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You're Under Arrest—Say Ah: Suggestions for Legislatures Drafting Statutes Allowing DNA Extraction from Arrestees

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I. Introduction

The procedures followed by law enforcement after the arrest of a suspect are all too familiar. The suspect is read his rights, brought to the police station, and "booked," a process involving verification of the suspect's identity by taking a photograph (the "mug shot") and impressions of the suspect's fingerprints.[1] In recent years a new element of the process has emerged—a lab technician will appear, don rubber gloves, and take either a blood sample or a swab of the inside of the suspect's cheek, known as a buccal swab.[2] From this swab, a DNA sample will be extracted, the total sample will be narrowed down to so-called "junk" strands,[3] and the suspect's DNA profile will be uploaded to the state and federal DNA databases.[4]

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1. *See* Corey Preston, Note, *Faulty Foundations: How the False Analogy to Routine Fingerprinting Undermines the Argument for Arrestee DNA Sampling*, 19 WM. & MARY BILL RTS. J. 475, 475 & n.1 (2010) (describing the booking procedure). Preston's suggestion of the grim scene from Alfred Hitchcock's *The Wrong Man* as a popular culture template, *id.* at 475 n.1, is an excellent choice, but for a more lighthearted version of the classic procedure, see MY BLUE HEAVEN (Warner Bros. Pictures 1990).

2. *See* United States v. Mitchell, 652 F.3d 387, 406–07 (3d Cir. 2011) (en banc) (describing methods of sample extraction).

3. *See id.* at 400–01 (defining junk DNA as "non-genic stretches of DNA not presently recognized as being responsible for trait coding" and explaining that junk strands are compared to other DNA samples through short tandem repeat (STR) technology that provides precise information about identity while revealing no traits of the individual). For a more thorough explanation of DNA and DNA testing procedures, see Robert W. Schumacher II, Note, *Expanding New York's DNA Database: The Future of Law Enforcement*, 26 FORDHAM URB. L.J. 1635, 1637–44 (1999).

4. *See* People v. Buza, 129 Cal. Rptr. 3d 753, 757 (Ct. App. 2011) (describing how a profile created in a state database is also entered into the national Combined DNA Index System (CODIS)).

The federal Combined DNA Index System (CODIS) and the various state DNA databases initially only contained profiles for people *convicted* of certain qualifying offenses.[5] Every court to consider the post-conviction DNA extraction statutes has found them to be constitutional.[6] Recently, the federal statute and many state statutes have been amended to allow law enforcement to take DNA samples from people *arrested* for qualifying offenses.[7]

Challenges to the federal statute have made their way to courts of appeals, and those that have considered the statute have deemed it constitutional.[8] State statutes have by and large gone unchallenged, but those state courts considering the issue have split.[9] Courts have analogized extraction of DNA after arrest to extraction of DNA after conviction.[10]

Courts to consider DNA extraction statutes consider extraction as two separate searches.[11] The first search, the extraction itself, whether done by blood draw or buccal swab, has been deemed minimally intrusive.[12] The second search, creation of the DNA profile in the database, is more controversial, but courts upholding extraction statutes have emphasized that arrestees have a reduced reasonable expectation of privacy,

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5. *See Mitchell*, 652 F.3d at 399 (providing history of federal statute).

6. *See* State v. King, 42 A.3d 549, 563 (Md. 2012) ("Courts have upheld overwhelmingly against Fourth Amendment challenges federal and state statutes authorizing warrantless, suspicionless DNA collection from convicted criminals, including incarcerated prisoners, parolees, and probationers."), *cert. granted*, Maryland v. King, 133 S. Ct. 954 (Nov. 9, 2012) (No. 12-207).

7. *See* 42 U.S.C. § 14135a (2006) (amended 2006); *see, e.g.*, CONN. GEN. STAT. ANN. § 54-102g (West 2012) (amended 2011).

8. *See* United States v. Mitchell, 652 F.3d 387, 415–16 (3d Cir. 2011) (en banc); Haskell v. Harris, 669 F.3d 1049 (9th Cir. 2012) (upholding the federal statute).

9. *Compare* Anderson v. Commonwealth, 650 S.E.2d 702, 706 (Va. 2007) (upholding state arrestee extraction statute), *with In re* Welfare of C.T.L., 722 N.W.2d 484, 492 (Minn. Ct. App. 2006), *Buza*, 129 Cal. Rptr. 3d at 782–83, *King*, 42 A.3d at 580, *and* Mario W. v. Kaipio, 281 P.3d 476, 483 (Ariz. 2012) (striking down state arrestee extraction statutes).

10. *See, e.g.*, *Mitchell*, 652 F.3d at 403–05.

11. *See, e.g.*, *Haskell*, 669 F.3d at 1058 (explaining the first search is the "physical collection of the DNA," the second is the "analysis of the information contained in the sample").

12. *See, e.g.*, *Mitchell*, 652 F.3d at 407.

database profiles contain only information that can be used to determine the identity the arrestee, and the penalties for improper disclosure of information in the database are stiff.[13] These courts support their argument by comparing DNA extraction to taking fingerprints and photographs—traditional booking procedures—finding it is merely a more efficient, foolproof way to serve the same interests in identifying the arrestee and establishing a baseline for the rest of the process.[14] The DNA databases have been found to be powerful law enforcement tools, and courts have concluded the interests of the government outweigh the interests of the individual.[15]

Recently, however, a powerful opposing viewpoint has emerged that would find these statutes unconstitutional.[16] This line of reasoning holds there are significant differences between extraction of DNA post-arrest and post-conviction, so the constitutionality of post-conviction extraction should not be a factor in evaluating post-arrest statutes.[17] Post-arrest statutes impose significant burdens on an arrestee, one who has not yet been found guilty of any crime, let alone a qualifying offense. Many statutes allow law enforcement to use all necessary force to obtain the sample, and many also make it a crime not to cooperate in providing a sample.[18] While every statute provides a procedure for expungement, some of these procedures are onerous, and virtually all statutes provide that if an arrestee is not convicted, but his profile is not expunged and a hit in the database leads to a future arrest, that arrest is not invalid because the profile should not have been in the database.[19] Finally, in the not-too-distant future, even junk DNA could be

13. *See, e.g.*, *id.* at 406–15.

14. *See, e.g.*, *id.* at 413–15.

15. *See, e.g.*, *id.* at 415–16.

16. *See, e.g.*, People v. Buza, 129 Cal. Rptr. 3d 753, 782–83 (Ct. App. 2011).

17. *See, e.g.*, *id.*

18. *See, e.g.*, CONN. GEN. STAT. ANN. § 54-102g(i), (j) (West 2012) (making refusal to cooperate a class D felony and allowing use of reasonable force to extract samples).

19. *See, e.g.*, ALASKA STAT. ANN. § 44.41.035(i), (q) (West 2012) (requiring arrestee to submit certified copy of court order showing charges did not result in conviction for qualifying offense to expunge record and providing that matches to database profiles kept in good faith are admissible against arrestee).

mined for all kinds of information beyond an arrestee's identity, potentially giving the government a wealth of information from someone who has yet to be found guilty.[20] For these judges, these factors tip the scales toward unconstitutionality.

This Note examines individual state statutes and the federal statute to see what elements legislatures might want to include in their statutes and what elements they might want to exclude in order to insulate their statutes from constitutional challenge and continue to provide law enforcement with a valuable investigatory tool.

II. Similarities and Differences Among Federal and State DNA Extraction Statutes

A. The Federal Statute

In 1994, Congress passed the Violent Crime Control and Law Enforcement Act,[21] which authorized the FBI to create CODIS. In the 2000 DNA Act,[22] Congress required the extraction of a DNA sample and creation of a profile in CODIS for anyone convicted of a qualifying federal offense. In 2006 Congress amended the DNA Act, mandating the extraction of DNA from anyone arrested for a qualifying federal offense.[23]

The DNA Act allows for collection of DNA from any individual, including juveniles, arrested for a qualifying offense.[24] Qualifying offenses include any felony, misdemeanor sex crimes and crimes of violence, and any attempt or conspiracy to commit a qualifying offense.[25]

The Act allows "use of such means as are reasonably necessary to detain, restrain, and collect a DNA sample from an

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20. *See* Ashley Eiler, Note, *Arrested Development: Reforming the Federal All-Arrestee DNA Collection Statute to Comply with the Fourth Amendment*, 79 GEO. WASH. L. REV. 1201, 1211 (2011) ("[A]s technology inevitably advances, scientists have predicted that even junk DNA will allow access to the wealth of information that an individual's DNA contains.").

21. 42 U.S.C. § 13701 (2006).

22. *Id.* § 14135a (2000).

23. *Id.* § 14135a(a)(1)(A) (2006).

24. *Id.*

25. *Id.* § 14135a(d).

individual who refuses to cooperate in the collection of the sample."[26] Refusal to cooperate is a misdemeanor.[27] Expungement is available for an arrestee who was not convicted of a qualifying offense if the arrestee sends the FBI a copy of the final court order disposing of the case.[28]

Based on the above, the DNA Act is a relatively unforgiving DNA extraction statute. It implicates many of the concerns identified by the courts that find post-arrest extraction statutes unconstitutional. First, it has a broad scope, extending beyond felonies to include non-sex crime misdemeanors, and to juveniles as well as adults.[29] Second, it authorizes use of reasonable force and criminalizes refusal to cooperate, creating significant immediate and future consequences for refusal to give a sample.[30] Third, expungement procedures place a substantial burden on the arrestee.[31] The arrestee needs to understand that the profile was created and needs to be expunged, a detail that can be easily lost in the swirl of criminal proceedings and the relief of not being convicted. Even if the arrestee understands the profile needs to be expunged, he must work with his lawyer or go to the courthouse to get a copy of his final order, determine where it needs to be sent, and send it to the FBI.

B. State Statutes

Different states have adopted many different frameworks for extraction of DNA from those who have been arrested for or convicted of qualifying offenses. This Note analyzes the statutes based on the factors highlighted by those who view the statutes

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26. *Id.* § 14135a(a)(4)(A).

27. *Id.* § 14135a(a)(5).

28. 42 U.S.C. § 14132(d)(1)(A) (2006).

29. *See id.* § 14135a(d)(3) (defining qualifying offenses to include misdemeanor crimes of violence); *id.* § 14135a(a)(1)(A) (authorizing collection of samples from all individuals, not merely adults).

30. *See id.* § 14135a(a)(4) (authorizing use of reasonable force); *id.* § 14135a(a)(5) (criminalizing refusal to cooperate).

