RAIDING THE GENOME

HOW THE UNITED STATES GOVERNMENT IS ABUSING ITS IMMIGRATION POWERS TO AMASS DNA FOR FUTURE POLICING

GEORGETOWN LAW
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Raiding the Genome:

How the United States Government Is Abusing Its Immigration Powers to Amass DNA for Future Policing

ABOUT THIS PROJECT

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COVER ART

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TABLE OF CONTENTS

About us

The Center on Privacy & Technology at Georgetown Law is a research center dedicated to exposing and opposing government and corporate surveillance in the digital era. Our research and advocacy focuses on the impact of mass surveillance on historically marginalized people, including Black and Brown communities, immigrant communities, religious minorities, workers, women and non-binary people, and poor people. We have published ground breaking research on issues ranging from police use of face recognition technology to the dragnet surveillance tactics of federal immigration authorities. We also train students to understand, analyze and critique the legal and policy frameworks that shape the development and deployment of new technologies. Our conference, The Color of Surveillance, is known as a space for activists, advocates, academics, and artists, to think together about the pressing social, political, cultural and economic issues arising from mass surveillance in the digital era.

For more about our work, visit:
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Executive Summary

In every cell in your body, there resides a complete copy of your genetic code. As you move about the world, you shed cells without even realizing it, leaving your DNA, like a genetic calling card, wherever you go. You probably don't think about the trail you're leaving. It wouldn't really matter if you did, because you can't stop shedding cells, and you can't leave your DNA at home.

But what if the government had access to a copy of your DNA and could track you based on this involuntary, unstoppable trail without your consent? How would it change your behavior to know that the government had a drop of your blood — or saliva — containing your "entire genetic code, which will be kept indefinitely in a government-controlled refrigerator in a warehouse in Northern Virginia"?[1] Would you feel free to seek out the medical or reproductive care you needed? To attend protests and voice dissent? To gather together with the people of your choosing?

This dystopia is fast becoming reality for millions of people, many of them already vulnerable because of over-policing, excessive surveillance, or economic insecurity. The federal government is amassing a huge trove of DNA, starting with a racialized, often traumatized, and politically powerless group: noncitizens. And it is using the federal agency that operates with the fewest practical constraints and least oversight — the Department of Homeland Security (DHS) — to do it. That's what this report is about.

In the waning days of the Trump administration, riding a wave of anti-immigrant sentiment and with the resources of the immigrant rights movement depleted by four years of emergency responses, the Department of Justice made what it billed as a technical, boring rule change: It eliminated an exemption in the government's existing DNA-collection rule that previously had allowed DHS to refrain from building out a labor-intensive and expensive DNA-collection program.[2] In so doing, it effectively set off a bomb that had lain dormant in federal law since

[1] *United States v. Kriesel*, 720 F.3d 1137, 1148 (9th Cir. 2013) (Reinhardt, J., dissenting).

[2] *See* DNA-Sample Collection from Immigration Detainees, 85 Fed. Reg. 13,483, 13,486-87 (March 9, 2020).

2005.[3] The 2005 DNA Fingerprint Act — which passed with little public scrutiny as an amendment to the reauthorization bill for the popular Violence Against Women Act — for the first time extended compulsory DNA collection to people outside of the criminal legal context: detained noncitizens.[4] But because of the exceptions in the implementing regulations, and because previous administrations thought it was a good idea to use those exceptions to avoid escalating DNA collection from noncitizens, DHS never mounted a large-scale DNA collection program. That is, until 2020.

This report, which is based on publicly available records, as well as interviews with people who have had their DNA taken by immigration authorities and legal service providers working with them, is the first attempt to examine in-depth what happened after the 2020 rule change, and to explain the legal and political implications of these developments.

Key Findings:

1. **Since 2020, DHS has added more than 1.5 million DNA profiles to a national law enforcement database.** After DHS agents collect DNA samples, they send the samples to the FBI for testing and inclusion in the federal government's DNA database known as the Combined DNA Index System (CODIS).[5] In CODIS, these profiles are housed in an index labeled "offender,"[6] where they become permanently searchable by law enforcement nationwide.[7] Over the first two decades of CODIS's existence, the government added approximately 25,000 DNA profiles from noncitizens to the database. In the first four years after implementation of the 2020 Rule, it added more than 1.5

[3] *See* DNA Fingerprint Act of 2005, Pub. L. 109-162, tit. X, 119 Stat. 2960 (codified as amended at 34 U.S.C. § 40702).
[4] *Id.*
[5] U.S. Dep't of Homeland Sec., DHS/ALL/PIA-080, Privacy Impact Assessment for CBP and ICE DNA Collection (Jul. 23, 2020), https://www.dhs.gov/publication/dhsallpia-080-cbp-and-ice-dna-collection.
[6] *See* BorderDNA Resources Project, *Detainee DNA Collection for CODIS*, Ann & Robert H. Lurie Children's Hosp. of Chicago (Nov. 2021), https://www.luriechildrens.org/globalassets/documents/luriechildrens.org/research/genetics-justice-lab/detaineednacollection_final_jan2022v3.pdf [https://perma.cc/9F6C-WGQB]; *Biology/DNA CODIS SOP*, Houston Forensic Sci. Ctr. 1, 5 (June 26, 2018), https://records.hfscdiscovery.org/Published/2018%20DNA_SOP_05-CODIS%20%20issued%2006-26-18.pdf [https://perma.cc/63JQ-5BWX].
[7] 85 Fed. Reg. 13,483, 13,491 ("CODIS's functions, parallel to those of the fingerprint databases, also include creating a permanent DNA record for the individual").

million. If DHS continues to collect DNA at the rate the agency itself projects, by 2034 one third of the DNA profiles in CODIS's "offender" index, which police use for criminal investigations, will have been taken without any of the procedural rules that police are supposed to follow before they can take a person's DNA.

2. **DHS misleads and intimidates people to get them to submit to DNA collection.** Even though DHS's internal policies require ICE and CBP officials to inform people before taking their DNA, many people we interviewed were not aware their DNA had been collected or thought the swab was for the purpose of a COVID-19 test. Those who were aware of the collection submitted to a cheek swab under threat of criminal prosecution if they did not comply.[8] Many people were afraid to even ask about the purpose of the swab. In our research, we did not discover a single instance of a person refusing to submit to DNA collection. If a person were to object to giving a DNA sample, ICE's admitted practice is to threaten that person with criminal prosecution.[9]

3. **DHS is collecting DNA primarily from people of color, creating new risks for already overpoliced communities.** From the Page Act of 1875 to the Immigration Act of 1924 to the "Muslim Ban" of 2017, the nation's immigration policies have consistently targeted migrants of color. Today, the vast majority of people being detained by federal agents, and therefore at risk of DNA collection, are people of color. This is in part because of the demographic makeup of the people coming to the U.S. but it is also because DHS disproportionately targets communities of color, particularly those with ties to Latin America, arresting them in far higher numbers than their white counterparts. DHS therefore is growing CODIS by drastically increasing the proportion of profiles in the federal database that are connected to people of color. The creation of a massive digital database that disproportionately subjects communities of color to genetic surveillance will only further entrench the well documented discrimination and abuse that permeates systems of policing and punishment.

[8] 34 U.S.C. § 40702 makes refusal to comply with DNA collection a class A misdemeanor punishable by up to a year in prison.

[9] Email from Valentina C. Seeley, Northern Region Director, ICE Office of Partnership and Engagement, to Ctr. on Privacy & Tech. Staff (June 22, 2022) (on file with author).

4. **This massive expansion of federal DNA-collecting power is the result of several low-profile administrative sleights of hand.** The authorizing statute passed in 2005 as an amendment to the bipartisan and popular Violence Against Women Act, with little publicity and no debate about the provision expanding DHS's DNA-collection authority. The Executive Branch has expanded the program slowly over time through administrative rules, most drastically in 2020. But during each rulemaking, the government has cursorily cast aside concerns over the risks DHS DNA-collection poses.[10] The result is that the most consequential expansion of the government's DNA-collection power since the advent of the CODIS database has occurred without meaningful democratic debate.

5. **The government is exploiting its immigration powers to collect genetic material for policing at a pace that would not be possible using criminal policing powers.** Until 2020, almost all the DNA profiles in CODIS's "offender" database were added by state and local police and other criminal law enforcement agencies. In the criminal context, there are some limitations on when, how, and from whom criminal law enforcement agencies can take DNA which make the process of amassing samples cumbersome and resource-intensive. In the immigration context, the only limitation on DNA collection is that a person must be "detained." But the meaning of the term "detained" in the immigration context is notoriously broad, vague and ever shifting. And unlike in the criminal legal system, ICE and CBP agents do not have to get judicial authorization to detain someone. There is no process for checking to make sure that every time they do detain someone, they meet constitutional requirements. The lack of procedural safeguards means that DHS can amass DNA data at a much quicker rate than police can, but all of the DNA DHS takes is accessible to police.

6. **DHS's DNA collection program violates the Fourth Amendment.** DHS's taking of DNA without individualized suspicion of criminal wrongdoing violates any reasonable understanding of the Fourth Amendment. *Maryland v. King,* the controlling Supreme Court precedent on law enforcement DNA collection, allows police to take DNA from people who are arrested based on a finding of probable cause that they committed a

[10] *See, e.g.*, DNA-Sample Collection from Immigration Detainees, 85 Fed. Reg. 13,483 (Mar. 9, 2020) (codified at 28 C.F.R. § 28.12).

serious crime. Although DHS often asserts that it has "probable cause" to detain people, that "probable cause" is not supported by any independent judicial review, and the requirement that DHS detain someone before taking their DNA does not therefore serve the same constitutional function as the requirement that police arrest someone before taking their DNA. If courts were to find DHS's DNA collection program constitutional, it would amount to a blank check to federal law enforcement agencies to take DNA from anyone without having to get permission or approval from any independent arbiter.

7. **Indefinite government retention of DNA samples poses major risks to individual rights and democratic self governance, given rapidly advancing technology and political instability in the U.S.** Once DHS collects a DNA sample, it sends that sample to the FBI, where a CODIS-compatible profile can be generated and uploaded to the national database. After the FBI creates a profile from a DNA sample, however, the agency retains the sample itself — indefinitely. Federal officials are on record stating their interest in keeping these samples precisely so that they can use them in conjunction with future-developed technologies. Our research uncovered a number of such technologies with which law enforcement officials nationwide are toying, from robust profiles called "single nucleotide polymorphisms" or "SNPs" (pronounced "snips") that can allow law enforcement agents to "rummage around" in people's family trees, to locally-controlled "rogue" DNA databases, to "daisy-chaining" together dangerous and untested tools. Current law is insufficient to protect against the risk that future administrations might mine DHS-collected DNA samples in order to target vulnerable communities. Indeed, we've seen many examples of this type of targeting — and the insufficiency of legal protections like those currently in place to stop it — throughout history.

Action is therefore urgently needed.

Conclusion:

Based on the findings of our research, and in the context of growing political instability in the U.S., our overarching recommendation is for a fundamental reform of the legal framework relating to DNA that takes into account advances in DNA technology; advances in our scientific

and sociological understanding of the meaning of DNA; and the implications for both individual liberty and national security of maintaining a massive, digitally networked, genetic database. Until such a reform on this scale can take place, with full democratic engagement from civil society and from the communities most impacted by genetic surveillance, we urge two urgent actions at the federal level:

1. **The Biden administration should immediately halt all DNA collection programs that are based on executive immigration powers and expunge and/or purge all profiles and samples thus far collected under the program.**

2. **Congress should repeal the section of the DNA Fingerprint Act that authorizes DNA collection from anyone "detained under the authority of the United States."**

Recognizing how unlikely it is that either of the changes will be enacted in the near future, an Appendix to the report identifies the range of institutions that have power to mitigate the harms of DHS's DNA collection program, and suggests some potential interventions organized communities could demand that those institutions undertake.

Raiding the Genome

How the United States Government Is Abusing Its Immigration Powers to Amass DNA for Future Policing

INTRODUCTION

On a hot late summer day, a group of about 30 people stands clustered under a tent in Brownsville, Texas.[1] Brownsville has become infamous as one of the places where the abuses and injustices of the U.S. immigration system have played out most acutely — from the mass prosecutions of migrants for border crossing violations to the separation of thousands of families targeted for those prosecutions.[2] The people gathered under this particular tent represent a small subset of the hundreds awaiting processing by U.S. Customs and Border Patrol (CBP) in Brownsville that day. One of the people in the crowd, "Fernando," a young man in his 20s who was born in Mexico, hopes to be reunited with his family in the United States.[3]

As CBP agents call people forward one by one, Fernando lingers near a small table under the tent where he notices that the agents are swabbing the cheeks of each person who approaches. He wonders what the purpose of the swab is — a drug test? When it is his turn to step forward, Fernando approaches the table. Without offering an explanation, a CBP agent uses a stick-like implement to scrape the inside of his cheek. Fernando asks the agent what it is for. The agent explains that CBP is collecting his DNA. Fernando is taken aback. Why does CBP need his DNA? What will the U.S. Department of Homeland Security (DHS) do with his DNA? What will

[1] Interview with Fernando (April 17, 2022) [hereinafter Fernando Interview] (notes on file with author). "Fernando" is a pseudonym used to protect the interviewee's identity. Many of the themes emerging from his experience were echoed in the stories of the many individuals whose experiences we heard about during our research.

[2] *See, e.g.,* Debbie Nathan, *Hidden Horrors of 'Zero Tolerance' — Mass Trials and Children Taken from Their Parents*, The Intercept (May 29, 2018), https://theintercept.com/2018/05/29/zero-tolerance-border-policy-immigration-mass-trials-children/ [https://perma.cc/CFQ8-DXMM]; Joanna Jacobbi Lydgate, *Assembly-Line Justice: A Review of Operation Streamline*, 98 Cal. L. Rev. 481 (2010) (detailing the "zero-tolerance" federal program that criminally prosecuted illegal border crossings en masse at federal district courts along the Southern border, including in Brownsville).

[3] Fernando Interview, *supra* note 1.

happen to it after they are done with it? What would happen if he refused to give the sample? He is too afraid to ask any of these questions.[4]

Fernando's experience is not unique — not to him nor to the group in the tent nor to people coming through Brownsville nor to people crossing the border. In fact, Fernando is one of more than 1.5 million people who have had their DNA taken by CBP and the U.S. Immigration and Customs Enforcement (ICE) since the federal government began using DHS to pursue an aggressive expansion of the federal DNA database four years ago. In 2019 during the Trump administration, the Department of Justice (DOJ) introduced a new rule to remove key exceptions in the regulations that govern DNA collection by DHS. The old rules permitted DHS to limit the size and scope of its DNA collection program according to the department's operational priorities, capacities and resources. Under these rules DHS kept its DNA collection program very small for many years. Under the new rule, which went into effect in 2020, DHS is required to take DNA from anyone the agency detains, even very briefly. DHS now takes DNA from hundreds of people every day and sends those samples to the FBI to be added to the Combined DNA Index System (CODIS), a network of biometric databases accessible by law enforcement agencies all over the United States.[5] As a result, DHS is now adding more profiles to CODIS each year than all other law enforcement agencies combined. **This report is the first attempt to quantify this expansion (Section A), describe its historical context and on-the-ground impact (Sections B-E), and analyze its legal and political implications (Sections F-G).**

Before the new rule went into effect in 2020, law enforcement agencies (state, local, and federal) added new DNA profiles to CODIS almost exclusively through the criminal legal system. The process of growing the database in this way was slow because, while the legal protections that apply to the genetic material of people accused of crimes are thin, some protections do exist. Those protections vary widely from jurisdiction to jurisdiction, but nowhere in the country is it legal for police officers to go around taking DNA from anyone they think might have violated the law. And yet that is essentially what CBP and ICE agents have been doing since the new rule went into effect in 2020. DHS claims the authority, based solely on its immigration enforcement

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[4] *Id.*

[5] *See* DNA-Sample Collection from Immigration Detainees, 85 Fed. Reg. 13,483 (Mar. 9, 2020) (codified at 28 C.F.R. § 28.12) [hereinafter DOJ 2020 Rule]; FBI, *Frequently Asked Questions on CODIS and NDIS*, https://www.fbi.gov/services/laboratory/biometric-analysis/codis/codis-and-ndis-fact-sheet [hereinafter FBI CODIS FAQ] (last visited March 25, 2024).

powers, to compel DNA samples from any person detained by CBP or ICE.

"Any person detained" might seem like a significant limitation on the category of people from whom DHS can take DNA. **But, as we discuss in detail in Section E, because the term "detained" in the immigration context is both broad and vague, as a practical matter almost nobody is categorically excluded from DNA collection by the requirement that they first be "detained."** Detention in the immigration context can mean everything from a brief delay at an airport to months or years of incarceration, and it can happen to anyone whom a single ICE or CBP agent thinks might be in violation of immigration laws (something about which ICE and CBP agents are often wrong, as evidenced by their track record of deporting U.S. citizens). It might be intuitive to suppose that because immigration law is civil law and people detained for immigration reasons are not suspected of any criminal offense, the protections for the genetic material of people detained by ICE and CBP would be stronger. But the opposite is true. Unlike in the criminal legal system, ICE and CBP agents do not need to get judicial authorization to detain someone. And there is no regular process for checking to make sure that every time they do detain someone, they meet constitutional requirements.

The expansiveness of immigration detention powers combined with the lack of oversight over the exercise of those powers is one of the many reasons that ICE and CBP have become notorious for abusing their detention authority — engaging in racial profiling, using excessive force, and even detaining U.S. citizens and legal permanent residents.[6] It is also one of the reasons that using the immigration system to amass DNA is much quicker for the government than using the criminal legal system.[7] The lack of procedural safeguards means that DHS spends less time and fewer resources to obtain each individual DNA sample. Meanwhile, the population of people who can be subjected to DHS collecting their DNA is at any given time much larger than the population that can be subjected to the police collecting it.

In principle, because DHS doesn't have to prove someone's immigration status in order to detain them, immigration authorities can detain anyone, and the burden will be on those individuals to raise a complaint of wrongful detention in court rather than on the government to prove that the detention was legal at the outset. That means literally anyone — including U.S. citizens — can

[6] *See infra* Sec. C.

[7] *See infra* Sec. E.

be subjected to DNA collection by ICE or CBP before having any opportunity to prove to a neutral third party that they shouldn't be.[8] In practice, of course, the vast majority of people who suffer abuses of discretion by ICE and CBP are people of color, people whose native language is not English, and people who do not have the economic means to fight back. Since the late 1990s, immigrant communities and immigrant rights advocates have been organizing against the racial injustices of the immigration detention system. Now, under the 2020 rule, the federal government is exploiting the secrecy and lack of oversight at DHS, the feeble civil rights framework for people targeted by immigration enforcement, and the vulnerabilities of immigrants and people crossing the border to build a massive genetic database dominated by the DNA profiles of Brown and Black people.

Even though DHS's DNA collection program is not subject to many of the practical constraints that exist to protect the civil rights of people who are subjects of criminal investigations, the FBI is storing all the DNA that DHS takes in CODIS, a database used for criminal investigations. This means that a wide array of local, state, federal, and even international law enforcement agencies can access the DNA profiles of hundreds of thousands of people who were forced to give up their genetic material without due process and without any criminal law justification and use that DNA in future criminal investigations and prosecutions.[9] Furthermore, because there is currently no clear procedure by which people who have their DNA taken by DHS can have it expunged (as there is in the criminal legal system), that DNA will be there indefinitely, regardless of whether DHS took that DNA legally or not, regardless of whether the people from whom DHS took the samples stay in the United States or not, regardless of whether they become permanent residents or citizens, or whether it turns out they already were.[10]

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[8] *See infra* Secs. E-F.

[9] *See, e.g.*, FBI CODIS FAQ, *supra* note 5 ("DNA profiles obtained from crime scene evidence . . . are searched against the Offender Indices"); *Id.* ("An international law enforcement agency may submit a request for a search of the National DNA Index either through the FBI's legal attaché responsible for that jurisdiction or through Interpol.").

[10] 34 U.S.C. § 12592(d)(1)(A)(ii) (providing that the FBI Director "shall" expunge a profile added to CODIS "on the basis of an arrest under the authority of the United States, if the Attorney General receives, for each charge against the person on the basis of which the analysis was or could have been included in the index, a certified copy of a final court order establishing that such charge has been dismissed or has resulted in an acquittal or that no charge was filed within the applicable time period"); Alexandra Zaretsky, *DNA Collection in Immigration Custody and the Threat of Genetic Surveillance*, 109 Cal. L. Rev. 317, 349-350 (2021) ("[T]here is tremendous uncertainty regarding how–and whether–individuals detained for immigration violations can prevent the government from permanently retaining their DNA. The final rule [published in 2020] makes no attempt to answer these questions."). *See also* Elizabeth E. Joh, *The Myth of Arrestee DNA Expungement*, 164 U. PA. L. Rev. Online 51, 56 (2015) (finding that in states with

As the U.S. continues to struggle to confront the brutality and racism in its systems of policing and punishment, it should not be difficult to imagine how allowing police to have access to a genetic database in which people of color and noncitizens are disproportionately represented will compound the injustices and abuses of those systems. These risks are further enhanced because CODIS is part of a much broader initiative — authorized by governments but driven by corporations — to amass biometric data about as many people as possible, to integrate it with other types of data collected about people through their on- and offline lives, and to network this information so that it becomes the basis of almost all law enforcement activity.[11]

In Section F of this report, we explain why it is unconstitutional for DHS to take DNA from people based solely on its immigration authority. ICE and CBP are systematically violating Fourth Amendment rights by taking DNA without any individualized suspicion of criminal wrongdoing. Scholars, commentators, and policymakers across the political spectrum have disparaged the most relevant Supreme Court decision on DNA — *Maryland v. King* — as poorly reasoned.[12] But our analysis finds that DHS is failing to meet even the very low constitutional standard that decision sets.

This means that law enforcement agencies are able to get around Fourth Amendment requirements as well as state law limitations on the use of DNA in their criminal policing endeavors. In our research for this report, we identified one case in which this has already

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arrestee-initiated expungement regimes, miniscule numbers of arrestees ever apply and succeed in having their DNA expunged).

[11] *See, e.g.*, U.S. Dep't of Homeland Sec., Privacy Impact Assessment for the Homeland Advanced Recognition Technology System (HART), DHS/OBIM/PIA-004 1-2 (Feb. 24, 2020), https://www.dhs.gov/sites/default/files/publications/privacy-pia-obim004-hartincrement1-february2020_0.pdf [https://perma.cc/WLB7-849A]; Fed. Bureau of Investigation, Next Generation Identification (NGI), https://le.fbi.gov/science-and-lab-resources/biometrics-and-fingerprints/biometrics/next-generation-identification-ngi [https://perma.cc/7C7U-8VUA]; Mizue Aizeki & Paromita Shah, *HART Attack: How DHS's Massive Biometrics Database Will Supercharge Surveillance and Threaten Rights*, Mijente, Just Futures Law & Immigrant Defense Project 1, 4 (May 2022), https://surveillanceresistancelab.org/wp-content/uploads/2023/01/HART-Attack-2022.pdf [https://perma.cc/H332-ZUYR]; Nina Wang et al., *American Dragnet: Data-Driven Deportation in the 21st Century*, Ctr. on Priv. & Tech. at Georgetown Law (May 10, 2022), https://www.americandragnet.org/sites/default/files/American_Dragnet_report_English_final.pdf; Jennifer Lynch, *HART: Homeland Security's Massive New Database Will Include Face Recognition, DNA, and Peoples' "Non-Obvious Relationships,"* Elec. Frontier Found. (June 7, 2018), https://www.eff.org/deeplinks/2018/06/hart-homeland-securitys-massive-new-database-will-include-face-recognition-dna-and [https://perma.cc/CBX2-9UMJ].

[12] *See infra* note 173.

happened: As detailed further in Section E, police in Suffolk County were able to obtain an individual's DNA from ICE without going through the normal channels to secure it through criminal legal processes. No doubt a systematic study would reveal many more examples.

One of the most concerning facts about the way the 2020 Rule has exploded governmental genetic surveillance is that the DNA in CODIS is of almost no use in immigration enforcement operations as they currently function. **This suggests that the real purpose of expanding federal DNA collection is not to enhance existing law enforcement systems (whether civil or criminal) but rather to make a speculative investment in genetic data as a resource around which future law enforcement systems may be organized.** The DHS DNA collection program would not be the first example of opportunistic experimentation by the federal government on immigrant communities. As one prominent immigration law scholar has said: "[E]xperience shows that innovations in surveillance techniques and technologies often are initiated with groups that are vulnerable or subject to heightened control — including noncitizens — before later going mainstream."[13]

In thinking about the kinds of future policing that DHS's DNA collection program is helping to make possible, it is crucial to remember that, as we explain in Section G, after creating and uploading each CODIS profile, the government stores the original physical DNA samples (the buccal swab or blood draw) indefinitely. In fact, the federal government has said in court that one of the reasons it wants to retain samples after processing is because of the possibility of using those samples in conjunction with developing technologies.[14] Many existing technologies can reveal an enormous amount of sensitive information about an individual — from their biological sex and other physical traits to their family relationships to their genetic ancestry (which includes information that can be correlated with race and ethnicity) to their propensity toward particular diseases.

While the particular type of DNA profile contained in CODIS does not currently make these categories of information available to users of the database, there is little in existing law to limit

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[13] Anil Kalhan, *Immigration Surveillance*, 74 Md. L. Rev. 1, 10 (2014).

[14] Answering Brief for Appellee the United States at 39, *United States v. Kriesel, Jr.*, 720 F.3d 1137 (9th Cir. 2013) (No. 11-30197) ("Accommodating advancements in DNA identification technology is a legitimate reason for retaining Kriesel's blood sample").

what the government can do with DHS-collected samples in the future.[15] DHS's DNA collection program therefore represents an unacceptable risk, especially on the eve of a presidential election in which the presumptive nominee from one party, whose previous presidential administration was the architect of the DHS DNA program, has said in campaign speeches that immigrants are "not people" and are "poisoning the blood of our country."[16] The integration of digital genetic surveillance technology within law enforcement systems that are fundamentally racialized, and which have not ceased to cause suffering and harm for communities of color since their inception, should be treated as a political emergency for the United States.

While this report argues that DHS's DNA collection program will have disproportionate racial effects, it does not assume that "race" is itself a genetic or biological characteristic. For discussion of the "fundamental flaw of equating genetic ancestry with race," see Dorothy Roberts, Fatal Invention (2011).

For all these reasons, the report concludes by calling on the Biden administration to put an immediate stop to DHS's DNA collection program, to expunge those profiles already entered into CODIS, and to purge any samples collected under the program. It also calls on Congress to repeal the provision of the DNA Fingerprint Act that authorizes DNA collection from anyone "detained under the authority of the United States." Recognizing that these outcomes may be unlikely to occur, we also include an Appendix identifying a variety of institutional actors with power to undercut the program or to mitigate its harms.

It is our hope that this report will be useful to organized communities, and in particular the immigrant rights movement, in organizing for the protection of rights, liberties, and the possibility of democratic self-governance.

[15] *See infra* Sec. G.

[16] *E.g.*, Marisa Iati, *Trump says some undocumented immigrants are 'not people'*, Washington Post (March 16, 2024), https://www.washingtonpost.com/politics/2024/03/16/trump-immigrants-not-people/ [https://perma.cc/6DQV-MXTB]; Nathan Layne, *Trump repeats 'poisoning the blood' anti-immigrant remark*, Reuters (Dec. 16, 2023), https://www.reuters.com/world/us/trump-repeats-poisoning-blood-anti-immigrant-remark-2023-12-16/; *Donald Trump on Illegal Immigrants "Poisoning the Blood of Our Country"*, C-SPAN (Dec. 16, 2023), https://www.c-span.org/video/?c5098439/donald-trump-illegal-immigrants-poisoning-blood-country.

METHODOLOGY

We used a variety of methods in researching this report. We interviewed several individuals with on-the-ground experience with this program: people from whom the U.S. Government collected DNA under the program's authority and lawyers and activists working on the front lines who have seen the impact of this program firsthand. We consulted publicly available sources of information about DHS's DNA collection practices, such as government publications, public comments, and news reports. We gathered information and insights from interviews with researchers who specialize in genetic science. We also obtained very limited information from interviews and correspondence with ICE and DHS offices and officials, including the Security, Intelligence, and Information Policy Section Chief of DHS's Office for Civil Rights and Civil Liberties (CRCL). Freedom of Information Act requests to relevant offices within the DOJ and DHS as well as requests to some of the local law enforcement agencies mentioned in the report either went unanswered or produced little additional information. Given extensive opportunities, officials within DHS, ICE, and CBP declined to share any meaningful information about the implementation of the 2020 DNA rule, or to discuss the legal questions we raised with them about the rule, other than the brief comments mentioned in this report.

We are continuing to work, in close collaboration with immigrant rights organizations, to obtain access to public records relating to DHS's DNA collection activities. Given the disturbing nature of our early findings and the urgency of the importance, we decided to release our research in a preliminary state. To gain real insight into how DNA collection is playing out on the ground, an institutional actor such as Congress or a court will likely have to take action to compel disclosure.

FINDINGS

A. Since 2020, DHS has added more than 1.5 million DNA profiles to a national law enforcement database.

Since 2020, the number of DNA samples that ICE and CBP have collected has skyrocketed. In the four years between the 2020 rule going into effect and the publication of this report, the number of DNA profiles in CODIS from "detainees"[17] has increased by approximately 50 times, or 5,000%.

In the documents published in support of the 2020 rule change, the government estimated that it would add approximately 748,000 additional profiles each year.[18] Our data suggests the program scaled up quickly, and is on track to meet or even exceed that projection.[19] The FBI reported that the CODIS database contained just 28,594 "detainee" profiles as of December 2019.[20] By the end

[17] The DNA Fingerprint Act authorizes DNA collection from "non-United States persons who are detained under the authority of the United States." 34 U.S.C. § 40702(a)(1)(A). A "non-U.S. detainee" is "a person who is not a U.S. citizen and not lawfully admitted for permanent residence, held for an administrative violation of law." Off. Inspector Gen., U.S. Dep't Homeland Sec., OIG-21-35, DHS Law Enforcement Components Did Not Consistently Collect DNA from Arrestees 1 (2021), https://www.oig.dhs.gov/sites/default/files/assets/2021-05/OIG-21-35-May21.pdf [perma.cc/9K3K-BYRH] [hereinafter OIG-21-35]. "Detainees" is a category of data maintained in CODIS, see FBI CODIS FAQ, but detainee profiles are included in the broader database of "offender" profiles. *See* Fed. Bureau of Investigation, *CODIS-NDIS Statistics*, https://le.fbi.gov/science-and-lab/biometrics-and-fingerprints/codis/codis-ndis-statistics [https://perma.cc/2TT2-L8VK] (last visited April 15, 2024) [hereinafter CODIS-NDIS Statistics]. For further discussion of the meaning–or lack thereof–of the "detained" limitation on DHS DNA collection, see *infra* Section E.

