

MANDATORY DNA COLLECTION PROGRAM POSES PRIVACY RISKS AND HARMS FOR MIGRANTS

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ABSTRACT

A recent rule issued by the Department of Justice allows U.S. government agencies, including Customs and Border Patrol and Immigration and Customs Enforcement, to collect the genetic material of detained migrants.¹ Under the DNA collection program, overseen by the Department of Homeland Security and the Department of Justice, genetic information collected from migrants is added to the Federal Bureau of Investigation's Combined DNA Index System for comparison to crime-scene DNA. This Commentary focuses on the justifications offered by the federal agencies involved in the mandatory DNA collection program and analyzes the privacy implications of the collection program, as well as potential downstream effects that the inclusion of this DNA in an offender database has on individuals entering the United States.

DOI: <https://doi.org/10.15779/Z38QF8JK3F>

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1. This Commentary uses the term “migrant” to refer to individuals seeking asylum, as well as refugees, migrants, and immigrants. The issues identified herein apply to all individuals who are not U.S. residents or citizens.

I. INTRODUCTION

Federal law enforcement agencies regularly deploy invasive surveillance mechanisms directed at migrants, including social media monitoring, cell site location information collection, facial recognition, geolocation tracking of vehicles crossing the border, and license plate scanning.² One of the newest surveillance mechanisms, and arguably the most invasive to date, poses significant risks to migrants' genetic privacy.

In January 2020, U.S. Immigration and Customs Enforcement (ICE) and U.S. Customs and Border Patrol (CBP) agents began collecting DNA samples from detained migrants pursuant to a Department of Justice (DOJ) rule proposed in the fall of 2019.³ The DNA collection policy established rules requiring all detained migrants to undergo mandatory DNA testing, and borders in Detroit, Michigan, and Eagle Pass, Texas, quickly began implementing the new collection protocol as a pilot program.⁴ The rule was made final in March 2020 and went into effect on April 8, 2020.⁵ Under the policy's collection standards, DNA is collected by law enforcement agents, such as those from ICE or CBP, who then send the genetic material to the

2. See *Timeline of Social Media Monitoring for Vetting by the Department of Homeland Security and the State Department*, BRENNAN CTR. (Nov. 12, 2019), <https://www.brennancenter.org/our-work/research-reports/timeline-social-media-monitoring-vetting-department-homeland-security-and> [https://perma.cc/E23L-KWMB]; Russell Brandom, *ICE Is About to Start Tracking License Plates Across the US*, THE VERGE (Jan. 26, 2018), <https://www.theverge.com/2018/1/26/16932350/ice-immigration-customs-license-plate-recognition-contract-vigilant-solutions> [https://perma.cc/WJW3-3T38]; Drew Harwell & Erin Cox, *ICE Has Run Facial-Recognition Searches on Millions of Maryland Drivers*, WASH. POST. (Feb. 26, 2020), <https://www.washingtonpost.com/technology/2020/02/26/ice-has-run-facial-recognition-searches-millions-maryland-drivers/> [https://perma.cc/M79F-TJJEK]; Martin Kaste, *Department of Homeland Security Facing Lawsuit over Use of GPS Tracking Along Border*, NPR (Aug. 30, 2019), <https://www.npr.org/2019/08/30/756034610/department-of-homeland-security-facing-lawsuit-over-use-of-gps-tracking-along-bo> [https://perma.cc/HSW2-FAJX]; Byron Tau & Michelle Hackman, *Federal Agencies Use Cellphone Location Data for Immigration Enforcement*, WALL ST. J. (Feb. 7, 2020), <https://www.wsj.com/articles/federal-agencies-use-cellphone-location-data-for-immigration-enforcement-11581078600> [https://perma.cc/37X7-5JLC].

3. See generally 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).

4. Dawud Walid, *New DNA Collection Program at Detroit Border Should Be Terminated*, DETROIT NEWS (Jan 12, 2020), <https://www.detroitnews.com/story/opinion/2020/01/13/opinion-new-dna-collection-program-detroit-border-should-terminated/4430979002/> [https://perma.cc/9RQW-5SQF].

