately 100,000 of those charges resulting in convictions.<sup>42</sup> The number of juveniles processed in juvenile courts nationwide is much larger. In 2008, courts with juvenile jurisdiction handled an estimated 1.65 million delinquency cases.<sup>43</sup> Even if only five percent of those juveniles are required to provide a DNA sample, that would mean over 80,000 juveniles each year. Should DNA collection from arrestees continue to spread to more states,<sup>44</sup> the potential numbers of juveniles subject to DNA collection would increase exponentially. In 2012, almost one million arrests of persons under age 18 were made in the United States.<sup>45</sup> All told, as many as several hundred thousand juveniles could, each year, be required to provide a genetic sample for purposes of DNA profiling.

Legislatures and courts have identified several rationales for compelling juveniles adjudicated delinquent to provide a DNA sample. Among them are the claim that DNA collection and profiling

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<sup>41</sup> MARK MOTIVANS & HOWARD SNYDER, SUMMARY: TRIBAL YOUTH IN THE FEDERAL JUSTICE SYSTEM 1 (U.S. Dep't of Justice: Bureau of Justice Statistics, 2011). Federal law also compels collection from anyone arrested.

<sup>42</sup> THE IMPACT OF PROSECUTING YOUTH IN THE ADULT CRIMINAL JUSTICE SYSTEM: A REVIEW OF THE LITERATURE 2 (UCLA School of Law Juvenile Justice Project, 2010) (citing Jennifer L. Woolard et al., *Juveniles within Adult Correctional Settings: Legal Pathways and Developmental Considerations*, 4 INT'L J. OF FORENSIC MENTAL HEALTH 1, 4 (2005)). David Chura, *Prison is No Place to Grow Up: Why Every State Must Enact Juvenile Justice Reforms*, YOUTHtoday. (Oct. 28, 2013), [http://www.youthtoday.org/view\\_blog.cfm?blog\\_id=770](http://www.youthtoday.org/view_blog.cfm?blog_id=770).

<sup>43</sup> JUVENILE COURT STATISTICS: 2008 6 (2011) (noting that juveniles court cases are up 43% since 1985, though down 12% from the peak of almost 1.9 million in 1997).

<sup>44</sup> This is likely following the Supreme Court's ruling in *Maryland v. King*, 133 S.Ct. 1 (2012) which upheld the constitutionality of compulsory pre-conviction DNA collection.

<sup>45</sup> *Uniform Crime Report*, CRIME IN THE UNITED STATES Tab. 36 (2012), <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s./2012/crime-in-the-u.s.-2012/tables/36tabledatadecoverviewpdf>.

serves the governmental purpose of accurately and efficiently identifying the person whose genetic material is seized,<sup>46</sup> and that it helps solve crime.<sup>47</sup> This Article focuses on the claim that DNA collection from juveniles adjudicated delinquent is in their best interest because it deters them from reoffending, thus promoting their rehabilitation.

The “best interests of the child” standard was born in the English common law.<sup>48</sup> It is “rooted in the concept of *parens patriae* and the authority of the state to protect those unable to protect themselves.”<sup>49</sup> Predominant in the child welfare and custody context, the best interest of the child standard puts concern for the welfare of the child (her physical, mental, social and moral well-being) at the center of the government’s intervention in a juvenile’s life.<sup>50</sup> The standard was the centerpiece of the juvenile court, which was created at the beginning of the twentieth century to handle juvenile matters separately from adults in a manner that promotes the best interests of children.<sup>51</sup>

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<sup>46</sup> See, e.g., *State ex rel. Juvenile Dept. of Multnomah Cnty. v. Orozco*, 878 P.2d 432, 435 (Or. 1994) (DNA collected “to record the immutable characteristics of arrestees and offenders for use in the investigation of future crimes.”).

<sup>47</sup> See, e.g., *Petitioner F. v. Brown*, 306 S.W.3d 80, 89 (Ky. 2010) (DNA database is “an investigative tool designed to provide law enforcement with additional information . . . to assist police in solving crimes where the perpetrator left DNA evidence.”).

<sup>48</sup> Julia Halloran McLaughlin, *The Fundamental Truth About Best Interests*, 54 ST. LOUIS U. L.J. 113, 119 (2009) (citing *Blissetts Case*, (1774) 98 Eng. Rep. 889, 898 (K.B.) (awarding custody to mother because it was “best for the child”).

<sup>49</sup> *Id.* at 125. “*Parens patriae*” means the role of the state as sovereign and guardian of persons unable to care for themselves, such as juveniles. BLACK’S LAW DICTIONARY 1221 (9th ed. 2009).

<sup>50</sup> JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA 676 (Melvin M. Biglow ed., 13th ed. 1886) (“Parents are entrusted with the custody of the persons and then education of their children, yet this is done upon the natural presumption that the children will be properly taken care of . . . and that they will be treated with kindness and affection . . . . But whenever . . . a father . . . acts in a manner injurious to the morals or interests of his children—in every case, the Court of Chancery will interfere”).

<sup>51</sup> See TANENHAUS, *The Evolution of Transfer Out of the Juvenile Court*, in THE CHANGING BORDERS OF JUVENILE JUSTICE, *supra* note 22, at 18 (noting that the juvenile court was concerned with the social welfare of children, not assignment of criminal responsibility, and “used the doctrine of *parens patriae* to argue that benevolent state treatment of children was in their best interest”).

The best interest standard is frequently criticized as indeterminate, easily manipulated and subject to unconscious cultural biases.<sup>52</sup> Critics view it as justifying state intervention and argue that it is often employed to serve adult interests in the name of child interests.<sup>53</sup> Indeed, the freedom and discretion that the best-interest standard granted to juvenile court judges explained much of the sorry shape the juvenile court had taken by the 1960s. Taking its first look at a juvenile court in the mid-1960s, the Supreme Court described it as “the worst of both worlds” – offering juveniles “neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.”<sup>54</sup>

Despite the widespread and long-standing criticism of the best interest standard, it remains at the center of juvenile court decision-making.<sup>55</sup> As a result, it is no surprise that legislation and case law regarding compulsory DNA collection from juveniles adjudicated delinquent in juvenile court frame the practice as being in the best interests of juveniles. A careful look at just what legislators and judges

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<sup>52</sup> Robert Mnookin & R. Swed, *The Best Interests Syndrome and the Allocation of Power in Child Care*, in PROVIDING CIVIL JUSTICE FOR CHILDREN 8 (H. Geach & E. Swed, eds., 1983) (criticizing the best interest standard as “flawed because what is ‘best for any child . . . is often indeterminate and speculative and requires a highly individualized choice between alternatives.”); Jon Elster, *Solomonic Judgments: Against the Best Interests of the Child*, 54 U. CHI. L. REV. 1, 7 (1987) (calling the best interest standard indeterminate, unjust, and subject to public policy concerns); (calling the best interest standard indeterminate, unjust, and subject to public policy concerns); Pamela Laufer-Ukles, *Selective Recognition of Gender Difference in the Law: Revaluating the Caretaker Role*, 31 HARV. J.L. & GENDER 1, 19 (2008) (noting that best interest considerations are “extremely broad and allow for the expression of particular judicial prejudice”).

