

## **Back to Blood: The Sociopolitics and Law of Compulsory DNA Testing of Refugees**

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### **ABSTRACT**

Since October 2012, certain family members of refugees seeking reunification through the United States Refugee Admissions Priority Three program must undergo DNA testing to prove they are genetically related. The putative purposes of the policy include fraud prevention, enhanced national security, and greater efficiency in refugee claims processing. Upon close inspection, however, the new policy generates significant sociopolitical and legal concerns. The notion of what constitutes a family is significantly narrowed. Required DNA testing may violate domestic laws and international human rights instruments regarding voluntary informed consent, privacy, and anti-discrimination. Traditional legal solutions insufficiently remedy these concerns and cannot prevent the collective march towards an intractable risk society that views the “Other” as a potential fraud. Alternative strategies to mitigate the impact of the new policy are recommended. Such strategies can allow for a more nuanced understanding of family and a firmer understanding of the inherent but also uncertain risks of DNA technology in the immigration and refugee context.

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## I. INTRODUCTION: THE ELUSIVE SEARCH FOR TRUTH

Truly and truthfully, who are you?

The answer to this question matters to each of us in disparate ways, yet it is particularly significant for refugees who seek a better life in the United States. The truth about who they are can set them free, while deception—deemed such by another—can condemn them. How identity and truth are determined for those seeking a better life has metamorphosed radically in just a few years.

As evidence of this claim, this Article examines a processing category in the United States Refugee Admissions Program, commonly referred to as the Priority Three, or P-3, family reunification program. Since October 2012, unmarried children under twenty-one years of age and parents of persons (called an anchor relative) lawfully admitted to the United States as refugees or asylees or permanent residents, or U.S. citizens who previously had refugee or asylum status, must undergo DNA testing to prove they are genetically related to the anchor relative.<sup>1</sup>

DNA testing has expanded to a constellation of fields, especially the forensic and familial, and, ostensibly, there are multiple beneficial purposes behind the policy. Some of the main claimed benefits for DNA testing in the refugee context include the following: establishing conclusive evidence of biological family relationships where no other evidence exists, to allow families to reunite;<sup>2</sup> preventing instances of

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<sup>1</sup> Press Release, U.S. Dep't of State, Bureau of Population, Refugees, and Migration (Oct. 4, 2012), *available at* [http://www.usrap.iom.int/joomla\\_25/images/RSC/P3/p-3%20program%20general%20info%2010-4-12.pdf](http://www.usrap.iom.int/joomla_25/images/RSC/P3/p-3%20program%20general%20info%2010-4-12.pdf) [hereinafter PRM Press Release].

<sup>2</sup> See, e.g., Cindy Carcamo, *Faces of Immigration: DNA Test Reunites Family*, ORANGE COUNTY REGISTER, Dec. 14, 2011, *available at* <http://www.ocregister.com/articles/hoang-331467-dat-son.html> (describing the situation of a Vietnamese mother in the U.S. on a special visa who had no documentary evidence to prove her biological relation to her son. After each took a DNA test that rendered a match, the mother's application was granted and the family was reunited after more than five years apart. The son told the reporter, "I didn't think much about what they were asking because I knew I was my mom's son," and the mother told the reporter, "I knew he was my son."). See also Alexandra Zabjek, *Refugees Undergo DNA Tests to Reunite Families*, EDMONTON JOURNAL (Can.), Jul. 16, 2007, at A13 (discussing how an adoptive parent from Rwanda took a DNA test and "it didn't surprise us," because "it's something that we were actually waiting for [and because] if they don't ask us, it means the process is far from being done.").

real fraud, such as the buying and selling of refugee slots by “refugee brokers”;<sup>3</sup> preventing human trafficking, as children may be petitioned for by persons who are bringing them to the U.S. as sex slaves or household slaves;<sup>4</sup> denying entry to those who may be terrorists;<sup>5</sup> reducing adjudication errors;<sup>6</sup> saving costs by improving efficiency

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<sup>3</sup> See RUTH ELLEN WASEM, CONG. RESEARCH SERV., RL34007, IMMIGRATION FRAUD: POLICIES, INVESTIGATIONS, AND ISSUES (2007). See also Miriam Jordan, *Refugee Program Halted As DNA Tests Show Fraud*, WALL ST. J., Aug. 20, 2008, at A3 (quoting the president of Lutheran Immigration and Refugee Services as saying refugee slots are precious and “[d]esperation makes people more susceptible to abuse or bribery.”); JILL ESBENSHADE, IMMIGRATION POLICY CENTER, AN ASSESSMENT OF DNA TESTING FOR AFRICAN REFUGEES 10 (2010) [hereinafter ESBENSHADE, ASSESSMENT] (noting that prior to the DNA pilot test project in Nairobi, USCIS and PRM were concerned about widespread reports of the existence of brokers who sold slots, provided documents, and coached applicants for the interviews); Emily Holland, *Moving the Virtual Border to the Cellular Level: Mandatory DNA Testing and the U.S. Refugee Family Reunification Program*, 99 CALIF. L. REV. 1635, 1676 (2011).

<sup>4</sup> There is no evidence that such a situation has occurred, but examples exist in the international adoption context. See, e.g., Larry Kaplow & Sonia Perez D., *Guatemala Mother Searched 5 Years for Adopted Girl*, ASSOCIATED PRESS, Aug. 6, 2011, available at [http://www.huffingtonpost.com/2011/08/06/guatemala-mother-searched\\_1\\_n\\_920259.html](http://www.huffingtonpost.com/2011/08/06/guatemala-mother-searched_1_n_920259.html) (describing situation of a Guatemalan mother submitting her DNA to prove maternity and have her kidnapped child returned, after the child had been adopted by an American family). See also Juan Carlos Llorca, *US Couple Almost Adopted Stolen Guatemalan Baby*, ASSOCIATED PRESS, Jul. 31, 2008, available at <http://www.huffingtonpost.com/huff-wires/20080731/guatemala-stolen-babies/> (describing situation of a Guatemalan mother having her baby kidnapped at gunpoint; fourteen months later, the mother spotted the child near an orphanage, just before an American couple was to adopt her; DNA testing proved her maternity and the authorities returned the child to her.).

<sup>5</sup> DNA testing may allow for sharing of genetic data with the Department of Defense terrorist database and the Interpol database, which combined have more than 200,000 DNA profiles of terror suspects. See, e.g., Noah Shachtman, *Detainees Fill Pentagon DNA Databank*, WIRED (Oct. 14, 2008), <http://www.wired.com/dangerroom/2008/10/detainees-fill/>. See also INTERPOL’s DNA database, <http://www.interpol.int/INTERPOL-expertise/Forensics/DNA> (last visited May 2, 2013).

<sup>6</sup> Though not discussed in this Article, quality control of DNA samples is an issue of concern. See Janice D. Villiers, *Brave New World: The Use and Potential Misuse of DNA Technology in Immigration Law*, 30 B.C. THIRD WORLD L.J. 239, 264–65 (2010). DNA testing is also not 100 percent foolproof; Holland, *supra* note 3, at 1662 n.186; See, e.g., *She’s Her Own Twin*, ABC PRIMETIME (Aug. 15, 2006), <http://abcnews.go.com/Primetime/story?id=2315693#>

(that is, accelerating the processing or adjudication time by reducing the need to submit multiple documents);<sup>7</sup> and promoting inter- and intra-governmental information sharing to deny entry to criminals, prevent future crimes, or help in forensic investigations of crimes.<sup>8</sup>

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.UKuriofAe0s (discussing story of two mothers whose DNA tests revealed they were not the biological mothers of their children—even though they were—a consequence of “chimerism,” a rare situation whereby two eggs are simultaneously fertilized and fuse together to create one individual instead of twins, but with two separate strands of DNA). *See also* Andreas O. Karlsson et al., *DNA-testing for Immigration Cases: The Risk of Erroneous Conclusions*, 172 *FORENSIC SCI. INT’L* 144 (2007) (finding that using inappropriate population frequency databases had minor effects on error rates, while likelihood ratios varied from an underestimation of 100 times up to an overestimation of 100,000 times, but cases can often be correctly interpreted if valid methods and strategies are used for likelihood comparisons); Micaela Poetsch et al., *The New Powerplex® ESX17 and ESII7 Kits in Paternity and Maternity Analyses Involving People from Africa—Including Allele Frequencies for Three African Populations*, 125 *INT’L J. LEGAL MED.* 149 (2011) (finding that since mostly only one parent and one or more children are tested with <15 short tandem repeats (STRs) analysis, the occurrence of possible mutational events has to be interpreted with great care and may lead to difficult or erroneous conclusions); Daniel Kling et al., *DNA Microarray as a Tool in Establishing Genetic Relatedness—Current Status and Future Prospects*, 6 *FORENSIC SCI. INT’L: GENETICS* 322 (2012) (noting that the choice of markers is at present in forensic genetics mostly limited to STRs, due to their high variability and their ability to provide a high power of discrimination, and also that STRs have a high mutation rate).

<sup>7</sup> *See, e.g.*, Evelyn Sahli, *Diffusion of DNA Testing in the Immigration Process* 82 (Dec. 2009) (unpublished M.A. thesis, Naval Postgraduate School), *available at* <https://www.hsdl.org/?view&did=30647> (quoting one expert who thinks that DNA testing early in the process would save money and time in file movement and storage, interviews, and investigations, and would enable applicants and petitioners to avoid the cost of procuring, translating and delivering fraudulent documents in an attempt to meet the documentary requirement when no legitimate document is available).

<sup>8</sup> *See, e.g.*, Sean Webby, *DNA Evidence Links Man to Stabbing Deaths of Mother and Toddler*, *MERCURY NEWS* (Jan. 5, 2008, 1:42AM), <http://www.myspace.com/bayareamissing/blog/344627615> (discussing how a Vietnamese refugee was arrested sixteen years later for murder after DNA from California’s State DNA Index System (SDIS) database matched blood collected at the crime scene). *See also* Samantha Maiden, *Biometric Security at Borders*, *SUNDAY TELEGRAPH* (Austl.) (Apr. 1, 2012, 12:00AM), <http://www.dailytelegraph.com.au/news/biometric-security-at-borders-to-catch-visa-fraud/story-e6freuy9-1226315240076> (discussing how sharing of refugees’ biometric information with authorities in other jurisdictions led to the deportation of an asylum seeker in Australia who was a registered sex offender in the U.S. and Germany).

Despite these purported benefits, mandatory DNA testing carries significant and arguably detrimental sociopolitical and legal impacts. With full faith in the objectivity of science and technology, the new policy creates epistemic and ontological shifts whereby the truth of identity and family relation may no longer lie in words spoken or texts written or images materialized on paper, but instead, in tests done on the body. The refugee's statement, "He is my son," may carry little weight compared to the cotton swab rubbed against the inner cheek. The refugee's body has become a site of evidence where truth lies and fraud lurks. "Family" has regressed from relational understanding to biological, corporeal understanding. The policy, in a real sense, takes us back to blood.<sup>9</sup>

The *us* is extraterritorially inclusive, for it involves the materialization of a collective, transnational effort among developed countries to harmonize an immigration and refugee law that emphasizes humanitarian principles while rendering invisible ideological rationales. The U.S. and many other countries use DNA tests to establish biological identity for family reunification in immigration and refugee law.<sup>10</sup> In the U.S., DNA testing is offered to immigrants on a "voluntary"<sup>11</sup> basis, serving as a last resort measure to

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<sup>9</sup> DNA testing often does not require a blood sample, but instead can be done with a buccal swab to collect cells on the inside of a cheek. See U.S. DEPARTMENT OF STATE, FOREIGN AFFAIRS MANUAL, 9 FAM 42.44 N2(a) (2012) [hereinafter FOREIGN AFFAIRS MANUAL]. I use the phrase "back to blood" not as a literal (and thus inaccurate) interpretation of DNA testing. Rather, it serves as a metaphor in the immigration and refugee context for an emerging state of affairs where governments impose a molecular gaze on a person that causes a return to our most primal understandings of familial relationships: those that exist only through immediate blood relationships. "Black to blood" is borrowed from TOM WOLFE, *BACK TO BLOOD: A NOVEL* (2012).

<sup>10</sup> See, e.g., Encarnación La Spina, *DNA Testing for Family Reunification in Europe: An Exceptional Resource?*, 6 *MIGRACIONES INTERNACIONALES* 39 (2012); Torsten Heinemann & Thomas Lemke, *Suspect Families: DNA Kinship Testing in German Immigration Policy*, 47 *SOCIOLOGY* 810, 811 (2013), available at <http://soc.sagepub.com/content/47/4/810> ("Today, at least 20 countries around the world (including 16 European countries) have incorporated parental testing into decision-making on family reunification in immigration cases: Australia, Austria, Belgium, Canada, Denmark, Estonia, Finland, France, Germany, Hungary, Italy, Lithuania, Malta, the Netherlands, New Zealand, Norway, Switzerland, Sweden, the UK, and the USA.").

<sup>11</sup> But see N.C. Aizenman, *DNA Testing a Mixed Bag for Immigrants*, WASH. POST, Oct. 25, 2006, at A1 (quoting Alison Brown, an immigration lawyer: "What's troubling is that it seems like the availability of DNA testing is leading

verify an “alleged biological relationship” where “no other credible proof such as documentation or photos of the relationship exists.”<sup>12</sup> Because all persons with blood relations share a similar sequence of DNA, comparing respective DNA material can establish genetic relationships with an extremely high level of accuracy.<sup>13</sup>

While the putative main goal of DNA testing in family reunification matters is proven certainty of a stated relationship,<sup>14</sup> this certainty may also cause more distrust among immigration officials, not to mention family members themselves. Identity documents—the written and visual texts, and the spoken word of the applicant—lose their power of truth in the face of science. There are various reasons for this reliance on genetic truth, but one of the most apparent is the post-9/11 climate that has induced a culture of risk and its apparent control,<sup>15</sup> framed in state sovereignty and national security discourse, that has exacerbated the imposition of DNA testing on immigrants and refugees.

In the wake of 9/11, and with the rise of ever-cheaper, ever-faster, evermore-accurate DNA technology, we are witnessing the emergence of a new order of bio-surveillance and what I call a “hemonomy,” a socially constructed system of laws and rules of categorization—truth/fraud, permitted/denied, secure/insecure—that literally interposes a “right of blood” established through DNA testing. This new order replaces hitherto pro-capitalist/non-communist immigration and refugee law with a securitized and surveilled pro-somatic immigration and refugee law. Coupled with this is an eisegetical transformation of evidence, where it is no longer the state interpreting immigration documents in accordance with the context and meaning of the applicant, but rather, the state imposing its interpretation onto the applicant’s molecularized, scripted body.

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to a greater level of mistrust of identity documents that otherwise would have been readily accepted,” and quoting Parastoo Zahedi, another attorney, recounting the story of a client: “My son said the official told him very simply, ‘No DNA test, no visa . . . .’”).

<sup>12</sup> FOREIGN AFFAIRS MANUAL, *supra* note 9, at N3(b).

<sup>13</sup> *Id.* at 42.44 N1(b).

<sup>14</sup> *Id.* at 42.44 N1(a) and (b).

<sup>15</sup> *See, e.g.*, DAVID GARLAND, THE CULTURE OF CONTROL, CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY (2001); RICHARD V. ERICSON, CRIME IN AN INSECURE WORLD (2007); Holland, *supra* note 3, at 1669–72.

The intersection of genetics and immigration is ripe for systematic and empirical exploration by legal scholars and social scientists.<sup>16</sup> As more countries institute DNA testing in their immigration and refugee laws and policies, it is critical to examine how these themes of objectivity, neutrality, and fraud reveal themselves. This Article aims to undertake these themes. I will focus on the sociopolitical and legal implications of Priority Three, which was suspended in 2008 due to fraud concerns, but was reinstated in October 2012 with *required* DNA testing for individuals claiming to be the parent or child of a refugee already living in the U.S.<sup>17</sup> I argue that this new policy is fraught with problems and that extant legal doctrines or frameworks do not adequately protect the fundamental human rights of refugees and associated family members.

In Part II of this Article, I will explore current refugee law and Priority Three, including the contentious pilot project in 2008 that led to its suspension and revival in late 2012. Part III and Part IV will critically analyze Priority Three from a sociopolitical and legal viewpoint, respectively. The political viewpoint will look at issues such as genetic essentialism and the body as a site of evidence. The legal viewpoint will look at issues such as informed consent, privacy, discrimination, and human rights. Ethical norms will be discussed in each. Part V will look towards some alternative solutions to mitigate the impact of the new Priority Three policy; Part VI concludes.

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<sup>16</sup> Torsten Heinemann, Thomas Lemke & Barbara Prainsack, *Risky Profiles: Societal Dimensions of Forensic Uses of DNA Profiling Technologies*, 31 *NEW GENETICS & SOC'Y* 249, 253 (2012) (“The impact of forensic genetics on immigration policies and family reunification still remains a non-issue for most social scientists . . . [T]he use of parental testing in immigration contexts also raises serious concerns that are yet to be studied . . .”). *But see* Holland, *supra* note 3 (discussing the policy implications of Priority Three and evaluating the science of DNA testing); Villiers, *supra* note 6 (using examples from U.S. criminal, family, and estates and trusts law to offer a policy for the use of DNA testing and evidence in immigration law); Martin G. Weiss, *Strange DNA: The Rise of DNA Analysis for Family Reunification and its Ethical Implications*, 7 *GENOMICS, SOC'Y & POL'Y* 1 (2011) (discussing broadly the ethical problems posed by DNA testing for family reunification); Heinemann & Lemke, *supra* note 10, at 16 (discussing parental DNA testing for family reunification in German immigration policy).

<sup>17</sup> See U.S. DEP'T OF STATE ET AL., PROPOSED REFUGEE ADMISSIONS FOR FISCAL YEAR 2013 REPORT TO THE CONGRESS (2012), *available at* <http://www.state.gov/documents/organization/198157.pdf> [hereinafter FY 2013 Refugee Admissions Report]. See also PRM Press Release, *supra* note 1.



## II. CURRENT REFUGEE LAW AND PRIORITY THREE

### A. Current Refugee Law

Current refugee law is centered in the executive branch but coordinated with Congress. The Department of Homeland Security, via the United States Citizenship and Immigration Services (USCIS) and its roving Refugee Corps, determines who may come to the U.S. as a refugee.<sup>18</sup> Additionally, the President each year designates groups of people as refugee-admissible in coordination with the United Nations High Commissioner for Refugees.<sup>19</sup> The State Department's Bureau of Population, Refugees and Migration (the Bureau) coordinates and manages the U.S. Refugee Admissions Program, which addresses U.S. resettlement policy and programs for the admission of refugees.<sup>20</sup> Refugee admissions "of special humanitarian concern" are determined through the Refugee Admissions Program priority system, which is divided into three priority-based processing programs.<sup>21</sup>

Priority One handles individual cases from persons of any nationality with compelling protection needs.<sup>22</sup> Priority Two handles members of specific groups identified by the State Department, in consultation with Homeland Security, USCIS, non-governmental organizations, the Commissioner, and other experts, as needing resettlement because of special humanitarian concern.<sup>23</sup> Priority Three handles individual "members of designated nationalities who have

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<sup>18</sup> The United States Refugee Admissions Program (USRAP) Consultation & Worldwide Processing Priorities, U.S. Citizenship and Immigration Services, <http://www.uscis.gov/portal/site/uscis> (follow humanitarian hyperlink; then follow refugees & asylum hyperlink; then follow refugees hyperlink; then follow "USRAP Consultations and Worldwide Processing Priorities" hyperlink) (last visited May 2, 2013).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> Immigration and Nationality Act, 8 U.S.C. § 1157(a)(3) (2011) [hereinafter INA].