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

Federal Bureau of Investigation (FBI) for processing and placement into the Combined DNA Index System (CODIS) database.⁶

CODIS was initially created to house genetic profiles collected from crime scenes, as well as genetic profiles from individuals who have been arrested and arraigned on criminal charges.⁷ CODIS is known as an “offender database,” as the profiles it contains have, up until now, only been associated with criminal acts. In a recent Privacy Impact Assessment issued by the U.S. Department of Homeland Security (DHS) on January 3, 2020, the three agencies involved in the effort to collect genetic material from migrants (DHS, ICE, and CBP) note that they recognize the “privacy risks inherent to the collection of DNA samples,” but that they nevertheless plan on going through with the program.⁸

In their assessment, DHS writes that the DNA collection program aligns with the Fair Information Practice Principles (FIPPs).⁹ While DHS, ICE, and CBP may claim to follow fairness principles in their assessment, it is impossible to align the FIPPs with a mandatory government DNA collection program that collects genetic material from vulnerable populations, including migrant children who may have been forced to leave their homes due to poverty, violence, or natural disasters, with or without their parents.¹⁰ This Commentary will examine the validity of the justifications presented in the DHS Privacy Impact Assessment, which states that the federal agencies adhere to the following principles: transparency; individual participation; purpose specification; data minimization; use limitation; data quality and integrity; security; accountability; and auditing.¹¹ While the Privacy Impact Assessment

6. *See 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/KAP8-L7Z3>].

7. *See id.* (noting that the database can hold DNA from arrestees and is used to search for offender hits and profiles).

8. U.S. DEP’T OF HOMELAND SEC., DHS/ALL/PIA-080, PRIVACY IMPACT ASSESSMENT FOR THE CBP AND ICE DNA COLLECTION 18 (Jan. 3, 2020), <https://www.dhs.gov/sites/default/files/publications/privacy-pia-dhs080-detaineddna-january2020.pdf> [<https://perma.cc/A452-UPPM>].

9. In 2008, the DHS committed to following the FIPPs in cases where the agency collects, processes, uses, and shares personally identifiable information; the Privacy Impact Assessment governing CBP and ICE DNA collection is an outgrowth of this promise. *See id.* at 11–17; *see also* U.S. DEP’T OF HOMELAND SEC., THE FAIR INFORMATION PRIVACY PRINCIPLES AT WORK (June 2011), https://www.dhs.gov/sites/default/files/publications/dhsprivacy_fippsfactsheet.pdf [<https://perma.cc/WC3D-A53C>].

10. *See* Nat’l Immigrant Justice Ctr., UNACCOMPANIED IMMIGRANT CHILDREN (Jan. 2014), <https://immigrantjustice.org/sites/default/files/content-type/research-item/documents/2016-11/NIJC%20Policy%20Brief%20-%20Unaccompanied%20Immigrant%20Children%20FINAL%20Winter%202014.pdf> [<https://perma.cc/JJS7-REU4>].

11. *Supra* note 8, at 11–17.

may argue that the collection practice is fair, transparent, and necessary, in truth these new procedures will do significant harm to an already vulnerable population.

II. THE COLLECTION PROGRAM LACKS TRANSPARENCY

Though DHS argues that DNA collection will be conducted in a transparent manner because the agency will give notice to individuals subject to collection, transparency in this case is not sufficient.¹² Posted notice is only given to individuals once they already are, or are about to be, detained, and immigration authorities have broad authority to detain those entering the United States for almost any reason.¹³ Furthermore, under the new policy, CBP and ICE also have discretion over whether to collect DNA from children, even children under the age of 14.¹⁴

The unprecedented collection of DNA from vulnerable children and the entering of that DNA profile into an “offender database” is harmful for a number of reasons. One such reason is that children could face criminal charges if they decline to submit to a DNA test.¹⁵ Additionally, entry into CODIS could also lead to discriminatory or unfair social consequences for those children in the future. Of the twenty-one states that allow the entering of juveniles into law enforcement genetic databases apart from the new collection program, most only do so once a juvenile has been arrested and arraigned on charges related to violent felonies and certain select misdemeanors (typically sexual assaults).¹⁶ And most of the states that allow juvenile DNA collection only do so following a special probable cause hearing.¹⁷ As such, under the new collection program, the DNA of migrant children would be entering a system intended for adult offenders, with few protections or safeguards for juvenile data.