<sup>53</sup> Appell *supra* note 14, at 718–19, (noting “this nation’s long and ongoing history of substituting state interests for the wishes and interests of children” and explaining how the best interest standard “enhances state power when it deploys children’s interests to justify individually targeted and coercive intervention into the lives of poor and minority children and their families”); ANTHONY PLATT, *THE CHILD SAVERS: THE INVENTION OF DELINQUENCY* xliii, 3 (40th Anniv. Ed. 2009) (aiming to “destroy the myth that the child-saving movement was successful” and arguing that the Progressives “helped to create special judicial and correctional institutions for the labeling, processing and management of ‘troublesome’ youth” that “subjected more and more juveniles to arbitrary and degrading punishments.”).

<sup>54</sup> *Kent v. United States*, 383 U.S. 541, 556 (1966).

<sup>55</sup> See, e.g., N.Y. FAMILY COURT ACT LAW § 301.1 (McKinney 1983) (“in any proceeding under this article, the court shall consider the needs and best interests of the respondent as well as the need for protection of the community.”).

mean when they claim that compulsory DNA collection serves juveniles' best interests reveals the emptiness, if not the erroneousness, of the claim.

There are two components to the best interest justification for collecting DNA from juveniles: deterrence and rehabilitation. The enacting legislation in several states includes, for example, a finding that DNA databasing is "an important tool in deterring recidivist acts."<sup>56</sup> Courts frequently assert the same. The Ninth Circuit recently declared that the "mere existence of the DNA database creates a strong deterrent effect."<sup>57</sup> Likewise, the Illinois Supreme Court, without reference to any empirical evidence, heralded "*the fact* that collection and storage of DNA pursuant to our indexing statute *has a deterrent and rehabilitative effect*" in upholding compulsory DNA collection from juveniles adjudicated delinquent.<sup>58</sup> The court then concluded that DNA collection from juveniles "advances, rather than conflicts with, the [deterrence and rehabilitative] goals of our Juvenile Court Act."<sup>59</sup> A Wisconsin court found that DNA profiling of juveniles "respond[s] to juvenile offender's needs for care and treatment, consistent with the prevention of delinquency."<sup>60</sup> In the most paternalistic decision, an Arizona appeals court characterized DNA databasing as consistent with the court's role as a "protecting parent" because it "works in

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<sup>56</sup> See, e.g., NEB. REV. STAT. § 29-4102 (1997) ("The Legislature finds that DNA data banks are an important tool . . . in deterring and detecting recidivist acts"); LA. REV. STAT. ANN. § 15:602 (1999) (same); R.I. GEN. LAWS ANN. § 12-1.5-1 (2002) (same); N.J. STAT. ANN. § 53:1-2 (Westlaw 1994) (same); ARK. CODE. ANN. § 12-12-1102 (1997) (same); 44 PA. STAT. ANN. § 2302 (West 2005) (same).

<sup>57</sup> *Haskell v. Harris*, 669 F.3d 1049, 1064, *reh'g en banc granted* 686 F.3d 1121 (9th Cir. 2012). The First and Third Circuits have likewise declared that the collection of DNA "indirectly promote[s] the rehabilitation of criminal offenders by deterring them from committing crimes in the future." *United States v. Weikert*, 504 F.3d 1, 13 (1st Cir. 2007) (citing *United States v. Sczubelek*, 402 F.3d 175, 176 (3d Cir. 2005)).

<sup>58</sup> *In re Lakisha M.*, 822 N.E.2d 570, 581 (Ill. 2008) (emphasis added).

<sup>59</sup> *Id.* at 579; see also *In re Calvin S.*, 58 Cal Rptr. 3d 559, 563 (Cal. App. 2007) (the rehabilitative goal of the juvenile court is "aided by DNA testing of juvenile felons").

<sup>60</sup> *In re S.M.L.*, 287 Wis.2d 829, \*4 (2005).

concert” with “the protection, treatment and guidance of children” by deterring future crime.<sup>61</sup>

But what precisely do legislators and courts mean when they say that DNA databasing has a deterrent and rehabilitative effect? And is there evidence to support such a claim? The supposed rehabilitative impact of DNA collection can be dealt with quickly. As used by courts and legislators, rehabilitation does not describe anything separate from deterrence. Instead, they conflate rehabilitation with deterrence. For example, in ruling compulsory DNA collection following an adjudication of delinquency constitutional, the Oregon Supreme Court declared that “deterrence is an integral part of rehabilitation.”<sup>62</sup>

Rehabilitation potentially describes something different from deterrence. Where deterrence operates to influence behavior out of knowledge of potential consequences,<sup>63</sup> rehabilitation has broader aims. It seeks to help individuals make better choices irrespective of the punishment consequences of those choices.<sup>64</sup> But there is nothing about DNA collection apart from deterrence that helps juveniles make better choices. Having their DNA in a government database searchable nationwide by law enforcement agencies does not help juveniles better identify right from wrong. Therefore, it does not make sense to consider rehabilitation as a distinct justification for compulsory DNA collection. If it rehabilitates juveniles at all, it does so because it deters unlawful behavior.

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<sup>61</sup> In the Matter of Appeal in Maricopa Cnty. Juvenile Action Nos. JV-512600 & JV-512797, 930 P.2d 496, 501-02 (Ct. App. 1996) (DNA collection “further[s] the protective and rehabilitative goals of the juvenile court”).

<sup>62</sup> State *ex rel.* Juvenile Dept. of Multnomah Cnty. v. Orozco, 878 P.2d 432, 438 (“if a convicted felon knows that those ‘leavings’ will reveal his or her identity and is therefore deterred from committing a crime, the rehabilitative process has begun.”).

<sup>63</sup> VALERIE WRIGHT, DETERRENCE IN CRIMINAL JUSTICE: EVALUATING CERTAINTY VS. SEVERITY OF PUNISHMENT 2 (The Sentencing Project ed., 2010).

<sup>64</sup> Francis T. Cullen & Paul Fendreau, *Assessing Correctional Rehabilitation: Policy, Practice and Prospects*, POLICIES, PROCESS AND DECISIONS OF THE CRIMINAL JUSTICE SYSTEM 116 (quoting *Declaration of Principles adopted and promulgated by the Congress in TRANSACTIONS OF THE NATIONAL CONGRESS ON PENITENTIARY AND REFORMATORY DISCIPLINE* 541 (E.C. Wines ed., 1871) “the prisoner’s destiny should be placed, measurably, in his own hands. . . he must be put into circumstances where he will be able, through his own exertions, to continually better his own condition.”).