<sup>22</sup> FY 2013 Refugee Admissions Report, *supra* note 17, at 7. These refugees are identified and referred to USRAP by UNHCR, a U.S. embassy, or a designated NGO. *Id.*

<sup>23</sup> *Id.* at 8. These groups generally are religious or ethnic minorities and constitute the majority of refugees admitted to the U.S. *Id.*

immediate family members in the United States who initially entered as refugees or were granted asylum.”<sup>24</sup>

In Priority Three processing, the family member in the U.S. is referred to as the anchor, while the relative overseas is referred to as the applicant, who must establish refugee status.<sup>25</sup> The applicant files an Affidavit of Relationship, which must be submitted to the Refugee Processing Center in Arlington, Virginia, via a resettlement agency that holds a current cooperative agreement with the Bureau to assist in the reception and placement of refugees in the U.S.<sup>26</sup> The affidavit is logged by the Refugee Processing Center and then sent to Homeland Security for review.<sup>27</sup> The applicant is allowed to include only certain family members, referred to as Qualifying Family Members, namely his or her spouse, parents, and unmarried children under twenty-one years of age.<sup>28</sup> These are derivative beneficiaries that need not establish refugee status themselves.<sup>29</sup> The Bureau, in consultation with Homeland Security through USCIS, establishes a list of nationalities eligible for Priority Three processing; this determination is based on a finding by the Bureau that the nationality is “of special humanitarian

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<sup>24</sup> *Id.* at 11. *Accord* INA, 8 U.S.C.A. § 1158(a) (2011). Asylees are individuals who are physically present in the United States, and whose claims are adjudicated on U.S. soil, whereas refugees are granted refugee status while physically present outside the United States. *Id.*

<sup>25</sup> Anchors are deemed “refugees” and asylees with proof of Form I-94, “permanent residents” with proof of Form I-551, Form I-151, or temporary proof from USCIS, or “citizens” with proof of passport or naturalization certificate. FY 2013 Refugee Admissions Report, *supra* note 17, at 11.

<sup>26</sup> *Id.* at 18.

<sup>27</sup> *Id.* at 11.

<sup>28</sup> *Id.* at 12. *Accord* INA, 8 U.S.C.A. § 1157(c)(2)(a)-(b); Holland, *supra* note 3, at 1653 (noting the cultural assumption that “an individual who is twenty-one years of age or older is expected to fend, legally and otherwise, for himself.” Meanwhile in many American households, children can remain dependent on their parents long after they reach the age of majority). Qualifying Family Members must be living outside of their country of origin or nationality and the relationship with the anchor must have existed at the time he or she was granted refugee/asylees status. They must be unable to return to their home country, and must prove their own refugee claim through an interview process as well. FY 2013 Refugee Admissions Report, *supra* note 17, at 12.

<sup>29</sup> FY 2013 Refugee Admissions Report, *supra* note 17, at 11–12.

concern to the U.S. for the purposes of family-reunification refugee processing.”<sup>30</sup>

### **B. DNA Testing of Priority Three Refugees and Family Members**

Since DNA profiling was first created in 1984,<sup>31</sup> advances in biotechnology and genetics have led immigration authorities to move beyond testimony and government documents<sup>32</sup> to establish, with great scientific exactitude, whether one family member is genetically connected to another. USCIS began exploring the use of DNA testing at the start of the new millennium.<sup>33</sup> While the Immigration and Naturalization Service, now USCIS, previously established that it could require blood parentage testing,<sup>34</sup> a July 14, 2000 memorandum to its field offices from Michael D. Cronin, then Acting Executive Associate Commissioner of Immigration, stated that no “statutory or regulatory authority to require DNA testing” existed.<sup>35</sup> It further added

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<sup>30</sup> *Id.* at 12. For FY 2013, “P-3 processing will be available to individuals of the following nationalities: Afghanistan, Bhutan, Burma, Burundi, Central African Republic, Chad, Colombia, Cuba, Democratic People’s Republic of Korea, Democratic Republic of Congo, Eritrea, Ethiopia, Haiti, Iran, Iraq, Republic of Congo, Somalia, South Sudan, Sri Lanka, Sudan, Uzbekistan, [and] Zimbabwe.” *Id.* at 13.

<sup>31</sup> Alec J. Jeffreys et al., *Hypervariable ‘Minisatellite’ Regions in Human DNA*, 314 *NATURE* 67, 72 (1985).

<sup>32</sup> FY 2013 Refugee Admissions Report, *supra* note 17, at 11.

Previously, in order to qualify for access under P-3 procedures, an applicant must have been outside of his or her country of origin, have had an Affidavit of Relationship (AOR) filed on his or her behalf by an eligible ‘anchor’ relative in the United States during a period in which the nationality was included on the eligibility list, and have been cleared for onward processing by the DHS/USCIS Refugee Access Verification Unit.

*Id.* See also 8 C.F.R. §§ 103.2(b)(2)(i), 204.2(d)(2)(v).

<sup>33</sup> Recommendation from the CIS Ombudsman to the Director, USCIS, pt. II, at 1 (Apr. 12, 2006).

<sup>34</sup> 8 C.F.R. § 204.2(d)(2)(vi). The blood testing could be done by means of blood parentage testing through Blood Group Antigen (BGA) or Human Leukocyte Antigen (HLA).

<sup>35</sup> Memorandum from Michael D. Cronin, Acting Exec. Assoc. Comm’r of the Office of Programs, U.S. Dept. of Justice, HQADN 70/11, Guidance on Parentage Testing for Family-Based Immigrant Visa Petitions 2 (July 14, 2000)

that “no parentage testing, including DNA testing, is 100 percent conclusive,” and that due to the “expense, complexity and logistical problems . . . and sensitivity inherent in parentage testing,” field offices “should be extremely cautious” when suggesting DNA testing.<sup>36</sup>

Nonetheless, the memo clearly permitted the use of DNA testing when the applicant did not satisfy the evidentiary threshold to establish a parental relationship and the Immigration and Naturalization Service would otherwise deny the petition without more conclusive evidence.<sup>37</sup> And, despite the warnings in the first part of the memo, the Immigration and Naturalization Service appeared to tout DNA testing’s benefits in the latter part.<sup>38</sup> For example, the memo stated that testing “can be an extremely valuable tool when it otherwise would be impossible to verify a relationship,” and that because parentage testing is an extremely fact-driven procedure, field officers providing laboratories “with suspicions of fraud or other pertinent facts” could help render a more accurate answer.<sup>39</sup> The memo also stated that DNA testing, involving potentially only a buccal swab, was less intrusive than traditional blood tests and could be more easily done in countries with limited medical and transportation facilities as there was no need to use live human blood cells.<sup>40</sup>

A sustained push for required DNA testing began in 2006, when Prakash Khatri, the USCIS Ombudsman, recommended to Emilio T. González, then-Director of USCIS, that if USCIS officers “doubt[ed] the authenticity of relationship documents, and/or the legitimacy of the relationships for which they are submitted as evidence,” they could require DNA testing “to verify the legitimacy of claimed family relationships.”<sup>41</sup> The Khatri memorandum emphasized that “[f]amily

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[hereinafter Cronin Memorandum] (*reprinted in* 77 INTERPRETER RELEASES 1096, 1096 (July 31, 2000)).

<sup>36</sup> *Id.* at 2; *See also* Holland, *supra* note 3, at 1645.

<sup>37</sup> Cronin Memorandum, *supra* note 35, at 3.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 2.

<sup>40</sup> *Id.* at 4.

<sup>41</sup> Letter from Prakash Khatri, U.S. Citizenship and Immigration Services Ombudsman, to Emilio T. González, Dir., USCIS at 1–4 (Apr. 12, 2006), available at [http://www.dhs.gov/xlibrary/assets/CISombudsman\\_RR\\_26\\_DNA-04-13-06.pdf](http://www.dhs.gov/xlibrary/assets/CISombudsman_RR_26_DNA-04-13-06.pdf) [hereinafter Khatri memorandum]. The memorandum

reunification is a pillar of U.S. immigration policy,” but added that “USCIS must be able to verify, and its customers must be able to establish, that the claimed family relationships that constitute the basis of eligibility for immigration benefits are legitimate.”<sup>42</sup> DNA testing was touted as a benefit for all parties, specifically in terms of improved national security, customer service, and efficiency, and as a policy proposal that could be tested in a pilot study.<sup>43</sup> However, there was no discussion of ethical, legal, or social risks.

USCIS and the Bureau announced in February 2008 that it had launched a compulsory DNA testing pilot project in Nairobi, Kenya, to DNA test 500 refugee applicants primarily from Somalia and Ethiopia.<sup>44</sup> The reason for this location was due to “frequent reports and anecdotal information that there was widespread fraud” in Priority

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recommended amending 8 C.F.R. §§ 204.2(d)(2)(v-vi), the latter of which would read in part:

DNA (deoxyribonucleic acid) or Genetic Testing. The director may require that DNA or genetic testing be conducted to verify an alleged biological relationship. Tests will be conducted by an approved laboratory accredited by the American Association of Blood Banks (AABB) using the Polymerase Chain Reaction-Short Tandem Repeat (PCR-STR) test or Restriction Fragment Length Polymorphism (RFLP) test, or other test that the Service determines has been accepted by the scientific community as achieving or surpassing the qualities of these tests . . . . Refusal to submit to DNA testing when requested may constitute a basis for denial of the petition, unless a legitimate medical or religious objection has been established. When a legitimate medical or religious objection is established, alternate forms of evidence may be considered based upon documentation already submitted.

Khatri memorandum, *supra* at 6.

To require DNA or genetic testing to “verify an alleged biological relationship” vastly broadens the scope of relationships as currently expressed in 8 C.F.R. § 204.2(d)(2)(vi), which states that “[t]he director may require that a specific Blood Group Antigen Test be conducted of the beneficiary and the beneficiary’s father and mother.”

<sup>42</sup> Khatri memorandum, *supra* note 41, at 3.

<sup>43</sup> *Id.* at 5.

<sup>44</sup> U.S. DEPT. OF STATE, FRAUD IN THE REFUGEE FAMILY REUNIFICATION PROGRAM FACTSHEET 2 (FEB. 3, 2009), *available at* <http://www.state.gov/j/prm/releases/factsheets/2009/181066.htm> [hereinafter FRAUD IN THE REFUGEE FAMILY]; ESBENSHADE, ASSESSMENT, *supra* note 3, at 10.

Three processing, “particularly in Kenya.”<sup>45</sup> The pilot program later expanded to other parts of Africa and eventually totaled 3,000 tested refugees.<sup>46</sup> The pilot project revealed that USCIS and the Bureau were only able to confirm “all claimed biological relationships” in fewer than twenty percent of tested family units,<sup>47</sup> though the conception of “fraud” deployed by USCIS and the Bureau is suspect,<sup>48</sup> and scholars have noted that the pilot study’s methodology was seriously flawed.<sup>49</sup> Further, USCIS and the Bureau did not consider that serious psychological and social impacts could result from requiring such tests, or that USCIS field officers were not trained in psychological or genetic counseling.<sup>50</sup> USCIS and the Bureau have never released the underlying statistics, making it impossible to determine to what extent true fraud existed. Nevertheless, the pilot project results led to the eventual suspension of the entire Priority Three program in October 2008.<sup>51</sup>

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<sup>45</sup> FRAUD IN THE REFUGEE FAMILY, *supra* note 44, at 2.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> See generally Jill Esbenshade, *Discrimination, DNA Testing, and Dispossession: Consequences of U.S. Policy for African Refugees*, 13 SOULS 175, 186 (2011) [hereinafter Esbenshade, *Discrimination*]. In any case where one or more family members did not appear at an interview or one or more family members refused to provide a sample for any reason, including privacy concerns (refusals and no-shows constituted the “great majority” of cases, according to the State Department), or where the results indicated that one or more relationships was different from the claim, the whole family unit was deemed fraudulent. USCIS and PRM also did not consider that undisclosed rapes (a common occurrence among refugee women) and infidelities may have discouraged women from agreeing to the test. See also Lauren Zwaans, *Church Fights DNA Tests for Refugees*, THE ADVERTISER (Austl.), Nov. 16, 2009, at 28 (reporting that an estimated 75 percent of Sierra Leonean refugee women have been raped since the civil war began in the early 1990s).

<sup>49</sup> See ESBENSHADE, ASSESSMENT, *supra* note 3, at 11–12. Refugees were apparently asked without forewarning in their interviews to provide a DNA sample to test for relationships between the primary applicant and his or her derivative relatives (rather than the “anchor” in the U.S., as there was uncertainty about the legality of testing on U.S. soil). Some refugees were also apparently told that DNA testing was voluntary, which impacted the “fraud” determination. *Id.* at 17 n.20.

<sup>50</sup> Esbenshade, *Discrimination*, *supra* note 48, at 187.

<sup>51</sup> FRAUD IN THE REFUGEE FAMILY, *supra* note 44.

In September 2010, the State Department published proposed rules (the Notice) requiring DNA testing of future Priority Three applicants.<sup>52</sup> The Notice stated that a revised Affidavit of Relationship, now an official State Department form, rather than an informal petition, would inform the anchor relative “that DNA evidence of all claimed parent-child relations between the anchor relative and parents and/or unmarried children under [twenty-one] will be required as a condition of access to P-3 processing.”<sup>53</sup> It did not state whether DNA testing of derivative beneficiaries would be required as well. The Notice stated that the costs would be borne by the anchor relative or their family members or derivative beneficiaries, but that successful applicants could be eligible for reimbursement of DNA test costs.<sup>54</sup>

The FY 2013 Refugee Admissions Report released in October 2012 stated that the U.S. Refugees Admissions Program would resume Priority Three processing with a newly approved Affidavit of Relationship Form<sup>55</sup> that contained “new language about penalties for committing fraud; and alerts filers that DNA evidence of certain claimed biological parent-child relationships will be required in order to gain access to an Immigration Service’s interview for refugee admission to the United States through the P-3 program.”<sup>56</sup> In a press release dated October 4, 2012, the Bureau stated that “DNA relationship testing will occur between the anchor and his/her claimed biological parents, and between the anchor and his/her claimed biological children.”<sup>57</sup> Applicants must pay all DNA testing costs, which are currently estimated at \$440 for the first person and \$220 for

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<sup>52</sup> 60-Day Notice of Proposed Information Collection: DS-7656; Affidavit of Relationship (AOR); OMB Control Number 1405-XXXX, 75 Fed. Reg. 54, 690–91 (Sept. 8, 2010).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> See Form DS-7656 at 3, available at [http://www.reginfo.gov/public/do/PRAViewIC?ref\\_nbr=201111-1405-010&icID=200164](http://www.reginfo.gov/public/do/PRAViewIC?ref_nbr=201111-1405-010&icID=200164) [hereinafter Form DS-7656].

<sup>56</sup> FY 2013 Refugee Admissions Report, *supra* note 17, at 12. The revised Form DS-7656 states that criminal prosecutions may be sought when family relationships are falsified to obtain immigration benefits. Form DS-7656, *supra* note 55.

<sup>57</sup> PRM Press Release, *supra* note 1, at 2.

each additional test;<sup>58</sup> an expensive sum for many refugee families. According to the Bureau, applicants will be reimbursed “*only if all claimed and tested biological relationships are confirmed by DNA test results,*”<sup>59</sup> and the reimbursement amount paid is subject to available funds from the International Organization for Migration, which manages the reimbursement process.<sup>60</sup>

It appears that DNA testing will be done using cells collected from a buccal swab.<sup>61</sup> The DNA of anchors is tested by an American Association of Blood Banks (AABB) approved laboratory in the U.S., while the DNA of Qualifying Family Members is tested by an embassy-appointed panel physician<sup>62</sup> or by the International Organization for Migration.<sup>63</sup> Persons who undergo DNA testing direct the laboratory conducting the test to send a paper report directly to the Refugee Processing Center.<sup>64</sup> The Affidavit of Relationship Form DS-7656 and results of the DNA test are sent to USCIS for an initial review of claimed relationships by the Refugee Access Verification Unit. Following completion of the Refugee Access Verification Unit review,<sup>65</sup> the Refugee Processing Center notifies the Resettlement Support Center whether case processing can continue.<sup>66</sup>

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<sup>58</sup> See Minnesota Dep’t of Health, *Refugee Health Quarterly* (Oct. 2012), available at <http://www.health.state.mn.us/divs/idepc/refugee/rhq/rhqoct12.pdf> [hereinafter *Refugee Health Quarterly*]. See also U.S. DEP’T OF HOMELAND SEC., *PRIVACY IMPACT ASSESSMENT FOR THE RAPID DNA SYSTEM* (2013), available at <http://www.dhs.gov/sites/default/files/publications/privacy/PIAs/privacy-pia-rapiddna-20130208.pdf> [hereinafter *RAPID DNA SYSTEM PIA*].

<sup>59</sup> PRM Press Release, *supra* note 1, at 2 (emphasis in original).

<sup>60</sup> *Id.*

<sup>61</sup> U.S. DEP’T OF STATE, *WORLDWIDE REFUGEE ADMISSIONS PROCESSING SYSTEM (WRAPS) PRIVACY IMPACT ASSESSMENT 4*, available at <http://www.state.gov/documents/organization/101146.pdf> [hereinafter *WRAPS PIA*] (“A parent-child DNA laboratory test costs more than \$400, with additional child verifications costing \$150 each.”). See also *RAPID DNA SYSTEM PIA*, *supra* note 58. See also *RAPID DNA SYSTEM PIA*, *supra* note 58, at 2 (describing the development of a Rapid DNA System portable testing device for “rapid family relationship verification” by way of buccal swabs).

<sup>62</sup> *Id.* (A panel physician is a medically trained, licensed, and experienced doctor practicing overseas who is appointed by the local U.S. embassy or consulate.).

<sup>63</sup> *Id.* at 4.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*



### III. THE SOCIOPOLITICS OF REFUGEE DNA TESTING AND FAMILY IDENTITY

The Khatri memorandum identified three benefits of DNA testing to prove a family relationship: national security (deterrence of fraud), customer service (diminishing requests for further evidence and interviews), and USCIS efficiency (putative scientific conclusiveness of DNA testing allows USCIS to reduce adjudication time and expense and reallocate resources to other important activities such backlog reduction and prevention).<sup>67</sup> References to risk, such as the “sensitivity inherent in parentage testing” and the need for caution when suggesting, or now requiring, DNA testing, as expressed in the Cronin memorandum, disappeared. The benefits of DNA testing will be critiqued in Part III and Part IV, and the many previously neglected risks will be explored. This section also examines the sociopolitical implications of required DNA testing and its potentially detrimental impact on refugees as individuals and members of a family unit.

#### A. The Meaning of Family

The primary issue in DNA testing of refugees and family members to determine the legitimacy of claimed relationships is what constitutes a family. Though no universal definition is possible, a family can be recognized as the “natural and fundamental group unit of society.”<sup>68</sup> A family is a unit critical for the continuance of culture, that is, the customs, values, beliefs, religion, and language of a community, and the sustainability of society itself because family facilitates the health and development of future generations and provides for human flourishing.<sup>69</sup> For U.S. immigration and refugee law, family is often constricted into the confines of nuclear family, consisting of one husband, one wife, and their genetically related children.<sup>70</sup> In itself,

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<sup>67</sup> Khatri memorandum, *supra* note 41, at 5.

<sup>68</sup> G.A. Res. 217 (III), U.N. Doc. A/RES/217 (III) at 79 (Dec. 10, 1948) [hereinafter UDHR]; G.A. Res. 2200A (XXI), U.N. GAOR, 22nd Sess., Supp. No 16, U.N. Doc A/6316 at art. 23 (Dec. 16, 1966) [hereinafter ICCPR 1966].

