DNA Collection in Immigration Custody and the Threat of Genetic Surveillance

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In October 2019, the Trump administration proposed a dramatic expansion of DNA collection from immigrants in federal detention. The final rule, which took effect in April 2020, eliminated a regulatory provision that had previously allowed the U.S. Department of Homeland Security (DHS) to exempt noncitizens from DNA collection if collection was "not feasible because of operational exigencies or resource limitations." By the end of 2020, DHS was regularly collecting DNA from individuals in immigration custody, including asylum seekers at legal ports of entry.

Biometric data collected from noncitizens are included within the federal Combined DNA Index System (CODIS). A forensic DNA profile is stored in CODIS, while a physical DNA sample remains subject to indefinite storage at the government's discretion. While forensic DNA profiles do not (yet) have the potential to reveal significant amounts of private genetic information, physical DNA samples contain an individual's full genetic blueprint. Expanding DNA collection in the immigration context raises normative concerns about privacy and consent, building on longstanding questions about the ethics, impact, and efficacy of DNA databases. This new rule may be the first to result in the government's widespread, permanent retention of genetic material based solely on a status other than a criminal arrest or conviction. In the long-term, mass DNA collection from noncitizens in federal detention could increase surveillance and overpolicing of minority communities.

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This Note examines and critiques the Trump administration's justifications for expanding DNA collection. Part I explores the human rights concerns underlying DNA collection and retention. Part II discusses the history and legal regime currently governing DNA collection in the United States, with a focus on how these frameworks apply to noncitizens in federal detention. Part II also outlines the Trump administration's rationales for the rule change, while Part III offers a point-by-point critique of these justifications. This Note analyzes privacy and human rights concerns surrounding DNA collection, challenges the Trump administration's racialized assumptions about crime detection and prevention, and highlights the hidden costs—both fiscal and human—of expanding CODIS on the basis of immigration status.

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INTRODUCTION

In October 2019, the U.S. Department of Justice (DOJ) issued a notice of proposed rulemaking (NPRM) designed to expand DNA collection from noncitizens in federal immigration detention.[1] DOJ positioned this policy as a way to "facilitate federal, state, and local crime reduction and investigation efforts" by "sav[ing] lives and bring[ing] criminals to justice."[2] As a result of the new rule, which took effect in April 2020,[3] DNA profiles of noncitizens in federal custody are entered into the FBI's Combined DNA Index System (CODIS), a database compiling DNA profiles of criminal offenders and arrestees at the local, state, and federal levels.[4] In addition to these forensic profiles, the government retains noncitizens' physical DNA samples indefinitely.[5] The government initiated a pilot program testing these changes in January 2020, and

1. DNA-Sample Collection from Immigration Detainees, 84 Fed. Reg. 56,397 (proposed Oct. 22, 2019) (to be codified at 28 C.F.R. pt. 28); *see also* Press Release, DOJ, Department of Justice to Publish Notice of Proposed Rulemaking to Comply Fully with DNA Fingerprint Act of 2005 (Oct. 21, 2019), https://www.justice.gov/opa/pr/department-justice-publish-notice-proposed-rulemaking-comply-fully-dna-fingerprint-act-2005 [https://perma.cc/6MP5-JDUF] (announcing NPRM).

2. Press Release, *supra* note 1.

3. DNA-Sample Collection from Immigration Detainees, 85 Fed. Reg. 13,483 (Mar. 9, 2020) (to be codified at 28 C.F.R. pt. 28).

4. *Id.* CODIS is the FBI's broad DNA collection program and includes the National DNA Index System (NDIS), the database containing forensic DNA profiles. For simplicity and consistency, I use the broader term CODIS throughout this Note.

5. Comment Letter from ACLU, Ctr. for Democracy & Tech., Ctr. on Priv. & Tech. at Georgetown L., Elec. Frontier Found., Elec. Priv. Information Ctr., Mijente, Nat'l Immigr. Project of the Nat'l Laws. Guild & Project South to Off. of Legal Pol'y, DOJ 5 (Nov. 12, 2019), https://www.aclu.org/sites/default/files/field_document/immigration_detention_dna_comment.pdf [https://perma.cc/TP5Z-ACVJ] [hereinafter ACLU Comment Letter 2019].

continued to scale up DNA collection in immigration custody throughout the remainder of the Trump administration.[6]

Experts have described this expansion of CODIS as "truly unprecedented."[7] As of June 2020, CODIS contained approximately 18.3 million DNA profiles.[8] DOJ estimates that its new rule will result in the addition of over 748,000 DNA profiles annually.[9] By way of comparison, the state of New York has added a total of about 670,000 profiles to CODIS over the past twenty years.[10]

For more than a decade, the DNA Fingerprint Act of 2005 has authorized DNA collection from noncitizens "detained under the authority of the United States."[11] However, the Obama administration declined to implement mass DNA collection from all immigrants in federal detention, employing a regulation that excused DNA collection when collection was "not feasible because of operational exigencies or resource limitations."[12] DOJ's new rule eliminates this exception, requiring DNA collection from nearly all noncitizens in federal immigration custody.[13] As written, the rule applies without distinction to lawful asylum seekers and children.[14]

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6. Press Release, 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 [https://perma.cc/BLH4-M6SB].

7. Interview with Andrea Roth, Professor of L., Univ. of Cal., Berkeley, Sch. of Law, in Berkeley, Cal. (Dec. 3, 2019); *see also* Saira Hussain, *DOJ Moves Forward with Dangerous Plan to Collect DNA from Immigrant Detainees*, ELEC. FRONTIER FOUND. (Mar. 19, 2020), https://www.eff.org/deeplinks/2020/03/doj-moves-forward-dangerous-plan-collect-dna-immigrant-detainees [https://perma.cc/7C92-GPK8] ("DOJ's final rule marks an unprecedented shift from DNA collection based on a criminal arrest or conviction to DNA collection based on immigration status."); Abigail Hauslohner, *U.S. Immigration Authorities Will Collect DNA from Detained Migrants*, WASH. POST (Mar. 6, 2020), https://www.washingtonpost.com/immigration/us-immigration-authorities-will-collect-dna-from-detained-migrants/2020/03/06/63376696-5fc7-11ea-9055-5fa12981bbbf_story.html [https://perma.cc/SV7Y-9LCP] ("[The] new rule . . . stands to dramatically expand a federal database of individual genetic information used by law enforcement.").

8. *CODIS – NDIS Statistics*, FBI, https://www.fbi.gov/services/laboratory/biometric-analysis/codis/ndis-statistics [https://perma.cc/7X95-2JTK]. This number refers to profiles taken from criminal offenders and arrestees, and does not include forensic profiles taken from crime scenes. For a discussion of the distinction, see *infra* Part III.A.3.

9. DNA-Sample Collection from Immigration Detainees, 85 Fed. Reg. at 13,488.

10. ACLU Comment Letter 2019, *supra* note 5, at 2; *CODIS – NDIS Statistics*, *supra* note 8.

11. 34 U.S.C. § 40702(a)(1)(A).

12. 28 C.F.R. § 28.12(b)(4) (2019).

13. DNA-Sample Collection from Immigration Detainees, 85 Fed. Reg. at 13,484. The updated regulation continues to provide exceptions for valid visa holders, persons briefly detained for inspection at airports or other legal ports of entry, and noncitizens held in connection with maritime interdiction. *Id.* The Attorney General also retains discretion to approve additional exceptions, leaving the door open for the Biden administration to roll back mass DNA collection from noncitizens in federal detention. *See id.* For further discussion, see *infra* Part II.

14. Caitlin Dickerson, *U.S. Government Plans to Collect DNA from Detained Immigrants*, N.Y. TIMES (Oct. 2, 2019) https://www.nytimes.com/2019/10/02/us/dna-testing-immigrants.html [https://perma.cc/Q43U-GH5A].

In response, experts on immigration, human rights, and genetic privacy have voiced significant concerns about expanding DNA collection to encompass overwhelmingly nonviolent, Latinx immigrants in federal custody.[15] On top of longstanding, systemic concerns about mass DNA collection, experts worry about the long-term preservation of noncitizens' DNA samples and the implications of treating lawful asylum seekers like criminals.[16] In light of the racially disparate impacts that DNA collection already has in the United States[17]—and the even more troubling abuses of DNA collection seen in places like China[18]—DOJ's new rule merits careful scrutiny.

This Note examines and critiques the Trump administration's justifications for expanding DNA collection in the immigration context. Part I explores the human rights concerns underlying DNA collection and retention. Part II discusses the history and legal regime currently governing DNA collection in the United States, with a focus on how these frameworks apply to noncitizens in federal detention. Part II also outlines the Trump administration's rationales for the rule change, while Part III offers a point-by-point critique of these justifications. This Note analyzes privacy and human rights concerns surrounding DNA collection, challenges the Trump administration's racialized assumptions about crime detection and prevention, and highlights the hidden

15. *See, e.g.*, Dickerson, *supra* note 14; 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 [https://perma.cc/J3LR-W4VH]; Comment Letter from Hum. Rts. Watch to Off. of Legal Pol'y, DOJ (Nov. 12, 2019), https://www.regulations.gov/contentStreamer?documentId=DOJ-OAG-2019-0004-1256&attachmentNumber=1&contentType=pdf [https://perma.cc/ZWH4-BURW].

16. Telephone Interview with Thomas J. White, Chief Sci. Officer (ret.), Celera (Nov. 5, 2019); Telephone Interview with Vera Eidelman, Staff Att'y & Alexia Ramirez, Brennan Fellow, ACLU Speech, Priv., and Tech. Project (Nov. 15, 2019) [hereinafter Eidelman & Ramirez Interview].

17. *See* Comment Letter from ACLU & ACLU of N. Cal. to Off. of Legal Pol'y, DOJ (May 19, 2008), https://www.aclu.org/sites/default/files/images/asset_upload_file236_35392.pdf [https://perma.cc/53HN-5F4C] [hereinafter ACLU Comment Letter 2008]; *see also* Daniel J. Grimm, Note, *The Demographics of Genetic Surveillance: Familial DNA Testing and the Hispanic Community*, 107 COLUM. L. REV. 1164, 1165 (2007) (discussing the disproportionate impact of familial DNA testing on Latinx communities).

18. China's use of American technology and expertise to collect DNA from ethnic Uighurs serves as an ominous warning about the technical feasibility of future abuses in the United States, and further highlights the dangers posed by racialized perceptions about crime. From 2016 to 2017, Chinese authorities collected DNA from millions of Uighurs. Sui-Lee Wee, *China Uses DNA to Track Its People, With the Help of American Expertise*, N.Y. TIMES (Feb. 21, 2019), https://www.nytimes.com/2019/02/21/business/china-xinjiang-uighur-dna-thermo-fisher.html [https://perma.cc/XG74-R8RE]. In violation of scientific norms, officials acquired DNA samples without consent and shared individuals' genetic information via an online platform run by an American scientist and partly funded by DOJ. *Id.* Chinese officials used American technology to compare Uighur DNA with the DNA of individuals from other ethnic groups in order to improve authorities' ability to ascertain the ethnic origin of DNA at crime scenes. *Id.* These efforts were part of China's broader crackdown on the Uighur community, which has notoriously included the internment of up to a million Uighurs in so-called "re-education camps." *Id.* In the final rule, DOJ describes foreign abuses of DNA as "irrelevant" to the government's plans to expand DNA collection in conformity with the legal standards of CODIS. DNA-Sample Collection from Immigration Detainees, 85 Fed. Reg. at 13,490.

costs—both human and fiscal—of expanding CODIS on the basis of immigration status.

While numerous scholars have called attention to the dangers and inequities of DNA collection from criminal offenders and arrestees, this Note homes in on the impact of expanding CODIS to include noncitizens in immigration detention. DOJ's new rule may be the first to result in the government's widespread, permanent retention of genetic materials based solely on a status other than a criminal arrest or conviction. Longstanding questions about privacy, consent, and targeted surveillance take on increased urgency as the government moves to add millions of people—many of whom do not even stand accused of criminal wrongdoing—to its growing forensic database.

At a moment when the United States faces widespread calls to reconsider law enforcement budgets and tactics, this rule quietly commits millions of dollars[19] toward collecting genetic information with the aim of solving and preventing violent crimes. Such broad and indiscriminate DNA collection is unlikely to have an appreciable effect on crime. But collecting and retaining this information, which will be disproportionately drawn from Latinx individuals, risks compounding existing inequalities and increasing surveillance of minority communities.

Importantly, the Attorney General retains authority under the final rule to approve new exceptions to mandatory DNA collection.[20] This Note identifies pressing reasons for the Biden administration to roll back DNA collection from noncitizens in federal detention, and to reevaluate the United States' broader approach to DNA collection as a tool for law enforcement.[21]

I.
THE HUMAN RIGHTS IMPLICATIONS OF DNA COLLECTION

A. Individual and Genetic Privacy Concerns

Expanding DNA collection to include immigrants in federal detention raises human rights concerns, particularly with respect to privacy. The right to privacy is enshrined in the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR),[22] and is

19. The government claims that rolling out this policy will cost $13 million over three years. *See* DNA-Sample Collection from Immigration Detainees, 84 Fed. Reg. at 56,400–01 (projecting annual costs by agency). The true costs, however, are substantially higher, as discussed in Part III.A.

20. DNA-Sample Collection from Immigration Detainees, 85 Fed. Reg. at 13,484.

21. This Note was originally written in December 2019 and has been updated to reflect updates through mid-2020. DHS's approach to DNA collection, and to the broader collection of biometric data in the immigration context, continues to evolve at a rapid pace. Where applicable, I have noted more recent developments that could impact the issues raised in this Note.

