

# DNA DRAGNETS

AYYAN ZUBAIR

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### Background

The NYPD regularly collects DNA samples from large swaths of the public in order to find a match with DNA recovered at crime scenes. This practice, known as a DNA dragnet, essentially amounts to a new iteration of “stop-and-frisk.” Just as the unconstitutional “stop-and-frisk” program disproportionately targeted New Yorkers of color for warrantless searches, so too are DNA dragnets used to surveil marginalized New Yorkers.<sup>1</sup>

The invasive technology behind DNA dragnets has been in use for decades. In the 1990s and early 2000s, police departments in San Diego, Ann Arbor, and Miami were the first to begin compiling DNA databases of thousands of individuals, predominantly people of color.<sup>2</sup> Notably, the dragnets in each of these cases failed to produce a suspect.<sup>3</sup> In fact, prior to 2004, nearly every DNA dragnet was unsuccessful.<sup>4</sup>

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<sup>1</sup> See NYCLU, *STOP-AND-FRISK DATA*, <https://www.nyclu.org/en/stop-and-frisk-data>.

<sup>2</sup> The San Diego Police Department tested roughly 800 African-American men in pursuit of a serial killer in 1990. In 1994, the police department in Ann Arbor, Michigan obtained DNA samples from 160 African-American men in pursuit of another serial killer. Between 1994 and 1995, police in the greater Miami area garnered the DNA of over 2,300 men in pursuit of a serial rapist. See MARK HANSON, *DNA Dragnet*, ABA JOURNAL, May 1, 2004, [http://www.abajournal.com/magazine/article/dna\\_dragnet](http://www.abajournal.com/magazine/article/dna_dragnet).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

## The Problems with DNA Dragnets

DNA dragnets' invasive genetic data collection constitutes a warrantless "search."<sup>5</sup> Individuals ensnared in the dragnet apparatus face a "catch-22": they can either "volunteer" their DNA or become a criminal suspect simply because they refused to do so. Facing such coercion, many innocent people provide their DNA to law enforcement agencies. Such dragnets would be bad enough if police deployed the tactic only for extreme cases, but law enforcement agencies have sadly used it to target crimes as minor as vandalism.

DNA dragnet programs' racial and socio-economic bias is just as clear. In one egregious case, the NYPD coerced saliva samples from over 380 African-American men in its investigation into the death of a white Queens woman killed while taking an afternoon jog.<sup>6</sup> When this initial sample set proved unsuccessful, the NYPD extended its dragnet, gathering the DNA of Chanel Lewis, an African-American man who was selected based only on the fact that months before the murder he had acted "suspiciously," according to an officer, by walking through the predominantly white neighborhood in the which the victim lived.<sup>7</sup>

As DNA tests become more advanced, they become more sensitive. These sensitivities can put innocent people in danger of serious jail time and even the death penalty. For example, Lukis Anderson faced the possibility of capital punishment after his DNA was found under a murder

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<sup>5</sup> See, e.g., *U.S. v. Jones*, 565 U.S. 400, 406 (2012) (holding that the government conducts a search whenever it physically intrudes on a constitutionally protected area for the purpose of gathering information).

<sup>6</sup> See JAN RANSOM & ASHLEY SOUTHWALL, 'Race-Biased Dragnet': DNA From 360 Black Men Was Collected to Solve Vetrano Murder, *Defense Lawyers Say*, NEW YORK TIMES, March 31, 2019, <https://www.nytimes.com/2019/03/31/nyregion/kearina-vetrano-trial.html>.

<sup>7</sup> *Id.*

victim's fingernails.<sup>8</sup> Anderson was arrested, but it emerged that he could not possibly have committed the crime—he was in the hospital at the time of the murder. Prosecutors hypothesize that a paramedic who treated Anderson before going to the crime scene inadvertently transferred Anderson's DNA onto the victim.<sup>9</sup> The Houston Forensic Science Center has proven that, as in Anderson's case, a person's DNA can be found in places they have never been.<sup>10</sup> While Anderson was eventually found innocent of the murder charge, others may not be as fortunate.