The deterrence argument for compulsory DNA collection consists itself of two different notions. First, the DNA database will make it easier for law enforcement to catch perpetrators whose DNA is in the database, and thus prevent their ability to commit additional crimes. This has been described as DNA collection's probative effect.<sup>65</sup> Courts have noted DNA collection's probative effect as a justification for compelling collection following a juvenile court adjudication. As the Oregon Supreme Court put it, for the juvenile justice system to succeed, "it must send a message—consistent, loud, and clear—to the youthful offenders in this state who are bent on committing serious crimes, that one of the consequences for their misdeeds is that they will be more readily identified, if they commit other misdeeds in the future."<sup>66</sup>

While no court has ever cited any, there is evidence that DNA collection makes it easier to catch lawbreakers and to do so more quickly. According to one study, the probability of reoffending and being convicted for any offense is 23.4% higher for those with a profile in the DNA database than those without.<sup>67</sup> At least one other study has found a net probative effect.<sup>68</sup> But this is both unsurprising and primarily an incapacitation argument for reducing crime, not a deterrence one.<sup>69</sup> By definition, those who DNA databasing make it

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<sup>65</sup> Bhati, *supra* note 9, at 11 (describing evidence that individuals whose profiles are in DNA databases who recidivate receive sanctions more quickly and with more certainty as the probative effect of DNA databasing).

<sup>66</sup> *Orozco*, 878 P.2d at 438 ("If the system can teach these juveniles that there are consequences to their actions, that they will be held accountable, it will have served both them and society well."); *see also In re S.M.L.*, 705 N.W.2d 906, 4 (Wis. Ct. App. 2005) ("Requiring juveniles adjudged delinquent of fourth-degree sexual assault to provide a DNA sample is rationally related to two stated goals of the Juvenile Justice Code." Protect the public and "respond to juvenile offender's needs for care and treatment, consistent with the prevention of delinquency.").

<sup>67</sup> Jennifer L. Doleac, *The Effects of DNA Databases on Crime* 16 (Dec. 2, 2012) (Frank Batten School of Leadership and Public Policy, Working Paper).

<sup>68</sup> Bhati, *supra* note 9 at 50 (finding probative effects because "offenders who have their DNA recorded in a database are likely to be rearrested and reconvicted quicker than" those who were not subject to DNA collection).

<sup>69</sup> *See In re Lakisha M.*, 882 N.E.2d 570, 574 (Ill. 2008) (DNA collection can "increas[e] public safety through either deterrence or removal of criminal offenders from the streets") (emphasis added). (quoting *People v. Garvin*, 847 N.E.2d 82, 92 (Ill. 2006)). Paul H. Robinson & John M. Darley, *Does Criminal Law Deter? A Behavioral Science Investigation*, 24 OXFORD J. LEGAL STUD. 173, 175 (2004)

easier to catch and punish for future crimes are continuing to offend, so their presence in the database did not deter them from reoffending.

The second deterrent component of DNA collection is that those in the database, knowing that they are more easily identifiable, will choose not to commit crimes they otherwise would have committed had they not been subject to DNA collection.<sup>70</sup> This is DNA collection's specific deterrent effect.<sup>71</sup> For there to be a specific deterrent effect, those subject to DNA collection should reduce their incidence of offending once their DNA profile is in the database. Given DNA collection's probative value (it increases the chances of getting caught), it is plausible that those who know they are in the database would commit fewer crimes. On this aspect of deterrence, however, the evidence is weak. According to Sheldon Krinsky and Tonia Simoncelli, scientists and authors of a recent book on DNA databasing and criminal investigations, "currently there is no empirical evidence to support the often-stated claim that DNA databases deter crime."<sup>72</sup>

Two recent studies have concluded that there is a specific deterrent effect. In 2010, Avinash Bhati authored a Justice Policy Center report that found 2–3% reductions in recidivism risk attributable to specific deterrence for robbery and burglary resulting from DNA databasing.<sup>73</sup> But Bhati also found *increases* in recidivism risk for other categories.<sup>74</sup> In a working paper, Jennifer L. Doleac asserts that the net probative effects of DNA databasing "suggests that deterrence is playing a role," but she did not make any specific deterrent calculation.<sup>75</sup> Notably, in contrast to Bhati's

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(suggesting that "much, if not most" studies which support a conclusion that doctrine affects crime rates "is the result of incapacitative rather than deterrent effects.").

<sup>70</sup> *Haskell v. Harris*, 669 F.3d 1049, 1064 (9<sup>th</sup> Cir. 2012), *reh'g granted*, 686 F.3d 1121 (9<sup>th</sup> Cir. 2012) (an individual is "less likely to commit another crime in the future if he knows that his DNA is catalogued in the State database.").

<sup>71</sup> Bhati, *supra* note 9, at 11 (specific deterrence means that individuals who would have re-offended choose not to re-offend to avoid receiving the swifter and more certain punishment brought about by DNA databasing).

<sup>72</sup> Krinsky, *supra* note 9, at 148.

<sup>73</sup> Bhati, *supra* note 9, at 7.

<sup>74</sup> *Id.* (noting increases in recidivism risk for "violent [crimes], property [crimes], and other" crimes).

<sup>75</sup> Doleac, *supra* note 68, at 17. Doleac also added that "effect of DNA profiling varies with offenders' age and criminal history", 16, and it is "unlikely that the effect

findings, Doleac found that “robbery and burglary rates are not significantly changed” by larger databases.<sup>76</sup> Moreover, that violent offenders in the DNA database were more likely to return to prison than similar offenders not in the DNA database suggested to Doleac that “the higher probability of getting caught outweighs any deterrent effect of DNA profiling.”<sup>77</sup> That is, DNA collection does a better job of *catching* those subject to it who reoffend than it does in *detering* those subject to it from reoffending.

There are several reasons why a weak, or absent, specific deterrent finding makes sense despite the intuitive appeal of the deterrence claim. One is that the law and economics, rational–actor foundation of deterrence is more theory than reality. As Paul Robinson and John Darley put it, having a criminal justice system deters, but the criminal law—the substantive rules governing the distribution of criminal liability and punishment—does not materially affect deterrence.<sup>78</sup> Another is that the deterrent effect of DNA databasing is overwhelmed or irrelevant to particular kinds of offending. Presence in a DNA database is unlikely to deter crime committed amongst those who know one another (where there will be no dispute as to the identity of the alleged assailant) or crime that occurs as a result of social, situational or chemical influences that overwhelm any cost–benefit analysis regarding violation rather than compliance.<sup>79</sup> Since these situations cover a significant bulk of crime, DNA collection is unlikely to show a deterrent effect.<sup>80</sup> Additionally, offenders may know that DNA evidence is not collected at the majority of crime scenes, and thus do not change their behavior after having their DNA profile entered into a database. Finally, some have suggested that

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[she found] will be linear as governments add more minor offenders (or non–offenders) to the database.” *Id.*, at 26.