31. *See id.* § 14132 (detailing expungement procedures); *see also* United States v. Mitchell, 652 F.3d 387, 420 (3d Cir. 2011) (en banc) (Rendell, J., dissenting) (explaining the many steps in the process of expungement under § 14132).

as unconstitutional, attempting to describe the approach taken by the majority of states, any significant minority approaches, and any novel solutions undertaken by individual states.

1. From Whom Can DNA Be Extracted?

Twenty-three states do not allow DNA to be taken at the time of arrest, requiring DNA to be taken only after the arrestee is convicted of a qualifying offense.[32] Of those twenty-three, fifteen have current or recently proposed legislation to expand the scope of their DNA extraction statutes to cover arrestees.[33]

Oklahoma is an outlier between the camps of states that do or do not allow extraction at the time of arrest. Oklahoma allows DNA taken at the time of arrest only from illegal aliens.[34] Oklahoma has recently proposed legislation to increase the scope of DNA collection to U.S. citizen arrestees as well.[35]

Of the twenty-six other states that allow a DNA sample to be taken at the time of arrest, only eight states allow a DNA sample

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32. *See* DEL. CODE ANN. tit. 29, § 4713(b) (West 2012); GA. CODE ANN. § 35-3-160(b) (West 2012); HAW. REV. STAT. § 844D-31 (West 2012); IDAHO CODE ANN. § 19-5506(a) (West 2012); IND. CODE ANN. § 10-13-6-10 (West 2012); IOWA CODE ANN. § 81.2 (West 2012); KY. REV. STAT. ANN. § 17.170(2)(a) (West 2012); ME. REV. STAT. ANN. tit. 25, § 1574 (2011.); MASS. GEN. LAWS ANN. ch. 22E, § 3 (West 2012); MICH. COMP. LAWS ANN. § 28.176 (West 2011); MISS. CODE ANN. § 45-33-37 (West 2012); MONT. CODE ANN. § 44-6-103 (2011); NEB. REV. STAT. ANN. § 29-4106 (LexisNexis 2012); NEV. REV. STAT. ANN. § 176.0913 (West 2011); N.H. REV. STAT. ANN. § 651-C:2 (2013); N.Y. EXEC. LAW § 995-c(3) (McKinney 2012); OR. REV. STAT. ANN. § 181.085 (West 2012); 44 PA. CONST. STAT. ANN. § 2316 (West 2012); R.I. GEN. LAWS ANN. § 12-1.5-1 (West 2012); WASH. REV. CODE ANN. § 43.43.754 (West 2012); W. VA. CODE ANN. § 15-2B-6 (West 2012); WIS. STAT. ANN. § 165.77 (West 2011); WYO. STAT. ANN. § 7-19-403 (West 2012).

33. *See* H.B. 132, 26th Leg., Reg. Sess. (Haw. 2011); S.B. 35, 117th Gen. Assemb., 1st Reg. Sess. (Ind. 2011); H.B. 314, Reg. Sess. (Ky. 2012); H.P. 849, 125th Leg., 1st Reg. Sess. (Me. 2011); S.B. 835, 187th Gen. Court (Mass. 2011); S.B. 1345, 96th Leg., Reg. Sess. (Mich. 2012); A.B. 552, 76th Reg. Sess. (Nev. 2011); S.B. 2857, 234th Leg. Sess. (N.Y. 2011); S.B. 811, 76th Leg. Assemb. (Or. 2011); S.B. 150, 197th Gen. Assemb. (Pa. 2013); S.B. 41, Leg. Sess. (R.I. 2013); H.B. 1369, 62nd Leg., 1st Spec. Sess. (Wash. 2011); H.B. 2867, 80th Leg., Reg. Sess. (W. Va. 2012); S.B. 214, 100th Leg., Reg. Sess. (Wis. 2011); H.B. 204, 62nd Leg., Gen. Sess. (Wyo. 2013).

34. OKLA. STAT. ANN. tit. 74, § 150.27a(A) (West 2012).

35. *See* S.B. 851, 53rd Leg., 1st Reg. Sess. (Okla. 2011).

to be taken from adults.[36] Among states that differentiate between adults and juveniles, Utah has the lowest floor for what age is appropriate to take a sample, extracting DNA from anyone over fourteen years of age who is arrested for a qualifying offense.[37] No statutes treat juvenile samples or profiles differently than adult samples or profiles.

In terms of what offenses qualify for post-arrest extraction, every state has its own unique compilation, with each state drawing a different line for what offenses are serious enough to warrant processing a sample and comparing it to the database. Some states enumerate certain felonies for which DNA can be extracted at the time of arrest.[38] Other states draw the line at felonies, but only felonies.[39] The states that draw the line further down, allowing extraction at the time of arrest for misdemeanors, typically choose misdemeanor sex crimes or crimes of violence as qualifying offenses.[40]

2. What "Encouragement" Is Provided to Ensure Collection?

Many states have confronted the problem of an arrestee who reacts with skepticism to the extraction of a DNA sample as a new part of post-arrest procedures. Twelve states follow the federal statute's lead and allow authorities to use reasonable force to extract a sample.[41] Reasonable force covers all kinds of

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36. *See* CAL. PENAL CODE § 296(a)(2) (West 2012); COLO. REV. STAT. ANN. § 16-23-103(1)(a) (West 2012); MO. ANN. STAT. § 650.055(1)(2) (West 2012); N.M. STAT. ANN. § 29-16-6(B) (West 2012); N.D. CENT. CODE ANN. § 31-13-03(1) (West); OHIO REV. CODE ANN. § 2901.07(B)(1) (West 2011); S.C. CODE ANN. § 23-3-620(A) (2012); S.D. CODIFIED LAWS § 23-5A-5.2 (2012).

37. *See* UTAH CODE ANN. § 53-10-403 (West 2012).

38. *See, e.g.*, ARK. CODE ANN. § 12-12-1006(a)(2) (West 2012) (limiting DNA extraction to first-degree murder, kidnapping, rape, and felony sexual assault).

39. *See, e.g.*, COLO. REV. STAT. ANN. § 16-23-103(1)(a) (West 2012).

40. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-610(O)(3) (2012) (including as qualifying offenses misdemeanor prostitution and indecent exposure); MD. CODE ANN., PUB. SAFETY § 2-504(a)(3)(i) (West 2012) (including as a qualifying offense "any crime of violence").

41. *See* ALASKA STAT. ANN. § 44.41.035(n) (West 2012); ARK. CODE ANN. § 12-12-1006(k)(1); CAL. PENAL CODE § 298.1(b)(1); COLO. REV. STAT. ANN. § 16-23-103(5); CONN. GEN. STAT. ANN. § 54-102g(j) (West 2012); FLA. STAT. ANN. § 943.325(8) (West 2012); 730 ILL. COMP. STAT. ANN. § 5/5-4-3(i)(1) (West 2012); LA. REV. STAT. ANN. § 15:609(I) (2012); MO. ANN. STAT. § 650.055(3); S.D.

activity. In one case, a suspect in a holding cell, shackled and chained to a metal bar, declined to give a DNA sample, and a detective warned the suspect he could "get hurt pretty bad" before he "forced [the suspect's] jaw open and forcefully took a buccal swab."[42] Most states allow the person taking the sample to judge when force should be used and what amount is necessary, but two states go an extra step to make sure force is necessary before it is used.[43]

Vermont injects additional due process into the use of force by initially allowing the arrestee to refuse to provide a sample.[44] If the arresting agency wants a sample taken before trial, it must seek a court order.[45] The arrestee is entitled to a hearing, at which time a judge decides whether a sample is required and can authorize reasonable force.[46]

California provides an elaborate framework for the use of reasonable force, defining it as the "force an objective and trained corrections officer would use in the circumstances," requiring written authorization from a supervising officer before force can be used, and providing that if force is used outside the arrestee's cell, it must be video recorded.[47] Both procedures have elements that could prove cumbersome. Both procedures, however, would placate those who fear giving police a blank check to use reasonable force in any situation, force that could easily be used to intimidate an innocent suspect or as a vehicle for discrimination.[48]

Several states offer additional "encouragement" to cooperate by making refusal to cooperate a crime. Four states follow the federal government and have made refusal to cooperate a

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CODIFIED LAWS § 23-5A-13; UTAH CODE ANN. § 53-10-404(3)(c); VT. STAT. ANN. tit. 20, § 1935 (West).

42. Friedman v. Boucher, 580 F.3d 847, 851 (9th Cir. 2009).

43. *See* VT. STAT. ANN. tit. 20, § 1935(a); CAL. PENAL CODE § 298.1(c) (West 2012).

44. *See* VT. STAT. ANN. tit. 20, § 1935(a).

45. *See id.*

46. *See id.* § 1935(b), (c).

47. CAL. PENAL CODE § 298.1(c).

48. *Cf.* Atwater v. City of Lago Vista, 532 U.S. 318, 372 (O'Connor, J., dissenting) ("[U]nbounded discretion carries with it grave potential for abuse.").

misdemeanor,[49] and three states have made refusal to cooperate a felony.[50] With the exception of Kansas, all states that make refusal to give a sample a crime, like the federal government, use both reasonable force and threat of an additional charge to ensure cooperation.[51] Kansas also requires the arrestee to be given notice that it is a crime to refuse to provide a sample before the additional charge can be brought.[52] On a day-to-day level, notice is probably provided to most arrestees to achieve cooperation, but a statutory requirement is a good idea, again to ensure maximum protection for the rights of arrestees while still allowing law enforcement to take DNA.

3. When Can the Sample Be Taken?

Another facet of state DNA extraction statutes that varies from state to state is the provision governing when the sample is taken.[53] This small detail could have significant repercussions for arrestees. Despite the best efforts of law enforcement, some arrests are chaotic, or are designed to find out what a person of interest knows, or are made by mistake. In most cases, mistaken arrests are quickly cleared up, but the effects could linger if DNA is taken right away, as now the arrestee, despite having done nothing that would constitute probable cause to support the arrest, has been forced to give a potential wealth of information to the state. All states have procedures in place to expunge a database record and destroy the sample if charges are never brought, but many depend on the arrestee to start the process.[54]

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49. *See* ARK. CODE ANN. § 12-12-1006(i) (West 2012); CAL. PENAL CODE § 298.1(a) (West 2012); FLA. STAT. ANN. § 943.325(15)(a) (West 2012); KAN. STAT. ANN. § 21-2511(m) (West 2012).