22. G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 12 (Dec. 10, 1948) [hereinafter UDHR]; International Covenant on Civil and Political Rights art. 17, *adopted* Dec. 19, 1966, S. Exec. Doc. E, 95-2, 999 U.N.T.S. 171.

included in over a dozen additional human rights treaties.[23] Yet the rapid evolution of DNA technology as a tool to solve crimes continues to test the definition of privacy in the modern era, engendering complex debates about how far privacy rights extend.[24]

Outside the United States, national, regional, and international bodies have expressed significant reservations about DNA collection. Countries across Europe, Africa, and the Middle East have adopted protective regimes surrounding DNA collection in order to ensure compliance with Article 17 of the ICCPR, which protects the right to privacy.[25] International bodies have applied particular solicitude to situations involving DNA collection from children and refugees.[26] In immigration and criminal justice contexts, international institutions have voiced heightened concerns regarding the long-term retention of both forensic DNA profiles and the physical DNA samples, such as blood and saliva, used to create those profiles.[27] This view aligns with a growing consensus among scientists, bioethicists, legal scholars, and human rights advocates that physical DNA samples, which contain a wealth of private genetic information, should be promptly destroyed after the creation of a forensic DNA profile.[28]

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23. For a list of treaties dealing with the right to privacy, see *International Standards*, OFF. OF HIGH COMM'R OF HUM. RTS., https://www.ohchr.org/EN/Issues/Privacy/SR/Pages/Internationalstandards.aspx [https://perma.cc/8YKT-GLJF].

24. *See, e.g.*, S. & Marper v. United Kingdom, 2008-V Eur. Ct. H.R. 1581 (holding that the indefinite retention of DNA samples violates Article 8 of the European Convention on Human Rights); ALKARAMA FOUND., REPORT SUBMITTED TO THE HUMAN RIGHTS COMMITTEE IN THE CONTEXT OF THE THIRD PERIODIC REVIEW OF KUWAIT 13 (2016), https://www.alkarama.org/en/documents/kuwait-human-rights-committee-2016-alkaramas-shadow-report-3rd-periodic-review [https://perma.cc/8HCF-7C77] (arguing that Kuwait's compulsory DNA collection law violated Article 17 of the ICCPR).

25. *See* Letter from Open Soc'y Just. Initiative & Instituto para las Mujeres en la Migración to Off. of Legal Pol'y, DOJ 5–7 (Nov. 12, 2019), https://www.justiceinitiative.org/uploads/13a80afc-9590-45df-8099-cd1e4b55f991/DOJ-public-comment-20191120.pdf [https://perma.cc/WN2K-EXGD] [hereinafter OSJI Comment Letter].

26. *S. & Marper*, 2008-V Eur. Ct. H.R. ¶ 124 ("[P]articular attention should be paid to the protection of juveniles from any detriment that may result from the retention by the authorities of their private data following acquittals of a criminal offence."); U.N. High Comm'r for Refugees, UNHCR Note on DNA Testing to Establish Family Relationships in the Refugee Context 5 (June 2008), https://www.refworld.org/docid/48620c2d2.html [https://perma.cc/SDY5-JQVR].

27. *See, e.g.*, U.N. Hum. Rts. Comm., Concluding Observations on the Third Periodic Report of Kuwait, U.N. Doc. CCPR/C/KWT/CO/3, ¶ 21 (Aug. 11, 2016) (urging Kuwait to "set a time limit after which DNA samples are removed from the [government] database"); U.N. High Comm'r for Refugees, *supra* note 26, at 4 ("All [genetic] materials . . . should normally be destroyed once a decision [about family relationships] has been made. If they are to be stored, the subjects of the test should be informed of the reasons, where this will take place, and their consent must be obtained."); *S. & Marper*, 2008-V Eur. Ct. H.R. ¶ 120 (concluding that indefinite retention of DNA profiles and samples from individuals suspected but not convicted of crimes violates the right to privacy under the European Convention on Human Rights).

28. *See, e.g.*, J.W. Hazel, E.W. Clayton, B.A. Malin & C. Slobogin, *Is it Time for a Universal Genetic Forensic Database?*, SCI. MAG., Nov. 23, 2018, at 898; ACLU Comment Letter 2019, *supra* note 5, at 10; JENNIFER LYNCH, IMMIGRATION POLICY CTR., FROM FINGERPRINTS TO DNA:

As DOJ's new rule illustrates, however, the United States takes a less protective approach to DNA collection. When discussing the privacy implications of expanding DNA collection to noncitizens in federal detention, DOJ focuses on the noninvasive nature of cheek swabs used to obtain physical DNA samples.[29] This emphasis on *how* DNA is collected fails to address concerns surrounding the indefinite retention of individuals' DNA samples by the federal government. Physical DNA samples contain an individual's full genetic blueprint.[30] As long as these samples remain under government control, they can be repeatedly reanalyzed even after a forensic profile has been created.[31] This provides the government with ongoing, prospective access to information about a person's genetic predispositions, family relationships, appearance, health, and geographic origin.[32] The government currently restricts the use of these samples to "generat[ing] DNA profiles for identification" and prohibits analysis designed to reveal "any physical traits, race, ethnicity, disease susceptibility, or other sensitive information about an individual."[33] Yet even if the government presently disclaims any intent to mine this "treasure trove" of genetic information, such assurances do not provide an adequate safeguard against subsequent abuses by future administrations.[34]

BIOMETRIC DATA COLLECTION IN U.S. IMMIGRANT COMMUNITIES AND BEYOND 14 (2012), https://www.americanimmigrationcouncil.org/sites/default/files/research/lynch_-_biometrics_052112.pdf [https://perma.cc/55X3-GJEK]; Beau P. Sperry, Megan Allyse & Richard R. Sharp, *Genetic Fingerprints and National Security*, AM. J. BIOETHICS, May 2017, at 1, 2.

29. DNA-Sample Collection from Immigration Detainees, 84 Fed. Reg. at 56,397.

30. Physical DNA samples contain a person's entire genetic code. From these samples, it is possible to extract and sequence DNA in order to derive particular insights about genetic traits and predispositions. Physical samples are distinct from the more limited forensic profiles contained in CODIS. For a helpful taxonomy of the stages and types of DNA collection, see Ayesha Rasheed, Note, *'Personal' Property: Fourth Amendment Protection for Genetic Information,* 23 U. PA. J. CONST. L. (forthcoming 2021) (on file with author).

31. Eidelman & Ramirez Interview, *supra* note 16; Ayesha K. Rasheed, *Personal Genetic Testing and the Fourth Amendment*, 2020 U. ILL. L. REV. 1249, 1277 (2020).

32. *See* Comment Letter from Victoria F. Neilson, Chair, Comm. on Immigr. & Nat'y L., Ass'n of the Bar of the City of N.Y., to Off. of Legal Pol'y, DOJ (Nov. 12, 2019), https://s3.amazonaws.com/documents.nycbar.org/files/2019600--DNACollectionCommentFINAL11.12.19.pdf [https://perma.cc/YD6D-3Q3B].

33. U.S. DEP'T OF HOMELAND SEC., DHS/ALL/PIA-080, PRIVACY IMPACT ASSESSMENT FOR THE CBP AND ICE DNA COLLECTION 4, 16 (2020), https://www.dhs.gov/sites/default/files/publications/privacy-pia-dhs080-detaineedna-january2020.pdf [https://perma.cc/DK9D-9LSZ]. In addition, the Supreme Court has hinted that the use of DNA samples by law enforcement to obtain private genetic information from arrestees might violate the Fourth Amendment. Maryland v. King, 569 U.S. 435, 464–65 (2013) ("If in the future police analyze samples to determine . . . an arrestee's predisposition for a particular disease or other hereditary factors not relevant to identity, that case would present additional privacy concerns not present here.").

34. *See* Andrea Roth, *Spit and Acquit: Prosecutors as Surveillance Entrepreneurs*, 107 CALIF. L. REV. 405, 413 (2019); *see also* United States v. Kriesel, 720 F.3d 1137, 1161 (9th Cir. 2013) (Reinhardt, J., dissenting) ("[N]o one can assure the over ten million Americans whose blood samples are currently held by the government, or the untold millions to come, that their samples will never be misused. The quick pace of technological advancement has led to the risk of privacy violations that we could never have imagined a short while ago.").

Forensic DNA profiles contain less information than physical DNA samples, but such profiles are still capable of revealing private genetic information.[35] The NPRM describes CODIS profiles as "sanitized 'genetic fingerprints'" that "can be used to identify an individual uniquely, but . . . do not disclose the individual's traits, disorders, or dispositions."[36] Nonetheless, recent studies have demonstrated that forensic profiles can be matched with profiles in genealogical databases, which do contain information about an individual's traits, disorders, and dispositions.[37]

With access to this type of information, the government could expand its uses of DNA in the immigration context. For instance, in February 2020, the Trump administration implemented a stricter definition of the public charge ground of inadmissibility contained in the Immigration and Nationality Act (INA).[38] In order to prove admissibility to the United States, immigrants must demonstrate that they are not likely to become dependent on public benefits, a consideration that explicitly takes into account the applicant's physical health.[39] In line with this policy, it is possible to imagine the U.S. Department of Homeland Security (DHS) seeking authorization to scrutinize immigrants' DNA for evidence of preexisting health or genetic conditions. Such conditions might not be immediately apparent upon physical inspection, but could nonetheless impact the likelihood of a person's becoming a public charge in the long term.[40]

Taking this a step further, it is likewise conceivable that the government could seek to scrutinize immigrants' DNA for evidence of genetic predispositions towards violence or criminality—a practice with some precedent

35. *See* DNA-Sample Collection from Immigration Detainees, 85 Fed. Reg. at 13,485.

36. DNA-Sample Collection from Immigration Detainees, 84 Fed. Reg. at 56,399.

37. *See, e.g.*, Michael D. Edge, Bridget F. B. Algee-Hewitt, Trevor J. Pemberton, Jun Z. Li & Noah A. Rosenberg, *Linkage Disequilibrium Matches Forensic Genetic Records to Disjoint Genomic Marker Sets*, 114 PNAS 5671 (2017). For additional discussion about the information contained in noncoding or "junk" DNA sequences, like the sequences used in CODIS profiles, see, for example, Stephen S. Hall, *Hidden Treasures in Junk DNA*, SCI. AM. (Oct. 1, 2012); https://www.scientificamerican.com/article/hidden-treasures-in-junk-dna/ [https://perma.cc/3DPK-4ACY]; Katherine Harmon, *'Junk' DNA Holds Clues to Common Diseases*, SCI. AM. (Sept. 5, 2012), https://www.scientificamerican.com/article/junk-dna-encode/ [https://perma.cc/HAN3-3D4T].

38. Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292 (Aug. 14, 2019) (to be codified at 8 C.F.R. pts. 103, 212, 213, 214, 245, 248); *Public Charge*, U.S. Citizenship & Immigr. Servs., https://www.uscis.gov/greencard/public-charge [https://perma.cc/74JK-2HK9] [hereinafter *Public Charge*, USCIS]. This rule remains subject to ongoing litigation across the country, including a series of injunctions. For the latest updates, see *Public Charge*, IMMIGR. LEGAL RES. CTR., https://www.ilrc.org/public-charge [https://perma.cc/7N5D-HKEB].

39. *Public Charge*, USCIS, *supra* note 38.

40. *See, e.g.*, Lesley McClurg, *Government Plans to Expand DNA Collection from Migrant Detainees*, KQED (Feb. 10, 2020), https://www.kqed.org/science/1956546/government-plans-to-expand-dna-collection-from-migrant-detainees [https://perma.cc/2GB9-C6LU] (discussing how DNA could be used to deny health insurance).

in criminal cases.[41] Certainly, the United States' dark history of genetic discrimination provides scant comfort on this front.[42] At present, federal laws governing genetic privacy and DNA collection protect against discriminatory uses of genetic information.[43] But it is not clear to what extent these protections apply to noncitizens, particularly individuals who are subsequently deported.

Mass DNA collection also raises the prospect of population surveillance.[44] Compulsory DNA collection from immigrant detainees is likely to exacerbate the overrepresentation of Latinx populations in CODIS and could encourage increased policing of minority communities.[45] This issue is discussed further in Part III.D of this Note.

B. Infringements on the Right to Seek Asylum

Beyond privacy and surveillance concerns, DOJ's new rule burdens the human right to seek asylum[46] and recasts lawful asylum seekers as criminals. The NPRM offers the observation that noncitizens "who are apprehended following illegal entry have likely committed crimes under the immigration

41. Using genetic information to "scavenge for associations between genotypes and criminal behavior remains a popular avenue of study" and has influenced the outcome of several criminal cases. Rasheed, *supra* note 31, at 1276; *see also Genetic Information Privacy*, ELEC. FRONTIER FOUND., https://www.eff.org/issues/genetic-information-privacy [https://perma.cc/7XY3-8PCT] (describing a "trend" in law enforcement towards utilizing behavioral genomics).