<sup>76</sup> *Id.* at 22.

<sup>77</sup> *Id.* at 1.

<sup>78</sup> Robinson & Darley, *supra* note 70, at 173.

<sup>79</sup> *Id.* at 174 (“even if they know the legal rules and perceive a cost–benefit analysis that urges compliance, potential offenders commonly cannot or will not bring such knowledge to bear to guide their conduct in their own interests, such failure stemming from a variety of social, situational, or chemical influences.”).

<sup>80</sup> Krimsky, *supra* note 9, at 149.

DNA collection changes the way people offend via forensic avoidance practices more than it deters criminality.<sup>81</sup>

It is not just the uncertain evidence that DNA databasing provides any specific deterrent benefits that undermines the deterrence rationale for DNA collection from juveniles. Additional damage comes from the ample evidence that juveniles are, as a rule, less deterrable than adults.<sup>82</sup> As a result, whatever specific deterrent effect DNA databasing may offer is significantly diminished, if not lost entirely, with respect to juveniles.

Adolescent brain research and social scientists have demonstrated three distinguishing characteristics of adolescence that undermine the deterrent effect of criminal sanctions: risk perception, peer influence, and future discounting.<sup>83</sup> First, juveniles perceive and assess risk differently than do adults. Juveniles both seek out risky behavior, including unlawful behavior, and underestimate the riskiness of unlawful behavior by underestimating the risks of getting caught and the certainty of punishment.<sup>84</sup> Their risk-seeking tendencies and

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<sup>81</sup> Eric Beauregard & Martin Bouchard, *Cleaning Up Your Act: Forensic Awareness as a Detection Avoidance Strategy*, 38 J. CRIM. JUST. 1160, 1160 (2010) (finding that some offenders take forensic precautions to avoid leaving biological evidence).

<sup>82</sup> Elizabeth S. Scott & Laurence Steinberg, *Social Welfare and Fairness in Juvenile Crime Regulation*, 71 LA. L. REV. 35, 60 (Fall 2010) (“at a minimum, [current] research provides no support for the contention that criminal punishment will effectively reduce recidivism [amongst juveniles]. Indeed, almost all of the rather sparse empirical evidence points to the conclusion that it does not have this effect); FRANKLIN E. ZIMRING, *CONFRONTING YOUTH CRIME: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON SENTENCING POLICY TOWARD YOUNG OFFENDERS* 37–38 (1978) (“Our capacity to nip criminal careers in the bud is either trivial or nonexistent.”).

<sup>83</sup> See, e.g., Scott, *supra* note 83, at 63 (“due to their psychosocial immaturity, teens on the street deciding whether to hold up a convenience store may simply be less capable than adults of considering the sanctions they will face.”); Brief for the American Psychological Association, et. al. as Amici Curiae Supporting Petitioner, at 3–4, *Graham v. State of Florida*, 560 U.S. 48 (2010) (Nos. 08-7412, 08-7621) (“Juveniles – including older adolescents – are less able to restrain their impulses and exercise self-control; less capable than adults of considering alternative courses of action and maturely weighing risks and rewards; and less oriented to the future and thus less capable of apprehending the consequences of their often-impulsive actions.”).

<sup>84</sup> Scott, *supra* note 1, 40–43 (adolescents differ from adults in their evaluation of risk, demonstrating a tendency to seek more novelty and to attach greater value to

their reduced capacity to perceive risk have obvious implications for deterrence policies, which are premised on a person's ability to properly weigh the benefits of engaging in unlawful behavior against the expected likelihood of getting caught and the ensuing costs of punishment.<sup>85</sup> As a result, even though DNA databasing increases the likelihood of getting caught for unlawful behavior, juveniles are unlikely to rationally include that in their risk assessment calculus.

The second characteristic of adolescence that undermines the deterrent justification for DNA databasing is juveniles' greater discounting of the future. "Generally, adolescents tend to focus more on short-term consequences and less on the long-term impact of a decision or behavior."<sup>86</sup> Therefore, even when juveniles recognize that there is a risk of getting caught and a risk of certain punishment, they discount that side of the ledger because of its distance from the now.

A third characteristic of adolescence that diminishes any specific deterrent effect of DNA databasing is juvenile's greater susceptibility to peer influence.<sup>87</sup> This susceptibility to peer influence leads juveniles to "impetuous and ill-considered actions and decisions,"<sup>88</sup> even when they have successfully recognized the risks of the behavior, and even if they have not discounted the long-term impacts of their decision. This characteristic of adolescence, too, has obvious implications for a deterrence justification for DNA collection. As Frank Zimring recognized, "[i]gnoring the well-known fact of group involvement causes us to . . . generate inaccurate models of deterrence."<sup>89</sup> Again, whatever deterrent effect DNA databasing may

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the potential rewards that risk-taking provides, especially in group settings); Laurence Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-taking*, 28 DEVELOPMENTAL REV. 78 (2008).

<sup>85</sup> Christopher Slobogin, Mark Fondacaro, & Jennifer Woolard, *A Prevention Model of Juvenile Justice: The Promise of Kansas v. Hendricks for Children*, 1999 WIS. L. REV. 185, 197 (1999) ("Adolescents appear to calculate the risks of getting caught and punished differently than adults; that is, they do not assess the certainty of punishment in the same way adults would, or indeed as they themselves would once they become adults.").

<sup>86</sup> *Id.*

<sup>87</sup> Zimring, *supra* note 20, at 73–74 ("adolescents commit crimes, as they live their lives, in groups.").

<sup>88</sup> *Johnson v. Texas*, 509 U.S. 350, 367 (1993).

<sup>89</sup> Zimring, *supra* note 20, at 73–74.

have is overwhelmed in the critical moment when juveniles make the decision to offend by the combination of their tendency to offend in groups and their susceptibility to peer influence.

