


7-5-2016

## Sealing and Destruction of Criminal Records for the Factually Innocent: A “Second Chance” for California Penal Code Section 851.8

Irina Fox

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### Recommended Citation

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# Sealing and Destruction of Criminal Records for the Factually Innocent: A “Second Chance” for California Penal Code Section 851.8

IRINA FOX\*

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\* © 2016 Irina Fox. Assistant Professor of Law, Creighton University School of Law. Many thanks to Shane Beasley for the countless hours of research assistance, and to Patrick Borchers, Raneta Mack, Richard Foreman, and Joseph Eden for their comments on an earlier draft of this Article.

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On July 22, 1972, Joseph Loder was arrested for attacking San Diego Police Officer Gosnell, who was clubbing with Loder’s wife.<sup>1</sup> Loder was charged with battery, obstructing a police officer, and disturbing the peace.<sup>2</sup> After Officer Gosnell was suspended from duty in connection with the beating incident, the San Diego City Attorney declined to press charges against Loder.<sup>3</sup> Loder agreed not to pursue any civil action against Officer Gosnell in exchange for the dismissal of the criminal complaint.<sup>4</sup>

Concerned about the detrimental impact of the arrest record, Loder requested the San Diego Police Department “erase” his arrest record—but the Police Department took no action.<sup>5</sup> Loder then sued for the same remedy and to notify any agency that had been made aware of the arrest that the record had been erased.<sup>6</sup> The Supreme Court of California, affirming the lower courts’ decisions, denied Loder the relief requested, and held that no California statute compelled the erasure of his arrest record.<sup>7</sup> In

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1. Loder v. Mun. Court, 553 P.2d 624, 626 (Cal. 1976), *cert denied*, 429 U.S. 1109 (1977).  
2. *Id.*  
3. *Id.*  
4. *Id.*  
5. *Id.* at 626–27.  
6. *Id.* at 627.  
7. *Id.* Procedurally, Joseph Loder elected to seek a writ of mandate with the Superior Court—an action that compels performance by any lower court. See CAL. CIV. PROC. CODE § 1085(a) (West 2015) (“A writ of mandate may be issued by any court to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled, and from which the party is unlawfully precluded by that inferior tribunal,

1975, the California legislature enacted Penal Code section 851.8, allowing courts to seal and destroy criminal records of persons who were factually innocent and acquitted at trial—the exact remedy Loder sought but was ineligible for under the original version of the statute.<sup>8</sup>

Today, the state of California provides a comprehensive expungement scheme to allow certain individuals to seal and destroy their criminal records and obtain a declaration of factual innocence from a court of law.<sup>9</sup> Expungement has been a much-debated topic in the United States, especially following the financial crisis that caused unemployment levels to spike drastically.<sup>10</sup> In addition to excluding many individuals from the

corporation, board, or person.”). To be eligible for the writ, a petitioner must meet “two basic requirements . . . namely, a clear, present and usually ministerial duty on the part of the defendant and a clear, present and beneficial right in plaintiff to performance of that duty.” *Taylor v. Bd. of Trs.*, 683 P.2d 710, 715 (Cal. 1984). The Supreme Court held that Loder’s writ must be denied because he failed to show any requisite duty under the first prong. *Loder*, 553 P.2d at 627.

8. CAL. PENAL CODE § 851.8 (Deering 1975). Loder’s case was decided by the Supreme Court in 1976 and was ineligible for that remedy, which at the time was limited to “factually innocent” defendants who were acquitted after a trial. The 1975 version of the statute read as follows:

Whenever a person is acquitted of a charge and it appears to the judge presiding at the trial wherein such acquittal occurred that the defendant was factually innocent of the charge, the judge may order that the records in the case be sealed, including any record of arrest or detention, upon the written or oral motion of any party in the case or the court, and with notice to all parties to the case. If such an order is made, the court shall give to the defendant a copy of such order and inform the defendant that he may thereafter state that he was not arrested for such charge and that he was found innocent of such charge by the court.

*Id.*

9. *Expungement of Record*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“The removal of a conviction (esp. for a first offense) from a person’s criminal record. — Also termed *expunction of record*; *erasure of record*.”); “An expungement statute is a legislative provision for the eradication of a record of conviction or adjudication upon fulfillment of prescribed conditions. It is a process of erasing the legal event of conviction or adjudication, and thereby restoring to the regenerate offender his *status quo ante*.” Nicholas G. Miller, *Insurance for Ex-Offender Employees: A Proposal*, 28 STAN. L. REV. 333, 355 (1976).

10. See, e.g., Joseph C. Dugan, *I Did My Time: The Transformation of Indiana’s Expungement Law*, 90 IND. L.J. 1321, 1323 (2015) (exploring, among other things, economic considerations of the “rap sheet stigma”); *What We Don’t Mention About Unemployment*, THE ATLANTIC, <http://www.theatlantic.com/sponsored/allstate/what-we-dont-mention-about-unemployment/267/> [https://perma.cc/BSQ2-R9W8]; Kai Wright, *Boxed In: How a Criminal Record Keeps You Unemployed For Life*, THE NATION (Nov. 6, 2013), <http://www.thenation.com/article/boxed-how-criminal-record-keeps-you-unemployed-life/> [https://perma.cc/5JCJ-9R8J].

workforce, criminal records present multiple other problems, not only for those individuals, but society at large. Any criminal history blemish “can haunt a person for the rest of his life,” creating a social stigma that prevents a person from reintegrating into society.<sup>11</sup> Nonetheless, criminal records serve “valid and important public purposes,”<sup>12</sup> such as the “promotion of more efficient law enforcement and criminal justice” and “protect[ing] the public from recidivist offenders.”<sup>13</sup>

The Supreme Court in *Loder* cited an abundance of authorities mandating the preservation of arrest records by various public officers.<sup>14</sup> Acknowledging the harshness of the consequences to Loder—such as “inaccurate or incomplete arrest records, dissemination of arrest records outside the criminal justice system, and reliance on such records as a basis for denying the former arrestee business or professional licensing, employment, or similar opportunities for personal advancement”<sup>15</sup>—the California Supreme Court emphasized that “the suspect’s right of privacy is not violated by prompt and accurate public reporting of the facts and circumstances of his arrest.”<sup>16</sup> The Supreme Court was convinced that for arrest records “in California[,] the risks have been greatly diminished in recent years by significant legislative and executive action.”<sup>17</sup>

In enacting California Penal Code section 851.8, the California legislature sought to balance the interests of record preservation against the severity of a haunting criminal record.<sup>18</sup> Unfortunately, the current version of the statute falls short of accomplishing this balance, by imposing an onerous burden on some individuals seeking a “second chance,” and failing to provide the necessary tools to enable those people to prove their factual innocence. This Article provides a comprehensive review of section 851.8 and proposes amendments to fairly balance the societal interests in preserving criminal records with the interests of factually innocent individuals in

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11. *People v. White*, 144 Cal. Rptr. 128, 130 (Cal. App. Dep’t Super. Ct. 1978).

12. *Id.*

13. *Loder v. Mun. Court*, 553 P.2d 624, 628 (Cal. 1976), *cert denied*, 429 U.S. 1109 (1977).

14. *See, e.g.*, CAL. GOV’T CODE § 6200 (West 2015) (imposing punishment by imprisonment on any “officer having the custody of any record, map, or book, or of any paper or proceeding of any court, filed or deposited in any public office, or placed in his or her hands for any purpose” if “the officer willfully does or permits any other person to” steal, remove, secrete, destroy, mutilate, deface, alter, or falsify that record); *People v. Pearson*, 244 P.2d 35, 51 (Cal. Ct. App. 1952) (sustaining a deputy sheriff’s conviction for removing certain papers from office); *People v. Tomalty*, 111 P. 513, 519 (Cal. Ct. App. 1910) (affirming a conviction for falsifying records).

15. *Loder*, 553 P.2d at 630.

16. *Id.* at 628.

17. *Id.* at 631.

18. *See generally* 20 CAL. JUR. 3D *Criminal Law: Pretrial Proceedings* § 330 (2009 & Supp. 2015) (providing a brief overview of the statute).

clearing their names. Part I reviews California law governing criminal record retention and dissemination and outlines the contemporary society's main policy considerations for preserving arrest records and for their expungement. Part II scrutinizes Penal Code section 851.8, offers a synopsis of the most significant California case law interpreting the statute, and outlines the procedure for filing a petition under the statute—including a discussion of the statutory standards for establishing factual innocence and the statutory burden shifting approach. Part II also examines the specifics of the hearing, including a review of the admissible evidence. Finally, Part III proposes amendments to the statute that would more successfully balance the interests of society and law enforcement and the affected individuals. Part IV concludes, highlighting that the current flaws of the statute can be remedied through allowing factual innocence petitioners rights to some discovery,<sup>19</sup> permitting anonymous filings for those arrested but never charged,<sup>20</sup> and correcting the timing restriction inconsistency.<sup>21</sup>

## I. CRIMINAL RECORDS AND THEIR EXPUNGEMENT IN GENERAL

### A. California Law Governing Criminal Record Retention and Dissemination

California's criminal records<sup>22</sup> are maintained on state and local levels, with record retention and dissemination regulated under state law.<sup>23</sup> Under Penal Code section 11075(a), criminal records are compiled “for purposes of identifying criminal offenders and of maintaining as to each

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19. See *infra* Section III.A.

20. See *infra* Section III.B.

21. See *infra* Section III.C.

22. “State summary criminal history information” is defined as information compiled by the Attorney General pertaining to the identification and criminal history of any person, such as name, date of birth, physical description, fingerprints, photographs, date of arrests, arresting agencies and booking numbers, charges, dispositions, and similar data about the person. CAL. PENAL CODE § 11105 (West 2015).

23. CAL. PENAL CODE §§ 11075–11081 (West 2011 & Supp. 2015); see generally Wallace Wade, *Who's Lying Now?: How the Public Dissemination of Incomplete, Thus Half-Truthful, Criminal Record Information Regarding A Statutorily Rehabilitated Petty Offender Is an Unjust Penalty and Why Laws Regarding Expungement Of and Restrictions on Dissemination of Criminal Records Information in California Must Be Reformed*, 38 W. ST. U. L. REV. 1, 7 (2010) (providing an overview of the nature and extent of criminal recordkeeping, availability and dissemination in California).

such offender a summary of arrests, pretrial proceedings, the nature and disposition of criminal charges, sentencing, incarceration, rehabilitation, and release.”<sup>24</sup> Generally, the State’s Attorney General is “responsible for the security of criminal offender record information” and must establish regulations to promote such record security.<sup>25</sup>

Records maintained by the state “shall be disseminated, whether directly or through any intermediary, only to such agencies as are, or may subsequently be, authorized access to such records by statute.”<sup>26</sup> California courts require that all doubts be resolved against disclosure,<sup>27</sup> recognizing that criminal records contain “extremely sensitive and private information.”<sup>28</sup> The California Department of Justice is authorized to release arrest records only in limited circumstances.<sup>29</sup> Under Penal Code section 11105, the Attorney General is permitted to furnish criminal history information to certain entities: courts and peace officers, district attorneys and prosecuting city attorneys, probation and parole officers, public defenders or other attorneys representing the

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24. CAL. PENAL CODE § 11075(a) (West 2011).

25. CAL. PENAL CODE § 11077 (West 2015).

26. CAL. PENAL CODE § 11076 (West 2011). Additionally, the California Public Records Act also regulates access to criminal records. See CAL. GOV’T CODE § 6250–6277 (West 2008 & Supp. 2015).

27. Under the California Constitution, Article I, section 1, “[a]ll people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and *privacy*.” CAL. CONST. art. I, § 1 (emphasis added). “The phrase ‘and privacy’ was added to California Constitution, article I, section 1 by an initiative adopted by the voters on November 7, 1972 (the Privacy Initiative or Amendment).” Hill v. Nat’l Collegiate Athletic Ass’n, 865 P.2d 633, 641 (Cal. 1994).

The principal focus of the Privacy Initiative is readily discernible. The Ballot Argument warns of unnecessary information gathering, use, and dissemination by public and private entities—images of government snooping, computer stored and generated dossiers and cradle-to-grave profiles on every American dominate the framers’ appeal to the voters. The evil addressed is government and business conduct in collecting and stockpiling unnecessary information . . . and misusing information gathered for one purpose in order to serve other purposes or to embarrass . . . the Privacy Initiative’s primary purpose is to afford individuals some measure of protection against this most modern threat to personal privacy.

*Id.* at 645 (citations and internal alteration and quotation marks omitted).

28. 42A CAL. JUR. 3D *Law Enforcement* § 35 (2008) (citing Housing Auth. v. Van de Kamp, 272 Cal. Rptr. 584, 589 (Cal. Ct. App. 1990)).

29. See Cent. Valley Chapter of the 7th Step Found. v. Younger, 262 Cal. Rptr. 496 (Cal. Ct. App. 1989) (imposing restrictions on the dissemination of arrest records); 7 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW § 587, at 972 (10th ed. 2005) (“Under [Penal Code] 11105 and [Labor Code] 432.7, the Department of Justice is required to furnish criminal history information (arrest records) to specified public agencies (exempt employers) but is prohibited from providing this information to others (nonexempt employers).”).

individual, as well as cities, counties, and their agencies “in fulfilling employment, certification, or licensing duties.”<sup>30</sup>

This authorization for release is limited by Labor Code section 432.7, with respect to employers. As of 2013, both public and private employers were prohibited from asking an applicant for, or seeking, information “concerning an arrest or detention that did not result in conviction, or . . . concerning a conviction that has been judicially dismissed or ordered sealed pursuant to law.”<sup>31</sup> If employers came into possession of such criminal records, the same statute forbids employers from using them as a factor “in determining any condition of employment including hiring, promotion, termination, or any apprenticeship training program or any other training program leading to employment.”<sup>32</sup> Some public agencies and healthcare organizations are exempt from the statute.<sup>33</sup>

This effort to limit the effect of arrests and minor convictions began in the mid-1970s with the 1975 enactment of California Labor Code section 432.7 and the 1976 enactment of section 432.8.<sup>34</sup> These statutes were meant to

minimize or eliminate the lingering social stigma flowing from what is now perceived to be a relatively minor form of criminal activity. The intent is to insure that once the offender has paid his prescribed debt to society, he not be further penalized by curtailment of his opportunities for rehabilitation, education, employment, licensing, and business or professional advancement.<sup>35</sup>

Acknowledging the disparate impact caused by criminal records and employers’ reluctance to hire persons with any type of record, section 432.7 of the Labor Code made it illegal for an employer to ask an applicant to disclose any information concerning an arrest that did not result in a

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30. CAL. PENAL CODE § 11105(b) (West 2011 & Supp. 2015). Whenever criminal records are furnished for employment, licensing, or certification purposes, the Department of Justice may charge a fee for furnishing the information. *Id.* § 11105(e).

31. CAL. LAB. CODE § 432.7(a) (West Supp. 2015); *see* WITKIN, *supra* note 29, at 972.

32. CAL. LAB. CODE § 432.7(a) (West 2014).

33. Cent. Valley Chapter of the 7th Step Found. v. Younger, 262 Cal. Rptr. 496, 503 (Cal. Ct. App. 1989).

34. CAL. LAB. CODE § 432.7 (West Supp. 2015); CAL. LAB. CODE § 432.8 (West 2011 & Supp. 2015). Section 432.7 is titled “Disclosure of arrest or detention not resulting in conviction, referral or participation in diversion programs, or conviction judicially dismissed or sealed; violations; remedies; exception; screening prospective concessionaires”; while section 432.8 is titled “Limitations on employers and penalties for certain convictions.”

35. Hooper v. Deukmejian, 176 Cal. Rptr. 569, 579 (Cal. Ct. App. 1981).



conviction,<sup>36</sup> and section 432.8 prohibited employers from asking questions about marijuana convictions within certain parameters.<sup>37</sup>

The original section 432.7 provided no protection to convicted criminals until the 2013 enactment of section 432.9.<sup>38</sup> That law extended the prohibition on inquiries to state and local agencies, and expanded existing law to include a prohibition on inquiries about “a conviction that has been judicially dismissed or ordered sealed pursuant to law.”<sup>39</sup> This section covers only those convicted through “a plea, verdict, or finding of guilt regardless of whether sentence is imposed by the court.”<sup>40</sup>

The federal Equal Employment Opportunity Commission (EEOC) provides nonbinding guidance on the use of criminal records by employers. Enforcement Guidance from the EEOC generally permits employers to take into account arrest and conviction records in making hiring decisions.<sup>41</sup> Prior to the expansion of section 432.7, California employers heavily relied on this guidance. The EEOC Guidance points out that “an arrest ‘may in some circumstances trigger an inquiry into whether the conduct underlying the arrest justifies an adverse employment action.’”<sup>42</sup> California courts treat this as persuasive authority on employment questions concerning convictions.<sup>43</sup> However, that guidance provides poorly defined exceptions to the general prohibition against asking applicants about their conviction history; these exceptions are heavily dependent on highly fact specific “business necessity” incidents, measured by case law defined factors.<sup>44</sup>

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36. *But see infra* text accompanying note 41, citing EEOC Guidance that sanctions employer access to arrest records.

37. *See Miller, supra* note 9, at 342.

38. CAL. LAB. CODE § 432.9 (West Supp. 2015) (titled “Prohibition against request to disclose conviction history prior to determination that applicant meets minimum employment qualifications; exceptions”).

39. S.B. 530, 2013–14 Sess. (Cal. 2013).

40. CAL. LAB. CODE § 432.7(a) (West 2011 & Supp. 2015).

41. EEOC, Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964 (2012), [http://www.eeoc.gov/laws/guidance/arrest\\_conviction.cfm#sdendnote101anc](http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm#sdendnote101anc) [<https://perma.cc/9WTQ-RPJ2>] [hereinafter *Guidance*]; *see generally* Jon D. Bible, *Catch-22: The EEOC’s Controversial Guidance on the Use of Criminal History Information by Employers*, 64 LAB. L.J. 20 (2013) (listing out potential issues employers face when they fail to run a background check and, at the same time, addressing legal discrimination issues employers may face when conducting a check).

