ESSAY

THE MYTH OF ARRESTEE DNA EXPUNGEMENT

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INTRODUCTION

Our national DNA database, CODIS, now contains over two million individual profiles taken from arrestees.[1] Most states[2] and the federal government collect felony arrestee DNA. The justification is clear: if we collect DNA after conviction, why not earlier? But what if the arrestee's case goes nowhere, either because the charges are dropped, never brought at all, or the arrestee is acquitted? Every jurisdiction that collects arrestee DNA permits, by the terms of its collection statute, those eligible to have their genetic information expunged.[3] Indeed, federal law requires all states participating in CODIS to establish expungement provisions.[4] Otherwise, a mere arrest would result in the permanent relinquishment of a person's genetic information.

But arrestee DNA expungement is a largely a myth. In most states where the police collect DNA samples upon arrest, the process of expungement is burdensome, costly, and must be initiated by the arrestee. Consequently, very

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1 *See CODIS—NDIS Statistics*, FBI, https://www.fbi.gov/about-us/lab/biometric-analysis/codis/ndis-statistics [http://perma.cc/Y77S-VQ5N] (last visited Nov. 10, 2015) (noting that the database contains 2,120,729 arrestee profiles in addition to 11,962,222 offender profiles).

2 *See* JULIE E. SAMUELS ET AL., URBAN INST., COLLECTING DNA AT ARREST: POLICIES, PRACTICES, AND IMPLICATIONS, at app. C (May 2013), http://www.urban.org/research/publication/collecting-dna-arrest-policies-practices-and-implications [http://perma.cc/7B4J-QPYE] (summarizing arrestee DNA collection laws in 28 states).

3 *See id.* (summarizing expungement provisions in 27 of the 28 states, but noting that no provisions were located for Oklahoma).

4 *See* 42 U.S.C. § 14132(d)(2(A)(ii) (2012) (requiring states to expunge records when the charges were "dismissed or [] resulted in an acquittal or [] no charge was filed" and additional conditions are met as a condition of access to the database).

few arrestees eligible for DNA expungement—because they were never charged or because their charges were dismissed—actually have their genetic profiles removed. For several states investigated here, only a handful of the thousands of arrestee DNA profiles added to the database have ever been expunged.[5]

As a result, an arrest alone *does* lead to permanent forfeiture of genetic privacy in most states. These states are following the letter but not the spirit of the federal expungement requirement. If states wish to keep the genetic information of *all* arrestees indefinitely, legislators should debate such policies openly, rather than establishing them through onerous expungement procedures. This Essay is the first to provide information on the number of *actual* DNA expungements, and argues for automatic expungement policies. In states where such policies exist, a significant fraction of arrestee DNA profiles have been expunged, nearing the estimated proportion of arrestees eligible for expungement.[6]

I. DNA Expungement Mechanics

Every state that collects DNA from arrestees also provides, by statute, a means for expungement in certain circumstances. Such procedures are required by federal law for access to CODIS but are governed by state law.[7]

A. *Arrestee DNA Collection*

In most states that collect DNA after arrest, law enforcement officials collect samples during the booking process.[8] The resulting DNA profile taken from that sample is eventually included in CODIS, the national database maintained by the FBI.[9] The collection of arrestee DNA expands the scope of DNA databases that began more than twenty years ago with the collection of DNA taken from those convicted of violent felonies.[10]

What distinguishes the arrestee from the convicted offender is that the arrestee has not yet been—and might never be—found guilty of the crime for which he might be charged. Not only are some arrestees later acquitted of their charged crimes, but a significant proportion of them are either never

5 *See infra* Section II.B.

6 *See infra* Part II.

7 *See supra* note 3 and accompanying text.

8 Samuels, *supra* note 2, at iii.

9 *See generally Combined DNA Index System (CODIS)*, FBI, https://www.fbi.gov/about-us/lab/biometric-analysis/codis [http://perma.cc/E9DZ-GSJL] (last visited Nov. 10, 2015).