These characteristics of adolescents, individually and collectively, significantly diminish any deterrent effect of the criminal law on juveniles.<sup>90</sup> As juvenile law experts Christopher Slobogin and Mark Fondacaro put it, the traits that mark adolescents tend to produce offenders “for whom the deterrent force of the criminal law is likely to be, literally, an afterthought.”<sup>91</sup>

These findings on juvenile deterrability are widely accepted and have been recognized by courts across the country. In *Roper v. Simmons*, the Supreme Court stated that “the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence.”<sup>92</sup> It added that “the lesser deterrability of juveniles is not offense or sentence specific; . . . juveniles are presumably relatively less likely to be deterred by *any* specific criminal punishment.”<sup>93</sup>

Despite the widespread acceptance of the limited deterrability of juveniles, only a couple of courts have recognized it when discussing DNA collection. In addressing the constitutionality of DNA collection from juveniles convicted or adjudicated delinquent, a New Jersey appellate court acknowledged “the inefficacy of deterrent measures directed against children who have limited understanding.”<sup>94</sup> Nevertheless, the court “conclude[d] that this Act establishes a

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<sup>90</sup> Slobogin, *supra* note 86, at 196 (“[T]he literature regarding risk perception and preference, temporal perspective, the effects of peer influence, and what might be called ‘stake-in-life’ research . . . [all] suggest that the average adolescent, typically defined as a youth up to eighteen, differs from the average adult in ways that diminish willingness to pay attention to criminal law.”).

<sup>91</sup> Slobogin, *supra* note 10, at 44; *see* Scott & Steinberg, *supra* note 83, at 56 (“the research on the general deterrent effect of legal regulation on juvenile crime is sparse and gives no clear answer to the question of whether . . . punitive measures reduce juvenile crime”).

<sup>92</sup> 543 U.S. 551, 571 (2005).

<sup>93</sup> CHRISTOPHER SLOBOGIN & MARK R. FONDACARO, *JUVENILES AT RISK, A PLEA FOR PREVENTIVE JUSTICE*, 47 (2011); *see* *Graham v. Florida*, 560 U.S. 48 (2010); *Miller v. Alabama* 132 S.Ct. 2455 (2012).

<sup>94</sup> *A.A. ex rel. B.A. v. Attorney Gen. of New Jersey*, 894 A.2d 31, 50 (N.J. Super. Ct. App. Div. 2006), *aff’d*, 914 A.2d 260 (N.J. 2007).

database and databank that further the state's compelling interest in deterring and detecting recidivist acts of prior offenders, at least when applied to adult and juvenile offenders over the age of fourteen.”<sup>95</sup> There is nothing in the deterrence data on adolescents, however, to suggest that 14 is an age that matters. To the contrary, the characteristics of youth that make juveniles less deterrable last until the early twenties.<sup>96</sup>

A Texas appellate court was also cautious on the deterrent effect of DNA databases, though apparently for strategic reasons. In addressing a claim that DNA collection following an adjudication of delinquency violated the ex post facto clause,<sup>97</sup> the court noted that a DNA databank may deter recidivism on the part of convicted persons.<sup>98</sup> The court nevertheless clarified that the legislatively stated purpose of the statute is identification, not deterrence, and stated that the threat of submitting to a blood draw and DNA databasing “does not, in itself, seem significant enough to deter possible offenders from committing sex offenses.”<sup>99</sup> By diminishing any deterrent effect of DNA collection, the court could conclude that the DNA statute was not criminal in effect and thus reject the ex post facto challenge to it. Apart from these two instances, no other court has recognized juveniles’ lesser deterrability in its analysis.

In sum, legislators and courts have defended compulsory DNA collection from juveniles adjudicated delinquent because doing so serves a deterrent purpose in line with the purpose of the juvenile court. There is little evidence, however, that DNA databasing provides a specific deterrent effect. Moreover, whatever deterrent value it does

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<sup>95</sup> *Id.*

<sup>96</sup> Barry C. Feld, *Adolescent Criminal Responsibility, Proportionality, and Sentencing Policy: Roper, Graham, Miller/Jackson, and the Youth Discount*, 31 LAW & INEQ. 263, 286 (2013) (“The human brain does not mature until the early twenties”); Laurence Steinberg et al., *Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence for a Dual Systems Model*, 44 DEV. PSYCHOL. 1764, 1764 (2008); Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799, 815–16 (2003).

<sup>97</sup> Appellants complained that the DNA collection statute applicable to them became effective after the date of their offenses and after they had accepted adjudications and dispositions in their cases. *In re D.L.C. et al.*, 124 S.W.3d 354, 361–62 (Tex. App. 2003).

<sup>98</sup> *Id.* at 367.

<sup>99</sup> *Id.* (citing TEX. GOV’T CODE ANN. § 411.143(a) (2005)).

provides is significantly diminished with regard to juveniles. They assess risk differently, are more subject to peer influence, and discount the future more than adults, all of which reduce any deterrent effect derived from the increased likelihood of getting caught in the future or suffering punishment created by DNA databasing. As a result, deterrence (and rehabilitation) fails as a defensible justification for compulsory DNA collection from juveniles. Therefore, legislators and courts must abandon this best interest of the child justification for compulsory DNA collection from juveniles.

## II. THE CONCEPT OF CHILDHOOD AND DNA DATABASING

Part I refuted the best-interest justification for compulsory DNA collection from juveniles, primarily by identifying adolescent brain science and psychosocial research findings that reject the notion that DNA databasing will deter juveniles from reoffending and promote their rehabilitation. Similar arguments from scientific findings have led in the last decade to the end of other criminal law practices that treated juveniles the same as adults.<sup>100</sup> These cases, and the scholarly output they have triggered, reflect a renewed emphasis on the idea that children are different from adults, and that their differences require expanded protections for children.<sup>101</sup> Some,

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<sup>100</sup> *Miller v. Alabama* 132 S. Ct. 2455, 2475 (2012) (finding mandatory life without parole sentences for juveniles violates the Eighth Amendment); *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2405 (2011) (“Neither officers nor courts can reasonably evaluate the effect of objective circumstances . . . without accounting for the age of the child subjected to those circumstances.”); *Graham v. Florida*, 130 S. Ct. 2011, 2034 (2010) (outlawing life without parole sentences for individuals who committed non-homicide crimes under the age of eighteen); *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (finding capital punishment for crimes committed by someone under the age of eighteen unconstitutional).

<sup>101</sup> See SCOTT & STEINBERG, *supra* note 1, at 29–30; Lawrence Steinberg, *Should the Science of Adolescent Brain Development Inform Public Policy?*, 64 AM. PSYCHOLOGIST 739, 742 (2009); Marsha L. Levick & Elizabeth-Ann Tierney, *The United States Supreme Court Adopts a Reasonable Juvenile Standard in J.D.B. v. North Carolina for Purposes of the Miranda Custody Analysis: Can a More Reasoned Justice System for Juveniles Be Far Behind?*, 47 HARV. C.R.-C.L. L. REV. 501, 504 (2012) (showing that “developmental differences between children and adults ultimately led to the recognition in *J.D.B.* that a reasonable juvenile standard was required” and arguing that “the reasonable juvenile standard has application in several other areas of the criminal law beyond the Fifth Amendment context . . .”).

however, have cautioned against making too much of the science.<sup>102</sup> As Professor Emily Buss put it, the law should not “assign rights and responsibilities” in lockstep with “assessments of children’s capacities documented in the scientific research.”<sup>103</sup>

The emphasis on developmental research in Part I was not meant to inextricably link juvenile policy to scientific findings. While the science is consistent and convincing, the science is not the last or the loudest word. This Part asserts that the basis for treating children differently from adults with regards to DNA databasing does not reside solely, or even predominantly, in science. Instead, drawing on the work of childhood studies scholars, it argues that a robust rationale for ending genetic databasing following a juvenile delinquency adjudication can be found in the constructed category of childhood.