42. Bible, *supra* note 41, at 28 (citing *Guidance*, at 11); *but see* *Schwartz v. Bd. of Bar Examiners of State of N.M.*, 353 U.S. 232, 241 (1957) (An arrest record, on the other hand, is not persuasive evidence of anything. “The mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct.”).

43. Today, its application would be curtailed by CAL. LAB. CODE § 432.7 (West 2015).

44. Alex Jeffrey Whitt, *When Convicts Need Not Apply: Proposing Clarifications to the EEOC’s 2012 Guidelines*, 47 J. MARSHALL L. REV. 401, 402–03 (2013).

California's current legislative and regulatory scheme significantly limits access to criminal records, but their retention and dissemination is essential in some cases.

*B. Society's Interest in Preservation of Criminal Records*

The value of criminal records retention is significant. The California Supreme Court in *Loder v. Municipal Court* extensively reviewed the government's "compelling interest in limited retention and dissemination of arrest records," which includes the "promotion of more efficient law enforcement and criminal justice" and "protect[ing] the public from recidivist offenders."<sup>45</sup>

Arrests and other criminal records are sent to the California Department of Justice, whose database retains all "information about the crime, the arrestee, the history of the prosecution and disposition, fingerprints, photographs and other relevant data."<sup>46</sup> Local police departments also maintain "police reports, evidence reports, booking records, property reports, investigative reports, daily summaries of police activity ('the police blotter'), reports of scientific examination of evidence, incident reports, and field interview cards," as well as the "suspect's photograph, fingerprints, and in some cases DNA sample."<sup>47</sup> Prosecutors and courts may also retain possession of some criminal records.<sup>48</sup>

The purposes of criminal record retention are manifold. From the initial stage of arrest through the post-conviction sentencing and probation phases, maintenance of accurate records is important. At the time of the arrest, police officers must identify each arrested individual: the names are checked against a database to determine whether there may be other charges against the arrestee, whether the arrestee may be wanted or is a fugitive, and whether he or she may pose a threat to the safety of the police officer.<sup>49</sup> An accurate arrest record both correctly identifies the suspected individual and gives notice to others that he or she may have committed a

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45. *Loder v. Mun. Court*, 553 P.2d 624, 628 (Cal. 1976), *cert denied*, 429 U.S. 1109 (1977).

46. *Wade*, *supra* note 23, at 8 (citing CAL. PENAL CODE § 11105 (West 2015)).

47. *Id.* (citing CAL. GOV'T CODE § 6254 (West 2015) and PENAL § 13300).

48. *Id.* (citing PENAL § 11105).

49. *Loder*, 553 P.2d at 628.

crime.<sup>50</sup> When an arrested individual is booked<sup>51</sup> at the police station, the record will usually be completed with fingerprints, photographs, vital statistics,<sup>52</sup> and possibly a DNA sample.

Additionally, law enforcement uses information from arrest records for solving the crime in question, as well as other crimes.<sup>53</sup> For crimes that are likely to result in recidivism, such as “the use of addictive drugs, child molesting, indecent exposure, gambling, bookmaking, passing bad checks, confidence frauds, petty theft, receiving stolen goods, and even some forms of burglary and robbery,”<sup>54</sup> several arrests may lead to the discovery of additional evidence and may even identify the suspect’s modus operandi.<sup>55</sup> Police may also use past arrests to support probable cause for a new arrest,<sup>56</sup> as long as there is additional “independent evidence of criminal involvement.”<sup>57</sup>

Besides law enforcement, prosecutors take into account the entire criminal record in exercising their discretion on whether to press formal charges, whether the charge will be a felony or a misdemeanor, and whether to offer a defendant a plea bargain.<sup>58</sup> Under some circumstances, diversion programs may be available to individuals charged with possession of

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50. *Id.* (quoting *Briscoe v. Reader’s Digest Ass’n, Inc.*, 483 P.2d 34, 39 (Cal. 1971)).

51. “To ‘book’ signifies the recordation of an arrest in official police records, and the taking by the police of fingerprints and photographs of the person arrested, or any of these acts following an arrest.” CAL. PENAL CODE § 7(21) (West 1987).

52. *Loder*, 553 P.2d at 628.

53. *Id.* (“We have held, for example, that a photograph taken pursuant to even an illegal arrest may be included among those shown to a witness who is asked to identify the perpetrator of a subsequent crime. . . . This is a fortiori permissible in the case of a lawful arrest; and the same identification function is served, of course, by the arrestee’s fingerprints and other recorded physical description.” (citing *People v. McInnis*, 494 P.2d 690, 692 (Cal. 1971))). Identifying a suspect may entice witnesses to testify. *Briscoe*, 483 P.2d at 39; *see also* *Kapellas v. Kofman*, 459 P.2d 912, 924 (Cal. 1969).

54. *Loder*, 553 P.2d at 628–29.

55. *Id.* at 629.

56. Natalie Lyons, *Presumed Guilty Until Proven Innocent: California Penal Code Section 851.8 and the Injustice of Imposing a Factual Innocence Standard on Arrested Persons*, 43 GOLDEN GATE U. L. REV. 485, 486 (2013) (“The police may lawfully use a past arrest to support probable cause to re-arrest the person.” (citing *Loder*, 553 P.2d at 628)).

57. *Loder*, 553 P.2d at 629 (“Although previous arrests of a suspect in connection with illicit drug transactions will certainly not suffice to constitute probable cause for search or arrest, and while, indeed, arrests without convictions may be of little probative value, still a suspect’s reputation as being involved in illicit drug traffic based on prior arrests may be considered.’ . . . When the investigating officer knows of such a pattern, that knowledge can be used, in connection with other information, to support a finding of probable cause for arrest.” (first quoting *People v. Buchanan* 103 Cal. Rptr. 66, 79 (Cal. Ct. App. 1972); then quoting *People v. Martin*, 511 P.2d 1161, 1164 (Cal. 1973))).

58. *Loder*, 553 P.2d at 629.

controlled substances, and this availability depends on prior offenses involving controlled substances.<sup>59</sup>

Once the arrested person is charged, a court may use the criminal record—including arrest records—to decide whether to release the defendant pretrial, as well as the amount of bail, if necessary.<sup>60</sup> Post-conviction, a court considers all prior history of individuals as assembled by probation officers in considering the sentence and eligibility for probation.<sup>61</sup> If sentenced to time in prison, an individual may be eligible for release on parole, based in part on past criminal history.<sup>62</sup>

In many circumstances, criminal records can appropriately be used outside of the criminal justice system. For example, certain types of employment<sup>63</sup> and professional licensing<sup>64</sup> may require an extensive background check to determine the applicant's eligibility. Penal Code section 11077.2 mandates the state's attorney general to "establish a communication network that allows the transmission of requests from private service providers in California to the Department of Justice for criminal offender record

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59. *Id.* ("In *Sledge v. Superior Court* . . . we recognized that such 'evidence' may include prior narcotics arrests of the defendant not resulting in a conviction, listed on his rap sheet.").

60. *Id.* at 630 (noting that the application form for pretrial release asks defendants to list their prior arrests and their dispositions).

61. *Id.* (citing CAL. PENAL CODE § 1203 (West 2015)). The supreme court explained the use of prior history in probation consideration:

Any prior arrest record of the defendant is routinely obtained and included in the report as part of his criminal history. In *People v. Peterson* . . . we reaffirmed the principle that upon conviction, evidence which would be inadmissible on the issue of guilt may be received for the purpose of determining whether and upon what conditions to grant probation, provided the proceedings remain fundamentally fair. For this purpose it has been held that the court may properly consider not only current arrests of the defendant giving rise to charges still pending, but also prior arrests which did not result in conviction.

*Id.* (first citing *People v. Escobar*, 264 P.2d 571, 574 (Cal. Ct. App. 1953); then citing *People v. White*, 240 P.2d 728, 729 (Cal. Ct. App. 1952)).

62. *Id.* (citing *Azeria v. Cal. Adult Auth.*, 193 Cal. Rptr. 839, 842 (Cal. Ct. App. 1961)).

63. Sandra J. Mullings, *Employment of Ex-Offenders: The Time Has Come for a True Antidiscrimination Statute*, 64 SYRACUSE L. REV. 261, 268 (2014) (noting that "under a federal statute, a state must suspend the driver's license of an ex-offender convicted of a drug offense for at least six months or risk losing a portion of its federal highway funds.").

64. Some "highly skilled professions, such as law and medicine, and lesser skilled or unskilled occupations, such as barbers and bingo operators" may require licensing or certification dependent often on lack of criminal record. *Id.* at 268.

information for purposes of employment, licensing, certification, custodial child placement or adoption.”<sup>65</sup>

Employee background checks are crucial for some types of private employers. A background check may protect the employer from property losses due to theft and fraud.<sup>66</sup> Moreover, a thorough background check may serve as an insurance against liability to third parties under the negligent hiring theory in tort law: a third party injured by an employee may pursue a claim against the employer.<sup>67</sup> When making hiring decisions, employers must weigh the risk of searching into the pasts of their current and prospective employees against the risk of a future lawsuit for possible negligent supervision, retention, or even discrimination.<sup>68</sup> Moreover, recent statistics support the need to run a background check due to proliferation of resume fraud.<sup>69</sup> The competitive job market contributes to an increase in competition, prompting applicants to embellish their qualifications.<sup>70</sup> Therefore, public and private employers, like the criminal justice system, have incentives to ensure that criminal records are accurately reported and preserved.

Furthermore, the First Amendment to the United States Constitution generally protects the right of access to public information, and some drastic

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65. Any such dissemination would be subject to limitations in CAL. LAB. CODE § 432.7. See *supra* Section I.A.

66. Bible, *supra* note 41, at 20; Nicole C. Baldwin, *Watch Your Back(ground checks)!*, 24 No. 3 CAL. EMP. L. LETTER 4 (May 12, 2014) at 1 (finding employers may have concerns about various negative aspects of hiring people with a criminal record. They may be concerned about potential lawsuits resulting from negligent hiring, damage to property, and endangerment of customers and employees).

67. Bible, *supra* note 41, at 21–23 (discussing elements of the torts and reviewing a few cases applying its elements).

68. CAL. LAB. CODE § 432.7 (West 2011 & Supp. 2015) (barring most employers from asking about convictions or arrest records). The inability to consider criminal past in hiring decisions leaves employers vulnerable to negligent hiring suits and retention risks, or, on the other end of the spectrum, causes them to unintentionally exceed the boundaries of their pre-employment screening, creating a risk of discrimination liability. Ryan D. Watstein, Note, *Out of Jail and out of Luck: The Effect of Negligent Hiring Liability and the Criminal Record Revolution on an Ex-Offender’s Employment Prospects*, 61 FLA. L. REV. 581, 582 (2009). Discussed in Section I.C *infra*, background checks obtained through third parties that are not in compliance with Federal Credit Reporting Act requirements can also subject employers to liability. See Susan Adams, *Background Checks on Job Candidates: Be Very Careful*, FORBES (June 21, 2013, 11:56 AM), <http://www.forbes.com/sites/susanadams/2013/06/21/background-checks-on-job-candidates-be-very-careful/> [<http://perma.cc/CG3V-ZP42>] (explaining the potential for Title VII discrimination suits when an employer turns away a job applicant based on criminal history, or the opposite, hiring the applicant and then suffering from a negligent hiring lawsuit).

69. Bible, *supra* note 41, at 22 (“A 2009 study reported that 46% of resumes showed discrepancies in employment and educational history; this number was 5% higher than in 2007. A survey of college students revealed that 95% would lie to get a job and that 41% had done so.”).

70. *Id.*

expungement remedies—such as record sealing and destruction—may raise concerns.<sup>71</sup> Some proponents of disclosure have characterized expungement by public officials as contrary to the well-being and safety of the public, based on a right to know information which bears on their community, and claim that public officials are not fulfilling their duty to inform the public.<sup>72</sup>

### C. Policy Justifying Expungement

On the other hand, an individual with a criminal record suffers from its detrimental and possibly life-long impact.<sup>73</sup> The stigma of having a criminal record affects not only an individual's success in society, but also familial and other interpersonal relationships.<sup>74</sup> The inability to reintegrate into

71. Clay Calvert & Jerry Bruno, *When Cleansing Criminal History Clashes with the First Amendment and Online Journalism: Are Expungement Statutes Irrelevant in the Digital Age?*, 19 COMMLAW CONSPECTUS 123, 126 (2010) (addressing the “troubling tension between criminal expungement statutes and the Constitutional freedoms of speech and press” and proposing an ethical, rather than a legal, solution); see *Ne. Press Ass'n v. Stuart*, 427 U.S. 539 (1976) (finding that a news media broadcast of criminal trial admissions and confessions is protected by the First Amendment).

72. Calvert & Bruno, *supra* note 71, at 124 (“The freedom of the press safeguarded by the First Amendment to the United States Constitution stands in stark contrast, if not diametric opposition, to the underlying policies of personal privacy and the reintegration of convicted persons who have since paid their debt to society. Rather than burying or suppressing the truth about the past, the First Amendment’s venerable vitality rests in the constant desire to expose the truth and to test competing conceptions of it. Margaret Love, former chair of the American Bar Association’s Criminal Justice Standards Committee Task Force on Collateral Sanctions, wrote in a 2003 law journal article that the policies underlying expungement of records ‘requires a certain willingness to ‘rewrite history’ that is hard to square with a legal system founded on the search for truth.’”) (quoting Margaret Colgate Love, *Starting over with a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code*, 30 FORDHAM URB. L.J. 1705, 1726 (2003)).

73. See Lyons, *supra* note 56, at 486 (“In California, an arrest remains on a person’s criminal record for her lifetime.”); Fruqan Mouzon, *Forgive Us Our Trespasses: The Need for Federal Expungement Legislation*, 39 U. MEM. L. REV. 1, 2 (2008–09) (“Millions of Americans suffer a life-long handicap as a result of a one-time lapse in judgment. Indeed, a single conviction—or even an arrest without conviction—can forever affect an individual’s voting rights, employment opportunities, and social standing.”); Mullings, *supra* note 63, at 262 n.4 (citing Deborah N. Archer & Kele S. Williams, *Making America “The Land of Second Chances”*: *Restoring Socioeconomic Rights of Ex-Offenders*, 30 N.Y.U. REV. L. & SOC. CHANGE 527, 527 (2006) (“Virtually every felony conviction carries with it a life sentence.”)).

74. See Ben Geiger, *The Case for Treating Ex-Offenders as a Suspect Class*, 94 CAL. L. REV. 1191 (2006); Dugan, *supra* note 10, at 1323 (noting that “interactions with the law-abiding world are problematic for persons convicted of crimes: the risk is high that

society due to a past criminal record may contribute to substance abuse and recidivism, creating “an obstacle impeding a changed man’s efforts at reformation and rehabilitation.”<sup>75</sup>

As a society, we allow expungement because it facilitates reintegration of individuals into the workforce. The social stigma associated with criminal records transcends the lone individual’s psyche and affects his or her employment chances, education opportunities, and even welfare eligibility.<sup>76</sup> Past criminal records may prevent individuals from voting,<sup>77</sup> obtaining housing,<sup>78</sup> and being able to adopt children,<sup>79</sup> may affect eligibility for welfare benefits,<sup>80</sup> or impede their ability to qualify for federal loans or grants for post-secondary education,<sup>81</sup> and could even foreclose the

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normally will ‘define a criminal only in terms of his stigma’ and avoid associating with him for fear of being contaminated.” (quoting Tracey L. Meares et al., *Updating the Study of Punishment*, 56 STAN. L. REV. 1171, 1184 (2004))).

75. Mouzon, *supra* note 73, at 2 n.4 (citing *North Carolina v. Rice*, 404 U.S. 244, 247 (1971) (recognizing that “[a] number of disabilities may attach to a convicted defendant even after he has left prison”)); *Parker v. Ellis*, 362 U.S. 574, 593–94 (1960) (Warren, C.J., dissenting) (“Conviction of a felony imposes a status upon a person which not only makes him vulnerable to future sanctions through new civil disability statutes, but which also seriously affects his reputation and economic opportunities.”) . . . ).

76. These barriers to reintegration into society have been referred to in literature as “collateral consequences” of criminal records. See generally Mullings, *supra* note 63 (reviewing collateral consequences faced by ex-offenders and proposing an antidiscrimination scheme that would ameliorate the negative impact of convictions).

77. Steven D. Bell, *The Long Shadow: Decreasing Barriers to Employment, Housing, and Civic Participation for People with Criminal Records Will Improve Public Safety and Strengthen the Economy*, 42 W. ST. L. REV. 1, 2 (2014) (“11 states (six in the South) ban[] ex-felons from voting even after they have completed prison and probation or parole.” (quoting Editorial, *Disenfranchised Felons*, N.Y. TIMES, July 15, 2012, at A16, <http://www.nytimes.com/2012/07/16/opinion/disenfranchised-felons.html> [<https://perma.cc/47GG-GSNA>])).

78. Corinne A. Carey, *No Second Chance: People with Criminal Records Denied Access to Public Housing*, 36 U. TOL. L. REV. 545, 546 (2005) (“But there are several million ex-felons in the United States, and under current housing policies, everyone convicted of a felony is automatically ineligible for a minimum of five years. In addition, there are tens of millions of Americans who have been convicted of misdemeanors, or merely arrested but never convicted of any offense, and they too can be, and often are, excluded from public housing on the basis of their criminal records.”).

79. See CAL. WELF. & INST. CODE § 361.4 (West 2015) (explaining that a social worker must run “a state-level criminal records check” before placing a child in a home. The same statute bans placement of children in homes of convicted individuals, unless the Director of Social Services grants an exemption under Section 1522 of the Health and Safety Code).

80. Mouzon, *supra* note 73, at 3 n.8 (citing 21 U.S.C. § 862a(a)–(b) (2000) (disqualifying individuals with drug felony convictions from receiving food stamps or Temporary Assistance for Needy Families (TANF))).