10 *See generally* FBI, CODIS Brochure (2010), https://www.fbi.gov/about-us/lab/biometric-analysis/codis/codis-brochure-2010 [http://perma.cc/VJQ9-GP4A].

charged or have their charges dismissed.[11] Despite this distinction, the United States Supreme Court upheld Maryland's arrestee DNA collection law against a Fourth Amendment challenge in the 2013 case of *Maryland v. King*.[12]

B. *Formal Expungement*

"Expungement" is a legal process that restores an arrested person to the legal status she held prior to arrest.[13] In the case of DNA profiles, expungement means the removal of the profile from government databases. While federal law requires states participating in CODIS to establish expungement procedures with respect to DNA sampling of arrestees, federal law does not specify the content of these laws.[14] The majority of states collecting arrestee DNA place the burden of initiating the process on the individual seeking expungement.[15]

Consider California, which contributes the largest number of arrestee DNA profiles to CODIS: 612,612 out of just over 2 million nationwide as of September 2015.[16] Since 2009, any adult felony arrestee is subject to mandatory DNA collection.[17] Like the majority of states collecting arrestee DNA samples, this mandatory collection occurs at booking; there is no additional judicial process before sampling.[18]

An arrestee in California may qualify for DNA expungement under state law if he is never charged or if the charges against him are dismissed.[19] But for eligible arrestees, the administrative burden is just beginning. The arrestee seeking expungement must send a written request, with proof of service, to three places: (1) "the trial court of the county where the arrest occurred," (2) the state's DNA laboratory, *and* (3) the prosecuting attorney of the county in which he was arrested.[20]

An expungement hearing follows, at which the person must provide: (1) a written request for expungement, (2) a letter from the prosecution certifying the arrestee's eligibility, (3) proof of written notice to the prosecuting

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11 *See, e.g.*, State v. Medina, 102 A.3d 661, 681 (Vt. 2014) ("Indeed, a substantial percentage of persons from whom DNA samples will be taken will never be convicted of a qualifying offense."); *see also infra* Section II.A.

12 133 S. Ct. 1958, 1980 (2013).

13 *See, e.g.*, S.D. CODIFIED LAWS § 23A-3-32 (2015) (noting that the effect of expungement is "to restore the defendant or arrested person, in the contemplation of the law, to the status the person occupied before the person's arrest or indictment").

14 42 U.S.C. § 14132(d)(2)(A) (2012).

15 *See* SAMUELS, *supra* note 2, at 27-28.

16 *CODIS—NDIS Statistics*, *supra* note 1.

17 CAL. PENAL CODE § 296(a)(2)(C) (Deering 2015).

18 *See id.* (lacking any requirement of judicial process prior to sampling).

19 *Id.* § 299(a).

20 *Id.* § 299(c)(1).

attorney and the DNA laboratory, and (4) a court order verifying that 180 days have passed since the arrestee initiated the expungement process and that the California Department of Justice or prosecuting attorney has not objected.[21] The effect of an objection is not clear from the statute,[22] however, since "[t]he reviewing court has the discretion to grant or deny the request for expungement" and that decision "is a nonappealable order,"[23] the effect is likely to permit denial of an expungement request based on any objection.

Like California arrestees, most former arrestees seeking expungement of their DNA profiles in other states face similar hurdles. A 2013 state survey on arrestee DNA collection practices by the Urban Institute found that of those 28 states that authorized arrestee DNA collection at the time, 18 placed the responsibility of the expungement process entirely on the arrestee.[24] Two states in the survey—Minnesota and Missouri—split the expungement burden between the state and the arrestee.[25] Most of the arrestee-initiation states do not require notifying arrestees that expungement procedures even exist.[26]

Only a minority of states (7 of 28 in the Urban Institute study) provide for automatic expungement and require the state, rather than the defendant, to initiate expungement proceedings for eligible arrestees.[27] In these states, the responsibility for determining expungement eligibility and for processing the expungement falls on the state itself.

Many of the difficulties encountered in the process of DNA expungement reflect problems inherent in criminal records expungement more generally. A criminal record is often a bar—informally or not—to employment, housing, and other services.[28] Created as a matter of public record, an arrest or conviction often winds up in private third party databases to be used by

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21 *Id.* § 299(c)(2).

22 *Id.*

23 *Id.* § 299(c)(1). The California Department of Justice also offers a "streamlined expungement application form" that offers expungement without a hearing or waiting period for qualified applicants. *See Instructions—Expungement Requests*, CAL. DEP'T JUST. OFF. ATT'Y GEN., http://oag.ca.gov/sites/all/files/agweb/pdfs/bfs/expungement_app_instruc.pdf [http://perma.cc/54JE-AK4P] (last visited Nov. 10, 2015).

24 SAMUELS, *supra* note 2, at 27-28.

25 *Id.* at 28. The report's authors identified Alaska as a jurisdiction that appeared to be an "individual-initiated expungement" state but whose statute presented some ambiguity. *Id.* at 27 n.30.