Childhood studies involve the critical exploration of the role of childhood in society.<sup>104</sup> Childhood studies emphasizes that childhood is both a natural fact and a social construction, and an essential and permanent component of the social order.<sup>105</sup> Every society recognizes the concept of childhood.<sup>106</sup> This is not surprising, since childhood is a natural fact: children’s bodies and brains are not yet fully developed.<sup>107</sup> Childhood is simultaneously a social construct. That is,

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<sup>102</sup> Terry A. Maroney, *Adolescent Brain Science After Graham v. Florida*, 86 NOTRE DAME L. REV. 765, 767 (2011) (“[T]he Graham Court gave [developmental neuroscience] the maximum weight it presently can bear” and “temptation to place even greater weight on [it] should . . . be resisted”); Terry A. Maroney, *The False Promise of Adolescent Brain Science in Juvenile Justice*, 85 NOTRE DAME L. REV. 89, 93 (2009).

<sup>103</sup> See Buss, *supra* note 14, at 13, 34 n.96, 37–48, 49 & n.144.

<sup>104</sup> See Thorne, *supra* note 16, 149–50 (2007) (describing childhood studies). Drawing on John Rawls’ work in *A Theory of Justice*, childhood studies scholars have explained that having a concept of childhood means simply recognizing that children differ from adults in some way. ARCHARD, *supra* note 18, at 27. Every society recognizes the concept of childhood but having a *conception* of childhood, on the other hand, “is to have a view of what those interesting differences are.” *Id.*

<sup>105</sup> Chris Jenks, *Introduction: Constituting the Child*, in THE SOCIOLOGY OF CHILDHOOD: ESSENTIAL READINGS 10–11 (Chris Jenks ed., 1982); Lourdes Gaitán Muñoz, *La nueva sociología de la infancia: Aportaciones de una mirada distinta* [*The New Sociology of Childhood: Contributions from a Different Approach*], 43 POLÍTICA Y SOCIEDAD 9, 10 (2006) (Spain).

<sup>106</sup> ARCHARD, *supra* note 18, at 31.

<sup>107</sup> Brief for the American Psychological Ass’n et al. as Amici Curiae Supporting Petitioners, *Graham v. State of Florida*, 130 S. Ct. 2011 (2010) (Nos. 08-7412, 08-

childhood is a contingent category whose boundaries are not inevitable or fixed, but are instead defined and maintained by law.<sup>108</sup> Societies can define childhood expansively or restrictively, and use any number of bases for setting the boundaries.

Not surprisingly, conceptions of childhood have differed over space and time.<sup>109</sup> For centuries, the defining difference between children and adults lay in physical differences in size and strength.<sup>110</sup> John Locke conceived of children as imperfect beings whose distinguishing characteristic was not their physical immaturity but their lack of the ability to reason.<sup>111</sup> After the rise of industrialization,

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7621) (“[R]ecent neuroscience research shows that adolescent brains are not yet fully developed in regions related to higher-order executive functions such as impulse control, planning ahead, and risk evaluation.”).

<sup>108</sup> Appell, *supra* note 14, at 735; ARCHARD, *supra* note 18, at 33 (“[T]he basis upon which childhood is seen essentially to differ from adulthood may be no more than a reflection of prevailing social priorities.”). The expressive function of the law then feeds back the law’s definition of childhood to society, shaping or reinforcing popular views of childhood. Jonathan Todres, *Maturity*, 48 HOUS. L. REV. 1107, 1116 (2012).

<sup>109</sup> Jens Qvortrup, *Childhood Matters: An Introduction*, in CHILDHOOD MATTERS: SOCIAL THEORY, PRACTICE AND POLITICS 6–7 (Jens Qvortrup et al. eds., 1994) (noting that the definition of childhood varies over time, space, and culture). Even within a particular society, childhood can be constructed differently in different areas. Brief of Juvenile Law Center et al. as Amici Curiae Supporting Respondent, *Roper v. Simmons*, 543 U.S. 551 (2005) (No. 03-633). In the United States, for example, maturity can be achieved at age 7 (age of criminal responsibility, can be prosecuted in criminal court), age 16 (driving), age 18 (voting and serving in the military), or age 21 (drinking alcohol). *Id.*

<sup>110</sup> Both legend and Congress have it that the age of majority was set as a bright-line rule at twenty-one by common law courts in the Thirteenth Century because Englishmen were eligible for knighthood only upon achieving 21 years of age, when they could be expected to carry a full suit of armor. T.E. James, *The Age of Majority*, 4 AM. J. LEGAL HIST. 22, 26 (1960); S. REP. NO. 92–96, at 5 (1971).

<sup>111</sup> JOHN LOCKE, TWO TREATISES OF GOVERNMENT 322, 324 (Peter Laslett ed., Cambridge Univ. Press 1960) (“Children . . . are not born in this full state of *Equality*, though they are born to it . . . . Age and Reason as they grow up, loosen [the bonds of dependency] till at length they drop quite off, and leave a Man at his own free Disposal . . . . The *Power*, then, *that Parents have* over their Children, arises from that *Duty* which is incumbent on them, to take care of their Off-spring, during the imperfect state of Childhood.”).

the modern American conception of childhood as marked by vulnerability and dependence took hold.<sup>112</sup>

The modern view of childhood is complicated. Children are seen as both in need of protection and autonomous beings. Childhood is understood as both a training period that should not have permanent, debilitating consequences, and a time when individuals must understand and face the consequences for their actions. The dominant conception of childhood in the law, however, is as “a protected space separated from . . . the broader adult society.”<sup>113</sup> It presumes an “inherent dependency, incapacity, and incompetence of the young and their need for adult care and protection”<sup>114</sup> Children need such protection because they are “unreliable decisionmakers who are unable to project into the future, are subject to peer pressure, and possess poor impulse control.”<sup>115</sup> Protective rules thus “aim to shepherd children into a self-sufficient, democratic, productive, and autonomous adulthood.”<sup>116</sup>

This modern conception of children as vulnerable beings in need of separate, protective rules holds even, or perhaps especially so, for juveniles who break the law. Indeed, that notion is the bedrock of a separate, supportive juvenile court. Born during the Progressive Era, the juvenile court “came into the world to prevent children from being treated as criminals.”<sup>117</sup> It protected juveniles from the criminal

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<sup>112</sup> Appell, *supra* note 17, at 749 (“[I]mmaturity and vulnerability . . . [both physically and psychologically] became the defining social and economic aspects of childhood.”).