81. *Id.* at 3 n.7 (citing 20 U.S.C. § 1091(r) (2012), which suspends “student eligibility for federal loans, grants, or work assistance because of conviction of certain drug offenses while receiving such aid”).

possibility of joining the military.<sup>82</sup> The ABA National Inventory of Collateral Consequences of Conviction (NICCC), which gathers data on collateral consequences of convictions in each U.S. jurisdiction, today reports that Californians with criminal records may suffer from up to 1,818 collateral consequences,<sup>83</sup> the examples of which include: “(1) mandatory prohibitions against operating or working at hospitals, daycare centers, and elder care facilities—even if unrelated to the nature of the prior offense, (2) ineligibility to become a certified domestic violence counselor—but not a certified substance abuse counselor, and (3) discretionary ineligibility or mandatory revocations of licenses in virtually every regulated occupation or profession, from barbers to nurses to attorneys.”<sup>84</sup>

In addition to the effect on the individual, criminal records have an inevitable economic impact felt by the entire society: criminal records keep many capable individuals out of the workforce.<sup>85</sup> According to a recent study, an employment background check of one in four American adults will reveal the existence of a criminal past.<sup>86</sup> It is estimated that approximately seven million California residents have criminal records.<sup>87</sup>

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82. *Id.* at 3–4 n.10 (citing 10 U.S.C. § 504(a) (2012) (“No person who has been convicted of a felony, may be enlisted in any armed force . . .” with the qualification that the Secretary of Defense may make exceptions on a case-by-case basis.)).

83. Collateral Consequences of Criminal Conviction in California, AM. BAR ASS’N, <http://www.abacollateralconsequences.org/search/?jurisdiction=10> [<https://perma.cc/7EEU-DZKX>] (last visited Apr. 5, 2016).

84. Bell, *supra* note 77, at 9–10.

85. See, e.g., *What We Don’t Mention About Unemployment*, *supra* note 10 (“[A] Stanford University study sought to put a dollar value to the impact of these limitations. The study found that a criminal record led to \$5,760 in forgone benefits to the community annually, primarily through lost earnings and tax revenue.”); Wright, *supra* note 10, at 18 (bias against hiring ex-offenders “has had massive consequences in an era of record poverty. The United States lost between \$57 billion and \$65 billion in GDP in 2008, according to the Center for Economic Policy and Research, as a result of the reduction in male workers.”).

86. *The “Wild West” of Employment Background Checks: A Reform Agenda to Limit Conviction and Arrest History Abuses in the Digital Age*, NAT’L EMP’T LAW PROJECT CTR. FOR CMTY. CHANGE, Aug. 2014, at 1, <http://www.nelp.org/content/uploads/2015/03/Wild-West-Employment-Background-Checks-Reform-Agenda.pdf> [<https://perma.cc/X6UC-FSK5>] [hereinafter *Wild West*].

87. Bell, *supra* note 77, at 2 (citing S.F., CA., POLICE CODE Art. 49, §§ 4901–4920 (2014), at § 4902 Findings, [http://library.amlegal.com/nxt/gateway.dll/California/police/article49proceduresforconsideringarrests?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:sanfrancisco\\_ca\\$anc=JD\\_Article49](http://library.amlegal.com/nxt/gateway.dll/California/police/article49proceduresforconsideringarrests?f=templates$fn=default.htm$3.0$vid=amlegal:sanfrancisco_ca$anc=JD_Article49)).



A job applicant's criminal record significantly decreases and often forecloses his or her chances of being hired.<sup>88</sup>

With the proliferation of private background check companies, criminal records are now easily accessible to many employers.<sup>89</sup> They hire private search companies, such as Accurate Background, Inc.,<sup>90</sup> ADP Screening and Selection Services,<sup>91</sup> First Advantage,<sup>92</sup> HireRight,<sup>93</sup> and Sterling,<sup>94</sup> in addition to various internet background check companies, whose services are readily accessible.<sup>95</sup> Private background check companies are diligent in

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88. See Bell, *supra* note 77, at 2, 10 (“[T]wo-thirds of employers surveyed in five major U.S. cities would not knowingly hire a person with a criminal record, regardless of the offense.”) (“Studies have shown that job applicants with criminal records are fifty percent less likely to receive a job callback.”) (citing Devah Pager, Bruce Western & Naomi Sugie, *Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records*, 623 ANNALS AM. ACAD. POL. & SOC. SCI. 195, 199 (2009), [http://scholar.harvard.edu/files/pager/files/annals\\_sequencingdisadvantage.pdf?m=1392390789](http://scholar.harvard.edu/files/pager/files/annals_sequencingdisadvantage.pdf?m=1392390789) [https://perma.cc/3XRR-M2HW]); Lahny R. Silva, *Clean Slate: Expanding Expungements and Pardons for Non-Violent Federal Offenders*, 79 U. CIN. L. REV. 155, 168 (2010) (citing Devah Pager & Bruce Western, *Investigating Prisoner Reentry: The Impact of Conviction Status on the Employment Prospects of Young Men* 20 (2009)) (“Various studies conducted over the past fifteen years consistently show that on average 60% of employers indicate that they would ‘probably not’ or ‘definitely not’ consider hiring an individual with a criminal history.”); *What We Don’t Mention About Unemployment*, *supra* note 10 (“According to the National Employment Law Project, one out of every four adult Americans has a criminal record, a broad term covering everything from violent crime to arrest without a conviction. But for most employers, the devil isn’t in the details—simply having a criminal record can often be enough to have your resume dismissed by employers, leaving you without options to earn a stable income.”).

89. Bell, *supra* note 77, at 14 (“In one survey, more than 90 percent of companies reported using criminal background checks for their hiring decisions.”); *Wild West*, *supra* note 86, at 1 (noting that “more employers than ever are conducting background checks on their prospective employees by relying on private background check companies or on government databases that are often accessible on-line at the click of a mouse.”).

90. *Products: Background Checks*, ACCURATE BACKGROUND, <https://www.accuratebackground.com/products.php?sec=17> [https://perma.cc/8BYL-E5G4] (last visited Apr. 5, 2016).

91. *Talent Management*, ADP, <http://www.adp.com/solutions/services/talent-management.aspx> [https://perma.cc/YZS7-UBK5] (last visited Apr. 5, 2016).

92. *Employment Background Check Solutions*, FIRST ADVANTAGE, <http://www.fadv.com/solutions/solutions/employment-solutions/criminal-records-and-sanctions.aspx> [https://perma.cc/QK3P-MTNZ] (last visited Apr. 5, 2016).

93. *Background Checks*, HIRERIGHT, <http://www.hireright.com/background-checks> [https://perma.cc/LNG8-QUPR] (last visited Apr. 5, 2016).

94. *Background Checks by Need: Criminal Record Checks*, STERLINGBACKCHECK <http://www.sterlingbackcheck.com/Need/Criminal-Records.aspx> [https://perma.cc/EK3E-VDQQ] (last visited Apr. 5, 2016).

95. E.g., Bible, *supra* note 41, at 22 (“One need only do a quick internet search to see that there are many ways to access myriad data about applicants; the [www.info-linkscreening.com/InfoLink/Downloads/link](http://www.info-linkscreening.com/InfoLink/Downloads/link) [https://perma.cc/6R25-DNEU], for example, enables one to learn about arrests and convictions, among other things.”); *Wild West*, *supra* note 86, at 2 (“[T]here is a new frontier of Internet background check vendors that often charge cut-rate fees for questionable products. One of the largest companies, background

obtaining all publicly accessible information. For instance, they send runners to courthouses to pull all new criminal charges filed against individuals.<sup>96</sup> They immediately update their files with new information. These entities are, in theory, subject to federal regulation with regard to the types of information they are allowed to report, but lack of enforcement permits them to report all data that they access.<sup>97</sup>

Even though California law limits employer inquiries regarding some criminal records, private background check companies access and disseminate all available information. In several other states, local governments officially contract with private companies, like Choicepoint, LexisNexis, and Westlaw to provide online access to criminal records for a fee.<sup>98</sup> California has no official criminal records database, and only five out of fifty-eight counties transmit criminal records data electronically to Choicepoint.<sup>99</sup> Runners manually retrieve records in the remaining fifty-three counties, with these records being stored and disseminated to employers without regard to the statutory limitations.<sup>100</sup>

Error is not uncommon in government records,<sup>101</sup> and the reports produced by private background-check companies compound the errors within

checks.com, charges \$15 for each report if the employer signs up for at least 25 searches. The company proudly claims that '[w]ith the database of over 345 million criminal records,' it 'has now become the leader in the acquisition of data from across the country and the delivery or instant online access to public records.'").

96. See *Wild West*, *supra* note 86, at 2.

97. See *id.* at 2, 3 (The National Association of Professional Background Screeners administers an accreditation program "to certify compliance with basic standards of accuracy and fairness, but only a handful of the companies signed the pledge." The industry is regulated by the Fair Credit Reporting Act (FCRA), also applicable to credit reporting agencies.); see also Bell, *supra* note 77, at 14 ("Under federal law, commercial providers of criminal histories are subject to the provisions of the Fair Credit Reporting Act ('FCRA') and 'generally may not report records of arrests that did not result in entry of a judgment of conviction, where the arrests occurred more than seven years ago. However, they may report convictions indefinitely.' Nonetheless, a survey of fifty randomly selected on-line providers of criminal history records found that despite these federal regulations, enforcement of FCRA's protections 'appears spotty at best.'"). An employer hiring a third-party background check company must also follow the FCRA. Bible, *supra* note 41, at 24.

98. Geiger, *supra* note 74, at 1199.

99. *Id.* at 1199 n.47.

100. *Id.*

101. See, e.g., U.S. DEP'T OF JUSTICE, THE ATTORNEY GENERAL'S REPORT ON CRIMINAL HISTORY BACKGROUND CHECKS 16-17 (2006), [http://www.bjs.gov/content/pub/pdf/ag\\_bgchecks\\_report.pdf](http://www.bjs.gov/content/pub/pdf/ag_bgchecks_report.pdf) [<https://perma.cc/WZN2-DJLJ>] (reporting various errors in criminal history records maintained by the FBI); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS, 2010 2 (2010),

criminal records.<sup>102</sup> These private companies are by no measure a paragon of accuracy, and errors within their reports abound.<sup>103</sup> When charges are dropped or dismissed, these background check companies often fail to update their files in the required timely manner, if at all.<sup>104</sup> Other errors may include reporting someone else's history due to name confusion, reporting facts in a misleading way, or misreporting the seriousness of the offense.<sup>105</sup> This ease of access to often inaccurate records keeps many individuals unemployed.

Expungement statutes shield individuals from the collateral consequences of having a criminal record, working within the larger legal system to achieve the goals of rehabilitation and reentry into society. Furthermore, expungement is aimed at preserving the personal interest and dignity of the individual arrested or convicted, while maintaining the government's record keeping interest and safety interests.<sup>106</sup>

California, the most populated state, has high unemployment rates and cannot afford to keep capable and qualified individuals out of the work force.<sup>107</sup> The financial crisis resulted in even higher unemployment rates, and caused many states to review their laws regarding employer access to criminal records. Several states forbid employment discrimination on the

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<https://www.ncjrs.gov/pdffiles1/bjs/grants/237253.pdf> [https://perma.cc/8MGU-R8R5]; Wright, *supra* note 10 (“In the EEOC’s 2012 guidance, the commissioners emphasize the haphazard nature of many of the databases now determining workers’ fates. They point to studies showing state and local databases with incomplete information that stops at the point of arrest, ignoring whether there was ever a conviction. In 2006, only half the records in the FBI’s database were complete. They’re also rife with clerical errors, like misspelled names.”).

102. *Wild West*, *supra* note 86, at 2.

103. See Daniel Epps, *The Consequences of Error in Criminal Justice*, 128 HARV. L. REV. 1065, 1067–68 (2015) (discussing errors in criminal convictions and reassessing the applicability of Blackstone’s adage—“[B]etter that ten guilty persons escape, than that one innocent suffer”—in today’s criminal justice system).

104. Wright, *supra* note 10 (“[T]he databases amassed by private companies often haven’t been updated, including to correct erroneous information”); *Wild West*, *supra* note 86, at 2.

105. *Wild West*, *supra* note 86, at 2.

106. Linda S. Bueth, *Sealing and Expungement of Criminal Records: Avoiding the Inevitable Social Stigma*, 58 NEB. L. REV. 1087, 1091–92 (1979).

107. Unemployment in California reached its highest in 2010, with an annual rate of 12.2%, compared to the 2007 annual rate of 5.4%, the 2008 rate of 7.3%, the 2009 rate of 11.2%, the 2011 rate of 11.7%, the 2012 rate of 10.4%, the 2013 rate of 10.3%, and the 2014 rate of 7.5%. See *Unemployment Fluctuates*, FIRST TUESDAY J. (June 23, 2015), <http://journal.firsttuesday.us/reeling-from-california-unemployment/2211/> [https://perma.cc/ZE8S-CL84]; *Unemployment Rate and Labor Force*, STATE OF CALIFORNIA EMP’T DEV. DEP’T, <http://www.labormarketinfo.edd.ca.gov/data/unemployment-and-labor-force.html#Table> [https://perma.cc/9DK3-5HG8] (follow “Historical Unemployment Rate and Labor Force Data Tables” hyperlink) (last visited Apr. 5, 2016).

basis of criminal history,<sup>108</sup> while the federal government provides tax incentives to those who are willing to hire individuals with criminal records.<sup>109</sup> Additionally, several states and local governments have adopted the “ban-the-box” initiatives, which remove all questions regarding criminal history from the job application and postpone any background check until later in the hiring process.<sup>110</sup>

The California legislature has attempted to balance the interest in preserving criminal records and the importance of allowing certain individuals a “second chance” because of the burdensome collateral consequences in employment, housing, and civic engagement placed on offenders.<sup>111</sup>

Thus, erasing a criminal record becomes a goal for many individuals, not unlike Joseph Loder, who wanted the opportunity to move past his

108. For instance, under the Wisconsin Fair Employment Act (WFEA) employers “may not engage in any act of employment discrimination . . . against any individual on the basis of arrest record, conviction record . . .” WIS. STAT. ANN. § 111.321 (West 2010). The state of Hawaii considers it “an unlawful discriminatory practice” to refuse to hire an individual because of “arrest and court record.” HAW. REV. STAT. ANN. § 378-2 (West 2013). New York forbids denial of employment due to a previous criminal conviction unless

(1) there is a direct relationship between one or more of the previous criminal offenses and the specific license or employment sought or held by the individual; or (2) the issuance or continuation of the license or the granting or continuation of the employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.

N.Y. CORRECT. LAW § 752 (McKinney 2007).

109. The Work Opportunity Tax Credit provides incentives to employers who hire a qualified ex-felon, or an individual “convicted of a felony under any statute of the United States or any State,” and who was hired within one year of conviction or release from prison. 26 U.S.C. § 51 (2014).

110. See generally ALL OF US OR NONE, *About: The Ban the Box Campaign*, <http://bantheboxcampaign.org/?p=20#.VZ15YPMqqko> [<https://perma.cc/K5F6-7WMY>] (last visited Apr. 5, 2016) (“The campaign challenges “the stereotypes of people with conviction histories by asking employers to choose their best candidates based on job skills and qualifications, not past convictions”); John P. Furfaro & Risa M. Salins, “*Ban the Box*” *Initiatives: Removing Conviction Histories From Employment Applications*, SKADDEN’S 2015 INSIGHTS (Jan. 2015), <http://www.skadden.com/insights/ban-box-initiatives-removing-conviction-histories-employment-applications> [<https://perma.cc/NU7B-F3BY>] (“To date, six states—Hawaii, Illinois, Massachusetts, Minnesota, New Jersey and Rhode Island, as well as the District of Columbia—have enacted ban the box laws for private employers. A number of localities, including Baltimore; Buffalo, New York; Chicago; Montgomery County, Maryland; Newark, New Jersey; Philadelphia; San Francisco; Seattle; and Rochester, New York, also have required removal of the conviction history question on private employers’ job applications.”).

111. See Bell, *supra* note 77, at 3–11 (providing a detailed discussion of collateral consequences of a criminal conviction).

altercation with Officer Gosnell. Expungement statutes seek to remedy individuals' wrongly perceived criminality, both to avoid stigma from society and maintain self-worth. Destroying the faulty criminal record becomes a priority, especially for those persons factually innocent of any crime. Although several other expungement remedies are available under California state law,<sup>112</sup> none go as far in their effects as the sealing and destruction of records under Penal Code section 851.8.