26 See *id.* at 32 (noting that only two of the eighteen individual-initiation states require such notification).

27 *See id.* at 27-28 (listing Connecticut, Maryland, North Carolina, Tennessee, Vermont, and Virginia as the states which are fully state initiated).

28 *See generally National Inventory of the Collateral Consequences of Conviction*, ABA, http://www.abacollateralconsequences.org/map/ (last visited Nov. 10, 2015).

employers, creditors, and others making significant decisions about a person's life.[29]

The stigmatizing effects of a traditional criminal record have recently been the target of advocacy and legislation. For instance, several state and local governments have considered so-called "ban the box" legislation to bar employers from asking applicants about criminal records.[30] Unlike traditional criminal records, however, DNA expungement has received scant attention.

II. EXPUNGEMENT IN PRACTICE

While the formal opportunity for expungement exists for those arrestees whose are never charged with a crime or acquitted, in reality relatively few profiles will ever be expunged. Most expungement procedures are burdensome and require arrestees to determine their own eligibility and initiate the process.

A. *Eligible Arrestees*

What would DNA expungement look like if eligible arrestees could easily benefit from it? While no detailed accounting exists, a rough estimate might start with how often arrests lead to no charges or charges being dismissed.

While the federal government does not collect regular data on felony arrest dispositions,[31] many states and local governments do. Consider again California, whose Department of Justice collects yearly crime data. In its most recent report, the California Department of Justice reported that in 2014, 68.9% of those adults arrested for a felony ended up with a criminal conviction.[32] A small number (3.2%) of arrestees were released by the police

29 *Cf.* Binyamin Appelbaum, *Out of Trouble, but Criminal Records Keep Men Out of Work*, N.Y. TIMES (Feb. 28, 2015), http://www.nytimes.com/2015/03/01/business/out-of-trouble-but-criminal-records-keep-men-out-of-work.html?smid=pl-share&_r=0 [http://perma.cc/8NRS-A7NX] (discussing growing concerns that widespread background checks may prevent too many people from finding work).

30 *Id.* Similarly, President Obama has "directed the federal Office of Personnel Management to delay inquiries into criminal history until later in the hiring process for most competitive federal jobs so applicants are not rejected before having a chance to make a positive impression." Peter Baker, *Obama Takes Steps to Help Former Inmates Find Jobs and Homes*, N.Y. TIMES (Nov. 2, 2015), http://www.nytimes.com/2015/11/03/us/obama-prisoners-jobs-housing.html [http://perma.cc/Z7SB-YV2J].

31 *See Crime in the United States, 2010*, FBI (Sept. 2011), https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/persons-arrested/arrestmain.pdf [http://perma.cc/Y2NZ-REXS] (noting that the uniform crime reporting program does not collect information on the "number of persons who were convicted, prosecuted, and/or imprisoned").

32 OFFICE OF THE ATTORNEY GEN., CAL. DEP'T OF JUSTICE, CRIME IN CALIFORNIA 50 tbl.38A (2014). Of course, this figure only roughly approximates the number of arrestees eligible for expungement because arrestees must also meet other criteria to qualify.

shortly after arrest.[33] Others had their complaints denied by the prosecution, for example, because the evidence in their case was inadequate (14.8%);[34] or had the charges in their case dismissed by the court (12.4%).[35] In other words, nearly a third of those arrested in California in 2014 for a felony—all of whom were subject to the state's arrestee DNA collection law—were potentially eligible for DNA expungement. Data from other jurisdictions suggest similar percentages of arrestees have felony charges dismissed or are never charged at all.[36] (No charges or dismissed charges are likely much more common in misdemeanor arrests.[37])

B. *The Data*

How many arrestees who may be eligible for DNA expungement actually obtain it? While there is variation from state to state, most states that collect arrestee DNA permit expungement when the charges are dropped, or if charges were never brought at all. Assume that these circumstances characterize just under a third of all arrestees. Or, more cautiously, assume that a quarter of felony arrestees might be eligible for DNA expungement.

These assumptions have little to do with the reality of expungement rates. What follows is a small sample of states that rely on arrestee-initiated expungements and their arrestee DNA expungement numbers.[38]

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33 *Id.*

34 *See id.* (noting that 46,199 single complaints were denied and 463 combined complaints were denied, for a total 14.8% denial rate out of the 315,782 total felony arrests).