42. *See, e.g.*, ADAM COHEN, IMBECILES: THE SUPREME COURT, AMERICAN EUGENICS AND THE STERILIZATION OF CARRIE BUCK 1–14 (2016) (discussing the Supreme Court's decision to allow forced sterilization of an ostensibly "feebleminded" woman); ACLU Comment Letter 2019, *supra* note 5, at 5 (noting the United States' history of forced sterilization and of discrimination against Black people based on perceptions about their genes); Michael B. Katz, *The Biological Inferiority of the Undeserving Poor*, SOC. WORK & SOC'Y (2013), https://ejournals.bib.uni-wuppertal.de/index.php/sws/article/view/359/717 [https://perma.cc/94W9-4ANR] (discussing persistent efforts to link poverty with race-based differences in cognitive ability).

43. For example, the Privacy Act of 1974, which governs data collected for criminal justice purposes, only protects U.S. citizens and legal residents. *See* Sara H. Katsanis, *Tracing the Windblown Seeds: Genetic Information as a Biometric for Tracking Migrants*, *in* SILENT WITNESS: FORENSIC DNA EVIDENCE IN CRIMINAL INVESTIGATIONS AND HUMANITARIAN DISASTERS 208, at 227 (Henry Erlich, Eric Stover & Thomas J. White eds., 2020). For an overview of domestic laws protecting genetic privacy, see generally *Genetic Information Privacy*, *supra* note 41.

44. A cautionary example is the government surveillance of Uighurs in Western China as facilitated by DNA collection. *See supra* note 18.

45. *See* Craig Klugman, *Immigrant DNA Collection: Fighting Crime or Moral Panic*, BIOETHICS (Oct. 23, 2019), http://www.bioethics.net/2019/10/immigrant-dna-collection-fighting-crime-or-moral-panic/ [https://perma.cc/B3X3-C583] (noting that "immigrants from Spanish speaking and Muslim-majority countries are far more likely to be detained" than immigrants from other countries); *see also* John Gramlich & Luis Noe-Bustamante, *What's Happening at the U.S.-Mexico Border in 5 Charts*, PEW RSCH. CTR. (Nov. 1, 2019), https://www.pewresearch.org/fact-tank/2019/11/01/whats-happening-at-the-u-s-mexico-border-in-5-charts/ [https://perma.cc/WBP9-2B2Q] (describing the most common countries of origin for individuals detained at the U.S.-Mexico border in 2018–2019).

46. *See* UDHR, *supra* note 22, art. 14(1) ("Everyone has the right to seek and to enjoy in other countries asylum from persecution.").

laws" as a partial justification for taking DNA samples from detained migrants.[47] Yet, as a matter of international and U.S. law, seeking asylum is legal.[48] For many asylum seekers, this process begins with the act of lawfully presenting at the border, which does not trigger a violation of U.S. immigration law. Even if the new rule does not technically criminalize seeking asylum,[49] it implicitly characterizes these asylum seekers as criminals.

Furthermore, the federal government shares at least some data in CODIS with foreign governments, though the exact extent of this sharing remains unclear.[50] As a result, experts worry that asylum seekers' DNA profiles could be shared with the repressive regimes they sought to escape, endangering both unsuccessful applicants who are returned to their country of origin and family members abroad who could be identified and targeted based on a relative's DNA.[51]

In both the NPRM and the final rule, DOJ attempts to pass off this rule as a technical change that simply shifts authority to grant exemptions from DHS to the Attorney General.[52] Yet the significant human rights concerns raised above demonstrate that any attempt to expand DNA collection from noncitizens in federal detention merits public scrutiny and attention. The following Section describes the history and legal regime currently governing DNA collection in the United States and explores the Trump administration's rationales for changing federal policy with respect to noncitizens in immigration custody.

II.
DNA COLLECTION FROM NONCITIZENS IN FEDERAL DETENTION

DOJ's NPRM and final rule draw heavily on the U.S. Supreme Court's reasoning in *Maryland v. King*, the leading case on the constitutionality of DNA

47. DNA-Sample Collection from Immigration Detainees, 84 Fed. Reg. at 56,399.

48. *See* 8 U.S.C. § 1158; UDHR, *supra* note 22, art. 14(1).

49. *See* DNA-Sample Collection from Immigration Detainees, 85 Fed. Reg. at 13,491 (stating that the rule does not criminalize seeking asylum).

50. The FBI website states:

> An international law enforcement agency may submit a request for a search of the National DNA Index . . . . Requests for such a search will be reviewed by the NDIS Custodian to ensure compliance with the Federal DNA Identification Act (criminal justice agency status, authorized specimen category, and participation in quality assurance program) as well as the inclusion of a sufficient number of CODIS Core Loci for effective searching.

Frequently Asked Questions on CODIS and NDIS, FBI, https://www.fbi.gov/services/laboratory/biometric-analysis/codis/codis-and-ndis-fact-sheet [https://perma.cc/LG7T-9URM]. In the final rule, DOJ states that "[t]he United States does not comply with [foreign governments'] requests if it believes they are made for oppressive or improper purposes," but does not offer any insight into how such assessments are made. DNA-Sample Collection from Immigration Detainees, 85 Fed. Reg. at 13,491. For additional discussion about sharing CODIS data externally, see ACLU Comment Letter 2019, *supra* note 5, at 6 & n.18; LYNCH, *supra* note 28, at 9.

51. *See, e.g.*, Eidelman & Ramirez Interview, *supra* note 16; ACLU Comment Letter 2019, *supra* note 5, at 10.

52. *See* DNA-Sample Collection from Immigration Detainees, 84 Fed. Reg. at 56,398–99; DNA-Sample Collection from Immigration Detainees, 85 Fed. Reg. at 13,483–84.

collection. Part II.A provides a brief overview of *King* and other key cases setting the constitutional parameters of DNA collection from criminal offenders and arrestees. Part II.B discusses the text and history of 28 C.F.R. § 28.12, the regulation altered by DOJ's new rule. Part II.C summarizes DOJ's justifications for changing the regulation and for implementing broader DNA collection, as described in the NPRM and reaffirmed in the final rule.

A. DNA Collection and the Constitution

1. Maryland v. King

In the seminal U.S. case on DNA databases, the Supreme Court upheld a Maryland law requiring DNA collection from individuals arrested for, but not convicted of, certain violent crimes.[53] In language extensively quoted throughout DOJ's NPRM, the Court emphasized law enforcement's need to accurately identify individuals in government custody, including the need to understand a suspect's criminal history.[54] Knowledge of an arrestee's criminal history could help law enforcement make decisions about whether to release that person on bail and whether holding the person at a particular facility poses a danger to staff or other prisoners.[55] In light of these interests, and because the Court viewed DNA tests as minimally invasive and functionally equivalent to fingerprinting, the Court concluded that Maryland's law did not violate the Fourth Amendment.[56]

DNA collection from immigrant detainees seemingly falls within *King*'s ambit.[57] However, the Maryland law at issue in *King* differs from DOJ's new rule in two key respects. First, Maryland's law focused on individuals arrested for "serious offense[s]," including crimes of violence.[58] By contrast, immigration-related offenses are generally nonviolent and not predictive of any propensity toward violent crime.[59] Second, Maryland's law provided for automatic destruction of DNA profiles and samples once a suspect was cleared of all charges.[60] At minimum, federal law requires innocent suspects or persons

53. Maryland v. King, 569 U.S. 435, 465 (2013).

54. *See id.* at 449–56; DNA-Sample Collection from Immigration Detainees, 84 Fed. Reg. at 56,399–400.

55. *King*, 569 U.S. at 450–52.

56. *Id.* at 461, 463.

57. Fourth Amendment protections apply to noncitizens in the United States. Almeida-Sanchez v. United States, 413 U.S. 266 (1973).

58. *King*, 569 U.S. at 443.

59. *See, e.g.*, Anna Flag, *The Myth of the Criminal Immigrant*, THE MARSHALL PROJECT (Mar. 30, 2018), https://www.themarshallproject.org/2018/03/30/the-myth-of-the-criminal-immigrant [https://perma.cc/PE28-7SXN]. For further discussion about the absence of a significant relationship between immigration and violent crime, see *infra* Part III.

60. *King*, 569 U.S. at 443; *see also* Elizabeth E. Joh, *The Myth of Arrestee DNA Expungement*, 164 U. PA. L. REV. ONLINE 51, 59 (2015) ("While not central to *King*'s holding, that Maryland required

acting on their behalf to take action in order to remove their DNA profiles from CODIS,[61] which means that profiles from innocent individuals remain in the federal database by default. More to the point, it is unclear whether individuals released from immigration detention can take any action at all to expunge their profiles from CODIS and ensure destruction of their physical DNA samples.[62]

Neither of these issues proved central to the Court's reasoning in *King*, and the differences described in the preceding paragraph likely provide a weak basis for a Fourth Amendment challenge.[63] But while these differences may not be sufficient to distinguish *King* as a legal matter, they do raise critical policy questions about how far DNA collection should extend. The new rule implicates several concerns that Justice Antonin Scalia flagged in his vigorous *King* dissent, including a fear that innocent citizens would be caught up in government-mandated DNA collection.[64] The dissent warned that *King* opened the door to DNA collection based on nonviolent, relatively minor crimes.[65] This concern is particularly apt in the present context, since immigration offenses include a large class of nonviolent, misdemeanor offenses.[66] The dissent's insistence that DNA collection is not necessary to establish identity, but rather is a pretext to "search[] for evidence that [a suspect] has committed crimes unrelated to the crime of . . . arrest,"[67] applies with equal force in the immigration context.

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the state, not the arrestee, to assume the responsibility of expunging eligible samples suggests that such state responsibilities are part of the majority's finding of Fourth Amendment reasonableness." (footnote omitted)).

61. 34 U.S.C. § 12592(d).

62. For further discussion about the need for clarity surrounding expungement provisions, see *infra* Part III.B.

63. The *King* majority noted in dicta that persons arrested for minor crimes may "turn out to be the most devious and dangerous criminals," pointing out that Oklahoma City bomber Timothy McVeigh was stopped for a traffic offense. 569 U.S. at 450. In addition, several lower and state courts have suggested that neither the nature of the crimes at issue nor the automatic expungement provision affected the ruling in *King*. *See, e.g.*, Haskell v. Harris, 745 F.3d 1269, 1273–74 (9th Cir. 2014) (Smith, J., concurring); Haskell v. Brown, 317 F. Supp. 3d 1095, 1109, 1111 (N.D. Cal. 2018); People v. Buza, 413 P.3d 1132, 1146, 1154–55 (Cal. 2018) (dicta); *but see id.* at 1157 (Liu, J., dissenting) (stating that non-automatic expungement "is not adequate to allay constitutional concerns").

64. *See King*, 569 U.S. at 481–82 (Scalia, J., dissenting); Paige St. John & Joel Rubin, *ICE Held an American Man in Custody for 1,273 Days. He's Not the Only One Who Had to Prove His Citizenship*, L.A. TIMES (Apr. 27, 2018), https://www.latimes.com/local/lanow/la-me-citizens-ice-20180427-htmlstory.html [https://perma.cc/5VCU-HW8C] (describing ICE's erroneous detention of an American child). For further discussion about the risk of erroneous DNA collection from U.S. citizens and lawful permanent residents, see *infra* Part III.

65. *See King*, 569 U.S. at 481 (Scalia, J., dissenting).

66. *See* AM. IMMIGR. COUNCIL, PROSECUTING PEOPLE FOR COMING TO THE UNITED STATES 2 (2020), https://www.americanimmigrationcouncil.org/sites/default/files/research/prosecuting_people_for_coming_to_the_united_states.pdf [https://perma.cc/M7WP-BZWZ]. Illegal entry, for example, is a misdemeanor for first-time offenders. *See id.* (citing 8 U.S.C. § 1325).

67. *King*, 569 U.S. at 470 (Scalia, J., dissenting).

2. United States v. Kriesel

Shortly after *Maryland v. King*, the Ninth Circuit held in *United States v. Kriesel* that the federal government could retain physical DNA samples indefinitely after creating a CODIS profile.[68] Appellant Thomas Kriesel did not challenge the government's right to retain his forensic DNA profile in CODIS.[69] Instead, he argued that the government should return the original DNA sample used to create the profile because the government no longer had a compelling need to retain this material.[70] The government candidly admitted that it had "never found an erroneous match between a DNA profile and a blood sample."[71] The government also stated that part of its rationale for retaining the physical sample was its "interest in being able to utilize as yet undeveloped technology."[72] Nonetheless, the court concluded that the government intended to preserve DNA samples for the sole, narrow purpose of confirming the accuracy of CODIS hits by retesting samples following a match.[73] The court refused to consider Kriesel's "speculative" privacy concerns.[74] Instead, it limited its consideration to the "actual scope and uses" of stored DNA according to available evidence.[75]

In a vehement dissent, Judge Stephen Reinhardt pointed out that retained DNA samples remain extremely vulnerable to abuse.[76] Federal law limits the use of DNA samples to "law enforcement identification purposes" but does not limit what "law enforcement identification purposes" entail.[77] In language that could equally apply in the immigration context, Judge Reinhardt observed that "[l]aw enforcement identification purposes could [conceivably] include retesting for certain behavior traits," such as tendencies toward violence or criminality.[78]

When noncitizens turn over their DNA, they must trust that the United States will observe, and not alter, the limits it has set for itself.[79] Providing DNA samples could prove particularly disturbing for asylum seekers or victims of human rights abuses, who may be hesitant to entrust their intimate information

68. 720 F.3d 1137, 1139–40 (9th Cir. 2013).
69. *Id.* at 1139.
70. *Id.*
71. *Id.* at 1146.
72. *Id*. at 1144.
73. *Id.* at 1144, 1146.
74. *Id.* at 1147.
75. *Id.*
76. *Id.* at 1148 (Reinhardt, J., dissenting).
77. 34 U.S.C. § 12592(b)(3)(A).
78. *Kriesel*, 720 F.3d at 1160 (Reinhardt, J., dissenting); *see also* ACLU Comment Letter 2019, *supra* note 5, at 5 ("Repeated claims that sexual orientation and human behaviors such as aggression, addiction, and criminal tendency can be explained by genetics render government databases especially prone to abuse."). For additional discussion of efforts to link genetics with criminal behavior, see *supra* note 41.
79. *See Kriesel,* 720 F.3d at 1161 (Reinhardt, J., dissenting).

to an unfamiliar government.[80] As Judge Reinhardt explained, the privacy interest at stake is "not mere speculation about future *uses* of [a person's] most intimate genetic data, but rather is the fact that the government *has possession and control over* [that person's] private information."[81]

While *Kriesel* remains good law in the Ninth Circuit, Judge Reinhardt's dissent illustrates the privacy concerns surrounding indefinite government retention of physical DNA samples.[82] The holding and implications of *Kriesel* reinforce the need for clarity around statutory expungement proceedings in the context of immigration detention, as discussed in Part III.B.