## II. PENAL CODE SECTION 851.8: PROCEDURE AND ITS APPLICATION

The California legislature enacted section 851.8 recognizing that innocent individuals should not suffer the harsh consequences a criminal record

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112. See, e.g., CAL. PENAL CODE § 1203.4 (West 2015) (explaining that an individual who “fulfilled the conditions of probation for the entire period of probation, or has been discharged prior to the termination of the period of probation” is rewarded with a “release[] from all penalties and disabilities.”); see also *Wade*, *supra* note 23, at 13 (citing *People v. Johnson*, 285 P.2d 74, 76 (Cal. Ct. App. 1955) (“Penal Code, sections 1203 et seq., dealing with the subject of probation, provide in effect that in granting probation the People of the State, speaking through their courts, may say to one who has committed a crime, “If you will comply with these requirements you shall be entitled to this reward.” The purpose and hope are, of course, that through this act of clemency, the probationer may become reinstated as a law-abiding member of society. Removal of the blemish of a criminal record is the reward held out through the provisions of Penal Code, section 1203.4, as an additional inducement.”). While this remedy is “sometimes referred to as ‘expungement’ of the conviction,” the remedy under section 1203.4 “does not, strictly speaking, ‘expunge’ the conviction, nor render the conviction ‘a legal nullity.’” *People v. Holman*, 155 Cal. Rptr. 3d 164, 182 (Cal. Ct. App. 2013), *review denied* (July 10, 2013) (citation omitted); see also PENAL § 1203.4(a) (“The order shall state, and the probationer shall be informed, that the order does not relieve him or her of the obligation to disclose the conviction in response to any direct question contained in any questionnaire or application for public office, for licensure by any state or local agency, or for contracting with the California State Lottery Commission.”); *People v. Sharman*, 95 Cal. Rptr. 134, 135 (Cal. Ct. App. 1971) (holding that “defendant’s construction of Penal Code section 1203.4, which would confer upon an offender the right to have the records in his case sealed, must be rejected”). Nonetheless, the “release[] from penalties and disabilities” provides “a palpable benefit, such that the conviction may be treated as if it were not a conviction for most purposes.” *Holman*, 155 Cal. Rptr. 3d at 182. Section 1203.4(a) covers persons convicted of a misdemeanor but never placed on probation, who may, one year after the date of the judgment, file a court petition to establish that he or she has “lived an honest and upright life and has conformed to and obeyed the laws of the land.” PENAL § 1203.4(a). Similar to section 1203.4, these “erased” convictions will have “the same effect in any future prosecution of the defendant as if it had not been set aside.” *Wade*, *supra* note 23, at 18. Other expungement remedies in California include CAL. HEALTH & SAFETY CODE § 11361.5 (West 2007) (“Destruction of arrest and conviction records; applicable offenses; method; records not applicable; costs” requires the destruction of any records pertaining to a marijuana violation within two years of its creation) and CAL. PENAL CODE § 4851 (West 2011) (Persons previously convicted of a felony may request from a court a Declaration of Rehabilitation, which is subsequently forwarded to the governor as an application for a pardon.).

carries. The original version of the statute, enacted in 1975, authorized sealing and destruction of records “only when ‘a person is acquitted of a charge and it appears to the judge presiding at the trial wherein such acquittal occurred that the defendant was factually innocent of the charge . . . .’”<sup>113</sup>

The statute was repealed and reenacted in 1980<sup>114</sup> and today guarantees a clean slate to several categories of petitioners who can prove their factual innocence.<sup>115</sup> Subsections (a) and (b) of the statute designate the procedure for situations where “a person has been arrested and no accusatory pleading has been filed.”<sup>116</sup> Subsection (c) is the counterpart for scenarios “where a person has been arrested, and an accusatory pleading has been filed, but where no conviction has occurred.”<sup>117</sup> Subsection (d) addresses instances where “a person has been arrested and an accusatory pleading has been filed, but where no conviction has occurred”—the same situation as in subsection (c) but where the prosecuting attorney concurs in petitioner’s eligibility for relief.<sup>118</sup> Subsection (e) focuses on situations where “any person is acquitted of a charge and it appears to the judge presiding at the trial at which the acquittal occurred that the defendant was factually innocent.”<sup>119</sup> Petitioners who have been convicted at trial but had their conviction reversed on appeal, though not covered explicitly by the statute, are eligible for sealing and destruction of their records under the Equal Protection Clause.<sup>120</sup> Finally, subsection (m) makes the remedies of this section available to petitioners whose arrests were “deemed to be or described as a detention under section 849.5 or 851.6.”<sup>121</sup>

113. *People v. Frank M.*, 210 Cal. Rptr. 53, 54 (Cal. Ct. App. 1985) (quoting 1975 Cal. Stat. p. 2002).

114. *Id.* at 54.

115. See generally 20 CAL. JUR. 3D, *supra* note 18, § 330 (reviewing petition procedure and providing illustrations); 4 B.E. WITKIN, CALIFORNIA CRIMINAL LAW § 84, at 324 (4th ed. 2012) (supplying a general overview of the statute).

116. CAL. PENAL CODE § 851.8(a)–(b) (West 2008).

117. *Id.* § 851.8(c).

118. *Id.* § 851.8(d).

119. *Id.* § 851.8(e).

120. *People v. McCann*, 45 Cal. Rptr. 3d 868, 871 (Cal. Ct. App. 2006) (“[F]or persons whose convictions have been reversed on appeal for *insufficient evidence*, it would violate equal protection to deny relief under section 851.8 and, therefore, we must construe the statute as covering this limited category of *convicted* defendants. We agree.”).

121. PENAL § 849.5 provides that “[i]n any case in which a person is arrested and released and no accusatory pleading is filed charging him with an offense, any record of arrest of the person shall include a record of release. Thereafter, the arrest shall not be

The following section provides an overview of the statute and cases interpreting it.

*A. Procedure for Petitioners Arrested but Never Charged with a Crime*

Subsections (a) and (b) of the statute set forth the steps for the filing of factual innocence petitions by arrestees never charged with a crime. In cases of an arrest with no subsequent charges, an arrestee must initially file a petition with the arresting law enforcement agency and the appropriate district attorney's office, requesting destruction of the arrest records. Subsection (g) mandates that the Department of Justice furnish such forms to factual innocence petitioners.<sup>122</sup> The petitioner must provide their personal information, including their name, date of birth, driver license number, social security number—optional—and address, as well all information specific to the arrest, such as its date, name of arresting agency, agency case number, charge or charges, and disposition. After a petitioner signs and dates the request to seal and destroy records, he or she must file the form with the appropriate law enforcement agency, providing a copy to the district attorney's office.<sup>123</sup>

If the police department determines that the arrested petitioner is factually innocent, and if the prosecuting attorney concurs, the police department must follow the sealing and destruction procedure as prescribed in the statute.<sup>124</sup> In this case, all records of the arrest will be sealed for three years and destroyed upon the expiration of that period.

Typically, however, this initial petition receives no response but is, in practice, a condition precedent to a subsequent court filing—akin to the requirement of exhaustion of administrative remedies.<sup>125</sup> Lack of response “within 60 days after the running of the relevant statute of limitations or within 60 days after receipt of the petition in cases where the statute of

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deemed an arrest, but a detention only.” CAL. PENAL CODE § 851.6 (West 1975) discusses the issuance of a certificate, which would confirm that the official action was a detention only.

122. For example, form BCIA 8270, PETITION TO SEAL AND DESTROY ADULT ARREST RECORDS, is available for download from the State of California Department of Justice Record Management/Record Sealing Unit. RECORD SEALING UNIT, BUREAU OF CRIMINAL INFO. & ANALYSIS, DEP'T OF JUSTICE, BCIA NO. 8270, PETITION TO SEAL AND DESTROY ADULT ARREST RECORDS (2015). California counties supply similar forms to factual innocence petitioners.

123. “A copy of the petition shall be served upon the prosecuting attorney of the county or city having jurisdiction over the offense.” CAL. PENAL CODE § 851.8 (a) (West 2011).

124. *Id.*

125. Lack of response by the police in most circumstances has nothing to do with the merits, but is probably explained by a shortage of resources and manpower to review and address these petitions.

limitations has previously lapsed” is deemed to be the denial of the petition.<sup>126</sup> In the case of a denial by the district attorney and the law enforcement agency, a petitioner may request adjudication of his or her factual innocence with the superior court—the procedure discussed below.<sup>127</sup>

*B. Procedure for Petitioners Charged with a Crime but  
Never Convicted*

Subsections (c) and (d) of the statute allow those who have been arrested and charged, but never convicted of the crime, to “petition the court which dismissed the action for a finding that the defendant is factually innocent of the charges for which the arrest was made.”<sup>128</sup> Subsection (e) covers individuals who were tried for the crime and acquitted.<sup>129</sup> Previous filing with law enforcement is not required for these petitioners; instead petitioner can request a finding of factual innocence directly from the court.

In each scenario, a petitioner has the burden to show his or her factual innocence, with the exception of those individuals covered by subsection (d). That subsection provides a simplified procedure if the prosecuting

126. PENAL § 851.8(b).

127. Denial of these petitions is virtually automatic at the level of law enforcement entities; and prosecutors often file an opposition.

128. CAL. PENAL CODE 851.8 (c)–(d) (West Supp. 2015); *see also* CAL PENAL CODE § 851.86 (West 2015), which provides that whenever a person is convicted of a charge, and the conviction is set aside based upon a determination that the person was factually innocent of the charge, the judge shall order that the records in the case be sealed, including any record of arrest or detention, upon written or oral motion of any party in the case or the court, and with notice to all parties to the case.

20 CAL. JUR. 3D, *supra* note 18, § 330.

129. *See* Epps, *supra* note 103, at 1101 & n.178 (noting that “most American jurisdictions have no legal mechanism that acquitted defendants can use to clear their names—that is, to receive some sort of official recognition that they are factually innocent rather than merely ‘not guilty.’” and stating that “California is an exception.” (citing CAL. PENAL CODE 851.8)).

Scholars have argued that California’s Penal Code section 851.8 is toothless for those who have been charged but acquitted. *See* Richard E. Myers II, *Requiring A Jury Vote of Censure to Convict*, 88 N.C. L. REV. 137, 175 (2015) (“California has attempted to solve this problem by creating a procedure by which a defendant may petition for a finding of innocence, although in practice the rule is rarely used because it permits a finding of innocence only when no reasonable prosecutor could have brought the charge.”). Although this premise recognizes the stringent burden placed on acquitted defendants, it ignores instances when acquitted defendants did prevail on their factual innocence petitions. *See, e.g.*, discussion of *People v. Laiwala*, *infra* Section II.D.1.e.



attorney concurs that a defendant who has been arrested and charged, but where no conviction has occurred, is eligible for factual innocence relief. In these cases, the court “may . . . grant the relief . . . at the time of the dismissal of the accusatory pleading.”<sup>130</sup>

Clarification concerning the unique stance of 851.8(d) petitioners comes from *People v. Frank M.*, in which the court explained that not all subsections of 851.8 require a finding of factual innocence.<sup>131</sup> The defendant, arrested and charged with a misdemeanor offense which resulted in an injury to another person, later successfully moved that the criminal prosecution against him be dismissed.<sup>132</sup> He then requested to seal and destroy his arrest record pursuant to section 851.8(d).<sup>133</sup> With the concurrence of the district attorney, the trial court granted that relief.<sup>134</sup> Four months later, the attorney general moved to vacate the sealing order, which the trial court denied.<sup>135</sup> The attorney general appealed, asserting that the court exceeded its jurisdiction because there had been no acquittal and no determination of factual innocence.<sup>136</sup> The court of appeals held that the facts of the present case were covered by subsection (d), which requires only that the court and the district attorney both agree to the sealing and destruction of arrest records pertaining to the charges which have not resulted in a conviction and which have been dismissed.<sup>137</sup> This subsection of the statute does not require a finding of factual innocence.<sup>138</sup>

Aside from subsection (d), all other petitioners must prove their factual innocence to be eligible for the sealing and destruction remedy of section 851.8.

### C. Court Filing

Upon the denial of the petition by law enforcement, or upon the expiration of the sixty-day waiting period for those arrested or never charged,<sup>139</sup> or

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130. CAL. PENAL CODE § 851.8(d) (West 2011).

131. *People v. Frank M.*, 210 Cal. Rptr. 53, 54 (Cal. Ct. App. 1985).

132. *Id.* at 53.

133. *Id.*

134. *Id.*

135. *Id.* at 54.

136. *Id.*

137. *Id.* at 55.

138. *Id.* at 55–56.

139. If, after receipt by both the law enforcement agency and the prosecuting attorney of a petition for relief under subdivision (a), the law enforcement agency and prosecuting attorney do not respond to the petition by accepting or denying the petition within 60 days after the running of the relevant statute of limitations or within 60 days after receipt of the petition in cases where the statute of limitations has previously lapsed, then the petition shall be deemed to be denied. In any case where the petition of an arrestee to the law enforcement

immediately upon the disposition of the criminal case for those against whom an accusatory pleading was filed,<sup>140</sup> petitioners may file a petition with a court of appropriate jurisdiction.<sup>141</sup>

The petition is ordinarily filed as a motion under the caption of the original criminal case if the defendant has already been charged. The situation is much more problematic for those who were only arrested because the statute fails to provide any protections of anonymity. Public access of arrest records is usually limited,<sup>142</sup> but a filing of the petition under the petitioner's full name would immediately destroy this anonymity. This statutory oversight is addressed by a recommendation later in this article, which proposes a standard procedure for a simultaneous motion to seal both the case caption and the petition itself.<sup>143</sup>

Attached to the petition for factual innocence should be the original request to seal and destroy records previously submitted to the police, if any,<sup>144</sup> petitioner's declaration, and a memorandum of points and authorities.<sup>145</sup> It is customary to also attach a proposed order sealing and destroying the records. Once the defendant files a petition with the clerk

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agency to have an arrest record destroyed is denied, petition may be made to the superior court that would have had territorial jurisdiction over the matter.

CAL. PENAL CODE § 851.8(b) (West 2011).

140. See *People v. Punzalan*, 6 Cal. Rptr. 3d 30, 32 (Cal. Ct. App. 2003) ("Once the accusatory pleading is filed, the factually innocent defendant need not even petition the arresting agency and district attorney with a request to seal the arrest record. (§ 851.8, subd. (c)) Instead, the defendant files his petition directly with the superior court and serves a copy on the district attorney, who may present evidence at the hearing on the petition.").

141. "In any case where the petition of an arrestee to the law enforcement agency to have an arrest record destroyed is denied, petition may be made to the superior court that would have had territorial jurisdiction over the matter." PENAL § 851.8 (b). See 5 CAL. CRIM. PRACTICE: MOTIONS, JURY INSTR. & SENT. § 60:2 (3d ed.) (providing an example of a factual innocence motion).

142. In general, details of the description of a person arrested and details of the circumstances of the arrest are public records and must be made public by state and local law enforcement agencies. However, such information may not be disclosed to the extent it would endanger the safety of a person involved in an investigation or the successful completion of the investigation or a related investigation.

LAURIE LEVENSON, CAL. CRIM. PROC. § 17:9 (2011–2015 ed.).

143. See *infra* Section III.B.

144. See Form BCIA 8270, *supra* note 122.

145. 5 CAL. CRIM. PRACTICE: MOTIONS, JURY INSTR. & SENT., *supra* note 141 §§ 60:4, 60:8 (providing an example of a memorandum of points and authorities accompanying the motion).

of court, the superior court will schedule a factual innocence hearing. The timing of the hearing would depend on the complexity of the factual issues and the amount of time needed for preparation. Petitioner must then serve a copy of the petition on the law enforcement agency and the district attorney at least ten days prior to the factual innocence hearing.<sup>146</sup> In many circumstances, the district attorney will oppose the petition, thus requesting a full evidentiary hearing.<sup>147</sup>

#### *D. The Factual Innocence Hearing*

A factual innocence hearing is an evidentiary proceeding in which both petitioner and the prosecutor are allowed to present evidence.<sup>148</sup> The statute prescribes the standard for a finding of factual innocence, allocates the burden of proof, and discusses types of admissible evidence.

##### *1. Standard for a Finding of Factual Innocence and Burden of Proof*

Subsection (b) of the statute sets forth both the standard for the determination of a petitioner's factual innocence and the allocation of the burden of proof. To find that a petitioner is factually innocent, a court must conclude that "no reasonable cause exists to believe that the arrestee committed the offense for which the arrest was made."<sup>149</sup> The initial burden of proof is on the petitioner "to show that no reasonable cause exists to believe that the arrestee committed the offense for which the arrest was made."<sup>150</sup> If the petitioner succeeds in meeting their burden, then the burden will shift to the district attorney "to show that a reasonable cause exists to believe that the petitioner committed the offense for which the arrest was made."<sup>151</sup>

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146. *Id.* § 60:6 (providing an example of notice to be served on the district attorney).

147. *See, e.g.*, *People v. Enders*, No. H036458, 2011 WL 6153190, at \*1 (Cal. Ct. App. Dec. 12, 2011); *People v. Laiwala*, 49 Cal. Rptr. 3d 639, 641 (Cal. Ct. App. 2006). Some prosecutors justify their almost automatic opposition to factual innocence petitions by unwillingness to set precedent in concurring with the petition. Because the initial burden is on the petitioner, prosecutors are likely willing to attend the hearing and listen to the petitioner's case before deciding whether sealing and destruction may be warranted.

148. California provides no court-appointed counsel or free transcripts for indigent petitioners. *People v. Scott M.*, 213 Cal. Rptr. 456, 464–65 (Cal. Ct. App. 1985), *disapproved on other grounds by People v. Adair*, 62 P.3d 45 (Cal. 2003). Section 851.1 provides a statutory remedy of expungement—a proceeding that takes place after a criminal proceeding—so there is no right to court-appointed counsel. *Id.*

149. CAL. PENAL CODE § 851.8(b) (West 2011).

150. *Id.*

151. *Id.*

*a. Definition of “Reasonable Cause”*

Section 851.8 does not define the term “reasonable cause,” but courts have consistently used the definition from other criminal law jurisprudence.<sup>152</sup> One of the first cases to define “reasonable cause” as it is used in section 851.8 is *People v. Scott M.*<sup>153</sup> In *Scott M.*, defendant was charged with several sexual offenses based on the accusations of a thirteen-year old alleged victim.<sup>154</sup> At trial, the defendant’s version of the story was that the sexual encounter was consensual.<sup>155</sup> Defendant was acquitted after a jury trial and filed for a finding of factual innocence.<sup>156</sup> He argued that a jury acquittal warrants relief under section 851.8, unless “there were substantial co[un]tervailing considerations which point[ ] to a contrary conclusion of innocence.”<sup>157</sup>

Noting that no case had defined the standard of reasonable cause as it is used in section 851.8, the court adopted the definition used in other criminal jurisprudence contexts.<sup>158</sup> Reasonable cause was previously defined as “that state of facts as would lead a man of ordinary care and prudence to believe and conscientiously entertain an honest and strong suspicion that the person is guilty of a crime.”<sup>159</sup> The court reviewed the evidence, concluding there was “ample rational ground for assuming appellant committed the offense” and was thus ineligible for exoneration under factual innocence.<sup>160</sup>

152. For example, reasonable cause for an arrest has been generally defined to be such a state of facts as would lead a man of ordinary care and prudence to believe and conscientiously entertain an honest and strong suspicion that the person is guilty of a crime. *People v. Ingle*, 348 P.2d 577, 580 (Cal. 1960). In the context of a warrantless search incident to an arrest, reasonable or “[p]robable cause is a suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true.” *People v. Smith*, 296 P.2d 913, 915 (Cal. Ct. App. 1956).

153. *Scott M.*, 213 Cal. Rptr. at 462.

154. *Id.* at 457–60.

155. *Id.* at 460–61.

156. *Id.* at 461.

157. *Id.* at 462.

158. *Id.* at 462–63.