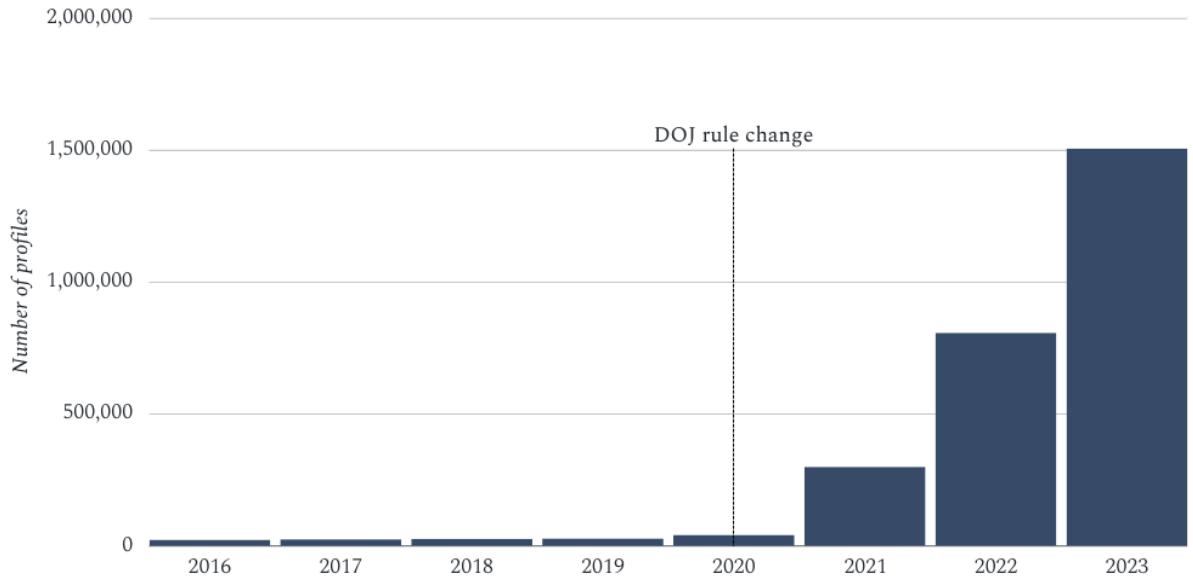
[18] DNA-Sample Collection from Immigration Detainees, 84 Fed. Reg. 56,397, 56,400 (Oct. 22, 2019) [hereinafter DOJ DNA Collection NPRM].

[19] Since the inception of the CODIS database, the FBI has maintained a public website that tracks the number of offender profiles, arrestee profiles, and forensic profiles stored in the national database. CODIS-NDIS Statistics, *supra*, note 17. The number of profiles DHS contributes is impossible to track through this source, however, because the FBI reports the number of profiles coming from people DHS detains together with samples coming from people convicted of criminal offenses, notwithstanding obvious legal distinctions between the two. *Id*. ("Offender profiles include Convicted Offender, Detainee, and Legal profiles at NDIS."). The FBI does, however, periodically report disaggregated numbers at events open to the public and respond to researcher inquiries for further details. Professor Sara Huston, a principal investigator at the Genetics and Justice Laboratory at the Ann & Robert H. Lurie Children's Hospital of Chicago and Northwestern University School of Medicine, has been studying the expansion of CODIS since 2008. She regularly attends the International Symposium on Human Identification, where DHS reports the number of "detainee" profiles in CODIS.

[20] Email from Sara Huston, Research Assistant Professor of Pediatrics, Northwestern University Feinberg School of Medicine, to Ctr. on Privacy & Tech. staff (Mar. 28, 2024) (on file with authors).

of 2021, that number had risen to just under 300,000.[21] By December 2023, the last interval at which we were able to secure data, the number had soared to 1,507,715.[22]

Figure 1: "Detainee" profiles in CODIS, 2016-2023



In the first 15 years during which the federal government had statutory authority to take DNA from people it "detains," the government added fewer than 30,000 profiles to the "Detainee" Index in CODIS. In the first 3 years after the DOJ's 2020 rule change, the government added more than 1.5 million.

Source: Sara Huston, Research Assistant Professor of Pediatrics, Northwestern University Feinberg School of Medicine.

[21] Email from Sara Huston, Research Assistant Professor of Pediatrics, Northwestern University Feinberg School of Medicine, to Ctr. on Privacy & Tech. staff (May 21, 2022) (on file with authors).

[22] Email from Sara Huston, Research Assistant Professor of Pediatrics, Northwestern University Feinberg School of Medicine, to Ctr. on Privacy & Tech. (Apr. 1, 2024) (on file with authors). As of August 2023, the "detainee" index contained 1,284,551 profiles. Lisa Grossweiler, CODIS & NDIS Update 2023, 34th International Symposium on Human Identification, Denver, CO (September 21, 2023), https://www.ishinews.com/events/codis-ndis-update-2023/.

As high as this number is, it only includes the samples that have actually been processed. DHS has sent so many samples to the FBI for processing and uploading to CODIS that the FBI reports being inundated. In its 2024 budget request to Congress, the FBI sought to increase its budget for processing DNA samples by nearly double, asking Congress for an additional $53.1 million, up from its current allotment of $56.7 million.[23] In his statement submitted to Congress as part of its hearing on the FBI's request in May 2023, FBI Director Christopher Wray explained that "[a]s a result" of the 2020 Rule change, "during the past 12 months, the FBI has received an average of 92,000 DNA samples per month (over 10 times the historical sample volume)."[24] He shared that the agency then was experiencing "a backlog of approximately 650,000 samples,"[25] indicating that the stunning number of noncitizen DNA samples currently represented in CODIS reported above — over 1.5 million — likely represents only a fraction of the samples DHS has collected to date. Wray also stated that "[w]hen Title 42 end[ed], the FBI anticipate[d] an additional 50,000 samples per month due to increased DHS detentions" bringing his estimate of the "total monthly samples received to approximately 120,000 (~1,440,000 samples per year)."[26]

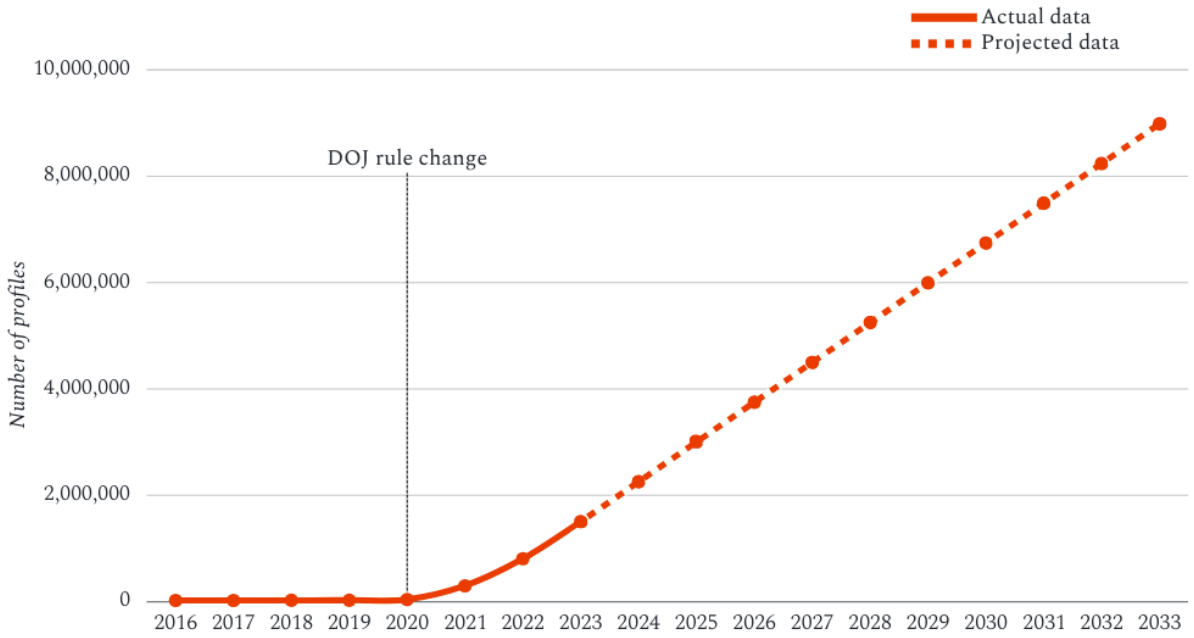
[23] Fed. Bureau of Investigation, *FY 2024 Budget Request*, https://www.justice.gov/d9/2023-03/fbi_fy_24_pb_bud_sum_ii_omb_cleared_3-08-23.pdf [https://perma.cc/4XDK-3M2N].

[24] *Federal Bureau of Investigation Budget Request For Fiscal Year 2024 Hearing Before S. Sci. & Related Agencies Comm. on Appropriations*, 118th Cong. (May 10, 2023) (statement of Christopher A. Wray, Director, Fed. Bureau of Investigation), at 16.

[25] *Id.*

[26] *Id.*

Figure 2: Expected growth of "detainee" profiles in CODIS if DHS's DNA collection program continues



In its documents supporting the 2020 Rule, DOJ predicted that DHS's DNA collection program would add 748,000 profiles to CODIS per year. Based on this estimate, we project that the "Detainee" Index will contain nearly 9 million profiles by 2033.

In short: It took all of U.S. criminal law enforcement — more than 800,000 officers from every state, local and federal law enforcement agency in the country -- 28 years to build a genetic database of about 22 million profiles. DHS, which probably has no more than 50,000 ICE and CBP officers doing DNA collection, is on track to add that many profiles, all on its own, in about the same amount of time.[27] DHS is thus matching or slightly exceeding the rate of DNA collection that is achieved by all of the police officers in the country with less than one tenth the manpower. If DHS continues to collect DNA at the rate the agency itself projects, by 2034 one third of the DNA profiles in CODIS's "offender" index will have been taken without any of the procedural protections that police are supposed to follow before they can take a person's DNA. Those same profiles will be available to police for use in criminal investigations.

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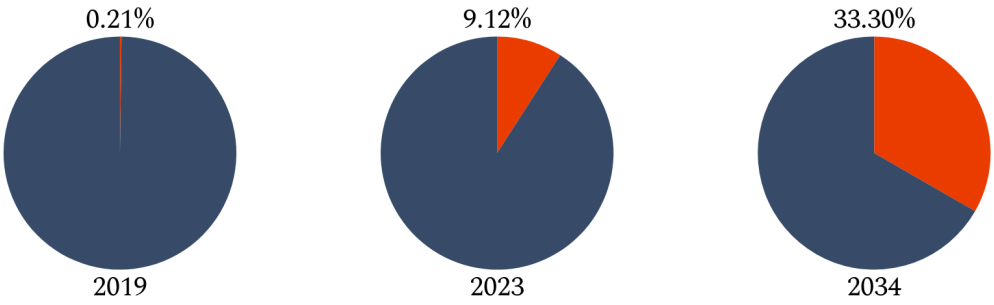
[27] As of February 2024, CODIS contained approximately 22 million profiles in its "offender" and "arrestee" indices. CODIS-NDIS Statistics, *supra*, note 19. At least 1.5 million of those came from DHS. *See supra* note 22. At a rate of 748,000 profiles per year, DHS could amass 22 million profiles, on its own, by 2051. *See supra* notes 18, 27. The estimate of an upper level limit of 50,000 ICE and CBP agents engaged in DNA collection is based on the number of ERO agents that ICE said it employed in its 2023 annual report (7,600) combined with the number of CBP agents and border patrol officers that CBP lists on its website for 2023 (approximately 45,000). We assume that not all of these personnel are engaged in DNA collection.

Figure 3: Proportion of "detainee" profiles in CODIS "offender" index



The "Offender" Index in CODIS contains DNA profiles against which crime scene samples are searched nationwide. Before the DOJ's 2020 Rule change, DNA from people "detained" under the authority of the United States made up a miniscule percentage of the profiles in this index. The data we gathered shows that by December 2023, that percentage had increased drastically to about 9% in the "Offender" Index. In its documents supporting the 2020 Rule change, DOJ predicted that DHS would add 748,000 profiles to CODIS per year. Based on this estimate, 1 in 3 profiles in the "Offender" Index in CODIS will have been added as a result of the program by 2034.

These numbers are staggering, and we do not know whether the current rate of collection represents complete program implementation or whether DHS has plans to increase collection even further. However, we know that the federal government seeks to expand its DNA collection and testing capabilities. As of the writing of this report, Congress remained deadlocked over a border deal that included $204 million for "expenses related to the analysis of DNA samples" and $25 million for "familial DNA testing."[28]

There are still details about DHS's DNA collection program that remain unknown or uncertain. DHS does not make many details public, and none of the officials we contacted at any of the agency headquarters or field offices were willing to provide us with anything more than generalized answers to our questions.

The two entities within DHS that are responsible for immigration enforcement are CBP and ICE. According to DHS, "CBP enforces immigration laws at and between the ports of entry,"

[28] Johana Bhuiyan, *'A privacy nightmare': the $400m surveillance package inside the US immigration bill*, The Guardian (Feb. 6, 2024), https://www.theguardian.com/us-news/2024/feb/06/us-immigration-bill-mexico-border-surveillance-privacy [https://perma.cc/S25T-L9S6].

while "ICE is responsible for interior enforcement and for detention and removal operations."[29]

We were able to obtain more information about the current extent of CBP's DNA collection activities than we were about ICE's. CBP stated in 2020 that it intended to "reach full operation by December 31, 2020, . . . well ahead of the 3 years contemplated by the rule."[30] A DHS official further asserted in an email communication with the Center on Privacy & Technology in 2021 that the expanded policy had been "fully operational by the end of 2020."[31] According to a 2023 Government Accountability Office (GAO) report, CBP "DNA collections continued to increase through fiscal year 2022," with the agency collecting and submitting "to the FBI for entry into CODIS 5,641 DNA samples in fiscal year 2020; 330,357 in fiscal year 2021; and 634,422 in fiscal year 2022."[32] CBP reported more than 1.6 million arrests in 2021 and 2022.[33] It is unclear whether the delta between the samples collected in those years and total arrest data represents a subset of people who will remain exempt from collection or whether CBP's collection may expand further, up to or beyond the level of reported arrests.

The 2023 GAO report states that "CBP data show that the program is operational nationwide at all field locations."[34] But CBP itself may not know the details; the same report states that "CBP does not have data to fully assess DNA program efficiency and effectiveness," specifically highlighting that CBP fails to document when and why it has not taken DNA from certain individuals.[35] CBP concurred with GAO's recommendations regarding further data collection and stated that it expects to roll out new tools through 2024.[36] No representatives from ICE or

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[29] *Immigration Enforcement Actions Annual Flow Report*, Office of Homeland Sec. Statistics, https://www.dhs.gov/ohss/topics/immigration/enforcement-AFR#:~:text=CBP%20enforces%20immigration%20laws%20at,for%20immigration%20and%20naturalization%20benefits [https://perma.cc/Q3HW-A4KB].

[30] Media Release, U.S. Customs and Border Protection, CBP to Meet Legal Requirement to Collect DNA Samples from Certain Populations of Individuals in Custody (Dec. 3, 2020), https://www.cbp.gov/newsroom/national-media-release/cbp-meet-legal-requirement-collect-dna-samples-certain-populations#:~:text=WASHINGTON%20%E2%80%94%20On%20Jan.,DNA%20Index%20System%20(CODIS) [https://perma.cc/C8TS-YD3D].

[31] Email from Richard J. Pauza, Pub. Affairs Officer, CBP, to author (Nov. 9, 2021) (on file with authors).

[32] U.S. Gov't Accountability Office, *DNA Collections: CBP is Collecting Samples from Individuals in Custody, but Needs Better Data for Program Oversight* 1, 7-8 (May 24, 2023), https://www.gao.gov/assets/gao-23-106252.pdf [https://perma.cc/GFA5-T6HD].

[33] *Border Patrol Arrests*, Transactional Rec. Access Clearinghouse, https://trac.syr.edu/phptools/immigration/cbparrest/.

[34] U.S. Gov't Accountability Office, *DNA Collections*, *supra* note 32, at 1, 11.

[35] *Id*. at 9-10.

[36] *Id*. at 17.

CBP responded to our attempts to clarify their internal criteria for full deployment of the program.[37] Because of DHS's lack of transparency, and in the absence of Congressional oversight, we do not know from how many people DHS is taking DNA daily, what exact factors determine whether DHS takes DNA from a particular person, or the complete list of locations and facilities where ICE and CBP are currently collecting DNA. We therefore cannot determine whether collection is focused on certain modes of entry or disproportionately targets specific ethnic or social groups (although, as described in Section C, by definition it disproportionately targets people of color).

Based on our interviews with legal service providers, DNA collection appears to be fully integrated into CBP processing activities at the southern border. We heard multiple reports from legal services providers on the border that, as of 2024, just about anyone who enters the country at a port of entry with a CBPOne appointment is being swabbed.[38] One organization, the Texas Civil Rights Project (TCRP), noted that after the Migrant Protection Protocols program initially wound down under President Biden, reports of DNA collection increased dramatically in April and May 2021.[39] Another TCRP interviewee stated that, as of 2024, it seems like DHS is "collecting DNA from everyone they can."[40] In a separate interview with the nonprofit organization Al Otro Lado, one staffer told us, "If I had to guess, I'd say that they're testing everyone."[41] This means that individuals who appear at a port of entry, follow all instructions for how to make a proper claim for asylum, make that claim, and are released into the interior without further detention beyond the few hours it takes to be processed through the

[37] *See* Email from Valentina C. Seeley, Northern Region Director, ICE Office of Partnership and Engagement, to Center on Privacy & Technology Staff (June 22, 2022) (on file with authors) ("This is the extent of the information that we are able to provide to you as it relates to your research and questions.") [hereinafter Seeley Email].

[38] Interview with Tex. Civ. Rts. Project (Mar. 18, 2024) [hereinafter 2024 TCRP Interview]; Email from Nicole Elizabeth Ramos, Project Director, Border Rights Project, Al Otro Lado, to Ctr. on Privacy & Tech. staff (Mar. 8, 2024) (on file with authors).

[39] Interview with Tex. Civ. Rts. Project (Oct. 27, 2021) [hereinafter 2021 TCRP Interview]. The "Migrant Protection Protocols," or "MPP" was a Trump Administration program, often called "Remain in Mexico," in which individuals were summarily removed to Mexico to await U.S. court processes. American Immigration Council, *The "Migrant Protection Protocols": An Explanation of the Remain in Mexico Program* (Jan. 7, 2022 (modified Feb. 1, 2024)), https://www.americanimmigrationcouncil.org/research/migrant-protection-protocols [https://perma.cc/ZH7V-TZ45]. The "Biden administration suspended, and then terminated, the program after President Biden took office," but the program was "'reinstated' . . . from December 2021 to August 2022 as the result of [a] federal court order which was eventually overturned by the Supreme Court." *Id*.

[40] 2024 TCRP Interview, *supra* note 38.

[41] Interview with Al Otro Lado (Mar. 20, 2024) [hereinafter 2024 Al Otro Lado Interview].

port of entry, are having their DNA taken.[42] This is a pattern that seems consistent throughout the first years of the program. Al Otro Lado reported in 2021 that "the vast majority of the asylum seekers for which we obtained humanitarian parole under the Huisha parole process[43] between April and August [2021] were subject to DNA collection as they were processed by CBP at US ports of entry along the US-Mexico border."[44]

TCRP also reported that, while Title 42 was in effect, families seeking asylum who were exempted from Title 42 and paroled into the U.S. received buccal swabs at ports of entry in Matamoros and Reynosa.[45] This was one of a number of reports of minors receiving DNA swabs that we heard about in our research. We were unable to confirm, however, that any children were swabbed for the purpose of adding their DNA to CODIS. Swabs of families taken for the purpose of confirming genetic relation should be treated differently from those taken and delivered to the FBI for addition to CODIS under the Rule. Providers at the border expressed skepticism, however, that they are in fact so treated.[46]

We also know that CBP is swabbing people coming through passport control at airports, although we do not know the full list of airports where this is happening. In an interview with the Center on Privacy & Technology, staff at the National Immigrant Justice Center (NIJC), a legal service provider, reported instances in which CBP at O'Hare International Airport in Chicago, Illinois, swabbed NIJC's clients after they presented valid travel documents at passport control.[47] NIJC's clients who experienced DNA collection were subsequently sent to

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[42] 2024 TCRP Interview, *supra* note 40; 2024 Al Otro Lado Interview, *supra* note 41.

[43] The *Huisha* parole process was a result of litigation challenging what became known as "Title 42," a March 2020 Trump Administration order that blocked many individuals seeking asylum from entering U.S. territory. *Huisha-Huisha v. Mayorkas*, 560 F. Supp. 3d 146, 157 (D.D.C. 2021), *aff'd in part, rev'd in part and remanded*, 27 F.4th 718 (D.C. Cir. 2022); Notice of Order Under Sections 362 and 365 of the Public Health Service Act Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists, 85 Fed. Reg. 17,060. From April to August 2021, legal services providers at the U.S.-Mexico border worked with DHS officials to refer certain particularly vulnerable individuals and their families for potential exemption from Title 42. *See* Int'l Rescue Comm., *Protection Denied: Humanitarian Consequences at the U.S. Southern Border One Year Into the Biden Administration* (2022) 9, https://www.rescue.org/sites/default/files/document/6476/fy22usmxborderbidenreport.pdf [https://perma.cc/8DZQ-EYZC]. This asylum-seeking process was known as a *Huisha* referral or, later, "consortium exceptions." *Id.*

[44] Email from Nicole Elizabeth Ramos, Project Director, Border Rights Project, Al Otro Lado, to Ctr. on Privacy & Tech. staff (Oct. 13, 2021) (on file with authors).

[45] 2021 TCRP Interview, *supra* note 39.

[46] *See* 2024 TCRP Interview, *supra* note 42.

[47] Interview with Nat'l Immigr. Just. Ctr. (Apr. 20, 2022) [hereinafter NIJC Interview].

immigration detention facilities, and we do not know whether CBP is also taking DNA from people sent to secondary screening even when those people are subsequently released and allowed to enter the U.S.

Most of the legal service providers who responded to our call for information about DHS DNA collection had experience with CBP practices but not ICE's, although TCRP reported that it has had clients who experienced DNA collection at a wide range of locations — from temporary processing facilities in Donna, Texas, to the ICE New York City Field Office.[48] When the Center on Privacy & Technology requested clarification from ICE field offices about categories of persons that the agency is subjecting to DNA collection, the Boston Field Office responded in an email that "[a]ll immigration detainees charged with [a] criminal or civil offense will have their DNA sampled generally at the point in which they are issued charging documents, shortly after being arrested."[49] We do not know whether DNA collection is routine and universal at all ICE detention facilities or whether ICE also takes DNA from people who are briefly detained in locations outside of actual detention facilities (such as courthouses).

Whether the current state of affairs represents a complete rollout of the program or DHS is still in process of scaling the program up, it is clear that the agency is making DNA collection a regular part of daily enforcement operations in a wide range of contexts all over the country.

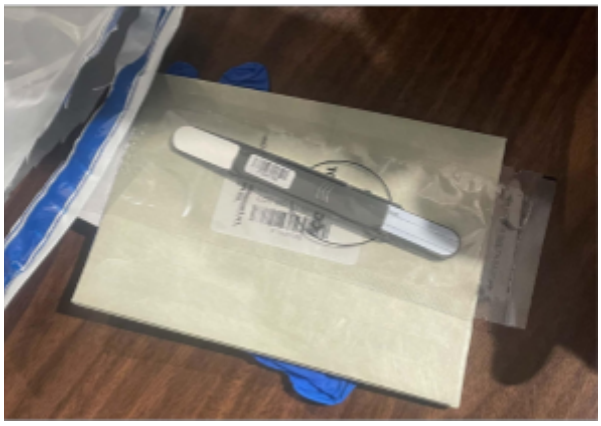
B. DHS misleads and intimidates people to collect their DNA.

Based on our interviews and public news reports about how ICE's and CBP's process of DNA collection plays out on the ground, people subjected to DNA collection experience it in one of two ways: Either they are unaware that their DNA is being taken, or — like Fernando — they know their DNA is being collected and are simultaneously afraid of how their sample will be used and afraid of the consequences if they resist providing it.

[48] 2021 TCRP Interview, *supra* note 45; Email from TCRP staff to Ctr. on Privacy & Tech. staff (March 5, 2024) (on file with authors).

[49] Seeley Email, *supra* note 37.

Figure 4:



A buccal (cheek) DNA collection device used by the U.S. Customs and Border Protection.

Source: GAO-23-106252

The 2020 DOJ rule and the underlying statute permit DHS to compel DNA samples from people they detain, with no requirement for consent.[50] In its Privacy Impact Assessment, DHS asserts that the risk that people ICE detains "will not be aware they must provide a DNA sample" is "partially mitigated [because a] privacy notice is publicly posted at ICE facilities where DNA is collected."[51] CBP claims that these notices are "communicated to detainees with limited English proficiency in a manner and language they can understand."[52] It further asserts that "CBP provides individual verbal notice to individuals subject to DNA collection," though it remains uncertain whether these verbal notices are also communicated in languages other than English.[53] However, none of the individuals we interviewed reported seeing a privacy notice about DNA collection posted at any ICE facility. Anecdotal evidence suggests that some individuals subjected to a cheek swab or blood draw while in ICE or CBP custody are often not even informed that DNA is being or has been collected.[54]

Legal service providers report that their clients consistently expressed confusion and concern about the DNA collection process.[55] Like Fernando, many people reported that they were afraid to ask about the cheek swab — let alone inquire whether they were allowed to opt out of DNA collection — for fear that the mere question might jeopardize their ability to enter or remain in

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[50] *See* 34 U.S.C. § 40702(4)(A) ("The Attorney General . . . may use or authorize the use of such means as are reasonably necessary to detain, restrain, and collect a DNA sample"); 34 U.S.C. § 40702(5) (declaring failure to cooperate with DNA collection to be a class A misdemeanor); 28 C.F.R. § 28.12(d) (also allowing reasonable means of detention and restraint for forced collection).

[51] *Privacy Impact Assessment for CBP and ICE*, DHS/ALL/PIA-080, U.S. Dep't of Homeland Sec. 1, 13 (2020), https://www.dhs.gov/sites/default/files/publications/privacy-pia-dhs080-detaineedna-october2020.pdf [https://perma.cc/AUM8-HTWF] [hereinafter DHS/ALL/PIA-080].

[52] *Id.* ((citing Exec. Order No. 13166, Improving Access to Services for Persons with Limited English Proficiency, 65 Fed. Reg. 50123 (Aug. 16, 2000)).

[53] *Id.*

[54] *See* NIJC Interview, *supra* note 47; Interview with the Refugee & Immigr. Ctr. for Educ. & Legal Serv. (Apr. 11, 2022) [hereinafter RAICES Interview].

[55] *Id*.

the U.S. Lawyers from the Refugee and Immigrant Center for Education and Legal Services (RAICES) noted that, in the absence of any explanation about the purpose of the cheek swab, many of their clients believed that the cheek swab was a COVID-19 test.[56] One of RAICES's clients reported that the CBP agent who took her sample told her it was only to "check for illness."[57] Attorneys at Project Corazon reported that clients who inquired about the cheek swab were told that their DNA samples could be used against them in the future if they were suspected of wrongdoing.[58]

These accounts of cheek swabs being administered without notice and instances of officials using threatening language to describe the purpose and potential consequences of DNA collection are consistent with reporting by Adolfo Flores at Buzzfeed News. In an interview, one asylum-seeker explained to Flores that he felt he had no choice but to submit to the cheek swab despite his confusion about what it would be used for: "At the moment, I didn't know if it was good or bad, I was just trusting the process, but afterwards I was left with a lot of questions."[59] In another instance, a client of Al Otro Lado asked about the cheek swab and was told that their DNA was being taken "in case they do anything bad, then the government will be able to find them."[60]

Our research indicates that CBP and ICE are at best inconsistent in providing individual notice and at worst are communicating about DNA collection in a way that confuses and intimidates people who are being subjected to it. Unfortunately, even if CBP and ICE were following their own policies and providing notice consistently to each person from whom they collect DNA, it would do little to mitigate the coercion inherent in the process.

[56] RAICES Interview, *supra* note 55.
[57] *Id.*
[58] Interview with Project Corazon (Nov. 1, 2021).
[59] Adolfo Flores, *US Border Officers Are Collecting DNA From Asylum-Seekers Even Though They Don't Have Criminal Records,* Buzzfeed News (June 4, 2021), https://www.buzzfeednews.com/article/adolfoflores/asylum-seekers-dna-us-border [https://perma.cc/42A3-7SMG].
[60] *Id. See also* 2024 TCRP Interview, *supra* note 46 (describing providers' understanding that DNA is being taken "in case in the future you commit a crime").

One interviewee reported to us that during the period when Title 42 was in place,[61] she took a tour of CBP border facilities, where the guides explained that DNA was taken during processing. When she asked what happens if someone doesn't consent, she reports the CBP agent said, "If they don't consent we send them back."[62] Since the end of Title 42, she reports people being told they will be detained instead of released if they do not consent to the swab.[63]

In addition, federal law authorizes DHS officials to restrain and forcibly take a DNA sample from people who refuse to give it voluntarily, and also makes refusal to comply with DNA collection a class A misdemeanor punishable by up to one year in prison.[64] When asked about how ICE responds if a person refuses to submit to DNA collection, in an email exchange with the Center on Privacy & Technology, ICE's Boston Field Office stated: "For those who do not comply with DNA sampling, they will be warned of consequences related to non-compliance and subsequently referred for criminal prosecution pursuant to 34 U.S.C. § 40702 if non-compliance persists."[65]

Figure 5:

CBP photos of rooms in which the agency holds people in the Rio Grande Valley.

Source: U.S. Customs and Border Protection, GAO-22-105321

[61] "Title 42" was the name by which a March 2020 Trump administration order came to be known. The order blocked many individuals seeking asylum from entering U.S. territory. Notice of Order Under Sections 362 and 365 of the Public Health Service Act Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists, 85 Fed. Reg. 17,060.

[62] 2024 TCRP Interview, *supra* note 60.

[63] *Id.*

[64] 34 U.S.C. § 40702(a)(4)(a), (5).

[65] Seeley Email, *supra* note 49.

We did not find any instances of refusal to comply with DNA collection as a lead charge in any of the DOJ data published by the Transactional Records Access Clearinghouse[66] or as the basis of a conviction recorded in the datasets maintained by the U.S. Sentencing Commission from 2002 to 2022.[67] We conferred with several federal defenders, who have almost the entire responsibility for representing people charged with crimes related to border crossing, as well as scholars on federal prosecutions, and none were aware of any specific instance of a person being criminally charged for refusing to submit to DNA collection.[68] It is possible that prosecutors are bringing these charges but dropping them in the course of plea negotiations. It is also possible that ICE and CBP are using the threat of criminal prosecution to compel people to submit to DNA collection but not actually referring people for prosecution when (if) they refuse. It is also possible that people are not resisting DNA swabbing because they are scared to or because they are not even aware that their DNA is being collected.