### ***People v. K.N. : A Win for Genetic Privacy***

A recent landmark court decision may drastically limit the NYPD's ability to obtain biometric data from children without a warrant. In *People v. K.N.*, a Manhattan criminal court considered the validity of a 17 year old's signed consent to harvest his DNA without parental supervision.<sup>11</sup> Judge Sandra Roper found that the NYPD's interactions with the minor without parental supervision were coercive and ruled the consent invalid,<sup>12</sup> determining that the DNA sample obtained by the NYPD violated the minor's Fourth Amendment rights.<sup>13</sup>

### **The Way Forward: Regulating DNA Dragnets**

While the *K.N.* ruling was rightly heralded by The Legal Aid Society, the organization defending the 17 year old, as a “watershed decision protecting the genetic privacy of young people,”<sup>14</sup> more needs

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<sup>8</sup> See KATIE WORTH, *Framed for Murder by His Own DNA*, THE MARSHALL PROJECT, April 19, 2018, <https://www.themarshallproject.org/2018/04/19/framed-for-murder-by-his-own-dna>.

<sup>9</sup> *Id.*

<sup>10</sup> See TINA HESMAN SAEY, *Shaking hands could transfer your DNA — leaving it on things you never touched*, \, April 17, 2016, <https://www.sciencenewsforstudents.org/article/long-handshake-spreads-your-dna-things-never-touched>

<sup>11</sup> *People v. K.N.*, N.Y.S.3d 1 (2018).

<sup>12</sup> *Id.* at 5.

<sup>13</sup> *Id.*

<sup>14</sup> See GEORGE JOSEPH, *How Juveniles Get Caught Up In The NYPD's Vast DNA Dragnet*, GOTHAMIST, Jan. 10, 2019 [http://gothamist.com/2019/01/10/dna\\_nypd\\_judge.php](http://gothamist.com/2019/01/10/dna_nypd_judge.php).

to be done. Judge Roper herself recognized its limitations and called upon the New York legislature to enact genetic-data protections into law.<sup>15</sup> Furthermore, the *K.N.* holding only applies to minors, leaving adult New Yorkers still at risk of becoming ensnared in DNA dragnets.

New York's use of DNA during an investigation is alarming in itself, but it is also unclear what happens to much this sensitive data after an investigation is completion. Unlike other states, the NYPD permanently maintains suspects' DNA in an unregulated database,<sup>16</sup> and stores the personal data of thousands of individuals who have never been convicted of a crime.<sup>17</sup> Without action in Albany, DNA dragnets will perpetually place innocent New Yorkers at risk of becoming false positives for crimes they did not commit. State legislators can take immediate action by passing Senate bill S6009, which would ban unregulated DNA databases throughout the state.<sup>18</sup>

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<sup>15</sup> *People v. K.N.*, *supra* note 15, at 7.

<sup>16</sup> See ANN GIVENS & ROBERT LEWIS, *Gun Cases Are Notoriously Hard to Make Stick. New York Thinks It Has the Answer*, THE TRACE, July 24, 2017, <https://www.thetrace.org/2017/07/nypd-dna-testing-gun-offenders/>.

<sup>17</sup> See *New York City Council Members Grill Crime Lab Officials About Unregulated DNA Database*, WNYC, Dec. 14, 2017, <http://www.coreyjohnson.nyc/2017/12/14/the-trace-new-york-city-council-members-grill-crime-lab-officials-about-unregulated-dna-database/>.

<sup>18</sup> See NYS SENATE S6009, <https://www.nysenate.gov/legislation/bills/2019/s6009>.



**SURVEILLANCE TECHNOLOGY  
OVERSIGHT PROJECT, INC.**

40 RECTOR STREET  
9TH FLOOR

NEW YORK, NY 10006

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