159. *Id.* (quoting *People v. Rhinehart*, 507 P.2d 642 (Cal. 1973). *Cf.* *People v. Price*, 821 P.2d 610 (Cal. 1991) (“under § 836, reasonable or probable cause to arrest ‘exists when the facts known to the arresting officer would lead a person of ordinary care and prudence to entertain an honest and strong suspicion that the person arrested is guilty of a crime’”).

160. *Id.* at 463.

The leading case from the California Supreme Court is *People v. Adair*.<sup>161</sup> In that case, the Court concluded that Jeanie Adair, the acquitted defendant in the case, did not meet her burden of showing that no reasonable cause existed to believe that she had committed the crime.<sup>162</sup> Adair was charged with and acquitted of the murder of her husband, Robert, who had died of head trauma.<sup>163</sup> In her defense at trial, Jeanie proffered several inconsistent stories, in all of which an intruder had allegedly attacked Jeanie and then killed Robert with a baseball bat.<sup>164</sup> After the jury acquitted the defendant, she filed a section 851.8 factual innocence petition.<sup>165</sup>

The supreme court articulated a “high and stringent standard” of proof for factual innocence petitioners.<sup>166</sup> Noting that the record “must exonerate, not merely raise a substantial question as to guilt,”<sup>167</sup> the court distinguished between other standards: “[F]actually innocent’ as used in [section 851.8(b)] does not mean a lack of proof of guilt beyond a reasonable doubt or even by ‘a preponderance of evidence.’”<sup>168</sup> Successful 851.8 petitioners must “show that the state should never have subjected them to the compulsion of the criminal law—because no objective factors justified official action . . . .”<sup>169</sup>

Defining the term “reasonable cause” as it is used in section 851.8, the supreme court drew on principles deeply rooted in California jurisprudence and affirmed the definition used in *Scott M.*<sup>170</sup> This “well-established legal standard,” according to the supreme court, is “defined as that state of facts as would lead a man of ordinary care and prudence to believe and conscientiously entertain an honest and strong suspicion that the person is guilty of a crime.”<sup>171</sup> A section 851.8 petitioner “must establish that facts exist which would lead no person of ordinary care and prudence to believe or conscientiously entertain any honest and strong suspicion that the person arrested—or acquitted—is guilty of the crimes charged.”<sup>172</sup>

Applying this stringent standard to the facts of the case, the court concluded that the trial court’s finding of factual innocence was incorrect because “its conclusions amounted to no more than inferences and deductions that

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161. *People v. Adair*, 62 P.3d 45 (Cal. 2003).

162. *Id.* at 46.

163. *Id.* at 46–48.

164. *Id.* at 47.

165. *Id.* at 48.

166. *People v. Enders*, No. H036458, 2011 WL 6153190, at \*5 (Cal. Ct. App. Dec. 12, 2011).

167. *Adair*, 62 P.3d at 54.

168. *Id.* (quoting *People v. Glimps*, 155 Cal. Rptr. 230, 235 (Cal. Ct. App. 1979)).

169. *Id.* at 51.

170. *Id.*

171. *Id.* (citations omitted).

172. *Id.* (quoting *People v. Matthews*, 9 Cal. Rptr. 2d 348, 350 (Cal. Ct. App. 1992)).

support a finding of reasonable doubt.”<sup>173</sup> The supreme court pointed out that, even though the defendant was acquitted, the reasonable interpretation of the evidence “strongly suggest[ed] that defendant bludgeoned her husband to death and concocted a story to cover her crime.”<sup>174</sup>

Lower courts have consistently followed *Adair*’s stringent standard, imposing a heavy burden on petitioners seeking to exonerate themselves.<sup>175</sup> For instance, in *People v. Esmaili*, after the dismissal of a charge of continuous sexual abuse of a child, defendant Bejan Esmaili filed a petition for a determination of factual innocence.<sup>176</sup> The court of appeals affirmed the lower court’s denial of the petition, finding that the defendant failed to meet his burden of proof.<sup>177</sup>

When reviewing the evidence at a preliminary hearing in connection with the sexual abuse charge, the lower court concluded that the evidence “did not provide sufficient cause to bind appellant over for trial,” and noted that the victim’s credibility was troubling.<sup>178</sup> Esmaili contended that “because the court had found there was no probable cause to hold him to answer at the preliminary hearing, there was no ‘reasonable cause’ within the meaning of section 851.8 to believe he had committed the charged offense.”<sup>179</sup> The court clarified that the determination of reasonable cause to arrest is an objective question and applied “an external standard” of whether “no person of ordinary care and prudence” would “believe or conscientiously entertain any honest and strong suspicion” that the petitioner was guilty of the crimes charged.<sup>180</sup> Consistent with *Scott M.* and *Adair*, the court reiterated that the petitioner’s burden of proof was aptly described as “incredibly high” and as requiring “no doubt whatsoever.”<sup>181</sup> Factual innocence required a showing that “the state should never have subjected [the defendant] to the compulsion of the criminal law—because no objective factors justified official action.”<sup>182</sup> The court summarized that

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173. *Id.* at 54.

174. *Id.*

175. *See, e.g.*, *People v. Gerold*, 94 Cal. Rptr. 3d 649, 656 (Cal. Ct. App. 2009); *People v. Medlin*, 100 Cal. Rptr. 3d 810, 817 (Cal. Ct. App. 2009).

176. *People v. Esmaili*, 153 Cal. Rptr. 3d 625, 628 (Cal. Ct. App. 2013).

177. *Id.* at 636.

178. *Id.* at 630.

179. *Id.*

180. *Id.* at 633.

181. *Id.* at 632.

182. *Id.* (citing *People v. Adair*, 62 P.3d 45, 54 (Cal. 2003)).

“the record must exonerate, not merely raise a substantial question as to guilt.”<sup>183</sup>

*b. Jury Acquittal Does Not Result in an Automatic Finding of Factual Innocence*

The benefits of sealing and destroying criminal records, according to California courts, are reserved for “those defendants who have not committed a crime.”<sup>184</sup> The prosecution’s failure to convict does not justify the remedy of section 851.8.<sup>185</sup> For cases involving an acquittal and a subsequent factual innocence petition, courts distinguish between acquittals in which a defendant is exonerated as innocent from those in which a prosecutor failed to meet the burden of proving guilt beyond reasonable doubt—for example, when not enough evidence was provided by the prosecutor.<sup>186</sup>

Despite the jury’s acquittal in *Scott M.*,<sup>187</sup> the court of appeals held that the trial court was not in error “to find there was reasonable cause to believe that the appellant had committed the act[s].”<sup>188</sup> The court explained that section 851.8 “is for the benefit of those defendants who have not committed a crime” and whom “the state should never have subjected . . . to the compulsion of the criminal law—because no objective factors justified official action . . . .”<sup>189</sup> Defendants who can meet their burden will be permitted to “purge the official records of any reference to such action.”<sup>190</sup>

The court reviewed the legislative intent behind the factual innocence statute, concluding that prosecution’s failure to convict reflects its failure to prove guilt beyond reasonable doubt.<sup>191</sup> This may result in the acquittal of defendants who are not factually innocent.<sup>192</sup> The statute does not

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183. *Id.*

184. *Adair*, 62 P.3d at 51 (quoting *People v. Scott M.*, 213 Cal. Rptr. 456, 463 (Cal. Ct. App. 1985), *disapproved on other grounds by Adair*, 62 P.3d at 53); *People v. Matthews*, 9 Cal. Rptr. 2d 348, 350 (Cal. Ct. App. 1992) (quoting *Scott M.*, 213 Cal. Rptr. at 463); *Scott M.*, 213 Cal. Rptr. at 463.

185. *Scott M.*, 213 Cal. Rptr. at 463; *People v. Bleich*, 100 Cal. Rptr. 3d 288, 293 (Cal. Ct. App. 2009) (noting that much more than a failure by the prosecution to convict is required in order to justify the sealing and destruction of records based on a determination of factual innocence (citing *Adair*, 62 P.3d at 51)).

186. *See, e.g., Bleich*, 100 Cal. Rptr. 3d at 296 (“Because we conclude the prosecution’s failure of proof in this case is evidentiary, and because on this record we cannot conclude the evidence completely exonerates appellant, we independently conclude the trial judge properly denied appellant’s petition for a finding of factual innocence.”).

187. *See supra* Section II.D.1.b., discussing the facts of *Scott M.*

188. *Scott M.*, 213 Cal. Rptr. at 463.

189. *Id.*

190. *Id.*

191. *Id.* (quoting *People v. Glimps*, 155 Cal. Rptr. 230, 234–35 (Cal. Ct. App. 1979)).

192. *Id.* (quoting *Glimps*, 155 Cal. Rptr. at 234–35).

create a rebuttable presumption of factual innocence in cases of jury acquittal—this determination remains with the trial court.<sup>193</sup> Section 851.8's remedy of sealing and destroying records requires more than the prosecution's mere failure to convict.<sup>194</sup> Instead, only defendant's actual innocence justifies this remedy.<sup>195</sup> When the trial court makes its independent determination to deny a factual innocence petition, it "does not 'disagree' with the jury's verdict . . . . It refines that verdict by distinguishing between those cases where acquittal is based upon actual innocence and those where acquittal is based upon the prosecution's failure to meet its burden of proof."<sup>196</sup>

*c. Dismissal or Acquittal for Technical Reasons Does Not Justify a Finding of Factual Innocence*

In addition to jury acquittals resulting from the prosecution's failure to meet its burden of proof beyond a reasonable doubt, any acquittal or dismissal for technical reasons other than innocence does not entitle a petitioner to the remedy of sealing and destroying the entire record. In *Tennison v. California Victim Compensation and Government Claims Board*, after defendant Tennison was found guilty of first degree murder, and after having unsuccessfully gone through certain state post-conviction remedies, Tennison filed a federal habeas petition and prevailed.<sup>197</sup> The federal court concluded that the prosecution's *Brady* violations warranted relief—yet it did not address Tennison's factual innocence. Tennison subsequently filed his section 851.8 petition and the prosecution filed a response, concurring that Tennison was factually innocent.<sup>198</sup> The court of appeals held that habeas corpus relief based on a *Brady* impropriety rather than insufficiency of the evidence was not automatically entitled to

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193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.* at 462.

197. *Tennison v. Cal. Victim Comp. & Gov't Claims Bd.*, 62 Cal. Rptr. 3d 88, 92 (Cal. Ct. App. 2007).

198. *Id.* at 92–93. Even though prosecution concurred in Tennison's request for sealing and destruction of the record, Tennison could not benefit from subsection d, which does away with the determination of factual innocence: to fall under subsection d, Tennison could not have been convicted. *See supra* Section II.B for a discussion of petitions under subsection (d).



a declaration of factual innocence, despite the concurrence by the district attorney and the superior court's assent.<sup>199</sup>

In a slightly different context, another California court reached the same conclusion as *Tennison*. In *People v. Glimps*, the court held that section 851.8 does not empower the court to seal records in matters that have been dismissed in furtherance of justice or for other technical reasons, because such dismissals are noncommittal on the issue of innocence, and do not meet the requirements in 851.8.<sup>200</sup> This matter combined two cases, with the State appealing two orders denying the State's motion to vacate prior orders sealing the records of two misdemeanor prosecutions.<sup>201</sup> The appellate court noted that the legislative history of the statute made it "crystal clear that, as enacted, the section was not intended to cover a situation in which 'the charge was dismissed—for any reason—without a conviction.'"<sup>202</sup> Dismissals "in furtherance of justice" may be "predicated on many grounds other than factual innocence,"<sup>203</sup> such as to effectuate plea bargains or to assist the prosecution in some way.<sup>204</sup> Such dismissals are of a technical nature and thus ignore the specific requirements of section 851.8: that it must appear to the judge presiding at the trial that the defendant was factually innocent of the charge.<sup>205</sup> The court explained that acquittal is merely one of the preconditions for sealing records in a criminal case.<sup>206</sup> However, "not all acquittals justify sealing" and "acquittals for technical reasons usually will not justify sealing."<sup>207</sup> Even an acquittal on the merits does not suffice under the statute—it is merely an adjudication that proof at the prior proceeding was not sufficient to overcome all reasonable doubt as to guilt.<sup>208</sup>

The same holding was recently reached in *People v. Esmaili*, discussed above. After the dismissal of a charge of continuous sexual abuse of a child, a suspect filed a petition for a determination of factual innocence.<sup>209</sup> The court of appeal affirmed the lower court's denial of Esmaili's petition, finding that the suspect failed to meet his burden of proof.<sup>210</sup> That court

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199. *Tennison*, 62 Cal. Rptr. 3d at 99.

200. *People v. Glimps*, 155 Cal. Rptr. 230, 235 (Cal. Ct. App. 1979) (quoting *Loder v. Mun. Ct.*, 553 P.2d 624, 636 n.21 (Cal. 1976), *cert denied*, 429 U.S. 1109 (1977)).

201. *Id.* at 233–34.

202. *Id.* at 235 (quoting *Loder*, 553 P.2d at 636 n.21).

203. *Id.* at 236 (citing *Loder*, 553 P.2d at 636).

204. *Id.* (citing cases to illustrate purposes for which dismissals are used).

205. *Id.* at 234 (quoting CAL. PEN. CODE § 851.8(e) (West 2008)).

206. *Id.*

207. *Id.* (footnote omitted).

208. *Id.* (quoting *People v. Griffin*, 383 P.2d 432, 437 (Cal. 1963)).

209. *People v. Esmaili*, 153 Cal. Rptr. 3d 625, 630 (Cal. Ct. App. 2013); *see supra* Section II.D.1.a for a discussion of the factual innocence standard in the same case.

210. *Esmaili*, 153 Cal. Rptr. 3d at 636.

clarified that the dismissal of a complaint does not qualify as a determination of factual innocence, nor does such a dismissal have any collateral estoppel effect requiring a finding of factual innocence.<sup>211</sup> Collateral estoppel provided no refuge to the petitioner because the factual innocence issue was never actually litigated.<sup>212</sup> Additionally, this doctrine is not applicable to dismissed criminal proceedings following preliminary hearings or when two proceedings have two different burdens of proof.<sup>213</sup> The court emphasized that the prosecution bore the burden of proof at the preliminary hearing, while appellant had the initial burden in his motion.<sup>214</sup>

*d. The Existence of a Substantive Defense Does not Always Establish Factual Innocence*

California courts have reiterated that factual innocence requires “establishing as a prima facie matter not necessarily just that the [defendant] had a viable substantive defense to the crime charged, but more fundamentally that there was no reasonable cause to arrest him in the first place.”<sup>215</sup> Proof of a defense does not always establish factual innocence: “it depends upon the nature of the defense whether a defense to the crime charged establishes factual innocence, for the purposes of Penal Code section 851.8.”<sup>216</sup> Some defenses are “unrelated to the conduct of the arrestee and his innocence,”<sup>217</sup> while others “may be so related to the defendant’s own conduct that the existence of the defense negates a requisite element of the offense or otherwise eliminates culpability, thereby revealing no reasonable cause to believe the arrestee committed an offense and establishing factual innocence.”<sup>218</sup>

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211. *Id.* at 634–35 (quoting *People v. Bleich*, 100 Cal. Rptr. 3d 288, 294 (Cal. Ct. App. 2009)).

212. *Id.* at 635.

213. *Id.* (first citing *People v. Wallace*, 93 P.3d 1037, 1043 (Cal. 2004); and then citing *In re Sylvia R.*, 64 Cal. Rptr. 2d 93, 95 (Cal. Ct. App. 1997)).

214. *Id.*

215. *See, e.g., Bleich*, 100 Cal. Rptr. 3d at 293 (quoting *People v. Adair*, 62 P.3d 45, 51 (Cal. 2003)); *People v. Medlin*, 100 Cal. Rptr. 3d 810, 817 (Cal. Ct. App. 2009).

216. *People v. Matthews*, 9 Cal. Rptr. 2d 348, 350 (Cal. Ct. App. 1992).

217. *Id.* (quoting *People v. Pogre*, 234 Cal. Rptr. 590, 593 (Cal. App. Dep’t Super. Ct. 1986), *disapproved on other grounds by Adair*, 62 P.3d 45 (noting that the entrapment defense is available “not because the defendant is innocent but because it is a lesser evil that some criminals should escape than that the government should play an ignoble part”).

218. *Id.* at 350.

In *People v. Gerold*, the court held that the relief provided by section 851.8 (b)–(c) does not apply to defendants who are found “not guilty by reason of insanity.”<sup>219</sup> Defendant Scot B. Gerold was charged with assault with a deadly weapon by force likely to produce great bodily injury and terrorist threats.<sup>220</sup> He pled not guilty by reason of insanity.<sup>221</sup> At trial, he was convicted of the charged offenses and found not guilty by reason of insanity upon conclusion of the sanity phase.<sup>222</sup> The court of appeal held that Gerold was not factually innocent of the charges against him, as required under the statute.<sup>223</sup> The court explained that there was reasonable cause to arrest defendant and compel him to face criminal charges: “[e]ven from the current temporal perspective—with all the benefit of hindsight—[the court could not] say that an officer, knowing that defendant was legally insane when committing the underlying offenses, would not have had reasonable cause with which to arrest him.”<sup>224</sup> “Factual innocence,” held the court, means not necessarily just that the defendant had “a viable substantive defense to the crime charged, but more fundamentally that there was no reasonable cause to arrest him in the first place.”<sup>225</sup> Defendant Gerold thus could not meet his burden.