35 *See id.* (noting that 36,953 cases were dismissed and 2294 diversions were dismissed, for a combined 12.4% dismissal rate out of the 315,782 total felony arrests).

36 The most recent crime data from the state of New York shows the ultimate outcome of felony arrests in 2014: diverted & dismissed (0.4%); dismissed (23.8%); DA declined to prosecute (4.7%). *See 2010–2014 Dispositions of Adult Arrests, All Reports*, N.Y. ST. DIVISION CRIM. JUST. SERVS., 2 (Apr. 21, 2015), http://criminaljustice.ny.gov/crimnet/ojsa/dispos/all.pdf [http://perma.cc/UH3B-343P] (listing the dispositions of felony arrests, including 9473 dismissals as adjournments in contemplation of dismissal, and 24,760 other dismissals for a combined total of 23.8% dismissed).

37 For example, in the most populous jurisdictions 66% of felony arrests result in convictions, while 80% of misdemeanor arrests in one county in Illinois ended in dismissal and 50% in New York City. Elizabeth E. Joh, *Should Arrestee DNA Databases Extend to Misdemeanors?*, RECENT ADVANCES IN DNA & GENE SEQUENCES 1, 4 (2014).

38 While most states do not publish the numbers of arrestees who have successfully obtained DNA expungement, the author obtained this sample through public records requests. In 2014, the author asked agencies in Arizona, California, Florida, Michigan, and Missouri for: (1) the number DNA profiles collected from arrestees; (2) the number of requests for DNA expungement; and (3) the number of actual expungements. Although the states began collecting arrestee DNA at different times, which affects the overall number of profiles collected, the focus here is on the percentage of the total profiles which have been expunged.

State	Arrestee DNA samples	Expungement requested	Expungement granted	% of total samples expunged
Arizona[39]	35,795	5	5	.0140%
California[40]	731,315	103	98	.0134%
Florida[41]	74,934	4	2	.00267%
Michigan[42]	12, 437	1	1	.00804%

By contrast, in jurisdictions where arrestee DNA expungement is "automatic" or state initiated, the results of expungement numbers are quite different. The 2013 Urban Institute study reported the following data on Maryland and Missouri,[43] both jurisdictions in which the state takes some responsibility for initiating expungements, for DNA samples collected and expungements performed from 2009 to 2011:

State	Arrestee DNA samples	Expungement granted	% of total samples
Maryland	33,649	10,258	30.5%
Missouri	13,746	1146	8.34%

The author's record requests obtained more recent data for Missouri through June of 2014, which revealed a slightly higher expungement rate:

State	Arrestee DNA samples	Expungement granted	% of total samples
Missouri[44]	23,465	3379	14.4%

The comparison is straightforward. When a state assumes responsibility for the DNA expungement process, much larger numbers of profiles are expunged. When it is up to the arrestee to (1) learn about the possibility of

39 *See* E-mail from the Ariz. Pub. Records Unit to Elizabeth Joh (July 1, 2014) (on file with author) (presenting data as of July 19, 2014).

40 *See* Letter from Brent E. Orick, Cal. Dep't of Justice, to Elizabeth Joh (June 30, 2014) (on file with author) (presenting data as of June 30, 2014).

41 *See* E-mail from Fla. Office of Gen. Counsel to Elizabeth Joh (June 23, 2014) (on file with author) (presenting data as of June 23, 2014).

42 Letter from Judy Fox, Mich. State Police, to Elizabeth Joh (July 2, 2014) (on file with author); *see also* Offender Dynamic Search Report (on file with author) (presenting data for Michigan as of July 9, 2014).

43 SAMUELS, *supra* note 2, at 48.

44 *See* Letter from Susanne R. Fleetwood, Mo. State CODIS Adm'r, to Elizabeth Joh (July 23, 2014) (on file with author) (presenting data through June 2014).

DNA expungement (2) determine her eligibility for expungement and (3) complete (and pay for) the necessary administrative requirements, DNA expungement is exceedingly "rare."[45]

Why have most states chosen arrestee-initiated expungement? States possess the weakest justification for retaining the genetic information of those who have been arrested but whose charges were dropped or never brought at all. The state's initial justification no longer exists and burdens "uniquely the sole group for whom the Fourth Amendment's protections ought to be most jealously guarded: people who are innocent of the State's accusations."[46] Those whose cases end in conviction, on the other hand, are different. Their convictions justify the forfeiture of significant rights. But former arrestees eligible for DNA expungement are free citizens once more.