<sup>69</sup> See Brooke Wilmsen, *Family Separation: The Policies, Procedures, and Consequences for Refugee Background Families*, 30 REFUGEE SURVEY Q. 44 (2011).

<sup>70</sup> Zvi Triger, *Introducing the Political Family: A New Road Map for Critical Family Law*, 13 THEORETICAL INQUIRIES L. 361, 365 (2012) (discussing the nineteenth century appearance of the phrase “nuclear family,” how only in the seventeenth century did the word “family” begin to connote a social unit that

this is not a radical tenet. Many cultures understand the construct of a nuclear family. Yet a nuclear family is very much a socially constructed symbol that imparts an array of questions as to who and what qualifies as husband, wife, and child.<sup>71</sup> Family is above all a dynamic, culturally specific category that may also have sub-cultural specificities. The United Nations High Commissioner for Refugees recognizes family's socially constructed meaning:

The UNHCR definition [of family for the purposes of resettlement] also includes persons who may be dependent on the family unit, particularly economically, but also socially or emotionally dependent. This includes children who have reached 18 years of age or who are married (if they remain in the family unit) or children or older people under foster care or guardianship arrangements, but are not biologically related.<sup>72</sup>

Indeed, for some cultures, marriage or its equivalent will establish a family, whereas for others, emphasis may be placed more on dependency or genetics. Yet even within these categories, there is a constellation of interpretations based on cultural factors and experiences, not only across the globe, but also within the U.S. For refugees, whose lives have been ripped apart by war and strife, the family unit may well be in a state of perpetual flux, constantly being created or recreated, with members coming and going. In many ways refugees epitomize the denuclearized family.<sup>73</sup>

For example, although U.S. immigration and refugee policy stipulates that children who are not genetically related may still be admitted to the U.S. through the Priority Three provided they are

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contains a father, a mother and children, and anthropological research showing that the multiple-parent model, called "alloparenting," was the dominant parenting model among early hominids).

<sup>71</sup> *Id.*

<sup>72</sup> UN High Commissioner for Refugees, Challenges and Opportunities in Family Reunification, Annual Tripartite Consultations on Resettlement, Geneva, UNHCR, 2008, at 2–3, available at <http://www.unhcr.org/4fbcf9619.pdf>.

<sup>73</sup> See, e.g., Laila Tingvold et al., *Parents and Children Only? Acculturation and the Influence of Extended Family Members Among Vietnamese Refugees*, 36 INT'L J. INTERCULTURAL REL. 260 (2012) (qualitative study of Vietnamese refugee children in Norway revealing that aunts, uncles, and cousins are experienced as significant persons in the lives of many adolescents). See also Esther Sample, *State Practice and the Family Unity of African Refugees*, 28 FORCED MIGRATION REV. 51 (2007) (finding that in her field work in African refugee camps, high mortality often causes denuclearized family groupings).

legally adopted,<sup>74</sup> the western conception of legal adoption is prohibited in certain regions or cultures, such as classical Islamic law and its concept of *tabanni*.<sup>75</sup> The closest equivalent in this legal system and culture is *kafala*, which involves physical custody of children, but the child is not treated like a birth child in many important regards and the system does not allow for rights of inheritance or other rights and responsibilities that biological children and parents may have.<sup>76</sup>

Many cultures also equate family with extended networks of relatives and clan structures. This is especially true in Somalia, the site of the pilot DNA test project in 2008, and other regions of Africa where “fostering of children by non-parental kin is prevalent”<sup>77</sup> for multiple reasons, including death, divorce, and the consequences of refugees’ plights whereby dynamic families are created by choice or circumstance rather than biology.<sup>78</sup> Anthropologist Christine Oppong also notes that a large number of kin can belong to a small number of categories in kinship systems, such that a father can refer to an uncle and a mother can refer to an aunt.<sup>79</sup> Similarly, Marshall Sahlins, an anthropologist who has extensively studied kinship systems, comments that even notions of biological and genetic family ties are opaque and are themselves tied to the social:

[W]here they are relevant, the blood, milk, semen, bone, flesh, spirit, or whatever of procreation are not simply physiological

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<sup>74</sup> Form DS-7656, *supra* note 55, at 1 (“In order to be claimed on this AOR . . . adopted children must have been in the legal custody of and resided with the adopting parent or parents for at least two years and legally adopted before their 16th birthday.”).

<sup>75</sup> See Kristen Stilt & Swathi Gandhavadi, *The Strategies of Muslim Family Law Reform* 14 (Northwestern U. Sch. of Law Pub. Law & Legal Theory Research Paper Series, No. 11-42) (Feb. 9, 2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1802757](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1802757).

<sup>76</sup> *Id.* at 14–15.

<sup>77</sup> Esbenshade, *Discrimination*, *supra* note 48, at 185.

<sup>78</sup> Taitz and colleagues note that 58 percent of Somalis given DNA testing by the Danish Immigration Service between January 1997 and September 1998 received a negative (non-matching) result. According to Somali community leaders, the finding was unsurprising: “The concept of family is very different in [the Somali] culture, and many Somalis are not aware of the Danish concept of who is a family member and thereby entitled to family reunification.” See Jackie Taitz et al., *The Last Resort: Exploring the Use of DNA Testing for Family Reunification*, 6 HEALTH & HUMAN RTS. 20, 26–27 (2002).

<sup>79</sup> Esbenshade, *Discrimination*, *supra* note 48, at 186.

phenomena nor do they belong to the parents alone. They are meaningful social endowments that situate the child in a broadly extended and specifically structured field of kin relationships. Through such substances, the child is *ipso facto* connected to wider circles of paternal and maternal relatives—let alone all those implicated when conception also involves bestowals from ancestral beings. So again, ‘biological’ relations being social relations, in such cases the nexus of so-called extended kinship is already in the composition of the foetus.<sup>80</sup>

Social science-informed studies indicate that equating the parent-child or sibling relationship as strictly biological (read: genetic) glosses over the multiple nuances and meanings of family.<sup>81</sup> Ethnographic studies suggest that many refugee families are the result of fragmented circumstances,<sup>82</sup> and far from knowingly committing fraud, many parents may be shocked to learn that a child is not in fact genetically related.<sup>83</sup>

DNA testing to establish a claimed biological relationship, seen in this light, becomes so convoluted as to paradoxically increase the “scientific certainty” of one person having nearly identical DNA to another person, and also render meaningless the underlying human bond it tests. A DNA test can reveal that a genetic relationship exists between two people with greater than 99.5 percent accuracy for parent-child,<sup>84</sup> but the revelation of “truth” constricts the ontology of family, ignores the traumatic refugee context, and indeed conceals family as a socially constructed phenomenon insusceptible to techno-scientific interpretation. As Emily Holland comments, “DNA testing cannot appreciate the refugee family or the refugee experience,

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<sup>80</sup> Marshall Sahlins, *Birth is the Metaphor*, 18 J. ROYAL ANTHROPOLOGICAL INST. 673, 674 (2012). See also MARSHALL SAHLINS, WHAT KINSHIP IS—AND IS NOT (2013).

<sup>81</sup> Lica Tomizuka, *The Supreme Court’s Blind Pursuit of Outdated Definitions of Familial Relationships in Upholding the Constitutionality of 8 U.S.C. § 1409 in Nguyen v. INS*, 20 LAW & INEQ. 275, 292–96 (2002) (discussing the changing sociological and legal definitions of “mother” and “father”).

<sup>82</sup> Wilmsen, *supra* note 69.

<sup>83</sup> Taitz et al., *supra* note 78, at 26 (discussing example of a family from Nairobi who were shocked to discover that a child they thought was theirs was not biologically related to either the mother or father; the parents apparently mistakenly reclaimed the child after years of separation due to civil war).

<sup>84</sup> FOREIGN AFFAIRS MANUAL, *supra* note 9, at N1(b).

because DNA neither detects nor reflects the harsh realities that refugees face.”<sup>85</sup>

### **B. When DNA Testing Destructs Familial Inclusion<sup>86</sup>**

The notion of marriage is fluid in many non-American cultures, and is changing in American culture as well. It may not entail a contractual arrangement with one other person of the opposite sex. Indeed, it may entail same-sex partnerships or arrangements with multiple spouses. For instance, polygamy exists in many Muslim and African countries, including some of those in Priority Three.<sup>87</sup> Polyandry, where a woman takes two or more husbands at the same time, accounts for up to one-third of all marriages (in the westernized conception) in Africa and is in fact increasing in urban cities and by the choice of women, who may view it as a means of extended support and freedom of movement.<sup>88</sup> Such fluidity finds dissonance in U.S. refugee law, a locus of cultural friction where differing interpretations of relationships result in the construction or deconstruction of categories. This is evidenced in the category of spouse.

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<sup>85</sup> Holland, *supra* note 3, at 1651.

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

<sup>87</sup> See, e.g., MIRIAM KOKTVEDGAARD ZEITZEN, POLYGAMY: A CROSS-CULTURAL ANALYSIS 157, 201–02 (2008) (discussing the widespread practice of polygamy in sub-Saharan Africa); Nadjma Yassari & Mohammed Hamid Saboory, Sharia and National Law in Afghanistan, in SHARIA INCORPORATED: A COMPARATIVE OVERVIEW OF THE LEGAL SYSTEMS OF TWELVE MUSLIM COUNTRIES IN PAST AND PRESENT 305–06 (Jan Michiel Otto ed., 2010) (noting that in Afghanistan, polygamy is permissible and seen as less of a social stigma than divorce); I. E. Pogrebov, *Prevalence and Assessment of Polygamy in Uzbekistan*, 47 RUSS. SOC. SCI. REV. 57, 58 (2006) (noting that in Uzbekistan, polygamy has become widespread); Elizabeth Heger Boyle & Ahmed Ali, *Culture, Structure, and the Refugee Experience in Somali Immigrant Family Transformation*, 48 INT’L MIGRATION 47, 49 (2009) (noting that the illegality of polygamy in U.S. immigration and refugee law “forces some [Somali] refugees to make changes in family structure and renegotiate family roles”). See generally Claire A. Smearman, *Second Wives’ Club: Mapping the Impact of Polygamy in U.S. Immigration Law*, 27 BERKELEY J. INT’L LAW 382, 383 (2009) (noting that “polygamy has been a bar to admission to the United States since the Immigration Act of 1891”).

<sup>88</sup> Ifi Amadiume, *Family and Culture in Africa*, in A COMPANION TO GENDER STUDIES 357, 364 (Philomena Essed et al. eds., 2009).

USCIS follows U.S. state family and criminal laws in recognizing only one contractually created spousal relationship at one time.<sup>89</sup> To sanction polygamous arrangements in the immigration and refugee context but not the domestic context would be poor policy and lawmaking. Yet the assumption in American immigration and refugee law that there can be only two parents of a child is contrary to developments in domestic law, such as family law,<sup>90</sup> which also allows for more a liberal view towards non-biological parents. In traditional English common law, Lord Mansfield's Rule stipulated that a husband obtained paternity of a child born to his wife during the marriage, regardless of actual paternity.<sup>91</sup> Though the strict rule has been overturned in the U.S.,<sup>92</sup> family law statutes, court decisions, and policies still often presume paternity in order to preserve familial and social stability and achieve equitable outcomes.<sup>93</sup> Even with DNA testing, family law uses doctrines such as equitable adoption and estoppel to prevent a parent from neglecting his or her duty to support a non-biological child.<sup>94</sup>

Courts will also invoke the Constitution to grant recognition of non-biological family members in the U.S. In *Moore v. City of East Cleveland*, the Supreme Court held that a city ordinance restricting housing to a single nuclear family unconstitutionally denied protection to a grandmother as it violated the Due Process Clause of the Fourteenth Amendment.<sup>95</sup> Justice Powell, writing for the majority, wrote that, "Ours is by no means a tradition limited to respect for the

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<sup>89</sup> See e.g., 8 U.S.C.A. § 1101(a)(35) ("The terms 'spouse', 'wife', or 'husband' do not include a spouse, wife, or husband by reason of any marriage ceremony where the contracting parties thereto are not physically present in the presence of each other, unless the marriage shall have been consummated"). See also Form DS-7656, *supra* note 55; Form I-730, Refugee/Asylee Relative Petition, available at <http://www.uscis.gov/files/form/i-730.pdf>, which use "spouse" in the singular; Smearman, *supra* note 87.

<sup>90</sup> See, e.g., *In re M.C.*, 123 Cal. Rptr. 3d 856 (Ct. App. 2011) (finding that child had three presumed parents).

<sup>91</sup> *Jack v. Jack*, 796 S.W.2d 543, 547 (Tex. Ct. App. 1990) (citing *Goodnight v. Moss*, 98 Eng.Rep. 1257, 1258 (1777)).

<sup>92</sup> *Serafin v. Serafin*, 258 N.W.2d 461, 462 (Mich. 1977).

<sup>93</sup> Villiers, *supra* note 6, at 262 (citing Melanie P. Jacobs, *My Two Dads: Disaggregating Biological and Social Paternity*, 38 ARIZ. ST. L.J. 809, 855 (2006)); See also UNIF. PARENTAGE ACT § 4(a) (2002).

<sup>94</sup> Villiers, *supra* note 6, at 262–63.

<sup>95</sup> *Moore v. City of East Cleveland*, 431 U.S. 494, 511–12 (1977).

bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition.”<sup>96</sup>

Courts will also invoke the Equal Protection Clause of the Fourteenth Amendment to overturn statutes that deny U.S. parents the opportunity to develop a parent-child relationship. For example, the Arizona Court of Appeals held that a biological mother was unconstitutionally denied the ability to prove her legal maternity in a surrogate parentage statute, whereas biological fathers had presumed legal paternity.<sup>97</sup> Agreeing with the trial court’s concern that the “current law could leave a child without any mother,”<sup>98</sup> the Court held that a mother genetically related to a child should have the equal opportunity to prove her legal maternity and develop the parent-child relationship.<sup>99</sup>

Even though courts will often look towards biology to establish filiation, parental intent and conduct can also, in certain instances, carry strong evidential weight.<sup>100</sup> For example, in *K.M. v. E.G.*, the Supreme Court of California held that a woman who donated her eggs so that her former lesbian partner could bear children through *in vitro* fertilization was a parent of those children, even though she signed a consent form relinquishing any future claims or responsibilities to the children.<sup>101</sup> The Court held that intent governed: a “woman who supplies ova to be used to impregnate her lesbian partner, with the understanding that the resulting child will be raised in their joint home, cannot waive her responsibility to support that child . . . [or] relinquish her parental rights.”<sup>102</sup>

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<sup>96</sup> *Id.* at 504.

<sup>97</sup> *Soos v. Super. Ct. ex rel. Cnty. of Maricopa*, 897 P.2d 1356, 1361 (Ariz. Ct. App. 1994); *see also J.R. v. Utah*, 261 F.Supp.2d 1268, 1296 (D. Utah, 2002).

<sup>98</sup> *Soos*, 897 P.2d at 1358.

<sup>99</sup> *Id.*

<sup>100</sup> *See, e.g., Steven v. Matthew*, 39 Cal. Rptr. 2d 535, 539 (Ct. App. 1995) (for the purposes of custody and visitation rights, a child’s social relationship with a non-biological father can trump the relationship with his biological father). There are problems associated with an intent-based approach to parentage, such as proving intention and the potential for a “battle of the intents” where parents may have conflicting “true” intents.

<sup>101</sup> *K.M. v. E.G.*, 117 P.3d 673, 675 (Cal. 2005).

<sup>102</sup> *Id.* at 682.

Whether through intent and conduct, equitable estoppel, or another doctrine, courts and legislators are demonstrably comfortable with letting equity and sociological understandings of the family trump genetics and biological understandings if it is in the best interests of the child and promotes family unity and social stability. But for family members seeking reunification under Priority Three, judicially-enforced protections under the Constitution are limited. Immigration and refugee law is within the purview of Congress, not the judiciary, and the rights of non-U.S. citizens, especially refugees abroad, are restricted.<sup>103</sup> The double standard used to determine a family—by applying a culturally homogenous, monogamous, genetic conception of family on refugees, while U.S. family law applies a more flexible, liberal conception to its “own” families—perverts principles of cultural diversity, dignity, human rights, and fundamental freedoms applicable to all persons.<sup>104</sup> The disruption of the family unit is one of the most disturbing outcomes of the revised Priority Three. Another troubling outcome is the emergence of the refugee’s body as a site of

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<sup>103</sup> See discussion *infra* Part 4B. Non-U.S. citizens within U.S. territory possess certain rights. See David Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights as Citizens?*, 25 T. JEFFERSON L. REV. 367, 369 (2003) (“In particular, foreign nationals are generally entitled to the equal protection of the laws, to political freedoms of speech and association, and to due process requirements of fair procedure where their lives, liberty, or property are at stake.”). However, refugees not on U.S. soil have few rights. See Brian G. Slocum, *The War on Terrorism and the Extraterritorial Application of the Constitution in Immigration Law*, 84 DENV. U. L. REV. 1017, 1023 (2007).

[A]n alien seeking admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative . . . [H]owever, once an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly.

*Id.* (citing *Landon v. Plasencia*, 459 U.S. 21, 32 (1982)).

<sup>104</sup> U.N. ESCO, 33d Sess., 33 C/Resolution 15, at 77 (Oct. 3–21, 2005), available at <http://unesdoc.unesco.org/images/0014/001461/146180e.pdf> [hereinafter Bioethics Declaration] (“The importance of cultural diversity and pluralism should be given due regard. However, such considerations are not to be invoked to infringe upon human dignity, human rights and fundamental freedoms . . .”). See also Jan Helge Solbakk, *Fortress Europe: DNA-testing, Ethics and Family Reunification*, GLOBALISING EUROPEAN BIOETHICS EDUCATION PAPERS, available at <http://www.gleube.eu/papers/fortress-europe-dna-testing-ethics.htm>.



evidence to be read by those holding power over whether an application should be approved.

### C. The Body as a Site of Evidence and Truth, and Genetic Scripture Eisegesis

The geneticization<sup>105</sup> of the family is a consequence of genetic essentialism, a belief that “reduces the self to a molecular entity, equating human beings, in all their social, historical, and moral complexity, with their genes.”<sup>106</sup> It is pronounced in the immigration and refugee context. While biomedical and social sciences have demonstrated that human beings are complex entities coproduced by biology, society, culture, and the environment, the uninhibited adoption of required DNA testing by the state to establish biological family relationship risks making the refugee’s body the primary determinant of truth, understanding, and existence.

When DNA becomes the essential condition for establishing a “legitimate” child, spouse, or parent, it crosses the boundary of science and technology into a cultural narrative of acceptable pillars of identity. Those whose bodies reveal untruth are deemed by the state to be socially illegitimate and unacceptable for family reunification. This imposed fractionalizing of the refugee family unit, re-victimizing of refugees, dehumanizing of identity, and spiraling down to the molecular level reflects more than all else entrenched psychological biases to etiologically make sense of complex sociopolitical worlds.<sup>107</sup> Reductions to the molecular level flatten irreducible complexities and simultaneously encourage an eisegetical interpretation of genetic scripture where life’s complex problems, such as determining who belongs to a family, are amenable to genetic solutions.

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<sup>105</sup> Abby Lippman, *Prenatal Genetic Testing and Screening: Constructing Needs and Reinforcing Inequities*, 17 AM. J.L. & MED. 15 (1991). See also Henk A.M.J. ten Have, *Genetics and Culture: The Geneticization Thesis*, 4 MED., HEALTH CARE & PHIL. 295 (2001).

<sup>106</sup> DOROTHY NELKIN & M. SUSAN LINDEE, *THE DNA MYSTIQUE: THE GENE AS A CULTURAL ICON* 2 (2004); Holland, *supra* note 3, at 1654.