B. 28 C.F.R. § 28.12: Implementing DNA Collection Under the DNA Fingerprint Act

Aided by the judiciary's determination that DNA-collection laws are constitutional, the federal government derives its authority to collect and retain DNA samples from statutory law. The DNA Fingerprint Act of 2005 authorizes DHS to "collect DNA samples . . . from non-United States persons who are detained under the authority of the United States."[83] Federal regulations, which first took effect in January 2009, govern the implementation of the Act.

The DOJ rule that took effect in April 2020 modified 28 C.F.R. § 28.12, the provision regulating the federal government's collection of DNA samples. Section 28.12 stipulates that DHS "shall collect DNA . . . from non-United States persons who are detained under the authority of the United States."[84] The regulation contains three exceptions to this broad mandate. First, noncitizens who are lawfully present or are being "processed for lawful admission" do not need to submit a DNA sample.[85] Being "processed for lawful admission" is generally understood as applying to people entering the country with valid nonimmigrant visas.[86] Second, individuals who are briefly detained for inspection at airports or other legal ports of entry to ensure that their entry

80. *See* Sara Katsanis, *DNA Designed for Human Rights*, FORENSIC MAG. (Sept. 25, 2015), https://web.archive.org/web/20160129005750/http://www.forensicmag.com/articles/2015/09/dna-designed-human-rights (stating that certain populations, including survivors of trauma, may be particularly skeptical of DNA collection).

81. *Kriesel*, 720 F.3d at 1158 (Reinhardt, J., dissenting).

82. More recently, Justice Mariano-Florentino Cuéllar of the California Supreme Court raised similar concerns in the context of California's DNA collection laws:

> [A] privacy intrusion occurs from the mere fact of the government's storage of an arrestee's DNA, regardless of the way that the government uses it. That the government retains access to a person's most private, sensitive genetic information—and the risks implicit in such access—constitutes a violation in itself, even if the government does not presently wring from the DNA all the flows of information to be found there.

People v. Buza, 413 P.3d 1132, 1174 (Cal. 2018) (Cuéllar, J., dissenting).

83. 34 U.S.C. § 40702(a)(1)(A).

84. 28 C.F.R. § 28.12(b) (2020).

85. *Id.* § 28.12(b)(1).

86. DNA-Sample Collection from Immigration Detainees, 85 Fed. Reg. at 13,484 (explaining that mandatory DNA collection is not intended to cover "lawful visitors from other countries").

documents are valid, but who are not "subject to further detention or proceedings," are likewise exempt from mandatory DNA collection.[87] The third exception pertains to maritime interdictions.[88]

Prior to April 2020, Section 28.12(b)(4) provided for a fourth exception. This exception permitted DHS, with approval from the Attorney General, to refrain from collecting DNA from detained noncitizens if the Secretary of Homeland Security determined that "the collection of DNA samples [was] not feasible because of operational exigencies or resource limitations."[89]

In the early stages of implementing the DNA Fingerprint Act, DHS recognized practical obstacles to collecting DNA from hundreds of thousands of individuals in federal immigration detention. In a 2010 letter to Attorney General Eric Holder, Secretary of Homeland Security Janet Napolitano determined that collecting DNA from all noncitizens covered by the statute would "severely strain the resources of [DHS] to perform its broader mission."[90] Secretary Napolitano stipulated that DHS would not collect DNA from noncitizens who were detained for processing but not facing criminal charges, or from noncitizens in custody awaiting removal proceedings.[91] The Attorney General approved the letter, and DHS consistently followed this approach from 2010 to 2019.[92] Throughout this period, DHS did not implement mass DNA collection to the full extent authorized by the DNA Fingerprint Act.

C. DOJ's Modifications: Enforcing DNA Collection in Immigration Contexts

In October 2019, DOJ issued the NPRM proposing to eliminate the discretionary exception contained in Section 28.12(b)(4).[93] In doing so, DOJ sought to compel DNA collection from all noncitizens in federal custody who do not fall within the three exceptions described in Section 28.12(b)(1)-(3).[94] The final rule adopted the changes described in the NPRM without modification.[95]

The NPRM followed an Office of Special Counsel (OSC) investigation that described the exception carved out by Secretary Napolitano as "temporary" and

87. 28 C.F.R. § 28.12(b)(2).

88. *Id.* § 28.12(b)(3).

89. 28 C.F.R. § 28.12(b)(4) (2019).

90. Letter from Janet Napolitano, Sec'y, U.S. Dep't of Homeland Sec'y, to Eric Holder, Att'y Gen., U.S. Dep't of Just. 1 (Mar. 22, 2010), https://www.eff.org/files/filenode/ice_dna_3-22-10_napolitanoletter.pdf [https://perma.cc/44B2-XMJJ].

91. *Id*. at 2.

92. Letter from Robert E. Perez, Deputy Comm'r, U.S. Customs and Border Prot., to Henry Kerner, Special Counsel, Off. of Special Counsel (Aug. 13, 2019), https://osc.gov/Documents/Public%20Files/FY19/DI-18-3920%2C%20DI-18-3924%2C%20and%20DI-18-3931/Supplemental%20Agency%20report%20DI-18-3920%2C%203924%2C%203391.pdf [https://perma.cc/HP8G-JTA2].

93. DNA-Sample Collection from Immigration Detainees, 84 Fed. Reg. at 56,398.

94. *Id*. at 56,397–98.

95. DNA-Sample Collection from Immigration Detainees, 85 Fed. Reg. 13,483.

condemned Customs and Border Protection (CBP) for failing to comply with federal law.[96] Citing three instances in which CBP's failure to collect DNA from noncitizens in federal custody may have delayed the apprehension of violent individuals, Special Counsel Henry Kerner criticized DHS for "compromis[ing] public safety." [97] He emphasized that OSC was taking "the strongest possible step . . . to rebuke the agency's failure."[98] Two months later, the federal government proposed a rule expressly designed to bring DHS into "full compliance" with the DNA Fingerprint Act by expanding DNA collection from noncitizens in federal detention.[99]

While the NPRM does not mention asylum seekers, the final rule clarifies that the elimination of the discretionary exception in Section 28.12(b)(4) affects lawful asylum seekers.[100] Asylum seekers are considered detained when they affirmatively apply for asylum at a U.S. port of entry or when they defensively apply following apprehension within the United States.[101] The final rule specifies that because asylum seekers' "legal eligibility to enter or stay in the United States remains to be determined in future proceedings," they are not exempt from DNA collection under the remaining exceptions to Section 28.12.[102]

In addition, the final rule fails to create permanent exceptions for children, another group that is both uniquely vulnerable and subject to special protections under international law.[103] DHS initially disclaimed any intent to collect DNA samples from children under the age of fourteen.[104] However, under the final rule, CBP agents retain discretion to collect DNA from children in "potentially criminal situations."[105] Furthermore, DOJ did not foreclose—and, in fact, explicitly left open—the possibility that DHS could require compulsory DNA collection from younger children in the future.[106]

96. Press Release, U.S. Off. of Special Counsel, OSC Urges CBP to Immediately Begin Collecting DNA Samples from Criminal Detainees (Aug. 21, 2019), https://osc.gov/News/Pages/19-15-CBP-DNA-Criminal-Detainees.aspx [https://perma.cc/VPL4-C3J8].

97. Letter from Henry J. Kerner, Special Counsel, Off. Of Special Counsel, to the President 6 (Aug. 21, 2019), https://osc.gov/Documents/Public%20Files/FY19/DI-18-3920%2c%20DI-18-3924%2c%20and%20DI-18-3931/Redacted%20DI-18-3920%2c%20DI-18-3924%2c%20DI-18-3931%20Letter%20to%20the%20President.pdf [https://perma.cc/N7ER-HTP5].

98. *Id*. at 7.

99. Press Release, *supra* note 1.

100. *See* DNA-Sample Collection from Immigration Detainees, 85 Fed. Reg. at 13,491.

101. Comment Letter from Hum. Rts. Watch, *supra* note 15, n.4.

102. DNA-Sample Collection from Immigration Detainees, 85 Fed. Reg. at 13,491.

103. *See, e.g.*, Comment Letter from Hum. Rts. Watch, *supra* note 15.

104. U.S. DEP'T OF HOMELAND SEC., *supra* note 33, at 15.

105. *Id.*

106. *Id.*; *see also* DNA-Sample Collection from Immigration Detainees, 85 Fed. Reg. at 13,486 ("Neither the existing regulation nor the amendment made by this rulemaking prescribes age criteria for DNA-sample collection. . . . If an agency limits fingerprinting to detainees above a certain age, DNA-sample collection *may* be correspondingly limited." (emphasis added)).

D. Dissecting the NPRM: Examining DOJ's Justifications

The government's proffered rationales for engaging in DNA collection to the full extent authorized by the DNA Fingerprint Act, as laid out in the NPRM and affirmed in the final rule, can be grouped into three primary categories.[107] First, the government maintains that its changes will not radically expand or alter the current scheme of DNA collection from criminal offenders and arrestees. Second, the government emphasizes the limited nature and uses of DNA profiles maintained in CODIS. Third, the government alludes to the utility of DNA profiles as a way to solve and deter serious crimes, including by exonerating innocent suspects. This Section explores each of these rationales in turn.

1. DOJ argues that immigration violations are criminal offenses, and criminal offenders are already subject to mandatory DNA collection.

Across the country, DNA collection has become "a routine booking measure."[108] The federal government and all fifty states collect DNA samples from persons convicted of certain violent felonies.[109] Thirty-one states and the federal government also collect DNA from individuals who are arrested for, but not necessarily convicted of or charged with, specific crimes.[110] In eight states, this includes people arrested for qualifying misdemeanor offenses.[111]

In DOJ's view, the line between ordinary criminal offenders and noncitizens detained for immigration-related offenses is an arbitrary one. The government argues that "most immigration detainees are held on the basis of conduct that is itself criminal."[112] In April 2018, as part of the Trump administration's "zero-tolerance" policy for illegal entry, Attorney General Jeff Sessions announced that noncitizens apprehended for entering without authorization would face prosecution.[113] This trend towards strict immigration enforcement has arguably "eroded" any principled difference between noncitizens in immigration custody and criminal arrestees.[114] Put simply, the government maintains that immigration detainees belong to the general category of lawbreakers and should not be categorically exempt from providing DNA samples.

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107. Because the final rule adopted the reasoning of the NPRM in full, this analysis follows the structure of the NPRM as a baseline.

108. DNA-Sample Collection from Immigration Detainees, 84 Fed. Reg. at 56,398.

109. NAT'L CONF. OF STATE LEGISLATURES, CONVICTED OFFENDERS REQUIRED TO SUBMIT DNA SAMPLES (2013), https://www.ncsl.org/Documents/cj/ConvictedOffendersDNALaws.pdf [https://perma.cc/QL9T-ATUR].

110. NAT'L CONF. OF STATE LEGISLATURES, DNA ARRESTEE LAWS (2018), http://www.ncsl.org/Documents/cj/Arrestee_DNA_Laws.pdf [https://perma.cc/9Y34-2K2K].

111. *Id.*

112. DNA-Sample Collection from Immigration Detainees, 84 Fed. Reg. at 56,399.

113. Press Release, DOJ, U.S. Attorney General Announces Zero-Tolerance Policy for Criminal Illegal Entry (Apr. 6, 2018), https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry [https://perma.cc/S6NQ-9MKD].