12. *See id.* at 12–13.

13. 8 U.S.C. § 1225 (2020).

14. *Supra* note 8, at 15.

15. *See supra* note 8, at 4.

16. NAT'L CONFERENCE OF STATE LEGISLATURES, DNA ARRESTEE LAWS (2013), <https://www.ncsl.org/Documents/cj/ArresteeDNALaws.pdf> [https://perma.cc/7D7N-N6TE].

17. *See, e.g.*, S.B. 243, 2013 Leg., 77th Sess. (Nev. 2013).

III. THE REALISTIC INABILITY OF INDIVIDUALS TO DECLINE TO PARTICIPATE IN THE COLLECTION PROGRAM VIOLATES THE PRINCIPLE OF INDIVIDUAL PARTICIPATION

The Privacy Impact Assessment notes that the risk that “DNA collection requires no consent and is not voluntary . . . cannot be mitigated.”¹⁸ This is because, under the new DNA collection policy, detained individuals cannot decline to have their DNA taken. If they do decline, they will be charged with a Class A misdemeanor,¹⁹ which is defined by a period of incarceration between six months and a year.²⁰ This effectively forces migrant detainees to choose between submitting their DNA to CODIS or having a Class A misdemeanor on their criminal record.

Because individuals can be detained at the border for almost any reason,²¹ the very act of withholding consent for a genetic test could be the lone mark on a migrant’s conviction record. In the immigration context, conviction status matters, as having a felony or a misdemeanor on one’s record can lead to numerous consequences, including removal from the United States.

IV. THE COLLECTION PROGRAM LACKS SUFFICIENT PURPOSE SPECIFICATION

The Privacy Impact Assessment notes that DNA is collected for “law enforcement purposes, such as the generation of future investigative leads.”²² A resulting significant concern, which isn’t explicitly addressed by the Privacy Impact Assessment, is familial matching. Currently, twelve states allow familial matching searches of CODIS, specifically through the state-level CODIS database known as the State DNA Index System (SDIS), which can involve allowing investigators to run searches of the database for possible relatives, rather than restricting searches to direct matches.²³ This means that not only are detained individuals who have been subject to a DNA test implicated in

18. *Supra* note 8, at 14.

19. *Id.*

20. 18 U.S.C. § 3559 (2020).

21. *See generally* American Immigration Council, *Immigration Detention in the United States by Agency* (Jan. 2020), https://www.americanimmigrationcouncil.org/sites/default/files/research/immigration_detention_in_the_united_states_by_agency.pdf [https://perma.cc/HSZ6-6KCR].

22. *Supra* note 8, at 14.

23. Katelyn Ringrose, *DOJ Doesn’t Go Far Enough to Limit Searches of Consumer DNA Services*, HILL (Oct. 4, 2019), <https://thehill.com/opinion/technology/463835-doj-doesnt-go-far-enough-to-limit-searches-of-consumer-dna-services> [https://perma.cc/Q8TY-53AM].

law enforcement searches, but so too are their family members in the United States and abroad.

Familial matching could put countless other unsuspecting innocent individuals into law enforcement databases due to errors in processing and interpreting genetic information. A study of familial matching found a significant error rate in identifying more distant relatives—for instance, misidentifying a cousin as a brother.²⁴ These kinds of identification errors could lead to more police interactions with innocent individuals merely due to a migrant relative’s inclusion within the database.

Mandated DNA collection will put more individuals of minority status into law enforcement databases, as well as increase interactions between law enforcement and vulnerable individuals. Risks associated with law enforcement interactions fall disproportionately on overpoliced ethnic groups that are already overrepresented in state and federal genetic databases.²⁵ Similar concerns around this issue exist in the area of law enforcement access to and use of public genealogy databases and direct-to-consumer genetic testing services. In the direct-to-consumer context, companies can craft privacy policies and practices that align with Future of Privacy Forum’s Privacy Best Practices for Consumer Genetic Testing Services.²⁶ In these cases, companies can choose to comply with law enforcement only upon receiving a warrant, subpoena, or legal order. However, in states that allow familial matching via SDIS, there is no such warrant requirement in order for law enforcement to engage in a search of the database.