50. *See* CONN. GEN. STAT. ANN. § 54-102g(i) (West 2012); 730 ILL. COMP. STAT. ANN. § 5/5-4-3(i)(1) (West 2012); S.D. CODIFIED LAWS § 23-5A-14 (2012).

51. *See supra* notes 41, 49–50 and accompanying text (listing Arkansas, California, Connecticut, Florida, Illinois, and South Dakota as states that allow both reasonable force and criminalize refusal to cooperate).

52. *See* KAN. STAT. ANN. § 21-2511(m).

53. *Compare, e.g.*, ALA. CODE § 36-18-25(c)(1) (2012) (allowing DNA to be taken at the time of booking), *with* MD. CODE ANN., PUB. SAFETY § 2-504(b)(1) (West 2012) (requiring law enforcement to wait until probable cause determination has been made to take a sample).

54. Discussed in greater detail in Part II.B.4, *infra*.

If a mistakenly arrested person walks out of the county jail breathing a sigh of relief that the mix-up has been sorted out and wanting nothing more to do with it, he could easily forget to initiate the expungement process. Thus, his record would be left in the system to perhaps be used against him at a later date, when police haul him in for questioning as part of a future investigation with which he is tangentially involved through DNA.

Fifteen state statutes, like the federal statute, explicitly allow for DNA to be taken at the time of booking.[55] Allowing a sample to be taken at this stage of the process presents the maximum risk for the state to gain information with potentially no justification in the case of a mistaken arrest. Seven states wait, choosing to take the sample after law enforcement has demonstrated probable cause for the arrest.[56] Waiting for a probable cause determination minimizes the risk to individuals of divulging information to the state without proper justification, and the state gets the DNA profiles for those truly deserving of being in the database pending trial.

4. What Are the Procedures for Expungement?

Expungement procedures are like qualifying offenses—there are many variables for state legislatures to consider when drafting legislation, so procedures vary from state to state. The most common procedure for expungement among states is the procedure adopted by the federal statute, which places the

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55. *See* ALA. CODE § 36-18-25(c)(1); ARIZ. REV. STAT. ANN. § 13-610(K) (2012); ARK. CODE ANN. § 12-12-1006(a)(2) (West 2012); CAL. PENAL CODE § 297(a)(1)(A) (West 2012); COLO. REV. STAT. ANN. § 16-23-103(1)(a) (West 2012); CONN. GEN. STAT. ANN. § 54-102g(a); FLA. STAT. ANN. § 943.325(3)(a) (West 2012); KAN. STAT. ANN. § 21-2511(e)(2) (West 2012); LA. REV. STAT. ANN. § 15:609(A)(1) (2012); MO. ANN. STAT. § 650.055(2)(1) (West 2012); N.D. CENT. CODE ANN. § 31-13-03(1) (West 2011); OHIO REV. CODE ANN. § 2901.07(B)(1) (West 2012); S.C. CODE ANN. § 23-3-620(A) (2012); S.D. CODIFIED LAWS § 23-5A-5.2; UTAH CODE ANN. § 53-10-403 (West 2012).

56. *See* 730 ILL. COMP. STAT. ANN. § 5/5-4-3(a-3.2) (West 2012); MD. CODE ANN., PUB. SAFETY § 2-504(b)(1); MINN. STAT. ANN. § 299C.105(1)(a)(1) (West 2012); N.C. GEN. STAT. ANN. § 15A-266.3A(b) (West 2012); TEX. GOV'T CODE ANN. § 411.1471(a)(1) (West 2011); VT. STAT. ANN. tit. 20, § 1933(a)(2) (West 2012); VA. CODE ANN. § 19.2-310.2:1 (West 2012).

burden on the arrestee to obtain a copy of a final order of dismissal of charges, *nolle prosequi*, acquittal at trial, conviction of a lesser, non-qualifying offense, or reversal of conviction, and mail that order to the state agency charged with maintaining the state DNA database.[57] The agency is then charged with promptly deleting the arrestee's profile in its database and contacting the FBI to make sure the profile is deleted from CODIS.[58] Thirteen states that allow post-arrest DNA extraction employ such procedures.[59]

Two states have unique expungement procedures that take novel approaches to lessen the burden on arrestees. Instead of placing the burden on the arrestee to make sure the profile is expunged if charges are not filed, Colorado places the burden on the district attorney's office to make sure the sample stays in the system.[60] If charges are filed and the arrestee is not convicted, Colorado does not require that the person obtain a copy of the final court order; it only requires the arrestee to submit basic information and "[a] declaration that, to the best of the person's knowledge, he or she qualifies for expungement."[61] Once the state bureau of investigation receives this request, Colorado once again shifts the burden to the district attorney—the bureau contacts the district attorney to see if the arrestee, in fact, does not qualify for expungement, and if the district attorney fails to reply within ninety days, the profile is expunged.[62]

Colorado provides notice to the arrestee to either confirm that the sample was destroyed or provide reasons why it was not

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57. *See* 42 U.S.C. § 14132(d) (2006) (detailing the procedure for expungement under the federal statute).

58. *Id.*

59. *See* ALA. CODE § 36-18-26 (2012); ALASKA STAT. ANN. § 44.41.035(i) (West 2012); ARIZ. REV. STAT. ANN. § 13-610(M); ARK. CODE ANN. § 12-12-1019 (West 2012); CAL. PENAL CODE § 299 (West 2012); CONN. GEN STAT. ANN. § 54-102*l* (West 2012); FLA. STAT. ANN. § 943.325(16); 730 ILL. COMP. STAT. ANN. § 5/5-4-3(f-1); KAN. STAT. ANN. § 21-2511(e)(4)–(5); LA. REV. STAT. ANN. § 15:614; N.M. STAT. ANN. § 29-16-10 (West 2012); N.D. CENT. CODE ANN. § 31-13-07; S.D. CODIFIED LAWS § 23-5A-29.

60. *See* COLO. REV. STAT. ANN. § 16-23-104 ("If the Colorado bureau of investigation does not receive confirmation of a felony charge within a year after receiving the sample for testing, the Colorado bureau of investigation shall destroy the biological sample and any results from the testing of the sample.").

61. *Id.* § 16-23-105(2).

62. *Id.* § 16-23-105(3)–(4).

destroyed.[63] This frees the arrestee from the burden of following up with the state agency to make sure the profile was destroyed, consequently the arrestee does not need to worry about subsequent arrest if his DNA is present at a future crime scene. Finally, the statute provides that if a future arrest is based on a DNA match in the database and the profile should have been expunged or is scheduled for expungement, the match is not admissible as evidence at the arrestee's trial.[64]

Maryland's extraction statute provides "[a]t the time of collection of the DNA sample . . . the individual from whom a sample is collected shall be given notice that the DNA record may be expunged and the DNA sample destroyed in accordance with [statutory expungement procedures]."[65] Three other states have joined Maryland in providing notice about expungement procedures to the arrestee at the outset.[66] This element of the procedure will make sure the arrestee is fully aware of how to go about getting the profile expunged if he is not subsequently convicted. This is different from procedures in other states, which require an arrestee to be proactive to determine what records were made and how they should be expunged.

Maryland also provides that the sample will be destroyed automatically whenever the prosecution ends: "If all qualifying charges are determined to be unsupported by probable cause: the DNA sample shall be immediately destroyed . . . ."[67] The statute provides that the same will happen if trial does not result in conviction, if the conviction is overturned, or if the arrestee is unconditionally pardoned.[68] Maryland, like Colorado, is one of the few states that sends notice to the arrestee and his lawyer to confirm expungement.[69]

Both Maryland and Colorado place the burden on the state, not the arrestee, to expunge database records and destroy DNA samples. This seems like the most important process of any

63. *Id.* § 16-23-105(5).

64. *Id.* § 16-23-105(6).

65. MD. CODE ANN., PUB. SAFETY § 2-504(a)(3)(ii) (West 2012).

66. *See* COLO. REV. STAT. ANN. § 16-23-103(2)(a) (West 2012); N.C. GEN. STAT. ANN. § 15A-266.3A(d) (West 2012); S.C. CODE ANN. § 23-3-660(E) (2012).

67. MD. CODE ANN., PUB. SAFETY § 2-504(d)(2)(i).

68. *Id.* § 2-511(a)(1).

69. *Id.* § 2-511(e).

expungement procedure that would satisfy the courts contending that post-arrest DNA extraction is unconstitutional. Several states have similar procedures,[70] and the fact that this element is widely adopted backs up the common-sense intuition that it is not a major burden to put on the court or the prosecutor, who will become used to dealing with the appropriate state agencies and can get records expunged quickly and easily. Arrestees, on the other hand, will be navigating the system infrequently at worst, with little knowledge of its inner workings.

California, which protects arrestees with its intricate procedures governing the use of reasonable force, also has some of the most exacting procedures for expunging a record. This increases the burden on an arrestee eventually not found guilty of a qualifying offense. Whereas most states only require the arrestee to contact the state agency responsible for the state DNA database, California requires the arrestee to contact, in writing, the trial court, the state Department of Justice (which administers the state database), *and* the prosecutor on the arrestee's case.[71] Not only does the arrestee have to write to three different places, but he is also required to obtain proof of service on all three.[72] While other states require just a certified copy of the document memorializing the final disposition of the arrestee's case, California requires that document, plus proof of service on the other named departments, *and* a separate court order verifying that there is no appeal pending or objection to expungement by the Department of Justice or the prosecutor.[73] The worry with the expungement procedure employed by the federal government and most states (arrestee must start process and submit certified copy of document) is that the arrestee will not know to do it, and that it will be somewhat inconvenient. The worry with a system as demanding as California's is that an arrestee could be fully apprised of the procedure and decide it is

70. *See, e.g.*, MINN. STAT. ANN. § 299C.105(3)(a) (West 2012) (requiring arrestee to initiate process if charges were dismissed, but providing for automatic expungement if arrestee is found not guilty); N.C. GEN. STAT. ANN. § 15A-266.3A(i) (moving burden from arrestee to prosecutor and court effective June 2012).

71. CAL. PENAL CODE § 299(c)(1) (West 2012).

72. *Id.*

73. *Id.* § 299(c)(2).

not worth the time, especially the onerous requirements of securing proof of service and having to follow up with busy courts to get a second court order.

5. Other Notable Features of State Systems

Individual states, being the great laboratories for experimentation that they are, have also come up with unique facets of their statutory schemes that defy easy categorization but deserve special attention for their novel approaches to some of the issues outlined above.