From the state's perspective, however, imposing responsibility for expungement on the arrestee is useful.[47] Arrestees who are unaware of their eligibility for DNA expungement or lack the resources to pursue the process provide states with more genetic information that may be useful in future investigations, either to link the arrestee to a crime or even a relative in the case of "familial" searches.[48]

Indeed, current expungement policies hinder the timely processing of DNA expungement requests. Most states that collect arrestee DNA do not specify any deadline for the state to complete expungement requests.[49] Some states even permit the use of an arrestee's DNA profile that remains in the database because of the state's failure or delay in processing an otherwise valid expungement request.[50]

The cumulative result of these policies, whether intended or not, is simple. In most states that collect arrestee DNA, the initial decision by the police to arrest that person *turns out in most cases to lead to the permanent*

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45 SAMUELS, *supra* note 2, at 28.

46 Maryland v. King, 133 S. Ct. 1958, 1989 (2013) (Scalia, J., dissenting).

47 *See, e.g.*, SAMUELS, *supra* note 2, at 28 ("[T]hese added protections [of state-initiated expungement] often carry a well-documented increase in collection, analysis, and monitoring activities that have deterred many states from compelling government agencies to bear responsibility for initiating [DNA] expungement.").

48 For an overview on familial or partial match DNA searches, see generally Erin Murphy, *Relative Doubt: Familial Searches of DNA Databases*, 102 MICH. L. REV. 291 (2010).

49 *See* SAMUELS, *supra* note 2, at 29 (noting that 23 of the 28 states with arrestee DNA collection do not specify a timeframe for expungement).

50 *See, e.g.*, CAL. PENAL CODE § 299(d) (Deering 2015) ("Any identification, warrant, probable cause to arrest, or arrest based upon a data bank or database match is not invalidated due to a failure to expunge or delay in expunging records."); MICH. COMP. LAWS § 28.176 Sec. 6(15) (2015) ("An identification, warrant, detention, probable cause to arrest, arrest, or conviction based upon a DNA match or DNA information is not invalidated if it is later determined that . . . in good faith . . . [a] DNA identification profile was not disposed of or there was a delay in disposing of the profile.").

collection and retention of the arrestee's genetic information, regardless of whether charges are dismissed or never brought at all.[51]

III. What Should Be Done?

The problems inherent in the DNA expungement procedures of most states have a very simple solution: adopt automatic expungement provisions that need not be initiated, pursued, or paid for by the arrested person. Models already exist in states that have adopted such "automatic" expungement policies, such as Connecticut, Maryland, North Carolina, South Carolina, Tennessee, Vermont, and Virginia.[52] All states should specify concrete timelines for expungement. No state should permit the police to use samples that exist in a DNA database where the state has failed to comply with an otherwise valid expungement request. Expungement procedures that are initiated by the government, timely, and transparent should be standard—even a condition of state participation in CODIS.

Furthermore, those courts considering challenges to arrestee DNA collection should consider that *Maryland v. King* itself upheld a state law that was premised on automatic expungement.[53] While not central to *King*'s holding, that Maryland law required the state, not the arrestee, to assume the responsibility of expunging eligible samples suggests that such state responsibilities are part of the majority's finding of Fourth Amendment reasonableness.[54]

Conclusion

The number of states that collect arrestee DNA will likely continue to grow, as will the types of offenses eligible for collection.[55] Yet in what are surely thousands of cases, some arrestees will forfeit their genetic information even though they did not ultimately face prosecution. The possibility of DNA expungement both ensures that arrestees do not forfeit their genetic rights simply because of an arrest, and checks law enforcement power. Arrestee DNA expungement procedures should be automatic, timely, and fair.

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51 *See, e.g.*, People v. Buza, 180 Cal. Rptr. 3d 753, 789 (Ct. App. 2014) ("Thus, in California, the government may retain indefinitely the DNA of individuals who have not been convicted of or even charged with a qualifying offense."), *review granted*, 432 P.3d 415 (Cal. 2015).

52 SAMUELS, *supra* note 2, at 28.

53 *See* Maryland v. King, 133 S. Ct. 1958, 1967 (2013) (noting that Maryland's statutes require that DNA samples must be "destroyed" if the criminal charges are not brought or do not result in a conviction).

54 Thanks to Hank Greely for this point.

55 *See generally* Joh, *supra* note 37.

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