V. THE INDEFINITE INCLUSION AND MAINTENANCE OF HUNDREDS OF THOUSANDS OF PROFILES EACH YEAR VIOLATES THE PRINCIPLES OF DATA MINIMIZATION AND USE LIMITATION

The Privacy Impact Assessment notes that the CBP and ICE will adhere to the principle of data minimization by taking only “directly relevant and necessary” genetic material and retaining it only “for as long as is needed to

24. Rori V. Rohlf et al., *The Influence of Relatives on the Efficiency and Error Rate of Familial Searching*, 8 PLOS ONE 1, 7 (2013), <https://doi.org/10.1371/journal.pone.0070495>.

25. Michael T. Risher, *Racial Disparities in Databanking of DNA Profiles*, 22 GENEWATCH 22, 5 (2009).

26. *See generally* Future of Privacy Forum, Privacy Best Practices for Consumer Genetic Testing Services (July 2018), <https://fpf.org/wp-content/uploads/2018/07/Privacy-Best-Practices-for-Consumer-Genetic-Testing-Services-FINAL.pdf> [<https://perma.cc/F6K9-SRHJ>].

fulfill the specified purposes.”²⁷ The assessment goes on to describe how long genetic material is maintained, but it fails to highlight the fact that, absent expungement,²⁸ states often house genetic profiles indefinitely, regardless of whether the original genetic material is destroyed.²⁹ The propensity of genetic information to serve as an identifier for generations means that it may never leave law enforcement’s hands.

The National DNA Indexing System (NDIS) currently houses around fourteen million genetic profiles, typically called “offender profiles,” that are available within CODIS.³⁰ According to the DOJ, if the FBI was to process DNA from all detainees, this could add as many as 748,000 additional genetic profiles to CODIS every year.³¹ This means that, within just a handful of years, genetic profiles from migrant detainees could make up a significant fraction of the profiles available in CODIS.

Additionally, as mentioned prior, although all states have expungement processes for arrestees, the Privacy Impact Assessment notes that genetic data collected from migrants will remain in CODIS in perpetuity.³² The policy may have been built on the assumption that detained individuals are more likely to have committed crimes or to commit them in the future. However, research on crime rates has proven that this is untrue, and migrants to the United States commit crimes with about the same frequency as U.S. persons.³³ The consequences of this policy could be incredibly negative and far-reaching, as the inability to expunge DNA from this database leads to unfair characterizations of those individuals who have been cleared of any charges.

27. *Supra* note 8, at 14.

28. See Christen Giannaros, *Unprecedented Infringement: Debunking the Constitutionality of DNA Collection from Mere Arrestees in Light of Maryland v. King*, 28 J. CIV. RTS. & ECON. DEV. 455, 460 (2016) (explaining that the burden to expunge DNA profiles is on the individual).

29. Mark A. Rothstein & Meghan K. Talbot, *The Expanding Use of DNA in Law Enforcement: What Role for Privacy?*, 34 J.L. MED. & ETHICS 153, 158 (2006).

30. *CODIS - NDIS Statistics*, FBI, <https://www.fbi.gov/services/laboratory/biometric-analysis/codis/ndis-statistics> [<https://perma.cc/5DTP-2GCN>].

31. *Supra* note 3, at 56,400.

32. *Supra* note 8, at 13; see also *DNA Sample Collection from Arrestees*, NAT’L INST. JUST. (Dec. 6, 2012), <https://nij.ojp.gov/topics/articles/dna-sample-collection-arrestees> [<https://perma.cc/CP3Z-JRMH>] (exploring the expungement practices of various states).

33. Anna Flagg, *Is There a Connection Between Undocumented Immigrants and Crime?*, N.Y. TIMES (May 13, 2019), <https://www.nytimes.com/2019/05/13/upshot/illegal-immigration-crime-rates-research.html> [<https://perma.cc/FP4C-XABN>].