114. DNA-Sample Collection from Immigration Detainees, 84 Fed. Reg. at 56,399.

2. DOJ argues that DNA collection is equivalent to a fingerprint.

The government maintains that DNA collection is no more invasive or informative than fingerprinting. The Supreme Court has described DNA collection as equivalent to a fingerprint,[115] and DOJ capitalizes on this argument to explain why expanded DNA collection should not trigger privacy concerns. DOJ argues that DNA profiles "do not disclose [an] individual's traits, disorders, or dispositions" and amount to nothing more than a "sanitized 'genetic fingerprint.'"[116] DNA profiles in CODIS contain a set of genetic markers, or alleles, derived from twenty loci that do not code for cognizable physical or mental traits.[117] For this reason, the resulting data is sometimes described as "junk DNA."[118]

Relying heavily on *Maryland v. King*, the government argues that forensic DNA profiles are no different from fingerprints with respect to the type or amount of information revealed.[119] Rather, the advantage of DNA derives primarily from its "unparalleled accuracy."[120] As the *King* court noted, "A suspect who has changed his facial features to evade photographic identification or even one who has undertaken the more arduous task of altering his fingerprints cannot escape the revealing power of his DNA."[121] Asserting that DNA is not collected in a physically invasive manner and that CODIS profiles do not reveal more information than fingerprints, the government concludes that DNA collection does not invade detainees' personal or genetic privacy.[122]

3. DOJ argues that collecting DNA will help solve and prevent a substantial number of violent crimes.

The third category of justifications offered in the NPRM reflects underlying concerns about crime control and prevention. Once again drawing on the language and logic of *King*, the government focuses on the need to "identify" dangerous individuals in immigration custody who could pose a threat to officers, other detainees, or the public.[123] According to the government, DNA identification can help law enforcement decide whether to detain or release particular individuals by alerting officers to a person's prior criminal history.[124] Knowledge of past offenses may also help law enforcement determine whether

115. *See* Maryland v. King, 569 U.S. 435, 436–37 (2013).
116. DNA-Sample Collection from Immigration Detainees, 84 Fed. Reg. at 56,399.
117. *See Frequently Asked Questions on CODIS and NDIS*, *supra* note 50; *cf. King*, 569 U.S. at 445 (acknowledging, at a time when CODIS was based on only thirteen alleles, that the alleles were "not known to have any association with a genetic disease or any other genetic predisposition" (citation omitted)).
118. Roth, *supra* note 34, at 414; *King*, 569 U.S. at 442–43.
119. DNA-Sample Collection from Immigration Detainees, 84 Fed. Reg. at 56,399.
120. *Id.* (quoting *King*, 569 U.S. at 451-52).
121. *King*, 569 U.S. at 459.
122. DNA-Sample Collection from Immigration Detainees, 84 Fed. Reg. at 56,398–99.
123. *Id.* at 56,399.
124. *Id.*

an individual is a flight risk and should be detained in advance of future immigration proceedings.[125]

In addition to this official rationale, both the NPRM and the final rule speak frankly about DOJ's desire to solve past and future crimes. Because individuals may leave behind DNA evidence without leaving fingerprints, the government postulates the existence of a "vast class of crimes that can be solved through DNA matching that could not be solved . . . if the biometric identification information collected from the individual were limited to fingerprints."[126] The government reasons that even if noncitizens have not committed a crime at the time their DNA sample is taken, they may still go on to commit crimes in the future.[127] Taking DNA now, this theory suggests, could play an instrumental role in solving future crimes.

E. Implementation Costs

DOJ estimates that, over the course of a three-year rollout, expanding DNA collection to include noncitizens in federal detention will cost the federal government approximately $13 million.[128] This estimate covers the costs of acquiring new technology, training and additional hours incurred by CBP officers, and the per-kit cost to test an individual's DNA.[129] The final rule proposes a gradual increase in collection from 250,000 samples in year one to 748,000 samples in year three.[130]

Because the new rule shifts authority to grant exemptions from DHS to the Attorney General, the government argues that any costs incurred will not be directly attributable to the rule change itself.[131] According to this logic, the costs of expanding DNA collection would be the same regardless of whether the Secretary of Homeland Security or the Attorney General were to give the order.[132]

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125. *Id.*

126. DNA-Sample Collection from Immigration Detainees, 85 Fed. Reg. at 13,487 (alteration in original).

127. *Id.* at 13,488.

128. DNA-Sample Collection from Immigration Detainees, 84 Fed. Reg. at 56,400–01.

129. *Id.*

130. *Id.* In practice, DHS opted for a more aggressive timeline, with the rollout essentially complete as of December 2020. *See* Press Release, *supra* note 6. As of the time of writing, actual expenditures or updated cost assessments are not available. This Note accordingly evaluates probable costs in comparison with DOJ's initial estimation.

131. *Id.*

132. *Id*. Somewhat puzzlingly, this argument ignores the fact that DOJ's express motive in taking discretion away from DHS was to ensure the full implementation of the DNA Fingerprint Act. *See* Press Release, *supra* note 1. Even if these costs *could* have been incurred under the old rule, the more salient point is that additional costs *will* be incurred going forward.

III.
CRITIQUES OF THE PROPOSED RULE CHANGE

Building on the privacy and human rights concerns described in Part I, this Section provides a detailed critique of DOJ's new rule and the resulting expansion of DNA collection from immigrant detainees. Part III.A engages directly with the rationales offered in DOJ's NPRM and final rule, while Parts III.B–D draw out additional implications related to the rule.

A. Challenging DOJ's Justifications

1. Collecting DNA from immigrant detainees is not akin to collecting DNA from persons arrested for or convicted of violent crimes.

DOJ justifies its expansion of DNA collection by arguing that immigration violations are criminal offenses, and criminal offenders are already subject to mandatory DNA collection. However, DOJ's effort to equate immigrant detainees with criminal offenders ignores lawful asylum seekers, dismisses the possibility of erroneous detention, and overlooks the fact that most immigration offenses are nonviolent misdemeanors.

As discussed in Part I, asylum seekers who lawfully present at a port of entry have not committed any immigration offense.[133] Unless DHS suspects a particular individual of committing a prior, independent crime in the United States, DNA collection from affirmative asylum seekers is analogous to suspicionless DNA collection from the general population. Some experts have extolled the virtues of a universal DNA database.[134] However, the DNA Fingerprint Act does not create one and the American public has never assented to such tactics via the political process.[135]

In addition, DOJ's rationale does not account for the risk that U.S. citizens and lawful permanent residents (LPRs) may be mistakenly detained and subjected to mandatory DNA collection. For example, in the summer of 2019, an eighteen-year-old American citizen was detained and held in federal immigration custody for almost four weeks after Border Patrol agents insisted

133. *See* 8 U.S.C. § 1158(a) (outlining the process for securing asylum).

134. *See, e.g.*, Hazel et al., *supra* note 28 (arguing that a universal genetic database could reduce the discriminatory impact of current DNA collection policies).

135. As Justice Scalia wrote, dissenting from the Supreme Court's decision to permit DNA collection from arrestees:

> Today's judgment will, to be sure, have the beneficial effect of solving more crimes; then again, so would the taking of DNA samples from anyone who flies on an airplane . . . , applies for a driver's license, or attends a public school. Perhaps the construction of such a genetic panopticon is wise. But I doubt that the proud men who wrote the charter of our liberties would have been so eager to open their mouths for royal inspection.

Maryland v. King, 569 U.S. 435, 482 (2013) (Scalia, J., dissenting).

that his birth certificate was fake.[136] As Justice Scalia prophesized in his *King* dissent, this type of mistake could cause citizens' DNA to be "taken and entered into a national DNA database if [they] are ever arrested, rightly or wrongly, and for whatever reason"[137]—a result that deeply troubled the dissent and that no Supreme Court Justice was willing to endorse.

As explained below, U.S. citizens subject to erroneous DNA collection under this rule may not be able to petition for the destruction of their DNA profiles and physical samples.[138] As a result, the federal government could retain DNA from innocent U.S. citizens and LPRs indefinitely. While mistaken detention of U.S. citizens represents a small fraction of arrests by Immigration and Customs Enforcement (ICE), these mistakes undeniably occur: between 2012 and 2018, ICE detained nearly 1,500 American citizens, including a ten-year-old boy who was held for two months.[139]

Finally, DOJ fails to consider that many people who violate immigration laws are misdemeanants and not convicted or even suspected of having committed serious offenses. In *Maryland v. King*, the Supreme Court upheld compulsory DNA collection from criminal arrestees under a statute that focused on persons arrested for "serious offense[s]," including violent crimes like "murder, rape, first-degree assault, kidnaping [*sic*], arson, [and] sexual assault."[140] In contrast to these serious offenses, a first-time unauthorized border crossing is a misdemeanor subject to a fine of less than $250 and no more than six months imprisonment.[141] Moreover, crossing the border illegally does not inherently involve violent conduct. While this mismatch may not impact a constitutional analysis,[142] it weakens the government's normative attempt to erase the distinction between immigrant detainees and the criminal arrestees already subject to DNA collection. After all, the vast majority of states do not collect DNA from persons arrested for nonviolent misdemeanor offenses.[143]

Taking these concerns into account, the government's attempt to equate all immigration detainees with criminals already subject to DNA collection—irrespective of the law that detainees violated or whether they violated any law at all—results in a false equivalency.

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136. Manny Fernandez, *An American Citizen is Released from Immigration Custody After Nearly a Month*, N.Y. TIMES (July 23, 2019), https://www.nytimes.com/2019/07/23/us/texas-citizen-detained-immigration.html?module=inline [https://perma.cc/WLV8-FD7X].

137. *King*, 569 U.S. at 481.

138. *See infra* Part III.B.

139. St. John & Rubin, *supra* note 64.

140. *King*, 569 U.S. at 443.

141. 8 U.S.C. § 1325; *see also* Alex Ellerbeck, *Trump Plans to Collect DNA from Nearly a Million Immigrants Despite Charges It Violates Privacy*, TEX. TRIB. (Jan. 31, 2020), https://www.texastribune.org/2020/01/31/trump-plans-collect-dna-nearly-million-immigrants/ [https://perma.cc/GJU7-NKHV] (describing first-time border crossing as a misdemeanor).

142. *See supra* Part II.A.

143. *See* NAT'L CONF. OF STATE LEGISLATURES, *supra* note 110.

2. DNA collection is not equivalent to a fingerprint.

DOJ argues that DNA collection is no more intrusive or informative than fingerprint collection. For the most part, experts agree that CODIS profiles do not currently expose significant amounts of genetic data.[144] At most, independent analysis of a CODIS profile may reveal an individual's sex or support inferences about that individual's race.[145] However, experts also acknowledge that CODIS markers are not "wholly absent and forever immune from any implications for potentially sensitive or medically relevant information," and that future scientific advances could expose additional data.[146] The ability to obtain additional information from CODIS profiles can develop hand-in-hand with government needs. For example, "In 2016, the number of CODIS markers was expanded [from 13] to 20, with additional markers chosen in part to improve [family] relationship detection."[147]

In addition, recent studies indicate that CODIS profiles may already reveal more information than originally thought. For instance, it may be possible to match CODIS profiles with the single-nucleotide polymorphism (SNP) profiles used by medical professionals and by commercial genealogical databases.[148] In other words, "CODIS profiles could be used to identify anonymized genomes from health-research databases or other sources."[149] Several consumer genetic databases have publicly admitted to working with law enforcement to solve crimes. [150] As more genetic databases share information with law enforcement, the likelihood of crossovers with CODIS profiles increases.

Even accepting the conventional narrative about what CODIS reveals, however, a DNA profile still reveals more information than a fingerprint. Unlike forensic profiles, fingerprints cannot be used to identify family relationships, nor do fingerprints yield information about a person's race or ancestry.[151] As discussed subsequently, the ability to identify family relationships based on forensic profiles gives rise to possible harassment and surveillance of individuals who are not even suspected of criminal activity.[152]

144. *See, e.g.*, Sara H. Katsanis & Jennifer K. Wagner, *Characterization of the Standard and Recommended CODIS Markers*, 58 J. FORENSIC SCI. (SPECIAL ISSUE) S169, S170 (2013); McClurg, *supra* note 40 (quoting Stanford bioethicist Hank Greely); Interview with Andrea Roth, *supra* note 7.

145. Interview with Andrea Roth, *supra* note 7.

146. Katsanis & Wager, *supra* note 144, at S171.

147. Katsanis, *supra* note 43, at 217.

148. Edge et al., *supra* note 37, at 5671; *see also* ACLU Comment Letter 2019, *supra* note 5, at 3–4; Roth, *supra* note 34, at 414 & n.46.

149. Wessel, *supra* note 15.

150. *See* Clive Thompson, *The Myth of Fingerprints*, SMITHSONIAN MAG. (Apr. 2019), https://www.smithsonianmag.com/science-nature/myth-fingerprints-180971640/ [https://perma.cc/4LV3-S7BR].

151. ACLU Comment Letter 2019, *supra* note 5, at 3.

152. *See* Erin Murphy, *Relative Doubt: Familial Searches of DNA Databases*, 109 MICH. L. REV. 291, 310 (2010). For further discussion, see *infra* Part III.D.

Most troublingly, as explained in Part I, the government retains the physical DNA sample used to create a CODIS profile. Numerous commenters criticized the NPRM for failing to specify whether and how DNA profiles—and consequently, the attendant physical samples—can be expunged from federal databases if an individual is ultimately cleared of wrongdoing.[153] In response, the final rule points to the "legal standards and design of CODIS" as a sufficient safeguard, but fails to provide additional clarity about expungement procedures.[154] Several experts I spoke with agreed that indefinite federal storage of DNA samples presents the most pressing concern, since these samples capture a person's entire genetic code and could be used to derive information far beyond the scope of a CODIS profile.[155] As a result, the government's comparison of fingerprints and DNA profiles is inapposite, particularly in its failure to account for indefinite retention of physical DNA samples.[156]

3. Collecting DNA from immigrant detainees will not solve or prevent a significant number of violent crimes.

The third justification DOJ presents for its new rule is that expanding DNA collection will solve and prevent violent crimes. While the government nominally focuses on the need to *identify* noncitizens in immigration detention, DOJ's desire to solve and prevent violent crimes lies at the heart of this rule.[157] DOJ issued this NPRM just two months after OSC lamented that CBP's "failure to collect DNA clearly inhibits law enforcement's ability to solve cold cases and to bring violent criminals to justice."[158] The NPRM did not reference the OSC investigation, but the timing of the proposed changes and the government's announcement that the new rule will "ensure that all federal agencies—including DHS—are in full compliance with the bipartisan DNA Fingerprint Act" suggest that OSC's critiques provided an influential backdrop.[159]

153. *See, e.g.*, Comment Letter from Victoria F. Neilson, *supra* note 32; ACLU Comment Letter 2019, *supra* note 5, at 8; OSJI Comment Letter, *supra* note 25, at 6.