Whatever the agencies have done to date, the existence of a federal statute criminalizing noncompliance with DNA collection, combined with the radical expansion of DHS's DNA collection practices, means that it is possible that at some point people detained by ICE or CBP under civil immigration law may be charged with and prosecuted for a federal misdemeanor simply for refusing to give a DNA sample. This is an extremely concerning possibility for many reasons but especially given the negative impact that contact with the criminal legal system can have on immigration cases[69] and given evidence from our interviews that DHS is collecting DNA from people carrying visas and from people pursuing asylum and other forms of immigration relief through the U.S. Citizenship and Immigration Services.

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[66] Housed at Syracuse University, Transactional Records Access Clearinghouse (TRAC) is a data and research organization that maintains and publishes government documents obtained under the Freedom of Information Act (FOIA). *See About Us*, Transactional Rec. Access Clearinghouse (TRAC) (2021), https://trac.syr.edu/aboutTRACgeneral.html [https://perma.cc/AD6T-R5BN].

[67] The U.S. Sentencing Commission maintains datafiles pertaining to federal sentencing data. *See Commission Datafiles*, USSC.gov, https://www.ussc.gov/research/datafiles/commission-datafiles [https://perma.cc/NNY7-XCU6].

[68] Emails from Mona Lynch, Chancellor's Fellow and Professor, Criminology, Law and Society, UC Irvine, to Matt Barno (Jul. 25-27, 2022) (on file with authors).

[69] *See generally* Hillel R. Smith, Cong. Rsch. Serv., R45251, Immigration Consequences of Criminal Activity (2021), https://sgp.fas.org/crs/homesec/R45151.pdf [https://perma.cc/WQG9-KKHB] (explaining how criminal charges and convictions can result in the inadmissibility or deportability of an immigrant). *See also* Jason A. Cade, *The Plea-Bargain Crisis for Noncitizens in Misdemeanor Court*, 34 Cardozo L. Rev. 1751, 1754-55 (2013) (noting that misdemeanor charges can lead to "detention, deportation, and bars to reentry," but that the mere threat of those consequences may also cause immigrants to take plea deals in order to "exit the system without ICE detection.").

C. DHS is collecting DNA primarily from people of color, creating new risks for already over-policed communities.

To understand the impact of DHS's DNA collection program, it is important to understand that the racialization of immigrants is deeply embedded in U.S. immigration policy. The country's first naturalization law, the Naturalization Act of 1790, provided that only "free white persons" could be naturalized, excluding from citizenship all those considered non-white. Over the subsequent decades, American courts sifted and categorized immigrants, identifying some as "white" and others as "non-white."[70] The first federal immigration law to regulate admission into the country was 1875's Page Law, which "restricted the entry of Chinese, Japanese, and other Asian laborers involuntarily brought to the U.S."[71] Shortly thereafter, in 1882, Congress passed the Chinese Exclusion Act, which "prohibited the further immigration of Chinese laborers, allowed only a few select classes of Chinese immigrants to apply for admission, and affirmed the prohibition of naturalized citizenship on all Chinese immigrants."[72] During World War II, in one of the nation's most shameful episodes, "army and civilian officials used the 1940 census as the data source to round up the Japanese ancestry population on the West Coast in 1942," placing "over 100,000 people in concentration camps."[73]

Over the past several decades, the groups disfavored and targeted by immigration policies have shifted with the political winds.[74] One of the most egregious recent examples of politically opportunistic surveillance expansion was the National Security Entry-Exit Registration System

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[70] *See, e.g.*, Ian Haney López, White by Law: The Legal Construction of Race (10th ed., N.Y.U. Press 2006) (1996).

[71] Tina Al-khersan & Azadeh Shahshahani, *From the Chinese Exclusion Act to the Muslim Ban: An Immigration System Built on Systemic Racism*, 17 Harv. L. & Pol'y Rev. 131, 136 (2022). "Any woman suspected of prostitution could be subjected to a lengthy investigation, but because many Americans falsely believed that all Chinese women coming to the United States were prostitutes, Chinese women were the main targets of government scrutiny." Erika Lee, *Immigrants and immigration law: A state of the field assessment*, 18 J. Am. Ethnic Hist. 85, 89-90 (1999).

[72] Lee, *supra* note 71, at 90.

[73] Margo Anderson, *Public Management of Big Data: Historical Lessons from the 1940s*, 7 Fed. Hist. 17, 21 (2015). "The Army's *Final Report* on the evacuation program, published in 1943, baldly noted that the 1940 census was the 'most important single source of information prior to the evacuation,' and the Census Bureau was given full credit for running special tabulations that 'became the basis for the general evacuation and relocation plan.'" *Id*. at 22. *See also* Margo Anderson & William Seltzer, *Challenges to the Confidentiality of U.S. Federal Statistics, 1910-1965*, 23 J. of Official Statistics, 1, 21 n.38 (2007). ("The U.S. Census Bureau provided very detailed small area tabulations (that is, meso data) from the 1940 Census for operational use in the forced removal of the Japanese Americans from their homes.").

[74] *See* Mizue Aizeki, *Multiplying State Violence in the Name of Homeland Security*, *in* Resisting Borders and Technologies of Violence (Haymarket Books 2023), at 21-24.

(NSEERS), which was created in 2002, in response to the attacks of September 11, 2001. NSEERS required non citizens in the U.S. who were from certain countries to go through a special registration process, which included being photographed, having their biometrics taken, and being subjected to an interrogation to gather in-depth biographical information.[75] The program resulted in no terrorism related convictions and was widely deemed ineffective in achieving its purported aims. In addition to being discriminatory on its face, the program had and continues to have long lasting consequences for those who were forced to register, many of whom were subjected to ongoing surveillance or even deported as a result of NSEERS requirements.[76]

While the government may shift its most intense targeting from one community to another depending on political conditions, what remains constant is the reliance on immigration powers as the means for carrying out aggressive surveillance against communities of color, often including humiliating interrogations and invasive physical examinations. Today, much of the focus is on people from Central America, a group that has been racialized in a way that mirrors the mistreatment of Black people, Asian immigrants, and Muslims.[77]

DHS does not report any data reflecting the race, ethnicity, or nationality of those from whom it collects DNA. But there is no doubt that DHS collects DNA primarily from people of color, because the vast majority of people who have contact with federal immigration agents are people of color. In recent years, DHS has targeted migrants coming from mainly Mexico, Central America, and South America.[78] A smaller but growing number of migrants from the

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[75] *The NSEERS Effect: A Decade of Racial Profiling, Fear and Secrecy*, Penn State Law Immigrants' Rights Clinic & Rights Working Group (2012), https://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1005&context=irc_pubs

[76] *Id*. at 23-24.

[77] Katy Murdza & Walter Ewing, *The Legacy of Racism within the U.S. Border Patrol*, Am. Immigr. Council 1, 14 (Feb. 10, 2021), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_legacy_of_racism_within_the_u.s._border_patrol.pdf [https://perma.cc/7Y6Q-XFF8]; Cecilia Menjívar, *The Racialization of "Illegality*," 150 Daedalus 91 (2021); Emily P. Estrada, Emily R. Cabaniss & Shelby A. Coury, *Racialization of Latinx Immigrants*, 17 Du Bois Rev. 125 (2020); Hana E. Brown, Jennifer A. Jones & Andrea Becker, *The Racialization of Latino Immigrants in New Destinations: Criminality, Ascription, and Countermobilization*, 4 Russell Sage Found. of the Soc. Sci. 118 (2018). *See also* Simone Browne, Dark Matters (2015).

[78] *2022 Yearbook of Immigration Statistics*, Office of Homeland Sec. Statistics i, 90-93 (Nov. 2023), https://www.dhs.gov/sites/default/files/2023-11/2023_0818_plcy_yearbook_immigration_statistics_fy2022.pdf [https://perma.cc/P3CQ-GTKQ]; *U.S. Border Patrol Nationwide Apprehensions by Citizenship and Sector (2007-2019)*, Customs & Border Protection (2021), https://www.cbp.gov/sites/default/files/assets/documents/2021-Aug/USBORD~3.PDF [https://perma.cc/ES9A-JW94];

Caribbean, Africa, and Asia have also been subjected to this racialized scrutiny.[79] What's more, DHS has shown a consistent pattern of racial profiling and discriminatory practices in immigration enforcement. For example, a 2021 study of CBP operations in Michigan found that the agency disproportionately arrests "people of Latin American origin."[80] Even DHS employees have sounded the alarm. A 2013 report noted that several former Customs employees organized to reveal, among other things, that the agency targets Black people.[81] One agency inspector explained how the search criteria listed in the *Personal Search Handbook* were based on stereotypes about Black women.[82] More recently, a group of Black CBP officers sued the agency, alleging that CBP "discriminate[s] against the non-white traveling public because of race," with "management officials frequently direct[ing] officers . . . to unduly scrutinize non-white travelers."[83]

Border Patrol Arrests, *supra* note 33; *Immigration and Customs Enforcement Arrests*, Transactional Rec. Access Clearinghouse, https://trac.syr.edu/phptools/immigration/arrest/.

[79] *See* Murdza & Ewing, *supra* note 77, at 14; *Del Rio Border Patrol Sector African Arrests top 1,100*, U.S. Customs and Border Patrol (July 19, 2019), https://www.cbp.gov/newsroom/local-media-release/del-rio-border-patrol-sector-african-arrests-top-1100 [https://perma.cc/93GP-P2BV]; Andrew Selsky & Patrick Whittle, *Record number of African migrants coming to Mexican border*, Associated Press (June 16, 2019), https://apnews.com/article/429f04067c38428ba0d06749b53e6df0 [https://perma.cc/SYW6-F2BN]; Eileen Sullivan, *Growing Numbers of Chinese Migrants Are Crossing the Southern Border*, N.Y. Times (Nov. 24, 2023), https://www.nytimes.com/2023/11/24/us/politics/china-migrants-us-border.html; Jens Manuel Krogstad & Jeffrey S. Passel, *U.S. border apprehensions of Mexicans fall to historic lows*, Pew Research Ctr. (Dec. 30, 2014), https://www.pewresearch.org/short-reads/2014/12/30/u-s-border-apprehensions-of-mexicans-fall-to-historic-lows/ [https://perma.cc/3WLR-NEG3].

[80] *The Border's Long Shadow: How Border Patrol Uses Racial Profiling and Local and State Police to Target and Instill Fear in Michigan's Immigrant Communities*, ACLU Michigan 1, 4 (2021), https://www.aclumich.org/sites/default/files/field_documents/100_mile_zone_report-updated.pdf [https://perma.cc/AXY2-AK4Y]. This pattern of racialized enforcement has been shown to transfer over to local law enforcement when local officers have increased access to ICE. In a 2009 study, researchers found that when Irving, Texas law enforcement gained 24-hour access to ICE, "discretionary arrests of Hispanics for petty offenses — particularly minor traffic offenses — rose dramatically." Trevor Gardner II & Aarti Kohli, *The C.A.P. Effect: Racial Profiling in the ICE Criminal Alien Program*, Chief Justice Earl Warren Inst. on Race, Ethnicity & Diversity at Berkeley Law 1, 1 (Sept. 2009), https://www.law.berkeley.edu/files/policybrief_irving_0909_v9.pdf [https://perma.cc/TZX2-FTS6].

[81] Yvonne D. Newsome, *Border Patrol: The U.S. Customs Service and the Racial Profiling of African American Women*, 7 J. of African American Studies 31, 46-47 (2013). As a result of the post-9/11 reorganization of federal agencies, the U.S. Customs Service was renamed the Bureau of Customs and Border Protection, and most of its components were combined with components of other federal agencies to form what we know today as CBP.

[82] *Id*. at 47.

[83] Complaint at 4, *Grays et al. v. Mayorkas*, No. 21-cv-1052 (Mar. 9, 2021), https://www.documentcloud.org/documents/20985600-borderpatrolgrayscomplaint.

Figure 6: Top 5 countries represented in DHS agency arrest records by recorded citizenship of the individual, 2015 to 2018

ICE	CBP
Mexico	Mexico
Honduras	Guatemala
El Salvador	Honduras
Guatemala	El Salvador
Cuba	India

Sources: Transactional Records Access Clearinghouse (TRAC); U.S. Border Patrol[84]

DHS's DNA collection program is thus drastically increasing the number and proportion of DNA profiles in the CODIS that are connected to people of color. The building of a federal database in which people of color are disproportionately represented will only exacerbate the racism that already exists in policing, surveillance and the carceral system.

Law enforcement already spends disproportionate resources, time, and energy targeting people and communities of color.[85] Too often, this targeting leads to dangerous and even lethal outcomes for policed individuals.[86] In many states, local law enforcement officers are also

[84] ICE data drawn from *Immigration and Customs Enforcement Arrests*, *supra* note 76, covering FY 2015 to May 2018. CBP data aggregated from data tables for 2015 to 2018 appearing in *U.S. Border Patrol Nationwide Apprehensions by Citizenship and Sector*, *supra* note 76.

[85] *See, e.g.*, Magnus Lofstrom, Joseph Hayes, Brandon Martin & Deepak Premkumar, *Racial Disparities in Law Enforcement Stops*, Pub. Pol'y Inst. of Cal. (2021), https://www.ppic.org/publication/racial-disparities-in-law-enforcement-stops/ [https://perma.cc/FGX5-NSR5]; Emma Pierson, Camelia Simoiu, Jan Overgoor, Sam Corbett-Davies, Daniel Jenson, Amy Shoemaker, Vignesh Ramachandran, Phoebe Barghouty, Cheryl Phillips, Ravi Shroff & Sharad Goel, *A large-scale analysis of racial disparities in police stops across the United States*, 4 Nature Human Behavior 736 (2020); *Justice Department Announces Findings of Two Civil Rights Investigations in Ferguson, Missouri*, U.S. Dep't of Just. (2015), https://www.justice.gov/opa/pr/justice-department-announces-findings-two-civil-rights-investigations-ferguson-missouri [https://perma.cc/6R9H-8FS8]; *Key Findings*, Police Scorecard, https://policescorecard.org/findings [https://perma.cc/PW7B-XYDV].

[86] *See US: Race, Rights and Police Brutality*, Amnesty Int'l (1999), https://www.amnesty.org/en/documents/AMR51/147/1999/en/. *See also* Reed T. DeAngelis, *Systemic Racism in Police Killings: New Evidence From the Mapping Police Violence Database, 2013-2021*, 0 Race and Justice 0 (2020); Adrienne N.

directly entangled in immigration enforcement, which doubles the risks to Black and Brown immigrant communities from racialized policing. State level anti-immigrant laws, like Arizona's infamous "show me your papers" law funnel people of color into both the criminal legal system and the immigration system. Pervasive policing also has more quotidian oppressive effects: contact with police can lead people to lose their housing, has been shown to "lower[] the educational performance of Black boys" from overpoliced neighborhoods and to increase young boys' likelihood of engaging in future behavior labeled "delinquent."[87]

The availability of a massive federal DNA database dominated by profiles linked to people of color will encourage more DNA-based policing. Bigger is not always better.[88] But the very existence of the database exerts a gravitational pull on police resources, incentivizing the gathering of yet more data as well as the adoption of additional digital tools for analyzing DNA,

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Milner, Brandon J. Georg & David B. Allison, *Black and Hispanic Men Perceived to Be Large Are at Increased Risk for Police Frisk, Search, and Force*, 11 PLoS ONE 1 (2016); *Creating Traffic Safety: A Policy Memo for Local Elected Leaders*, Local Progress 1, 4, https://localprog.org/TrafficSafetyMemo (citing Sam Levin, *US police have killed nearly 600 people in traffic stops since 2017, data shows*, The Guardian (Apr. 21, 2022)) ("28% percent of those killed in traffic stops are Black drivers, despite the fact that they account for only 13% of the general population.").

[87] Dhruv Mehrotra, Surya Mattu, Annie Gilbertson & Aaron Sankin, *How We Determined Crime Prediction Software Disproportionately Targeted Low-Income, Black, and Latino Neighborhoods*, The Markup (Dec. 2, 2021), https://themarkup.org/show-your-work/2021/12/02/how-we-determined-crime-prediction-software-disproportionately-targeted-low-income-black-and-latino-neighborhoods [https://perma.cc/4BTV-Z9NL]; Kathryn Ramsey Mason, *Crime-free housing ordinances and eviction*, 36 IRP Focus 12 (2020).

[88] *See infra* notes 208-09 and accompanying text (describing that, as more data is entered into a DNA database, the chances for false positives will increase making the database as a whole less useful). Time and again, we have seen how data-driven criminal policing is not better, more accurate, more efficient, or fairer than its analog version. *See, e.g.*, Sarah Lageson, *Criminally Bad Data: Inaccurate Criminal Records, Data Brokers, and Algorithmic Injustice*, 2023 U. Ill. L. Rev. 1771, 1775-78 (2023); Stop LAPD Spying, *Automated Banishment: The Surveillance and Policing of Looted Land*, (2021), https://automatingbanishment.org/; Matthew Guariglia, *Technology Can't Predict Crime, It Can Only Weaponize Proximity to Policing*, Elec. Frontier Found. (Sept. 3, 2020), https://www.eff.org/deeplinks/2020/09/technology-cant-predict-crime-it-can-only-weaponize-proximity-policing [https://perma.cc/QMA2-T3F6]; Rashida Richardson, Jason M. Schultz & Kate Crawford, *Dirty Data, Bad Predictions: How Civil Rights Violations Impact Police Data, Predictive Policing Systems, and Justice*, 94 N.Y.U L. Rev. 193 (2019); Beryl Lipton, *Eight years in, LAPD can't measure PredPol's effect on crime*, MuckRock (Mar. 12, 2019) https://www.muckrock.com/news/archives/2019/mar/12/algorithms-lapd-predpol/ [https://perma.cc/UP6R-XQM5]; Clare Garvie, *Garbage In, Garbage Out: Face Recognition on Flawed Data*, Ctr. on Priv. & Tech. at Georgetown Law (May 16, 2019), https://www.flawedfacedata.com/; Stop LAPD Spying, *Before the Bullet Hits the Body: Dismantling Predictive Policing in Los Angeles* (2018), https://stoplapdspying.org/wp-content/uploads/2018/05/Before-the-Bullet-Hits-the-Body-May-8-2018.pdf [https://perma.cc/93PP-ZSH9].

and for connecting it with other surveillance databases and networks.[89] The larger and more integrated the DNA database is with other digital policing infrastructure, the greater the likelihood that police will not only rely on DNA in more investigations but also choose to allocate time and resources to investigations that can be done using DNA data. We have already seen police move from seeking to use DNA to investigate only "serious" crimes to more and more minor offenses, including property crimes like vandalism.[90] As Hamid Khan, founder of the Stop LAPD Spying Coalition has noted, "[a]ny time surveillance gets legitimized, then it is open to be expanded over time."[91] Further expansion to federal immigration enforcement only reinforces the existing pressures and incentives to engage in DNA-based profiling. Existing levels of policing and surveillance of Brown and Black communities will only intensify.

D. This expansion of federal DNA-collection power is the result of several low-profile administrative sleights of hand.

The immediate cause of the massive expansion in DNA collection from noncitizens described thus far is DOJ's 2020 rule change. But it is important to understand that, at this point, simply restoring the regulations to their pre-Trump Administration framework likely would not put a stop to DHS's DNA collection program. This is because Congress constructed the statutory infrastructure that made the 2020 Rule possible almost 20 years ago. The foreshortened regulatory process that happened in 2019 and 2020 was the final move in a series of several

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[89] *See, e.g.*, Stop LAPD Spying, *Before the Bullet Hits the Body*, *supra* note 88; Andrew Guthrie Ferguson, *Surveillance and the Tyrant Test*, 110 Geo. L.J. 205 (2021) ("surveillance technology offers government a new power to monitor and control citizens . . . " that "[p]ower will be abused"); *Id.* at 211 (Describing the "trap lens": the view that "giving police any new surveillance power is a trap that will essentially create new social control methods to be used against the less powerful. The trap is set by providing seemingly new innovations under the guise of progress or objectivity. The trap springs when those technologies reify existing social hierarchies, structural power dynamics, and racial bias.").

[90] *See, e.g.*, Lauren Kirchner, *DNA Dragnet: In Some Cities, Police Go From Stop-and-Frisk to Stop-and-Spit*, ProPublica (Sept. 12, 2016), https://www.propublica.org/article/dna-dragnet-in-some-cities-police-go-from-stop-and-frisk-to-stop-and-spit [https://perma.cc/2LLQ-RKMS] (cops "swab everything from the steering wheel of a stolen car to the nozzle of a spray-paint can used for vandalism"); John K. Roman, Shannon Reid, Jay Reid, Aaron Chalfin, William Adams & Carly Knight, *The DNA Field Experiment: Cost-Effectiveness Analysis of the Use of DNA in the Investigation of High-Volume Crimes*, Urban Inst. Justice Pol'y Ctr. 3 (2008), https://www.ojp.gov/pdffiles1/nij/grants/222318.pdf [https://perma.cc/MXH2-AYMN].

[91] Tate Ryan-Mosley & Jennifer Strong, The activist dismantling racist police algorithms, MIT Technology Review (June 5, 2020), https://www.technologyreview.com/2020/06/05/1002709/the-activist-dismantling-racist-police-algorithms/ [https://perma.cc/5VHJ-QFYD].

under-the-radar changes to law and policy that unfolded over many years and several Presidential administrations.

The history of federal law-making related to DNA collection goes back only to 1994, when Congress authorized the FBI to create the National DNA Index System (NDIS).[92] Since 2000, Congress has gradually expanded the categories of people from whom federal law enforcement agencies collect DNA. In 2001, for example, Congress passed the USA PATRIOT Act, which added three new categories of qualifying federal offenses to the list of those requiring DNA collection: (1) terrorist acts; (2) crimes of violence; and (3) any attempt or conspiracy to commit either (1) or (2).[93] In 2004, the Justice for All Act extended DNA collection to all individuals convicted of federal felony offenses.[94]

But the most drastic expansion of the federal government's DNA collection program – and the one most relevant for this report – came in 2005. That year, the DNA Fingerprint Act was attached as an amendment to the reauthorization bill for the popular Violence Against Women Act.[95] With just a few simple lines of text, the bill for the first time expanded federal DNA collection to include those arrested on suspicion of having committed a crime, not just those convicted of an eligible offense. It also, for the first time, extended compulsory DNA collection to persons outside of the criminal legal context – specifically, to detained non-citizens. The new law provided that:

> (A) The Attorney General may, as prescribed by the Attorney General in regulation, collect DNA samples from individuals who are arrested **or from non-United States persons who are detained under the authority of the United States.**

Because this language was buried in the VAWA reauthorization, the change avoided serious public scrutiny.[96] Congress held no public hearings or debate on the measure,

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[92] *See* DNA Identification Act of 1994, 34 U.S.C. § 12592.

[93] *See* USA Patriot Act of 2001, Pub. L. No. 107-56, § 503, 115 Stat. 272, 364 (2001).

[94] *See* Justice For All Act of 2004, Pub. L. No. 108-405, § 203, 118 Stat. 2260, 2270 (2004).

[95] *See* Violence Against Women and Dep't of Reauthorization Act of 2005, Pub. L. 109-162, tit. X, 119 Stat. 2960, 3084 (2006) (codified as amended at 34 U.S.C. § 40702).

[96] *See* Am. Civil Liberties Union et al., Comment Letter on U.S. Dep't of Justice Proposed Rule, DNA-Sample Collection from Immigration Detainees 1 (Nov. 12, 2019),

and there was little opportunity for civil and human rights organizations to voice their strenuous opposition.[97]

The DNA Fingerprint Act acted as a grant of authority, permitting – but not requiring – the Attorney General to collect DNA samples from noncitizens.[98] In a 2008 rule, DOJ picked up that authority and *mandated* collection, issuing a rule stating that U.S. agencies that detain non-U.S. persons *shall* collect DNA from such persons.[99] The rule, however, included four categories of exemption, the last of which was a kind of catch-all that acted to preserve agency discretion. Under the 2008 rule, DHS was not required to collect DNA samples from:

> (1) Aliens lawfully in, or being processed for lawful admission to, the United States;
> (2) Aliens held at a port of entry during consideration of admissibility and not subject to further detention or proceedings;
> (3) Aliens held in connection with maritime interdiction; or
> (4) Other aliens with respect to whom the Secretary of Homeland Security, in consultation with the Attorney General, determines that the collection of DNA samples is not feasible because of operational exigencies or resource limitations.[100]

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https://www.aclu.org/sites/all/libraries/pdf.js/web/viewer.html?file=https%3A%2F%2Fwww.aclu.org%2Fsites%2Fdefault%2Ffiles%2Ffield_document%2Fimmigration_detention_dna_comment.pdf (noting that the DNA Fingerprint Act of 2005 "was attached as an amendment to the broadly popular Violence Against Women Act ('VAWA') reauthorization bill and was approved by Congress absent adequate consideration").

[97] *See, e.g.*, Am. Civil Liberties Union & Am. Civil Liberties Union of N. Cal., Comment Letter on U.S. Dep't of Justice Proposed Rule: RIN 1105-AB24 Proposed Rule, DNA-Sample Collection Under the DNA Fingerprint Act of 2005 and the Adam Walsh Child Protection and Safety Act of 2006 (May 19, 2008), https://www.aclu.org/documents/aclu-comments-justice-department-regarding-collection-dna-under-dna-fingerprint-act-2005-and; Center for Constitutional Rights, Comment Letter on U.S. Dep't of Justice Proposed Rules: DNA-Sample Collection Under the DNA Fingerprint Act of 2005 and the Adam Walsh Child Protection and Safety Act of 2006, 28 C.F.R. Part 28 (May 19, 2008), https://ccrjustice.org/sites/default/files/assets/CCR%20DNA%20Database%20Comments.pdf.

[98] *See* 34 U.S.C. § 40702(a)(1)(A); DNA-Sample Collection Under the DNA Fingerprint Act of 2005 and the Adam Walsh Child Protection and Safety Act of 2006, 73 Fed. Reg. 21083 (Apr. 18, 2008); DNA-Sample Collection and Biological Evidence Preservation in the Federal Jurisdiction, 73 Fed. Reg. 74,932 (Dec. 10, 2008).

[99] *See* DNA-Sample Collection and Biological Evidence Preservation in the Federal Jurisdiction, 73 Fed. Reg. 74,932, 74,942 (Dec. 10, 2008).

[100] DNA-Sample Collection and Biological Evidence Preservation in the Federal Jurisdiction, 73 Fed. Reg. 74,932, 74,942 (Dec. 10, 2008).

Relying primarily on the fourth exemption for "operational exigencies," DHS did not move to incorporate DNA collection into the majority of its regular enforcement operations. "Operational exigencies" refers to constraints that the department might face because of limited financial resources, technical capabilities, and personnel. It is a way of deferring to the agency's own determinations about what to prioritize when resources are limited. In 2010, then-DHS secretary Janet Napolitano wrote to then-Attorney General Eric Holder and requested exemption from the requirement to collect DNA from individuals in immigration custody awaiting deportation proceedings or not charged with a crime, as well as non-U.S. persons detained and awaiting administrative proceedings.[101] She argued, under the "operational exigencies" exception, that it just wasn't feasible to collect and process so much DNA, so DHS would prioritize those accused of crimes, rather than conduct large-scale collection.[102] Thereafter in 2012 and 2013, the Federal Protective Service, ICE, and Secret Service implemented limited DNA collection programs aimed at individuals arrested on criminal charges, while CBP did not.[103]

DNA collection stayed relatively small-scale at DHS–with a total of only 25,000 profiles added to the "detainee" category of CODIS after more than a decade–until February 2018, when officials from the Trump DOJ began pressuring CBP to do more.[104] In February 2018, Trump DOJ officials met with officials from CBP "to request CBP start collecting DNA from non-U.S.

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[101] Letter from Janet Napolitano, Sec'y Dep't Homeland Sec., to Eric Holder, Att'y Gen. 2-3 (Mar. 22, 2010), https://www.eff.org/files/filenode/ice_dna_3-22-10_napolitanoletter.pdf [https://perma.cc/44B2-XMJJ]. (This exemption did not apply to non-U.S. persons arrested for border crossing violations or drug offenses, which constitute federal crimes); *See* 28 C.F.R. § 28.12 (2020).

[102] *See* Letter from Janet Napolitano, Sec'y Dep't Homeland Sec., to Eric Holder, Att'y Gen. 2 (Mar. 22, 2010), https://www.eff.org/files/filenode/ice_dna_3-22-10_napolitanoletter.pdf [https://perma.cc/44B2-XMJJ]; Off. Inspector Gen., U.S. Dep't Homeland Sec., DHS Law Enforcement Components Did Not Consistently Collect DNA from Arrestees (OIG-21-35) 3 (2021), https://www.oig.dhs.gov/sites/default/files/assets/2021-05/OIG-21-35-May21.pdf [hereinafter OIG-21-35] ("During their correspondence, Secretary Napolitano indicated, and the Attorney General agreed, DHS would phase in DNA collection of [criminal] arrestees 'over the next year.'").

[103] *See* Off. Inspector Gen., U.S. Dep't Homeland Sec., OIG-21-35, DHS Law Enforcement Components Did Not Consistently Collect DNA from Arrestees 3 (2021), https://www.oig.dhs.gov/sites/default/files/assets/2021-05/OIG-21-35-May21.pdf [hereinafter OIG-21-35].

[104] *See* Sara Huston (Katsanis), *Tracing Windblown Seeds: Genetic Information as a Biometric for Tracking Migrants*, *in* Silent Witness: Forensic DNA EvidenceAnalysis in Criminal Investigations and Humanitarian Disasters 217 (Henry A. Erlich, Thomas J. White, & Eric Stover eds., 2020); Off. Inspector Gen., U.S. Dep't Homeland Sec., OIG-21-35, DHS Law Enforcement Components Did Not Consistently Collect DNA from Arrestees 3 (2021), https://www.oig.dhs.gov/sites/default/files/assets/2021-05/OIG-21-35-May21.pdf [hereinafter OIG-21-35].

detainees."[105] CBP "claimed the 2010 exemption was still in effect and it did not plan to begin collecting DNA from non-U.S. detainees."[106]

But in July of 2018, a CBP employee filed a whistleblower complaint about the agency's failure to collect DNA.[107] In reaction to the whistleblower complaint, and in line with its February 2018 exhortation, DOJ issued a Notice of Proposed Rulemaking in October 2019. The proposed rule removed the "operational exigencies" exemption from the regulation, eliminating most of DHS's discretion to exempt people in its custody from DNA collection.[108] DOJ estimated that, as a result of this rule change, DHS would collect DNA samples from almost 750,000 individuals per year.[109]

In any other presidential administration, DOJ's push to ramp up DNA collection likely would have received significant attention from the media, civil society organizations, and Congress. But the DNA Rule was somewhat lost among the many other anti-immigrant policy changes the Trump administration pursued during its four years in office. Immediately after his inauguration, President Trump issued a series of executive orders that vilified migrants and threw communities across the country into chaos.[110] While litigation over those orders proceeded through the courts, Trump appointees took their seats throughout the government and began implementing the administration's anti-immigrant agenda. The policy that received the most attention was the administration's decision to remove children from their families at

[105] Off. Inspector Gen., U.S. Dep't Homeland Sec., OIG-21-35, DHS Law Enforcement Components Did Not Consistently Collect DNA from Arrestees 3 (2021), https://www.oig.dhs.gov/sites/default/files/assets/2021-05/OIG-21-35-May21.pdf.