<sup>107</sup> Ilan Dar-Nimrod & Steven J. Heine, *Genetic Essentialism: On the Deceptive Determinism of DNA*, 137 PSYCHOL. BULL. 800 (2011). See also Eric Luis Uhlmann et al., *Blood is Thicker: Moral Spillover Effects Based on Kinship*, 124 COGNITION 239, 242 (2012); Johannes Keller, *In Genes We Trust: The Biological Component of Psychological Essentialism and Its Relationship to Mechanisms of Motivated Social Cognition*, 88 J. OF PERSONALITY & SOC. PSYCHOL. 686 (2005).

Anthropologists Didier Fassin and Miriam Ticktin have each noted that European and American immigration authorities are now looking to the body, rather than words, as the main source of truth and legibility.<sup>108</sup> This is a biopolitical frame distinct from that of sociologists Nikolas Rose and Carlos Novas, whose work describes a new world of the “political economy of hope” and the “biological citizen” who individualizes health action and responsibility and sees biology as manipulable.<sup>109</sup> For refugees and family members subject to required DNA testing, their somatic self is not open to shaping and reshaping; their biology is indeed destiny. It is a “central field of action” and “one of the few sources of value” for refugees.<sup>110</sup> Unlike the biological citizen and unlike the highly skilled or wealthy immigrant, the refugee’s body is rendered immutable so as to be deciphered and interpreted in techno-scientific logics by the state. Biological measures are seen to reveal the refugee’s very essence. As Professor Ticktin writes:

The body is a source of authentication in situations where the subject is conceived as unable to provide a reasoned, spoken truth. . . . [T]ruth for those managed by the humanitarian government is similarly found in ‘primordial landscape of the racialized body’ . . . both designating and producing them as Other, as beyond and outside reason. However, the racialized body takes shape in new terms, as immutable biology.<sup>111</sup>

This essentialist “truth ordeal,”<sup>112</sup> where only biological measures speak the ultimate truth,<sup>113</sup> reflects not just a political economy of hope

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<sup>108</sup> Miriam Ticktin, *How Biology Travels: A Humanitarian Trip*, 17 *BODY & SOC’Y* 139 (2011) [hereinafter *How Biology Travels*]. See generally MIRIAM TICKTIN, *CASUALTIES OF CARE: IMMIGRATION AND THE POLITICS OF HUMANITARIANISM IN FRANCE* (2011); DIDIER FASSIN, *HUMANITARIAN REASON: A MORAL HISTORY OF THE PRESENT* 109–29 (2012) [hereinafter *HUMANITARIAN REASON*].

<sup>109</sup> Nikolas Rose & Carlos Novas, *Biological Citizenship*, in *GLOBAL ASSEMBLAGES: TECHNOLOGY, POLITICS, AND ETHICS AS ANTHROPOLOGICAL PROBLEMS* 439 (Aihwa Ong & Stephen J. Collier eds., 2005). See also NIKOLAS ROSE, *THE POLITICS OF LIFE ITSELF: BIOMEDICINE, POWER AND SUBJECTIVITY IN THE TWENTY-FIRST CENTURY* (2007).

<sup>110</sup> *How Biology Travels*, *supra* note 108, at 144.

<sup>111</sup> *Id.* at 153.

<sup>112</sup> *HUMANITARIAN REASON*, *supra* note 107, at 109.

<sup>113</sup> *How Biology Travels*, *supra* note 108, at 153 (describing how a New York City immigration lawyer finds that “[O]ne almost needs to have physical evidence or a doctor’s testimony in order to get one’s claim accepted” and “that now that

as Professors Rose and Novas describe, but also a hegemony of fear by both refugees and the U.S. government.<sup>114</sup> A refugee family must place their faith in the techne of science to determine blood lines in order to fit into the legally and politically permissible category of family. As oral testimony and paper documentation are increasingly unsatisfactory evidence of a bona fide relationship, refugees and family members are transmogrified into *homines sacri*<sup>115</sup>—bare lives subject to the political control and biopower of the state.

Required DNA testing in Priority Three processing produces another adverse effect. The long-standing principle of humanitarianism is “genewashed” by an eisegetical transformation of evidence. Immigration documents may come to be interpreted less in accordance with the context and meaning of the applicant, that is, an exegetical interpretation which reads out of the documentary and oral evidence what the refugee intends to convey. One would understandably suspect a continuation of this prior state because DNA is the quintessential exegetic object: it is treated as accurate, prophetic, and unambiguous. In other words, “DNA doesn’t lie” and “DNA is science—it cannot be faked.” Yet DNA testing technology is governed by human agents. A detached, scientific, and objective reading of DNA to establish a legitimate family is itself a subjective decision that accepts certain understandings and forecloses others. The state can thus impose its interpretation on the applicant’s molecularly scripted body, reading into and out of the body what it wants to find. Positivistic interpretations of our basic building blocks of life do no justice to the mythological and cultural significance they import, nor to the wider symbolic and deeply engrained values each culture ascribes to the body, psyche, and soul.

Three consequences arise from required DNA testing. First, the interpretive and evidential turn towards the molecular level creates a gulf between what is seen—acts of humanitarianism, justifiable prevention of fraud, increased opportunity for reunification of certain families—and what may be intended—highly contestable and political actions of decreeing who is and is not part of the family. Second, the

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immigrants and refugees have access to medical services through humanitarian NGOs, judges expect ‘richer evidence.’”).

<sup>114</sup> See *infra* Part D.

<sup>115</sup> GIORGIO AGAMBEN, *HOMO SACER: SOVEREIGN POWER AND BARE LIFE* (Werner Hamacher & David E. Wellbery eds., Daniel Heller-Roazen trans., Stanford University Press, 1998) (1995).

focus and over-reliance on the molecular can blind other assemblages—the non-somatic testimony comprised of documentary and oral evidence—that may be equally if not more important.<sup>116</sup> Third, intermediating laboratories, USCIS, and the Bureau can disculpate themselves from contestable agency by transforming DNA into a locus of responsibility, that is, an externalization-through-internalization. The AABB accredited scientific lab and USCIS and the Bureau interpret the DNA sample according to their own categorical presuppositions, but the cause of the outcome, whether admittance or denial, is placed in the truth-telling DNA, not in any individual, laboratory, or government body. By reading into the body certain understandings, but holding DNA out as the objective standard bearer of ultimate truth, responsibility for latent political decisions or an adverse finding is shifted from the entity requesting DNA or performing DNA analysis to the individual embodying it. “DNA doesn’t lie” is not merely a refrain of putative scientific accuracy, but a removal of agential blame for traumatic consequences.

#### **D. Of Risk Society and Hemony**

Countries instituted DNA testing in family reunification cases in the early 1990s,<sup>117</sup> coinciding with the rising availability and reliability of testing technology. But if the original reason for DNA testing in this early era was to prevent fraud or help adjudicate particular claims that could not otherwise be resolved with suspicious, unreliable, or unavailable documentary evidence, as evidenced by the analysis in the Cronin memorandum from 2000, recent international events and ideological and political developments have given new impetus for its widespread adoption.<sup>118</sup> That new impetus rests on concerns of national security and risk.

National security discourse regarding immigrants and refugees is historically situated in the U.S., dating back to the Chinese exclusion

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<sup>116</sup> See Aizenman, *supra* note 11. See also Taitz et al., *supra* note 78, at 29 (discussing how authorities have been accused of rejecting documentation they would have previously accepted now that DNA technology has become available).

<sup>117</sup> See, e.g., Aliens Act, (Act No. 301/2004), §§ 65–66 (Fin.) (allowing DNA testing to establish family ties since 1991).

<sup>118</sup> Zabjek, *supra* note 2 (noting that “[I]n the early 1990s, Canadian visa officers were increasingly seeing suspicious applications, raising concerns about the entire sponsorship process”).

statutes in the late nineteenth century and continuing through the anarchist fears of the early twentieth century and the Red Scare of 1919–1921 and 1947–1957.<sup>119</sup> Past immigration laws and policies were explicitly racist and interwoven with eugenical discourses. Today, the laws and policies are framed as responses to protean, systemic threats to the nation.<sup>120</sup> Emily Holland documents the historic securitization of migration:

Since WWII, and well into the Cold War, politicians and members of the media have characterized refugees and other migrants as a threat to countries' political and economic stability, cultural values, physical security, and diplomatic relations. In the 1980s, claims arose regarding 'bogus refugees': individuals who had achieved refugee status but did not meet the immigration requirements to qualify as refugees. In the 1990s, refugees became increasingly associated with system abuse and fraud.<sup>121</sup>

"Fortress America" is evidently an old concept, but there is a perceptible mutation in the placement of risk and criminality. Each is branded no longer explicitly on race, but now tacitly on culture, such as "suspicious" Somalis. Fortress America's risk discourse has been exacerbated by terrorist attacks in the new millennium. As political scientist Ariane Chebel d'Appollonia notes:

[N]either the United States nor European countries dramatically changed their policy options in the aftermath of 9/11. Rather, they simply strengthened existing measures or implemented reforms. Interestingly, the 'new' threats were not perceived as an incentive for policy innovation, but rather as the a posteriori legitimization of previous, failed policies. Such a reflexive tendency to do 'more of the same' raises serious concerns about the relevance of both the premises and stated objectives of current immigration policies.<sup>122</sup>

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<sup>119</sup> Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1832–34 (2007); Ruchir Patel, *Immigration Legislation Pursuant to Threats to US National Security*, 32 DENV. J. INT'L L. & POL'Y 83, 84–86 (2003).

<sup>120</sup> Holland, *supra* note 3, at 1670.

<sup>121</sup> *Id.*

<sup>122</sup> ARIANE CHEBEL D'APPOLLONIA, *FRONTIERS OF FEAR: IMMIGRATION AND INSECURITY IN THE UNITED STATES AND EUROPE* 7 (2012). *See also* Catarina Kinnvall & Paul Nesbitt-Larking, *Securitising Citizenship: (B)ordering Practices and Strategies of Resistance*, 27 GLOBAL SOC'Y 337, 347 (2013) ("[T]he securitisation of borders is not simply about manipulating and mobilising opinion but also describes the process through which individuals and

Thus, in the aftermath of 9/11, there was an intensification of securitization measures against immigrants and refugees. Among the flurry of legislation passed in the aftermath of 9/11, the PATRIOT Act promoted further biometric testing to prove individuals' identities<sup>123</sup> and abolished the Immigration and Naturalization Services, which was absorbed into departments handling national security and health: Homeland Security (and USCIS, created in March 2003) and the Department of Health and Human Services.<sup>124</sup> In the aftermath of the bombings in Madrid on March 11, 2004 and London on July 7, 2005, governments around the world further strengthened securitization measures,<sup>125</sup> prompting fears among refugees that their treatment within refugee camps would worsen, and that admission to safe haven countries would plummet.<sup>126</sup> Such fears were substantiated, as refugee

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groups struggle to cope with uncertainty and insecurity/ies. This mode of powerlessness and anxiety clearly predates 9/11, but it has also created a foundation for emerging responses to this event and others like it, as such responses have thrived on the sensibility of vulnerability.").

<sup>123</sup> Holland, *supra* note 3, at 1670.

<sup>124</sup> *Id.*

<sup>125</sup> D'APPOLLONIA, *supra* note 122, at 103.

<sup>126</sup> See, e.g., Marc Lacey, *Letter From Kenya: London Attacks Raise Anxiety in a Far Place*, INT'L HERALD TRIB., Aug. 3, 2005, at 2, available at: [http://www.nytimes.com/2005/08/02/world/africa/02iht-journal.html?\\_r=0](http://www.nytimes.com/2005/08/02/world/africa/02iht-journal.html?_r=0) (quoting a Somali refugee in Kenya on rising anxiety after the terrorist attacks that repercussions will be felt by those of east African origin: "Sometimes we don't feel like human beings . . . [w]e aren't dead, but we're not living either. We're suspended in the air."). The Boston Marathon bombings on April 15, 2013 have also prompted questions about whether refugee and asylum programs should be revamped because of weaknesses in security screening. See Ashley Parker & Michael D. Shear, *Senator Says Boston Attack Should Factor in Immigration Debate*, N.Y. TIMES, Apr. 20, 2013, at A13, available at: <http://www.nytimes.com/2013/04/20/us/politics/senator-says-boston-bombing-should-be-factor-in-immigration-debate.html> (quoting a senior Republican on the Senate Judiciary Committee: "Given the events of this week, it's important for us to understand the gaps and loopholes in our immigration system . . . How can we beef up security checks on people who wish to enter the U.S.?"); Victor Davis Hanson, *Confronting the Dreaded D-word*, WASH. TIMES, Apr. 26, 2013, at B1, available at <http://www.washingtontimes.com/news/2013/apr/26/confronting-the-dreaded-d-word/> (arguing that the government should be "disinclined to grant asylum to 'refugees' from war-torn Islamic regions and then allow them periodically to go back and forth from their supposedly hostile homelands").

admissions to the U.S. after 9/11 have remained far below the pre-9/11 admission levels.<sup>127</sup>

There was also a shift in global discourse underlying the justifications for DNA testing to establish a family relationship. The Khatri memorandum from 2006 considered three benefits of instituting required DNA testing to verify an alleged biological relationship.<sup>128</sup> The first one listed was that it would be a benefit to national security “by deterring fraud and bringing scientific certainty to USCIS adjudications.”<sup>129</sup> Similarly, a 2008 CRS Report for Congress on immigration fraud stated that, “Since the terrorist attacks of September 11, 2001 the policy priorities have centered on document integrity and personal identification with a sharp focus on intercepting terrorist travel and other security risks.”<sup>130</sup>

As noted by social scientists and legal scholars, security is a social construct that is malleable temporally and geographically within and outside a given community. It is not that security threats are purely incorporeal, but rather that a multiplicity of issues can be perceived and framed as threats to human lives and responded to politically.<sup>131</sup> The convergence of fraud and criminality or security discourses is becoming more pronounced,<sup>132</sup> a symptom of what sociologist Ulrich

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<sup>127</sup> Holland, *supra* note 3, at 1671.

<sup>128</sup> Khatri memorandum, *supra* note 41, at 5.

<sup>129</sup> *Id.* at 5.

<sup>130</sup> WASEM, *supra* note 3, at 10.

<sup>131</sup> See, e.g., PETER HOUGH, UNDERSTANDING GLOBAL SECURITY 10 (2d ed. 2008) (discussing security as a human condition that should be defined in behavioral terms); Georgios Karyotis, *Securitization of Migration in Greece: Process, Motives, and Implications*, 6 INT’L POL. SOC. 390, 390 (2012) (discussing how securitization of migration in Greece was not an inevitable result of a public order or economic crisis, but rather primarily a crisis and threat of the “Other,” constructed by political and security elites as undesirable, dangerous, and inferior); Karsten Friis, *From Liminars to Others: Securitization Through Myths*, 7 PEACE AND CONFLICT STUD. 1, 3 (2000) (discussing the Copenhagen School of security studies that rejects security as something objectively “given”, but regarding it rather as a social process applicable to any perceived value and any chosen referent object). See also Kinnvall & Nesbitt-Larking, *supra* note 122, at 359 (“Those who live within the cracks of the securitised order, who are designated other and outsider, or the enemy within, find themselves dislocated by the reconfigurations of borders that take place as regimes respond to uncertainty and threat.”).

<sup>132</sup> See, e.g., Anna Pratt & Mariana Valverde, *From Deserving Victims to ‘Masters of Confusion’: Redefining Refugees in the 1990s*, 27 CANADIAN J. SOC. 135, 150

Beck has termed “risk society.”<sup>133</sup> In these societies, “the consequences and successes of modernization become an issue with the speed and radicality of processes of modernization.”<sup>134</sup>

Two recent European examples epitomize such legal and sociopolitical alterations. In October 2007, the French Parliament signed a new immigration bill, an “Act relating to the control of immigration, integration and asylum.”<sup>135</sup> Article Thirteen of the bill would have allowed a consular agent expressing any “serious doubt about the authenticity” of the legitimacy of a claimed relation between an applicant and a family member living in France to compel the applicant to undergo a DNA test to prove a genetic relation to the applicant’s mother.<sup>136</sup> The bill limited the test to applicants from twenty specific countries, the majority of which were African.<sup>137</sup> In November 2007, the bill passed scrutiny in the country’s highest constitutional court.<sup>138</sup> The court ruled that because the DNA test was voluntary, it did not violate French law—even though the country’s Civil Code states that studies of a person’s genetic information can only be used with consent for medical or scientific research, or by

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(2002) (discussing measures adopted by the Canadian government in the mid-1990s to deal with undocumented Somali refugees that were driven in part by concerns of fraud); Miranda Devine, *Foiled by a Ship of Frauds*, SUNDAY TEL. (Austl.), May 6, 2012, at 49 (discussing how claims of widespread fraud in immigration visa applications have “implications for national security”).

<sup>133</sup> ULRICH BECK, *RISK SOCIETY: TOWARDS A NEW MODERNITY* (Mark Ritter trans., Sage Publications 1992) (1986) [hereinafter *RISK SOCIETY*]; ULRICH BECK, *WORLD AT RISK* (Ciaran Cronin trans., Polity, 2007) [hereinafter *WORLD AT RISK*].

<sup>134</sup> *WORLD AT RISK*, *supra* note 133, at 6.

<sup>135</sup> See Conseil constitutionnel [CC] [Constitutional Court] decision No. 2007-557DC, Nov. 15, 2007, J.O. 19001 (Fr.), available at [http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank\\_mm/anglais/a2007557dc.pdf](http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/a2007557dc.pdf) [hereinafter Constitutional Court decision].

<sup>136</sup> Roya Hajbandeh, *‘France, Love it or Leave it’: New French Law Restricts Family Reunification*, 27 WIS. INT’L L.J. 335, 343 (2009). See also Tera Rica Murdock, *Whose Child is This?: Genetic Analysis and Family Reunification Immigration in France*, 41 VAND. J. TRANSNAT’L L. 1503 (2008).

<sup>137</sup> Hajbandeh, *supra* note 136, at 343.

<sup>138</sup> See Constitutional Court decision, *supra* note 135 (The Constitutional Court ruled that one section of the bill, unrelated to genetic testing, was unconstitutional).



court order.<sup>139</sup> While labeled as “disgusting” by a member of then President Nicolas Sarkozy’s own cabinet and as creating “an environment of racial legitimization” by the UN Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance,<sup>140</sup> the majority of the French public approved DNA testing.<sup>141</sup> In late 2009, however, the government scrapped the DNA test provision because of logistical problems and concerns about France’s image abroad.<sup>142</sup>

In 2009, the U.K. Border Agency<sup>143</sup> launched its Human Provenance Pilot Project, which sought to determine the current national origin of refugees.<sup>144</sup> From September 2009 until March 2010, save for a six-week suspension due to early criticisms, the project

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<sup>139</sup> CODE CIVIL [C. CIV.] art. 16-10 (Fr.) (“An examination of the genetic particulars of a person may be undertaken only for medical purposes or in the interest of scientific research.”). *See also* CODE CIVIL [C. CIV.] art. 16-11 (Fr.) (“The identification of a person owing to his genetic prints may only be searched for within the framework of inquiries or investigations pending judicial proceedings or for medical purposes or in the interest of scientific research.”) (Legifrance trans.).

<sup>140</sup> *See* Meaghan Emery, *Europe, Immigration and the Sarkozian Concept of Fraternité*, 21 FRENCH CULTURAL STUD. 115, 124 (2010).