VI. THE COLLECTION PROGRAM FACES UNRESOLVED PRACTICAL ISSUES WITH IMPLEMENTATION: DATA QUALITY AND INTEGRITY, SECURITY, ACCOUNTABILITY, AND AUDITING

DHS intends to implement a program whereby CBP and ICE agents conduct DNA sample collection and complete a form indicating a migrant's personally identifiable information (PII) that will accompany their genetic sample in the mail.³⁴ According to DHS, all personnel (both CBP and ICE) will be trained on DNA collection procedures as well as the appropriate handling of PII (including Sensitive PII).³⁵ This means that the roughly 20,000 individuals employed by ICE and the roughly 60,000 employed by CBP will be eligible, or possibly required, to become versed in DNA collection procedures in order to procure genetic information from the roughly 748,000 detained individuals subject to mandatory retrieval.³⁶

According to DHS, training for DNA collection consists of taking in-person and video-based lessons,³⁷ but there is little information on the quality of this instruction. This is concerning because there is good reason to question CBP and ICE's ability to implement such a program; ICE has a history of being undertrained. In 2018, the Office of the Inspector General found that ICE's program for training former law enforcement officers was inefficient and that ICE was "not monitoring the officers to ensure they complete required training."³⁸ As a result, the individuals within the program lacked the "necessary training to be competent and capable of carrying out their delegated immigration duties."³⁹

In the Privacy Impact Assessment, DHS notes that genetic material will be tracked via barcode to mitigate the risk of losing samples and other corresponding personal information,⁴⁰ but this program comes less than a year after news that DHS lost track of migrant children separated from their parents

34. *See supra* note 8, at 3–6.

35. *Supra* note 8, at 17.

36. *Enforcement and Removal Operations*, ICE, <https://www.ice.gov/about> [<https://perma.cc/3VA4-GAC5>] (last updated May 13, 2020); *About CBP*, CBP, <https://www.cbp.gov/about> [<https://perma.cc/VJ25-GT75>] (last updated Sept. 18, 2019).

37. *Supra* note 8, at 16.

38. U.S. DEP'T OF HOMELAND SEC., OFFICE OF INSPECTOR GEN., OIG-18-77, LACK OF PLANNING HINDERS EFFECTIVE OVERSIGHT AND MANAGEMENT OF ICE'S EXPANDING 287(G) PROGRAM 3 (Sept. 19, 2018).

39. *Id.* at 8.

40. *Supra* note 8, at 17.

at the border.⁴¹ As the DHS inspector general recently admitted, pursuant to a lawsuit with the ACLU, the agency “struggled to provide accurate, complete, reliable data on family separations.”⁴²

This program also comes at significant expense. The additional staff hours needed to implement the program are expected to cost DHS about \$5.1 million in the first three years alone.⁴³ That does not include the cost of processing the DNA kits (around \$8 million in the first three years) or the costs of the additional time and budgetary strains on the FBI (which is responsible for providing DHS with the same support it offers federal agencies collecting DNA from arrestees and crime scenes).⁴⁴

This collection process will consequently take money, time, and attention away from legitimate crime-solving needs and public safety efforts. For example, the funds and effort spent on collecting DNA from detained migrants could instead be better allocated to help process the roughly 200,000 backlogged sexual assault kits that are already awaiting processing in the United States.⁴⁵

VII. CONCLUSION

The new DNA collection policy instituted by CBP and ICE is costly, difficult to implement and oversee, and poses a serious threat to the privacy of migrants and their family members. Examining and dispelling the justifications these policies rely on is only the first step to dismantling this novel government surveillance project. Protecting migrants’ civil liberties is paramount, and even if proposed migration bans are lifted, the wall goes unbuilt, and children are freed from detainment, surveillance of migrant communities will only become more invasive if policies like these are allowed to proceed unchecked.

41. See The Editorial Board, *The Lost Children of the Trump Administration*, N.Y. TIMES (Jan. 17, 2019), <https://www.nytimes.com/2019/01/17/opinion/family-separation-border-trump.html> [<https://perma.cc/UM5Y-8EBP>].

42. *Family Separation*, ACLU, <https://www.aclu.org/issues/immigrants-rights/immigrants-rights-and-detention/family-separation> [<https://perma.cc/8VAR-3LGJ>] (quoting a report released by the DHS inspector general).

43. *Supra* note 3, at 56,401.

44. *Id.*

45. Caroline Mimbs Nyce, *These Attacks Could’ve Been Prevented*, ATLANTIC (July 15, 2019), <https://www.theatlantic.com/newsletters/archive/2019/07/nationwide-epidemic-of-untested-rape-kits-atlantic-daily/594046/> [<https://perma.cc/H3ZL-YVFA>].