<sup>113</sup> Paula S. Fass & Michael Grossberg, *Preface*, in *REINVENTING CHILDHOOD AFTER WORLD WAR II* ix (Paula S. Fass & Michael Grossberg eds., 2012); ARCHARD, *supra* note 18, at 37 (“[T]he most important feature of the way in which the modern age conceives of children is as meriting separation from the world of adults.”). It is “a time-limited developmental category . . .” Appell, *supra* note 17.

<sup>114</sup> Michael Grossberg, *Liberation and Caretaking: Fighting over Children’s Rights in Postwar America*, in *Reinventing Childhood After World War II* 19, 29 (Paula S. Fass & Michael Goldberg eds., 2012).

<sup>115</sup> Appell, *supra* note 17, at 709.

<sup>116</sup> *Id.*; ZIMRING, *supra* note 20, at 18–19 (“Above almost all else, we seek a legal policy that preserves the life chances for those who make serious mistakes . . . [and that gives] young law violators the chance to survive our legal system with their life opportunities still intact.”).

<sup>117</sup> Waters, *supra* note 22.

process and its severe punishments and stigma,<sup>118</sup> replacing adversarialness and procedural formality with judicial discretion and cooperative, individualized treatment that preferred rehabilitation and training over punishment.<sup>119</sup> Moreover, the juvenile court accomplished its mission with greater confidentiality for the juveniles involved, and without saddling juveniles with a permanent criminal record.<sup>120</sup>

It is not implausible, therefore, that compulsory DNA collection from juveniles adjudicated delinquent would be consistent with the best-interest aims of the juvenile court. If DNA collection helped steer juveniles away from a life of crime and responded to their need for supportive services, it would arguably serve their best interests. But as shown above, that conclusion depends on false notions of juveniles' deterrability. Moreover, it is based on a view of children as rational and mature, as not needing protection from, and as freely and appropriately subject to, the same consequences for involvement with criminal justice as adults. This conception of childhood is at odds with the modern conception. And it is at odds with the Supreme Court's recent decisions that remind us that children are children and that they require protective treatment under the criminal law.

The better conclusion from the prevailing conception of childhood is that juveniles should not be subject to compulsory DNA

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<sup>118</sup> Zimring, *supra* note 22, at 209–10 (stating the policy of juvenile court is to punish offenders without permanently destroying long-term life chances and developmental opportunities); Julian W. Mack, *The Juvenile Court*, 23 Harv. L. Rev. 104, 109 (1909) (“To get away from the notion that the child is to be dealt with as a criminal; to save it from the brand of criminality, the brand that sticks to it for life; to take it in hand and instead of first stigmatizing and then reforming it, to protect it from the stigma,—this is the work which is now being accomplished by . . .” the juvenile court); DAVID S. TANENHAUS, *JUVENILE JUSTICE IN THE MAKING* 25 (2004); BEN B. LINDSEY & HARVEY J. O’HIGGINS, *THE BEAST* 85 (1910) (stating the criminal prosecution of youth was an “outrage against childhood, against society, against justice, decency and common sense.”). Not all scholars see the Progressives in the same light—some use “child savers” more derisively—and argue that Progressives sought to control children and assimilate immigrant children. PLATT, *supra* note 53, at 43–44.

<sup>119</sup> Mack, *supra* note 119, at 118–20 (stating a juvenile brought into the court should “be made to feel that he is the object of its care and solicitude.”).

<sup>120</sup> PLATT, *supra* note 53, at 137–38.

collection following an adjudication of delinquency. At least three reasons support that conclusion. First, juveniles should not be compelled to provide DNA samples for purposes of databasing because children, as children, require different treatment from the criminal law. After more than two decades of increasingly treating children involved in the criminal justice system like adults,<sup>121</sup> the pendulum has shifted back to special protections for children in the criminal law.<sup>122</sup> This trend, consistent with the modern conception of childhood as a separate, protected space, reinforces the necessity of preserving the line between children and adults.<sup>123</sup> The very category of childhood exists as a counter-position to adulthood.<sup>124</sup> Children cannot simply be viewed as miniature adults,<sup>125</sup> governed by the same laws imposing the same consequences for misbehavior, or the notion of childhood collapses. As Justice Frankfurter put it long ago,

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<sup>121</sup> Legislatures allowed juvenile courts to mete out ever more punitive sanctions. See BARRY C. FELD, *BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT* 246 (1999) (“[S]tates’ juvenile court jurisprudence, sentencing laws, policies, and practices have become increasingly more punitive”); Kristin Henning, *What’s Wrong with Victims’ Rights in Juvenile Court?: Retributive Versus Rehabilitative Systems of Justice*, 97 CAL. L. REV. 1107, 1113 (2009) (“[C]ontemporary law-and-order policies make it easier for prosecutors to transfer juveniles to adult court, create presumptions for detaining youth pending trial, impose mandatory minimum sentences for juveniles, lift the protective veil of confidentiality in juvenile proceedings, and require juveniles to register in sex-offender databases.”). Legislatures made it easier to avoid the jurisdiction of juvenile court and process and punish juveniles in criminal court. See Robert O. Dawson, *Judicial Waiver in Theory and Practice*, in *THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT* 45, 52 (Jeffrey Fagan & Franklin E. Zimring eds., 2000). And the Supreme Court refused to extend or recognize special protections for youth. See *Yarborough v. Alvarado*, 541 U.S. 652, 667 (2004) (rejecting the argument that failure to consider a juvenile suspect’s age in determining custody for *Miranda* purposes clearly violated federal law); see also *Schall v. Martin*, 467 U.S. 253, 255, 281 (1984) (upholding pretrial detention of an accused juvenile delinquent based on finding that there was “serious risk” that juvenile “may before the return date commit an act which if committed by an adult would constitute a crime”).

<sup>122</sup> See *supra* note 101.

<sup>123</sup> Scott & Steinberg, *supra* note 84, at 80 (“[R]egulation grounded in scientific knowledge of adolescence is more likely to prevent juvenile crime and reduce its social cost than an approach that ignores differences between juveniles and adults”).

<sup>124</sup> Appell, *supra* note 14, at 720 (“Treating children the same as adults . . . challenge[s] both adulthood and childhood . . .”).

<sup>125</sup> *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2404 (2011) (citing *Eddings v. Oklahoma*, 455 U.S. 104, 115–16 (1982)).

“[c]hildren have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State’s duty towards children.”<sup>126</sup> It should, therefore, make us pause when the genetic databanking consequences of a juvenile court adjudication are the same as that of a criminal conviction.