<sup>141</sup> An OpinionWay poll conducted on October 11, 2007 found that 56 percent supported DNA testing of immigrants. *See* Sally Marthaler, *Nicolas Sarkozy and the Politics of French Immigration Policy*, 15 J. EUR. PUB. POL’Y 382, 392 (2008). Another newspaper poll found that 49 percent supported the test, while 43 percent were opposed to it. *See* Hajbandeh, *supra* note 136, at 345.

<sup>142</sup> *France Stops Controversial DNA Testing Law*, UNITED PRESS INTERNATIONAL (Paris), Sept. 15, 2009, *available at* [http://www.upi.com/Top\\_News/Special/2009/09/15/France-stops-controversial-DNA-testing-law/UPI-16931253055189](http://www.upi.com/Top_News/Special/2009/09/15/France-stops-controversial-DNA-testing-law/UPI-16931253055189) (quoting then-Interior Minister Eric Besson as saying that the provision “in the end . . . serves no purpose other than to bring the image of France into disrepute” and “the genetic samples should be taken by a doctor . . . [but] our consulates aren’t equipped for that [and] we’d need to invest a lot of resources for a very marginal interest”).

<sup>143</sup> On March 26, 2013, the British government announced that the U.K. Border Agency would be abolished and its work returned to the Home Office, the ministerial department responsible for immigration. *See UK Border Agency ‘Not Good Enough’ and Being Scrapped*, BBC NEWS, Mar. 26, 2013, *available at* <http://www.bbc.co.uk/news/uk-politics-21941395>.

<sup>144</sup> Human Provenance Pilot Project: Resource Page, GENOMICS NETWORK, <http://www.genomicsnetwork.ac.uk/cesagen/events/pastevents/genomicsandidentitypoliticsworkstream/title,22319,en.html> (last visited Apr. 30, 2013).

tested 100 individuals' mitochondrial DNA and Y chromosome, conducted analyses of single-nucleotide polymorphisms (SNPs), and tested isotopic ratios of elements such as hydrogen, oxygen, carbon, and nitrogen found in hair and fingernails.<sup>145</sup> The Border Agency hypothesized that through this information, they could determine the nationality of refugees, and specifically, if they were from Somalia rather than from Kenya or another neighboring country.<sup>146</sup> Scientists wrote in leading journals from the start of the project, condemning it as ethically and scientifically flawed.<sup>147</sup> The U.K.'s government advisory panel, the Human Genetics Commission, recommended that the project be disbanded.<sup>148</sup> Leading geneticists in the U.K. also questioned how the project was ever approved.<sup>149</sup> In June 2011, the Border Agency tersely announced that it was ending the program and that no genetic information would be released.<sup>150</sup>

While both of these examples may be culturally contextualized, they speak to several common threads that transcend geographic borders. First, they highlight how fraud is situated within a national security discourse that equates it with risk. The rhetoric of fraud, security threat, and risk provides a popular motive for governments to root out potential terrorists who could slip through the immigration

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<sup>145</sup> Editorial, *Genetics without Borders*, 461 NATURE 697 (2009).

<sup>146</sup> *Id.*

<sup>147</sup> See generally *id.*; John Travis, *Scientists Decry Isotope, DNA Testing of 'Nationality'*, 326 SCIENCE 30 (2009); David J. Balding et al., *Genetic and Isotopic Analysis and the UK Border Agency*, SIGNIFICANCE, June 2010, at 58; Peter J. Aspinall & Martha Chinouya, *Determining the Identity of 'Black Africans' in UK Population and Health Policy Contexts: Ethical Issues and Challenges*, 17 SOC. IDENTITIES 255 (2011).

<sup>148</sup> Human Genetics Commission Secretariat, *The UK Border Agency's Human Provenance Pilot Project*, Paper HGC09/P25 (2009).

<sup>149</sup> Balding et al., *supra* note 147, at 61 ("We are aware of no university researchers who were consulted, and none have subsequently come forward."). See also *Genetics without Borders*, *supra* note 145, at 697 ("The border agency says that the project has undergone scientific peer review, although it is difficult to say by whom . . ."); Rebecca Hill & Mark Henderson, *DNA Test for Bogus Refugees Scrapped as Expensive Flop*, TIMES (London), June 17, 2011, at 32 (quoting Professor Sir Alec Jeffreys of the University of Leicester as stating that, "The notion you could use DNA to help identify nationality is nonsensical: nationality is lines on a map which genes don't exactly obey.").

<sup>150</sup> Hill & Henderson, *supra* note 149; Holland, *supra* note 3, at 1678.

and refugee system.<sup>151</sup> In this “risk society,” the management of risk has significant bearings on the law’s power to act as if in a perpetual “state of exception”<sup>152</sup> and to intervene *through* persons.<sup>153</sup> Similarly, the examples show how states are increasingly (re)asserting their sovereignty over border control, often to the detriment of the human rights and desires of individuals who wish to reunite with their family. The introduction of genetics into the field of immigration and refugee law exacerbates the already fraught tension between politics and human rights.

The examples also illustrate how states place ever greater faith in the objectivity of science. DNA testing is understandably treated by policymakers and immigration officials as scientific and accurate. But “scientific” and “accurate” often dangerously elide with “objective” in determining truth—even if the science has not yet caught up to the purported aims of the immigration and refugee policy, such as pinpointing national origins. Relatedly, DNA testing is viewed as a morally neutral technology. While many scholars have contested the supposed moral neutrality of technology,<sup>154</sup> others go further and question the motives of the actors who produce and use technology,<sup>155</sup> including in politically charged fields like immigration. In particular, one can unpack the latent dilemmas that are created by using genetic markers to determine what constitutes a family, or what immigration law expert Professor Janice Villiers calls the potential replacement of “social relationships with genetic relationships.”<sup>156</sup> DNA testing in the immigration and refugee context may be an example of what the

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<sup>151</sup> Holland, *supra* note 3, at 1670–72.

<sup>152</sup> GIORGIO AGAMBEN, *STATE OF EXCEPTION* (Kevin Attell trans., University of Chicago Press, 2005) (2003); *CONTEMPORARY STATES OF EMERGENCY: THE POLITICS OF MILITARY AND HUMANITARIAN INTERVENTIONS* (Didier Fassin & Mariella Pandolfi eds., 2010).

<sup>153</sup> *RISK SOCIETY*, *supra* note 133; RICHARD V. ERICSON & KEVIN D. HAGGERTY, *POLICING THE RISK SOCIETY* (1997).

<sup>154</sup> *See, e.g.*, JACQUES ELLUL, *THE TECHNOLOGICAL SOCIETY* (John Wilkinson trans.) (1964); Henk A.M.J. ten Have, *Genetics and Culture: The Geneticization Thesis*, 4 *MED., HEALTH CARE & PHIL.* 295 (2001).

<sup>155</sup> *See, e.g.*, Bruno Latour, *Morality and Technology: The End of the Means*, 19 *THEORY, CULTURE & SOC’Y* 247 (Couze Venn trans.) (2002); Peter Kroes, *Technical Artefacts: Creations of Mind and Matter: A Philosophy of Engineering Design*, in 6 *PHIL. OF ENGINEERING & TECH.* 163 (2012).

<sup>156</sup> Villiers, *supra* note 6, at 259.

bioethicist, lawyer, and historian Professor Paul Lombardo elsewhere has called “neo-eugenic schemes” treated as a “panacea for social conditions.”<sup>157</sup>

To bring these examples and discussion into the Priority Three context, the U.S. government may be entering a world in which it makes decisions concerning future refugee admissions under conditions of a manufactured, self-inflicted climate of fear. In this environment, compulsory DNA testing is less a humanitarian act to resolve otherwise unclear family relationships and more a response to the *anticipation* of fraud by refugees, staged as a serious national security risk. This is a fundamental shift from the current government policy of DNA testing of immigrants (rather than refugees), which instructs field officers to “not request DNA in an attempt to disprove a relationship,” like requesting “DNA testing between marital partners on suspicion that they are blood relatives.”<sup>158</sup> Now, every Priority Three refugee, viewed as the Other, is a suspect. But even among refugees, certain cultures are singled out, constituting what anthropologist Nadine Naber has termed “a dual process of cultural racism and racialization of national origin.”<sup>159</sup> This is evident in an undated USCIS Senior Policy Council “Options Paper”:

Revelation of [the 2008 DNA pilot test] high fraud rate in Africa raises serious national security concerns. Up until last year, when USCIS began bringing large numbers of Iraqi refugees to the United States, Somalia represented the largest source country for refugee admissions. Screening from this region is important, as evidenced by the 1998 U.S. embassy bombings in Kenya and Tanzania and the fact that Somalia has long been a haven for Al-Qaeda. Adding urgency to the issue is the recent revelation that a naturalized U.S. citizen blew himself up in a suicide bombing in Somalia. The FBI is investigating, and is concerned that young men of Somali origin have departed the United States to fight and train overseas, possibly to return on U.S. passports to carry out terrorist acts here.

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<sup>157</sup> Kristen Philipkoski, *Blaming the ‘Defective’ People*, WIRED, Mar. 26, 2001, available at <http://www.wired.com/science/discoveries/news/2001/03/42567>.

<sup>158</sup> FOREIGN AFFAIRS MANUAL, *supra* note 9, at N4(a).

<sup>159</sup> Nadine Naber, *The Rules of Forced Engagement: Race, Gender, and the Culture of Fear among Arab Immigrants in San Francisco Post-9/11*, 18 CULTURAL DYNAMICS 235, 236 (2006).

Leaving open loopholes that allow potential terrorists, or simply fraudulent applicants, to insert themselves in legitimate family groups . . . threatens our security . . . .

. . .

USCIS must protect the integrity of our immigration system, establish identity early on, and take steps to avoid granting benefits to criminals and terrorists.<sup>160</sup>

The Options Paper does not discuss how conducting DNA tests will prevent terrorism, nor does it provide any evidence to substantiate a link between DNA tests and counter-terrorism. One may question the unsubstantiated and tendentious association of the embassy bombings and al-Qaeda with Somali refugees and the belief that DNA testing is a strong prophylactic for terrorism.

The rhetoric in the Options Paper passage ably illustrates how in our “risk society,” actual harm is decoupled from risk, for “risk means the *anticipation* of catastrophe.”<sup>161</sup> In an age where security is a value placed more highly than freedom and equality, references to open loopholes, urgency, FBI concerns, possible acts of terrorism on U.S. soil, and associations of terrorist attacks with refugees are as a whole compelling enough to justify intrusions on the Other. Threatening “new concepts of war,” where “combatants could be civilians” and “war zones could be our neighborhoods” means “manipulation of the aspiration for family life [cannot be] excluded.”<sup>162</sup> Pernicious persecution must be the new normal in our continuous state of exception: “Once we understand that . . . family migration *may* be exploited for the purpose of terrorism, we understand that immigration laws and policies *have to* be used as a defensive measure.”<sup>163</sup> This

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<sup>160</sup> U.S. CUSTOMS AND IMMIGRATION SERVICES SENIOR POLICY COUNCIL, EXPANDING DNA TESTING IN THE IMMIGRATION PROCESS, *available at* [https://www.eff.org/sites/default/files/filenode/USCIS\\_DNA\\_Senior\\_Policy\\_Council\\_Options\\_Paper.pdf](https://www.eff.org/sites/default/files/filenode/USCIS_DNA_Senior_Policy_Council_Options_Paper.pdf), at 1–3.

<sup>161</sup> WORLD AT RISK, *supra* note 133, at 9.

<sup>162</sup> Liav Orgad, *Love and War: Family Migration in Time of National Emergency*, 23 GEO. IMMIGR. L.J. 85, 126 (2008) (arguing that family migration in time of national emergency should be regulated by establishing a “Presumption of Dangerousness” in the Immigration and Nationality Act, which means that every non-resident enemy alien — or non-resident alien under the rule of states sponsoring terrorism — may present a security risk and is presumed inadmissible, but that the presumption may be refuted in special cases).

<sup>163</sup> *Id.* (emphasis added).

validates Beck's contention that "to the extent that global risks cannot be calculated in accordance with scientific methods and prove to be objects of non-knowing, the cultural perception of global risk—that is, the post-religious, quasi-religious *belief* in its reality—acquires central importance."<sup>164</sup> To everyone's loss, moral and political harm increase, for in the hemonomic order of required DNA testing of the non-criminal refugee (but treated as the pre-judged criminal—or terrorist-to-be), Priority Three inaugurates a neo-eugenical scheme of genetic selection not for the creation of future perfect children, but for future perfect securitized and Americanized refugees.

#### IV. LEGAL CHALLENGES AND HUMAN RIGHTS

In this Part IV, I focus my legal critique on certain areas that are particularly impacted by compulsory DNA testing: consent, privacy, dignity, and discrimination. These areas will be analyzed from multiple legal frameworks. Canadian case law, which is rich in refugee DNA testing jurisprudence, is cited to provide comparative perspective, while international human rights law is discussed extensively as it offers a particularly productive frame of analysis. Refugees are entitled to full enjoyment of their human rights, as recognized in the 1951 Refugee Convention,<sup>165</sup> but these rights consistently rub against competing rights of the federal government, including the sovereign right to control national borders.

##### A. Impacts on Consent, Privacy, and Human Dignity

DNA testing for forensic purposes, unlike whole genome sequencing or comprehensive genetic testing or screening, only

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<sup>164</sup> WORLD AT RISK, *supra* note 133, at 73.

<sup>165</sup> See Convention Relating to the Status of Refugees, pmbl., July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 [hereinafter 1951 Refugee Convention] (stating that "The High Contracting Parties, considering that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination"). The U.S. is not a signatory to the 1951 Refugee Convention but the Senate ratified (with two reservations) the 1967 Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [herein 1967 Refugee Protocol]. See 19 U.S.T. at 6257-58. The Protocol entered into force as to the United States on Nov. 1, 1968. *Id.* at 6257. The 1967 Refugee Protocol incorporates almost all of the 1951 Refugee Convention, but eliminated the temporal and geographic limitations of the latter.

determines identity or familial matching. Testing generally consists of genotypes at a panel of thirteen to twenty-five markers, all of which are short-tandem repeats (STRs).<sup>166</sup> STRs are limited in scope and do not appear to have any known direct positive or negative predictive value for inferring phenotypes like a person's appearance or health.<sup>167</sup> That said, mandatory DNA testing could still violate privacy interests, both in human rights instruments<sup>168</sup> and in domestic legislation and common law for anchor refugees.<sup>169</sup>

Refugees are afforded limited privacy protection with respect to the initial, required collection of DNA. Once anchors and claimed

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<sup>166</sup> See RAPID DNA SYSTEM PIA, *supra* note 58, at 3 (“The initial Rapid DNA prototype uses 13 STR loci to verify parent-child relationships.” . . . “To allow for verification of grandparent/grandchild and sibling relationships, future prototypes will examine 26 loci. Since grandchildren only receive 1/4 of their DNA from a grandparent, twice as many loci are needed to verify that relationship at the same 99.5% likelihood threshold.”).

<sup>167</sup> See generally Sara H. Katsanis & Jennifer Wagner, *Characterization of the Standard and Recommended CODIS Markers*, 58 J. FORENSIC SCI. 169 (2013) (discussing whether genotypes in the criminal law-based Combined DNA Index System are causative or predictive of known phenotypes).

<sup>168</sup> See, e.g., UDHR, *supra* note 68, art. 12; ICCPR 1966, *supra* note 68, art. 17. For consideration of privacy interests in genetic information and DNA samples in the non-criminal and international human rights context, see Elizabeth B. Ludwin King, *A Conflict of Interests: Privacy, Truth, and Compulsory DNA Testing for Argentina's Children of the Disappeared*, 44 CORNELL INT'L L.J. 535 (2011) (discussing right to privacy implications of Argentinean law adopted in 2009 that requires DNA testing of children suspected of being taken from the 30,000 or so “disappeared” during the military junta of 1977–1983, in cases where the raising parents are suspected of having knowingly adopted their children illegally).

<sup>169</sup> Domestic law includes the Fourth and Fourteen Amendments of the U.S. Constitution, the Privacy Act of 1974, and state constitutions, laws, and regulations. For consideration of privacy interests in genetic information and DNA samples in the domestic and criminal context, see *Maryland v. King*, 569 U.S. \_\_\_ (2013), No. 12-207 slip op, at \*28 (2013) (Maryland's DNA Collection Act, which allows DNA collection from persons arrested, but not yet convicted, for crimes of violence and burglary, ruled constitutional under the Fourth Amendment totality of the circumstances balancing test). See also PRESIDENTIAL COMMISSION FOR THE STUDY OF BIOETHICAL ISSUES, PRIVACY AND PROGRESS IN WHOLE GENOME SEQUENCING 68–69 (2012) [hereinafter PRESIDENTIAL COMMISSION] (noting that there is no standard or comprehensive approach to the protection of genetic information in the U.S., and the level of protection afforded to an individual's genetic information differs from state to state).

family members provide a DNA sample, they have no right to consent to limits on its use,<sup>170</sup> a situation distinct from federal and state health information and genetic privacy statutes that afford U.S. nationals (hence including anchor refugees) privacy rights and generally mandate informed consent.<sup>171</sup> It is doubtful that refugees and family members are truly informed about the nature, risks, and benefits of DNA testing or have the ability to refuse testing without providing a legally acceptable justification.<sup>172</sup>

The State Department has provided information about the retention and future use of the DNA sample and results. A Privacy Impact Assessment conducted in November 2011 revealed that personally identifiable information associated with the DNA test and maintained in the Worldwide Refugee Admissions Processing System database includes the date and number of the test, the name of the laboratory, and the test result sheet with genetic marker (allele) information redacted.<sup>173</sup> The samples themselves will not be sent to or kept by the U.S. government,<sup>174</sup> and no genetic information about applicants is

<sup>170</sup> WRAPS PIA, *supra* note 61, at 10.

<sup>171</sup> Health Insurance Portability and Accountability Act, 45 C.F.R. § 160.203 (2002); Genetic Privacy Act, MINN. STAT. § 13.386 (2012).

[G]enetic information about an individual . . . may be collected by a government entity . . . or any other person only with the written informed consent of the individual [and] may be used only for purposes to which the individual has given written informed consent [and] may be stored only for a period of time to which the individual has given written informed consent.

*Id.* It is unclear what “persons” other than governmental agencies are covered by the terms of the Minnesota Genetic Privacy Act. *See* Gordon J. Apple, *Genetic Privacy in Minnesota: Unintended Conflicts and Consequences*, 69 APR BENCH & B. MINN. 25 (2012).

<sup>172</sup> It should be noted that, in principle, some provision of information is provided. Prior to DNA testing, the Resettlement Support Center sends a letter to the anchor advising him or her that DNA testing is required, along with a “fact sheet about DNA testing” and a list of laboratories approved by the AABB in the U.S. where the testing must be done. Qualifying Family Members being tested overseas are also provided basic information about the “purpose” of DNA testing; it is unclear if they are provided a fact sheet. *See* WRAPS PIA, *supra* note 61, at 3.

<sup>173</sup> WRAPS PIA, *supra* note 61, at 1–2.

<sup>174</sup> *Id.* at 3. The WRAPS PIA indicates that DNA samples taken overseas are in the possession of a designated Resettlement Support Center staff member, in accordance with the chain-of-custody requirements of the AABB-approved



compiled or maintained in the Worldwide Refugee Admissions database.<sup>175</sup> There is no evidence that the government is planning to create a DNA database for refugees, though given the rapid increase in DNA databases around the world and the overt link in government documents between Priority Three refugees and national security and terrorism,<sup>176</sup> this policy may well change in the near future.<sup>177</sup>

Control of dissemination of personal information is curtailed, and the disclosure of unexpected or adverse findings about the genetic identity of families violates dignity, which lies at the core of all humans. Numerous anecdotes attest to the fact that test results can be psychologically and socially disruptive and devastating for families, especially for children.<sup>178</sup> No psychological or genetic counseling is

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laboratory, until they are mailed to the U.S. by the Resettlement Support Center for testing. *Id.* No mention is made if the samples are retained by the laboratories or immediately destroyed after testing, leaving open the question about their future use.