One of the most interesting approaches taken by any state is that of Alabama, which gives arrestees the absolute right to refuse to give a sample:

> [A]ny person arrested for a felony offense . . . shall consent in writing freely and voluntarily to provide a DNA sample and shall be informed that they are providing written permission without any threats or promises. The person shall have the right to refuse to provide a sample . . . without penalty. The refusal may not be used as evidence against the person in any proceeding.[74]

This is perhaps the ultimate arrestee protection because the arrestee has the choice of whether to provide any information to the state through a DNA sample. This measure, however, exalts the rights of arrestees over the legitimate needs of law enforcement. Any arrestee wise to this part of the statute will decline to give a sample, denying law enforcement potentially valuable information concerning the identity and history of the arrestee.

Connecticut sharply limits the pool of arrestees from whom it can take DNA samples by requiring that the arrestee be arrested for a qualifying offense *and* have a prior felony conviction before a sample can be taken.[75] Texas has a similar statute—DNA can only be taken at the time of arrest from an arrestee who has previously been convicted of a qualifying offense.[76] This is an

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74. ALA. CODE § 36-18-25(c)(3) (2012).

75. CONN. GEN. STAT. ANN. § 54-102g(a) (West 2012).

76. TEX. GOV'T CODE ANN. § 411.1471(a)(2) (West 2011) (allowing for samples to be taken at time of arrest from an arrestee who has already been

effective way to target repeat offenders, and thus increases the likelihood of connection to other open investigations and maximum usefulness of extraction. The guarantee of increased effectiveness, however, comes at too high a price. Repeat criminals savvy enough to avoid arrest or conviction for prior crimes may only be able to be linked to prior crimes by DNA, and the Connecticut statute would allow them to potentially continue to elude responsibility for prior crimes.

A persistent theme cropping up in many state statutes is the presence of various allusions to funding. Many DNA statutes were passed years ago, when states were more financially sound, and even then statewide DNA databases were considered a luxury, to be maintained if funding was available. The recent economic downturn has left many state budgets in dire straits, and programs like DNA databases are now more of a luxury than ever. Florida explicitly provides how funding will affect extraction of DNA from arrestees: "DNA samples collected . . . from persons arrested for any felony offense or attempted felony offense in this state are subject to sufficient funding appropriations passed by the Legislature and approved by the Governor . . . ."[77] The statute then provides a schedule, starting in 2011 with certain categories of felonies (homicide, assault, sexual battery, lewdness) and expanding as funding allows with the ultimate goal of covering all felonies by 2019.[78] A clear tension exists in every state between a security-conscious desire to use DNA to catch serious offenders and keep them off the streets and a budget-conscious desire to spend money in other pressing (and potentially crime-preventing) areas like education, healthcare, and unemployment assistance.

Some states have attempted to bolster their bottom line by soliciting contributions from the arrestees themselves. One state, Utah, makes the arrestee pay $150 as the cost of collection at the time the sample is taken, unless the court finds the arrestee indigent and unable to pay.[79] Several other states loan the arrestee the cost of the extraction and collect if the arrestee is

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convicted of an enumerated felony). DNA is taken at indictment for those arrested for enumerated felonies without a prior conviction. *Id.* § 411.1471(a)(1).

77. FLA. STAT. ANN. § 943.325(3)(b) (West 2012).

78. *Id.*

79. UTAH CODE ANN. § 53-10-404(2)(a) (West 2012).

convicted.[80] The Utah method is an invitation to stoke the fires of those who would see all arrestee extraction statutes found unconstitutional. Nothing would gall those who see post-arrest extraction as an unconstitutional invasion of privacy more than not only having one's privacy invaded, but also having to pay the state for the privilege. While forcing a convicted arrestee to compensate the state for extraction and creation of a profile is on less slippery ground constitutionally, it still smacks of unfairness. Budget-conscious states seeking to maintain a valuable law enforcement tool in the face of fiscal realities will have to make many tough choices, one of which is whether to try to collect from convicted arrestees, taking not only their freedom but also various administrative costs of convicting them and keeping an eye on them after they are released.

III. Constitutional Challenges to Federal and State Statutes

Many arrestees have challenged the constitutionality of federal and state statutes relied on by law enforcement personnel to take a DNA sample before conviction and enter it into CODIS or a state database. These challenges have engendered a sharp divide between judges. Although the federal statute has been upheld by every court to consider it, it has been upheld by divided courts and over sharp dissents.[81] Challenges on the state level have been more successful, with four state courts invalidating regimes in their respective states.[82] The opinions to date have provided a road map of the different viewpoints on what makes DNA extraction from arrestees constitutional. By understanding the issues on which supporters and critics of the statutes agree and disagree, a legislature can better understand how to immunize a statute from constitutional challenge and continue to

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80. *See, e.g.*, FLA. STAT. ANN. § 943.325(12)(a); N.D. CENT. CODE ANN. § 31-13-03(3) (West 2011).

81. *See* Haskell v. Harris, 669 F.3d 1049 (9th Cir. 2012); United States v. Mitchell, 652 F.3d 387 (3d Cir. 2011) (en banc); United States v. Pool, 621 F.3d 1213 (9th Cir. 2010), *vacated as moot*, 659 F.3d 761 (9th Cir. 2011).

82. *See* Mario W. v. Kaipio, 281 P.3d 476 (Ariz. 2012); People v. Buza, 129 Cal. Rptr. 3d 753 (Ct. App. 2011); King v. State, 42 A.3d 549 (Md. 2012); *In re* Welfare of C.T.L., 722 N.W.2d 484 (Minn. Ct. App. 2006).

provide a valuable tool to law enforcement while still protecting the rights of arrestees.[83]

The Fourth Amendment provides: "The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated . . . ."[84] All courts to consider DNA extraction from arrestees agree that it involves two separate searches for purposes of the Fourth Amendment. These searches are evaluated under a totality of the circumstances test, balancing interests of the individual against government interests, and if government interests prevail, the search is reasonable and thus constitutional.[85] The first search is the extraction of the sample itself, and it is constitutional because "the intrusion occasioned by the act of collecting the DNA sample is minimal."[86] It is the second search, "the processing of the DNA sample and the creation of the DNA profile for [the database]" that courts have had to analyze more closely.[87]

Four major points of disagreement have emerged. First, courts differ as to whether an arrestee is more like a convict, with a reduced reasonable expectation of privacy, or more like a normal citizen, with a full reasonable expectation of privacy. Second, courts disagree over how similar DNA extraction is to accepted booking procedures of taking fingerprints and photographs. Third, courts have placed different weight on the availability of expungement and whether it means extraction at arrest is constitutional or unconstitutional. Finally, courts have differed over the use of reasonable force and the role it plays in Fourth Amendment analysis.

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83. The U.S. Supreme Court is about to weigh in as well. It has granted certiorari in *Maryland v. King* and will hopefully provide definitive guidance to states on exactly what is required for an extraction statute to be constitutional under the Fourth Amendment. King v. State, 42 A.3d 549, *cert. granted*, Maryland v. King, 133 S. Ct. 594 (Nov. 9, 2012) (No. 12-207).

84. U.S. CONST. amend. IV.

85. *See Mitchell*, 652 F.3d at 402 (outlining the totality of the circumstances test).

86. *See, e.g.*, *id.* at 407.

87. *Id.*

A. The Analogy Between DNA Extraction from People Arrested for Qualifying Offenses and People Convicted of Qualifying Offenses

In *United States v. Mitchell*,[88] a majority of the Third Circuit, sitting en banc, began its analysis by looking to cases upholding DNA extraction following conviction.[89] The majority's analysis was shaped by the fact that both the Third Circuit and all the other circuits had "concluded that the collection of DNA samples from prisoners or probationers is a reasonable search consistent with the Fourth Amendment."[90] The majority reasoned that while extraction of DNA from an ordinary citizen would be unreasonable, extraction from convicted felons was reasonable because felons have "a reduced expectation of privacy—and in particular privacy of identity."[91] The majority found arrestees had similarly reduced expectations of privacy, and held the search of creating a database profile for arrestees was reasonable.[92] A

88. *See* United States v. Mitchell, 652 F.3d 387, 415–16 (3d Cir. 2011) (en banc) (holding the DNA Act, as amended to allow DNA extraction from felony arrestees, is constitutional under the Fourth Amendment). In *Mitchell*, the court considered the constitutionality of the expanded federal DNA Act, 42 U.S.C. § 14135a, which allows extraction of a DNA sample from any adult or juvenile arrested for a felony and certain other qualifying offenses, and the use of that sample to create a DNA profile in CODIS. *Id.* at 401. Mitchell had been arrested for attempted possession with intent to distribute cocaine. *Id.* at 390. Although the statute authorizes the arresting agency to take a sample at the time of arrest, in this case the prosecutor waited until Mitchell's initial appearance in court to announce his intention to collect a DNA sample. *Id.* Mitchell objected, and the district court, following briefing on the issue, found the statute unconstitutional. *Id.* The Third Circuit majority reasoned that the collection of DNA and creation of a profile had already been deemed minimally intrusive in the case of people convicted of qualifying offenses, and analogized the collection of a sample at the time of booking to the taking of fingerprints, making the interests of the arrestee minimal. *Id.* at 407, 413. The majority found the government has a compelling interest in collecting DNA from arrestees and creating database profiles, so it concluded, given the totality of the circumstances, that the Act is constitutional. *Id.* at 415–16.

89. *Id.* at 403.

90. *Id.* at 404–05.

91. *Id.* at 404 (quoting United States v. Sczubelek, 402 F.3d 175, 184 (3d Cir. 2005)); *see also* Friedman v. Boucher, 580 F.3d 847, 863 (9th Cir. 2009) (Callahan, J., dissenting) ("Once an individual is lawfully arrested based upon probable cause, his identification becomes a matter of legitimate state interest, and he cannot claim privacy in it.").