Likewise, in *People v. Matthews*, the court held that while proof of a defense to a crime charged is not categorically ignored, to be relevant when determining factual innocence requires that the nature of the defense show that there was no reasonable cause to arrest the defendant in the first place.<sup>226</sup> Defendant Roland G. Matthews, a corporate president against whom environmental crime charges had been dismissed as part of a plea bargain with the corporation, moved to seal and destroy his arrest records.<sup>227</sup> The court of appeal held that the trial court erred in granting Matthews’ motion to seal and destroy his arrest records because he did not carry his burden to show he was factually innocent of the strict liability crime of illegal storage of hazardous waste.<sup>228</sup> Matthews’ defense was that his position as corporate president made it impossible to oversee daily operations within the corporation, taking him “‘outside of the scope of even strict liability’ for his company’s hazardous waste violations.”<sup>229</sup> The court’s view

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219. *People v. Gerold*, 94 Cal. Rptr. 3d 649, 651–52 (Cal. Ct. App. 2009).  
220. *Id.* at 652.  
221. *Id.* at 651.  
222. *Id.*  
223. *Id.* at 657.  
224. *Id.*  
225. *Id.* at 659 (quoting *People v. Adair*, 62 P.3d 45, 51 (Cal. 2003)).  
226. *People v. Matthews*, 9 Cal. Rptr. 2d 348, 350 (Cal. Ct. App. 1992).  
227. *Id.* at 349.  
228. *Id.*  
229. *Id.* at 352.

was that persons, like a corporate president, are responsible for the company.<sup>230</sup> The court held that defendant Matthews did not present any evidence that he had “undertaken all objectively possible means to discover, prevent or remedy” the criminal violations discovered.<sup>231</sup> Additionally, there was evidence that “Matthews did not utilize this power fully and, as a result, failed to discover, prevent or remedy these conditions.”<sup>232</sup> Sealing and destroying arrest records was not an available remedy because Matthews “was not powerless to prevent or remedy promptly these violations.”<sup>233</sup>

In *People v. Pogre*, the trial court granted the defendant’s petition for a finding of factual innocence based on her defense of entrapment to soliciting an act of prostitution.<sup>234</sup> The appellate court found that the acquittal based on the defense of entrapment was the equivalent of an “acquittal for technical reasons” and did not entitle the defendant to having the record sealed.<sup>235</sup> The court explained that “[e]ntrapment is a defense, not because the defendant is innocent but because it is a lesser evil that some criminals should escape than that the government should play an ignoble part.”<sup>236</sup> Therefore, the court found it inappropriate to determine that defendant had not committed a crime, and was therefore factually innocent under section 851.8.<sup>237</sup>

*e. Ability to Negate an Element of the Offense is One Way to Prove Factual Innocence*

One possible way to establish factual innocence is to refute an element of the crime for which the petitioner was arrested.<sup>238</sup> For example, in

230. *Id.* at 353 (“At the hearing on Matthews’ motion to seal and destroy his arrest records, it became even more apparent that his corporate responsibility and authority were not merely nominal. Matthews was one of the company’s owners and the highest ranking corporate officer in charge of Diceon at the time of the violations. Matthews had the power with other executives to hire and fire employees, to expend corporate funds to institute corrective measures, and even ‘personally had the authority to shut the company down.’”).

231. *Id.* at 354.

232. *Id.*

233. *Id.* (quoting *United States v. Park*, 421 U.S. 658, 674 (1975)).

234. *People v. Pogre*, 234 Cal. Rptr. 590, 591 (Cal. App. Dep’t Super Ct. 1986), *disapproved on other grounds by Adair*, 62 P.3d 45.

235. *Id.* at 593.

236. *Id.* (citing *People v. Benford*, 345 P.2d 928, 934 (Cal. 1959)).

237. *Id.* at 595.

238. *People v. Laiwala*, 49 Cal. Rptr. 3d 639, 645 (Cal. Ct. App. 2006) (“[Some] legal defenses may be so related to the defendant’s own conduct that the existence of the defense negates a requisite element of the offense or otherwise eliminates culpability, thereby revealing no reasonable cause to believe the arrestee committed an offense and establishing

*People v. Laiwala*, a defendant, whose grand theft of a trade secret conviction was reversed on insufficient evidence grounds, petitioned the court for a finding of factual innocence.<sup>239</sup> Laiwala was originally convicted for taking a master key—program source code—from his employer.<sup>240</sup> The elements of the crime were: “(1) a taking or unauthorized use of information that (2) qualifies as a trade secret with (3) the requisite specific intent.”<sup>241</sup> Both at trial and at his subsequent factual innocence hearing, Laiwala showed that the program code he allegedly took did not meet the definition of a trade secret: “No reasonable person could have conscientiously believed that a program that was able to perform only a well-known process derived economic value from not being generally known.”<sup>242</sup> The prosecution was unable to rebut this evidence, focusing instead on the fact that Laiwala could have committed a different crime.<sup>243</sup> The court clarified that only the charges for which the arrest was made were relevant to establishing factual innocence.<sup>244</sup>

Another case from the California Court of Appeal, *People v. McCann*, granted petitioner McCann’s section 851.8 request, reversing his conviction of practicing medicine without a license and finding that his alleged conduct could not have violated the statute at issue because he had a valid license to practice medicine at all relevant times.<sup>245</sup> The court reversed his conviction for reasons “more than just finding there was insufficient evidence to sustain the conviction.”<sup>246</sup> Rather, the court found that McCann “could not possibly have committed the offense with which he was charged.”<sup>247</sup> Because “McCann could not possibly have been guilty of practicing medicine without a license, [the court] conclude[d] the trial court erred by denying his motion for a finding of factual innocence.”<sup>248</sup>

As stringent as the standard is, factual innocence is not an unachievable result for those who are able to prove it. As will be demonstrated below

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factual innocence, within the meaning of Penal Code section 851.8.” (quoting *Matthews*, 9 Cal. Rptr. 2d at 350)).

239. *Id.* at 640–41.

240. *Id.* at 643.

241. *Id.*

242. *Id.* at 644.

243. *Id.* at 644–45.

244. *Id.* at 645 (“In this case, Laiwala was arrested on a charge of grand theft of a trade secret. He was not arrested for ‘data theft.’ Accordingly, the absence of any ground for a reasonable belief that the information taken was a trade secret establishes that he is factually innocent of grand theft of a trade secret, the charge for which he was arrested. It is irrelevant whether there was reasonable cause to believe that Laiwala had committed data theft, a crime with which he was never charged and for which he was never arrested.”).

245. *People v. McCann*, 45 Cal. Rptr. 3d 868, 870 (Cal. Ct. App. 2006).

246. *Id.* at 874.

247. *Id.*

248. *Id.* at 875.

and with the incorporation of amendments proposed by this article, section 851.8 is quite liberal in the types of evidence that the court is allowed to consider.

### *E. Evidence Admissible at the Hearing*

To apply the objective legal standard in determining whether reasonable cause exists for believing the petitioner committed the offense, a trial court must consider all “material, relevant and reliable evidence.”<sup>249</sup> Such evidence may include “declarations, affidavits, police reports, or any other evidence submitted by the parties which is material, relevant and reliable.”<sup>250</sup> Courts may take into account “otherwise inadmissible evidence—such as police reports and evidence suppressed pursuant to section 1538.5”<sup>251</sup> and “all the evidence presented, not just that which would support probable cause for arrest.”<sup>252</sup> Thus, any subsequently disclosed facts may be used to establish petitioner’s factual innocence.<sup>253</sup>

In *People v. Chagoyan*, Luis Chagoyan was charged with the sale or transportation of cocaine and with possession for sale of cocaine, but after prosecutors were unable to bring their witnesses to court, the charges were dismissed.<sup>254</sup> Chagoyan moved for a finding of factual innocence, but the trial court denied his request, holding there was no “need to conduct any hearing.”<sup>255</sup> Chagoyan appealed, arguing that “the trial court abused its discretion in summarily denying his motion without holding an evidentiary hearing.”<sup>256</sup> The court of appeal agreed and reversed.<sup>257</sup> The court held that section 851.8 places the burden on the arrestee and that because of this

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249. CAL. PENAL CODE § 851.8(b) (West 2011).

250. *Id.*

251. *People v. Adair*, 62 P.3d 45, 51 (Cal. 2003).

252. *People v. Enders*, No. H031941, 2009 WL 2365851, at \*5 (Cal. Ct. App. Aug. 3, 2009) (citing *Adair*, 62 P.3d at 51 n.4).

253. *People v. Gerold*, 94 Cal. Rptr. 3d 649, 656 (Cal. Ct. App. 2009) (“The present tense ‘exists’ necessarily means that the existence of reasonable cause depends on the current evidence rather than simply the evidence that existed at the time that the arrest and prosecution occurred.”); *People v. Medlin*, 100 Cal. Rptr. 3d 810, 817 (Cal. Ct. App. 2009) (“The court may consider facts disclosed after arrest.”).

254. *People v. Chagoyan*, 132 Cal. Rptr. 2d 419, 420 (Cal. Ct. App. 2003), *modified*, (May 1, 2003).

255. *Id.* at 422.

256. *Id.*

257. *Id.*

burden, the petitioner must be allowed to adduce his evidence concerning his factual innocence.<sup>258</sup>

Counsel for Chagoyan attached documents supporting Chagoyan's claim of innocence to his written request for a hearing, and attempted to submit Chagoyan's own testimony and the testimony of a security guard who would attest to Chagoyan's innocence.<sup>259</sup> The court concluded that the "testimony appellant sought to present would have constituted 'material, relevant and reliable' evidence . . . on the issue of whether there was 'reasonable cause to arrest him in the first place' or whether 'the state should never have subjected [him] to the compulsion of the criminal law—because no objective factors justified official action.'"<sup>260</sup> The court then reasoned that because the appellant was not able to adduce his evidence, he was not able to properly satisfy his required burden of proof.<sup>261</sup> The trial court erred in refusing to consider the proffered evidence, and the matter had to be remanded to permit the appellant the opportunity to adduce his evidence before the trial court made its determination on the motion for a finding of factual innocence.<sup>262</sup> The holding of this case has been broadly interpreted as guaranteeing a petitioner the right to present evidence.<sup>263</sup>

In *People v. Medlin*, the court held that section 851.8 allows suppressed evidence, facts disclosed after an arrest, and evidence not presented at trial to be considered when reviewing a petition for a finding of factual innocence and destruction of arrest record through an objective standard.<sup>264</sup> Two defendants, a licensed vocational nurse and a director of nursing at a long-term care facility, were charged with dependent adult abuse likely to produce great bodily harm or death.<sup>265</sup> The jury acquitted both defendants,

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258. *Id.* at 424.

259. *Id.* at 425.

260. *Id.*

261. *Id.*

262. *Id.*

263. *See, e.g.,* *People v. Robinson*, No. A108509, 2005 WL 2234794, at \*2 (Cal. Ct. App. Sept. 14, 2005) ("To satisfy this burden of proof, the defendant is entitled to present evidence, including live testimony by percipient witnesses." (citing *Chagoyan*, 132 Cal. Rptr. at 423–24)). *But see* *People v. Mazurak*, No. B171063, 2004 WL 1859674, at \*1 (Cal. Ct. App. Aug. 20, 2004) ("A fair reading of *Chagoyan* reveals that while, if a defendant has 'material, relevant and reliable' live testimony to present, the trial court must hear it, nothing requires a trial court to elicit something that is not offered.").

264. *People v. Medlin*, 100 Cal. Rptr. 3d 810, 817 (Cal. Ct. App. 2009) ("The hearing is not limited to the evidence presented at trial. The court may consider any evidence relied upon to arrest and charge, including declarations, affidavits, police reports, or any other evidence submitted by the parties which is material, relevant and reliable. Even suppressed evidence is considered. The court may consider facts disclosed after arrest.") (citations and internal quotation marks omitted).

265. *Id.* at 810.

and the trial court found defendants factually innocent, and ordered the records of their arrests destroyed.<sup>266</sup> Articulating a broad standard for admissibility of evidence, the court of appeal reversed the trial court's factual innocence finding. The court reasoned that there was reasonable cause to believe that defendants acted with criminal negligence toward the patient.<sup>267</sup> The defendants' contention that they were innocent because of a mistake made by an expert concerning a tube size had no merit according to the court, which held that such a mistake did not negate all legal cause to suspect criminal negligence.<sup>268</sup>

Though the standard for evidence admissibility is broad, it is not without limits. In a case in which the defendant was acquitted after a jury trial, during his factual innocence hearing, he sought to proffer two jury declarations, which stated the jurors believed defendant was innocent.<sup>269</sup> The trial court refused to consider these declarations.<sup>270</sup> The court of appeals first addressed the permissive language of the statute: "judicial determination of factual innocence made pursuant to this section *may* be heard and determined upon declarations, affidavits, police reports, or any other evidence submitted by the parties which is material, relevant and reliable."<sup>271</sup> Because the jurors "did nothing more than listen to the evidence produced at trial, and knew nothing about the events in question except what they learned at trial," they were not "experts" at deciding guilt or innocence.<sup>272</sup> As such, the trial court had discretion whether to take into account these juror declarations and whether to accord them any weight.<sup>273</sup>

Cases discussing admissibility of evidence during factual innocence hearings all stem from situations when defendants have already been charged and had access to criminal discovery or *Brady* materials. A significant oversight in the statute is the failure to allow some limited discovery to assist those arrested but never charged with a crime. These petitioners, although bound by the same stringent burden of proof, have no access to any exonerating information. A proposed amendment that addresses this flaw will be discussed in Part III.A below.

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266. *Id.* at 816.

267. *Id.* at 819.

268. *Id.*

269. *People v. Scott M.*, 213 Cal. Rptr. 456, 461 (Cal. Ct. App. 1985), *disapproved on other grounds by People v. Adair*, 62 P.3d 45 (Cal. 2003).

270. *Id.*

271. *Id.* at 464 (emphasis in original).

272. *Id.*

273. *Id.*



### F. Timing Issues

Subsection (l) imposes a two-year time limit<sup>274</sup> for filing of the petition “from the date of the arrest or filing of the accusatory pleading, whichever is later.”<sup>275</sup> This time restriction can be waived if the petitioner can show “good cause” and “absence of prejudice.”<sup>276</sup>

In *People v. Bermudez*, the court held that the two-year statutory limitations period applies to defendants who were charged but never convicted, notwithstanding the provision stating that such defendants may file the petition “at any time after dismissal of the action.”<sup>277</sup> In 1988, petitioner David Ronald Bermudez sought a determination of factual innocence in connection with a 1972 rape charge.<sup>278</sup> After Bermudez was sentenced to prison in 1982 for an unrelated crime, he learned that the dismissed rape charge “had resulted in several adverse consequences, including restrictions on the work he could do in prison, threats from other persons in the prison system, and possible adverse effects on his ability to qualify for professional licensing in California.”<sup>279</sup> Bermudez’s trial counsel obtained a letter in 1984, indicating the rape charge was dismissed due to innocence.<sup>280</sup> In his 1988 petition, Bermudez sought a declaration of factual innocence.<sup>281</sup> The district attorney responded to his petition, requesting its denial for failure to show “good cause” for a waiver of the two-year time limit.<sup>282</sup> The trial court denied the petition as untimely, and the court of appeals affirmed, rejecting Bermudez’s contention that the two-year statutory

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274. In *People v. White*, 144 Cal. Rptr. 128, 132 (Cal. App. Dep’t Super. Ct. 1978), the court held that section 851.8 was “fully retroactive,” authorizing anyone who was or had been acquitted to apply for relief. The respondent sought to seal his arrest records after being found not guilty of two misdemeanor offenses. *Id.* at 129. He complained that “the continued existence of the records of arrest and prosecution posed serious professional impediments and were of grave concern to him and his family.” *Id.* The court held that the respondent’s record, which had occurred before the enactment of section 851.8, could be expunged. According to the court’s statutory interpretation, legislative intent was to apply the rule to all offenses. *Id.* at 131. This rule is no longer the case, as there has been an incorporation of a two-year statute of limitations. CAL. PENAL CODE § 851.8(l) (West 2008 & Supp. 2015).

275. PENAL § 851.8(l). There is a special exception for filings that were made prior to January 1, 1983 that is of no import to this discussion. *Id.*

276. See *People v. Gerold*, 94 Cal. Rptr. 3d 649, 653 (Cal. Ct. App. 2009); *People v. Bermudez*, 264 Cal. Rptr. 60, 62 (Cal. Ct. App. 1989), *reh’g denied and opinion modified* (Dec. 23, 1989).

277. *Bermudez*, 264 Cal. Rptr. at 62.

278. *Id.* at 61–62.

279. *Id.* at 61.

280. *Id.*

281. *Id.* at 62.

282. *Id.*

limitations period imposed by section 851.8(1), did not apply to petitioners like himself who had been charged but not convicted.<sup>283</sup>

The court then addressed the issue of waiver, taking into account Bermudez's contention that the delay was caused when "he had 'tried to resolve this informally since '81,' and that he had 'written to the District Attorney's office . . .'"<sup>284</sup> Bermudez also asked the court to "make allowances for [his] layman status," and argued that he was unaware of any adverse consequences of the dismissed charge until 1982.<sup>285</sup> While giving weight to Bermudez's "ignorance and lack of representation" between 1972 and 1984, the court concluded "there was no showing whatsoever of any good cause" for waiver for the four-year period from 1984 until the filing of the petition in 1988.<sup>286</sup> Thus, the petition was untimely.<sup>287</sup>

In a later decision under the same caption, *People v. Bermudez*, the court of appeal again affirmed the trial court's denial of another untimely factual innocence petition.<sup>288</sup> Appellant Luis E. Bermudez was arrested in October of 2001 and charged in December of the same year.<sup>289</sup> The charges were dismissed in January 2002.<sup>290</sup> Approximately three years after the dismissal, in November of 2004, appellant requested relief from the police department and the district attorney.<sup>291</sup> In February of 2007, appellant filed a court petition seeking to seal and destroy records of his 2001 arrest.<sup>292</sup> In a declaration attached to the petition, appellant stated, "I did not know the procedures to seal and clean a record and did not know this was affecting my job search. This is one of the reason [sic] I did not submit [sic] this petition before."<sup>293</sup> The court of appeal affirmed the trial court, explaining: "The two-year limitation period in section 851.8(1) guards against the presentation of stale claims of factual innocence and encourages a swift conclusion to section 851.8 petitions. However, if good cause for the delay exists, and the prosecution is not prejudiced by

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283. *Id.*

284. *Id.* at 62.

285. *Id.* at 62–63.

286. *Id.* at 63.

287. *Id.*

288. 91 Cal. Rptr. 3d 510, 514 (Cal. Ct. App. 2009), *modified on denial of reh'g* (Apr. 20, 2009).

289. *Id.* at 511.