<sup>175</sup> *Id.*

<sup>176</sup> See e.g., U.S. CITIZENSHIP AND IMMIGRATION SERVICES, SENIOR POLICY COUNCIL, OPTIONS PAPER, EXPANDING DNA TESTING IN THE IMMIGRATION PROCESS 1–2, available at [https://www.eff.org/sites/default/files/filenode/USCIS\\_DNA\\_Senior\\_Policy\\_Council\\_Options\\_Paper.pdf](https://www.eff.org/sites/default/files/filenode/USCIS_DNA_Senior_Policy_Council_Options_Paper.pdf) (“Leaving open loopholes that allow potential terrorists, or simply fraudulent applicants, to insert themselves in legitimate family groups . . . threatens our security.”).

<sup>177</sup> Holland, *supra* note 3, at 1675–76.

<sup>178</sup> See Esbenshade, *Discrimination*, *supra* note 48, at 187–88 (recounting situation of a mother in the 2008 DNA pilot project who had to tell her sixteen-year-old son that he was the product of a rape, even though the mother’s husband had just recently died and she had never wanted the son to know that her husband was not his biological father. The son cried upon learning the news; no counseling was provided). See also *Nigerian Family Waiting for Reunion*, TORONTO STAR (Can.), Dec. 29, 2011, at GT4 (discussing story of five young Sierra Leonean children, who two months after reuniting with their father in Canada, could not petition for their mother because a DNA test revealed that she was not the biological mother of two of the children and the High Commissioner of Canada in Ghana did not believe she was “in an ongoing genuine marital relationship” with the father); Zwaans, *supra* note 48 (discussing three brothers trying to get their remaining brother out of Guinea, but confronting problems because the brother “refused to have the DNA test because there is a high chance one of [his] children is not his,” and “if one of those kids is not his, he won’t be able to come, and what will that do to the family? He doesn’t want to put his kids through that.”); Zabjek, *supra* note 2 (discussing story of a young Kenyan boy whose mother was dead and learned he was not, in fact, the biological child of the man he knew to be his father and was thus rejected by the Canadian government).

provided by government officials before or after the DNA test. Human rights instruments recognize both the sensitive nature of genetic information<sup>179</sup> and that each person is entitled to “social and cultural rights indispensable for his dignity and the free development of his personality.”<sup>180</sup> Compared with Europe, Canada, and elsewhere, the U.S. has been reluctant to adopt the language of dignity in domestic legislation, though a federal bioethics commission has associated dignity with privacy as part of the principle of respect for persons.<sup>181</sup>

Yet it is unclear what legal remedy may be obtained for the disclosure of unwanted information or information that can violate a refugee’s individual or family dignity. Human rights treaties have been deemed non-self-executing.<sup>182</sup> Successful claims made under the Alien Tort Statute, which gives district courts original jurisdiction over any civil action by an alien for a tort committed in violation of an international or U.S. treaty,<sup>183</sup> are unlikely since successful claims are

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<sup>179</sup> See U.N. Educ., Sci., and Cultural Org., International Declaration on Human Genetic Data, pmb., 32d sess., 20th plen. mtg. (Oct. 16, 2003), *available at* <http://www.unesco.org/new/en/social-and-human-sciences/themes/bioethics/human-genetic-data/> [hereinafter IDHGD].

[H]uman genetic data have a special status on account of their sensitive nature since . . . they may have a significant impact on the family, including offspring, extending over generations, and in some instances on the whole group . . . and they may have cultural significance for persons or groups.

*Id.*

<sup>180</sup> UDHR, *supra* note 68, art. 22. Article 22 is linked to the right to social security, but the drafting is awkward. For a history on the drafting of Article 22, see JOHANNES MORSINK, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING, AND INTENT 4–12, 199–210 (1999).

<sup>181</sup> See, e.g., PRESIDENTIAL COMMISSION, *supra* note 169, at 45 (“Respect for persons also encompasses respect for the individual’s dignity and privacy. Therefore, violation of an individual’s privacy, such as the misuse or unauthorized disclosure of whole genome sequencing data, demonstrates a violation of the principle of respect for persons.”).

<sup>182</sup> *Medellín v. Texas*, 552 U.S. 491, 505 (2008) (“[W]hile treaties may comprise international commitments . . . they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be ‘self-executing’ and is ratified on these terms.”).

<sup>183</sup> *Alien’s Action for Tort*, 28 U.S.C. § 1350 (2011); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 720 (2004) (Alien Tort Statute does not create a cause of action, but instead merely “furnish[es] jurisdiction for a relatively modest set of actions alleging violations of the law of nations.”).

limited to specifically defined, universally accepted, and obligatory norms of international law. These claims have been limited to egregious abuses such as slavery, war crimes, or torture. Litigants must overcome U.S. government enjoyment of sovereign immunity.<sup>184</sup> Tort claims like invasion of privacy, failure to warn, or negligent infliction of emotional distress are also unlikely to succeed against the federal government or its agents due to the restrictive Federal Tort Claims Act<sup>185</sup> and the potential for claims to be buried by public international legal wrangling. This situation itself perpetuates violations of dignity, given its close relation to due process and status to sue.<sup>186</sup>

### **B. Intersections of Discrimination and Plenary Power**

Human rights instruments protect all individuals from discrimination on multiple grounds and entitle them to equal protection of the law.<sup>187</sup> However, the exercise of sovereign power

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<sup>184</sup> See generally Anshu Budhrani, *Regardless of My Status, I am a Human Being: Immigrant Detainees and Recourse to the Alien Tort Statute*, 14 U. PA. J. CONST. L. 781 (2012) (finding that successful claims under the Alien Tort Statute are very limited unless there is strong evidence of cruel, inhuman, or degrading treatment). See also *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980) (Paraguayan former police chief successfully sued in U.S. by two Paraguayan citizens resident in the U.S. for torture and murder of family member committed in Paraguay); *Sosa*, 542 U.S. at 738 (kidnapping and single illegal detention of less than a day of a person wanted for murder, followed by the transfer of custody to lawful authorities and a prompt arraignment “violates no norm of customary international law so well defined as to support the creation of a federal remedy”); *Flores v. Southern Peru Copper Corp.*, 414 F.3d 233 (2d Cir. 2003) (rights to life and to health are too indeterminate to constitute a cause of action under the statute).

<sup>185</sup> Federal Tort Claims Act, 28 U.S.C. §§ 1346(b) (2011). See generally Paul F. Figley, *Understanding the Federal Tort Claims Act: A Different Metaphor*, 44 TORT TRIAL & INS. PRAC. L.J. 1105 (2009). The Federal Tort Claim Act expressly bars claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred. 28 U.S.C. § 2680(k) (2011). See also *Meredith v. United States*, 330 F.2d 9, 11 (9th Cir. 1964) (barring claim arising at U.S. embassy in Bangkok, Thailand).

<sup>186</sup> Jeremy Waldron, *How Law Protects Dignity*, 71 CAMBRIDGE L.J. 200, 208–10 (2012).

<sup>187</sup> See, e.g., UDHR, *supra* note 68, art. 2; ICCPR 1966, *supra* note 68, art. 26. See also IDHGD, *supra* note 179, art. 7.

Every effort should be made to ensure that human genetic data and human proteomic data are not used for purposes that discriminate

over the control of immigration and refugee policy for ensuring security in the revamped Priority Three leads to questions about agency action. USCIS officials appear more willing to reject documents of refugees from certain countries or regions.<sup>188</sup> It is understandable from a psychological standpoint that USCIS officials will overweigh or blindly accept DNA evidence and reject what was previously acceptable documentation when DNA technology, with its symbolic power of infallible truth and science, can provide clean answers without the need for perceived time-consuming, labor-intensive, and fallible, subjective human decision making.<sup>189</sup>

But this overreliance can be discriminatory; two types of discrimination in particular are worth mentioning.<sup>190</sup> First, there is discrimination based on race, nationality, and culture. When governments involve themselves in the determination of identity and origin, possibly adverse differential treatment and impact arise. Indeed, instances from Europe<sup>191</sup> and Kuwait<sup>192</sup> show that the practice,

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in a way that is intended to infringe, or has the effect of infringing human rights, fundamental freedoms or human dignity of an individual or for purposes that lead to the stigmatization of an individual, a family, a group or communities.

*Id.* “Discrimination” is used in this section to refer to distinctions among individuals or groups that are or should be socially unacceptable.

<sup>188</sup> See, e.g., Aizenman, *supra* note 11.

<sup>189</sup> Psychology studies in the criminal law context demonstrate that over-reliance on forensic technology like DNA testing (known as the “CSI-effect”) can increase the burden of proof on a defendant and lead to unwarranted convictions. See Jane Goodman-Delahunty & David Tait, *DNA and the Changing Face of Justice*, 38 AUSTRALIAN J. OF FORENSIC SCI. 97 (2006) (defining “CSI-effect” and providing a research review of the over-reliance on DNA testing). See also Jenny Wise, *The New Scientific Eyewitness: The Role of DNA Profiling in Shaping Criminal Justice* 238, 270–71 (Feb. 27, 2009) (unpublished Ph.D. thesis, University of New South Wales), available at <http://unsworks.unsw.edu.au/fapi/datastream/unsworks:4093/SOURCE02> (discussing how an over-reliance on DNA evidence can lead to “lazy policing” and miscarriages of justice, and that one of the lesser-acknowledged impacts of the use of forensic DNA profiling has been the receding importance placed on other types of evidence).

<sup>190</sup> Other important types of discrimination, including discrimination based on sex, are worth future discussion.

<sup>191</sup> See, e.g., Taitz et al., *supra* note 78, at 29 (noting that “the Finnish government has most frequently required DNA testing of refugees from Somalia, Iraq, Angola, and the Democratic Republic of the Congo”). See also La Spina, *supra*

even if “voluntary,” can risk systematic discrimination against certain peoples.<sup>193</sup> Overlapping with privacy interests, some refugees may have religious beliefs that forbid them from taking a DNA test, but there is no option to refuse a test on religious grounds.<sup>194</sup> Similarly, refugees from countries that do not recognize legal adoption will face cultural and religious discrimination. However, if a cultural or religious discrimination complaint was filed, a court would likely find that reliance on personal choice and the customs of one’s country of

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note 10, at 48 (noting that the Portuguese government relies on vaguely worded laws and its discretionary powers to require DNA testing of immigrants almost exclusively from India and Pakistan).

<sup>192</sup> See Immigration and Refugee Board of Canada, *Kuwait: Criteria and Procedures for Granting Citizenship to Bidoun Through DNA Testing*, (Feb. 12, 1999), available at <http://www.unhcr.org/refworld/docid/3ae6ad602c.html> (discussing how the government of Kuwait is carrying out genetic tests on stateless Arabs, known as the *bedoun* (also transliterated as *bidoun* and *bedoon*, meaning “without” in Arabic), who claim Kuwaiti nationality through family lineage, and quoting a Kuwaiti government official as stating that “adopting DNA testing is a non-negotiable basis to assess the right of citizenship through a claim of kinship to a Kuwaiti mother, father or other relative”); *Naturalization of 35,000 Bedoon Pending DNA Tests*, KUWAIT TIMES, July 3, 2012, available at <http://news.kuwaittimes.net/2012/07/03/naturalization-of-35000-bedoons-pending-dna-tests/> (reporting that 35,000 files of *bidoun* claiming Kuwaiti citizenship were transferred from the Central Agency for Illegal Residents to the Criminal Evidence General Department for DNA testing). According to the Chairman of the Central Agency for Illegal Residents, *bidoun* on limited pay are exempt from the fees charged for the DNA tests. A. Saleh, *KHRS, CSRSIR Discuss Bedoon Naturalization*, KUWAIT TIMES, Aug. 27, 2011, available at [http://www.mideast-times.com/home\\_news.php?newsid=3522](http://www.mideast-times.com/home_news.php?newsid=3522).

<sup>193</sup> Holland, *supra* note 3, at 1672–73.

<sup>194</sup> No U.S. case law appears to have addressed this issue in the immigration and refugee context, but case law indicates support for involuntary DNA testing of criminal suspects regardless of religious beliefs. See *U.S. v. Brown*, 330 F.3d 1073, 1077 (8th Cir. 2003) (suspect charged with sexual assault failed to establish that involuntary DNA testing violated religious rights under Religious Freedom Restoration Act or First Amendment of the Constitution). There are two cases on point in Canada. See *Uyanze v. Canada* (Minister of Citizenship and Immigration), [2000] No. V98-03773 (Can. Imm. Ref. App. Bd.) (tribunal approved applicant’s petition to reunite with his son despite his refusal to take a DNA test because it contravened his beliefs as a Jehovah’s Witness); *Melese v. Canada* (Minister of Citizenship and Immigration), [2007] No. TA5-12361 (Can. Imm. Ref. App. Bd.) (tribunal ruled that applicant was the biological daughter of father based on other evidence even though daughter refused to take a DNA test to prove filiation because it contravened her belief as a Jehovah’s Witness).

origin to foreclose other possible avenues to gain entry to the U.S. are not reasons to interfere with executive and legislative branch plenary powers to control immigration and refugee policy.<sup>195</sup>

Second, there is economic discrimination, as the cost of the DNA test will fall on some of the poorest people in the world. DNA test prices are decreasing but still cost several hundred dollars,<sup>196</sup> presenting a significant obstacle for large families. Even if there is the possibility of a future reimbursement for a positive test result, many refugees may not have the funds to pay for the test up front, in which case a court might find relief—but only if other evidence strongly indicates a biological relationship.<sup>197</sup>

However, in addition to the unlikely legal remedies available through tort law or human rights legislation or treaties, it is well established under the plenary power doctrine<sup>198</sup> that courts will almost always defer to legislative and executive branch powers to discriminate against immigrants and refugees—and hence allow its domestic laws and policies to trump constitutional and human rights-driven concerns about privacy, consent, and otherwise disparate treatment. Since *Chae Chan Ping v. United States*,<sup>199</sup> the Supreme Court has recognized federal power to exclude foreigners as an

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<sup>195</sup> See, e.g., *M.A.O. v. Canada (Minister of Citizenship and Immigration)*, [2002] No. T99-14852 (Can. Imm. Ref. App. Bd.) (In this case, petitioner refused to adopt his non-biological son because doing so violated certain Muslim customs prohibiting adoption. However, the tribunal found that it was not a constitutional violation if foreign law does not make provisions for a certain legal procedure recognized in Canada, and that problems with foreign law are an insufficient reason to set aside or to read a meaning into a section of Canadian legislation which is clear on its face and in its interpretation to date).

<sup>196</sup> *Refugee Health Quarterly*, *supra* note 58; *RAPID DNA SYSTEM PIA*, *supra* note 58.

<sup>197</sup> See, e.g., *Sheikhahmed v. Canada (Minister of Citizenship and Immigration)*, [1999] No. T98-04375 (Can. Imm. Ref. App. Bd.) (tribunal ruled that petitioner was credible in stating he could not afford the \$3,000 for DNA tests for him and his two children left behind in Somalia and that special relief should be granted so his family could reunite in Canada). See also *Mohamad-Jabir v. Canada (Minister of Citizenship and Immigration)*, [2008] No. TA3-06158 (Can. Imm. Ref. App. Bd.) (tribunal ruled that evidence established on a balance of probabilities that family was biologically related and that petitioner's claim of inability to pay thousands of dollars for DNA testing was credible).

<sup>198</sup> See *infra* note 213 for citations and further discussion regarding the "Plenary Power Doctrine."

<sup>199</sup> *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

“incident of sovereignty” that forms “a part of those sovereign powers delegated by the Constitution,” and which can be exercised “at any time when, in the judgment of the government, the interests of the country require it.”<sup>200</sup> So strong is the power that Justice Frankfurter remarked in 1952:

But whether immigration laws have been crude and cruel, whether they may have reflected xenophobia in general or anti-Semitism or anti-Catholicism, the responsibility belongs to Congress. . . . [T]he underlying policies of what classes of aliens shall be allowed to enter and what classes of aliens may be allowed to stay, are for Congress exclusively to determine even though such determination may be deemed to offend American traditions and may . . . jeopardize peace.<sup>201</sup>

Indeed, the Supreme Court reaffirmed in 1976 that, “In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.”<sup>202</sup> Even after the passage of the seemingly liberal Immigration and Nationalization Act of 1965,<sup>203</sup> judicial hesitancy over “policy questions [that are] entrusted exclusively to the political branches of our government”<sup>204</sup> has allowed the executive and legislative branches to discriminate based on race,<sup>205</sup> sex,<sup>206</sup> age,<sup>207</sup> sexual orientation,<sup>208</sup> political speech or associational activities,<sup>209</sup> and

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<sup>200</sup> *Id.* at 609.

<sup>201</sup> *Harisiades v. Shaughnessy*, 342 U.S. 580, 597 (1952) (Frankfurter, J., concurring).

<sup>202</sup> *Mathews v. Diaz*, 426 U.S. 67, 79–80 (1976).

<sup>203</sup> Roger Daniels, *The Immigration Act of 1965: Intended and Unintended Consequences*, HISTORIANS ON AMERICA (Apr. 3, 2008), <http://iipdigital.usembassy.gov/st/english/publication/2008/04/20080423214226eaifas0.9637982.html>.

<sup>204</sup> *Fiallo v. Bell*, 430 U.S. 787, 798 (1977); *See Nguyen v. I.N.S.*, 533 U.S. 53, 72–3 (2001); *See also U.S. v. Flores-Villar*, 536 F.3d 990, 997 (9th Cir. 2008), *aff’d per curiam by an equally divided court*, 131 S. Ct. 2312, 2312 (2011).

<sup>205</sup> *Dunn v. I.N.S.*, 499 F.2d 856, 858 (9th Cir. 1974).

<sup>206</sup> *See Hoyt v. Florida*, 368 U.S. 57, 65 (1961) (holding that a statute to exclude women from jury service was upheld as constitutional).

<sup>207</sup> *Nazareno v. Attorney General of U. S.*, 512 F.2d 936 (D.C. Cir. 1975).

<sup>208</sup> *See Boutilier v. I.N.S.*, 387 U.S. 118, 118 (1967); *See also Adams v. Howerton*, 673 F.2d 1036, 1036 (9th Cir. 1982); *In re Longstaff*, 538 F.Supp. 589, 589 (N.D. Tex. 1982).

marriage.<sup>210</sup> Reiterated as recently as 2009, “the [Supreme] Court has, without exception, sustained the exclusive power of the political branches to decide which aliens may, and which aliens may not, enter the United States, and on what terms”<sup>211</sup> because immigration and refugee matters are “wholly outside the concern and competence of the Judiciary.”<sup>212</sup>

Despite strong rebuke from legal scholars,<sup>213</sup> the plenary power doctrine will not dissipate in the post-9/11 climate that has caused a dominant re-assertion of state control of territorial borders. Thus, contrary to claims that globalization or transnationalism has eroded state sovereignty, Priority Three and related refugee policies that are embedded within a securitization and surveillance logic illustrate the ongoing capacity of the state to rule, to control, and to circumvent international norms and human rights. As Professor Chebel d’Appollonia remarks, “immigration [and refugee] policy remains one of the last bastions of the traditional Westphalian state.”<sup>214</sup> The executive branch and Congress will continue to have the discretion to discriminate against non-nationals, and courts will unlikely involve themselves in cases of discrimination based on required DNA testing of certain categories of refugees. If they did, it is almost certain that they would find that required DNA testing of refugees and family members is rationally related to a legitimate government interest in preventing fraud, that is, illegitimate families. There is precedent for

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<sup>209</sup> *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999). *See also* *Kleindienst v. Mandel*, 408 U.S. 753 (1972).