154. DNA-Sample Collection from Immigration Detainees, 85 Fed. Reg. at 13,490.

155. Interview with Andrea Roth, *supra* note 7; Eidelman & Ramirez Interview, *supra* note 16; *see also supra* Part I.A.

156. As a California Supreme Court Justice recently put it: "To treat fingerprints and DNA samples as essentially similar is akin to comparing a single piece of fruit to a chain of supermarkets." People v. Buza, 413 P.3d 1132, 1172 (Cal. 2018) (Cuéllar, J., dissenting).

157. *Maryland v. King* rests on the same dubious distinction. *See* 569 U.S. 435, 466 (2013) (Scalia, J., dissenting) ("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.").

158. Letter from Henry J. Kerner, *supra* note 98, at 6.

159. Press Release, *supra* note 1. DOJ subsequently acknowledged the investigation in the final rule, noting OSC's favorable commentary on the change to 28 C.F.R. § 28.12. DNA-Sample Collection from Immigration Detainees, 85 Fed. Reg. at 13,487. Special Counsel Henry's Kerner's statement of support directly frames the new rule in terms of solving and preventing crime: "Because whistleblowers spoke up, DNA samples from criminal detainees will be cross-checked in a database to see if individuals have been accused of violent crimes. This rule will bring more expeditious justice for victims and will

As commentators pointed out, DNA collection is not necessary to effectuate identification: "The biometric collection that DHS already engages in—fingerprint collection—is less intrusive and far cheaper, and it accomplishes the government's stated goals."[160] Although the government states that DNA collection provides a more accurate form of identification, the NPRM never asserts that fingerprints are inaccurate or ineffective in a way that impedes law enforcement identifications.[161] To the extent that the government's true rationale is to solve the ostensibly "vast class of crimes" for which fingerprint identification is insufficient, DOJ presented little evidence that DNA collection would have this effect.[162]

As a result, the government's goal does not seem to be "identifying" particular individuals. Rather, the government's interest is "searching for evidence that [noncitizens have] committed crimes unrelated to the crime of . . . arrest" by running detainees' DNA profiles through CODIS to see if those profiles match DNA samples from unsolved crimes.[163] In a January 2020 privacy impact assessment, DHS frankly acknowledged this:

> The time it may take for the FBI Laboratory to process a DNA sample . . . 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. Nevertheless, . . . [t]he collected DNA samples may be used by other federal law enforcement agencies to support law enforcement investigations and to generate further investigative leads.[164]

In the final rule, DOJ further notes that DNA collection could exonerate innocent persons and stop past offenders from committing additional crimes.[165]

DOJ's vision of solving and preventing large numbers of violent crimes through expanded DNA collection rests on a series of faulty assumptions. DNA databases are most effective when they contain a high proportion of known (i.e.,

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help get criminals off the streets." Press Release, U.S. Off. of Special Counsel, Special Counsel Applauds Rule to Initiate DNA Collection from Undocumented Criminal Detainees (Oct. 3, 2019) https://osc.gov/News/Pages/20-01-Initiate-DNA-Collection.aspx [https://perma.cc/CQ2P-7PZR].

160. ACLU Comment Letter 2019, *supra* note 5, at 6–7.

161. *See* DNA-Sample Collection from Immigration Detainees, 84 Fed. Reg. at 56,399.

162. *See* DNA-Sample Collection from Immigration Detainees, 85 Fed. Reg. at 13,487. The NPRM and final rule describe a single case in which DNA evidence would have led to earlier apprehension of a dangerous individual. *Id.* at 13,485; DNA-Sample Collection from Immigration Detainees, 84 Fed. Reg. at 56,400. Ironically, a subsequent investigation concluded that the government "could have caught [the offender] earlier using old-fashioned fingerprint records." Ellerbeck, *supra* note 141; *see also* ACLU Comment Letter 2008, *supra* note 17 (explaining that "[u]seful DNA is not detectable at the scenes of the majority of crimes").

163. *See King*, 569 U.S. at 470 (Scalia, J., dissenting).

164. U.S. DEP'T OF HOMELAND SEC., *supra* note 33, at 3.

165. DNA-Sample Collection from Immigration Detainees, 85 Fed. Reg. at 13,485.

properly convicted) violent offenders. The known offenders' DNA can then be cross-compared with DNA samples from unsolved crime scenes.[166] DOJ's DNA collection scheme implicitly assumes—contrary to existing evidence—that immigrants are particularly likely to commit violent crimes. In addition, the government adopts an overly simplistic view of DNA databases, which assumes that more DNA profiles inherently lead to more crimes solved. Finally, the government assumes that DNA evidence is always accurate. In practice, adding millions of DNA profiles to CODIS will not have the transformative impact on crime that DOJ envisions and might even hinder law enforcement investigations.

a. Immigrants are less likely than the general population to commit violent crimes.

The belief that DNA collection from immigrant detainees will solve or prevent a substantial number of violent crimes rests on the widely debunked notion that immigrants, specifically those who entered the country unlawfully, are particularly prone to commit crime. Numerous studies by liberal and conservative organizations alike have consistently demonstrated that immigrants are *less* likely than native-born Americans to commit crimes of almost any kind.[167] This pattern persists irrespective of the severity of the crime and notwithstanding the high concentration of immigrants in economically disadvantaged areas.[168] In 2018, the libertarian CATO Institute concluded that "immigration enforcement programs targeting illegal criminals have no effect on local crime rates."[169] In fact, "[t]he evidence that legal and illegal immigrants are less likely to be incarcerated, convicted, or even arrested for crimes is so

166. *See, e.g.*, *DNA, Race, and Public Safety*, OPEN SOC'Y INST.-BALT., https://www.osibaltimore.org/2013/02/dna-race-and-public-safety [https://perma.cc/M93C-LDDB]; JEREMIAH GOULKA, CARL MATTHIES, EMMA DISLEY & PAUL STEINBERG, CTR. ON QUALITY POLICING, RAND CORP., TOWARD A COMPARISON OF DNA PROFILING AND DATABASES IN THE UNITED STATES AND ENGLAND 1 (2010), https://www.rand.org/content/dam/rand/pubs/technical_reports/2010/RAND_TR918.pdf [https://perma.cc/3DCH-HRZT].

167. *See, e.g.*, WALTER A. EWING, DANIEL E. MARTÍNEZ & RUBÉN G. RUMBAUT, AM. IMMIGR. COUNCIL, THE CRIMINALIZATION OF IMMIGRATION IN THE UNITED STATES (2015), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_criminalization_of_immigration_in_the_united_states.pdf [https://perma.cc/JCK6-HSX8]. For a comprehensive overview of studies exploring the absence of a link between immigration and crime, see generally Cecilia Chouhy & Areyls Madero-Hernandez, *'Murderers, Rapists, and Bad Hombres': Deconstructing the Immigration-Crime Myths*, 14 VICTIMS & OFFENDERS 1010 (2019).

168. *See, e.g.*, Chouhy & Madero-Hernandez, *supra* note 167, at 1012; Alex Nowrasteh, *Criminal Immigrants in Texas: Illegal Immigrant Conviction and Arrest Rates for Homicide, Sex Crimes, Larceny, and Other Crimes*, CATO INST. (Feb. 26, 2018), https://www.cato.org/publications/immigration-research-policy-brief/criminal-immigrants-texas-illegal-immigrant [https://perma.cc/XR9J-AS6T] (concluding that immigrants in Texas are less likely to be arrested and less likely to be convicted of homicide or sexual crimes than native-born Americans).

169. Nowrasteh, *supra* note 168. The CATO Institute tracked arrest and recidivism rates of deportable and non-deportable immigrants in Texas, where undocumented immigrants comprise at least 6.4 percent of the population, over a four-year period from 2011 to 2015. *Id.*

overwhelming that even immigrant restrictionists" have been forced to acknowledge the absence of any demonstrable connection between immigration and crime.[170] While it is difficult to estimate crime rates among undocumented immigrants accurately, the available data suggest that undocumented immigrants are slightly more likely than documented immigrants—but still less likely than native-born Americans—to engage in crime.[171]

b. Simply adding more DNA profiles to CODIS will not help solve crimes.

Databases like CODIS rely on two types of DNA profiles: forensic profiles and offender profiles.[172] Forensic profiles are derived from unidentified DNA left behind at crime scenes, while offender profiles are DNA profiles taken from known individuals, including the noncitizens subject to DNA collection under DOJ's new rule.[173] A "cold hit" occurs when a newly-entered offender profile matches a forensic profile from an old, unsolved case, or vice versa (i.e., when a new crime scene profile matches an existing CODIS profile).[174] Cold hits can significantly aid law enforcement investigations, particularly in cases with no leading suspects.[175]

Simply adding individuals' profiles to a DNA database does not lead to a significant increase in cold hits.[176] Cold hits are "more strongly related to the number of crime-scene samples [forensic profiles] than to the number of offender profiles in the database."[177] Once "the known-offender database is populated

170. Alex Nowrasteh, *Another Confusing Federal Report on Immigrant Incarceration*, CATO INST. (June 12, 2018), https://www.cato.org/blog/another-confusing-federal-report-immigrant-incarceration [https://perma.cc/2R8T-2M6L]; *see also* Dianne Solis, *New Study Says Immigrants Commit Crimes Less Often in Texas Than Those Born in the U.S.*, DALL. MORNING NEWS (Feb. 26, 2018), https://www.dallasnews.com/news/immigration/2018/02/26/new-study-says-immigrants-commit-crimes-less-often-in-texas-than-those-born-in-the-u-s/ [https://perma.cc/HUQ4-LF9Z] (discussing results of CATO study in relation to Texas).

171. Richard Pérez-Peña, *Contrary to Trump's Claims, Immigrants are Less Likely to Commit Crimes*, N.Y. TIMES (Jan. 26, 2017), https://www.nytimes.com/2017/01/26/us/trump-illegal-immigrants-crime.html?module=inline [https://perma.cc/5RXE-N8JT].

172. This Note sometimes refers to CODIS profiles as "forensic profiles" as shorthand to distinguish these profiles from physical DNA samples. In the context of a DNA database, however, the term "forensic profiles" specifically refers to unidentified crime scene DNA, while the term "offender profiles" refers to DNA taken from criminal offenders or arrestees—or, under the present rule, immigrant detainees.

173. JULIE E. SAMUELS, ELIZABETH H. DAVIES & DWIGHT B. POPE, URB. INST., COLLECTING DNA AT ARREST 1 (2013), https://www.urban.org/sites/default/files/publication/23666/412831-Collecting-DNA-at-Arrest-Policies-Practices-and-Implications.PDF [https://perma.cc/PL88-72BP].

174. Ranjit Chakraborty & Jianye Ge, *Statistical Weight of a DNA Match in Cold-Hit Cases*, FORENSIC SCI. COMMS. (July 2009), https://archives.fbi.gov/archives/about-us/lab/forensic-science-communications/fsc/july2009/undermicroscope/2009_07_micro01.htm [https://perma.cc/6RAR-KZVF].

175. *Id.*

176. *See, e.g.*, SAMUELS ET AL., *supra* note 173, at 6; GOULKA ET AL., *supra* note 166, at 1; ACLU Comment Letter 2008, *supra* note 17.

177. GOULKA ET AL., *supra* note 166, at 1.

with a sufficient number of persons who are actually involved in criminal activity," an influx of offender profiles drawn from the general population will not significantly benefit law enforcement investigations.[178] In the United Kingdom, for example, a massive expansion of DNA collection between 2006 and 2008 did not substantially improve the rate of cold hits.[179]

In the United States, researchers similarly demonstrated that increasing the number of offender profiles does not automatically increase the number of cold hits. Researchers compared offender and forensic profiles added to CODIS from 2009–2012 with the number of investigations that DNA hits aided during that timeframe.[180] The study concluded that:

> Although processing forensic profiles is about 25 times more expensive than processing an offender profile . . . , . . . the relative benefit of a forensic profile (407 investigations aided for every 1,000 forensic profiles), in terms of aiding an investigation, is 50 times that of an offender profile (8 investigations aided for every 1,000 offender profiles).[181]

In other words, processing forensic profiles is more expensive but significantly more effective than adding offender profiles to a database. This reflects the fact that people convicted of violent felonies, whose DNA samples tend to be in CODIS already, are more likely than mere arrestees or low-level misdemeanants to have committed the type of crime that DNA evidence can help solve.[182]

The U.S. and U.K. studies indicate that indiscriminately adding hundreds of thousands of offender profiles to CODIS is unlikely to appreciably increase the rate at which crimes are detected and solved.[183] As of June 2020, CODIS contained over 18.3 million offender profiles (of which more than four million belonged to arrestees, not convicted offenders) compared with just over one million forensic profiles.[184] The benefits of adding 748,000 immigration detainees to CODIS on a yearly basis—many of whom have never been convicted of any offense and are less likely than the general population to engage

178. *DNA, Race, and Public Safety*, *supra* note 166 (citation omitted); *see also* ACLU Comment Letter 2008, *supra* note 17 ("As [CODIS] expands to include people convicted of minor offenses or those merely arrested or detained, the chance that any given profile in the database will help resolve a future crime diminish.").