290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.*

it, the late filing is permitted.”<sup>294</sup> The court did not address whether appellant established good cause and absence of prejudice, but indicated in a footnote that “[o]ne obvious example of good cause for exceeding the statutory deadline arises when the accusatory pleading is filed more than two years before the case is resolved in favor of the accused.”<sup>295</sup>

Therefore, if a factual innocence petition is filed after the two-year time limit, courts require petitioners to meet the requirements of waiver. Under the “good cause” prong, courts consider petitioner’s good faith effort to obtain determination of factual innocence as well as lack of sophistication and lack of representation.<sup>296</sup> As for absence of prejudice, courts warn against staleness of the claim: thus, it appears that showing that all the evidence is intact and available, and that witnesses are present and willing to testify, may suffice as lack of prejudice.

An outstanding issue never squarely addressed by any court is the irreconcilable conflict between part (l) and part (b) of the statute.<sup>297</sup> While part (l) mandates that a petition be filed within two years of the arrest or dismissal of the charges, part (b) requires petitioners to wait until the expiration of the statute of limitations for the underlying crimes. Because felony crimes carry a three-year statute of limitations, petitioners are at risk of missing the two-year time bar in subpart (l). Part III.C of this Article proposes an amendment to fix the discrepancy.

### *G. Standard of Review on Appeal*

After the passage of the statute, there was a debate as to the appropriate standard of review on appeal from a trial court’s finding of factual innocence. One view was that a de novo standard should apply,<sup>298</sup> whereas others contended that the reviewing court must accord deference under the substantial evidence test and not substitute its judgment for that of the trial court where facts reasonably support the trial court’s ruling.<sup>299</sup>

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294. *Id.* at 514.

295. *Id.* at n.6.

296. *See also* *People v. Gerold*, 94 Cal. Rptr. 3d 649, 653 (Cal. Ct. App. 2009) (“Assuming arguendo that defendant’s confinement to mental institutions between July 1998 and November 2002 would be deemed a per se showing of good cause for the delay in filing the petition during that period.”).

297. *See infra* Section III.C.

298. *People v. Matthews*, 9 Cal. Rptr. 2d 348 (Cal. Ct. App. 1992) (reviewing all evidence de novo).

299. *See People v. Scott M.*, 213 Cal. Rptr. 456, 463 (Cal. Ct. App. 1985), *disapproved on other grounds by People v. Adair*, 62 P.3d 45 (Cal. 2003) (“Moreover, in reviewing a lower court’s determination of reasonable cause, we will not substitute our judgment for that of the trial court. Hence, the trial court ruling will not be set aside if

The appellate court in *Scott M.*, having adopted the general criminal jurisprudence definition of “reasonable cause,” set out a deferential standard of review, stating that it would not substitute its judgment for the trial court’s judgment.<sup>300</sup> If there exists “some ‘rational ground for assuming the possibility that an offense has been committed and that the defendant is guilty of it,’” the trial court’s ruling would not be set aside.<sup>301</sup>

In *People v. Adair*, the Supreme Court of California overruled this part of *People v. Scott M.*, distinguishing the appropriate standard of review on appeal from a finding of factual innocence.<sup>302</sup> Noting that the factual findings of the trial court deserve deference when supported by substantial evidence, the California Supreme Court clarified that an appellate court “must independently examine the record to determine whether the defendant has established ‘that no reasonable cause exists to believe’ he or she committed the offense charged.”<sup>303</sup>

Noting that the statute does not specify the standard of appellate review, the court pointed out that the “necessary analytical context” provided by the statute would guide the court’s inquiry.<sup>304</sup> Relief under section 851.8 is not appropriate “unless the court finds that no reasonable cause exists to believe” the defendant committed the offense charged.<sup>305</sup> Thus, any reasonable cause would preclude the court from granting the petition.<sup>306</sup> Under the factual innocence test established by the legislature, the burden is on the defendant to establish “that facts exist which would lead no person of ordinary care and prudence to believe or conscientiously entertain any honest and strong suspicion that the person arrested—or acquitted—is guilty of the crimes charged.”<sup>307</sup> The Court interpreted this test to be an “objective standard,” which requires an appellate court to “apply an independent standard of review and consider the record de novo in deciding whether it supports the trial court’s ruling.”<sup>308</sup> Applying the substantial evidence test would force the court of appeal to focus only on those facts

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there exists some ‘rational ground for assuming the possibility that an offense has been committed and that the defendant is guilty of it.’”) (citation omitted).

300. *Scott M.*, 213 Cal. Rptr. at 463.

301. *Id.*

302. *Adair*, 62 P.3d at 53–54.

303. *Id.* at 46.

304. *Id.* at 50.

305. *Id.* at 51.

306. *Id.* at 50.

307. *Id.* at 52.

308. *Id.* at 51.

that support the possibility of innocence while ignoring facts that support reasonable cause.<sup>309</sup> Though fact finding functions such as assessing witness credibility, resolving conflicting testimony, weighing the evidence, and drawing factual inferences are ordinarily reserved for the trial court, the statutory determination whether “no reasonable cause exists” is an objective question measured by an external standard—would “no person of ordinary care and prudence . . . believe or conscientiously entertain any honest and strong suspicion that the person arrested—or acquitted—is guilty of the crimes charged”?<sup>310</sup>

The appellate court in *Laiwala* extrapolated on the exact meaning of *Adair*'s holding.<sup>311</sup> After Defendant *Laiwala*'s conviction of grand theft of a trade secret was overturned on appeal on grounds of insufficient evidence, *Laiwala* sought a determination of his factual innocence with the trial court.<sup>312</sup> Having held a full evidentiary hearing, the court denied *Laiwala*'s petition, even though it adopted the appellate court's reversal of *Laiwala*'s conviction.<sup>313</sup> The appellate court reversed the trial court, concluding that “*Laiwala* established, and the district attorney failed to refute, that there is no reasonable cause to support a finding that the information at issue was a trade secret.”<sup>314</sup>

The court explained that reasonable cause under the meaning of section 851.8 is “a well-established legal standard, defined as that state of facts as would lead a man of ordinary care and prudence to believe and conscientiously entertain an honest and strong suspicion that the person is guilty of a crime.”<sup>315</sup> Because this is an objective evaluation, each court “must apply an independent standard of review and consider the record de novo in deciding whether it supports the trial court's ruling.”<sup>316</sup> This independent review may be accomplished in one of two ways. First, the court may review the record de novo to assess whether the petitioner failed to meet his or her statutory burden that “‘no reasonable cause exists to believe’ the defendant committed the charged offense.”<sup>317</sup> As an alternative, the court may “assess whether the trial court's conclusion to that effect is supported by substantial evidence.”<sup>318</sup> Either approach satisfies the standard under the statute because the reviewing court “should defer to the trial

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309. *Id.*

310. *Id.* at 52.

311. *People v. Laiwala*, 49 Cal. Rptr. 3d 639, 642 (Cal. Ct. App. 2006).

312. *See supra* Section II.D.1.e for a discussion of *Laiwala* facts.

313. *Laiwala*, 49 Cal. Rptr. at 641.

314. *Id.*

315. *Id.* at 642.

316. *Id.*

317. *Id.*

318. *Id.*

court's factual findings to the extent they are supported by substantial evidence, but it must independently examine the record to determine whether the defendant has established that no reasonable cause exists to believe he or she committed the offense charged."<sup>319</sup>

#### *H. Effect of Exoneration*

The effect of exoneration under section 851.8 is the destruction of both the arrest records and the factual innocence petition relief sought. A court that finds the petitioner factually innocent of the charges must order the sealing and subsequent destruction of arrest records.<sup>320</sup> The court will order the law enforcement agency having jurisdiction over the offense, the California Department of Justice, as well as the arresting law enforcement agency "to seal their records of the arrest and the court order to seal and destroy the records, for three years from the date of the arrest and thereafter to destroy their records of the arrest and the court order to seal and destroy those records."<sup>321</sup> The court will also order the law enforcement agency and the Department of Justice "to request the destruction of any records of the arrest which they have given to any local, state, or federal agency, person or entity."<sup>322</sup> To comply with the court order, every state, local agency, person, or entity in California receiving such a request "shall destroy its records of the arrest and the request to destroy the records."<sup>323</sup> A petitioner will receive a copy of the "court order concerning the destruction of the arrest records."<sup>324</sup>

Courts broadly interpret the effects of sealing and destruction. For instance, one court of appeal held that fingerprint impressions obtained at the time of an arrest constitute "records of the arrest" within the meaning of section 851.8(b).<sup>325</sup> Defendant Christiansen was convicted of four violations of the statute, which bans public officials' financial interest in

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319. *People v. Gerold*, 94 Cal. Rptr. 3d 649, 657 (Cal. Ct. App. 2009) (quoting *People v. Adair*, 62 P.3d 45, 46 (Cal. 2003)) (citations, internal quotation marks and alterations omitted).

320. CAL. PENAL CODE § 851.8 (West 2011); *People v. Laiwala*, 49 Cal. Rptr. 3d 639, 641 (Cal. Ct. App. 2006).

321. PENAL § 851.8(b).

322. *Id.*

323. *Id.*

324. *Id.*

325. *People v. Christiansen*, 178 Cal. Rptr. 3d 396, 397 (Cal. Ct. App. 2014).

contracts made in their official capacity.<sup>326</sup> After appealing and being cleared of all convictions and sentences on appeal, the defendant moved for a finding of factual innocence under section 851.8(c).<sup>327</sup> While the motion was granted in full, and all her records, including the DNA sample, were ordered sealed and destroyed, the defendant's fingerprint impressions obtained at the time of arrest were ordered retained.<sup>328</sup> The court of appeals held that the case was of the type that fit the legislature judgment in avoiding the burdens placed on acquitted defendants by having an arrest record, and as such, all records of the arrest, including the fingerprints, must be destroyed.<sup>329</sup>

### III. PROPOSED AMENDMENTS

Even though petitioners face a “high and stringent standard” in meeting the burden of proof, section 851.8 has sweeping effects. Unlike other expungement measures, Section 851.8's far-reaching remedy guarantees to petitioners status quo ante: it is as if the arrest, charges, or conviction had never happened. Nonetheless, several legislative oversights force factual innocence petitioners and representing attorneys to traverse technical obstacles while preparing for the hearing. First, the statute contemplates no discovery for arrested petitioners, thus evidence can be—and often is— withheld by the prosecution. Second, nothing in the statute permits an arrested petitioner to file the complaint anonymously—and filing under the arrestee's name makes the previously nonpublic record of arrest accessible to the multiple background search companies. Finally, the statute contains an irreconcilable statute of limitations conflict—likely a legislative oversight. Amending the statute to fix these three issues would further facilitate the ability of the innocent to get a clean slate.

#### *A. Evidence to Be Used During the Hearing and the Discovery Amendment*

Under section 851.8, the court may adjudicate factual innocence based on “declarations, affidavits, police reports, or any other evidence submitted by the parties which is material, relevant, and reliable.”<sup>330</sup> The statute's significant omission is a failure to authorize discovery for the benefit of arrested petitioners. Though courts have taken a broad approach to the

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326. *Id.*

327. *Id.*

328. *Id.* at 398.

329. *Id.* at 399.

330. CAL. PENAL CODE § 851.8 (West 2011). *See supra* Section II.E, discussing evidence admissible at the hearing.

evidence admissible at a factual innocence hearing, without any statutory or formal discovery tools, petitioners often have no access to even the most basic evidence. Lack of access to discovery most affects those petitioners seeking a factual innocence determination who have not been charged with the crime or against whom charges have been dismissed.<sup>331</sup> An arrested individual has limited resources, and those resources do not include any crucial exculpatory evidence.<sup>332</sup> Under California law, an individual may request his or her “rap sheet” from the Department of Justice.<sup>333</sup> However, this record is of limited use, as it merely lists arrests and convictions and a brief statement of their disposition. Requesting a copy of the arrest report from the police department is equally unhelpful.<sup>334</sup> Prior to releasing the report, law enforcement authorities will ordinarily heavily edit most of the facts that they deem not pertinent to the petitioner.<sup>335</sup> Some of the edited information may implicate other arrestees and thus be exculpatory to the petitioner.

Without a statutory mandate in section 851.8, the prosecutors in most cases will not produce evidence to a person who is not a criminal defendant.

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331. The third group of section 851.8 petitioners—those charged yet acquitted of all charges—will presumably have had access to prosecution’s evidence under the U.S. and California Constitutions, as well as California’s statutory civil discovery scheme.

332. Laura Berend, *Less Reliable Preliminary Hearings and Plea Bargains in Criminal Cases in California: Discovery Before and After Proposition 115*, 48 AM. U. L. REV. 465, 475 n.36 (1998) (“Discovery obligations attach only after a criminal case is filed in court. Prior to filing the criminal charge, the prosecution has access to information not available to the defense, especially if the defendant is indigent. This information includes police reports (or at least verbal information from the law enforcement agency investigating the incident or affecting an arrest), lab reports, mental state assessments, medical reports, and information from law enforcement sources from other jurisdictions.”).

333. See *Online Request Form*, OFFICE OF THE ATTORNEY GEN., STATE OF CAL. DEP’T OF JUSTICE, [https://oag.ca.gov/contact/publicrecords\\_form](https://oag.ca.gov/contact/publicrecords_form) [<https://perma.cc/PA4S-SNEQ>] (last visited Apr. 5, 2016).

334. Under the California Public Records Act (CPRA), CAL. GOV’T CODE §§ 6250–6270, an individual may request as a public record a “report of crimes and incidents written in the course of business of law enforcement agency.” See *California Public Records Act*, L.A. POLICE DEP’T, [http://www.lapdonline.org/i\\_want\\_to\\_know/content\\_basic\\_view/36329](http://www.lapdonline.org/i_want_to_know/content_basic_view/36329) [<https://perma.cc/987X-W4EA>] (last visited Apr. 10, 2016). However, “[c]ertain records or portions of records are subject to privacy laws and/or other exemptions and are rarely ever available for viewing.” *Id.*

335. See, e.g., *id.* (identifying several items as most likely to be redacted from public records, such as, identifying juvenile, certain victim, or confidential informant information; criminal offender record information; information that may endanger safety or jeopardize an investigation, anything reflecting “analysis, recommendation or conclusion of the investigating officer,” etc.).



The prosecution has a legitimate reason not to voluntarily disclose or produce any evidence: this evidence could still be relevant or even crucial in an active case. Petitioners have filed motions to compel production, but courts are hesitant to force the prosecutor to produce any evidence when there is no express authorization in the statute. All criminal discovery is “governed exclusively by—and barred except as provided by” criminal discovery statute.<sup>336</sup>

Factual innocence petitioners who were arrested but never charged are unique in their status of having no access to discovery. In California, parties to both civil and criminal cases are afforded broad discovery rights. Section 851.8 is a part of California’s Penal Code, so most petitioners seeking to prove their factual innocence should at a minimum be able to avail themselves of California’s Penal Code discovery protections. In a criminal case, each side is subject to mandatory disclosure provisions of Penal Code sections 1054 to 1054.7.<sup>337</sup> Penal Code section 1054.1 requires the prosecuting attorney to disclose to the defendant the following categories of information in possession of the prosecuting attorney:<sup>338</sup> names and

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336. *Hines v. Superior Court*, 25 Cal. Rptr. 2d 712, 713 (Cal. Ct. App. 1993) (citations and internal quotation marks omitted).

337. *See, e.g., California v. Trombetta*, 467 U.S. 479, 485 (1984) (“The prosecution must also reveal the contents of plea agreements with key government witnesses, and under some circumstances may be required to disclose the identity of undercover informants who possess evidence critical to the defense.” (first citing *Giglio v. United States*, 405 U.S. 150, 150 (1972); and then citing *Roviaro v. United States*, 353 U.S. 53, 55 (1957))); *People v. Ruthford*, 534 P.2d 1341, 1346 (Cal. 1975) (recognizing “a duty on the part of the prosecution, even in the absence of a request therefor, to disclose all substantial material evidence favorable to an accused, whether such evidence relates directly to the question of guilt, to matters relevant to punishment, or to the credibility of a material witness”). Criminal discovery is governed by Criminal California Penal Code, Part 2 “Of Criminal Procedure,” Title 6 “Pleadings and Proceedings Before Trial,” Chapter 10 “Discovery,” Sections 1054–1054.10. Constitutional discovery protections are even broader than California’s statutory rights. *See generally* LEVENSON, *supra* note 142, § 16:6 (“The due process clause of the United States Constitution requires that the prosecutor disclose substantial material evidence favorable to the accused. This type of constitutionally mandated disclosure is known as Brady discovery, and it is broader than that required by Penal Code § 1054.1. Material evidence for these purposes is evidence that may make the difference between conviction and acquittal. It includes evidence that is exculpatory, mitigating, or would reduce a penalty, as well as evidence that could be used to impeach a prosecution witness. The cumulative effect of all withheld evidence that is favorable to the defendant is considered, rather than individually considering the effect of each item of evidence. The prosecutor must disclose all evidence that reasonably appears favorable to the defendant.”).

338. California’s Constitution provides that “[i]n order to provide for fair and speedy trials, discovery in criminal cases shall be reciprocal in nature, as prescribed by the Legislature or by the people through the initiative process.” CAL. CONST. art. I, § 30. Reciprocity here implies that both prosecution and defense are bound by the same discovery duties. Under this constitutional provision mandating reciprocal discovery in criminal cases and authorizing prosecutorial discovery, once defense discloses information to prosecution,

addresses of prosecution witnesses, statements of all defendants, all evidence, including any exculpatory evidence, felony convictions of any witnesses, and any written statements of witnesses whom the prosecutor intends to call at the trial, including experts.<sup>339</sup>

In a typical factual innocence scenario, a person who was arrested but never charged wishes to clean up his or her record. Investigators and the prosecutor will be reluctant to proffer discovery when the charges are dropped or never filed because the crime may still be actively investigated in relation to codefendants. To protect its interest in not disclosing potentially crucial evidence, the prosecution may request an in camera review of any potential discovery to be produced to an arrested individual and his or her counsel. Thus, the statute must be amended to provide discovery to factual innocence petitioners, subject to the court's in-camera review of all relevant evidence including, but not limited to, the police report and any inculpatory or exonerating evidence.<sup>340</sup> In camera review would allow the court to determine which evidence should be discoverable to petitioner, and which evidence and information should remain under seal to protect the interests of the prosecution. This approach would balance the government's interest in investigating crimes against the petitioner's desire to exonerate himself.<sup>341</sup>

Allowing the court to review in camera all evidence pertinent to petitioner's arrest would not jeopardize any currently active case for the prosecution. Rather, it would permit the court to adequately consider all "material,

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prosecution in turn is obligated under its continuing duty of disclosure to tell defense of any witnesses it intends to call in rebuttal. See *Hobbs v. Mun. Court*, 284 Cal. Rptr. 655, 657 (Cal. Ct. App. 1991), *overruled by* *People v. Tillis*, 956 P.2d 409 (1998) (disapproving *Hobbs* to the extent it concluded that "due process reciprocity requirements expand[ed] the scope of discovery beyond the provisions of section 1054.1 . . .").