<sup>210</sup> *See* *Almario v. Attorney General*, 872 F.2d 147 (6th Cir. 1989).

<sup>211</sup> *Kiyemba v. Obama*, 555 F.3d 1022, 1025 (D.C. Cir. 2009).

<sup>212</sup> *Id.* at 1026 (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 596 (1952) (Frankfurter, J., concurring)).

<sup>213</sup> *See, e.g.*, Jessica Portmess, *Until the Plenary Power Do Us Part: Judicial Scrutiny of the Defense of Marriage Act in Immigration after Flores-Villar*, 61 AM. U. L. REV. 1825, 1865 (2012); Natsu Taylor Saito, *The Enduring Effect of the Chinese Exclusion Cases: The “Plenary Power” Justification for On-going Abuses of Human Rights*, 10 ASIAN L.J. 13, 35–36 (2003); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power. Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 549 (1990). *But see* Gabriel J. Chin, *Is There a Plenary Power Doctrine? A Tentative Apology and Prediction for Our Strange but Unexceptional Constitutional Immigration Law*, 14 GEO. IMMIGR. L.J. 257, 287 (2000) (arguing that the plenary power doctrine is largely dicta, albeit harmful dicta).

<sup>214</sup> D’APPOLLONIA, *supra* note 122, at 17.



such speculation, including a 1982 Ninth Circuit opinion addressing immigrants and same-sex marriages:

Congress manifested its concern for family integrity when it passed laws facilitating the immigration of the spouses of some valid heterosexual marriages. This distinction is one of many drawn by Congress pursuant to its determination to provide some—but not all—close relationships with relief from immigration restrictions that might otherwise hinder reunification in this country . . . . In effect, Congress has determined that preferential status is not warranted for the spouses of homosexual marriages. Perhaps . . . this is because homosexual marriages never produce offspring, because they are not recognized in most, if in any, of the states, or because they violate traditional and often prevailing societal mores. In any event, having found that Congress rationally intended to deny preferential status to the spouses of such marriages, we need not further ‘probe and test the justifications for the legislative decision.’<sup>215</sup>

Legislative discretion creates a troublesome void in respect for persons, as the near absolute removal of judicial oversight increases the risk of multiple human rights violations. It therefore urges one to consider alternative paths to justice. Policies that adversely impact consent, privacy, and dignity, and that have a discriminatory purpose or effect should, in the interest of fundamental human rights and legitimacy, be proportional to the perceived need to prevent legitimate fraud or protect enduring American values.

## V. SOME ALTERNATIVE PATHS

Though this Article has expressed serious reservations about the new Priority Three policy, it should not be read as a rebuke of all the underlying rationales. Biometrics and DNA technology have proven useful in a variety of contexts to improve distribution of resources and curtail fraud.<sup>216</sup> DNA testing can provide a credible means of establishing some form of identity and allow families to reunite when other documentation is unavailable. In a climate awash in concerns of fraud and national security, DNA testing provides political viability

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<sup>215</sup> *Adams v. Howerton*, 673 F.2d 1036, 1042–43 (9th Cir., 1982) (quoting *Fiallo v. Bell*, 430 U.S. 787, 799 (1977)).

<sup>216</sup> See Achraf Farraj, *Refugees and the Biometric Future: The Impact of Biometrics on Refugees and Asylum Seekers*, 42 COLUM. HUM. RTS. L. REV. 891, 914–19 (2011) (describing the various UNHCR-endorsed uses of biometrics to deter fraud and detention and improve distribution of aid in refugee camps).

that may well sustain Priority Three, and in this sense, it is better to have a priority system for family reunification for refugees than none at all. Nonetheless, the problems and risks associated with required DNA testing of refugees have not been adequately addressed by the federal government, and Part IV posits that traditional legal solutions may not be viable. This Part V therefore proposes five policy-oriented solutions that mitigate the impact of the new policy, allowing for a nuanced understanding of family and a firmer understanding of the inherent but uncertain risks of DNA technology in the refugee (and immigration) context.

#### A. Adopting the Proportionality Principle

The plenary power of the executive branch and Congress to regulate immigration and refugee law is not absolute. As noted by constitutional and human rights lawyer Shayana Kadidal, the power is not enumerated in the Constitution but instead is “inherent in sovereignty.”<sup>217</sup> That is, the power is a creation and function of international law. For Kadidal, the plenary power can therefore be limited by the same body of law that creates it. International law and the proportionality principle in particular can be used by courts to weigh the public interest asserted by the state against the hardship endured by an immigrant or refugee through some sanction or procedure in an individual case, even in a case where a court would otherwise defer to the plenary power of Congress.<sup>218</sup>

Scholars contend that the proportionality principle has particular resonance in immigration law proceedings given the principle’s historical association with ensuring the proper balance of punitive

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<sup>217</sup> Shayana Kadidal, “Federalizing” *Immigration Law: International Law as a Limitation on Congress’s Power to Legislate in the Field of Immigration*, 77 *FORDHAM L. REV.* 501, 504 (2008). See also Mark R. von Sternberg, *The Plenary Power in a Human Rights Perspective*, 16 *PACE INT’L L. REV.* 65, 69–70 (2004) (discussing how the 2001 Supreme Court decisions in *Zadvydas v. Davis*, 533 U.S. 678, and *I.N.S. v. St. Cyr*, 533 U.S. 289, were important judicial checks on the plenary power doctrine and that modern international human rights laws place restrictions on unfettered state sovereignty).

<sup>218</sup> Kadidal, *supra* note 217, at 514–15, 518–521. Kadidal argues that international law norms may diminish Congress’s plenary powers over time: “As the fount of Congress’s supposedly ‘plenary’ power over aliens, international law also provides fundamental limitations on that power—limitations which we can expect will become more robust with time, and which, one hopes, federal courts will continue to see fit to enforce.” *Id.* at 527.

measures.<sup>219</sup> Law professor Michael Wishnie argues, for instance, that “the plenary power doctrine does not preclude a constitutional proportionality analysis” in cases of immigration sanctions, such as where an immigrant faces detention or a removal order for almost any violation.<sup>220</sup> In his view, “case-by-case proportionality review is an as-applied challenge, which does not implicate the plenary power doctrine quite so directly” because it often “implicates neither foreign affairs nor national security.”<sup>221</sup> Professor Wishnie concedes that making a categorical (rather than a case-by-case) proportionality test claim would more explicitly challenge the plenary power doctrine, though it would invade federal sovereignty no less than court decisions invalidating state capital punishment or life-without-parole sentences for juveniles have done for state sovereignty.<sup>222</sup>

The proportionality principle does not only apply to punitive measures, however.<sup>223</sup> It dates back in the West to Aristotle’s *Nicomachean Ethics*,<sup>224</sup> is reflected in human rights instruments,<sup>225</sup>

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<sup>219</sup> Christopher Michaelsen, *Reforming Australia’s National Security Laws: The Case for a Proportionality-Based Approach*, 29 U. TAS. L. REV. 31, 38 (2010) (noting that the proportionality principle is “readily applied in criminal justice policy and criminal law where the severity of punishment is expected to be proportionate to the seriousness of the crime.”).

<sup>220</sup> Michael J. Wishnie, *Immigration Law and the Proportionality Requirement*, 2 U.C. IRV. L. REV. 415, 447 (2012) (arguing that removal orders by the U.S. government against immigrants should be subject to constitutional proportionality review, both on a case-by-case basis and categorically, under the command of the Fifth Amendment’s Due Process Clause and in some cases the Eighth Amendment) [hereinafter Wishnie, *Immigration Law*]. See also Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683 (2009); Angela M. Banks, *Proportional Deportation*, 55 WAYNE L. REV. 1651 (2009); Angela M. Banks, *The Normative and Historical Cases for Proportional Deportation*, 62 EMORY L.J. 1243 (2013).

<sup>221</sup> Wishnie, *Immigration Law*, *supra* note 220, at 447.

<sup>222</sup> *Id.* at 448.

<sup>223</sup> Michaelsen, *supra* note 219, at 38 (“At the national level, many liberal democratic systems recognise the principle of proportionality as a key component of criminal, administrative and constitutional law.”).

<sup>224</sup> Eric Engle, *The History of the General Principle of Proportionality: An Overview*, 10 DARTMOUTH L.J. 1, 3 (2012).

<sup>225</sup> For example, the proportionality principle is reflected in the UNHCR Note on DNA Testing to Establish Family Relationships in the Refugee Context, which protects the right to privacy. The Human Rights Committee has stated that any interference with the right must be “a proportionate means to achieve a

and has been applied by courts around the world as a mechanism to guarantee the full respect of human rights by the state.<sup>226</sup> The European Court of Human Rights has invoked the principle in immigration and refugee cases involving deportation,<sup>227</sup> in turn, several U.S. federal courts have acknowledged the European Court of Human Rights' rulings "as an authoritative source of international human rights law and as 'indicative of the customs and usages of civilized nations.'"<sup>228</sup> U.S. legal scholarship and jurisprudence is incrementally constructing a culturally-specific framework of proportionality,<sup>229</sup> which can be seen as a more coherent, flexible, reasoned, scrutinized, and balance-favoring variation of its varying norms analyses, such as "scrutiny" for legislative and executive

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legitimate aim, which should be in the interest of society, be reasonable, and must comply with the provisions, aims and objectives of the ICCPR." See UN High Commissioner for Refugees, UNHCR Note on DNA Testing to Establish Family Relationships in the Refugee Context, June 2008, 3, available at <http://www.unhcr.org/refworld/docid/48620c2d.html> [hereinafter UNHCR Note on DNA Testing]. See also Human Rights Committee, General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation, Apr. 8, 1988, available at <http://www.unhcr.org/refworld/docid/453883f922.html>. See generally Michaelsen, *supra* note 219, at 40–41.

<sup>226</sup> See Juan Cianciardo, *The Principle of Proportionality: The Challenges of Human Rights*, 3 J. CIV. STUD. 177, 177–78 (2010).

<sup>227</sup> Kadidal, *supra* note 217, states;

Article 8 of the European Convention mandates application of a proportionality test to the expulsion of noncitizens with strong family ties to the deporting nation and/or very few links to the country to which they would be sent. The standard applied by the court assesses whether deportation is justified by a 'pressing social need' and whether the interference with family life is disproportionate with respect to the public interest to be protected.

*Id.* at 519.

<sup>228</sup> *Id.* at 519 (quoting *Fernandez v. Wilkinson*, 505 F. Supp. 787, 797 (D. Kan. 1980), *aff'd sub nom.* *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382 (10th Cir. 1981)).

<sup>229</sup> See Jud Mathews & Alec Stone Sweet, *All Things in Proportion? American Rights Review and the Problem of Balancing*, 60 EMORY L.J. 797, 874–75 (2011). See also STEPHEN BREYER, *MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW*, 163–64 (2010); see generally E. THOMAS SULLIVAN & RICHARD S. FRASE, *PROPORTIONALITY PRINCIPLES IN AMERICAN LAW: CONTROLLING EXCESSIVE GOVERNMENT ACTIONS* (2009) (arguing that proportionality review is emerging in U.S. law but is not yet a unified theory).

impingement on civil rights, “reasonableness” for searches and seizures, and “fair notice” for imposition of criminal liability.<sup>230</sup> The Supreme Court has also been increasingly citing the principle in its decisions,<sup>231</sup> though the focus, at least from a constitutional perspective, remains on criminal and civil sanctions.<sup>232</sup>

Broadly speaking, the principle holds that statutes or policies that significantly implicate competing constitutionally protected interests and human rights in complex ways should be proportionate. It can be

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<sup>230</sup> See Bernhard Schlink, *Proportionality in Constitutional Law: Why Everywhere But Here?*, 22 DUKE J. COMP. & INT’L L. 291, 297 (2012) (“Whenever American courts review limitations and intrusions with strict scrutiny or a middle tier of scrutiny, or even with a requirement of mere rationality, theirs is a means-end analysis that is a more-or-less thorough proportionality analysis.”). See also Engle, *supra* note 224, at 10 (“Means-end review with strict scrutiny for suspect classes and proportionality are methodologically synonymous.”).

<sup>231</sup> See, e.g., *District of Columbia v. Heller*, 554 U.S. 570, 689–90 (2008) (Breyer, J., dissenting).

[W]here a law significantly implicates competing constitutionally protected interests in complex ways, the Court generally asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute’s salutary effects upon other important governmental interests . . . . Any answer would take account both of the statute’s effects upon the competing interests and the existence of any clearly superior less restrictive alternative . . . . Contrary to the majority’s unsupported suggestion that this sort of ‘proportionality’ approach is unprecedented, . . . the Court has applied it in various constitutional contexts, including election-law cases, speech cases, and due process cases.

*Id.* See also *Roper v. Simmons*, 543 U.S. 551, 560–61 (2005).

The prohibition against ‘cruel and unusual punishments’ . . . must be interpreted according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design. To implement this framework we have established the propriety and affirmed the necessity of referring to ‘the evolving standards of decency that mark the progress of a maturing society’ to determine which punishments are so disproportionate as to be cruel and unusual.

*Id.* See generally Michael J. Wishnie, *Proportionality: The Struggle for Balance in U.S. Immigration Policy*, 72 U. PITT. L. REV. 431, 446–51 (2011) [hereafter Wishnie, *Proportionality*].

<sup>232</sup> Wishnie, *Proportionality*, *supra* note 231, at 446–51.

seen as comprising three sub-principles:<sup>233</sup> (1) adequacy: the policy must be suitable to achieve its stated purpose; (2) necessity: the means chosen must be those of similar efficacy that are least restrictive of the constitutionally protected interests; and (3) proportionality in the narrow sense (also known as proportionality *stricto sensu*)—the advantages and disadvantages brought about by the policy must be examined to determine whether the balance is proportional. This is sometimes framed, albeit questionably, as a cost-benefit analysis;<sup>234</sup> however, a policy can only be proportionate if it does not affect the essential content of the involved interests or rights.<sup>235</sup>

To engage in a better understanding of the inherent but uncertain risks of DNA testing technology in Priority Three, but also in the broader immigration and refugee context, a proportionality test should be used to inquire whether required DNA testing, given its possible violations of human and constitutional rights and interests, is justified by the ends it purportedly serves. That is, the new Priority Three

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<sup>233</sup> Cianciardo, *supra* note 226, at 179–81; Michaelsen, *supra* note 219, at 41–42. *See also* Schlink, *supra* note 230, at 292 (“The proportionality principle thus reads as follows: If you pursue an end, you must use a means that is helpful, necessary, and appropriate.”); Engle, *supra* note 224, at 2 (defining the proportionality principle as the legal rule that “state action must be a rational means to a permissible end, which does not unduly invade fundamental human rights”). *Cf.* MATTIAS KLATT & MORITZ MEISTER, *THE CONSTITUTIONAL STRUCTURE OF PROPORTIONALITY* 8 (2012) (“The proportionality test consists of four rules, namely legitimate ends, suitability, necessity, and proportionality in its narrow sense.”). The U.S. Supreme Court has adopted different criteria for a proportionality test in the context of criminal and civil sanctions. *See* Wishnie, *Proportionality*, *supra* note 231, at 446–49 (discussing a “narrow proportionality review” for case-by-case analysis and a second test for categorical review of a sanction that focuses on the nature of the offense or the characteristics of the offender).

<sup>234</sup> Cianciardo, *supra* note 226, at 180–81. *See also* Engle, *supra* note 224, at 8.

Late modernity sometimes links proportionality (means end testing) with balancing (cost benefit analysis) or with examining the relationship between the value of the right invaded and the extent of the invasion of that right. The latter view is the better one to avoid confusion between economic cost/benefit analyses balancing alienable economic rights against each other versus proportionality analysis of conflicting constitutional rights.

*Id.*

<sup>235</sup> Cianciardo, *supra* note 226, at 183.

policy should be subject to judicial (as well as administrative and legislative) review for conformity to proportionality principles.

It is admitted that the proportionality principle has been advocated so far only in cases of immigration proceedings, particularly deportation hearings. But deportation and denial of family reunification on the basis of a mandatory DNA test both revolve around the potential fracturing of a family unit and can be seen as a sanction. The difference lies in the temporal imposition of the measure: deportation is punitive because it is a response to an alleged wrong, whereas required DNA testing can be seen as a coercive measure responding to a perceived risk. I suggest that, based on the precedent of the principle's invocation in the context of sanctions, it is plausible that a refugee or U.S. citizen with standing can sue the federal government to challenge the constitutionality of required DNA testing on substantive due process and equal protection grounds under the Fifth Amendment.

A plaintiff could claim, for example, that required DNA testing violates his or her liberty and privacy interests and subjects that person to an unfair burden compared to other refugees or immigrant families seeking reunification. Should a court look towards emergent norms of international law that place restrictions on national power, it may find that the proportionality principle requires a compelling state interest to mandate a test for a class of refugees that determines a family unit on biology alone. As Kadidal emphasizes, given the difficulties of a categorical proportionality challenge, “the reasonableness and proportionality of measures interfering with family integrity and association have to be evaluated on a case-by-case basis,” but should also take into account the best interests of the child.<sup>236</sup>

A counterargument is that in order to uphold obligations in law and policy to preserve the integrity of the family reunification process, the government has a legitimate interest in combating fraud and verifying family relationships where serious doubts remain—after all other types of proof have been examined. To this end, targeted DNA testing may be proportionate and legally justified. Indeed, since fraud is equated with national security, a challenge to the policy might confront the difficulty noted by Professor Wishnie: the plenary power doctrine is often used as a shield in cases implicating foreign affairs or national

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<sup>236</sup> Kadidal, *supra* note 217, at 519, 528.

security.<sup>237</sup> Moreover, since the proportionality reviews under the Fifth Amendment have historically been limited to punitive sanctions,<sup>238</sup> a plaintiff could have to make a difficult argument that a family reunification denial due to a mandatory DNA test result is a punitive measure that constrains some fundamental liberty interest.

Yet if a challenge is made on a case-by-case basis and thus does not attempt to facially challenge the policy, there may be greater receptiveness by a court. Likewise, if the proportionality principle is applied to the policy not through the lens of a punitive measure, but rather through a public policy lens, greater receptivity could result. At base, this means that the analysis would not ask whether the new required DNA testing policy under Priority Three is a punitive measure that violates a procedural or substantive due process interest. Instead, the analysis would be whether the policy is a proportionate means of achieving the intended object of protecting against fraud in the refugee family reunification program, and possibly related objects such as the protection of Americans against potential security risks by refugees who fraudulently enter the country.

A court may view a DNA dragnet approach as a disproportionate and punitive means of accomplishing the task of determining fraud. Required DNA testing is likely viewed as more intrusive by refugees and family members than other groups, given past persecution by their own government or persons their government has been unable to control. The Priority Three policy may especially run into difficulty on the second and third prongs of the proportionality test listed above, that is, necessity and the advantages and disadvantages of the policy. As discussed, it is doubtful that the policy complies with U.S. international human rights obligations. Fraud prevention and family relationship verification, as well as secondary benefits of national security, administrative convenience, and economic efficiency, do not seem advantages that are proportionally balanced by the significant costs incurred by mandatory DNA testing of Priority Three refugees and family members.

The proportionality principle has application to all branches of government. Legal scholar Christopher Michaelsen notes:

Proportionality . . . is not only a judicial doctrine for courts to apply in reviewing the legality of government action. It is also a

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<sup>237</sup> Wishnie, *Immigration Law*, *supra* note 220, at 447.