92. *Id.* at 416 ("[G]iven arrestees' . . . diminished expectations of privacy in

Ninth Circuit majority in *Haskell v. Harris*[93] reached the same result. The *Haskell* majority noted there is universal agreement that felony arrestees have diminished privacy expectations, and noted a statute that allowed police to take DNA from citizens at random would be unconstitutional, but a statute allowing for extraction of DNA from felony arrestees after police determined there was probable cause was constitutional.[94]

In *United States v. Pool*,[95] the majority found that whether DNA is collected after conviction or after a probable cause determination, the "government's interests remain substantial."[96] The *Pool* majority explained that even though the arrestee had yet to be convicted, the government had an interest in protecting society and ensuring compliance with conditions of pretrial release in the "lengthy period of time between an initial determination of probable cause and a person's trial (and even more time before a conviction becomes final after an unsuccessful appeal)."[97] The proposition that arrestees have a lowered reasonable expectation of privacy than ordinary citizens finds support in Supreme Court precedent: "If the arrest is lawful, the privacy interest guarded by the Fourth Amendment is subordinated to a legitimate and overriding governmental concern."[98]

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their identities and the Government's legitimate interests in the collection of DNA from these individuals, we conclude that such collection is reasonable and does not violate the Fourth Amendment.").

93. *See* Haskell v. Harris, 669 F.3d 1049 (9th Cir. 2012).

94. *See id.* at 1058–61.

95. *See* United States v. Pool, 621 F.3d 1213, 1228 (9th Cir. 2010) (upholding extraction of DNA from arrestees pursuant to the federal statute after a finding of probable cause), *vacated as moot*, 659 F.3d 761 (9th Cir. 2011). In *Pool*, a Ninth Circuit panel considered the constitutionality of the DNA Act allowing DNA extraction from those arrested for qualifying offenses. *Id* at 1214–15. Pool was arrested on child pornography charges, and consented to all conditions of pre-trial release at arraignment except giving a DNA sample. *Id.* at 1215. The magistrate upheld the Act, and the court affirmed, finding under a totality of the circumstances that while Pool raised "non-frivolous concerns," the interests of the government in identifying those arrested for qualifying offenses outweighs the individual's privacy interest in his identity. *Id.* at 1228.

96. *Id.* at 1222–23.

97. *Id.* at 1223.

98. United States v. Robinson, 414 U.S. 218, 260 (1973) (Powell, J., concurring).

Some courts have found the analogy between convicted offenders and arrestees far less convincing. In *People v. Buza*,[99] a unanimous panel of the California Court of Appeals invalidated California's DNA extraction statute, distinguishing *Mitchell* and *Pool* because those cases both dealt with DNA extraction after a judicial determination of probable cause, while the case before it involved extraction at the time of booking.[100] The concurring opinion in *Pool* was careful to note this distinction as well, explaining "this case condones DNA testing for individuals for whom a judicial or grand jury determination has been made; it does not address such sampling from mere arrestees."[101] The *Buza* court emphasized that unanimous approval by circuit courts of DNA extraction from individuals convicted of qualifying offenses was not quite the ringing endorsement proponents like the *Mitchell* majority claimed because those cases "generated significant debate and disagreement among the judges that decided them."[102]

The Maryland Court of Appeals weighed in decisively, finding that the privacy interest of arrestees is greater than that of convicted felons in *King v. State*.[103]

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99. *See* People v. Buza, 129 Cal. Rptr. 3d 753, 783 (Ct. App. 2011) (holding the California DNA extraction statute unconstitutional to the extent it requires arrestees to submit a DNA sample before a determination of probable cause by a judge or grand jury). In *Buza*, the court considered the constitutionality of the California DNA extraction statute, which requires that a sample be taken from an individual arrested for a qualifying offense "as soon as administratively practicable," normally at booking. *Id.* at 756–57. Buza was arrested for arson, a qualifying offense under California law, but he refused to provide a DNA sample in jail after his arrest. *Id.* at 755. Buza was charged with a misdemeanor for failing to provide a sample, and he challenged his subsequent conviction on the grounds the statute was unconstitutional. *Id.* The court agreed and found individual interests outweighed state interests in this case and DNA extraction from arrestees without individualized suspicion or a judicial determination of probable cause was unreasonable. *Id*. at 783. In *Haskell*, the Ninth Circuit panel also considered the California extraction statute, and the majority distinguished *Buza* and found the statute constitutional. Haskell v. Harris, 669 F.3d 1049, 1054 n.2, 1065 (9th Cir. 2012).

100. *Buza*, 129 Cal. Rptr. 3d at 766.

101. United States v. Pool, 621 F.3d 1213, 1231 (9th Cir. 2010) (Lucero, J., concurring).

102. *Buza*, 129 Cal. Rptr. 3d at 762.

103. King v. State, 42 A.3d 549 (Md. 2012).

> The State underestimates . . . the power of a conviction. . . . [C]onvicted felons have a "severely reduced expectation of privacy"; the difference regarding a mere arrestee is critical here. Although arrestees do not have all the expectations of privacy enjoyed by the general public, the presumption of innocence bestows on them greater protections than convicted felons, parolees, or probationers. A judicial determination of criminality, conducted properly, changes drastically an individual's reasonable expectation of privacy. . . . This right should not be abrogated by the mere charging with a criminal offense: the arrestee's presumption of innocence remains.[104]

The dissents in both *Mitchell* and *Pool* also disagreed strongly with the analogy drawn by the respective majorities. The *Mitchell* dissent stated simply that "[c]onvicts . . . differ from arrestees and pretrial detainees in an obvious, but nonetheless critical, respect: they have been found guilty beyond a reasonable doubt, not just accused, of a crime."[105] The *Mitchell* dissent conceded that privacy interests of arrestees are "diminished in certain, very circumscribed situations," but argued those interests are "not so weak as to permit the Government to intrude into their bodies and extract the highly sensitive information coded in their genes."[106] The dissenting judge in *Pool* also put his position in no uncertain terms: "If there was, as the majority describes, a 'watershed event' that justified what would otherwise be an unconstitutional seizure, the event was a conviction, not a post-arrest probable cause determination."[107] This line of reasoning could also find support in Supreme Court precedent.[108]

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104. *Id.* at 577. The dissent in *King*, however, countered the majority's assertion about the effect of extraction at arrest on the presumption of innocence, noting the arrestees, while presumed innocent, are subject to all manner of lawful intrusions. *See id.* at 582–83 (Barbera, J., dissenting).

105. United States v. Mitchell, 652 F.3d 387, 421 (3d Cir. 2011) (en banc) (Rendell, J, dissenting).

106. *Id.*

107. United States v. Pool, 621 F.3d 1213, 1236 (9th Cir. 2010) (Schroeder, J., dissenting). For a similarly bright line, see *In re* Welfare of C.T.L., 722 N.W.2d 484, 491–92 (Minn. Ct. App. 2006) ("And because a person who has been charged is innocent until proven guilty, we see no basis in concluding that before being convicted, a charged person's privacy expectation is different from the privacy expectations of a person who was charged but the charge was dismissed . . . .").

108. *See* Arizona v. Gant, 556 U.S. 332, 344–45 (2009) (holding that in

B. The Analogy Between DNA and Photos and Fingerprints

Judges who believe postarrest DNA extraction is constitutional also draw support by placing DNA in line with fingerprints and photographs, routinely taken at the time of booking at police stations all over the country, reasoning that if those twentieth century standard procedures are constitutional, so too is the twenty-first century addition of DNA sampling. At first blush, the analogy between DNA—microscopic particles divined from our cells, capable of analysis only by computer, and containing the secrets of who we are and how we work—and the mug shot and fingerprint impressions taken as part of standard booking procedure, seems like "pure folly," as it was called by the district court in *Mitchell*.[109]

The Third Circuit majority in *Mitchell*, however, reversing the district court, accepted the analogy.[110] It explained fingerprints are used to identify an arrestee, fingerprinting of all arrestees at booking is endorsed universally, and DNA taken at the time of arrest is "used only for identification purposes," thus the DNA sample taken after arrest is properly viewed as "fingerprints for the 21st century."[111] Arrestees have argued even the junk DNA used to create database profiles can reveal familial characteristics, information absent from fingerprints or photos, but the *Pool* majority responded by noting because

> by definition the match [between database profile and family member DNA] is not perfect . . . . This seems somewhat analogous to a witness looking at a photograph of one person and stating that the perpetrator has a similar appearance which leads the police to show the witness photos of similar

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certain circumstances surrounding an arrest of a vehicle occupant, the arrestee has a lesser reasonable expectation of privacy, but once secured and out of reaching distance, the arrestee has a reasonable expectation of privacy, search of passenger compartment is unreasonable). The analogy could be drawn to extraction cases that once the arrestee is secured, there is no exigency requiring DNA extraction before a judicial determination of probable cause.

109. United States v. Mitchell, 681 F. Supp. 2d 597, 608 (W.D. Pa. 2009), *rev'd*, 652 F.3d 387 (3d Cir. 2011) (en banc).

110. *Mitchell*, 652 F.3d at 411.

111. *Id.* at 409–11; *see also* State v. Franklin, 76 So. 3d 423, 424–25 (La. 2011) (considering Louisiana's DNA extraction statute and echoing the *Mitchell* majority's reasoning that DNA is the fingerprints of the twenty-first century).

> looking individuals, one of whom the witness identifies as the perpetrator.[112]

The concurrence went further, extending the similarity to fingerprints, which "may also correlate with certain traits."[113] While the concurrence was not blind to the unclear history of the constitutionality of fingerprinting, it asserted that "the near universal acceptance of the practice casts a long shadow over this case."[114] The *Haskell* majority noted "[f]ingerprinting has been consistently upheld as constitutional," explained that there is a "clear analogy" between fingerprints and DNA, and added that DNA has several advantages over fingerprints: "DNA identification is more robust and reliable than fingerprint identification; DNA is more often left at crime scenes than fingerprints, thus enhancing DNA's investigative efficacy; and . . . DNA contains a much broader range of identifying information than fingerprints . . . ."[115]

The *Buza* court offered a detailed counter-argument setting out many reasons why DNA is different from fingerprints.[116] The court took little comfort in the fact that only junk strands were used to create the database profile: "[S]cientific advances will undoubtedly increase the quantity and nature of information that can be extracted from that limited genetic information."[117] The dissents in both *Mitchell* and *Pool* echo the concern about the amount of information revealed in DNA.[118] Even if junk DNA continued to reveal little information about the traits of the person from whom it was extracted, the state would still have the original sample, which "contain[s] the entire human genome, [and] which [the state's] laboratory is required to collect and store."[119] DNA, unlike fingerprints, has "the potential for research to identify genetic

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112. United States v. Pool, 621 F.3d 1213, 1221 (9th Cir. 2010).

113. *Id.* at 1230 (Lucero, J., concurring).

114. *Id.*

115. Haskell v. Harris, 669 F.3d 1049, 1059–60 (9th Cir. 2012).

116. *See* People v. Buza, 129 Cal. Rptr. 3d 753, 768–70 (Ct. App. 2011).