339. CAL. PENAL CODE § 1054.1 (West 2011)

340. Under reciprocal discovery provisions of Penal Code section 1054.7, trial court may, "in its discretion, order briefing and argument on a contested issue of privilege, and conduct in camera hearing where necessary." *Izazaga v. Super. Ct.*, 815 P.2d 304, 322 (Cal. 1991). See generally 20A CAL. JUR. 3D *Criminal Law: Pretrial Proceedings* § 927 (2015) ("A verbatim record must be made of the in-camera proceeding. If the court grants relief, the entire record of the in-camera showing must be sealed and preserved in the records of the court, and must be made available to an appellate court in the event of an appeal or writ. In its discretion, the court may, after trial and conviction, unseal any previously sealed matter." (citing CAL. PENAL CODE § 1054.7 (West 2015))).

341. Discovery produced to petitioner will likely turn on a reciprocal obligation to produce evidence to the prosecution, as mandated by article I, section 30 of the California Constitution, subject to the protections of the Fifth Amendment right against self-incrimination. PENAL § 851.8.

relevant, and reliable” evidence as is mandated by the statute. This evidence would include the complete and un-redacted police report, which may inculpate other individuals, and would thus be material and relevant to petitioner’s innocence. In addition to the information included in the police report, law enforcement or the prosecuting attorney may also have other real evidence in their possession, such as photographs of the alleged crime scene, any impounded contraband, fingerprints of petitioner, and other arrested individuals, and DNA samples. In their investigation subsequent to the arrest, law enforcement may also have come across other exculpatory evidence in conducting witness interviews or post-arrest crime scene analysis. In other words, any exculpatory evidence available to the prosecution should be accessible to factual innocence petitioners. This approach would be in accord with California’s criminal discovery scheme. However, in maintaining the balancing approach taken by California legislature, the prosecution should be permitted to request an initial in camera review so as not to interfere with any active investigation or prosecution.

### *B. Need for Anonymity*

Factually innocent petitioners who have previously been charged will file their section 851.8 request as part of their original criminal case under its original captions—for example, *People v. Smith*. The goal in those cases will be to temporarily seal and eventually destroy the entire record, including the factual innocence petition itself. As contemplated by the statute, relief under this section permanently removes any record of this offense from the defendant’s rap sheet.

The situation is much more complicated for those individuals who were arrested but never charged—their arrest records, although public, are not generally accessible, except in limited circumstances.<sup>342</sup> Filing a section 851.8 factual innocence petition under the arrestee’s name would immediately publicize the fact and the details of the arrest. In the initial petition, an individual will have to disclose all information on the form supplied by the Department of Justice—the form that will be attached to the court filing.<sup>343</sup> A court filing becomes public and is thus accessible to various private background check companies, who send daily runners to California courthouses for record updates.<sup>344</sup> Creating a public record of what the State of California has previously decided is nonsensical and goes against

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342. See *supra* notes 331–32.

343. See *supra* note 122.

344. See *supra* Section I.C.

the statute's ultimate goal—the destruction of the record in appropriate circumstances.

Neither section 851.8 nor any other California statute currently provides any anonymity protections for the arrestees attempting to clear their records.<sup>345</sup> Some practitioners have ingenuously been filing these petitions under the individual's initials in the caption, continuing to refer to the petitioner anonymously throughout the petition. Even though some courts have accepted such petitions—others have rejected them as without any authority—other significant problems remain unaddressed by this approach. The petition itself must disclose specific facts about the arrest—and frequently a petitioner's name may be ascertained from these facts. For instance, a petitioner will need to attach as an exhibit their previously filed police petition form to demonstrate that they have met the condition precedent of a previous filing with law enforcement. That form, as mentioned *supra*,<sup>346</sup> requests very detailed information from petitioner, such as name, date of birth, driver's license number, address and even social security number, optionally.

To redact any information from the filing, a petitioner must have first moved the court for permission to seal, requesting redaction as well as that the filing be permitted under petitioner's initials. Some clerks of court have refused to accept petitions with contemporaneous motions to seal, demanding that the case caption contain petitioner's full name until the motion is granted—a circular issue with no resolution.

The appropriate amendment here would be simple, noncontroversial, and within the spirit of the statute. The California legislature should amend the procedural portion of the statute to permit the initial filing under seal with the arrestee's initials in the caption, so long as petitioner

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345. CAL. CIV. PROC. CODE § 474 (West 1955) allows plaintiffs to designate unknown defendants by a fictitious name (Jane or John Doe). However, this section “requires that the plaintiff be truly ignorant of the name of the Doe defendant when the complaint was filed, and dictates that the amendment be filed as soon as the name of a Doe is learned.” ERIC E. YOUNGER & DONALD E. BRADLEY, CALIFORNIA MOTIONS § 15:20 (2d ed. 2005). Under Section 827 of the Welfare and Institutions Code, which provides for confidentiality of records in the juvenile court, courts have allowed use of initials or a first name and first initial of the last name for minors. *See* T.N.G. v. Super. Ct., 484 P.2d 981, 981 n.1 (Cal. 1971); 9 B.E. WITKIN, CALIFORNIA PROCEDURE § 799 (5th ed. 2008). Factual innocence petitioners are not covered by either statute.

346. *See supra* Section II.A.

submits a contemporaneous motion to seal.<sup>347</sup> This motion to seal is required because without the court’s specific finding that petitioner’s privacy interest outweighs the interest of the public in accessing public records, such sealing and redaction would likely violate both the California and U.S. Constitutions.<sup>348</sup>

In this initial motion to seal, petitioners should advocate that their privacy is the “overriding interest supporting closure” and that it outweighs the interests of the public access to court records.<sup>349</sup> First, under California law, arrest records are not generally accessible to the public.<sup>350</sup> Second, courts have previously recognized that petitioners may have a privacy interest in their arrest records.<sup>351</sup> There is a “substantial probability” that revealing arrest-specific information would cause prejudice to petitioners in the absence of the sealing: indeed, it would defeat the purpose of the statute and is thus against the intent of the legislature. Petitioners should “narrowly tailor” their request to seal by redacting only the information that could lead to the identification of the individual, such as name, date of birth, driver’s license number, and other personal information. The motion should be supplied with any other facts specific to each petitioner.

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347. Under California Rules of Court, Rule 2.551, a court order is required to file any record under seal—the parties cannot stipulate to a filing under seal. A motion to seal must “be accompanied by a memorandum and a declaration containing facts sufficient to justify the sealing.” CAL. R. CT. 2.551(b)(1). While the motion is pending, the movant will file one public, redacted version of the 851.8 petition and lodge with the court the complete version “conditionally under seal.” R. 2.551(b)(4)–(5).

348. The public has a First Amendment right of access to civil litigation documents filed in court and used at trial or submitted as a basis for adjudication. *NBC Subsidiary (KNBC–TV), Inc. v. Super. Ct.*, 980 P.2d 337, 358 (Cal. 1999).

[T]he United States Supreme Court and numerous unanimous lower courts have held that the First Amendment of the federal Constitution generally precludes closure of substantive courtroom proceedings in criminal cases unless a trial court provides notice to the public on the question of closure and after a hearing finds that (i) there exists an overriding interest supporting closure; (ii) there is a substantial probability that the interest will be prejudiced absent closure; (iii) the proposed closure is narrowly tailored to serve that overriding interest; and (iv) there is no less restrictive means of achieving that overriding interest.

*Id.* at 340.

349. *Id.*

350. See *WITKIN*, *supra* note 29, at 972.

351. *Hous. Auth. v. Van de Kamp*, 272 Cal. Rptr. 584, 589 (Cal. Ct. App. 1990) (“[W]e are mindful that under the statutory scheme set forth by the Legislature, nondisclosure of criminal records is the general rule. While the Legislature has set forth the exceptions to the general rule in section 11105, subdivisions (b) and (c), those exceptions are to be narrowly construed. Because these records contain extremely sensitive and private information, all doubts are resolved against disclosure.” (first citing *Younger v. Berkeley City Council*, 119 Cal. Rptr. 830 (Cal. Ct. App. 1975); and then citing *Opinion No. 59-300*, 36 Ops. Cal. Atty. Gen. 1 (Cal. Attorney Gen. July 1, 1960))).

Thus, the procedural portion of the statute should be amended to allow petitioners to file under their initials only, while simultaneously submitting a motion to seal with the court. Thus, the entire filing, including the petition, declaration, memorandum of points and authorities, and any attachments, would be either redacted or completely under seal until the court rules on the motion to seal.<sup>352</sup>

### C. Time Restrictions

There is an irreconcilable conflict between the time restriction for filing factual innocence petitions and the statute of limitations for the underlying crimes. The current version of subsection (l) of the statute imposes a two-year time limit for filing the petition “from the date of the arrest or filing of the accusatory pleading, whichever is later.”<sup>353</sup> This time restriction may be waived if the petitioner can show “good cause” and “absence of prejudice.”<sup>354</sup> On the other hand, part (b) of the statute contemplates that factual innocence petitions will be filed “after the running of the relevant statute of limitations.”<sup>355</sup>

The time restriction does not present any issues for misdemeanor crimes, but it is problematic in its application to felony arrests. If a petitioner is arrested on suspicion of a misdemeanor, the district attorney has one year to bring charges. After the expiration of the one-year time period, the arrestee can file for exoneration in compliance with the two-year time restriction in section 851.8(l). However, if the underlying crime was a felony, the government has three years from the time of the arrest to charge the arrestee with the felony.<sup>356</sup> Filing a factual innocence

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352. If the court denies the motion to seal, finding that petitioner’s privacy interests are outweighed by the interest of public access to information, petitioner’s information will be temporarily accessible. If the 851.8 petition to seal and destroy is ultimately granted, petitioner or his or her counsel will need to be extra diligent to ensure the record of the proceeding has not been disseminated. Section 851.8’s remedy extends to the sealing and destruction of the entire record of the factual innocence petition if the petitioner is successful. CAL. PENAL CODE § 851.8 (West 2015). It will be important to verify that both government and private entities comply with the court’s order.

353. CAL. PENAL CODE § 851.8(l) (West 2011). There is a special exception for filings that were made prior to January 1, 1983 that is of no import to this discussion.

354. *Id.*

355. *Id.* § 851.8(b).

356. CAL. PENAL CODE § 801 (West 2011) (“Except as provided in Sections 799 and 800, prosecution for an offense punishable by imprisonment in the state prison or pursuant

petition in compliance with the two-year time limit in 851.8(l) would be premature, as the relevant statute of limitations for the felony will not yet have run. On the other hand, waiting until the lapse of the felony statute of limitations would bar the filing of a factual innocence petition as untimely. Petitioner's only option at that time would be to qualify for a waiver through showing of "good cause" and "absence of prejudice."

This irresolvable conflict appears to be the result of a legislative oversight. The current version of the statute is inadequate in its case-by-case approach to waiver of time restrictions. The legislature likely contemplated the need for a waiver only in exceptional cases. Under the current irreconcilable time limitations, petitioners must try to qualify for a waiver in each case for which they await the expiration of the underlying statute of limitations. For instance, a person arrested on charges of possession of controlled substances would likely be informed by the police department that the prosecution has three years to bring charges.<sup>357</sup> Waiting for the expiration of the statute of limitation will cause the arrestee to violate the two-year time restriction in 851.8(l). Before briefing the merits of his or her factual innocence, this petitioner will need to meet the stringent requirements of showing "good cause" and "absence of prejudice."

Another approach currently used by a few petitioners is to move for a determination of timeliness within the two-year time restriction under 851.8(l). Petitioners have asked the court to rule that the subsequent petition to be filed upon the expiration of the three-year felony statute of limitations would be timely. This latter approach is meant to obviate the need to show "good cause" and "absence of prejudice." Neither of these measures should be necessary.

Subsection (l) should be amended to clarify that the two-year restriction starts running from the expiration of the longest statute of limitations for charging the underlying crimes. So for the arrests on suspicion of both misdemeanor and felony violations, the longer felony statute of limitations should serve as the trigger for the 851.8(l) clock. In other words, in cases of felony arrests, an arrestee would have to file his or her factual innocence petition within two years after the three-year statute has run.

Allowing factual innocence petitions prior to the expiration of the statute of limitations on the underlying crimes would impede the government's legitimate interest in prosecution of offenses. The government should not have to defend against a factual innocence petition prior to the expiration of the statute of limitations. In fact, the prosecution could well be preparing to file charges against the arrestee and other suspects. Having to face the

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to subdivision (h) of Section 1170 shall be commenced within three years after commission of the offense.").

357. See CAL. HEALTH & SAFETY CODE § 11350 (West 2015).

petitioner in court with introduction of the evidence may hamper the government's case not only against the petitioner but against any potential co-defendants.

The following proposed amendment would eliminate the need to qualify for a waiver in each case for which a petitioner waits until the lapse of the underlying statute of limitations; yet it would preserve the interests of the government to effectively investigate and prosecute crimes. It would also promote more efficient administration of justice, obviating the court's need to rule either on a motion for determination of timeliness or on the fact-intensive issues of waiver. This amendment also preserves the good cause waiver in exceptional cases when a petitioner could not timely file within the two-year time limit.

*D. Proposed Amendments to California Penal Code Section 851.8*

The statute should thus be amended to fix the flaws discussed in Parts A through C:

(b) . . . In any case where the petition of an arrestee to the law enforcement agency to have an arrest record destroyed is denied, petition may be made to the superior court that would have had territorial jurisdiction over the matter. Petition may initially be filed under the arrestee's initials in the case caption with all personal identifying information conditionally under seal, if the arrestee simultaneously with the petition files a motion to seal pursuant to Rules of Court, Rules 2.550 to 2.551. A copy of the petition shall be served on the law enforcement agency and the prosecuting attorney of the county or city having jurisdiction over the offense at least 10 days prior to the hearing thereon. The prosecuting attorney and the law enforcement agency through the district attorney may present evidence to the court at the hearing. Petitioner shall be granted discovery rights pursuant to Penal Code §§ 1054 to 1054.7, subject to the prosecuting attorney's right to request a preliminary in camera review of any evidence. Notwithstanding Section 1538.5 or 1539, any judicial determination of factual innocence made pursuant to this section may be heard and determined upon declarations, affidavits, police reports, or any other evidence submitted by the parties which is material, relevant, and reliable . . . .

(l) For arrests occurring on or after January 1, 1981, and for accusatory pleadings filed on or after January 1, 1981, petitions for relief under this section may be filed up to two years from the date of the expiration of the statute of limitations for underlying crimes or from the date of filing of the accusatory pleading, whichever is later. Any time restrictions on filing for relief under this section may be waived upon a showing of good cause by the petitioner and in the absence of prejudice.



### E. Alternative Approaches

The statute generally achieves a fair balance between the interests of the government and private entities in accurate record keeping and retention and the desire of those factually innocent to clear their record. Commentators have suggested, however, that section 851.8 places an insurmountable onus on innocent petitioners, thus violating procedural due process of the California Constitution.<sup>358</sup> One alternate approach proposes an “inversion of the section 851.8 standard and procedure.”<sup>359</sup> Under this approach, in the absence of a criminal charge or when the arrested person has been acquitted, there should be a presumptive right to seal the record.<sup>360</sup> This inversion proposal would place the burden on the prosecution to rebut this “presumptive right through evidence tending to show that the State’s interest in retaining the record overrides the arrested person’s interest in sealing it.”<sup>361</sup> The main problem with this approach is that it places an undue burden on the state in scenarios when arrestees have “no presumptive entitlements” and are seeking a statutory remedy.<sup>362</sup> The statutory scheme does not deprive factually innocent petitioners of any right—to the contrary, it provides a sweeping remedy of sealing and destroying the records and a viable mechanism to achieve that remedy. The presumptive sealing of the record also ignores the government’s and the public First Amendment interest in access to all criminal records. As to the triggers for the presumptive sealing, this approach ignores that there may be many reasons other than innocence for a prosecutor to decide not to bring charges associated with a particular arrest. For instance, a much larger case could be under investigation at the time against the same petitioner. Acquittals are also an inadequate trigger for the presumptive sealing of the records: as discussed above, acquittals very often do not speak to a petitioner’s innocence but may be based on a variety of technical grounds. Finally, law enforcement and district attorneys simply do not have the resources to put on a full evidentiary defense of their position in each case they choose not to concur with presumptive sealing. A factual innocence determination is a statutory remedy—and not a criminal proceeding—so the statute rightly places the burden on the petitioner.

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358. Lyons, *supra* note 56, at 509–10, 519 (first citing CAL. CONST. art. I, § 7(a); and then citing *People v. Ramirez*, 599 P.2d 622, 624 (Cal. 1979)).

359. *Id.* at 521.

360. *Id.*

361. *Id.*

362. *Id.* at 512–13, 522.

## IV. CONCLUSION

Despite the current flaws in the statute, section 851.8 mostly reaches the social goals of expungement by removing onerous collateral consequences of criminal records. The statute, for the most part, strikes the right balance between the interest of the government and society in keeping accurate records and the interests of individuals. The statutory flaws are not irreparable; the proposed changes would mitigate petitioner's burden by providing access to discovery, securing privacy through anonymity protections, and clarifying the timing conflicts in the statute.