[106] Off. Inspector Gen., U.S. Dep't Homeland Sec., OIG-21-35, DHS Law Enforcement Components Did Not Consistently Collect DNA from Arrestees 3 (2021), https://www.oig.dhs.gov/sites/default/files/assets/2021-05/OIG-21-35-May21.pdf.

[107] Off. Inspector Gen., U.S. Dep't Homeland Sec., OIG-21-35, DHS Law Enforcement Components Did Not Consistently Collect DNA from Arrestees 3 (2021), https://www.oig.dhs.gov/sites/default/files/assets/2021-05/OIG-21-35-May21.pdf.

[108] *See* DNA-Sample from Immigration Detainees, 84 Fed. Reg. 56,397 (Oct. 22, 2019).

[109] *See* DNA-Sample Collection From Immigration Detainees, 85 Fed. Reg. 13,483, 13,488 (Mar. 9, 2020) (codified at 28 C.F.R. § 28.12).

[110] *See President Trump's Executive Orders on Immigration and Refugees*, Ctr. for Migration Studies (Jan. 29, 2017), https://cmsny.org/trumps-executive-orders-immigration-refugees/.

the southern border, resulting in thousands of separated families, many of whom still have yet to be reunited.[111]

The government also gave the public a very short period of time to respond to the announcement of the rule change. The Administrative Procedure Act, which governs the regulatory process, requires agencies to give at least 30 days for public comment on major new policies.[112] Without any explanation, DOJ limited the notice and comment period for its new DNA collection Rule to 20 days.[113] Nevertheless, and in spite of the shortened comment period, DOJ received more than 40,000 public comments on the proposed Rule,[114] many of which cited concerns about the Rule's impact on immigrant communities, as well as on privacy rights and surveillance culture more broadly.[115]

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[111] *See, e.g., A Timeline of the Trump Administration's Family Separation Policy*, American Oversight, https://www.americanoversight.org/a-timeline-of-the-trump-administrations-family-separation-policy#jan-18. (It is worth noting that the chaos of the family separation policy created an opportunity for further ground-softening on the use of DNA, in this case to reunify separated families that negligent bureaucratic record-keeping had abandoned.); *DNA to Reunify Separated Migrant Families*, Ann & Robert H. Lurie Children's Hospital of Chicago (May 27, 2021), https://www.luriechildrens.org/en/news-stories/dna-to-reunify-separated-migrant-families/.

[112] Administrative Procedure Act, 5 U.S.C. § 553(d).

[113] *See* DNA-Sample Collection From Immigration Detainees, 84 Fed. Reg. 56,397 (Oct. 22, 2019) ("Written and electronic comments must be sent or submitted on or before November 12, 2019.").

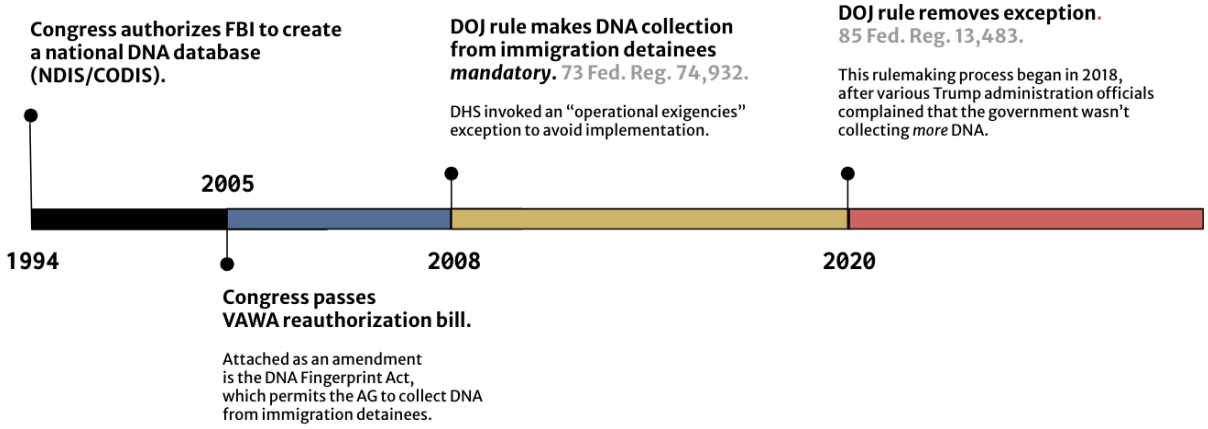
[114] *See* DNA-Sample Collection From Immigration Detainees, 85 Fed. Reg. 13,483, 13,486 (Mar. 9, 2020) (codified at 28 C.F.R. § 28.12).

[115] *See, e.g.*, Am. Civil Liberties Union et al., Comment Letter on U.S. Dep't of Justice Proposed Rule: FR Doc # 2019-22877, Docket No. OAG-164, DNA-Sample Collection from Immigration Detainees 4-5 (Nov. 12, 2019), https://epic.org/wp-content/uploads/apa/comments/Coalition-Comments-Immigration-Detention-DNA-Collection.pdf; Comm. on Immigration & Nationality Law, New York City Bar Association, Comment on U.S. Dep't of Justice Proposed Rule: RIN No. 1105-AB56 or Docket No. DOJ-OAG-2019-0004, Comments in Response to the Proposed Rule Re: DNA Sample Collection from Immigration Detainees 2 (Nov. 12, 2019), https://s3.amazonaws.com/documents.nycbar.org/files/2019600--DNACollectionCommentFINAL11.12.19.pdf; Open Society Justice Initiative & Instituto para las Mujeres en la Migración, Comment Letter on U.S. Dep't of Justice Proposed Rule: RIN 1105-AB56 Proposed Rule, DNA-Sample Collection from Immigration Detainees 3 (Nov. 12, 2019), https://www.justiceinitiative.org/uploads/13a80afc-9590-45df-8099-cd1e4b55f991/DOJ-public-comment-20191120.pdf [https://perma.cc/WN2K-EXGD]; *US Proposal to Collect DNA from Detained Immigrants Violates Privacy Rights*, Hum. Rts. Watch (Nov. 12, 2019), https://www.hrw.org/news/2019/11/12/us-proposal-collect-dna-detained-immigrants-violates-privacy-rights.

DOJ published the final, essentially unchanged, rule in March 2020.[116] CBP "began collecting DNA from any person in CBP custody who is subject to fingerprinting" in January 2020[117] — months prior to DOJ's publication of the final Rule. ICE launched its program in Dallas in May 2020.[118]

DHS's DNA-collection program is now shocking in its size, scope, and pace.[119] As described throughout this report, there is a real risk that the existence of such a large genetic database with virtually no limits on its exponential growth will shift the distribution of power between the government and the people in the United States in a fundamental way. That such a fundamental shift could be made through the series of inconspicuous policy moves described here, without meaningful democratic deliberation, should shock the conscience of the political community.

Figure 7:



Timeline of events leading to DHS's DNA collection program.

[116] *See* DNA-Sample Collection From Immigration Detainees, 85 Fed. Reg. 13,483 (Mar. 9, 2020) (codified at 28 C.F.R. § 28.12).

[117] Letter from NIJC to Katherine Culliton-Gonzalez, Officer for Civil Rights and Civil Liberties, DHS 4 n.15 (Feb. 23, 2022), https://immigrantjustice.org/sites/default/files/content-type/press-release/documents/2022-02/NIJC-Request-CRCL-investigation-CBP-airport-arrests_Feb-23-2022.pdf.

[118] Betsy Woodruff Swan & Daniel Lippman, *DHS Begins Collecting DNA from Undocumented Immigrants After Whistleblower Complaints*, Politico (May 15, 2020), https://www.politico.com/news/2020/05/15/dhs-dna-whistleblower-immigrants-260097.

[119] *See supra* Section A.

E. The government is exploiting its immigration powers to collect genetic material at a pace that would not be possible using criminal policing powers.

There are several reasons why it would make sense for an administration that wants to radically expand DNA collection to rely on its immigration powers rather than its criminal law enforcement powers to do so. The overarching reason is that DHS operates with almost no real bureaucratic oversight and in the context of a long history of judicial deference to the executive and legislative branches on the issue of immigration. When people have challenged detention, deportation, or other immigration enforcement actions on constitutional grounds, courts have repeatedly invoked principles of judicial deference to avoid limiting the federal government's immigration powers.[120] One of the things that made it possible for the judiciary to maintain such a hands-off approach on immigration policy, even in the face of enforcement agencies' serious abuses of power, is the fact that immigration law is civil law, not criminal law.[121] Because the penalties a person can face for violating civil law are typically much less severe than punishments for violations of criminal law, courts have not extended the same constitutional protections to people defending against civil liability as they have to people defending against criminal charges.

Despite being "civil" in nature, the consequences that people face when they are suspected of violating immigration law are often just as severe as, if not more severe than, criminal punishment. Eighty percent of people in immigration detention are held in the same facilities used for criminal incarceration,[122] and for many, deportation may in fact be "tantamount to a death sentence."[123] Nevertheless, courts have held that because immigration law is "civil" and "non-punitive," people subjected to detention and deportation are not entitled to the same

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[120] Shoba Sivaprasad Wadhia & Christopher J. Walker, *The Case Against* Chevron *Deference in Immigration Adjudication*, 70 Duke L.J. 1197 (2021).

[121] *See* Michael Kagan, *Immigration Law's Looming Fourth Amendment Problem*, 104 Geo. L.J. 125, 167 (2015) ("the plenary power doctrine and . . . the premise that immigration law is civil, not criminal . . . allowed the American immigration enforcement infrastructure to develop in a parallel universe for more than a century").

[122] Setareh Ghandehari et al., *Carceral Carousel*, Immigr. Legal Res. Ctr. & Detention Watch Network 5 (May 2023), https://www.ilrc.org/sites/default/files/2023-05/Carceral%20Carousel%20%282023%29_1.pdf [https://perma.cc/TG3K-JGZ6].

[123] *Tantamount to a Death Sentence: Deported TPS Recipients Will Experience Extreme Violence and Poverty in Honduras and El Salvador*, Centro Presente, Alianza Americas & Lawyers' Committee for Civil Rights and Economic Justice (July 2018), https://lawyersforcivilrights.org/wp-content/uploads/2018/08/Updated-TPS-Delegation-Report-July-2018.pdf [https://perma.cc/W2CT-BBTA].

constitutional protections as people subjected to criminal prosecution.[124] These include the right to court-appointed counsel, the right to neutral review of detention decisions, the privilege against self-incrimination, and the right to confront witnesses against oneself, among other protections. The legal fiction that immigration detention is not punishment has often enabled the federal government to invoke its detention powers to justify indignities that, if they were "punishment," would not be allowed. The compelled taking of genetic material is one such example.

The collection and use of DNA in the criminal legal system has been the subject of numerous critiques by scholars, practitioners, policymakers, and the communities who are most subject to policing.[125] But as problematic as DNA is in the criminal context, there are some limitations on when, how, and from whom criminal law enforcement agencies can take DNA which, if they do not make the practice fair or just, at least make it somewhat more cumbersome and resource-intensive to carry out.[126] These limitations stem both from the U.S. Constitution[127] and state law. For example, some states limit DNA collection by police to people who have been convicted of certain offenses or require a judicial warrant specifically for the taking of DNA. The most permissive states in the U.S. allow police to take a person's DNA when that person is lawfully arrested (but not yet convicted) for a qualifying offense (this category is always defined in terms of the "seriousness" of the crime). This means that, in the criminal context, the taking of DNA is only legal if the underlying arrest is legal; and the arrest is only legal if a judge determines that the arrest met the Fourth Amendment's probable cause requirement.

Making an arrest or conviction for a serious offense a precondition for DNA collection serves two functions in the criminal context. It is a limitation on the category of people who can be

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[124] *See Padilla v. Kentucky*, 559 U.S. 356, 365 (2010) (acknowledging the consequence of deportation as "a particularly severe 'penalty'" that is "intimately related to the criminal process"); Leigh Ainsworth, *Immigration Law Isn't So "Civil" Anymore: The Criminal Nature of the Immigration System*, 53 American Crim. L. Rev. 30, 34 (2016); Mary Bosworth & Emma Kaufman, *Foreigners in a Carceral Age: Immigration and Imprisonment in the United States*, 22 Stanford L. & Policy Rev. 429 (2011).

[125] *See, e.g.*, Erin Murphy, Inside the Cell: The Dark Side of Forensic DNA (2015); Dorothy Roberts, Fatal Invention (2011); Steve Mercer & Jessica Gabel, *Shadow Dwellers: The Underregulated World of State and Local DNA Databases*, 69 N.Y.U. Ann. Surv. Am. L. 639 (2014); Natalie Quan, *Black and White or Red All over? The Impropriety of Using Crime Scene DNA to Construct Racial Profiles of Suspects*, 84 S. Cal. L. Rev. 1403 (2011).

[126] *But see* Lindsay Nash, *Inventing Deportation Arrests*, 121 Mich. L. Rev. 1301, 1313 (2023) (noting that "the probable cause review procedure in . . . the criminal legal system" often does not "live[] up to the checking function intended").

[127] *See infra* Section F.

subjected to DNA collection (meaning there are fewer people from whom the government can legally take DNA), and it is a check on the police's power to infringe on individual rights (meaning that the government has to spend more time and resources before it becomes legal to take DNA). These limitations significantly hinder the pace at which the government can build its genetic database.

In the immigration context, the "detention" precondition does not properly serve either of these functions. It is an extremely weak categorical limitation because "detained" can refer to so many different situations in the immigration context and because the executive branch's power to detain has been interpreted so broadly. And, as we argue more fully in Section F, it does not act as a check on the constitutionality of DNA collection in individual cases, even in the very minimal way that arrest does in the criminal context, because judges aren't checking each instance of ICE or CBP detention to ensure its legality. In the simplest possible terms, what this means is that when the government uses immigration powers, it can take DNA from many more people, much more quickly, than it can using criminal policing powers.

Neither the 2020 DOJ Rule nor the underlying statute define the kinds of detention that can authorize DNA collection. Immigration authorities have long used "detention" to refer to a wide range of different circumstances — from an interview in an airport screening room to a few days in a local jail where ICE rents space to months or even years of incarceration.[128] You may have been briefly detained by CBP yourself and not even thought of it as detention if, for example, you were ever pulled out of the car line at a land border between the U.S. and Canada or Mexico. The image that likely comes to mind for most people when they think of immigration detention

[128] *See, e.g.*, Hillel R. Smith, Cong. Rsch. Serv., R45915, Immigration Detention: A Legal Overview (Sept. 2019), https://sgp.fas.org/crs/homesec/R45915.pdf [https://perma.cc/BT3K-7PZ9] (reviewing DHS detention authority); *What is Immigration Detention? And Other Frequently Asked Questions*, Int'l Det. Coal. (2023), https://idcoalition.org/about/what-is-detention/ [https://perma.cc/Y64C-AWPV] ("Immigration detention can occur . . . when migration authorities first come in to contact with a person . . . at a border point, such as in an airport or sea port, or it may occur when authorities conduct a raid or otherwise come across a person in the community who does not have the necessary documentation."); *Short-Term Detention Standards and Oversight*, U.S. Dep't of Homeland Sec. & U.S. Cust. & Border Prot. 3 (Dec. 2015), https://www.cbp.gov/sites/default/files/assets/documents/2022-Jan/Short-Term%20Detention%20Standards%20and%20Oversight_1.pdf [https://perma.cc/QCH4-XP38] ("For the purpose of detention, a person in CBP custody is detained for the length of time that is necessary for CBP to complete an interview, collect biographic and biometric data, run record checks, complete required case paperwork, determine disposition, and admit and/or release the individual or transfer him/her to another agency's custody.").

is an image of a person in something like a jail cell, or perhaps — after the highly publicized family separation crisis of 2018 — in one of the crowded tent city dormitories at the southern border. ICE and CBP do incarcerate tens of thousands of people every day in facilities like these, and we know that DNA collection is now a regular part of operations at most, if not all, ICE detention and CBP processing centers. But in recent years, the total number of people booked into ICE and CBP custody each year has reached somewhere between 130,000 and 400,000.[129] Those totals still fall far short of the DOJ's prediction, during the process that resulted in the 2020 rule change, that DHS would collect DNA from 748,000 people per year. This suggests that in a significant percentage of cases, DHS will take DNA from people who are not actually booked into detention. Further research is necessary to understand what the range of different situations are where a person is not booked into detention but is nevertheless considered by DHS to be "detained" enough that they can be subjected to DNA collection. But, as one interviewee noted, "It seems like they are using detained to mean anybody."[130]

While we do not have full information about all the on-the-ground contexts in which DHS is currently taking or not taking DNA, we do know that the federal government considers itself to have the authority to take DNA even during the briefest immigration stops. In its justification for the 2020 Rule the DOJ asserted: "Lawful entrants from other countries may be regarded as detained when, for example, they are briefly held up at airports during routine processing or taken aside for secondary inspection."[131] Nevertheless, the explanation continued, "when such entrants are not subject to further detention or proceedings, categorically requiring DNA-sample collection is not necessary to realize the rule's objectives."[132] In other words, even though the government believes that even these very brief and routine delays count as detention for the purpose of the DNA statute, they aren't at this point going to require DHS to take DNA in such contexts. But if the federal government believes it is entitled to take DNA from "lawful entrants . . . briefly held up during routine processing," it is difficult to imagine what kinds of delays an immigration official could impose on a person who would not give rise to the authority to take the person's DNA. If this is truly the meaning of the statute, then anyone

[129] *ICE Annual Report Fiscal Year 2023*, U.S. Immigr. and Cust. Enf. 13 (2023), https://www.ice.gov/doclib/eoy/iceAnnualReportFY2023.pdf [https://perma.cc/RGQ2-JWPX]; *CBP vs ICE Book-Ins to Detention, October 2018 - 03/09/2024*, Transactional Rec. Access Clearinghouse, https://trac.syr.edu/immigration/detentionstats/book_in_agen_program_table.html [https://perma.cc/7T5M-H589].
[130] 2024 TCRP Interview, *supra* note 62.
[131] DOJ 2020 Rule, 85 Fed. Reg. at 13,484.
[132] *Id.*

entering the U.S. without a U.S. passport or green card on their person should be prepared to submit to DNA collection based on a single CBP agent's whim.

While apparently considering that even the briefest forms of detention give the federal government the authority to take DNA, the DOJ Rule does permit — but does not require — DHS to exempt certain categories of people from DNA collection. These include: "aliens lawfully in, or being processed for lawful admission to, the United States" and "aliens held at a port of entry during consideration of admissibility and not subject to further detention or proceedings."[133] CBP claims that it currently does not take DNA from people in those categories, and we did not find any specific examples to contradict that claim.[134] But it would be a mistake to be reassured by this. Without changing the Rule, DHS could decide to require DNA collection even from people who fall into one of the available exceptions. The DOJ could also revisit its rulemaking and remove the exceptions entirely.

The vagueness, breadth, and shifting boundaries of the term "detained" in the immigration context mean that the category of people who can be subjected to DNA collection by DHS is vast and essentially indeterminate. But what makes the indeterminacy of the category so exploitable is the fact that, no matter how detention is defined, there are few processes for ensuring that when an ICE or CBP detains someone, the detention is legal or the rights of the detained person are protected. While immigration authorities are supposed to have some level of evidence that a person is in violation of immigration law before detaining them for any period longer than the "brief holdups" the DOJ describes as part of regular processing,[135] they do not have to show this evidence to any independent arbiter or obtain approval from any neutral magistrate. This means that, unlike local law enforcement agencies, ICE and CBP do not have to allocate time and resources to creating or complying with systems for judicial sign-off on all their detention decisions.

So, to return to the DOJ's list of exemptions, all it takes for a person to be moved from the

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[133] 28 C.F.R. § 28.12(b).

[134] *See* U.S. Customs & Border Prot., *CBP to Meet Legal Requirement to Collect DNA Samples from Certain Populations of Individuals in Custody* (Dec. 3, 2020), https://www.cbp.gov/newsroom/national-media-release/cbp-meet-legal-requirement-collect-dna-samples-certain-populations.

[135] *See infra* Section F for further discussion.

"being processed for legal admission" category to the "subject to further detention or proceedings" category is a single CBP agent's belief that the person is "suspicious."[136] For example, in February 2022, NIJC filed a complaint with the DHS Office of Civil Rights and Civil Liberties describing a range of instances where CBP sent individuals to secondary screening at O'Hare even though they presented valid student and tourist visas.[137] One of the complainants, Tahiri, arrived at O'Hare with a tourist visa.[138] The CBP officer at the immigration checkpoint found Tahiri to be suspicious because he did not carry any cash and was returning after having visited the U.S. the year before. Tahiri explained that he had other means of accessing funds and that he was returning for a few weeks to visit family members. Still, the CBP officer sent him to another room, where he was further interrogated for about six hours with almost nothing to eat, had his phone and tablet seized, and had his visa revoked.[139]

A person in immigration detention may have an opportunity at various stages in their case to argue against their continued detention; but to have a judge review the legality of that initial detention decision (analogous to the arrest in the criminal context), a person ICE or CBP detains must of their own accord raise the claim that their initial detention was illegal. Doing so is impracticable for most and impossible for many.[140] Many people who are detained "have limited English proficiency and understanding of America's complex immigration system."[141] What's more, unlike people charged with crimes, people accused of violating the country's civil

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[136] *See infra* Section F; 8 U.S.C. § 1357(a) authorizes immigration enforcement officers to interrogate, without a warrant, any "person believed to be an alien as to his right to be or to remain in the United States," and to arrest that individual if an officer has "reason to believe" that person is violating U.S. immigration law or regulation and that they will escape before a warrant can be obtained. 8 C.F.R. § 287.8(b) specifies that the standard for brief detention for questioning not amounting to arrest is "reasonable suspicion, based on specific articulable facts." The regulation further states that any information obtained from such interrogation can be used to support a subsequent arrest. *Id.* *See also United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975) (the Fourth Amendment "forbids stopping or detaining persons for questioning about their citizenship on less than a reasonable suspicion that they may be aliens").

[137] Request for investigation into CBP airport arrests & secondary screening, National Immigrant Justice Center (Feb. 23, 2022), https://immigrantjustice.org/sites/default/files/content-type/press-release/documents/2022-02/NIJC-Request-CRCL-investigation-CBP-airport-arrests_Feb-23-2022.pdf [https://perma.cc/9S8A-CF99].

[138] *Id.*

[139] *Id.*

[140] *See, e.g.,* Kagan, *supra* note 121, at 156-61 (explaining that rather than automatically receiving a custody hearing, a detained individual must themselves request a hearing, "even after having received an official form [from ICE] that misleadingly says that 'you may not' request review by an immigration judge"); *Access to Counsel*, NIJC, https://immigrantjustice.org/issues/access-counsel.

[141] *Access to Counsel*, *supra* note 140.

immigration laws have no right to a government-provided attorney. As a result, most do not have legal representation.[142] People in detention have limited, if any, access to a law library or to evidence or witnesses who might support their case. They are unlikely to have counsel, and if they succeed in filing a claim on their own, they would be forced to proceed pro se against well-resourced and trained government prosecutors. So, even though there is a way for a person detained by immigration authorities to challenge the legality of their original detention/arrest, it is the exception rather than the rule for a judge to review, let alone invalidate, an ICE or CBP agent's rationale for taking a person into custody.

All of these factors taken together — the vagueness of the meaning of detention, the lack of oversight and accountability, and the weakness of rights protection systems for people whom DHS targets for arrest and detention — mean that "detention" is an essentially meaningless limitation on DNA collection. Requiring that a person be detained before DHS can take their DNA adds none of the bureaucratic friction that requiring probable cause for arrest in the criminal context does. The immigration enforcement system is thus an extremely efficient vehicle for escalating genetic surveillance.

To fully understand the impact of tying the authority for DNA collection to detention, it is important to understand that the lack of oversight and accountability at DHS means that ICE and CBP regularly violate the few limits that do exist to constrain their detention powers. Scholars have found that the agency has an egregious record of discriminatory profiling. CBP agents have "used markers such as speaking Spanish or a 'Hispanic' appearance as grounds to investigate longtime Michigan residents for violations of immigration laws."[143] DHS's discriminatory practice of using religion as a consideration in nominating individuals to the federal terrorism watch list resulted in Dearborn, Michigan (a town of 100,000 people that is roughly 40% Arab and Muslim) having the second-most residents in the nation on the watchlist,

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[142] *Id.*; Letter to Congress re: AILA Recommendations for Fiscal Year 2024 Appropriations, Am. Immigr. Lawyers Assoc. (March 17, 2023) ("Over the last 20 years (2003-2022), more than 55 percent of people appearing in immigration court were unrepresented."), https://www.aila.org/library/aila-issues-recommendations-fy2024-federal-budget [https://perma.cc/6YMY-8436].

[143] Harsha Panduranga & Faiza Patel, *Stronger Rules Against Bias*, Brennan Ctr. for Justice 1, 3, https://www.brennancenter.org/our-work/policy-solutions/stronger-rules-against-bias [https://perma.cc/QLJ8-YPS3] (citing Monica Andrade-Fannon & Geoff Boyce, *The Border's Long Shadow*, *supra* note 80, at 5); Allyson Waller, *U.S. Border Agency Settles with 2 Americans Detained for Speaking Spanish*, N.Y. Times (Nov. 26, 2020), https://www.nytimes.com/2020/11/26/us/montana-spanish-border-patrol.html).

behind only New York City (which has a population of more than 8.4 million).[144]

In an interview with the Privacy Center, the NIJC shared that their intake data in the year and half following the implementation of the 2020 rule showed that most individuals being singled out for secondary screening at O'Hare were from Mexico, India, and Iran, in addition to several African and Asian countries.[145] In one instance, an NIJC client from the Middle East reported that a CBP agent told him he was being pulled aside specifically because of his country of origin.[146]

[144] *Id.*

[145] Interview with NIJC (Apr. 20, 2022).

[146] *Id.*

EXPLAINER:
Coming through the border as a noncitizen

There are many ways to enter the U.S. The most common method of entry is by coming through a border crossing, also known as a port of entry. Ports of entry exist all across the U.S. and include airports, shipping ports, as well as land border crossings with Mexico and Canada.[147]

There are various types of visas that allow people to lawfully enter the country, including those classified as "immigrant visas," or visas that allow people to remain in the country indefinitely, and "nonimmigrant visas," which provide authorization to enter for time-and purpose-limited periods. People may also try to enter the country without authorization, including individuals seeking asylum who may enter the country either by (1) traveling directly to a border crossing or (2) crossing the border and presenting to a CBP officer.[148]

Others may covertly cross the border and interact with DHS authorities only when caught.

When people present themselves for admission to the country at a port of entry, a CBP officer will review their documents and make a determination as to whether the individual may enter. If a CBP officer wants additional information, the officer can unilaterally decide to subject the individual to "secondary screening" (also known as a "secondary inspection").[149] If selected for secondary screening, officers will direct the individual to an interview area for further questioning. Under current case law, CBP officers need not show any particular level of individualized suspicion to conduct brief secondary screenings at the border.[150]

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[147] Locate a Port of Entry, U.S. Cust. and Border Prot., https://www.cbp.gov/about/contact/ports; Astrid Galvan, *AP Explains: What Happens When Migrants Arrive at U.S. Border*, Associated Press (June 26, 2019), https://apnews.com/article/immigration-donald-trump-us-news-ap-top-news-az-state-wire-3b490335aa39487893e6ad745424f6ff [https://perma.cc/K8AX-JJL8].

[148] Emily Goldstein and Mandi Cai, *What Do Migrants Experience When They Request Asylum at the Texas-Mexico Border?*, Tex. Trib. (July 22, 2019), https://www.texastribune.org/2019/07/22/asylum-seekers-experience-texas-mexico-border/ [https://perma.cc/J2F7-WFGW].

[149] *See* Study in the States, *What is Secondary Inspection?*, U.S. Dep't of Homeland Sec., https://studyinthestates.dhs.gov/students/travel/what-is-secondary-inspection [https://perma.cc/ADT5-K8UH].

[150] *See, e.g.*, *United States v. Martinez-Fuerte*, 428 U.S. 543, 563-64 (1976) ("As the intrusion here is sufficiently minimal that no particularized reason need exist to justify it, . . . Border Patrol officers must have wide discretion in selecting the motorists to be diverted [to a secondary inspection area] for the brief questioning involved."); *United States v. Barnett*, 935 F.2d 178, 181 (9th Cir. 1991) ("[The law] does not mandate an inquiry into the subjective purpose of [an] agent making referrals to secondary inspection, unless there is some objective evidence supporting the charge of pretext."); *United States v. Sanders*, 937 F.2d 1495, 1499 (10th Cir. 1991) ("No individualized suspicion is necessary to stop, question and then selectively refer motorists to a secondary inspection checkpoint.").

There is also good reason to be concerned that DHS will erroneously take DNA from permanent residents and citizens. Although the statute and regulation both limit the federal government's DNA collection to detained "non-U.S. persons" (which should exclude citizens and permanent residents), neither stipulates any process by which officials should determine whether an individual is, in fact, a "non-United States person" before swabbing them. DHS regularly wrongly detains U.S. citizens.[151] A 2021 GAO report found, for example, that "ICE arrested 674, detained 121, and removed 70 potential U.S. citizens" between 2015 and March 2020 alone.[152]

Even though the federal government is using immigration enforcement powers to speedily amass DNA data, criminal policing agencies are (at least for now) the entities most likely to access and use that data in enforcement operations. This means that DNA taken from someone without suspicion of criminal wrongdoing can be used by police to prosecute that person criminally, even in states that have laws explicitly requiring a criminal conviction or a warrant before a person can have their DNA taken. CODIS is the most obvious mechanism by which police can access that data. But it can also happen through informal channels.

We discovered that in at least one instance, ICE collected DNA from an individual and appears to have quickly shared it behind the scenes with local law enforcement to use against the individual in a criminal prosecution. In an interview and email exchange with the Center on Privacy & Technology, an immigration attorney in New York described how DNA taken from her client as part of his immigration processing was used against him in a domestic criminal prosecution.[153] The client had been arrested and charged with felonies in Suffolk County. Because ICE had issued a detainer against the client,[154] Suffolk County law enforcement notified

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[151] *See generally* Jacqueline Stevens, *U.S. Government Unlawfully Detaining and Deporting U.S. Citizens as Aliens*, 18 Va. J. Soc. Pol'y & L. 606 (2011) (presenting original research on the detention and deportation of U.S. citizens by ICE). *See also, e.g.*, Fiona Harrigan, *This U.S. Citizen Was Detained by ICE for Over a Month. Now He's Getting a $150,000 Settlement*, Reason (Dec. 15, 2022), https://reason.com/2022/12/15/this-u-s-citizen-was-detained-by-ice-for-over-a-month-now-hes-getting-a-150000-settlement/ [https://perma.cc/6KAL-UEK6]; Emanuella Grinberg, Konstantin Toropin & Jason Morris, *A US-Born Citizen Who Was in Immigration Detention for Three Weeks Has Been Released*, CNN (July 25, 2019), https://www.cnn.com/2019/07/23/us/us-citizen-detained-texas/index.html [https://perma.cc/VLG5-VH3X].