117. *Id.* at 769.

118. *See* United States v. Mitchell, 652 F.3d 387, 424 (3d Cir. 2011) (en banc) (Rendell, J., dissenting) (explaining the DNA used to create the sample represents a "vast" amount of information about the arrestee); *Pool*, 621 F.3d at 1234 (Schroeder, J., dissenting) ("DNA sampling . . . provides infinitely more information about an individual than fingerprints.").

119. *Buza,* 129 Cal. Rptr. 3d at 769.

causes of antisocial behavior that might be used to justify various crime control measures," and DNA, unlike fingerprints, "is viewed by society as a process reserved exclusively for criminals."[120] The court pointed out that "the practice of fingerprinting on arrest, though routine, has never been subjected to Fourth Amendment analysis," and if the state's true interest in DNA is identification, fingerprinting is a much more effective tool, as DNA analysis can take weeks, while fingerprints can be run almost immediately.[121]

The *King* majority supplemented the counter-argument laid out in *Buza*. It explained that while the physical intrusion of a buccal swab is minimal, it is still greater than the intrusion of taking a fingerprint because it involves going inside the body rather than taking an impression of the outside.[122] Like the *Buza* court, the *King* majority observed that traditional booking procedures have never undergone constitutional scrutiny, and even if those procedures are constitutional, we should not be in a hurry to supplement them with DNA extraction.[123] The *King* majority concluded that DNA offered the potential for much more information about an arrestee than fingerprints, and it could "not turn a blind eye to the vast genetic treasure map that remains in the DNA sample retained by the State."[124]

The Arizona Supreme Court took a different approach to the analogy between DNA and fingerprints than any other court in considering the Arizona extraction statute in *Mario W. v. Kaipio*.[125] The *Mario W.* court found that the intrusion required for a buccal swab is no greater than the intrusion required to take fingerprints, and found the state has a compelling interest in taking a DNA sample from a suspect at the time of arrest, just like it has a compelling interest in taking fingerprints at the time of booking.[126] While the court found the first search, the taking of the sample, constitutional, it found the second search was

120. *Id.*
121. *Id.* at 770–72.
122. King v. State, 42 A.3d 549, 576–77 (Md. 2012).
123. *Id.* at 577.
124. *Id.*
125. Mario W. v. Kaipio, 281 P.3d 476 (Ariz. 2012).
126. *See id.* at 481–82.

unconstitutional because the state has no compelling interest in processing the sample until after the suspect has either been adjudicated or failed to appear.[127] In terms of the second search, the court explained, "[T]he State's reliance on the fingerprinting analogy here is misplaced."[128] Fingerprints, photographs, and voice exemplars require only one search to be used for investigative purposes, but DNA requires the creation of a profile from the sample, and the *Mario W.* court found that difference sets it apart from traditional booking procedures.[129]

C. The Effectiveness of Expungement Procedures

As described earlier, most statutes place the burden on the arrestee to initiate and maintain the process of getting a DNA profile expunged and sample destroyed if not convicted of a qualifying offense.[130] The assignment of the burden of expungement to an arrestee strikes many courts as unfair, and raises the specter of indefinite retention of profiles and samples.[131] Proponents of extraction statutes respond that expungement exists as a way to terminate the search if the arrestee is not convicted of a qualifying offense and thus has a full reasonable expectation of privacy in his identity.[132]

Opponents of extraction statutes first point out that expungement is not an easy process.[133] Opponents also use the presence of expungement procedures for an entirely different

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127. *See id.* at 483.

128. *Id.* at 482.

129. *See id.*

130. *See supra* Part II.B.4.

131. *See* United States v. Pool, 621 F.3d 1213, 1237 (9th Cir. 2010) (Schroeder, J., dissenting) (discussing indefinite retention, which can only result from conviction or failure to expunge); People v. Buza, 129 Cal. Rptr. 3d 753, 780–83 (Ct. App. 2011) (discussing prospect of indefinite retention unless lengthy, complex expungement process is completed).

132. *See* United States v. Mitchell, 652 F.3d 387, 404, 412 (3d Cir. 2011) (en banc) (noting availability of expungement as a factor contributing to reasonableness of search).

133. *See* Haskell v. Harris, 669 F.3d 1049, 1068 (Fletcher, J., dissenting) ("Expungement is a lengthy, uncertain, and expensive process."); *Buza*, 129 Cal. Rptr. 3d at 758 (discussing length and difficulty of expungement procedures under California statute).

purpose: to undercut claims by proponents that the primary function of extraction statutes is to identify arrestees.[134] The logic of the argument is that if the primary purpose of the statutes is to identify defendants, there would be no expungement procedure because, even if the arrestee is not convicted, the interest in identifying the arrestee next time the arrestee is in custody would still exist.[135] Opponents argue the primary purpose must instead be "to *use* those profiles and the information they provide as evidence in the prosecution and to solve additional past and future crimes."[136] Involvement in the crime at issue or other crimes is certainly information about which arrestees have a significant expectation of privacy, and the additional weight of this interest tips the totality of the circumstances scales for opponents in favor of unconstitutionality.[137]

One court that concluded an extraction statute was unconstitutional articulated a separate, but related purpose the presence of expungement procedures served in its argument:

> [The expungement] requirement suggests that the legislature has determined that the state's interest in collecting and storing DNA samples is outweighed by the privacy interest of a person who has not been convicted . . . because a person who has been charged is presumed innocent until proved guilty, we see no basis for concluding that before being convicted, a charged person's privacy expectation is different from the privacy expectation of a person who was charged but the charge was dismissed or the person was found not guilty.[138]

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134. *See id.* at 423 (Rendell, J., dissenting) ("If the Government's real interest were in maintaining records of arrestees' identities, there would be no need to expunge those records upon an acquittal or failure to file charges against the arrestee."); Mario W. v. Kaipio, 265 P.3d 389, 408 (Ariz. Ct. App. 2011) (Norris, P.J., dissenting in part) ("If the purpose of DNA sampling was to establish identity, there would be no need to expunge . . . records."), *rev'd in part*, 281 P.3d 476 (Ariz. 2012).

135. *Mitchell*, 652 F.3d at 422–23 (Rendell, J., dissenting).

136. *Id.* at 423.

137. *See, e.g.*, *id.* at 424, 431 (explaining that the true purpose of expungement should be factored into the totality of circumstances and concluding the federal statute is unconstitutional).

138. *In re* Welfare of C.T.L., 922 N.W.2d 484, 491–92 (Minn. Ct. App. 2006); *see also* King v. State, 42 A.3d 549, 577 (Md. 2012)

> The expungement provisions of the Act recognize the importance of a conviction in altering the scope and reasonableness of the expectation

Cast in this light, the availability of expungement reinforces the position of opponents that the true dividing line between those with a reasonable expectation of privacy in identity is not between ordinary citizen and arrestee, with convicts included in the arrestee category, but between ordinary citizen and convicts, with arrestees continuing to qualify as ordinary citizens until they are convicted.[139]

D. The Use of Reasonable Force to Extract Samples

In *Friedman v. Boucher*,[140] a Ninth Circuit panel majority relied heavily on the degree of force applied by the officer taking the sample in finding the extraction at issue was a violation of the arrestee's Fourth Amendment rights: "Shackling a detainee, chaining him to a bench, and forcibly opening his jaw to extract a DNA sample without a warrant, court order, reasonable suspicion, or concern about facility security is a violation of the detainee's clearly established rights under the Fourth

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> of privacy. If an individual is not convicted of a qualifying crime or if the original charges are dropped, the DNA sample and DNA profile are destroyed. The General Assembly recognized the full scope of the information collected by DNA sampling and the rights of persons not convicted of qualifying crimes to keep this information private. This right should not be abrogated by the mere charging with a criminal offense: the arrestee's presumption of innocence remains.

139. *See* United States v. Mitchell, 652 F.3d 387, 421 (3d Cir. 2011) (en banc) (Rendell, J., dissenting) (discussing the difference in expectations of privacy between ordinary citizens, arrestees, and convicts); United States v. Pool, 621 F.3d 1213, 1236 (9th Cir. 2010) (Schroeder, J., dissenting) (same).

140. *See* Friedman v. Boucher, 580 F.3d 847, 860 (9th Cir. 2009) (holding that restraining a suspect and forcibly extracting a DNA sample for the sole purpose of solving cold cases without a warrant or reasonable suspicion violated the Fourth Amendment). In *Friedman*, the suspect had been convicted of a sex offense in Montana, and after his release moved to Las Vegas, Nevada. *Id.* at 851. In Las Vegas, he was arrested for an unrelated offense, and while in jail pending trial, a Las Vegas detective, authorized by a local prosecutor, forcibly extracted a DNA sample despite the suspect's strenuous objection. *Id.* The suspect brought a suit under 42 U.S.C. § 1983, and the trial court found the police officer and prosecutor were entitled to qualified immunity, so it granted summary judgment and the suspect appealed. *Id.* at 852. On appeal, the court found the reason given by the officials, that the DNA would be used to solve cold cases, did not justify the warrantless, suspicionless, forcible search, and the officials violated clearly established constitutional rights and thus were not entitled to qualified immunity. *Id.* at 860.

Amendment."[141] And the *Friedman* majority was not merely worried about the extreme facts before it—it was wary of any position that would "endorse routine, forcible DNA extraction."[142]

The dissent in *Friedman* would have found the search constitutional[143] and argued the force used was reasonable in light of "jailers' concerns with security [that] extend to all inmates."[144] Other courts have not been troubled by the force used in the extraction in *Friedman*.[145] In *Pool*, a Ninth Circuit case decided after *Friedman*, the majority offered three principle reasons why the federal extraction statute could be upheld despite the result in *Friedman*: there was a judicial determination of probable cause, Pool had been arrested for a qualifying offense (as opposed to the unrelated offense that landed Friedman in the jail where extraction took place), and Nevada offered no statutory authority for the extraction in *Friedman*,[146] unlike in *Pool*, in which the Government relied on the DNA Act.[147]

IV. The Reasons for DNA Extraction from Arrestees

This Note has considered similarities and differences between the federal and state DNA extraction statutes and the major points of contention among courts for and against the statutes. The arguments put forth by proponents and opponents of the statutes are well reasoned, but at this point it is necessary to place those arguments in context by taking a step back and looking at the purposes served by DNA extraction at the time of

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141. *Id.* at 860.

142. *Id.* at 857.