The second reason that the modern conception of childhood rejects DNA databasing of juvenile delinquents is that databasing conflicts with a separate, protective regime for juveniles. Treating juveniles who authorities have decided to process in juvenile court just like adult criminals is particularly discordant with the modern conception of childhood, and the juvenile court, as a separate, protected space.<sup>127</sup> The decision by the government to proceed in juvenile court instead of adult court is a decision that matters. It reflects a conclusion that the alleged behavior does not warrant the serious consequences or permanent record that come with a criminal conviction. Instead, by proceeding in juvenile court, the government has chosen to intervene and impose appropriate sanctions while also helping the juvenile avoid further entanglement with the criminal justice system. Making a juvenile court adjudication a trigger for DNA databasing is a punitive, crime-control scheme.<sup>128</sup> That most juveniles age out of crime, and do not recidivate,<sup>129</sup> further underscores the inappropriateness of genetic databasing as a consequence of a juvenile adjudication.

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<sup>126</sup> *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring).

<sup>127</sup> *Waters*, *supra* note 22.

<sup>128</sup> *State ex rel. Juvenile Dep’t. of Multnomah Cnty. v. Orozco*, 878 P.2d 432, 438 (Or. Ct. App. 1994) (“If the juvenile justice system is ever to succeed, it must send a message—consistent, loud, and clear—to the youthful offenders in this state who are bent on committing serious crimes, that one of the consequences for their misdeeds is that they will be more readily identified, if they commit other misdeeds in the future. If the system can teach these juveniles that there are consequences to their actions, that they will be held accountable, it will have served both them and society well.”).

<sup>129</sup> Many estimate that only about five percent of adolescent offenders persist in criminal behavior into adulthood. See, e.g., SCOTT & STEINBERG, *supra* note 1, at 53. Terrie Moffitt, *Life Course Persistent versus Adolescent-Limited Antisocial Behavior* in DANTE CICHETTI AND DONALD COHEN, EDS. *DEVELOPMENT PSYCHOPATHOLOGY VOL. 3* 2<sup>nd</sup> ed.(2006).

The third reason to end DNA databasing following a delinquency adjudication is that rather than rehabilitating or deterring juveniles, DNA databasing actually risks making things worse for juveniles. As childhood studies scholar David Archard noted, “[c]hildren suffer specific (and often greater) harms as children and, . . . are more likely to suffer them because they are children.”<sup>130</sup> Childhood scholar Annette Ruth Appell similarly remarked that “[u]nlike other subordinated groups, children will outgrow their subordination as children; but whether they will be subordinated as adults depends very much on their childhood.”<sup>131</sup>

Recall that Jennifer Doleac found that DNA profiling has a particularly large net probative effect for young offenders (that is, it makes it easier to catch them more frequently and more quickly)<sup>132</sup> While this might initially support DNA profiling of juveniles—offending peaks in late adolescence,<sup>133</sup> making DNA collection from juveniles a plausible priority—there is a darker side to it at odds with the subject juvenile’s best interests. Research has demonstrated that involvement in the juvenile justice system “is associated with an increased likelihood of offending behavior.”<sup>134</sup> This has led some to conclude that “contact with the youth justice system is inherently criminogenic.”<sup>135</sup>

To the extent that this is true, DNA collection from juveniles may achieve the opposite of its goals. By placing subject juveniles in the pool of the usual suspects, DNA databasing increases the likelihood of their detection and punishment, which itself may *increase* recidivism. As one researcher observed, “catching [young

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<sup>130</sup> ARCHARD, *supra* note 18, at 61.

<sup>131</sup> Appell, *supra* note 20, at 706.

<sup>132</sup> Doleac, *supra* note 68, at 25.

<sup>133</sup> CHRISTOPHER SLOBOGIN & MARK R. FONDACARO, *JUVENILES AT RISK: A PLEA FOR PREVENTIVE JUSTICE* ix (2011) (stating people under 18 commit between 15–20% of all crime in the U.S.).

<sup>134</sup> Lesley McAra & Susan McVie, *Youth Justice? The Impact of System Contact on Patterns of Desistance from Offending*, 4 EUR. J. CRIMINOLOGY 315, 318 (2007); Holly A. Wilson & Robert D. Hoge, *The Effect of Youth Diversion Programs on Recidivism: A Meta-Analytic Review*, 40 CRIM. JUST. & BEHAV. 497, 514 (2013) (collecting studies).

<sup>135</sup> Lesley McAra & Susan McVie, *Youth Justice? The Impact of System Contact on Patterns of Desistance from Offending*, 4 EUR. J. CRIMINOLOGY 315, 318 (2007).

offenders] more quickly and more often when they commit new crimes could produce a cohort of more hardened criminals.”<sup>136</sup> This is hardly in the juvenile’s, or anyone’s, best interests.

### III. CONCLUSION

For more than a century, juvenile courts have provided juveniles specialized treatment in a separate forum motivated by the desire to promote juveniles’ best interests. Legislatures and courts have declared that seizing juveniles’ genetic material and databasing it after an adjudication of delinquency serves juveniles’ best interests because it deters them from future crime and promotes their rehabilitation. But there is little evidence to support such a claim, and good reason to doubt it.

It is not just scientific findings that undermine the claim that DNA databasing is in the best interests of a juvenile who has been adjudicated delinquent. The concept of childhood itself, and its purpose and meaning in modern society, further undermine a regime that imposes the same permanent consequences for juveniles as it does for adults convicted in criminal court. Indeed, the prevailing conception of childhood (as a protected space for those whose development must be guarded and promoted because of their vulnerabilities) demands that we not subject juveniles to compulsory DNA collection for purposes of databasing based on a finding of juvenile delinquency.

Understanding childhood as a social construct makes it possible, and coherent, to untether the rules for children from scientific facts. Protective rules governing children can be justified not because the science supports it, but based on what we want the experience, purpose and meaning of childhood to be.<sup>137</sup> When the science and the

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<sup>136</sup> Doleac, *supra* note 68, at 26 (noting that when young offenders “have little (non-criminal) human capital in the form of education, employment experience, or ties to friends and family to rely on when they are released”).

<sup>137</sup> Appell, *supra* note 14, at 740 (“[T]he existence of a legal category for children as well as its boundaries and the rights of and duties owed to children are not nature’s law, but ‘political choices’ . . . . [T]he category of childhood is comprised of a set of value judgments and decisions about human beings between birth and eighteen; and about what it means to be a child and what it means to be an adult . . . .”). The

concept agree, as they do here, laws that impose a different result beg careful assessment.

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expressive function of the law then feeds back the law's definition of childhood to society, shaping or reinforcing popular views of childhood. Todres, *supra* note 109.