[152] U.S. Gov't Accountability Office, *Immigration Enforcement: Actions Needed to Better Track Cases Involving U.S. Citizenship Investigations*, GAO-21-487 (Jul 20, 2021), https://www.gao.gov/assets/d21487.pdf [https://perma.cc/NZW6-9FQY].

[153] Interview with the Legal Aid Society of Suffolk Cnty. (Mar. 30, 2022) [hereinafter Suffolk Cnty. Interview].

[154] For an explanation of what a detainer is, see notes 155-63 and accompanying text.

ICE when he posted bail, and ICE apprehended and arrested the man. ICE agents collected a buccal swab from the client at ICE's New York City field office. At some point in the process, the local prosecutor received the DNA sample from ICE and matched it to the DNA collected from the scene of the crime for which the client was originally charged.[155] The assistant district attorney in the case told the defense attorney that the district attorney's office got the client's DNA from ICE.[156]

We have also already seen one example of states using the pretext of immigration enforcement to expand their own DNA collection practices. For example, in 2023 Florida passed a new law that empowers the state's law enforcement agencies to take DNA from people in custody on an immigration detainer, even if there is no criminal law justification for doing so.[157] This law means that, from now on, if police in Florida hold someone for ICE — even when there is no criminal law basis to hold that person — police may take and upload that person's DNA under state law without having to obtain the person's consent and without the review or oversight of any independent magistrate. This is a new variation on a type of conservative policymaking that has proliferated in opposition to legislation passed in many states and municipalities to prohibit local collaboration with ICE.[158] Bills similar to the Florida law have been introduced in Alabama[159] and Texas.[160]

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[155] Suffolk Cnty. Interview, *supra* note 153.

[156] Email exchange with the Legal Aid Society of Suffolk Cnty. (Feb. 27, 2024).

[157] Fla. Stat. § 943.325(2)(g) (including in the definition of a "qualifying offender" "any person, including juveniles and adults, who is. . . [i]n the custody of a law enforcement agency and is subject to an immigration detainer issued by a federal immigration agency.").

[158] *Compare* Lena Graber & Krsna Avila, *Growing the Resistance: How Sanctuary Laws and Policies Have Flourished During the Trump Administration*, Immigr. Legal Res. Ctr. (Dec. 2019), https://www.ilrc.org/sites/default/files/resources/2019.12_sanctuary_report-final-12.17.pdf [https://perma.cc/2USU-EYCJ] *with* Tex. Gov't Code § 752.053; Tex. S.B. 4 (2023).

[159] S.B. 320 (Ala. 2023), https://legiscan.com/AL/text/SB320/2023.

[160] HB 20, 88(R) Sess., Tex. H. Comm. Rep. 3-4, https://legiscan.com/TX/text/HB20/id/2800928.

EXPLAINER:
ICE Detainers

In the 2000's, DHS began building detention and deportation programs into the physical and bureaucratic infrastructure of the criminal legal system. One of the most important features of this strategy is ICE's reliance on local police and jails to incarcerate people on ICE's behalf. ICE asks local law enforcement agencies to keep someone in custody for ICE by issuing a form called a "detainer."[161] Over the years, ICE has changed its practices many times, going from claiming it was mandatory for local law enforcement to comply with an ICE detainer (it is not) to claiming detainers that were not requests to hold someone but rather "Requests for notification of release" to writing probable cause on them in big letters.[162] Courts have held that ICE detainers must be based on probable cause to believe that an individual can be deported.[163] But unlike a criminal arrest warrant, which must be supported by probable cause and issued by a court, an ICE detainer is based on a finding from an immigration officer and is not subject to external judicial review. A detainer is not proof of a person's immigration status, and it is not evidence that a person will face immigration proceedings or be deported. Indeed, courts are split as to the legality of ICE detainers.[164]

By definition, ICE detainers apply only after local law enforcement no longer has its own basis to hold someone. If ICE does not take custody after 48 business hours, local law enforcement is supposed to release the individual. In practice, however, local agencies

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[161] *See, e.g.,* Immgr. Legal Resource Ctr., Annotated Immigration Detainer (I-247A) (Oct. 2021), https://www.ilrc.org/sites/default/files/resources/i-247a_new.pdf.

[162] *See, e.g.,* Melissa Keaney, Julia Harumi Mass & Angie Junck, *Issue Brief: Immigration Detainers and Local Discretion*, Am. Civil Liberties Union of Northern Cal. 1, 2 (Apr. 2011), https://www.aclunc.org/sites/default/files/detainers_issue_brief.pdf [https://perma.cc/D5MA-MVFD]; *Priority Enforcement Program*, U.S. Immigr. & Customs Enf't, https://www.ice.gov/pep [https://perma.cc/5C4B-XSLB]; *Sample I-247N*, Immigr. Defense Project, https://www.immigrantdefenseproject.org/wp-content/uploads/I-247N.pdf [https://perma.cc/37KJ-CFTY]; *Sample I-274A*, Immigr. Defense Project, https://www.immigrantdefenseproject.org/wp-content/uploads/I-247A.pdf [https://perma.cc/S3U8-UXK8].

[163] *See, e.g.*, *Gonzalez v. Immigr. & Customs Enf't*, 975 F.3d 788, 824 (9th Cir. 2020); *Morales v. Chadbourne*, 793 F.3d 208, 216 (1st Cir. 2015); *State v. Lopez-Carrera*, 245 N.J. 596, 626 (2021).

[164] *See, e.g.*, *Morales*, 793 F.3d at 217, 223 (1st Cir. 2015); *Hernandez v. United States*, 939 F.3d 191 (2d Cir. 2019); *Gonzalez v. Immigr. & Customs Enf't*, 416 F.Supp.3d 995 (C.D. Cal. 2019); *C.F.C. v. Miami-Dade Cnty.*, 349 F. Supp. 3d 1236, 1259-62 (S.D. Fla. 2018) (collecting cases); *Moreno v. Napolitano*, 213 F. Supp. 3d 999, 1005, (N.D. Ill. 2016). *See also* Krsna Avila & Lena Graber, *ICE Detainers are Illegal — So What Does That Really Mean?*, Immigr. Legal Res. Ctr. (Apr. 2020), https://www.ilrc.org/sites/default/files/resources/ice_detainers_advisory.pdf [https://perma.cc/ZV74-62LT].

have held people in custody solely because of a detainer for much longer, "even when ICE does not assume custody."[165]

Many states and localities have passed laws telling local law enforcement whether and how to respond to such requests. Some prohibit compliance with ICE detainers, while others mandate it.[166] Some local agencies even have written agreements with ICE that delegate to local officers various immigration enforcement functions, including issuing immigration detainers themselves and transporting individuals directly to ICE.[167] ICE has reported that, as of February 2024, the agency has 136 such agreements with agencies across 28 states.[168]

Between 2008 and 2012, ICE reported 834 erroneous detainer requests issued for U.S. citizens.[169]

[165] *Immigration Detainers: An Overview*, Am. Immigr. Council (Mar. 21, 2017), https://www.americanimmigrationcouncil.org/sites/default/files/research/immigration_detainers_an_overview_0.pdf [https://perma.cc/GKC8-9QLU].

[166] *See ICE Detainers: Strategies & Considerations for Criminal Defense Counsel*, Immigr. Legal Res. Ctr. (Dec. 2021), https://www.ilrc.org/sites/default/files/resources/ice_detainers-_advice_and_strategies_for_criminal_defense_counsel.pdf [https://perma.cc/V98V-ACXZ].

[167] *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, Immigr. & Customs Enf't, https://www.ice.gov/identify-and-arrest/287g [https://perma.cc/Q8UA-45KU].

[168] *Id.*

[169] *Backgrounder on ICE Detainer Requests*, Am. Civil Liberties Union (Jan. 31, 2019), https://www.aclu.org/sites/default/files/field_document/aclu_backgrounder_on_detainers_1.31.19_-_public.pdf [https://perma.cc/XL2J-2628].

F. DHS's DNA collection program violates the Fourth Amendment.

In addition to the many ethical and political problems with DHS's DNA collection program, it is also likely unconstitutional under the Fourth Amendment to the U.S. Constitution. The Fourth Amendment protects people from unreasonable government searches and seizures. DNA collection entails multiple layers of seizure and search: the seizure of the physical DNA sample (when a law enforcement officer swabs the inside of an individual's mouth or takes their blood); the testing of that biological sample for a genetic profile; the uploading of that profile for entry into CODIS; and the searching of that profile every time there is a query in the database.[170] Courts have said nothing about the constitutionality of compulsory DNA collection in the immigration context. What's more, the case law applying the Fourth Amendment to DNA collection in the criminal enforcement context does not take into account the sophistication of current DNA technologies or the scope of forensic DNA use in the U.S. But even applying the existing judicial tests, it is doubtful that the Fourth Amendment permits DHS to take DNA from people it detains under its immigration powers without any individualized suspicion of criminal wrongdoing.

The Supreme Court case most relevant to this question is *Maryland v. King*.[171] In *King*, the court held that "taking and analyzing a cheek swab" of an arrestee's DNA is reasonable under the Fourth Amendment "[w]hen officers make an arrest supported by probable cause to hold [the individual] for a serious offense."[172] The Court based this finding on the state's assertion that its interest in taking and analyzing the DNA lay not in crime solving but instead in "identifying" the arrestee as part of "routine booking" procedures.[173] As Justice Scalia noted in his dissent, Maryland could not have relied on its interest in solving past (or future) crimes — even if it seems evident that was the state's true interest in *King* — because "[t]he Fourth Amendment forbids searching a person for evidence of a crime when there is no basis for believing the

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[170] *See United States v. Mitchell*, 652 F.3d 387, 406 (3d Cir. 2011) (en banc). Though the *Mitchell* court addresses DNA collection pursuant to 34 U.S.C. § 40702(a)(1)(A), formerly at 42 U.S.C. § 14135(a)(1)(A), the situation is analogous to DNA collection under 28 C.F.R. § 28.12(b). A third constitutional search may occur at the time the database is queried. *See, e.g.*, *United States v. Hasbajrami*, 945 F.3d 641, 670 (2d Cir. 2019) ("querying that stored data does have important Fourth Amendment implications, and those implications counsel in favor of considering querying a separate Fourth Amendment event that, in itself, must be reasonable").

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

[172] *Id.* at 465-66.

[173] *Id.* at 461.

person is guilty of the crime or is in possession of incriminating evidence. That prohibition is categorical and without exception; it lies at the very heart of the Fourth Amendment."[174] The majority also failed to explain why, even if the government had a legitimate interest in collecting and analyzing DNA for the purpose of identifying people in custody, a rule prohibiting database access for anything other than identity checks would prevent the government from fulfilling that purpose.

Despite the countless critiques scholars, commentators, and policymakers from across the political spectrum have made of the decision in *Maryland v. King*,[175] it is clear that the DOJ had the case in mind when drafting the 2020 DNA collection rule. In the "government interests" section of the 2020 final Rule, the DOJ essentially cut and pasted the government interests laid out by the *King* majority, making only minor tweaks to adapt the listed interests to the context of immigration enforcement.

[174] *Id.* at 466 (Scalia, J., dissenting). Although Justice Kennedy strenuously avoids saying that the government interest that makes the DNA search in *King* reasonable is solving past crimes, the opinion nevertheless refers to that interest repeatedly, citing examples of serial killers who were caught as a result of traffic stops and analogizing the usefulness of DNA sampling to gang databases. As Scalia points out, in the majority's explanation of how DNA collection helps the government "identify" a person in its custody, it seems that what the court "means by 'identifying' someone is 'searching for evidence that he has committed crimes unrelated to the crime of his arrest'" as for example in the court's claim "that knowing 'an arrestee's past conduct is essential to an assessment of the danger he poses.'" *Id.* at 670. "The court's assertion that DNA is being taken, not to solve crimes, but to identify those in the State's custody taxes the credulity of the credulous." *Id.* at 466. Scalia compares authorization of suspicionless DNA searches on the basis of what appears to be an entirely pretextual interest in "identifying" someone with the general warrants executed by the British in the founding era, which inspired the Fourth Amendment in the first place. *Id.* at 467.

[175] *See e.g.*, Jennifer K. Wagner, *DNA, Racial Disparities, and Biases in Criminal Justice: Searching for Solutions*, 27.2 Alb. L.J. Sci. & Tech. 95, 104-05 (2017); Tracey Maclin, Maryland v. King*:* Terry v. Ohio *Redux*, 2013 Supreme Court Rev. 259 (2014); Elizabeth E. Joh, Maryland v. King: *Policing and Genetic Privacy*, 11 Ohio State J. of Crim. Law 281 (2013); Walter Olson, Maryland v. King *and the Surveillance State*, Cato Inst. (June. 4, 2013), https://www.cato.org/blog/maryland-v-king-surveillance-state [https://perma.cc/R96X-LJKT]; Lyle Dennistton, *Opinion recap: Solving "cold cases" made easier*, SCOTUSblog (June 3, 2013), https://www.scotusblog.com/2013/06/opinion-recap-solving-cold-cases-made-easier/ [https://perma.cc/8V6M-59E9].

EXPLAINER:
Maryland v. King

In 2009, Alonzo King was arrested on assault charges. As he was being processed for booking into a Wicomico County, Maryland jail, law enforcement officers swabbed his cheek, pursuant to a Maryland state law. When the resulting DNA sample was loaded into CODIS, it resulted in a match to an unsolved 2003 rape. King was charged with that rape. In the rape case, he moved to suppress the DNA match, arguing that Maryland's state law allowing DNA collection from people merely arrested but not yet convicted of a crime violated the Fourth Amendment to the U.S. Constitution. On appeal, the Maryland Court of Appeals set aside King's conviction, agreeing that a program of suspicionless collection from persons legally presumed innocent was unconstitutional. The U.S. Supreme Court took up the case and in 2013 decided by a 5-4 majority that, where officers make a felony arrest supported by probable cause, taking and analyzing a cheek swab of the arrestee's DNA is reasonable under the Fourth Amendment. Justice Anthony M. Kennedy delivered the majority opinion. Justice Scalia, ordinarily on the side of law enforcement agencies, wrote a fierce dissent in which he was joined by Justices Ginsburg, Sotomayor, and Kagan.

Figure 8:

Political cartoon published the day after Maryland v. King *was decided.*

Artist: Jeff Parker

There are three major flaws with the government's adoption of the language from *King* to, presumably, try to pre-empt Fourth Amendment challenges to the DHS collection program. First, *King* limited its holding to cases in which the person from whom DNA is taken was arrested based on probable cause to believe they had committed a serious crime.[176] As discussed in detail in Section E, immigration law violations are civil not criminal, and there are no checks on DHS's detention authority equivalent to the probable cause check on police arrest authority. Second, in *King*, the Supreme Court accepted as legitimate the government's interest in "identification" of those criminal law enforcement arrests. But that interest, weak even when *King* was decided, is an especially irrational basis for DNA collection in the context of immigration enforcement. And third, the Court's analysis of the privacy interests at stake in *King* fails the test of time and is out of step with current advances in DNA science. This section explains each of these three problems in detail.

Immigration detention cannot stand in for criminal arrest in the holding of King

In its notice of the final 2020 rule, the DOJ asserted: "DNA identification furthers the fundamental objectives of the criminal justice system, clearing innocent persons who might otherwise be wrongly suspected or accused by identifying the actual perpetrator, and helping to bring the guilty to justice."[177] Alarmingly, the DOJ went on to insist without any legal argument that "it makes no difference whether the basis of the detention is suspected criminality or an immigration violation."[178] The plain language of the opinion in *King*, directly contradicts this claim. The Court's ruling conditions the "reasonableness" of a DNA search on a person being arrested on probable cause of having committed a serious crime. And while the Court does not offer a developed explanation of why DNA searches should be limited to people arrested for a serious crime, the opinion drives home both that DNA searches are justified by the gravity of the harms involved in serious crimes and that limiting DNA searches to cases involving serious crimes will help to ensure DNA collection is not rampant. Quite obviously, neither of these considerations can justify a program that allows the federal government to take DNA from hundreds of thousands of people every year without suspicion of any criminal wrongdoing, let

[176] *See King*, 569 U.S. at 465 (emphasis added). *See also id.* at 443, 448-50, 463, 465. The Maryland statute at issue provided for DNA collection from individuals charged with a crime of violence, defining "crime of violence" to include things like murder, rape, kidnapping, arson, sexual abuse, carjacking, and various forms of assault and sexual offenses. *See* Md. Crim. Law § 14-101(a).

[177] DOJ 2020 Rule, 85 Fed. Reg. at 13,483.

[178] *Id.*

alone "serious" criminal wrongdoing.

Even more crucial for the *King* majority than the "serious crime" limitation on DNA collection is the fact that criminal arrests must be supported by a finding of "probable cause." The Court refers to the "probable cause" precondition for all DNA collection multiple times throughout the opinion and emphasizes as a mitigating factor that the Maryland statute at issue in the case provides for the destruction of DNA records stemming from criminal charges that "are determined to be unsupported by probable cause." "Probable cause" is part of the bedrock of the Bill of Rights.[179] The Fourth Amendment requirement that government officials have "probable cause" before interfering with the security of our "persons, houses, papers, and effects" ensures that there is a check on the government's exercise of some of its most awesome powers.[180] In the criminal context, police must demonstrate probable cause to an independent magistrate either before an arrest (by getting a warrant) or soon after an arrest (during a probable cause hearing).[181] As the Supreme Court has explained, the purpose of this requirement is "to allow a neutral judicial officer to assess whether the police have probable cause to make an arrest or conduct a search."[182] That neutrality is essential, and the Supreme Court has invalidated warrants when issued by individuals who, by virtue of their role, "cannot be asked to maintain the requisite neutrality with regard to their own investigations."[183]

The reason an arrest based on probable cause was so important for the holding in *King* is that the Court thought (rightly or wrongly) that because Maryland had to make a showing of probable cause to arrest a person, there wasn't a significant risk that allowing the state to take DNA after that point would result in an abuse of police discretion. In other words, there was little reason to worry the authorities would run around taking DNA from everyone, because there are judicial mechanisms in place to ensure that every arrest an officer makes meets a

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[179] U.S. Const. amend. IV. *See Henry v. United States*, 361 U.S. 98, 100 (1959) ("The requirement of probable cause has roots that are deep in our history.").

[180] *See Steagald v. United States*, 451 U.S. 204, 212 (1981) ("The purpose of a warrant is to allow a neutral judicial officer to assess whether the police have probable cause to make an arrest or conduct a search. As we have often explained, the placement of this checkpoint between the Government and the citizen implicitly acknowledges that an 'officer engaged in the often competitive enterprise of ferreting out crime,' . . . may lack sufficient objectivity to weigh correctly the strength of the evidence supporting the contemplated action against the individual's interests in protecting his own liberty.").

[181] *Gerstein v. Pugh*, 420 U.S. 103, 113-14 (1975); *Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991).

[182] *Steagald*, 451 U.S. at 212.

[183] *Coolidge v. New Hampshire*, 403 U.S. 443, 446-47, 450 (1971), overruled in part on other grounds by *Horton v. California*, 496 U.S. 128 (1990).

minimum constitutional standard.

There is no such oversight in the immigration context. Courts have required DHS officers to have varying levels of suspicion that a person is violating the nation's civil immigration laws before detaining them, based on where the interaction occurs and the length of the detention. Judges have permitted detention without any individualized suspicion during some border stops, permitted "brief" detentions based on "reasonable suspicion," and required "probable cause" for lengthier detentions.[184] Our research suggests that, as of 2024, the majority of people from whom DHS is taking DNA are subject to the kind of detention for which the government is supposed to have "probable cause" to believe they are in violation of immigration laws. While existing case law is quite murky on the question of what factors move detention from the category that requires reasonable suspicion to the category that requires probable cause, we can say with some certainty that both the courts and DHS consider that for anyone the government actually books into a detention center, the government must have probable cause to believe they have violated immigration law.

But, as explained in Section E, in the immigration context, "[t]here is no mechanism by which any judge or neutral adjudicator assesses at the outset of an immigration case that ICE has solid grounds for concluding that a person is in the United States unlawfully."[185] So while courts have said that DHS should have probable cause to detain someone for longer periods of time, there is no process requiring DHS to demonstrate that it did.

In the U.S., the phrase "probable cause" has become a totem standing in for the idea of fairness. DHS has a long history of exploiting that popular association, invoking "probable cause" to justify enforcement actions that no one outside the agency has ever authorized or reviewed. For example, in part as a reaction to litigation over the unconstitutionality of its detention practices, DHS increasingly issues what it calls "administrative warrants," which are emblazoned with the phrase "probable cause."[186]

But these "administrative warrants" are just forms that DHS issues internally — ICE officers are

[184] *See, e.g.*, Talia Peleg, *The Dangers of ICE's Unchecked Re-Arrest Power*, 86 Albany L. Rev. 517, 535-36 (2023); Lindsay Nash, *Deportation Arrest Warrants*, 73 Stan. L. Rev. 433, 455-58 (2021); Kagan, *supra* note 121, at 158-59.
[185] Kagan, *supra* note 121, at 132.
[186] *See, e.g.,* Nash, *Deportation Arrest Warrants*, *supra* note 184, at 438.

the ones who sign them.[187] No "neutral magistrate" reviews them prior to an immigration officer arresting a person, and there is no requirement for a "probable cause" hearing before a neutral magistrate to review the constitutionality of the arrest after the fact.[188] To the contrary, an individual who shares the very same interest in investigating, detaining, and prosecuting the subject of a warrant is the one reviewing the request. Without a neutral reviewer anywhere in the process, administrative warrants serve no constitutional function.[189] As the Supreme Court has noted, "[t]he Fourth Amendment does not contemplate" that individuals in such positions will be capable of serving as the required "neutral and disinterested magistrates."[190]

So, even in cases where it is clear that DHS is supposed to have probable cause to detain someone, that requirement alone — without any systematic and independent review of DHS's compliance — does not serve as a check on the government's power to take DNA. Unless the phrase "probable cause" is a magic spell unconnected with any concrete constitutional purpose, it cannot be used to justify DHS's DNA collection program under *Maryland v. King*. The lack of any robust probable cause requirement for immigration detention is just one failure within an immigration system which is so broken and backlogged that, as one expert we interviewed put it, "it is not a meaningful place for people to seek remedy for rights violations."[191]

As constitutionally problematic as it is for DHS to take DNA from people who are subjected to the longer periods of detention that fall under the "probable cause" standard, there is good reason to be concerned that DNA collection is happening in a much wider range of detention contexts. As explained above in Section E, while we do not know for sure whether ICE and CBP are currently taking DNA from people who are detained only briefly, the DOJ's public statements suggest that the federal government believes it has the power to do so. Were courts to sanction the taking of DNA in such cases, it would have disastrous constitutional implications.

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[187] 8 C.F.R. § 287.5(e)(2).

[188] *See, e.g.*, *Aguilar v. U.S. Immigr. & Customs Enf't Chi. Field Off.*, 346 F. Supp. 3d 1174, 1189 (N.D. Ill. 2018) (summarizing federal court cases holding that the Fourth Amendment does not require judicial review of immigration officials' probable cause determinations underlying their arrests).

[189] Nash, *Deportation Arrest Warrants*, *supra* note 184, at 436-45.

[190] *United States v. U.S. Dist. Ct.*, 407 U.S. 297, 317 (1972).

[191] Interview with Jumana Musa, Director of the Fourth Amendment Center, National Association of Criminal Defense Lawyers, (May 10, 2024).

"Reasonable suspicion" is the standard that courts apply when U.S. immigration authorities detain someone for a "brief period of time."[192] "Reasonable suspicion" is a significantly lower standard of suspicion than "probable cause." An immigration officer does not need much evidence that you may be violating or have violated civil immigration law to stop you and ask you questions. Unlike probable cause, which is an objective standard requiring that "the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed," reasonable suspicion is a subjective standard defined merely as something more than a "hunch," based on "specific reasonable inferences."[193]

Maryland v. King cannot be, and never has been, invoked to justify a law enforcement officer taking DNA from someone detained under anything less than a probable cause standard. In the criminal legal system, police regularly detain people on the basis of mere suspicion in what are known as *Terry* stops.[194] While a criminal arrest must be supported by probable cause, a *Terry* stop needs only to be supported by "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" a search or seizure.[195] The suspicion required to stop someone under *Terry* needs to adhere to "a less demanding standard" than that required for probable cause, meaning that police can operate not only on less but also on lower-quality, less-reliable information than they need to arrest someone.[196] Police often subject people to searches in the context of *Terry* stops. *Terry* made possible the racist stop-and-frisk programs for which many municipal police departments in major U.S. cities have become

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[192] 8 U.S.C. § 1357(a) authorizes immigration enforcement officers to interrogate, without a warrant, any individual who appears to be entering or attempting to enter the U.S. in violation of immigration laws, and to arrest that individual if an officer has reason to believe that they will escape before a warrant can be obtained. 8 C.F.R. 287.8(b) specifies that the standard for interrogation and detention not amounting to arrest is a "reasonable suspicion, based on articulable facts" that the person is unlawfully entering the country, and further, that any information obtained from such interrogation and detention can be used to support a subsequent arrest. *See also United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975) (holding that the Fourth Amendment "forbids stopping or detaining persons for questioning about their citizenship on less than a reasonable suspicion that they may be aliens").

[193] *Henry v. United States*, 361 U.S. 98, 102 (1959); *Terry v. Ohio*, 392 U.S. 1, 27 (1968).

[194] Legally distinguished from a formal arrest, the Supreme Court originally defined a *Terry* stop as "a carefully limited search of the outer clothing" of persons who "may be armed and presently dangerous . . . in an attempt to discover weapons which may be used to assault" a police officer who has "observe[d] unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity is afoot." *Terry*, 392 U.S. at 30. The Court later expanded the meaning to encompass "[a] brief stop of a suspicious individual, in order to determine his identity or to maintain the *status quo* momentarily while obtaining more information." *Adams v. Williams*, 407 U.S. 143, 146 (1972).

[195] *Terry*, 392 U.S. at 21.

[196] *Alabama v. White*, 496 U.S. 325, 330 (1990).

infamous.[197] But there has never been a suggestion that *King* allows police to take DNA during a *Terry* stop. Indeed, there would likely be outrage if the police began doing so.

In 2013, a federal court reviewed New York's stop-and-frisk program in a case called *Floyd v. City of New York* and found it unconstitutional.[198] Nevertheless, the court found some of the stops described in evidence to be properly supported by reasonable suspicion. A few examples illustrate just how low the bar is:

- Dominique Sindayiganza, a middle-aged, Black Queens man left his Manhattan office around 5:30 p.m. carrying a backpack and wearing dark blue rain pants and a green winter jacket. After running an errand, he entered a Petco thinking it was a children's clothing store. He quickly realized his error but as he started to exit he heard someone say: "This is the guy." Officers stopped him just outside. Police explained that a woman had identified him as a man who had been following her asking her for money. The court ruled that "the police had reasonable suspicion to forcibly stop Sindayiganza for suspected harassment because he matched a specific description provided by an identified victim and was in close proximity to the reported harassment just minutes after it allegedly occurred."[199]
- David Floyd walked out of the cottage where he lived and encountered a tenant in his godmother's neighboring three-family home who told Floyd that he was locked out of his apartment. Floyd worked to help the man, using spare keys to which he had access through his godmother to try to open the door. The court ruled that the subsequent police stop of Floyd and his neighbor (both Black men) was based on reasonable suspicion because the "officers observed the men jostling the door knob and trying numerous keys in the door, . . . observed a backpack on the ground," and because the

[197] *See, e.g.*, Evan Casey, *Report finds Black Milwaukee residents still more likely to be stopped and frisked by police*, Wis. Pub. Radio (Sept. 26, 2023), https://www.wpr.org/report-finds-black-milwaukee-residents-still-more-likely-be-stopped-and-frisked-police [https://perma.cc/G85C-TR5Q]; Andy Grimm, *Chicago police policies on searching pedestrians, vehicles need a new review, activists say*, Chicago Sun-Times (Aug. 10, 2023), https://chicago.suntimes.com/crime/2023/8/10/23826613/activists-call-for-new-review-of-chicago-police-policies-on-searching-pedestrians-vehicles [https://perma.cc/Q2D8-N3GE]; Corey Kilgannon, *N.Y.P.D. Anti-Crime Units Still Stopping People Illegally, Report Shows*, N.Y. Times (June 6, 2023), https://www.nytimes.com/2023/06/05/nyregion/nypd-anti-crime-units-training-tactics.html.

[198] *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013).

[199] *Id.* at 648.

> home's location "near the Cross Bronx Expressway" made it "a target for burglary," one of which had occurred nearby "three weeks before."[200]

While police must seek judicial approval for arrests, they do not have to seek judicial approval for every stop based on reasonable suspicion. This means that the operation of the "reasonable suspicion" standard is more similar across immigration and criminal policing contexts than is the operation of the "probable cause" standard. If detention based on mere "reasonable suspicion" were held to justify DNA collection, that would give police a constitutional blank check to take DNA from just about anyone, for just about any reason. In fact, it is difficult to see how a court could permit DHS to take DNA during brief detention without, as a constitutional matter, also authorizing any government actor to take DNA from any person they interact with, no matter how briefly, as long as that interaction is legal in its own context.

To quote Scalia's dissent in *Maryland v. King*, while compelling DNA samples from millions of immigrants might "have the beneficial effect of solving more crimes; then again, so would the taking of DNA samples from anyone who flies on an airplane (surely the Transportation Security Administration needs to know the 'identity' of the flying public), applies for a driver's license, or attends a public school."[201] But, like Scalia, we doubt the framers of the Fourth Amendment "would have been so eager to open their mouths for royal inspection."[202]

DHS DNA collection serves no valid "identification" interest

All four of the *King*-inspired "identification" interests that the government lists in its 2020 rule are based on the idea that it will be useful to immigration officials to know whether or not the people they detain already have DNA in CODIS. Citing directly to *King* for each listed interest, the Rule asserts the importance of DNA for DHS's ability to (1) identify people in custody; (2) manage risks inside detention facilities; (3) ensure detainees will appear for future immigration proceedings (because if they have committed "crime[s] for which [they] may be held to account"

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[200] *Id.* at 652.

[201] *King*, 569 U.S.at 482 (Scalia, J., dissenting). Moreover, research shows that DNA testing can often be unreliable. *See* Matthew Schaer, *The False Promise of DNA Testing*, The Atlantic (June 2016), https://www.theatlantic.com/magazine/archive/2016/06/a-reasonable-doubt/480747/ [https://perma.cc/H3HR-5ZQ2]; Aaron Opoku Amankwaa & Carol McCartney, *The Effectiveness of the Current Use of DNA in Criminal Investigations in England and Wales*, 3 WIREs Forensic Sci. 1 (2021).

[202] *King*, 569 U.S. at 482.

they have "an incentive to flee"); and (4) manage those in DHS custody as well as make decisions about whether to release a person (using past contact with the criminal legal system as a public safety risk factor).[203]

As was the case with the interests articulated in *King*, most of these interests are not actually about "identification" in the sense of establishing someone's identity but are rather about understanding details of a person's background that may be relevant to the management of their case. As strained as this understanding of the meaning of "identification" is in the context of criminal law enforcement, in the context of immigration enforcement, it is nonsense.