143. *See id.* at 867 (Callahan, J., dissenting) ("I would find, that an in-custody repeat sex offender, like Friedman, does not have a reasonable expectation of privacy under the Fourth Amendment to prevent state authorities from using a buccal swab to take a DNA sample.").

144. *Id.* at 865.

145. *See* United States v. Pool, 621 F.3d 1213, 1224–25 (9th Cir. 2010) (distinguishing *Friedman*).

146. Nevada does not have a state statute that allows extraction of DNA from arrestees—it only allows samples to be taken from those convicted of qualifying offenses. *See* NEV. REV. STAT. ANN. § 176.0913 (West 2011).

147. *Pool*, 621 F.3d at 1224–25.

arrest, before offering suggestions as to how a legislature should approach composing an extraction statute.

The primary purpose in extracting DNA from arrestees, as described above, is identification of the person police have in custody.[148] Knowing the identity of an arrestee in custody is important for several reasons. First, it will let police and prosecutors know with whom they are dealing.[149] An arrestee with prior convictions has a strong interest in obscuring his identity at apprehension, and extracting a DNA sample and running it through state and national databases will reduce the likelihood the attempt will be successful, and police will know the arrestee's criminal history. Most immediately, police and prosecutors will know if the arrestee is wanted elsewhere.[150] If the arrestee is wanted elsewhere, the arresting jurisdiction can begin to make arrangements with the other jurisdiction(s) to determine which one will try the arrestee first and arrange extradition if necessary. Running the sample through CODIS may also reveal a criminal history previously unknown to law enforcement by generating a match with a sample from a cold case.[151]

If the arrestee is staying in the arresting jurisdiction, the prosecutor, armed with the true identity and criminal history of the arrestee, will form a position as to whether "the individual may be released pending trial without endangering society and ensuring that he or she complies with the conditions of his or her release."[152] The Supreme Court has established that the

148. *See, e.g.*, *id.* at 1222 (describing the principal government interest in DNA extraction as identification).

149. *Id.*

150. *See* Anderson v. Commonwealth, 650 S.E.2d 702, 706 (Va. 2007) (listing the determination of wanted status elsewhere as a legitimate interest of government in knowing identity of arrestee) (citing 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 5.3(c) (4th ed. 2004)).

151. *See id.* at 704 (describing arrest of defendant for an unrelated qualifying offense, sample was take pursuant to statute, sample matched that taken from rape victim in stalled investigation); *see also* United States v. Mitchell, 652 F.3d 387, 414 (3d Cir. 2011) (en banc) ("The second component [of an arrestee's identity]—what a person has done—can have important pretrial ramifications. Running an arrestee's DNA profile through CODIS could reveal matches to crime-scene DNA samples from unsolved cases.").

152. United States v. Pool, 621 F.3d 1213, 1233 (9th Cir. 2010).

"government's interest in preventing crime by arrestees [released before trial] is both legitimate and compelling."[153] Further, knowledge of the criminal history of an arrestee will better enable police after arrest, and corrections officials if the arrestee is kept in custody prior to trial, to take appropriate measures to ensure security in the jail or prison.[154] Even the *Buza* court, in finding the California extraction statute unconstitutional, conceded the strength of these identification interests.[155]

Opponents of DNA extraction statutes argue that the need for identification is already met by taking fingerprints and comparing them to the state and national fingerprint databases.[156] DNA, however, has several advantages over fingerprints, one of which is that "fingerprint patterns cannot be converted into numerical data that can be searched as efficiently as DNA data."[157] Another advantage is that "the absolute certainty [of fingerprints] has been proved wrong in the past."[158] A fingerprint can be distorted or incomplete, leading to many potential matches.[159] A prominent example of mistaken fingerprint identification is the story of Brandon Mayfield, an Army veteran who became a lawyer and was arrested after a "match" of his fingerprint turned up on evidence from the 2004 Madrid terror bombings, despite Mayfield having not left the

153. United States v. Salerno, 481 U.S. 739, 749 (1987).

154. *See* Friedman v. Boucher, 580 F.3d 847, 865 (2009) (Callahan, J., dissenting) ("[J]ailers' concerns with security extend to all inmates . . . .").

155. *See* People v. Buza, 129 Cal. Rptr. 3d 753, 761 (Ct. App. 2011) ("[T]he government has a strong interest in identifying and prosecuting offenders and, in the case of those on supervised release, promoting rehabilitation and protecting the community.").

156. *See, e.g.*, Preston, *supra* note 1, at 486 (explaining fingerprinting is a foolproof way of determining identity while giving the government far less information about the arrestee than a DNA sample).

157. D.H. Kaye, *The Constitutionality of DNA Sampling on Arrest*, 10 CORNELL J.L. & PUB. POL'Y 455, 489 (2001).

158. State v. Rose, No. K06-0545, 2007 WL 4358047, at *25 (Md. Cir. Ct. Oct. 19, 2007) (excluding fingerprint evidence from capital trial on *Frye* grounds due to lack of reliability).

159. *See Weighing Fingerprints as Forensic Evidence*, CBS NEWS (Feb. 11, 2009), http://www.cbsnews.com/2100-3445_162-4069140.html?tag=contentMain; contentBody (last visited Apr. 7, 2013) (on file with the Washington and Lee Law Review).

United States in a decade.[160] Mayfield was eventually cleared, but the incident led the FBI to reevaluate their fingerprint identification system.[161] Even a small sample of blood, saliva, or tissue, however, can be enough to create a DNA profile, and a match to that profile is "nearly unassailable evidence of identity."[162] While a criminal may be able to thwart the collection of fingerprint evidence by wearing gloves, "it is much more difficult for a perpetrator not to leave some DNA evidence at the scene of a crime."[163]

Individual identification may be the primary reason DNA is extracted, but it is far from the only reason. Another reason is to prevent future crimes.[164] Prevention of future crimes is related to the previous discussion of identification—DNA extraction can prevent future crimes by correctly and fully identifying the arrestee and his criminal history so that a dangerous arrestee is either not released prior to trial or is effectively supervised.[165] DNA can also be used to form profiles of repeat offenders in databases as samples from the same person are recovered at multiple crime scenes.[166] From these suspect profiles, crime patterns can be analyzed, and police become more likely to apprehend a suspect before the next crime is committed, which is especially valuable when a budding criminal can be stopped before minor crimes escalate to major crimes.[167] The DNA itself

160. *Id.*

161. *Id.*

162. Elizabeth E. Joh, Essay, *Reclaiming "Abandoned" DNA: The Fourth Amendment and Genetic Privacy*, 100 NW. U. L. REV. 857, 876 (2006); *see also* Julie A. Singer et al., *The Impact of DNA and Other Technology on the Criminal Justice System: Improvements and Complications*, 17 ALB. L.J. SCI. & TECH. 87, 96 (2007) ("DNA tests affect legal outcomes by providing certainty about identity in a way that has not been possible before.").

163. United States v. Pool, 621 F.3d 1213, 1222 (9th Cir. 2010).

164. *See* Robert Molko, *The Perils of Suspicionless DNA Extraction of Arrestees under California Proposition 69: Liability of the California Prosecutor for Fourth Amendment Violation? The Uncertainty Continues in 2010*, 37 W. ST. U. L. REV. 183, 187 (2010) (identifying one of the benefits of DNA extraction from arrestees as preventing future crimes).

165. *See id.* at 187–88 (discussing studies done in Chicago and Denver, both of which revealed crimes committed by arrestees released before trial based on incomplete information in the hands of the prosecutor or judge).

166. *See* Singer, *supra* note 162, at 102.

167. *Id.* at 102–03.

does not provide this information, but if matching DNA is found at three gas station robberies in the same neighborhood, police can stake out the fourth gas station and apprehend the suspect in the course of the next robbery. An example of the extra value would be if a subsequent search of the gas-station robber's apartment revealed he and his gang decided the real money was in kidnapping and ransoming children of wealthy individuals, and that was going to be their next crime. DNA extraction can also have a deterrent effect, leading an arrestee released before trial to think twice before resuming criminal activity or starting any new endeavor for fear his DNA will be discovered and used to enhance the pending charges.[168]

A final purpose for the extraction of DNA is to exonerate the innocent.[169] In a different context, the Supreme Court has made clear "the community has a real interest in [searches that] may yield necessary evidence for the solution and prosecution of crime, evidence that may insure that a wholly innocent person is not wrongly charged with a criminal offense."[170] When an arrestee's sample is analyzed, it may reveal the arrestee is not the person the police are looking for (police thought they arrested John Smith, DNA reveals they arrested Jon Smythe), or that the arrestee did not commit the crime in question (DNA recovered at the scene does not match), or that the arrestee actually committed a crime for which an innocent person is on trial or serving time.[171]

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168. *See Pool*, 621 F.3d at 1223 ("The collection of a DNA sample . . . discourages a defendant from violating any condition of his or her pretrial release.").

169. *See* United States v. Kincade, 379 F.3d 813, 839 n.38 (9th Cir. 2004) ("CODIS promptly clears thousands of potential suspects . . . .").

170. Schneckloth v. Bustamonte, 412 U.S. 218, 243 (1973) (discussing consent searches).

171. *Cf.* United States v. Mitchell, 652 F.3d 387, 414–15 (3d Cir. 2011) (en banc) ("Collecting DNA samples from arrestees can speed both the investigation of the crime of arrest and the solution for any past crime for which there is a match in CODIS.").

V. Evaluation of DNA Extraction Statute Ingredients

In preceding Parts, this Note has considered the DNA extraction statutes crafted by Congress and every state legislature, the reception these efforts have received in federal and state courts, and the reasons why DNA is taken from arrestees. With all this in mind, it is possible to offer guidance to a legislature evaluating its DNA extraction statute and seeking to immunize the statute from constitutional challenge. This Note will offer the benefit and possible risk (i.e., the risk that inclusion of a particular ingredient will lead to a finding of unconstitutionality) of various ingredients, but it will stop short of proposing a model statute. Investigation of the federal and state statutes has revealed one thing clearly: every legislature weighs its own peculiar mix of needs and concerns in drafting a statute. Every jurisdiction has its own mix of crime control, arrestee protection, and financial concerns that go into statutory construction. There simply is no one-size-fits-all suggestion that would be of any practical use.