179. *DNA Bank Solves Only One Crime for Every 800 New Entries Despite Massive Investment*, DAILY MAIL (May 5, 2008), https://www.dailymail.co.uk/news/article-564051/DNA-bank-solves-crime-800-new-entries-despite-massive-investment.html [https://perma.cc/6ADB-U2LS]. U.K. law enforcement solved an average of one additional crime for every 788 new entries into the database. *Id.*

180. SAMUELS ET AL., *supra* note 173, at 51.

181. *Id.*

182. *See id.*; *see also* ACLU Comment Letter 2008, *supra* note 17 (discussing the type of crimes for which DNA evidence is and is not effective).

183. *See DNA, Race, and Public Safety*, *supra* note 166.

184. *CODIS – NDIS Statistics*, *supra* note 8. The number of "offender profiles" counts profiles taken from immigration detainees. *Id.* Often, these individuals are not "actually involved in criminal activity," which further reduces the likelihood that their profiles will match with DNA from future crime scenes. *See DNA, Race, and Public Safety*, *supra* note 166.

in violent crime—do not outweigh the financial or social costs of collecting and storing this DNA.

Delays and backlogs in testing and processing DNA samples that have already been collected provide an additional layer of complication. Even before DOJ's rule took effect, "scores of collected DNA information [sat] untested in government laboratories due to back-logged labs and over-collection of this sensitive information."[185] As of July 2018, more than 200,000 sexual assault kits nationwide—some of which were several years old—had yet to be submitted to a government laboratory for testing.[186] In the past, rapid expansion of DNA collection has created backlogs at the state level. During one such delay in California, a rapist attacked two victims after his DNA was collected but before the government processed the sample through CODIS.[187] Flooding federal laboratories with additional DNA samples will only exacerbate current backlogs and could delay both the apprehension of violent persons and the exoneration of wrongfully imprisoned individuals.[188]

With respect to existing backlogs, DOJ argues that "[a]nalysis of the perpetrator's DNA in a rape kit will not solve the crime unless the perpetrator's DNA profile has been entered into CODIS" because "[t]he effective operation of CODIS requires that the DNA database be well populated on both ends."[189] But CODIS is already well populated with DNA profiles; by comparison, the database is insufficiently populated with forensic profiles, including unprocessed rape kits and crime scene DNA.[190] A perpetrator's DNA cannot help solve a crime if the crime scene sample was never entered into CODIS to begin with. As a result, DOJ's emphasis on collecting more offender profiles is misplaced and unlikely to solve a substantial number of crimes.

185. Comment Letter from Victoria F. Neilson, *supra* note 32. For an analysis of backlog at the state and local levels despite DOJ's investment of nearly $1 billion since 2004 to eliminate backlogs in DNA processing, see generally U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-216, DNA EVIDENCE: DOJ SHOULD IMPROVE PERFORMANCE MEASUREMENT AND PROPERLY DESIGN CONTROLS FOR NATIONWIDE GRANT PROGRAM (2019), https://www.gao.gov/assets/700/697768.pdf [https://perma.cc/42BG-Q3MQ].

186. Can Wang & Lawrence M. Wein, *Analyzing Approaches to the Backlog of Untested Sexual Assault Kits in the U.S.A.*, 63 J. FORENSIC SCI. 1110, 1110 (2018); *see also* Letter from Rashida Tlaib, Member of Cong., Veronica Escobar, Member of Cong. & Joaquin Castro, Member of Cong., to Chad F. Wolf, Acting Sec'y, U.S. Dep't of Homeland Sec. (Jan. 21, 2020), https://tlaib.house.gov/sites/tlaib.house.gov/files/DHS%20DNA%20Collection%20Letter_Signed.pdf [https://perma.cc/J76F-VSLH] (expressing concern that collecting DNA from hundreds of thousands of immigrants will "exacerbate [the] backlog of untested sexual assault kits").

187. ACLU Comment Letter 2008, *supra* note 17.

188. *See id.*

189. DNA-Sample Collection from Immigration Detainees, 85 Fed. Reg. at 13,488.

190. *CODIS – NDIS Statistics*, *supra* note 8; ACLU Comment Letter 2008, *supra* note 17.

c. DNA evidence is not infallible.

Finally, it is worth noting that DNA evidence, while generally reliable, is not infallible.[191] As the government points out, DNA evidence has enormous power to exonerate those who have been wrongly accused.[192] However, the presence of DNA at the scene of a crime can also lead to dangerous confirmation bias.[193] For example, in 2012, Lukis Anderson—an alcoholic, unhoused, Black man—was charged with murder because paramedics accidentally transferred his DNA to the crime scene after treating him earlier in the evening.[194] Despite the absence of further evidence connecting him to the crime, Anderson's prior criminal record, lack of permanent housing, and alcoholism all raised suspicions.[195] With enough digging, prosecutors found a link between Anderson and his suspected accomplices.[196]

While cases like Anderson's are rare, DNA analysis remains vulnerable to human error. As Berkeley Law Professor Andrea Roth has explained:

> The chance that an innocent person might coincidentally match a crime-scene DNA profile is extremely low, although higher in cases with degraded or low-quantity crime scene samples. But an innocent person can also be falsely implicated through an erroneous or misleading match resulting from malfeasance, interpretive error, presence of one's DNA because of "transfer" to another person, innocent presence at the scene, or contamination of the sample. Indeed, there have been at least sixteen documented cases of innocent people falsely accused of crimes due to "cold hits" from laboratory cross-contamination, mislabeling of samples, or interpretive errors.[197]

As DNA identification technologies become increasingly widespread, the potential for error multiplies. For example, some police precincts have begun using Rapid DNA machines to analyze DNA samples collected from individuals and even from crime scenes.[198] Ordinary police officers, rather than specially trained forensic DNA analysts, typically operate these machines, increasing the possibility that samples will be mishandled or results will be misinterpreted.[199]

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191. *See generally* William C. Thompson, *Forensic DNA Evidence: The Myth of Infallibility*, *in* GENETIC EXPLANATIONS: SENSE AND NONSENSE 227 (Sheldon Krimsky & Jeremy Gruber eds., 2013).

192. DNA-Sample Collection from Immigration Detainees, 84 Fed. Reg. at 56,399.

193. Murphy, *supra* note 152, at 310.

194. Katie Worth, *Framed for Murder by His Own DNA*, WIRED (Apr. 19, 2018), https://www.wired.com/story/dna-transfer-framed-murder/ [https://perma.cc/U4TP-U6LA].

195. *Id.*

196. *Id.*

197. Roth, *supra* note 34, at 414–15 (footnotes omitted).

198. Heather Murphy, *Coming Soon to a Police Station Near You: The DNA 'Magic Box'*, N.Y. TIMES (Jan. 21, 2019), https://www.nytimes.com/2019/01/21/science/dna-crime-gene-technology.html [https://perma.cc/REJ8-9UVP]. Some of these machines are manufactured by Thermo Fisher Scientific, the American company whose technology helped fuel China's DNA collection from ethnic Uighurs. *See supra* note 18.

199. Murphy, *supra* note 198; *see also* Thompson, *supra* note 150 (discussing the risk that police may misinterpret samples containing multiple people's DNA).

To date, Rapid DNA machines have mostly been used at the state and local level, but the FBI is currently piloting the use of these machines to add individuals' DNA profiles to CODIS.[200] In the final rule, DOJ indicates its ultimate intent to implement Rapid DNA technology in immigration as well as criminal settings.[201]

In response to concerns about potential misidentification, DOJ argues that "DNA matches are not taken as conclusive evidence of guilt," reasoning that prosecutors must still prove guilt beyond a reasonable doubt.[202] Yet cases like Anderson's demonstrate the disproportionate weight that DNA evidence can carry with law enforcement and jurors alike.[203] The fact that fingerprints can also lead to mistaken identification does not mean that DNA collection poses no additional risk, nor does it automatically justify doubling down on the collection of biometric data.[204] Rather, it reflects the need for heightened care and awareness of prospective biases whenever biometric data are at issue.[205]

DNA collection from the overwhelmingly Latinx population in federal immigration detention threatens to exacerbate existing biases and inequities in law enforcement.[206] An "increasingly skewed database" will "further perpetuate discrimination," since "those represented in the database are more likely than others to be implicated in a future crime," whether that implication turns out to be legitimate or mistaken.[207] As a result, implicit racial and cultural biases could combine with seemingly objective evidence to frame the innocent and perpetuate injustice.

To the extent that DOJ's focus on the need for "identification" is not pretextual, the government has failed to demonstrate why existing biometrics, including fingerprinting, are insufficient. If the government's true rationale rests on the need to prevent and solve violent crimes, it has failed to provide data indicating that mass DNA collection from detainees will have a significant impact, and it has failed to engage with evidence contradicting this assumption.

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200. Murphy, *supra* note 198; DNA-Sample Collection from Immigration Detainees, 85 Fed. Reg. at 13,486.

201. DNA-Sample Collection from Immigration Detainees, 85 Fed. Reg. at 13,486.

202. *Id.* at 13,490.

203. *See* Worth, *supra* note 194 (describing a 2008 study showing that jurors viewed DNA evidence as "95 percent accurate and 94 percent persuasive of a suspect's guilt").

204. In the final rule, DOJ maintains that because fingerprint identification is already prone to error, collecting DNA does not pose an additional or noteworthy risk. DNA-Sample Collection from Immigration Detainees, 85 Fed. Reg. at 13,490 ("[F]ingerprint identification may likewise implicate an innocent person in a crime committed by another because he left fingerprints at the scene of the crime. The possibility of such mishaps does not warrant eschewing the use of either fingerprints or DNA, but rather is outweighed by the great value of biometric information.").

205. *See, e.g.*, Thompson, *supra* note 150 (explaining that juries may be even less skeptical of fingerprints than of DNA evidence).

206. *See supra* note 45 and accompanying text.

207. *See* ACLU Comment Letter 2008, *supra* note 17.

4. The implementation costs are significantly higher than DOJ suggests.

According to experts (and common sense), expanding DNA collection to include immigrants in federal detention will cost substantially more than the government has claimed. For instance, the NPRM fails to account for the substantial costs of "transporting, tracking, analyzing and storing [DNA] samples."[208] One forensic scientist estimated the cost of processing DNA samples at $150 to $300 per individual.[209] Following the government's proposed collection schedule, this would increase costs by $224 to $448 million in the first three years alone, without factoring in additional costs such as transportation and storage.[210]

Unless immigration violations dramatically decrease,[211] or the cost of processing and storing DNA declines substantially, the government's expenditures will hold steady after the initial three-year implementation period. DOJ's argument that such costs could have been incurred under the old regulation is simply irrelevant.[212]

DOJ argues that the "[d]iversion of the funding needed for the collection and use of biometric information from arrestees and detainees . . . would not go far towards eliminating poverty or other social ills," but that failing to collect this information "would impair public safety and the effective operation of the justice system."[213] Even accepting DOJ's cost estimate of $13 million over three years, this statement strains credulity.[214] The true estimated cost of $224 to $448 million, according to their own collection schedule, makes this statement laughable. At the low end of this adjusted cost estimate, collecting DNA from

208. Comment Letter from Victoria F. Neilson, *supra* note 32.

209. Telephone Interview with Thomas J. White, *supra* note 16.

210. The fact that the FBI, rather than DHS, would bear these costs does not affect overall government expenditures. *See* DNA-Sample Collection from Immigration Detainees, 85 Fed. Reg. at 13,488 (reiterating the NPRM's initial cost analysis, noting that DOJ is "cognizant" of unspecified additional costs related to storage and transport, and explaining that the FBI is "prepared to expand its operations as needed for these purposes").

211. DOJ asserts that this rule was "not adopted as a deterrent to immigration" and is unlikely to have a deterrent effect on lawful immigration. *Id.* at 13,487. Even if unlawful entry suddenly ceased, however, this rule would still apply to a substantial number of lawful asylum seekers, visa overstayers, and undocumented individuals present in the United States. *See id.* at 13,488, 13,491.

212. *See* DNA-Sample Collection from Immigration Detainees, 84 Fed. Reg. at 56,400; *see also* note 132 and accompanying text.

213. DNA-Sample Collection from Immigration Detainees, 85 Fed. Reg. at 13,488.

214. Countless small and medium-sized nonprofits, operating with a budget of less than $10 million annually, serve individuals struggling with poverty, food insecurity, housing, mental health, and other significant social issues. *See* Kerstin Frailey, *What Does the Nonprofit Sector Really Look Like?*, GUIDESTAR (Jan. 6, 2017), https://trust.guidestar.org/what-does-the-nonprofit-sector-really-look-like [https://perma.cc/V986-N67E]. Even within the law enforcement realm, relatively low-budget initiatives have proved effective. For example, a Dallas-area pilot program called Right Care—initially funded with a $3 million grant—has worked with local police to help mentally ill individuals obtain treatment. Jon Schuppe, *What Would It Mean to 'Defund the Police'? These Cities Offer Ideas*, NBC NEWS (June 10, 2020), https://www.nbcnews.com/news/us-news/what-would-it-mean-defund-police-these-cities-offer-ideas-n1229266 [https://perma.cc/BE7S-MHAJ].

noncitizens in federal detention would average out to $75 million a year. This is more than the annual budget of a "large" nonprofit ($10 to $50 million), more than double Los Angeles's budget for economic development ($30 million), and almost as much as Los Angeles's budget for housing ($81 million).[215] Indeed, the funds devoted to ramping up DNA collection over three years falls in the same range as the annual budget of the Legal Aid Society in New York City ($294 million in 2019).[216] In light of these numbers, it is hard to argue that the funds earmarked for expanded DNA collection would not make a significant impact in other spheres.