DHS's DNA collection serves no valid "identification" interest in the context of the federal immigration enforcement system as it currently operates. One overarching practical reason for this is that in the vast majority of cases, DNA taken from a person in ICE or CBP custody will not be processed quickly enough to establish a CODIS match to be established before the person is transferred or released. DHS's own Privacy Impact Analysis states: "The time it may take for the FBI Laboratory to process a DNA sample submitted by CBP or ICE may result in any potential match to CODIS occurring after the subject is no longer in CBP or ICE custody. Therefore, it is unlikely that CBP or ICE would be able to use a DNA profile match for public safety or investigative purposes prior to either an individual's removal to his or her home country, release into the interior of the United States, or transfer to another federal agency."[204]

But even if the practical problem of CODIS processing times did not exist (and the federal government's growing investment in the develop of "rapid DNA" testing suggests the practical problem may disappear in the near future), it would still be unreasonable for DHS to use DNA to fulfill the four interests the DOJ gave for the rule change.[205]

The government's first stated interest is in having "a safe and accurate way to process and identify the persons . . . they must take into custody," by using DNA "to connect the individual to his 'CODIS profile in outstanding cases.'"[206] But given that 72.8% of people in ICE detention

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[203] DOJ 2020 Rule, 85 Fed. Reg. at 13,485 (quoting *Maryland v. King*, 569 U.S. 435, 449-453 (2013)).

[204] DHS/ALL/PIA-080, *supra* note 53.

[205] *See, e.g.*, Tally Kritzman-Amir, *Swab Before You Enter: DNA Collection and Immigration Control*, 56 Harv. C.R.-C.L. L. Rev. 77, 80 (2021) ("out of all of the biometric methods, DNA testing is considered to be the least efficient at actually identifying people at a minimal cost").

[206] DOJ 2020 Rule, 85 Fed. Reg. at 13,485.

have no criminal record[207] and that the vast majority of people crossing the border have no criminal record in the U.S.,[208] there is no reason to believe that taking DNA from people whom DHS detains will be an efficient means of establishing the identity of people in DHS custody. DHS already has an enormous number of resources at its disposal that it can use to more reliably identify people in cases where identity is in question, including other biometric databases.

Of course, as the DNA database grows, it may be useful for establishing identity in a greater number of cases. As we argue in Section E, it is this interest in building up the genetic database for future policing that more obviously explains the DOJ's decision to make DNA collection by DHS mandatory. But an interest in being able to identify people using their genetic data in the *future* cannot weigh in the government's favor when analyzing the reasonableness of the privacy intrusion involved in taking DNA from someone *today*.

There is also good reason to doubt that drastically increasing the size of the DNA database is going to enable fairer and more accurate identification of people in immigration custody. Several scholars and scientific bodies have expressed concern that growing DNA databases on a massive scale will make systems of policing, prosecution, and punishment less just — increasing false charges and wrongful prosecutions.[209] In 2014, the European Network of Forensic Science Institutes stated: "[a]s DNA-databases become larger, the chance of finding adventitious

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[207] *Immigrant Detention Numbers on Their Way Back Up After Pandemic Slump?*, Transactional Rec. Access Clearinghouse (June 10, 2022), https://trac.syr.edu/whatsnew/email.220610.html [https://perma.cc/AE5T-LV5M].

[208] According to CBP Enforcement Statistics, U.S. Border Patrol had 2,063,692 total encounters in fiscal year 2023. Of those, the agency encountered only 15,267 noncitizens who had ever been convicted of a crime abroad or in the U.S.,of which only 988 had outstanding warrants. *See CPB Enforcement Statistics Fiscal Year 2023*, U.S. Customs & Border Prot., https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics [https://perma.cc/TC96-ZAK7].

[209] *See* Matthew Schaer, *The False Promise of DNA Testing*, The Atlantic (June 2016), https://www.theatlantic.com/magazine/archive/2016/06/a-reasonable-doubt/480747/; Aaron Opoku Amankwaa & Carol McCartney, *The Effectiveness of the Current Use of DNA in Criminal Investigations in England and Wales*, 3 WIREs Forensic Sci. 1 (2021); *see also DNA Dragnets*, New Atlantic (Spring 2005), https://www.thenewatlantis.com/publications/dna-dragnets [https://perma.cc/49CN-MZHV] ("[C]ontrary to the claims of law enforcement, DNA dragnets do not have an impressive success rate in catching criminals."); *Can DNA Demand a Verdict?,* Learn.Genetics, https://learn.genetics.utah.edu/content/science/forensics [https://perma.cc/U3UQ-RVHT] (last visited Apr. 17, 2024) (noting that DNA "is used in less than 1% of all criminal cases . . . ."); *Interpreting Results of DNA Analysis,* Office for Victims of Crime (Apr. 2001), https://ovc.ojp.gov/sites/g/files/xyckuh226/files/publications/bulletins/dna_4_2001/dna8_4_01.html [https://perma.cc/BTA5-PSXD] (explaining that DNA results do not indicate whether a suspect was or was not present or whether they committed the crime or not–only that the substance tested may have come from, or did not come from, the suspect).

matches also increases . . . ."[210] As more data is entered into CODIS, the chances for false positives will increase, which will not only make DNA less useful for "identification" but will also increase the risk that people who have had their DNA taken by DHS without any judicial oversight may subsequently be targeted wrongfully for criminal policing and prosecutions.[211]

Even in an imagined future scenario where the federal government has a reliable genetic database and the means to make DNA testing an efficient means of identifying people in immigration custody, that fact would not justify storing that person's DNA indefinitely in CODIS where it can be accessed by law enforcement for use in criminal policing and prosecution. The government could satisfy its identification interest simply by running searches only against the known person database to see whether there is a match. But that is not what DHS does nor seeks to do. Instead, after entering the person in the known person database, DHS then allows that profile to be searched in perpetuity against the crime scene database for the specific and sole purpose of criminal investigation.

The three remaining identification interests the DOJ gave are not about figuring out a person's identity but about using past contact with the criminal legal system as a factor in making decisions about how to treat the person in immigration custody. There are several problems with this reasoning. For one thing, a DNA match in CODIS does not mean that a person has been found guilty of a crime but rather that they may have had some connection to the place where a crime occurred.[212] If the goal is simply to identify which people in the detention center

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[210] Erin E. Murphy, *The Dark Side of DNA Databases*, Atlantic (Oct. 8, 2015), https://www.theatlantic.com/science/archive/2015/10/the-dark-side-of-dna-databases/408709 [https://perma.cc/RCW3-5JCU].

[211] *See* Lindzi Wessel, *Scientists Concerned over US Plans to Collect DNA Data from Immigrants,* Nature (Oct. 7, 2019), https://www.nature.com/articles/d41586-019-02998-3.

[212] To be included in CODIS's national DNA database, a "forensic" sample must be "attributed to the putative perpetrator." FBI, National DNA Index System (NDIS) Operational Procedures Manual V.4 (2016), at § 4.2.1.8. This means that the law enforcement officers and lab technicians who worked to upload the profile believe the sample could be from the person who committed the alleged crime. But it does not mean that association is true. Indeed, Department of Justice audits conducted between 2010 and 2015 found "instances of unreliable data that did not support an asserted profile," "typographical errors that resulted in incorrect entries," and, most troublingly, "a large proportion of labs" that have "upload[ed] DNA profiles that the rules do not authorize," like those of alleged crime victims. Murphy, Inside the Cell, *supra* note 125, at 139-40. The 22 labs audited during this period "exhibited a 6 percent error rate in uploading–that is, six in one hundred samples were put in the DNA database but should not have been there." *Id.* (One lab, in San Jose, California, had a "whopping . . . one in three" error rate). Extrapolating out from this data, it is possible that tens of thousands of forensic profiles in the national database do not belong there. *Id*. at 140. What's more, modern DNA-typing techniques can now generate profiles from crime scene samples on the basis

have past convictions, a DNA search in CODIS therefore will be much less efficient and reliable than a search of the various databases available to DHS (for example, the National Data Exchange System or the National Crime Information Center)[213] to search court records. For this reason, it would not be reasonable or rational — let alone prudent or fair — to treat a CODIS match as information relevant to questions that implicate important liberty interests, such as how someone should be managed inside detention or whether, when, or how the person should be transferred or released.

The government's four "identification" interests, which it claims justify taking DNA from anyone whom DHS detains, are thus untethered from any of the actual practices or purposes of immigration enforcement. In contravention of the Fourth Amendment, the program currently permits immigration authorities to conduct searches by taking DNA without a legitimate purpose related to immigration enforcement, and without individualized suspicion of criminal wrongdoing.

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of extremely small quantities of biological material — in some instances, less than 10 cells. John M. Butler *et al.*, DNA Mixture Interpretation: A NIST Scientific Foundation Review 10, 44 (NISTIR 8351-DRAFT2021) https://doi.org/10.6028/NIST.IR.8351-draft [hereinafter "NIST Draft"]. Laboratories regularly generate profiles on the basis of poor quality and degraded forensic samples, and from biological material known to include a mixture of numerous people's DNA. *See, e.g.*, FBI CODIS FAQ, *supra* note 5. The processes required to conduct this type of profile-generation are subjective and may lead to inaccurate profiles. *See* NIST Draft at 2. Indeed, studies have shown that different examiners at accredited laboratories analyzing the same sample come up with different results when typing DNA mixtures. *See generally*, Jan W. De Keijser et al., *Differential Reporting of Mixed DNA Profiles and Its Impact on Jurists' Evaluation of Evidence. An International Analysis*, 23 Forensic Sci. Int'l: Genetics 71 (2016); Itiel E. Dror & Greg Hampikian, *Subjectivity and Bias in Forensic DNA Mixture Interpretation*, 51 Sci. & Just. 204 (2011). Additionally, we now understand that "DNA transfers easily between objects," and a person's DNA may be found at a crime scene that person has never had anything to do with. *E.g.*, NIST Draft at 8, 10, 13. NIST therefore cautions that "the presence of a person's DNA in an evidence sample does not necessarily mean that the DNA is relevant to the crime. Relevance should be assessed. If not, the evidence can be misleading." NIST Draft at 7.

[213] *See National Crime Information Systems*, U.S. Dep't of Just., https://www.justice.gov/tribal/national-crime-information-systems (last visited April 17, 2024).

EXPLAINER:
DHS cannot take DNA under the "Border Search Exception"

DHS claims extraordinary powers at the border, including the power to carry out routine suspicionless searches of anyone crossing the border.[214] DHS regularly attempts to exploit these powers, arguing in case after case that it can trample people's rights just by virtue of their location within — or even near — the border zone.[215] The federal government has not so far suggested that DHS's DNA collection program is reasonable under the Fourth Amendment as a "routine border search." To do so would be politically explosive, because it would amount to a claim that the government can take DNA from any person who approaches the border, without regard for their immigration status or any other factor. It nevertheless is important to briefly explain why DHS's DNA collection program cannot be justified as a routine border search for Fourth Amendment purposes.

While individuals crossing the border may have "limited justifiable expectations of privacy," they are still entitled to some degree of personal autonomy.[216] The motivation behind the border search exception is that authorities must be able to "regulate the collection of duties" and "prevent the introduction of contraband into this country."[217] Courts therefore have held that "government agents may conduct a 'routine search' at the international border or its functional equivalent without probable cause, a warrant, or any suspicion to justify the search."[218] Courts have found activities like fingerprinting and photographing to be

[214] 8 U.S.C. § 1357(c) (giving DHS officers and employees "power to conduct a search, without warrant, of the person, and of the personal effects in the possession of any person seeking admission to the United States, concerning whom such officer or employee may have reasonable cause to suspect that grounds exist for denial of admission to the United States . . . which would be disclosed by such search."). The Supreme Court has blessed these warrantless border searches. *United States v. Ramsey*, 431 U.S. 606, 616 (1977) ("[S]earches made at the border, pursuant to the long-standing right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border. . . .").

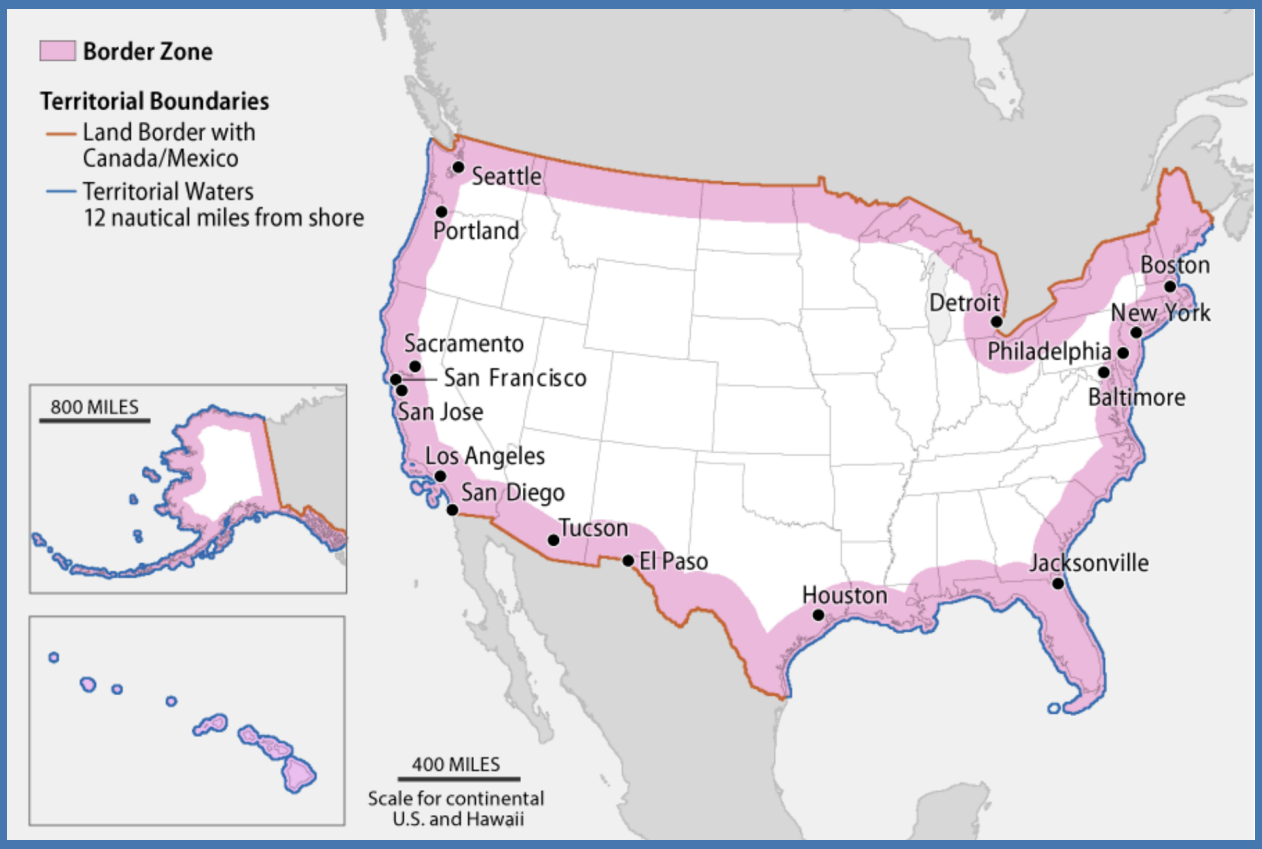
[215] *E.g., United States v. Aigbekaen*, 943 F.3d 713, 721 (4th Cir. 2019); *United States v. Kim*, 103 F. Supp. 3d 32, 35 (D.D.C. 2015).

[216] *United States v. Baxter*, 951 F.3d 128, 133 (3rd Cir. 2020) (citing *Ramsey*, 431 U.S. at 623 n.17).

[217] *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985) (citing *Ramsey*, 431 U.S. at 616-17).

[218] *United States v. Rivas*, 157 F.3d 364, 367 (5th Cir. 1998).

Figure 9:



A map of the United States showing the "100-mile border zone."

Source: Congressional Research Service; 8 C.F.R. § 287.1(a)(2), (b)

"routine."[219] Whether a search is routine or not depends on how much the search invades the traveler's "privacy and dignity."[220] Any stop or search that "is not 'routine" still requires at least "reasonable suspicion of wrongdoing to pass constitutional muster."[221] So, the question may turn on whether DNA collection is "routine" for Fourth Amendment purposes.

[219] *See Tabbaa v. Chertoff*, 509 F.3d 89, 99 (2d Cir. 2007) ("We also conclude that the fingerprinting and photographing of plaintiffs does not take the searches out of the realm of what is considered routine because, at least in the context of a border search, being fingerprinted (even forcibly) and photographed is not particularly invasive, especially considering that the photographs and fingerprints were used solely to verify plaintiffs' identities and then were discarded from the government's databases.").

[220] *United States v. Kelly*, 302 F.3d 291, 294 (5th Cir. 2002) (citing *United States v. Sandler*, 644 F.2d 1163, 1167 (5th Cir. 1981)).

[221] *Rivas*, 157 F.3d at 367 (citing *United States v. Cardenas*, 9 F.3d 1139, 1148 n.3 (5th Cir. 1993)).

There are three strong arguments as to why it is not.

First, unlike fingerprinting, DNA collection involves intrusion into the body.[222] In the border search jurisprudence, bodily intrusions such as strip searches, pat-downs, and cavity searches have been held to require varying degrees of suspicion to comport with the Fourth Amendment. The more intrusive, the more suspicion is required.[223]

Second, as detailed elsewhere in this report, collection of DNA samples presents immense potential for invading the individual's privacy and dignity. The genetic material contained in a DNA sample is distinct from other identifiers like fingerprints, which carry little additional information beyond their identification purpose. DNA samples carry intensely private and sensitive information, such as those implicating health statuses and familial relationships.

Third, DNA contains information that implicates the rights not only of the individual from whom a sample is taken but also back in time to their ancestry, laterally to living family members and forward to descendants, for eternity. It is also unchangeable. If legal structures or technologies change in the future or if there is abuse of the system, individuals cannot just get a new DNA code. The government currently retains the DNA samples that it collects indefinitely, with few constraints on how samples are used or future testing may be done.[224] And like their faces, individuals can never choose to leave their DNA at home.[225]

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[222] Although Justice Kennedy minimized the impact of the intrusion in *Maryland v. King*, the majority acknowledged that the buccal swab required to collect a DNA sample is an intrusion into the body and that "[v]irtually any intrusio[n] into the human body will work an invasion of cherished personal security that is subject to constitutional scrutiny." *Maryland v. King*, 569 U.S. 435, 446 (2013) (internal quotations and citations omitted).

[223] *E.g.*, *United States v. De Gutierrez*, 667 F.2d 16, 19 (5th Cir. 1982) ("[A] simple frisk or pat-down of a person crossing the border may be based on 'mere suspicion' because of the relatively low degree of intrusion involved," but "a strip search . . . 'presents a degree of intrusion which requires more than mere suspicion to justify.'") (citing *Sandler,* 644 F.2d at 1167).

[224] *See infra* Section G.

[225] *See Hearing on Facial Recognition Technology (Part 1): Its Impact on Our Civil Rights and Liberties Before the H.Comm. on Oversight and Reform*, 116th Cong. 5 (2019) (statement of Clare Garvie), available at https://www.congress.gov/116/meeting/house/109521/witnesses/HHRG-116-GO00-Wstate-GarvieC-20190522.pdf.

The "deeply revealing nature" of DNA

Out of touch even in 2013, the Supreme Court's dismissal in *Maryland v. King* of the privacy interests at stake in a DNA search deserves reconsideration given the government's unconsented to and indefinite retention of individuals' DNA samples and the realities of advancing technology.[226] In *King*, the Court made much of the fact that the DNA records in CODIS include only "non-coding DNA" and that this so-called "junk DNA" could not provide "information beyond identification" such as genetic traits or medical information.[227] The Court acknowledged that if DNA data were used to do more than ascertain identity, that would raise additional privacy concerns.[228]

In the years since, advances in genetic science have complicated the distinction between coding and noncoding DNA. For example, researchers have linked a variety of genetic disorders to "noncoding" parts of the human genome, and have shown that it may be possible to de-anonymize people's DNA from data sets and make reliable inferences about the entire genome from a limited set of genomic data.[229] Noncoding DNA is also highly revealing of genetic relationships, and law enforcement agencies are increasingly using a variety of forms of familial matching in policing and prosecution.[230]

What's more, the risks of the indefinite retention of the samples themselves have come into sharper focus. Unlike the profile uploaded to CODIS which (at least for now) contains little sensitive information,[231] the sample itself "can contain information about a person's entire genetic make-up, including [biological sex], familial relationships, and other hereditary

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[226] For the Supreme Court's analysis of the privacy interests at stake, see 569 U.S. 435, 461-65 (2013).

[227] *King*, 569 U.S. at 442-43, 464.

[228] *King*, 569 U.S. at 464-65.

[229] *See, e.g.*, Natalie Ram, *DNA by the Entirety*, 115 Colum. L. Rev. 873, 880-81 (2015); Mayra M. Bañuelos, Yuómi Jhony A. Zavaleta, Alennie Roldan & Rori V. Rohlfs, *Associations between forensic loci and expression levels of neighboring genes may compromise medical privacy*, PNAS, Sept. 2022, at 1, 6.; Kim J, Edge MD, Algee-Hewitt BFB, Li JZ, & Rosenberg NA. *Statistical Detection of Relatives Typed with Disjoint Forensic and Biomedical Loci*, Cell, Oct. 2018, at 1, 9-12.

[230] *See, e.g.*, Madison Pauly, *Police Are Increasingly Taking Advantage of Home DNA Tests. There Aren't Any Regulations to Stop It*, Mother Jones (Mar. 12, 2019), https://www.motherjones.com/crime-justice/2019/03/genetic-genealogy-law-enforcement-golden-state-killer-cece-moore/.

[231] The profiles uploaded to CODIS contain data on the number of repeated sets of alleles, known as short tandem repeats (STRs), appearing at a standardized set of locations, or loci, in the person's genome. For more on what makes up this profile and additional information about the DNA-analysis process, *see* Primer: What is DNA, and how does law enforcement use it? *and* Glossary of Terms, both included as appendices to this report.

information, race, health, disease history and predisposition to disease, and perhaps even sexual orientation."[232]

Because of their potential informational richness, DNA samples (as opposed to profiles) could readily "be mined for more private information or otherwise misused in the future."[233] Indeed, federal officials have openly described their interest in using future-developed technologies on retained samples. In 2006, M. Dawn Herkenham, "the chief of the FBI unit responsible for implementing the NDIS,"[234] described the FBI's interest in retesting previously-collected samples to keep up with advancing technological capabilities:

> It is important to maintain the offender's DNA sample in the event that there is a change in the technology used to analyze the samples that will be contributed to the state and national DNA databases. . . . While it may appear that the thirteen core STR loci will remain the core loci required for NDIS for the foreseeable future, additional loci (Y-STRs) and systems (single nucleotide repeats or SNPs) are being evaluated, validated and implemented in forensic DNA laboratories across the country. It is when the casework is analyzed with additional loci or systems that it will be incumbent on the laboratory to ensure that their offender samples are evaluated with those additional loci and systems to continue compatibility of the DNA database for search purposes.[235]

And the government has already professed in court its interest in doing so.[236] In the early 2000s, Thomas Kriesel was arrested and pleaded guilty to a drug-related charge. He was sentenced to a prison term, followed by a term of supervised release.[237] One condition of that supervised release

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[232] Jennifer Lynch, Am. Immigr. Council, From Fingerprints to DNA: Biometric Data Collection in U.S. Immigrant Communities and Beyond 7 (2012); *see also* Elizabeth E. Joh, *Policing by Numbers: Big Data and the Fourth Amendment*, 89 Wash. L. Rev. 35, 53 (2014) ("These samples pose rich data possibilities; information that could be analyzed in different ways for a variety of purposes."). Researchers continue to work to identify ways that CODIS STR profiles might reveal more information than currently understood. *See infra* note 253.

[233] *United States v. Kincade*, 379 F.3d 813, 837 (9th Cir. 2004). For discussion of how DNA collected for scientific purposes has been used in ways that defy the original research subjects' expectations, see, e.g., Amy Harmon, *Where'd You Go With My DNA?*, NY Times (Apr. 4, 2010), https://www.nytimes.com/2010/04/25/weekinreview/25harmon.html.

[234] Joh, *Policing by Numbers*, *supra* note 232, at 54 n. 129.

[235] M. Dawn Herkenham, *Retention of Offender DNA Samples Necessary to Ensure and Monitor Quality of Forensic DNA Efforts: Appropriate Safeguards Exist to Protect the DNA Samples from Misuse*, 34 J.L. Med. & Ethics 380, 381 (2006).

[236] *Kriesel,* 720 F.3d at 1144.

[237] *Id.*

was that Kriesel had to "provide a blood sample for analysis of his DNA" for inclusion in CODIS.[238] After the FBI generated and uploaded Kriesel's DNA profile to CODIS, the FBI's Federal DNA Database Unit (FDDU) retained the physical blood sample.[239] Once Kriesel finished his term of supervised release, he made a novel motion: He asked the court for an order returning his property — his DNA sample.[240] When the case went before the appellate court, the government argued that it should be able to retain the blood sample because of the government's "speculative interest in being able to utilize as yet undeveloped technology."[241]

Law enforcement across the country continues using and experimenting with precisely the kinds of "as yet undeveloped technology" with which Herkenham and the *Kriesel* officials were concerned. For example, law enforcement has become increasingly interested in the capabilities of a different type of DNA profile from the CODIS standard, based on characteristics of DNA known as a "single nucleotide polymorphism" or "SNP" (pronounced "snip"). A SNP profile contains vastly more information than the STR profiles found in CODIS, because they are measured in far greater quantities (typically ranging from the hundreds of thousands to over 1 million) and represent the coding portion of the genome. These are the types of profiles created and stored by commercial genetic data companies like 23andMe and Ancestry.com. Once created, a SNP profile can be loaded into one of these commercial databases, allowing law enforcement officials to "rummag[e] around" in innocent people's family trees, searching for genetic similarities and investigative leads — an increasingly popular form of investigation known as "forensic investigative genetic genealogy," or "FIGG."[242] States and localities are also building their own "rogue" DNA databases, populated with samples and profiles that could not

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[238] *Id.* at 1139.

[239] *Id.* at 1140. We have every reason to believe a similar process is followed for DHS-collected samples. *See infra* note 252 and accompanying text; *see also Federal Bureau Of Investigation Budget Request For Fiscal Year 2024 Hearing Before S. Sci. & Related Agencies Comm. on Appropriations*, 118th Cong. (2023) (statement of Christopher A. Wray, Director, Fed. Bureau of Investigation); *Biometrics and Fingerprints*, FBI.gov, https://le.fbi.gov/science-and-lab/biometrics-and-fingerprints/federal-dna-database-unit#Links ("Agencies submit blood or buccal (cheek) samples to the unit from individuals who are required by law to do so. These include . . . Non-U.S. citizens who are detained under the authority of the United States. FDDU then produces a DNA profile for each of these individuals and uploads it to the NDIS, which is part of the Combined DNA Index System (CODIS).").

[240] *See* Fed. R. Crim. P. 41(g) (Motion to Return Property).

[241] *Kriesel,* 720 F.3d at 1144.

[242] Erin Murphy, *Law and policy oversight of familial searches in recreational genealogy databases*, 292 Forensic Sci. Int. e5, e6 (2018). FIGG is also sometimes referred to as simply "IGG" or "Forensic Genetic Genealogy" (FGG).

be added to the national database under current regulations.[243] And police agencies across the country are attempting to use scientifically unproven and dangerous technologies, sometimes layered together, to experiment with the outer limits of DNA identification. For example, numerous policing agencies are experimenting with a tool developed and marketed by a company called Parabon NanoLabs which claims to be able to create a 3D model of a face from a DNA sample, which police then run through face recognition software to attempt to locate suspects.[244] Researchers and advocates have called the technique "junk science" and "dangerous" and have said that "[d]aisy chaining unreliable or imprecise black-box tools together is simply going to produce unreliable results."[245] Law enforcement agencies are thus experimenting with forensic genealogy using technologies acquired through opaque procurement processes which have not been examined or approved by any court of law or legislative body.

In the 2018 case, *Carpenter v. United States*, the Supreme Court found that police violated the Fourth Amendment by accessing cellphone location information without a warrant.[246] The majority opinion pointed to the "deeply revealing nature" of cellphone location data and the "depth, breadth, and comprehensive reach" of the information about a person that can be gleaned from those records.[247] While the Court noted that its decision in *Carpenter* was "a narrow one,"[248] several courts have since relied on *Carpenter* to suggest that other forms of invasive digital surveillance may implicate the Fourth Amendment, or state constitution equivalents, because of the revealing nature of digital records about a person when those

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[243] *See, e.g.*, Steve Mercer & Jessica Gabel, *Shadow Dwellers: The Underregulated World of State and Local DNA Databases*, 69 N.Y.U. Ann. Surv. Am. L. 639, 667-80 (2014).

[244] *See, e.g.*, Dhruv Mehrotra, *Cops Used DNA to Predict a Suspect's Face–and Tried to Run Facial Recognition on It*, Wired (Jan. 22, 2024), https://www.wired.com/story/parabon-nanolabs-dna-face-models-police-facial-recognition/.

[245] *Id.* (quoting Jennifer Lynch and Clare Garvie).

[246] *See* 585 U.S. 296 (2018).

[247] *Carpenter v. United States*, 585 U.S. 296, 320 (2018). *See* Paul Ohm, *The Many Revolutions of* Carpenter, 32 Harv. J. L. & Tech. 357, 369-78 (2019). The cell phone location information at issue in *Carpenter* was held not by the individuals but by their wireless carriers. For this reason, the Court said, *Carpenter* implicated a line of precedent about the "third party doctrine," which held that "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." *Smith v. Maryland*, 442 U.S. 735, 743–44 (1979). In analyzing the role of the third party doctrine in *Carpenter*, the majority emphasized the lack of true "voluntary" provision of the information, saying "[c]ell phone location information is not truly 'shared' as one normally understands the term." *Carpenter*, 585 U.S. at 315. While the Fourth Amendment analysis around DHS DNA collection does not involve the third-party doctrine, it is important to note that there can be no argument that individuals whose DNA DHS collects have provided their swabs to DHS in any knowing or voluntary manner. *See supra* Section B.

[248] *Carpenter*, 585 U.S. at 316.

records are aggregated.[249] For the majority in *Carpenter*, it was also important that cell phone location data is collected from "all of the 400 million devices in the United States — not just those belonging to persons who might happen to come under investigation." The result is that "police need not even know in advance whether they want to follow a particular individual, or when. Whoever the suspect turns out to be, he has effectively been tailed every moment of every day . . . and the police may — in the Government's view — call upon the results of that surveillance without regard to the constraints of the Fourth Amendment."[250] This same concern applies to DNA data collected by DHS under the current program, and it is a concern not only with respect to individuals whose DNA is actually in CODIS, but with respect to the other individuals that law enforcement officials may be able to use that DNA to identify through forensic genealogy.