To begin, a statute will certainly be constitutional if it chooses to limit DNA extraction to convicted felons, as many states have chosen to do.[172] This is a perfectly legitimate choice given the budgetary priorities of a jurisdiction, and it is sure to be upheld because all courts to consider the issue agree that individuals convicted of qualifying offenses have a lesser reasonable expectation of privacy, enabling the government to use DNA to supervise their release.[173]

If, however, a legislature desires to expand the statute to cover arrestees, that choice, in and of itself, will not invalidate the statute.[174] The government has a substantial interest in identifying arrestees,[175] DNA is a very good way to do

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172. *See id.* at 405 ("Ultimately [all circuits] likewise concluded that the collection of DNA samples from prisoners or probationers is a reasonable search consistent with the Fourth Amendment.").

173. *See id.*

174. *See* People v. Buza, 129 Cal. Rptr. 3d 729, 782 (Ct. App. 2011) (analyzing the California DNA extraction statute not as invalid on its face, but invalid as applied to an arrestee who has yet to have a judicial determination of probable cause).

175. *See, e.g.*, United States v. Pool, 621 F.3d 1213, 1222 (9th Cir. 2010) (describing the principal government interest in DNA extraction as

that,[176] and extraction at arrest is not in itself unconstitutional because even courts striking down statutes allowing extraction at arrest acknowledge those interests and would uphold a statute if privacy interests were protected enough to tip the scales in favor of constitutionality.[177]

If a legislature chooses to take advantage of the (perhaps quite substantial) benefits that will accompany DNA extraction from arrestees,[178] the most important ingredient to provide in a statute is a waiting period until a neutral arbiter has found probable cause. Courts that have upheld the federal statutes have emphasized that in the cases before them, extraction was not sought until after probable cause had been determined,[179] and in two of the state-court cases to invalidate statutes, courts focused on the absence of a judicial determination of probable cause.[180] To explain the emphasis reviewing courts place on the finding of probable cause by a judge or grand jury, one may look to the text of the Fourth Amendment itself, which specifically mentions probable cause,[181] and years of precedent valuing the

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identification).

176. *See* Joh, *supra* note 162, at 876 (explaining DNA provides nearly unassailable evidence of identity).

177. *See Buza*, 129 Cal. Rptr. 3d at 761 (explaining government interest in identification is important, utilizing totality of the circumstances balancing test, but ultimately finding individual interests outweighed government interests in California's statute).

178. *See supra* Part IV.

179. *See Pool*, 621 F.3d at 1232 (Lucero, J., concurring) ("The first point, which the majority states in no uncertain terms but which bears repeating, is that this case condones DNA testing for individuals for whom a judicial or grand jury determination of probable cause determination has been made; it does not address such sampling from mere arrestees."); United States v. Mitchell, 652 F.3d 387, 412 n.22 (3d Cir. 2011) (en banc) (reserving question of whether DNA could be extracted from arrestees for whom there has been no judicial or grand jury determination of probable cause).

180. *See* People v. Buza, 129 Cal. Rptr. 3d 729, 766 (Ct. App. 2011) (describing the extraction of a sample from arrestee before judicial or grand jury determination of probable cause as involving a "more extreme" circumstance than *Pool* or *Mitchell*); *In re* Welfare of C.T.L., 722 N.W.2d 484, 492 (Minn. Ct. App. 2006) (invalidating extraction statute for taking sample without magistrate's determination of probable cause for search).

181. *See* U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . . .").

interpretation of evidence by "a neutral and detached magistrate instead of . . . the officer engaged in the often competitive enterprise of ferreting out crime."[182] The additional burden that waiting will place on the police is minimal—any warrantless arrest already requires "a timely determination of probable cause,"[183] and that determination must come within forty-eight hours.[184] If a legislature feels strongly enough about wanting to take the sample at the time of booking, such a position is not per se unconstitutional, but it certainly places statutes at a great risk of being deemed unconstitutional.

One feature that all extraction statutes share is a procedure for expungement. The differences between various state expungement regimes was explored at length earlier, and both proponents and opponents of DNA extraction of arrestees have used the presence of expungement to support their argument.[185] The features of a given expungement regime have seemed to matter little to courts considering the constitutionality of the overall legislative scheme, but the concern of courts with "indefinite retention" of samples[186] suggests adopting a pro-arrestee expungement regime would better insulate a given statute from constitutional challenge. It would seem that a procedure that resulted in profiles being deleted and samples being destroyed after a certain period of time barring intervention from the state[187] would be the best way to mollify courts concerned with indefinite retention, but a statute with just such a procedure was recently found unconstitutional.[188] Another

182. Johnson v. United States, 333 U.S. 10, 14 (1948).

183. Gerstein v. Pugh, 420 U.S. 103, 126 (1975).

184. Cnty. of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991).

185. *See* United States v. Mitchell, 652 F.3d 387, 412 (3d Cir. 2011) (en banc) (noting availability of expungement as a factor contributing to reasonableness of search); *see also* Mario W. v. Kaipio, 265 P.3d 389, 408 (Ariz. Ct. App. 2011) (Norris, P.J., dissenting in part) ("If the purpose of DNA sampling was to establish identity, there would be no need to expunge . . . records.").

186. United States v. Pool, 621 F.3d 1213, 1237 (9th Cir. 2010) (Schroeder, J., dissenting).

187. *See, e.g.*, COLO. REV. STAT. ANN. § 16-23-104(2) (West 2011) (providing for automatic destruction of sample and profile after one year unless prosecutor objects).

188. *See* MD. CODE ANN., PUB. SAFETY § 2-511(a)(1), (d) (West 2012), *invalidated by* King v. State, 42 A.3d 549 (Md. 2012).

element of an expungement process that would protect a scheme from constitutional challenge is the approach adopted by four states of providing notice to an arrestee at the time the sample is taken,[189] given the emphasis the Supreme Court has placed on sufficiency of notice in other contexts.[190] The Supreme Court will get a chance to weigh in on this issue because the Maryland statute invalidated by the *King* court also contained a notice provision.[191]

One factor that should be left out of extraction statutes to ensure they survive constitutional challenge is a provision authorizing use of reasonable force to obtain the sample. The majority of the Ninth Circuit panel in *Friedman* focused heavily on the facts surrounding the extraction of the sample from the arrestee, and though most officers taking samples will have no impure motive, as long as reasonable force is allowed more sets of facts will be generated like those in *Friedman*, putting an extraction regime on potentially shaky ground from the first page of an opinion.

A legislature may worry that in the real world of the station house or county jail, many arrestees will not cooperate, and without reasonable force the legislature deprives itself of a valuable stick to encourage cooperation. Twelve states that allow post-arrest extraction, however, make no mention of reasonable force in their statutes and have been able to make the system work. To make sure the state gains the benefits of DNA extraction in the face of an uncooperative arrestee, a legislature can provide a framework like that adopted by Vermont, in which a judge determines if a sample needs to be taken and can give neutral authorization to use force when confronted by a stubborn arrestee.[192]

All extraction statutes have in common provisions setting out qualifying offenses, determining whether both juveniles and adults will be required to give samples, and other details of

189. *See* COLO. REV. STAT. ANN. § 16-23-103(2)(a); N.C. GEN. STAT. ANN. § 15A-266.3A(b2) (West 2012); S.C. CODE ANN. § 23-3-660(E) (2011).

190. *See generally* Jones v. Flowers, 547 U.S. 220 (2006) (discussing notice required to satisfy the Due Process Clause).

191. *See* MD. CODE ANN., PUB. SAFETY § 2-504(a)(3)(ii), *invalidated by* King v. State, 42 A.3d 549 (Md. 2012).

192. *See* VT. STAT. ANN. tit. 20, § 1935 (West 2012).

expungement. These features are highly dependent on the unique needs of the state, and because reviewing courts have yet to involve any of these features in analysis of an extraction statute, a legislature can feel free to choose any option that fits its unique needs with little risk that option will lead to a finding of unconstitutionality.

VI. Conclusion

All legislatures take seriously the protection of citizens, one of the foremost functions of any government. The potential value of DNA in aiding law enforcement cannot be underestimated: "[I]t is one of the more transformative developments that have taken place in recent legal history."[193] One way legislatures have sought to take advantage of the increased knowledge of the human genome is extracting DNA at the time of arrest. Extraction of DNA at the time of arrest for qualifying offenses has been adopted by twenty-three states, and fifteen more are currently considering adopting such legislation. Arrestees have challenged this practice, and courts have duly begun a task with which they are very familiar—trying to reconcile advancing technology with the fundamental interests protected by the Fourth Amendment.

Some challenges have been successful, and some potential flaws in the statutes have been brought to light, but legislatures should be undeterred in their use of a new technology of limitless promise to protect their citizens.[194] This does not mean legislatures should rush headlong into uncharted territory. Legislatures should heed guidance from reviewing courts and incorporate prevailing views into statutes to ensure maximum protection of both citizen security and individual rights, and avoid disruption in the procedures of law enforcement by passing statutes and creating procedures only to have them swiftly struck from the books. This Note has attempted a close look at the guidance from courts so far, and though courts have split into camps as to whether current arrestee extraction statutes are

193. Singer, *supra* note 162, at 96.

194. *See* Joh, *supra* note 162, at 881 ("[L]egislatures can offer flexibility and greater protection where judicial interpretation of the Fourth Amendment falls short.").

constitutional, the guidance on how to make such statutes constitutional seems clear. It should be noted, however, that this guidance is almost certainly incomplete. While the Third Circuit weighed in en banc in *Mitchell* just last year, the Ninth Circuit, the judges of which had diverse and intelligent views on the interplay of DNA extraction and the Constitution in approving DNA extraction from convicts,[195] was ready to hear *Pool* en banc until the appellant's guilty plea mooted the case.[196] Now the United States Supreme Court is set to weigh in.[197]

Statutes should provide that a sample can only be extracted after a judicial or grand jury determination of probable cause, expungement procedures should place the burden of the process on the state, not the arrestee, notice should be given of expungement procedures, and reasonable force should be used to extract a sample only as a last resort and with the blessing of a magistrate. Statutes tailored in this way should address the concerns of opponents and allow law enforcement to extract DNA at the time of arrest and use the power of genetics to determine exactly who an arrestee is, bringing to justice the criminals that are hardest to catch and exonerating the innocent.

195. *See generally* United States v. Kincade, 379 F.3d 813 (9th Cir. 2004).

196. *See* United States v. Pool, 659 F.3d 761 (9th Cir. 2011).

197. *See* King v. State, 42 A.3d 549, *cert. granted*, Maryland v. King, 133 S. Ct. 594 (Nov. 9, 2012) (No. 12-207).