<sup>238</sup> Wishnie, *Proportionality*, *supra* note 231, at 458–59.



legislative doctrine for the political institutions to observe in their decision-making functions. As such, it forms an essential component of public policy and good governance.<sup>239</sup>

Thus, courts, as well as the executive branch and Congress, when drafting or passing policies or regulations, should ultimately address the implications of required DNA testing of Priority Three refugees and family members in order to determine the constitutionally protected interests and human rights affected. They should decide whether required DNA testing affects any of these interests and rights and whether the means chosen are the least restrictive. The proportionality principle is clearly not problem-free,<sup>240</sup> but it does offer a more promising path for guarding constitutional and human rights and interests.

### **B. DNA Testing as a Government-Funded Last Resort with Protective Measures**

Aside from adopting the proportionality principle, there are several components involved in designing a more proportional test for truthful family reunification. First, the U.S. should follow the United Nations High Commissioner for Refugees recommendations and the practices of other countries. DNA testing should be used only as a last resort,<sup>241</sup> particularly in situations where there are serious doubts about a stated relationship, or strong indications of fraudulent motives, and all other

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<sup>239</sup> Michaelsen, *supra* note 219, at 37. The principle as applied to public policy has origins in German constitutional and administration jurisprudence and is now utilized across Europe and countries such as England, Canada, New Zealand, South Africa, and Israel, as well as in international treaty-based regimes. *Id.* at 39.

<sup>240</sup> See Schlink, *supra* note 230, at 299 (identifying not insurmountable problems of insufficient or ambiguous information and the subjective nature of balancing of rights, interests, and values).

<sup>241</sup> See, e.g., Citizenship and Immigration Canada, Operating Manual OP 1–Procedures (August 16, 2012), s. 5.10, available at <http://www.cic.gc.ca/english/resources/manuals/op/op01-eng.pdf> (“A DNA test to prove relationship is a last resort [hereinafter CIC Operating Manual]. When documentary submissions are not satisfactory evidence of a bona fide relationship, officers may advise applicants that positive results of DNA tests by a laboratory listed in Appendix E are an acceptable substitute for documents.”). See also UNHCR Note on DNA Testing, *supra* note 225, at 4; Holland, *supra* note 3, at 1680.

means and types of proof have been examined.<sup>242</sup> DNA testing of children should only be done if it is in the best interests of the child.<sup>243</sup>

Case-by-case assessments that involve looking at the particular relationships applicants engage in, from a functional and sociological perspective, are more appropriate and will not open the floodgates to administrative inefficiency or mass fraud. It may make the process less streamlined, but this is not necessarily a drawback. Streamlining in this situation may be more problematic as it removes the social significance and meaning of kinship and treats DNA tests as a quick-fix panacea for fraud. Political scientist Anne Staver notes that “as the family is at once a subjective and an objective reality, objective ‘fraud proof’ criteria, such as the DNA tests are intended to be, are insufficient.”<sup>244</sup>

Fraud prevention is a legitimate concern, and alternative measures to detect it have been proposed by scholars.<sup>245</sup> Sociologist Jill Esbenshade suggests, for example, that strengthening the refugee registration system with resources to systematically document relationships and collect and store biometric identifiers during entrance registration, then rechecking and updating these throughout the process, is a reasonable alternative to tighten fraud controls.<sup>246</sup> Provided that this is accomplished in a way that respects cultural sensitivities about biometric collection,<sup>247</sup> such an alternative path to fraud prevention is more proportional to the desired aims and respectful of refugees’ and family members’ rights.

Second, when DNA testing is undertaken, true informed consent must be obtained from all mature and competent persons, including adolescents. This means disclosing in understandable language to all family members being tested, at a minimum, the nature and purpose of

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<sup>242</sup> UNHCR Note on DNA Testing, *supra* note 241, at 4.

<sup>243</sup> *Id.* at 6.

<sup>244</sup> Anne Staver, *Family Reunification: A Right for Forced Migrants?* 30 (U. Oxford Refugee Studies Centre, Working Paper Series No. 51, 2008), available at [http://www.rsc.ox.ac.uk/publications/working-papers-folder\\_contents/RSCworkingpaper51.pdf](http://www.rsc.ox.ac.uk/publications/working-papers-folder_contents/RSCworkingpaper51.pdf).

<sup>245</sup> Villiers, *supra* note 6, at 268–70 (suggesting mechanisms from the Immigration Marriage Fraud Amendments Act of 1986, and the New York district-based “Stokes interview” to discourage marriage fraud, be implemented).

<sup>246</sup> ESBENSHADE, ASSESSMENT, *supra* note 3, at 15.

<sup>247</sup> See Farraj, *supra* note 216, at 940 (outlining measures to overcome cultural sensitivities to collection biometric identifiers for registration).

the test, information about collection, safe storage, both current and future use, all reasonably foreseeable risks—especially psychosocial risks—and benefits, and the consequences of refusing consent. All family members should be provided opportunities throughout the process to ask questions, and receive prompt and adequate responses, about the DNA test and its implications for the petition and for the family unit. It may be unrealistic to allow refugees or family members to control the informed consent process such that they can determine limits on the use of the DNA sample or genetic information, but basic provision of information to allow them to make an informed decision is an essential ingredient to respect them as persons and to fulfill human rights obligations and domestic laws.

Third, required DNA testing is eminently different from voluntary DNA testing when it comes to the ethics of expense. When a physically intrusive procedure is mandated by the state for certain groups and the potential for violations of fundamental rights is heightened, as in compulsory or conditional screening for public health measures,<sup>248</sup> the state should bear the burden of expense up front as a matter of social justice. After all, many refugees in Priority Three are unlikely to be in a position to readily incur the costs of testing. The United Nations High Commissioner for Refugees has recommended that “the cost of a DNA test should be borne by the State requiring the test.”<sup>249</sup> Given that there will only be an estimated 1,150 Priority Three refugees for fiscal year 2013,<sup>250</sup> this proposal does not impose an onerous economic burden on the U.S. government. Rather than exacerbate a potential class-based system of refugee entries by now requiring refugees to pay the initial cost of required DNA testing, the government should cover the entire costs at the front-end. It should remove the eligibility-for-reimbursement clause for positive match results since it unjustly stratifies and penalizes refugee families who unknowingly are not genetically related. Just as important, genetic counseling should be provided pre and post-testing and paid for by the government in order to mitigate the potentially disruptive or destructive psychological trauma that can result from an unexpected

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<sup>248</sup> LAWRENCE O. GOSTIN, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT 395–418 (2nd ed. 2008).

<sup>249</sup> UNHCR Note on DNA Testing, *supra* note 241, at 8.

<sup>250</sup> FY 2013 Refugee Admissions Report, *supra* note 17, at 20.

finding, and families should have the option to explain negative test results confidentially.<sup>251</sup>

Fourth, as a last resort measure, DNA test results or scanned genetic loci should not be added to any DNA database for alternative purposes, especially for medical, criminal, or terrorism-related purposes. The government has pledged that genetic marker information will be redacted in the WRAPS database.<sup>252</sup> It must be held to its word. Likewise, AABB accredited laboratories should specify publicly and transparently, and government documents and policies should make clear, what will happen to the DNA sample after testing. Finally, refugees and family members must be provided protective measures beyond pledges of strict security controls and oversight. This especially means ensuring rights of action so that if DNA samples or test results are compromised, refugees have an ability to obtain a remedy for the wrong committed.

### C. DNA Testing as Holistic

The U.S. has historically recognized that the legislative intent of the Immigration and Naturalization Act is preservation of the family unit.<sup>253</sup> Thus, reliance on genetic tests alone to determine legitimate familial bonds is insufficient. A negative DNA test result should not lead to automatic rejection of a petition and an assumption of a fraudulent relationship. Rather, refugees and family members should be provided an opportunity to explain negative test results and should be asked to undergo other examinations to determine if the petition should be accepted. This is the policy in other countries,<sup>254</sup> including Canada, where negative test results for immigrants do not lead to automatic rejection but instead further examinations—even if it means treating biological relationships as legal fictions to uphold principles of natural justice.

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<sup>251</sup> Other countries address counseling. For example, Australia suggests applicants seek (at their own expense) counseling before deciding to undertake DNA testing and may provide counseling after the DNA test results are known. Australian Government—Department of Immigration and Citizenship—Fact Sheet 23: DNA Testing, *available at* <http://www.immi.gov.au/media/fact-sheets/23dna.htm>.

<sup>252</sup> WRAPS PIA, *supra* note 61, at 1–2.

<sup>253</sup> *See* Villiers, *supra* note 6, at 268.

<sup>254</sup> *See* Taitz et al., *supra* note 78, at 27 (noting that in Australia and the Netherlands, negative test results do not necessarily lead to rejection).

In *Canada (Minister of Public Safety and Emergency Preparedness) v. Martinez-Brito*, the Federal Court dismissed an application for judicial review of an Immigration Appeal Division decision that determined a Canadian permanent resident had established, on a balance of probabilities, that his thirteen-year-old son was biologically his and therefore a member of the family class permissible for sponsored permanent residence.<sup>255</sup> This, *despite the fact* that a DNA test indicated the son was not biologically his. According to the Court, the immigration officer responsible for the file violated procedural fairness and thus breached principles of natural justice by requesting a DNA test with a statement that, “If I do not receive word . . . that you will be proceeding with the DNA testing, I will assume that you are no longer interested in pursuing the sponsorship and will close the file.”<sup>256</sup> Canadian immigration policy documents specify that a DNA test to prove a relationship is a last resort.<sup>257</sup> Moreover, a 2003 Federal Court decision noted that because DNA testing intrudes into an individual’s privacy, it is “a tool that must be carefully and selectively utilized,”<sup>258</sup> and a 2008 Immigration Appeal Division decision noted that, “A request for DNA testing should be limited generally to those relatively rare cases where viable alternatives to such testing do not exist.”<sup>259</sup> Since “the officer simply demanded that the respondent and his sons undergo DNA testing or the file would be closed,”<sup>260</sup> he disregarded his own agency’s operation manual and the judicial warnings.

The Court ruled the DNA evidence and any evidence directly attributable to it was excludable since to reintroduce involuntarily obtained evidence, even that which disproved a biological relationship, “could lead to abuse and serious injustice”<sup>261</sup> and a “breach of natural justice.”<sup>262</sup> With the DNA evidence excluded, the Court still found

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<sup>255</sup> *Canada (Minister of Public Safety and Emergency Preparedness) v. Martinez-Brito*, 2012 F.C. 438 (2012) (Can.), para. 57.

<sup>256</sup> *Id.* at para. 4.

<sup>257</sup> *Id.* at para. 45. *See also* CIC Operating Manual, *supra* note 241.

<sup>258</sup> *Id.* at para. 46 (quoting *MAO v. Canada (Minister of Citizenship and Immigration)*, 2003 F.C. 1406, para. 84 (2003)) (Can.)).

<sup>259</sup> *Id.* at para. 47. (quoting *Mohamad-Jabir v. Canada (Minister of Citizenship and Immigration)*, 2008 IADD 44, para. 33) (Can.)).

<sup>260</sup> *Id.* at para. 46.

<sup>261</sup> *Id.* at para. 51 (quoting *R. v. G.(B)*, [1999] 2 S.C.R. 475 at para. 33) (Can.)).

<sup>262</sup> *Id.* at para. 53.

acceptable the Immigration Appeal Division's decision that the testimonial and documentary evidence established on a balance of probabilities that the father was the biological father of his son.<sup>263</sup> At a time when the discipline of biology is moving away from a reductionist and analytic approach and is seeking to apprehend systems holistically,<sup>264</sup> there is virtue for the law and government officials to view the biological and sociological family as interrelated concepts and, except in rare occurrences, to treat DNA test results merely as one part among many of an application to reunite a family, even if a result is negative.

#### D. A Broader Construction and Definition of Family

The federal government should follow the recommendation of the United Nations High Commissioner for Refugees by implementing a broader, flexible construction and definition of family that comports to sociological and humanitarian understanding, and which especially impacts African cultures.<sup>265</sup> This would “accommodate the peculiarities in any given refugee situation, and help to minimize further disruption and potential separation of individual members during the resettlement process.”<sup>266</sup> The current alternative to establishing genetic connections between parent and child, namely legal adoption, is not a culturally or legally permissible option in several Priority Three eligible countries.<sup>267</sup> If refugee officials accepted broader, culturally-attuned understandings of the terms

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<sup>263</sup> *Id.* The IAD acknowledged that while “fictively trying to determine biological filiation on the basis of testimonies and documents alone is very difficult,” it was able to decide that “all the testimonies heard and evidence submitted established that the respondent continued to treat Lully as his son and that, while there was no documentary evidence to support the respondent’s testimony that he continues to provide financial support for Lully, the IAD had no reason to doubt his testimony.” *Id.* at para. 9, 12.

<sup>264</sup> Andrew C. Ahn et al., *The Limits of Reductionism in Medicine: Could Systems Biology Offer an Alternative?* 3 PLOS MED. e208 (2006), available at <http://www.plosmedicine.org/article/info%3Adoi%2F10.1371%2Fjournal.pmed.0030208>; Hans V. Westerhoff & Bernhard O. Palsson, *The Evolution of Molecular Biology into Systems Biology*, 22 NATURE BIOTECH. 1249 (2004).

<sup>265</sup> Holland, *supra* note 3, at 1680–81.

<sup>266</sup> UN High Commissioner for Refugees, *Protecting the Family: Challenges in Implementing Policy in the Resettlement Context*, June 2001, 2, available at <http://www.unhcr.org/refworld/docid/4ae9aca12.html>.

<sup>267</sup> See discussion *supra* Part 2B.

parent, child, or spouse, it would afford refugees and family members better integration and support in the U.S. and lessen the potential economic burden imposed on the federal, state, or local government to support the resettlement process.<sup>268</sup>

It is therefore as much in the interest of refugees as it is in the self-interest of the government to accept that biological or legal ties are but one component of the thoroughly sociopolitical, cultural, multiplex realities that bind and sustain refugee families. Yet even if this ideal is not politically achievable, government officials should at a minimum work with resettlement agencies to both thoroughly inform all anchors and Qualifying Family Members of the Priority Three policy-based definitions of family and also develop a system to accept informal (extra-legal) adoptions or foster relationships as permissible exceptions to the otherwise biological or legally-driven family definition.<sup>269</sup>

### **E. Transparency, Participation, and Collaboration**

If the executive branch truly aims to promote transparency and legitimacy in government,<sup>270</sup> it should make USCIS and the Bureau more transparent in their policies and data, especially with aggregated statistics on DNA test results, by ensuring they are freely and publicly accessible to all interested parties. Effective public monitoring of Priority Three processing will allow it to proceed with integrity and accountability. Rapidly disseminating data openly will facilitate participation and collaboration among various communities that could result in better design of refugee policies and mitigate the risks and problems associated with controversial measures, such as required DNA testing. In sum, putting open government into action will go a long way to establishing trust among both the American public and refugees and creating innovative solutions to complex challenges, of which refugee resettlement certainly qualifies.

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<sup>268</sup> See Sample, *supra* note 73, at 51–52 (noting that through supporting family unity, the “economic burden” governments fear will actually lessen); Holland, *supra* note 3, at 1681.

<sup>269</sup> ESBENSHADE, ASSESSMENT, *supra* note 3, at 16.

<sup>270</sup> See, e.g., Memorandum for the Heads of Exec. Dept’s & Agencies (Jan. 21, 2009), available at [http://www.whitehouse.gov/the\\_press\\_office/Transparency\\_and\\_Open\\_Government](http://www.whitehouse.gov/the_press_office/Transparency_and_Open_Government); see also *Open Government Initiative*, THE WHITE HOUSE, <http://www.whitehouse.gov/open> (last visited May 2, 2013) (detailing various blogs and methods for individuals to promote the idea of transparency and legitimacy).

### F. Family Reunification as a Moral Duty and Human Right

Lastly, immigration and refugee advocates should continue to campaign for family reunification as a moral duty and human right owed to any settled refugee. This means that the right should be seen as not merely an obligation to admit refugees, which is already widely accepted as a duty of a liberal democratic state, but also an obligation to admit family members of settled applicants who are already governed under the liberal democratic state that has granted them refuge.<sup>271</sup> By presuming that settled applicants' family members, defined broadly in accordance with the United Nations High Commissioner for Refugees recommendations, are legitimate refugees, the burden of proving otherwise falls on the government rather than on refugees. After escaping a life of misery, no refugee should be forced to choose between life and liberty *or* family life by submitting a DNA sample. As Staver writes:

If the duty is also one to uphold particularly strong bonds, one must acknowledge that these bonds may have other bases than blood or conventional marriage. Conceived in such a way, family reunification would be a right not only for the nuclear, biological family, but for families as they self-identify.<sup>272</sup>

## VI. CONCLUSION

To faithfully answer the question posed at the beginning of this Article—who are you, truly and truthfully?—one must view it as a constellation of dialogical explorations that move towards what can best be described as relational truth. That is to say, this cardinal question requires an epistemological ordering that sees belief and fact co-existing and truth dependent on the connections between object and subject, science and society, and technology and humans. These orderings have found common ground in the past and present, in the local and global. The ancient, southern African epistemology of *ubuntu*, for instance, expresses the belief that identity of the self is formed interdependently through community,<sup>273</sup> while Professor Robert Ferguson writes that, “Everything must be shared for relational truth to emerge, and the transparency in that sharing must be absolute.

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<sup>271</sup> See Staver, *supra* note 244, at 26–28.

<sup>272</sup> *Id.* at 27.

<sup>273</sup> See, e.g., MICHAEL BATTLE, *UBUNTU: I IN YOU AND YOU IN ME* (2009).



Truth and truthfulness must come together.”<sup>274</sup> But to this he adds that, “The engaged citizen in a republic of laws should never trust to mere authority . . . . [One] should remember that the law is only as strong as the justifications that make it true, and that it is subject to pressure in areas of controversy.”<sup>275</sup> And so it must be for the imposition of DNA testing on Priority Three refugees and family members.

We owe it to ourselves as engaged citizens in a republic of laws to question the purposes behind and assumptions of compulsory DNA testing and whether the ends sought justify the means imposed. Should the law weaken the presumption of innocence by treating all refugees and family members seeking to reunite in the U.S. through Priority Three as possible frauds? This Article has endeavored to show that it should not, for the sake of humanity’s concern for those most abused by fellow humankind. In our quest for accuracy—telling the true from the false—we must not lose sight of its coproduction with agency, for it is as much the authority determining what functions as truth as it is the genetic loci being scanned.

By peeling back the layers of the new DNA testing policy, this Article has deconstructed the known and unknown to show that every first order action, even the seemingly minute ones as swabbing an inner cheek to capture DNA, has second order consequences, perhaps ones as profound as disrupting a family and crushing a child’s future. In turning our sociopolitical and legal gaze towards the near future, it is hoped that criticism of compulsory DNA testing of a category of people who have witnessed the worst of humanity will spur at least some of the reform and rethought proposed herein. Because fraud itself may be open to shifting planes of meaning,<sup>276</sup> healthy skepticism towards the very foundation of this new government policy is warranted, necessary, and just. For it is only by asking the fundamental questions, by questioning authority, and by leaving no stone unturned that we discover the relational truth of blood and soul that constitutes our mutuality of being.

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<sup>274</sup> Robert A. Ferguson, *Judicial Rhetoric and Ulysses in Government Hands*, 15 RHETORIC & PUB. AFF. 435, 458 (2012).

<sup>275</sup> *Id.* at 459.

<sup>276</sup> Holland, *supra* note 3, at 1675 (noting that “[I]n order to smuggle Jewish intellectuals out of Nazi Germany, the forerunners of what would become the International Rescue Committee used forged documents to ferry individuals to freedom. In this instance, ‘fraud’ was not questioned but has been championed.”).