Given advances in DNA science, the proliferation of poorly regulated (or entirely unregulated) DNA technologies and the networking of DNA databases with other types of biometric data, it no longer seems reasonable to compare (as the Court did in *King*) the privacy interests a person has in their DNA to the privacy interests a person has in their fingerprints. The information that may be available to a law enforcement agency through a DNA swab is potentially much more revealing than the information revealed through cellphone location data. And DNA cannot be changed, cannot be left at home, and cannot be divorced from the individual's entire lineage — both backward and forward in time, from ancestors to heirs. It allows for the deepest, broadest, most comprehensive reach imaginable. Given this reality, it would be woefully incomplete to analyze the privacy interest a person has in their DNA as limited to the "junk" in their own genome.[251]

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[249] *See, e.g., Commonwealth v. McCarthy*, 142 N.E.3d 1090, 1098-1100, 1102-04, (Mass. 2020) ("With enough cameras in enough locations, the historical location data from an ALPR system in Massachusetts would invade a reasonable expectation of privacy and would constitute a search for constitutional purposes."); *Commonwealth v. Mora*, 150 N.E.3d 297, 304-05, 307, 309-312 (Mass. 2020) ("This combination of duration and aggregation in the targeted surveillance here [via pole camera directed at defendant's home] is what implicates a person's reasonable expectation of privacy."). Legal scholars have suggested additional applications of *Carpenter*, including to DNA. *See generally* Natalie Ram, *Genetic Privacy After* Carpenter, 105 Va. L. Rev. 1357 (2019).

[250] *Carpenter*, 585 U.S. at 317

[251] While courts have largely "refused to speculate about the uses to which the government could conceivably put DNA information," in at least one case the government explicitly offered as justification for retaining an individual's DNA sample "a speculative interest in being able to utilize as yet undeveloped technology." *Kriesel*, 720 F.3d at 1144, 1147.

G. Indefinite government retention of DNA samples poses major risks given rapidly advancing technology, and political instability in the U.S.

Any time the government collects sensitive information about specific individuals, there is a risk that information will be used for purposes beyond those originally offered as justification for the privacy invasion and that some of those purposes will be malign. This risk, in the context of DNA collection, is heightened because the government retains the original samples of genetic material after creating the CODIS profile. This means that, in addition to worrying about how existing DNA data might be misused, we should also be concerned about the potential for additional genetic information to be extracted from the underlying samples, making the people from whom the samples were taken (and their family members) highly vulnerable. The federal government has offered no justification whatsoever for its practice of hoarding what is arguably the most sensitive possible kind of personal data.

As discussed above, once DHS collects a DNA sample from an individual, the agency sends that sample to the FDDU for processing and addition of the resultant profile to CODIS. The FDDU then stores the sample itself — the blood or buccal swab containing the individual's biological material — indefinitely.[252] When assessing the risks of DHS DNA-collection, therefore, we must think beyond the uses and abuses that CODIS currently makes possible to take a broad view of what might be possible tomorrow, next year, and far into the future. Once a DNA sample is collected and placed in a government storage facility, the future possibilities for its use may be limited in practice only by prevailing policy winds. So long as the federal government retains the original DHS-collected DNA samples, further testing and future creation of more robust profiles, or the application of future technologies like those described above, are possible.[253] What protections may exist due to current limits of technological capabilities, or in statute and

[252] BIO-101-00 DNA Quality Assurance Manual (2022), https://fbilabqsd.fbi.gov/file-repository/dna/bio-101-00-dna-quality-assurance-manual.pdf/view ("The FDDU will retain all DNA database samples (e.g., FTA cases) indefinitely unless otherwise directed . . . ."); *see also, e.g.*, *Kincade*, 379 F.3d at 837 ("the government does not destroy blood samples drawn for DNA profiling . . . .").

[253] It must be noted that, while sample retention presents the largest and most immediate risks, the potential for future risk to those subjected to DHS DNA-collection do not end there. Developing technologies may obviate the need to return to the sample to create a new profile at all: States and researchers are exploring algorithmic technologies that purport to be able to infer a SNP profile from an STR profile, match an STR profile to an existing SNP profile, or conduct cross-database, cross-typing searching. *See, e.g.*, Jaehee Kim et al., *Statistical Detection of Relatives Typed with Disjoint Forensic and Biomedical Loci*, 175 Cell 848, 848 (2018). Existing studies have not reliably been replicated, but efforts appear to continue.

regulation today, could change drastically in the future.[254] Given the rapid and ongoing advance of DNA technology and the reality of current U.S. political dynamics, the risks of DHS's DNA collection program are unjustifiable.

This massive DNA cache could be co-opted to facilitate the targeting of vulnerable groups and do unimaginable harm. History is rife with examples of governments at home and abroad using race, ethnicity, disability, and other social groupings as a condition for exclusion and persecution. As discussed above, U.S. immigration law was built on precisely this foundation.[255] From the Page Act of 1875 to the Immigration Act of 1924 to the "Muslim Ban" of 2017, the nation's policies have consistently targeted migrants of color.[256]

Similarly, U.S. immigration law has long been marked by near-eugenical concern over the "purity," desirability, and health of those coming to the country. Federal statutes have, over time, both explicitly and implicitly excluded those with a variety of physical and mental conditions, motivated by fears of migrants bringing disease or drawing on the public fisc.[257] The Immigration Act of 1891 excluded "[a]ll idiots, insane persons, paupers or persons likely to become a public charge."[258] Starting in 1916, the U.S. Public Health Services forced people crossing the southern border to undergo "intrusive, humiliating, and harmful baths and physical examinations" based on "the belief that Mexicans were bringing disease into the United

[254] *See Kincade*, 379 F.3d at 844 (Reinhardt J., dissenting) ("Thomas Jefferson once warned that '[t]he time to guard against corruption and tyranny is before they shall have gotten hold of us. It is better to keep the wolf out of the fold, than to trust to drawing his teeth and talons after he shall have entered.'") (quoting Thomas Jefferson, Notes on the State of Virginia 121 (William Peden ed., 1955)).

[255] *See supra* Section C.

[256] *Id.*

[257] *See, e.g.*, Immigration Act of 1891, ch. 551, § 1, 26 Stat. 1084, 1084; *United States v. Williams*, 186 F. 354, 355-56 (S.D.N.Y. 1911) (60-year-old Italian man with a wife and six children in the U.S., who had resided in the U.S. for 16 years, to be deported under public charge rule as a result of losing his leg to gangrene); Howard Markel & Alexandra Minna Stern, *The foreignness of germs: the persistent association of immigrants and disease in American society*, 80 The Milbank Quarterly 757, 757 (2002), https://doi.org/10.1111/1468-0009.00030 (describing 20th century American discourse in which "foreigners were consistently associated with germs and contagion"); Edward Steiner, On the Trail of the Immigrant 72 (1906) (U.S. immigration law "sifts, picks, and chooses; admitting the fit and excluding the weak and helpless."); *id.* at 64-65 (describing Ellis Island experience of being "examined for general physical defects and for the dreaded trachoma, an eye disease, the prevalence of which is greater in the imagination of some statisticians than it is on board immigrant vessels.").

[258] 26 Stat. 1084.

States."[259] Early 20th century processing centers engaged in medical inspections that were "often predicated on the prevailing racial and class stereotypes," with "Mexican and Chinese laborers . . . subjected to harsher medical scrutiny, more frequently poked for blood and urine samples, and disinfected with chemical agents."[260]

Modern immigration law continues this tradition of placing migrants' health and perceived self-sufficiency at the center of the immigration process. The very first grounds on which migrants may be excluded under the Immigration and Nationality Act are "health-related grounds," including having certain "physical or mental disorder[s]" or "a history of behavior associated with" such disorders and being "a drug abuser."[261] Similarly, the "Public Charge" rule makes any person who "in the opinion of the consular officer at the time of application for a visa, or in the opinion of the Attorney General at the time of application for admission or adjustment of status, is likely at any time to become a public charge" inadmissible.[262] In public debates about immigration, politicians continue to press narratives of migrants as bringers of disease, even, at times, drawing on some of the most noxious eugenic ideas in world history.[263]

In recent years, authoritarian regimes abroad have turned to DNA to carry out surveillance and

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[259] Natalia Molina, *Borders, Laborers, and Racialized Medicalization: Mexican Immigration and U.S. Public Health Practices in the Twentieth Century*, *in* Precarious Prescriptions: Contested Histories of Race and Health in North America 167, 169 (L. B. Green, J. Mckiernan-González, & M. Summers eds., 2014).

[260] Markel & Stern, *The foreignness of germs*, *supra* note 257, at 762.

[261] 8 U.S.C. § 1182(a)(1). Note that the Department of Justice classifies substance use disorders as disabilities protected under the Americans with Disabilities Act. *See, e.g.*, U.S. Dep't of Just. C.R. Div., *The ADA and Opioid Use Disorder: Combating Discrimination Against People in Treatment or Recovery*, ADA.gov, https://www.ada.gov/resources/opioid-use-disorder/.

[262] 8 U.S.C. § 1182(a)(4).

[263] *See, e.g.*, Clark Kauffman, *Trump warns Iowans of World War III and immigrants 'destroying our blood'*, Iowa Capital Dispatch (Dec. 19, 2023), https://iowacapitaldispatch.com/2023/12/19/trump-warns-iowans-of-world-war-iii-and-immigrants-destroying-our-blood/ [https://perma.cc/AJD4-GGQR] (reporting Trump saying at Iowa rally that people entering the country "could be very unhealthy, they could bring in disease that's gonna catch on in our country . . ." and "And it's true: They are destroying the blood of our country."); Hannah Fingerhut & Ali Swenson, *At Iowa rally, Trump doubles down on comments about immigrants poisoning the nation's blood*, PBS News Hour (Dec. 20, 2023), https://www.pbs.org/newshour/politics/at-iowa-rally-trump-doubles-down-on-comments-about-immigrants-poisoning-the-nations-blood [https://perma.cc/KN4E-QKBQ] (describing same rally and comments); Rupert Neate & Jo Tuckman, *Donald Trump: Mexican migrants bring 'tremendous infectious disease' to US*, The Guardian (July 6, 2015), https://www.theguardian.com/us-news/2015/jul/06/donald-trump-mexican-immigrants-tremendous-infectious-disease [perma.cc/J9JH-EAAN] (describing Trump "accusing Mexicans of being responsible for 'tremendous infectious disease . . . pouring across the border'").

repression. For example, Human Rights Watch and Citizen Lab have both independently documented the Chinese government's abusive and pervasive collection of DNA on ethnic minorities including Uighur Muslims and Tibetans.[264]

Current U.S. law is insufficient to counter the risk that government actors may use DHS-collected samples for this kind of targeted and discriminatory genetic policing.[265] Courts have not conclusively stated that the Fourth Amendment bars subsequent analysis of lawfully collected DNA samples.[266] And courts generally have been dismissive of claims regarding the potential misuse of DNA samples or profiles, arguing that the "DNA Act offers a substantial deterrent to such hypothetical abuse by imposing a criminal penalty for misuse of DNA samples."[267] The current statute does offer some protection: It limits use of "any sample

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[264] *See, e.g.*, Maya Wang & Yves Moreau, *US company must stop supplying China's regime with DNA surveillance tech*, The Hill (Jan. 25, 2024), https://thehill.com/opinion/international/4421537-us-company-must-stop-supplying-chinas-regime-with-dna-surveillance-tech/ [https://perma.cc/XP8C-8TY8]; Human Rights Watch, *China: New Evidence of Mass DNA Collection in Tibet* (Sept. 5, 2022), https://www.hrw.org/news/2022/09/05/china-new-evidence-mass-dna-collection-tibet [https://perma.cc/9XGF-DSUM]; Emile Dirks, *Mass DNA Collection in the Tibet Autonomous Region from 2016–2022*, Citizen Lab Rep. No. 158, Univ. of Toronto (Sept. 13, 2022), https://tspace.library.utoronto.ca/bitstream/1807/128584/1/Report%23158--mass-dna-collection.pdf [https://perma.cc/XR5A-DWRX].

[265] *See Kincade*, 379 F.3d at 843 ("Even governments with benign intentions have proven unable to regulate or use wisely vast stores of information they collect regarding their citizens. The problem with allowing the government to collect and maintain private information about the intimate details of our lives is that the bureaucracy most often in charge of the information 'is poorly regulated and susceptible to abuse. This [ ] has profound social effects because it alters the balance of power between the government and the people, exposing individuals to a series of harms, increasing their vulnerability and decreasing the degree of power that they exercise over their lives.'" (quoting Daniel J. Solove, *Digital Dossiers and the Dissipation of Fourth Amendment Privacy*, 75 S. Cal. L. Rev. 1083, 1105 (2002))).

[266] *Compare, e.g.*, *Boroian v. Mueller*, 616 F.3d 60, 68 (1st Cir. 2010) ("We do not hold, as some courts have suggested, that once a DNA sample is lawfully extracted from an individual and a DNA profile lawfully created, the individual necessarily loses a reasonable expectation of privacy with respect to *any* subsequent use of that profile. . . . We recognize . . . the possibility that the government may eventually seek to put [a] retained DNA profile to uses that go beyond the mere matching of identification records, thereby making the fingerprint analogy less powerful and providing the basis for an argument that a new search has occurred."); *State v. Randall*, 387 Wis. 2d 744, 774, 930 N.W.2d 223, 237 (2019) (approving of analysis of blood for alcohol content despite suspect's withdrawal of consent after collection, but stating that if the government sought to undertake further testing revealing "genetic information about her ancestry, family connections, medical conditions, or pregnancy, our conclusion would be different."); *with, e.g., Green v. Berge*, 354 F.3d 675, 680 (7th Cir. 2004) (Easterbrook, J., concurring) ("[T]he fourth amendment does not control how properly collected information is deployed."). *See also* Ram, *Genetic Privacy*, *supra* note 249, at 1380-81.

[267] *United States v. Weikert*, 504 F.3d 1, 13 (1st Cir. 2007); *see also, e.g.*, *United States v. Mitchell*, 652 F.3d 387, 407 (3d Cir. 2011); *Boroian*, 616 F.3d at 66–69; *United States v. Kriesel*, 508 F.3d 941, 948 & n. 10 (9th Cir. 2007) ("*Kriesel I*"); *Banks v. United States*, 490 F.3d 1178, 1192 (10th Cir. 2007).

collected" and "any result of any analysis carried out" on that sample to the "purpose specified" in the statute authorizing collection.[268] In the case of DHS-collected samples, that purpose is provision to the FBI for analysis and inclusion in CODIS.[269] Anyone who knowingly discloses, obtains, or uses a sample without authorization can lose their future access to CODIS and "shall be fined not more than $250,000, or imprisoned for a period of not more than one year. Each instance of disclosure, obtaining, or use shall constitute a separate offense under this subsection."[270] Finally, the DOJ must notify Congress 180 days before it plans to "modify or supplement the core genetic markers needed for compatibility with the CODIS system."[271] But to bar the DOJ from actually making such noticed changes, Congress would have to respond by passing legislation — something that seems unlikely if not impossible given current political dynamics.

But there are several important vulnerabilities to this scheme.[272] First, the penalties inscribed in law only take effect after the damage has already been done. Second, statutory penalties are not self-executing. Out-of-bounds uses of DHS-collected DNA may very well violate not only these statutes but also the Fourth Amendment, anti-discrimination statutes, the Equal Protection Clause, and more, but ensuring that courts have the opportunity to weigh compliance requires, first, knowing what is happening, and, second, someone being able to bring a challenge. With DHS-collected samples, we may have reason to be concerned that such intervention would be unlikely, if not in many cases impossible.[273] Third, the existence of similar penalties has proven insufficient to protect vulnerable communities from misuse of their administratively-held and statutorily-protected data in the past. For more than a century, federal statutes have "mandate[d] that the information provided to a census official cannot be used for 'taxation, regulation, or investigation,' or to 'harm' an individual, group, or organization."[274] Yet in the lead-up to World

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[268] 34 U.S.C. § 40706(a).

[269] 34 U.S.C. § 40702(b) ("The Attorney General . . . shall furnish each DNA sample collected under subsection (a) to the Director of the Federal Bureau of Investigation, who shall carry out a DNA analysis on each such DNA sample and include the results in CODIS.").

[270] 34 U.S.C. § 40706.

[271] 34 U.S.C. § 40721.

[272] *See Kriesel*, 720 F.3d at 1160 ("[R]egardless of the statutory limitations, concerns that the government may use DNA samples 'beyond identification purposes are real and legitimate.'" (quoting *Kriesel I*)).

[273] For discussion of the difficulties in bringing constitutional challenges to certain DNA abuses, see Murphy, Inside the Cell, *supra* note 125, at 208-11.

[274] Anderson, *Public Management of Big Data*, *supra* note 73, at 21. *See, e.g.*, 46 Stat. 25 ("information furnished under the provisions of this Act shall be used only for the statistical purpose for which it is supplied"); 46 Stat. 26 ("in no case

War II, the existence of census data that could lead U.S. officials to Japanese communities proved too tempting to resist.[275] Despite the existence of steep penalties on the books, officials nevertheless used census data to target Japanese communities for removal and incarceration.[276] Fourth, current law includes a massive exception for law enforcement: "the results of DNA tests performed for a Federal law enforcement agency for law enforcement purposes may be disclosed only . . . to criminal justice agencies for law enforcement identification purposes."[277] What those "law enforcement identification purposes" might be is undefined. In his "vehement dissent" in *Kriesel*, Judge Stephen Reinhardt of the 9th Circuit "observed that '[l]aw enforcement identification purposes could [conceivably] include retesting for certain behavior traits.'"[278] An administration that wanted to use DHS-collected samples in new ways would not only have the permissive immigration enforcement framework to draw on in interpreting this exception to permit further testing but the even more deferential national security framework as well.[279] And fifth, as Kriesel's counsel argued, "nothing prevents Congress from expanding the use of bodily

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shall information furnished under the authority of this Act be used to the detriment of the person or persons to whom such information relates"); 13 U.S.C. § 9(a) (officials may not "use the information furnished under the provisions of this title for any purpose other than the statistical purposes for which it is supplied").

[275] *See generally* Anderson, *Public Management of Big Data*, *supra* note 73. *See also* Anderson & Seltzer, *Challenges to Confidentiality*, *supra* note 73; Exec. Off. of the President, Big Data: Seizing Opportunities, Preserving Values (May 2014) ("Once information about citizens is compiled for a defined purpose, the temptation to use it for other purposes can be considerable, especially in times of national emergency. One of the most shameful instances of the government misusing its own data dates to the Second World War. Census data collected under strict guarantees of confidentiality was used to identify neighborhoods where Japanese-Americans lived so they could be detained in internment camps for the duration of the war.").

[276] *See supra* notes 73, 271; 13 U.S.C. § 214 (Person who wrongfully discloses Census data "shall be fined not more than $5,000 or imprisoned not more than 5 years, or both.").

[277] 34 U.S.C. § 12593(b)(1).

[278] Alexandra Zaretsky, *DNA Collection in Immigration Custody and the Threat of Genetic Surveillance*, 109 Cal. L. Rev. 317, 330 (2021).

[279] *See, e.g.*, Catherine Y. Kim, *Plenary Power in the Modern Administrative State*, 96 N.C. L. Rev. 77, 83 (2017) ("[T]he Supreme Court routinely sustained government decisions that would plainly violate constitutional rights had they occurred outside of the immigration context, reasoning that the political branches possess 'plenary power' to exclude, deport, and detain noncitizens without judicial restraint."); Adam B. Cox, *Deference, Delegation, and Immigration Law*, 74 U. Chi. L. Rev. 1671, 1671 (2007) ("The history of immigration jurisprudence is a history of obsession with judicial deference."); Eric A. Posner, *Deference to the Executive in the United States After September 11: Congress, the Courts, and the Office of Legal Counsel*, 35 Harv. J.L. & Pub. Pol'y 213, 215 (2012) (discussing national security-based deference to the executive and how "courts gave the executive a nearly free pass" after September 11); Anderson & Seltzer, *Challenges to Confidentiality*, *supra* note 73, at 3 (In pushing for more expansive access to census data in order to target Japanese Americans for internment, for example, officials argued that "in the interests of national defense" the administration should "make an exception in connection with investigations of violations of the laws against espionage and other matters relating to national defense.").

samples in the future far beyond the limited purposes for which they were originally collected."[280] Indeed, as this report has described, changes to statute and regulation have already "exponentially expanded the number of people subject to compulsory DNA sampling."[281]

Given the opportunity, what would a future authoritarian-leaning U.S. regime do with a massive cache of recently-arrived people's DNA? As of this writing, it appears the country may be on the cusp of such a government again after the next election.

CONCLUSION

Since 2020, DHS has been quietly building a massive government DNA database by forcing vulnerable, politically disempowered migrants, many of whom are suffering from serious trauma, to give over samples of their genetic material to the federal government. Immigrant communities and communities of color bear the most immediate and most acute harms of DHS's program, but if the government continues to amass DNA at the current rate, there is nobody who will not be affected. Coerced collection of DNA samples violates the fundamental right of bodily autonomy, and the collection of DNA at the current scale represents a serious threat to the balance of power in a democratic society. If the Fourth Amendment is to continue to mean anything, it must be read to prohibit this program.

Based on our findings and in the context of growing political instability in the U.S., our overarching recommendation is for a complete overhaul of the legal framework relating to DNA, which takes into account: advances in DNA technology; advances in our scientific and sociological understanding of the meaning of DNA; and the implications for both individual liberty and national security of maintaining a massive, digitally networked, genetic database. Until such a reform on this scale can take place, with full democratic engagement from civil society and from the communities most impacted by genetic surveillance, we urge two urgent actions at the federal level:

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[280] Brief for Appellant, *United States v. Kriesel*, 604 F.3d 1124 (9th Cir. 2010) (No. 09–30160), 2009 WL 6967058, at *11.
[281] *Id.* For discussion of federal efforts to modify the statutory provisions preventing abuse of census data during the lead-up to World War II, see Anderson & Seltzer, *Challenges to Confidentiality*, *supra* note 73, at 3.

1. **The Biden administration should immediately halt all DNA collection programs that are based on executive immigration powers and expunge and/or purge all profiles and samples thus far collected under the program.**

2. **Congress should repeal the section of the DNA Fingerprint Act that authorizes DNA collection from anyone "detained under the authority of the United States."**

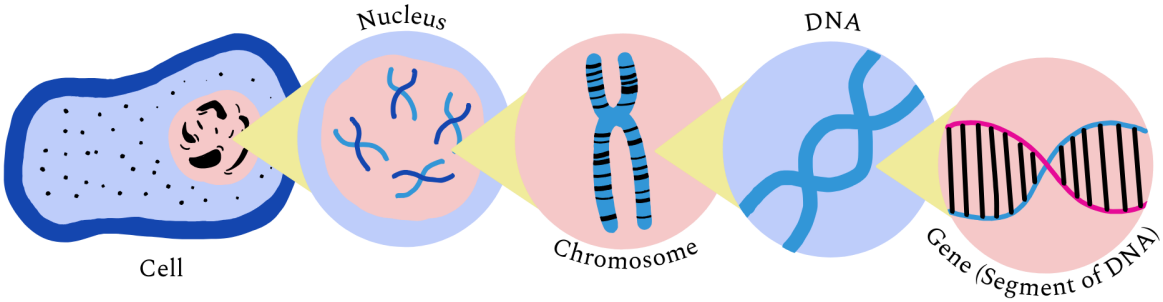
Recognizing how unlikely it is that either of these changes will be enacted in the near future, we include as an appendix a power map that identifies the range of institutions that have power to mitigate the harms of DHS's DNA collection program and suggests some potential interventions that those institutions could undertake. Our hope is that these ideas will inform organizing and advocacy within the movements for immigrant rights, racial justice, and privacy and that demands related to DNA will become part of local, state and federal policy campaigns led by those movements.

Primer:

What is DNA, and how does law enforcement use it?

Just about every cell in the human body contains a complete copy of our genetic code. From blood stains, skin cells, swabs of saliva, samples of sweat, and many more, we can extract material containing the full set of instructions for all our inherited traits — everything from the shapes of our noses to our susceptibility to certain cancers. These instructions are written in a four-letter language (A, G, C, and T), with each letter representing a specific chemical compound called a nucleotide. The human genetic code is made up of about 3.2 billion nucleotides strung together in different combinations and joined in long, double helix structures called deoxyribonucleic acid: DNA.[282] Virtually all of our DNA — about 99.6% of it — is the same from person to person.[283] But techniques are available to distinguish among individuals using the 0.4% that differs.

Figure 10:



DNA resides within the nucleus of human cells.

In a law enforcement setting, investigators might have access to either of two types of samples: a "forensic" sample (sometimes also called an evidence or crime-scene sample) or a "reference" sample (sometimes also called a known sample). A forensic sample is one "collected from a crime scene, a person, an item, or a location connected to the criminal event," while a reference sample is from a known source — someone whose DNA was collected because they are a

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[282] Chelsea Toledo & Kirstie Saltsman, *Genetics by the Numbers: 10 Tantalizing Tales*, Nat'l Inst. of Gen. Med. Sci. (June 12, 2012), https://www.livescience.com/20873-genetics-numbers-dna-basics-nigms.html.

[283] *Id.*

suspect in the case, were previously arrested for or convicted of a crime, or — relevant here — were "detained under the authority of the United States."[284]

To determine whether a reference sample matches a forensic profile sample, technicians can use a variety of techniques to generate profiles. The profile itself is essentially a string of numbers that represent the information contained in the DNA strand that can then be compared. The method used to create a DNA profile can be important in how useful that profile is, and what can be done with it. The standard national profile uploaded to CODIS measures short tandem repeats (STRs): segments of the genome at which certain known sequences repeat. STRs take advantage of a common type of variation in the human genome that is not represented by a change in a single letter, but rather how many times a string of letters is repeated. Because each person inherits genetic material from their biological mother and father, DNA is stored in pairs of chromosomes; accordingly, a person has two pieces of information for each spot (or "locus") on the genetic strand. For instance, the maternal chromosome might contain six repetitions of the sequence 'ACT' at a certain locus, also called a "marker," (ACTACTACTACTACT) while the paternal chromosome at the same locus repeats that segment eight times (ACTACTACTACTACTACTACT). In this case, the person's DNA would be said to have a genotype of "6, 8" at that locus.

Figure 11:

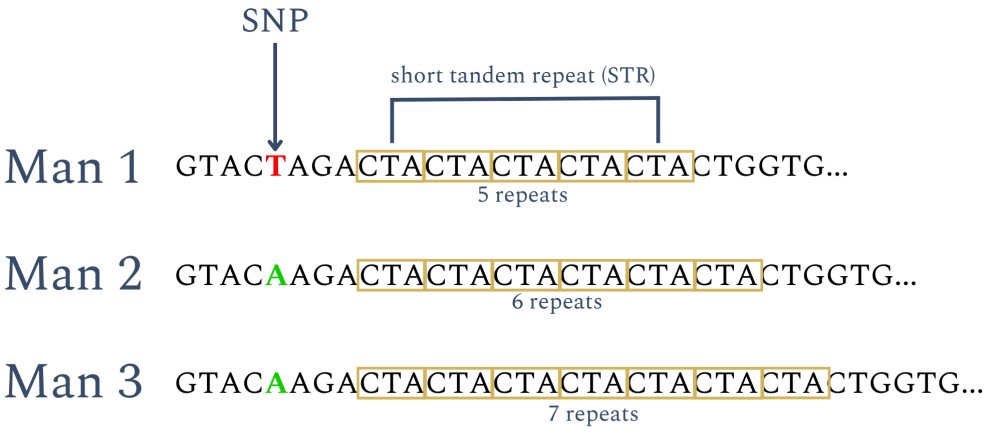

Illustration of genetic variation.

[284] FBI CODIS FAQ, *supra* note 5. For discussion of the limits placed on forensic samples uploaded to the national database, see *supra* note 212. Note that there is also a database of profiles intended to help identify missing persons, which contains profiles of unidentified human remains, missing persons, and relatives of missing persons, but that database is not compared to the forensic index.

Currently, FBI guidelines describe a set of 20 loci that laboratories should use when conducting forensic analysis on DNA samples. The loci at which forensic investigators measure STRs were specifically chosen to be so-called "junk" genes — genes unlikely to tell investigators much about the person's predisposition to disease or physical traits. With scientific advances, that may not always be the case.[285] A "DNA profile" is thus 40 pieces of information (the maternal and paternal chromosomes repeat at 20 loci), and when comparing a known person's profile to that from a crime scene, it is possible to either exclude the known person or find that the two profiles match. Once a match is found, it becomes a question of probability: What is the likelihood that a person picked at random from the population would have matched at those loci? If the answer is "very, very unlikely" then fact finders might conclude that the suspected person likely left the DNA. If the answer is "very likely — this is a common profile," then the suspected person may be included in the possible range of people who could have left the profile, but other evidence should be required.

Depending on the quality of a DNA sample, investigators are not always able to read the nucleotide sequences at all 20 loci. The FBI requires that all DNA profiles uploaded to CODIS contain data for at least eight of the 20 "core" loci. According to the FBI, the probability that two people share the exact same nucleotide sequences at all 20 core loci is over 1 in 1 billion.

There are other methods for developing profiles from DNA samples. Commercial databases like 23andMe and MyHeritage use "single nucleotide polymorphisms," or "SNPs" (pronounced "snips").[286] SNPs are places in the genome where a single base (letter) has been inserted, deleted, or substituted. Unlike STR typing, SNPs "are chosen precisely for their informational richness."[287] Compared to what's available from the 20 loci in CODIS's STR profiles, SNP profiles provide more locations in the human genome to search for.[288] As a result, whereas STR typing can connect a profile to direct relations like siblings, parents, or children, a SNP profile is capable of producing "leads much farther out," such as to fourth and fifth cousins.[289] In addition to allowing for long-range familial searching like this, DNA typing based on SNPs may provide

[285] *See, e.g.*, Bañuelos et al., *supra* note 229.
[286] Murphy, Inside the Cell, *supra* note 125, at 244.
[287] Murphy, *Law and policy oversight*, *supra* note 242, at e5.
[288] Ray A. Wickenheiser, Expanding DNA database effectiveness, 4 Forensic Sci. Int. Synerg. 1, 8 (2022).
[289] Murphy, *Law and policy oversight*, *supra* note 242, at e6; Wickenheiser, *supra* note 288, at 7.

information about a person's "phenotype," or physical characteristics[290] and disease predispositions.[291]

[290] Bruce Budowle & Angela van Daal, *Forensically relevant SNP classes*, 44 BioTechniques 603 (2008).

[291] What are single nucleotide polymorphisms (SNPs)?, MedlinePlus, https://medlineplus.gov/genetics/understanding/genomicresearch/snp/.

Glossary of Terms

CBP: U.S. Customs and Border Protection, formed in March 2003 by combining the pre-existing (1) U.S. Border Patrol, (2) U.S. Customs Service, (3) U.S. Immigration and Naturalization Service, and (4) Animal Plant Health Inspection Service agencies to manage border enforcement between all land, sea, and air ports of entry.[292]

CODIS: The "Combined DNA Index System" was created by the DNA Identification Act of 1994, Pub. L. No. 103-322 (1994), codified at 34 U.S.C. § 12592. CODIS is a federally-run law enforcement database that allows for the comparison of DNA profiles derived from forensic samples to those of known samples. Technically, CODIS is the software used to search the National DNA Index System (NDIS). Colloquially, "CODIS" is often used as a shorthand for NDIS.