In addition to downplaying the costs, DOJ cannot demonstrate that choosing not to collect DNA from immigrant detainees will in fact "impair public safety and the effective operation of the justice system."[217] DOJ has not shown that adding immigrants' DNA profiles to CODIS will have more than an occasional, anecdotal impact on crime, despite a substantial investment of resources. At a moment when the United States is questioning the efficacy of large police budgets in general, mass DNA collection should be part of the conversation.

B. The Need for Clarity Surrounding Expungement

DNA collection from noncitizens in federal custody inherently occurs in a stressful and coercive environment. By design, the government's proposed policy will have the greatest impact on Spanish-speaking individuals crossing the U.S.-Mexico border.[218] Taken together, these factors raise questions about the government's ability to obtain meaningfully informed consent and whether that matters normatively even if it does not change the legal analysis. Moreover, because DNA collected under these circumstances will remain in the government's possession for the foreseeable future, it is necessary to consider how DOJ's rule may increase scrutiny of immigrants and their families in the medium and long term. The remainder of this Note is devoted to addressing these interrelated concerns.

Commentators complained that the NPRM did not discuss expungement procedures, which are particularly relevant for individuals who are erroneously detained or who later gain lawful entry into the United States.[219] As a result, there is tremendous uncertainty regarding how—and whether—individuals detained

215. Frailey, *supra* note 214; Paige Fernandez, *Defunding the Police Will Actually Make Us Safer*, ACLU (June 11, 2020), https://www.aclu.org/news/criminal-law-reform/defunding-the-police-will-actually-make-us-safer/ [https://perma.cc/UYJ2-GXN4].

216. LEGAL AID SOC'Y, ANNUAL REPORT 2019, at 44 (2019), https://legalaidnyc.org/annual-report/2019/ [https://perma.cc/PB39-GWGE].

217. *See* DNA-Sample Collection from Immigration Detainees, 85 Fed. Reg. at 13,488.

218. *See supra* note 45 and accompanying text.

219. *See, e.g.*, ACLU Comment Letter 2019, *supra* note 5, at 9–10; Comment Letter from Victoria F. Neilson, *supra* note 32, at 5; Comment Letter from Hum. Rts. Watch, *supra* note 15; OSJI Comment Letter, *supra* note 25, at 6.

for immigration violations can prevent the government from permanently retaining their DNA. The final rule makes no attempt to answer these questions.[220]

Federal law requires all states participating in CODIS to establish clear procedures for expungement.[221] Thirteen states automatically destroy a suspect's DNA profile and physical sample if the suspect is acquitted or if the relevant charges are dropped or overturned.[222] However, in the majority of states, "the process of expungement is burdensome, costly, and must be initiated by the arrestee."[223] Unsurprisingly, expungement occurs more often in states with automatic expungement procedures.[224] On the other hand, "When it is up to the arrestee to (1) learn about the possibility of expungement[,] (2) determine [their] eligibility for expungement[,] and (3) complete (and pay for) the necessary administrative requirements, DNA expungement is exceedingly 'rare.'"[225]

Like most states, the federal government does not provide for automatic expungement of DNA profiles and samples.[226] Furthermore, the federal expungement provision may not even apply to immigrant detainees. The relevant law refers only to individuals convicted of felonies, sexual crimes, and crimes of violence, as well as individuals arrested under federal authority.[227] The law remains silent with respect to noncitizens detained pursuant to federal authority.[228] As a result, immigration detainees—possibly including mistakenly detained citizens and LPRs—may be unable to petition for the return of their genetic material even if they subsequently demonstrate a valid asylum claim or prove that federal detention was otherwise erroneous.[229] If this is in fact the case, immigration detainees occupy a demonstrably inferior position as compared with all other offenders and arrestees subject to DNA collection.

Even assuming that immigration detainees can benefit from the federal expungement provision, however, their DNA profiles and samples are unlikely to be expunged from CODIS as a practical matter. Noncitizens, even more than arrestees in non-automatic expungement states, are unlikely to learn about or actively pursue expungement. Most of these individuals are operating in the

220. *See* DNA-Sample Collection from Immigration Detainees, 85 Fed. Reg. at 13,491 ("The matters these comments raise are fully and adequately addressed in the existing legal standards and design of CODIS, which are beyond the scope of this rulemaking and are not changed in any manner by this rulemaking.").

221. Joh, *supra* note 60, at 51.

222. NAT'L CONF. OF STATE LEGISLATURES, *supra* note 110.

223. Joh, *supra* note 60, at 51.

224. *Id.* at 57.

225. *Id.* at 57–58 (footnote omitted).

226. *Cf.* 34 U.S.C. § 12592(d) (providing for expungement upon receipt of a certified copy of a final court order demonstrating acquittal or an overturned conviction).

227. *See* 34 U.S.C. § 12592(d)(1)(A)(i)–(ii); 34 U.S.C. § 40702(d).

228. Comment Letter from Hum. Rts. Watch, *supra* note 15.

229. *Id.*

context of an unfamiliar legal system and without counsel.[230] Individuals who are ultimately deported seem particularly unlikely to learn about or to challenge the ongoing inclusion of their DNA profiles in CODIS or the government's retention of their physical DNA samples.

It is difficult even to envision what expungement would look like in the context of immigration detention. Expungement works in the arrest context because there are only two possible outcomes: either a charge will not end in a conviction (because it is dismissed or ends in an acquittal) or the suspect will be convicted.[231] But immigration results can be more complicated. If a noncitizen enters illegally, but is subsequently granted asylum, does the fact of initial unlawful entry still control for purposes of expungement? If an asylum seeker lawfully presents at a port of entry but is denied asylum status, should it matter for expungement purposes that the applicant followed the letter of the law? What about a person who does not obtain asylum but who is granted temporary relief under the Convention Against Torture? Without additional clarity from DOJ and DHS, these questions cannot be answered.

C. The Need for Informed Consent

In the context of law enforcement, the U.S. Supreme Court has upheld forced DNA collection from arrestees and criminal offenders.[232] With respect to CODIS profiles, the federal government only requires consent from individuals who willingly provide DNA samples in order to identify missing relatives.[233] The DNA Fingerprint Act and 28 C.F.R. § 28.12 treat noncitizens in federal custody the same way as criminal offenders and arrestees.[234] Thus, as a legal matter, the government is not required to obtain consent before collecting DNA from noncitizens in immigration detention. In fact, the government treats refusal to submit to DNA collection under these circumstances as a crime.[235]

From a normative and policy perspective, however, it is worth considering whether informed consent should apply, particularly with respect to asylum seekers. Outside of the law enforcement context, scientific norms surrounding DNA collection generally require informed consent.[236] For instance, UNHCR has stressed the need to obtain voluntary consent from refugees and asylum seekers before taking DNA for the purpose of verifying family relationships.[237]

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230. *See, e.g.*, INGRID EAGLY & STEVEN SHAFER, AM. IMMIGRATION COUNCIL, ACCESS TO COUNSEL IN IMMIGRATION COURT 9 (2016), https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf [https://perma.cc/F4LU-7G3C] (finding that from 2007–2012, just 14 percent of detained immigrants acquired counsel in removal proceedings).

231. Interview with Andrea Roth, *supra* note 7.

232. Maryland v. King, 569 U.S. 435, 465 (2013). For further discussion, see *supra* Part II.A.

233. *Frequently Asked Questions on CODIS and NDIS*, *supra* note 50.

234. *See* 34 U.S.C. § 40702(a); 28 C.F.R. § 28.12(b) (2020).

235. U.S. DEP'T OF HOMELAND SEC., *supra* note 33, at 1.

236. Wee, *supra* note 18.

237. U.N. High Comm'r for Refugees, *supra* note 26, at 3.

As Northwestern Medical Professor Sara Katsanis has observed, "It is a real and ongoing bioethical challenge . . . to judge consent among people who are under duress, or in fact whether consent is even possible."[238] Asylees seeking lawful entry into the United States theoretically have a choice: if they do not want to submit to compulsory DNA collection, they can choose not to enter the country. But because the stakes are so high for these persons, many of whom are fleeing trauma and persecution, this "choice" may still be the product of coercion rather than voluntary consent. In addition, these individuals are unlikely to know why their genetic information is being taken or how it will ultimately be stored and used, undermining the "informed" aspect of consent.

As with many facets of DOJ's rule, asylum seekers presenting at the border for legal entry face a particularly thorny conundrum. Although these individuals are technically considered detained under federal authority,[239] they have not broken any law. Why, then, should they be treated as criminals from whom informed consent is not required? As an ethical matter, the absence of informed consent in the context of DOJ's rule remains deeply troubling.

D. The Potential for Police Harassment and Targeted Surveillance

As highlighted throughout this Note, minority populations are already significantly overrepresented in the U.S. criminal justice system and in CODIS. The government's proposed rule will exacerbate this imbalance by collecting DNA from hundreds of thousands of predominantly Latinx individuals. This matters because "[w]hen one group is overrepresented, whether in statistics or a database, its members become coded as criminals—and clearly in need of additional surveillance."[240]

Contrary to the oft-touted belief that only the guilty need fear DNA collection, law-abiding individuals can and have been harassed on the basis of their CODIS profiles.[241] An individual whose DNA does not completely match a forensic profile from a crime scene may still be subject to police investigation if a search returns a "partial" match.[242] When a forensic sample does not exactly match a known offender's DNA profile, but the two profiles still share substantial similarities, this "partial match" may suggest a close family relationship between the holder of the DNA profile and the perpetrator of the unsolved crime.[243] If a person's relative fits the "presumed profile of the criminal perpetrator," police may be more inclined to believe that the person has

238. Katsanis, *supra* note 43, at 224.

239. *See* DNA-Sample Collection from Immigration Detainees, 85 Fed. Reg. at 13,491.

240. Jason Silverstein, *The Dark Side of DNA Evidence*, NATION (Mar. 27, 2013), https://www.thenation.com/article/archive/dark-side-dna-evidence/ [https://web.archive.org/web/20201113222310/https://www.thenation.com/article/archive/dark-side-dna-evidence/].

241. *See, e.g.*, Murphy, *supra* note 198.

242. *See* Murphy, *supra* note 152, at 297.

243. *See id.*

knowledge about the unsolved crime or its perpetrator.[244] At least ten states acknowledge using partial matches this way in order to obtain leads on suspects.[245]

When the DNA profiles in CODIS skew heavily toward particular populations, "the burden of [partial] search techniques will primarily be borne by innocent relatives of those subpopulations."[246] From a law enforcement perspective, an insular set of suspects that is disproportionately drawn from certain racial or ethnic groups creates obvious gaps in crime detection. Ironically, the overrepresentation of young, non-White men in CODIS partially explains why police have turned to commercial DNA databases, which "tend to contain the genetic data of predominantly white individuals from higher income brackets," in order to catch high profile criminals like the Golden State Killer.[247]

At the same time, scrutinizing potential relatives of criminal offenders forces individuals who are not actually suspected of criminal activity to live under a "cloud of suspicion."[248] Police have no obligation to clear a suspect's name or repair reputational damage after an investigation, and demonstrable police observation and suspicion have the potential to "disrupt a career, destroy a marriage, or ruin a life."[249] In this manner, implementing DOJ's new rule could meaningfully increase surveillance of already over-policed immigrant and minority communities.

Some experts believe that concerns about surveillance may be overblown, at least to the extent that those concerns focus on the risk posed by CODIS profiles rather than stored DNA samples.[250] While commercial genealogical databases can be used to identify distant relatives, CODIS profiles generally only reveal close familial connections.[251] Nonetheless, the potential for harassment can only increase if members of an already overrepresented population are added to CODIS at a disproportionate rate.

CONCLUSION

This Note maintains that privacy and human rights concerns significantly outweigh any purported benefits of collecting DNA from noncitizens in federal immigration detention. DOJ has failed to justify this policy in the NPRM or the final rule. Equally troubling is the government's failure to grapple with valid concerns around privacy and surveillance, which were raised in comments to the

244. *Id.* at 298.
245. ACLU Comment Letter 2019, *supra* note 5, at 4.
246. Murphy, *supra* note 152, at 322.
247. Hazel et al., *supra* note 28, at 899; *see also* Rasheed, *supra* note 31, at 1261–62 (discussing the use of commercial DNA databases to identify the Golden State Killer and describing increased interest by law enforcement in conducting kinship analysis).
248. Murphy, *supra* note 152, at 346.
249. *Id.* at 314.
250. Interview with Andrea Roth, *supra* note 7.
251. *Id.*

original NPRM and all but ignored in the final rule. At a time when law enforcement budgets are under serious scrutiny, spending hundreds of millions of dollars on a policy that is unlikely to yield appreciable benefits should trigger public skepticism, outrage, and alarm.

Because the Attorney General retains authority to approve new exceptions to DNA collection, the Biden administration can reverse course on this poorly rationalized rule. However, the government can and should go further in reconsidering the United States' approach to DNA collection and its status as an international outlier with respect to protecting genetic privacy. As this Note demonstrates, the government has ample room to clarify and increase the accessibility of expungement procedures; implement truly informed consent; and clarify when and how it shares biometric data with foreign governments. These reforms would extend beyond the current rule and its applicability to federal immigration detainees by calling into question the impact of DNA collection and databases writ large.