Buccal Swab: This is a method of collecting a DNA sample by swabbing the inside of an individual's cheek. The cheek cells collected are then tested in a laboratory, usually for law enforcement or for clinical purposes.[293]

DHS: The United States Department of Homeland Security. DHS was established under the Homeland Security Act of 2002, which united 22 federal agencies under one umbrella, including ICE and CBP.[294] DHS says that its mission includes, among other things: to counter terrorism and homeland security threats, secure U.S. borders and approaches, and to preserve and uphold the nation's prosperity and economic security.[295] Advocates and scholars have critiqued the establishment of DHS, arguing that siting the immigration bureaucracy under the rubric of homeland security is both a symptom and a cause of the increased militarization of U.S. immigration.[296]

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[292] Off. of Border Control and the Off. of Pol'y and Plan., *National Border Patrol Strategy*, U.S. Customs and Border Protection 1 (2004).

[293] Gai L. McMichael et al., *DNA from Buccal Swabs Suitable for High-Throughput SNP Multiplex Analysis*, 20 J. Biomolecular Tech. 232, 233 (Dec. 2009).

[294] *See* Pub. L. No. 107–296, 116 Stat. 2142 (2002).

[295] Mission, DHS.gov, https://www.dhs.gov/mission.

[296] *See, e.g.*, Aizeki, *supra* note 74, at 21 (citing Roberto Lovato, *Building the Homeland Security State*, N. Am. Cong. on Latin Am. (Oct. 31, 2008) (describing how the Bush administration's restructuring of federal agencies "move[d] the citizenship-processing and immigration-enforcement functions of government . . . to the more militarized, anti-terrorist bureaucracy of the Department of Homeland Security")); Masha Gessen, *Homeland Security Was Destined to Become a Secret Police Force*, The New Yorker (Jul. 25, 2020).

Detainer: A detainer, or "immigration hold," is a form that U.S. Immigration and Customs Enforcement (ICE) issues to request that local, state, or federal law enforcement from another agency hold an individual in that entity's custody for up to 48 hours beyond their release date so that ICE can decide whether to obtain custody of the individual.[297] A detainer is not a judicial warrant and is not signed by a judge.

Detain: What it means for the U.S. government to "detain" someone is a central focus of this report.[298] As conducted by the federal agencies discussed here, detention may be predicated on varying degrees of suspicion of civil or administrative (not criminal) law violations, or no suspicion at all, and may last for minutes, hours, months, or years.[299]

Detainee: Someone who has been detained.

Forensic Investigative Genetic Genealogy: FIGG, or Investigative Genetic Genealogy ("IGG"), uses single nucleotide polymorphisms (SNPs) rather than short tandem repeats (STRs), and commercial rather than government databases to build family trees from the information left in the crime scene sample in order to isolate a possible known perpetrator. This method gained popularity in 2018 and has been used by law enforcement in "cold" criminal cases.[300]

Forensic Profile: Profiles drawn from samples collected at crime scenes.[301]

Forensic Sample: Generally, "biological material reasonably believed by investigators to have been deposited by a putative perpetrator and that was collected from a crime scene, a person, an item, or a location connected to the criminal event."[302]

ICE: U.S. Immigration and Customs Enforcement, a subagency of DHS, created in March 2003, to increase internal immigration enforcement and prevent undocumented immigration and the illegal import of goods and funds within and out of the U.S.[303]

Locus: A specific location or stretch of nucleotides within a genome ("loci" is the plural form).[304]

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[297] *See* 8 C.F.R. § 287.7.

[298] *See* Secs. E-F.

[299] OIG-21-35, *supra* note 17, at 1 ("a non-U.S. detainee is a person who is not a U.S. citizen and not lawfully admitted for permanent residence, held for an administrative violation of law.").

[300] Claire L. Glynn, *Bridging Disciplines to Form a New One: The Emergence of Forensic Genetic Genealogy*, 13 Genes 1381, 1381 (2022), https://doi.org/10.3390/genes13081381 [https://perma.cc/9Y8H-YXH8].

[301] Natalie Ram, *Fortuity and Forensic Familial Identification*, 63 Stan. L. Rev. 751, 761 (2011).

[302] *Interim Policy: Forensic Genetic Genealogical DNA Analysis and Searching*, U.S. Dep't of Just. (Effective Nov. 1, 2019), https://www.justice.gov/d9/pages/attachments/2019/09/24/finaldojinterimpolicyonfgg.pdf [https://perma.cc/G8HZ-EMWU], at 2 n.6.

[303] *Strategic Plan 2021-2025*, U.S. Immigration and Customs Enf't (2020), https://www.ice.gov/doclib/about/pdf/iceStratPlan2021-2025.pdf [https://perma.cc/3SQA-6HWC], at 5.

[304] Ellen Sidransky, *Talking Glossary of Genomic and Genetic Terms*, Nat'l Hum. Genome Rsch. Inst. (updated Mar. 18, 2024), https://www.genome.gov/genetics-glossary/Locus [https://perma.cc/9U3Y-KR7D].

Long-Range Familial Searching: Another name for investigative genetic genealogy, in which law enforcement exploits "third-party consumer genomics services to trace suspects by finding their distant genetic relatives."[305]

Marker: Another word for a "genetic locus, or location" on the genome.[306]

NDIS: National DNA Index System (NDIS) is the name for the national repository of genetic information (including known profiles and crime-scene profiles). NDIS is a pointer system — it includes the profile and pointer information to the laboratory and case that the profile came from, not identifying information about the individual or case itself. NDIS is searched using software known as CODIS, and thus "CODIS" is often used as a shorthand for NDIS. Technically, however, CODIS is the software that can be used to search the NDIS, a state DNA index (SDIS) or local index (LDIS).[307]

Near Miss: A CODIS search that is not a match between a known person and crime scene sample, but may suggest a possible familial relation between the person in the database and the unknown individual's DNA.[308]

Nucleotide: The "basic building block" of ribonucleic acid ("DNA") and deoxyribonucleic acid ("RNA") consisting of a "sugar molecule . . . attached to a phosphate group and a nitrogen-containing base."[309]

Offender Profile: The genetic identifiers — typically the 20-loci federal standard — that contain DNA information of a known person.[310]

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[305] Yaniv Erlich et al., *Identity Inference of Genomic Data Using Long-Range Familial Searches*, 362 Science 690, 690 (2018), https://doi.org/10.1126/science.aau4832.

[306] *Interim Policy: Forensic Genetic Genealogical DNA Analysis and Searching*, U.S. Dep't of Just. (Nov. 1, 2019), https://www.justice.gov/d9/pages/attachments/2019/09/24/finaldojinterimpolicyonfgg.pdf [https://perma.cc/W8LK-WLZT], at 2 n.5.

[307] *See* Erin M. Prest, *Privacy Impact Assessment for the [Combined Deoxyribonucleic Acid (DNA) Index System (CODIS)]*, Fed. Bureau of Investigation (Mar. 14, 2023), https://www.fbi.gov/file-repository/pia-combined-national-deoxyribonucleic-acid-dna-index-system-codis-031423.pdf/view [https://perma.cc/NCB5-E6Y9], at 2.

[308] Erin E. Murphy, *The U.S. is Building Massive DNA Databases*, Sci. Am. (Mar. 1, 2013), https://www.scientificamerican.com/article/united-states-building-massive-dna-databases/ [https://perma.cc/5V79-9LET].

[309] Lawrence Brody, *Talking Glossary of Genomic and Genetic Terms*, Nat'l Insts. of Health, Nat'l Hum. Genome Rsch. Inst. (updated Mar. 21, 2024), https://www.genome.gov/genetics-glossary/Nucleotide [https://perma.cc/8GW3-DLCH].

[310] Nat'l Inst. of Just., *What Every Law Enforcement Officer Should Know About DNA Evidence: First Responding Officers*, U.S. Dep't of Just. Off. of Just. Programs (June 8, 2023), https://nij.ojp.gov/nij-hosted-online-training-courses/what-every-law-enforcement-officer-should-know-about-dna/codis/database-files [https://perma.cc/66DV-8USL].

Partial Match Search: A moderate stringency DNA database search that does not aim for an exact match between a crime-scene sample and a known person, but rather looks for partial matches – such as a moderate stringency search that "results in one or more partial matches between single-source and non-degraded DNA profiles that share at least one allele at each locus, indicating a potential familial relationship" between the individual in the database and the unknown individual from the sample.[311]

Reference Sample: "[B]iological material from a known source."[312]

Secondary Screening: An interview or "secondary inspection" conducted at a designated location at a port of entry when a CBP officer cannot verify an individual's provided information, or when an individual does not have all required information.[313]

SNP: Pronounced "snip," "SNP" stands for "single nucleotide polymorphisms." SNPs are "places in the genome where a single base (letter) has been inserted, deleted, or substituted."[314]

STR DNA Typing: A "widely-used forensic DNA technology that examines 13-20 (or more) genetic locations on the non-sex chromosomes that contain 2 to 6 base-paired segments known as nucleotides, which tandemly repeat at each location."[315]

Stringency: The strictness in the setting of a search in a DNA database to return matches — such as a requirement of an exact match between two samples, or allowing partial matches. Low and moderate stringency searches may also use "specialized software outside of CODIS to detect and statistically rank a list of potential [genetic] candidates."[316]

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[311] Sara Debus-Sherrill & Michael B. Field, *Understanding Familial DNA Searching: Policies, Procedures, and Potential Impact, Summary Overview*, ICF (June 2017), https://www.ojp.gov/pdffiles1/nij/grants/251043.pdf [https://perma.cc/44FG-37BQ], at 2.

[312] *Interim Policy: Forensic Genetic Genealogical DNA Analysis and Searching*, U.S. Dep't of Just. (Nov. 1, 2019), https://www.justice.gov/d9/pages/attachments/2019/09/24/finaldojinterimpolicyonfgg.pdf [https://perma.cc/8M3Q-3DQ2], at 2 n.7.

[313] *What is Secondary Inspection?*, *supra* note 149.

[314] For further discussion of SNPs, *see* Primer: What is DNA, and how does law enforcement use it?.

[315] *Interim Policy: Forensic Genetic Genealogical DNA Analysis and Searching*, U.S. Dep't of Just. (Nov. 1, 2019), https://www.justice.gov/d9/pages/attachments/2019/09/24/finaldojinterimpolicyonfgg.pdf [https://perma.cc/2R8Q-59RF], at 2 n.5.

[316] Tepring Piquado et al., *Forensic Familial and Moderate Stringency DNA Searches*, RAND Corp., prepared for Nat'l Inst. of Just. (2019), https://www.rand.org/pubs/research_reports/RR3209.html [https://perma.cc/KAK4-YM8Y], at 3.

Appendix

DNA Policy Power Map

This appendix is intended for use by organized communities looking for ways, in the absence of transformative federal change, to brainstorm strategic initiatives. It identifies the range of institutions that have power to mitigate the harms of DHS's DNA collection program, and suggests some potential interventions that those institutions could undertake. Our hope is that these ideas will inform organizing and advocacy within the movements for immigrant rights, racial justice and privacy, and that demands related to DNA will become part of local, state and federal policy campaigns that those movements lead.

United States Congress

Congress is said to have "plenary" power over immigration.[317] That means that Congress holds the broadest power among the branches to set policy about the conditions under which people may enter and remain in the country, subject to constitutional limits. Congress created and can modify the structure of the agencies that enforce the country's immigration laws, empower the Executive to take specific actions or remove the power to take others, and set rules around how those agencies conduct their business. Congress therefore is the institution best positioned to take the most sweeping actions to stop or limit the harms of DHS's DNA collection program. Some of the actions it could take include:

- **Repeal the language in the 2005 DNA Fingerprint Act authorizing DHS to collect DNA:** Congress could eliminate DHS's DNA collection program by striking the phrase "and from non-United States persons who are detained under the authority of the United States" from the statute. This change would return the legislation to an earlier form and remove the authorization for DHS and other agencies to collect DNA from people detained by immigration authorities.
- **Amend the statute to remove authorization for DHS to collect DNA from people held without probable cause or on civil immigration charges**: A narrower and therefore less

[317] *See, e.g.*, *Kleindienst v. Mandel*, 408 U.S. 753, 769 (1972); *I.N.S. v. Chadha*, 462 U.S. 919, 940 (1983); *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001).

protective avenue would be to amend the statute to prohibit all DNA collection from non-U.S. persons detained for civil immigration offenses or held for administrative proceedings or "detained" without probable cause. This would permit collection from people charged with criminal immigration offenses and therefore at least interpose a finding by a neutral magistrate and be consistent with *Maryland v. King*'s notion that compulsory DNA testing is constitutionally justified because arrestees have diminished liberty interests. It would essentially return DHS's DNA collection program to its 2010 status, when Secretary Janet Napolitano and Attorney General Eric Holder exempted non-U.S. persons not facing criminal charges from mandatory DNA collection.[318] However, by amending the legislation itself to prohibit DHS from collecting DNA from detained persons not charged with criminal violations, rather than relying on DHS to categorize certain groups of exempt persons, both the DOJ and DHS would be prevented from later unilaterally amending the requirements.

- **Mandate segregation and expungement of all DHS DNA records unless certain criteria are met:** Current federal law provides for the expungement of DNA records "on the basis of an arrest under the authority of the United States, if the Attorney General receives, for each charge against the person on the basis of which the analysis was or could have been included in the index, a certified copy of a final court order establishing that such charge has been dismissed or has resulted in an acquittal or that no charge was filed within the applicable time period."[319] As discussed above, such a procedure would be virtually impossible for an individual noncitizen to manage — especially a *detained* non-citizen without a lawyer — and, to be effective, would result in a nightmare of administration.[320] Federal law could, instead, streamline the process while better protecting the rights of individuals and their families, by segregating all DHS-collected DNA samples in the database to be automatically expunged, unless and until a qualifying event occurs, such as a finding of probable cause, conviction, or order of removability, at which time only those profiles that qualify would permanently be added to the database.

[318] *See* U.S. Dep't of Homeland Sec., *Letter from Secretary Janet Napolitano to Attorney General Eric. H. Holder, Jr.* (Mar. 22, 2010), https://www.eff.org/files/filenode/ice_dna_3-22-10_napolitanoletter.pdf [https://perma.cc/57P3-ZFVQ], Bates stamp pp. 000060–000062.

[319] 34 U.S.C. § 12592(d)(1)(A)(ii).

[320] *See* Joh, *The Myth of Arrestee DNA Expungement*, *supra* note 10, at 56–57 (comparing states with automatic and arrestee-based expungement regimes and finding that, in states with arrestee-initiated regimes, merely 0.00804%-0.0140% of arrestee profiles are actually expunged, despite approximately 30% likely being eligible for expungement).

Such a system would allow DHS to utilize the profiles for whatever identification purpose indeed exists (if any) but avoid placing those with valid claims to lawful status and their families under watch permanently. Still, requiring automatic expungement would not on its own eliminate the privacy and civil rights harms that DHS's DNA collection program raises. It would be most effective for Congress to take this action in addition to striking the language in the 2005 DNA Fingerprint Act authorizing DHS to collect DNA. Together, noncitizen DNA collections going forward would end, and any samples already in CODIS would be expunged. It would also facilitate a ban on searches of DHS profiles for domestic crime-solving purposes, while allowing searches for identification purposes only.

- **Conduct oversight hearings to compel DHS and the DOJ to answer questions about the operation of the program and its legal justification:** As the public saw firsthand during and following the Trump era, one of Congress's powers is its ability to bring information about the federal government's workings to light through the oversight process. Even where there is not yet an appetite for some of the legislative changes suggested above, Congress should conduct oversight hearings to investigate DHS's DNA-collection policy and practice. Congress could exercise its subpoena power to compel the DOJ and DHS to answer questions and give evidence about the scope of current DNA collection practices, the process of DNA collection as carried out by ICE and CBP, and the agencies' own understanding of the legal limits applying to both policy and practice. Congress could solicit testimony from state and local criminal law enforcement agencies to understand how the information in CODIS is used in policing and prosecutions, in part to facilitate analysis of the costs versus benefits of the practice. If Congress were to do so, advocates should demand that it solicit the opinions of those with lived experience in the system, advocates working with and for immigrant communities, and experts on the forensic reliability of DNA, privacy law, and the Fourth Amendment.
- **Prohibit DHS from using funds for DNA collection and storage:** One of Congress's ultimate powers is that of "the purse."[321] Congress could, for example, include an appropriations rider in the DHS appropriations bill that would prevent DHS from implementing the DNA collection program. An appropriations rider can be advocated

[321] U.S. Const. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.").

for on an annual basis in each fiscal year until a more permanent legislative or regulatory fix can be achieved.

Federal Agencies

Federal agencies exist to implement federal laws. Three federal agencies have power to enact policies that could significantly reduce the extent, or mitigate the harms, of DNA collection in the immigration context: the DOJ, DHS, and FBI. There are several things each agency could do, even while the radically permissive provisions of the DNA Fingerprint Act remain law, to slow down the rate at which immigrant DNA profiles are collected and uploaded to CODIS.

Advocating for change with any federal agency is a two-sided coin. On the one hand, depending on the agency's political leaning at a given moment in history, it can be easier to change policy through an agency than it is to do so through legislation, because there is no body that needs to vote on the change. If agency leadership is persuaded that the change is a good one and is willing to expend the political capital to see it through, the chance that the policy change will eventually take effect is high. The flipside of this is that as soon as the political posture of the agency shifts, the policy can be changed again with the same relative ease through those same processes. A further complication of agency policymaking is that sometimes two agencies within the same administration can have different political agendas and different approaches to the same issue. For example, it was the sense among the leadership in Trump's DOJ that Trump's DHS was not collecting enough DNA, which led to the change to the DNA collection rule in 2020.

While the language of the DNA statute is problematically broad, it also leaves a wide window for agencies to use their discretion to decide how the statute will be implemented. The statute allows, but does not require DNA collection.[322] It merely empowers the Attorney General, the head of the DOJ, to issue regulations mandating collection.[323] As explained above, for 15 years after the DNA Fingerprint Act was passed, DHS collected DNA only in very limited

[322] 34 U.S.C. § 40702(a)(1)(A) ("The Attorney General *may*, as prescribed by the Attorney General in regulation, collect DNA samples from individuals who are arrested, facing charges, or convicted or from non-United States persons who are detained under the authority of the United States." (emphasis added)).
[323] *Id.*

circumstances. Had DOJ regulations not demanded that DHS do so, this limited collection would have continued to be perfectly legal.

It is therefore within the power of both the DOJ and DHS to make policy that would narrow the scope of DHS's DNA collection practices.

The Department of Justice

The DOJ has the power to impose limitations on DHS's DNA collection practices, up to and including stopping the program altogether.

- **Invoke Existing Exceptions:** Under the existing rule, the Attorney General retains the authority to approve "limitations or exceptions" to DHS's DNA collection program.[324] The Attorney General could therefore limit DNA collection to those instances in which the agency sought and secured a judicial warrant supported by probable cause and where DNA collection furthered a concrete and particularized, immediate agency need. Such a limitation would bring the program in line with Fourth Amendment jurisprudence and avoid the constitutional problems with the scheme documented here. It would, however, remain insufficient because it would (a) easily be undone by a later administration, and (b) not obviate the racial disproportionality and community surveillance risks attendant to any DNA collection program trained on a vulnerable community.
- **Issue new rules.** The DOJ could undertake a new regulatory process to revise the rules for DNA collection by DHS. This could involve creating a new set of exceptions or exclusions for the rule, which would allow or require DHS to forgo DNA collection in certain cases. For example, an "operational exigencies" exception previously allowed DHS to categorize certain groups of individuals from whom DNA would not be collected due to cost, implementation concerns, or other resource limitations.[325] Individuals who were detained for processing under administrative proceedings or detained within DHS custody pending administrative removal proceedings were thus exempted from DNA

[324] 28 C.F.R. § 28.12(b).

[325] *See* U.S. Dep't of Homeland Sec., *Letter from Secretary Janet Napolitano to Attorney General Eric. H. Holder* (Mar. 22, 2010), https://www.eff.org/files/filenode/ice_dna_3-22-10_napolitanoletter.pdf [https://perma.cc/2CZB-C37L], Bates stamp p. 000060.

collection.[326] Simply restoring the operational exigencies exemption would probably not be a good strategy at this point, given that DHS has now demonstrated the operational feasibility of widespread DNA collection. However, the agency could institute a rule that directly exempts, for example, all individuals detained on purely administrative or civil charges.[327]

Another way that the DOJ could limit the scope of DHS's DNA collection powers would be to define the term "detained" very narrowly for the purposes of the regulation. This is also something that DHS could decide to do in its own policies for implementation of the regulations. The risk of this approach is that the definition would not be narrow enough to significantly restrict the growth of CODIS's DNA corpus and would end up legitimizing the idea that DHS detention can be a sufficient constitutional justification for a DNA search. The Privacy Center therefore does not recommend changing the definition of "detained" unless the definition is limited to mean only detention supported by probable cause that the detained person committed a crime on the basis of which the DOJ can already take DNA. This would simply neuter the DNA Fingerprint Act in the immigration context.

Department of Homeland Security

Even if the DOJ is not willing to act, DHS still has some discretion in how it implements its collection program under the current rule. DHS could:

- **Require ICE and CBP to verify that an individual is a non-U.S. person before collecting DNA:** DHS has an established track record of detaining and even deporting U.S. persons.[328] The suspicions of agency officials therefore should not be treated as evidence on the question of whether an individual is or is not a U.S. citizen or lawful permanent resident. The agency's power to collect DNA is limited, under the statute, to "non-United States persons[.]"[329] A reform-minded DHS should therefore instruct

[326] *See id.* at Bates Stamp pp. 000060–000062. This exemption did not apply to non-U.S. persons arrested on federal criminal charges, including border crossing violations and drug crimes. *See id.*
[327] *See id.*
[328] *See generally* Stevens, *supra* note 151 (presenting original research on the detention and deportation of U.S. citizens by ICE). *See also* Harrigan, *supra* note 151; Grinberg, Toropin & Morris, *supra* note 151.
[329] 34 U.S.C. § 40702(a)(1)(A); DOJ 2020 Rule, 85 Fed. Reg. at 13,484.

officers not to collect DNA from any person unless they are able to ascertain, by clear and convincing evidence, that an individual is neither a U.S. person nor a U.S. permanent resident. This shift would likely require neither legislative action nor new agency rulemaking.

- **Issue guidance clarifying that DHS will implement the rule consistent with the agency's understanding of constitutional law:** Whatever the intended scope and impact of the statutes and regulations relating to DNA collection, DHS is still required to comply with the U.S. Constitution. As this report lays out, the current rule raises serious constitutional concerns. DHS could issue agency guidance limiting its implementation of the rule to avoid constitutional violations, as well as potential liability for such violations. Such guidance could ground a DHS decision to, for example, define the term "detained" narrowly to limit DNA collection solely to individuals arrested on probable cause for a crime found by a neutral magistrate or to stop collecting DNA indefinitely.

Federal Bureau of Investigation

The FBI is also relevant for organizations and communities considering undertaking advocacy on DNA because the FBI maintains the CODIS database, decides what functionality it will have and how DNA samples will be stored and shared, and establishes policies for accessing the DNA data in CODIS. Because the FBI has so much power to determine what goes into CODIS and who can access CODIS data, and because the FBI can change its own rules about CODIS, advocacy targeting the FBI could be effective if the agency's leadership were persuaded of the potential civil rights implications of DHS's DNA collection program. But even major changes to CODIS would be at best a temporary and incomplete solution. Changing how CODIS works would not do anything to remedy the privacy violations that happen in the DNA collection process itself. And given police access to the rapidly growing number of private DNA databases, imposing stricter limits on CODIS could prove to be a temporary mitigation measure. It would also do little to stop state and local law enforcement agencies from relying even more heavily on corporate databases.

- **Destroy DNA samples:** The federal government appears to retain the physical DNA samples that DHS takes, even after typing and uploading to CODIS.[330] This means that,

[330] *See supra* Sec. G.

even if STR profiles are the only type of profile extracted now, a future administration could choose to go back and create more robust profiles from the samples amassed. The FBI often claims that it must retain these samples for quality assurance purposes, but this rationale is weak. And in at least one case, the government has shown its hand, claiming that it wants to retain the samples not just for "QA" but because of its "speculative interest in being able to utilize as yet undeveloped technology" on the samples.[331] The best practice (short of never collecting samples) would be for the samples to be destroyed immediately after typing.

- **Automatically expunge DNA records of non-U.S. persons who later regularize their immigration status:** The impact of an individual's inclusion in CODIS may last a lifetime and may even span generations.[332] Individuals who have been arrested or convicted under criminal law may have their CODIS records expunged upon receipt of a final court order documenting an overturned conviction, dismissal, acquittal, or a lack of charges.[333] It is not clear that any similar process exists for people who are detained under the immigration authority but later regularize their immigration status. Federal law says that the FBI director "shall" expunge a DNA record collected:

  > on the basis of an arrest under the authority of the United States, if the Attorney General receives, for each charge against the person on the basis of which the analysis was or could have been included in the index, a certified copy of a final court order establishing that such charge has been dismissed or has resulted in an acquittal or that no charge was filed within the applicable time period.[334]

  To the extent this provision applies to individuals whose DNA was collected while they were "detained" by DHS, it is not clear how an individual would go about getting a

[331] *Kriesel,* 720 F.3d at 1144.

[332] A recent New York bill proposes to allow law enforcement to use DNA from CODIS-NDIS databases and publicly available data from ancestry research companies to search for familial matches in cases of violent crimes. *See* S. 4538, 2023-2024 Reg. Sess. (N.Y. 2023). This is especially troubling given recent allegations that nearly 32,000 individuals were subjected to illegal DNA searches by NYPD. *See* Kate Lisa, *New York Bill Revived for Family DNA Search to Solve Violent Crime*, Spectrum Loc. News (May 10, 2022), https://spectrumlocalnews.com/nys/central-ny/politics/2022/05/10/bill-revived-for-police-to-use-family-dna-to-solve-violent-crime [https://perma.cc/P7CR-JHE4]; Aaron Katersky, *NYPD Accused of Illegally Obtaining, Storing the DNA Samples of Nearly 32,000 People*, ABC News (Mar. 22, 2022), https://abcnews.go.com/US/nypd-accused-illegally-obtaining-storing-dna-samples-32000/story?id=83598107 [https://perma.cc/L74Y-EWKN].

[333] FBI CODIS FAQ, *supra* note 5.

[334] 34 U.S.C. § 12592(d)(1)(A)(ii).

document that would satisfy its conditions or where they should take that document even if it existed. Even if an expungement process for people detained by DHS were implemented, the burden would still be on the individual to know about their DNA record and request expungement. Instead, the FBI could create a mechanism by which DHS-collected DNA records are automatically expunged whenever an individual regularizes their immigration status. Expungement would not cure the privacy and civil rights harms associated with DHS's DNA collection, but it would mitigate some of the harms that arise when DNA records are stockpiled and retained indefinitely.

State Legislatures

In contrast to the federal government, states have almost no power over the country's immigration apparatus.[335] But that does not mean that state legislatures have no power to affect the impact of DHS's DNA collection program on their communities. Criminal law enforcement is generally the province of the states. State legislatures can set the rules that govern their own law enforcement officials and the functioning of their own DNA labs, databases, search tools, and courts.

- **Enact state laws prohibiting state and local law enforcement agencies from relying on DNA obtained from immigrants without probable cause:** Because all state and local law enforcement agencies are required to comply with the Fourth Amendment of the U.S. Constitution, none are permitted to compel a person to give DNA without at least an arrest supported by probable cause to believe the person committed a criminal violation. Some states go much further to require that a person first be convicted of a particular category of crime or to require a warrant specifically for the collection of a person's DNA. Every state and local government should therefore be concerned (both because of the ethical implications and the potential legal liability) about the use of DNA collected without safeguards. Passing legislation to ensure that local law enforcement agencies do not rely on DNA taken without probable cause — during

[335] *E.g.*, U.S. Const. Art. I, § 8, cl. 18; *Arizona v. United States*, 567 U.S. 387 (2012); *Truax v. Raich*, 239 U.S. 33, 42 (1915); *United States v. Texas*, 601 U.S. ___, 3 (2023) (Sotomayor, J., dissenting); *United States v. Texas*, No. 24-50149, 2024 WL 1297164, at *6, n.64 (5th Cir. Mar. 26, 2024).

investigations or in court — would not prevent all of the Fourth Amendment harms that flow from DHS's warrantless DNA collection regime, but it would help to limit the reduplication of those harms in state and local legal systems.

Courts

State and federal courts have the power to constrain the various executive branch entities. A federal court could, for example, consider an individual or class action challenging aspects of the program and invalidate the program on constitutional grounds. Advocates could bring to court a challenge to the rule under the Administrative Procedure Act, and a court could find that the rule is "contrary to constitutional right," "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or that the adoption of the rule violated procedural requirements that agencies must follow in adopting new rules.[336] State courts could be sites for the same types of challenges or could consider challenges in the context of individual cases in which DHS-collected DNA played a role. Such challenges could have the benefit of resulting in changes to the program even over the opposition of the agencies discussed above. Courts can also serve an important information-forcing function, either through discovery in any of the above matters or through a suit under the Freedom of Information Act, which could force into the open further information about the costs, function, guardrails and risks of the program. But court-based challenges can be risky and, if not done with care, may fail to build the kind of power in the community that has the potential to sustain change over time.[337]

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[336] *See* 5 U.S.C. §§ 553, 701-706. Plaintiffs generally have 6 years to facially challenge agency regulations, starting from the date on which the agency published the final rule in the Federal Register. *See, e.g.*, *N. Dakota Retail Ass'n v. Bd. of Governors of the Fed. Rsrv. Sys.*, 55 F.4th 634, 639-41 (8th Cir. 2022), cert. granted sub nom. *Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys.*, 144 S. Ct. 478 (2023); *Hire Ord. Ltd. v. Marianos*, 698 F.3d 168, 170 (4th Cir. 2012); *But see Dunn-McCampbell Royalty Int., Inc. v. Nat'l Park Serv.*, 112 F.3d 1283, 1287 (5th Cir. 1997) ("It is possible, however, to challenge a regulation after the limitations period has expired, provided that the ground for the challenge is that the issuing agency exceeded its constitutional or statutory authority. To sustain such a challenge, however, the claimant must show some direct, final agency action involving the particular plaintiff within six years of filing suit."). The final 2020 rule was published in the Federal Register on March 9, 2020, meaning that a facial challenge would need to be filed by March 9, 2026.

[337] *See, e.g.*, Gerald Lopez, *Rebellious Lawyering: One Chicano's Vision of Progressive Law Practice* (Westview Press 1992); William P. Quigley, *Revolutionary Lawyering: Addressing the Root Causes of Poverty and Wealth*, 20 Wash. U. J.L. & Pol'y. 101, 113–15 (2006); Paul D. Butler, *Poor People Lose:* Gideon *and the Critique of Rights*, 122 Yale L.J. 2176, 2187–98 (2013); Amna Akbar, *Law's Exposure: The Movement and the Legal Academy*, 65 J. Legal Educ. 352 (2015).

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