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## COMMENT

# PRESUMED GUILTY UNTIL PROVEN INNOCENT: CALIFORNIA PENAL CODE SECTION 851.8 AND THE INJUSTICE OF IMPOSING A FACTUAL INNOCENCE STANDARD ON ARRESTED PERSONS

NATALIE LYONS\*

### INTRODUCTION

“Aren’t you that guy who was on the news?” This was the standard response by myriad employers to job applications submitted by Kenny Woods, a twenty-two-year-old man from Haverford, Pennsylvania, after police erroneously accused him of the hit-and-run killing of Daniel Giletta.<sup>1</sup>

“Before this happened, you run my name and . . . nothing, I was nobody. Now, I’m all over the Internet.”<sup>2</sup> Nine months later, Mr. Woods, a father of two, remains unemployed despite his significant efforts to find a job.<sup>3</sup>

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<sup>1</sup> Dana DiFilippo, *His Reputation Is Still in Police Custody*, PHILA. DAILY NEWS (July 14, 2011), [articles.philly.com/2011-07-14/news/29773582\\_1\\_wrongful-convictions-erroneous-arrests-killer](http://articles.philly.com/2011-07-14/news/29773582_1_wrongful-convictions-erroneous-arrests-killer) (noting that Mr. Woods “applied everywhere; hotels, the airport, mental health, SEPTA, auto-body shops, [grocery and convenience] markets, [retail] stores”).

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

<sup>3</sup> *Id.*

Woods exemplifies the “crippling, long-lasting repercussions” faced by persons wrongfully accused of a crime.<sup>4</sup> In California, an arrest remains on a person’s criminal record for her lifetime.<sup>5</sup> Arrest records are not probative of guilt.<sup>6</sup> Nonetheless, an arrest record can have persistent, damaging effects on an individual’s life. The police may lawfully use a past arrest to support probable cause to re-arrest the person.<sup>7</sup> California statutory provisions that forbid law enforcement agencies from disclosing arrest records to employers exempt several categories of employers from their purview.<sup>8</sup> Moreover, those provisions fail to prevent commercial reporting agencies from unlawfully reporting arrest information on criminal background reports.<sup>9</sup> These uses and misuses of the arrest record effectively sanction the notion that an arrestee should be deemed “suspicious”—a label that particularly impacts members of low-income, minority communities, who are arrested at greatly disproportionate rates.<sup>10</sup>

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

<sup>5</sup> See CAL. PENAL CODE §§ 13101-13103 (Westlaw 2013) (providing for the retention of criminal record information on a “nonerasable storage medium” and prohibiting the complete destruction of that information).

<sup>6</sup> See *infra* Part I.

<sup>7</sup> *Loder v. Mun. Court*, 553 P.2d 624, 628-29 (Cal. 1976) (noting several law enforcement uses of arrest records).

<sup>8</sup> See, e.g., CAL. LAB. CODE § 432.7(b) (Westlaw 2013) (providing that the protections do not inhibit disclosure of arrests to a government agency employing a peace officer); CAL. LAB. CODE § 432.7(e) (Westlaw 2013) (providing that the protections do not apply to “persons seeking employment for positions in the Department of Justice or other criminal justice agencies”); CAL. LAB. CODE § 432.7(f) (Westlaw 2013) (authorizing a health facility employer to receive information on arrests for certain criminal offenses); CAL. PENAL CODE § 11105(m) (Westlaw 2013) (providing for disclosure of the full criminal record and any subsequent arrest records to an employer that is licensed as a community care facility, residential care facility for the elderly, or child care center).

<sup>9</sup> See U.S. DEP’T OF JUSTICE, THE ATTORNEY GENERAL’S REPORT ON CRIMINAL HISTORY BACKGROUND CHECKS 53-54 (2006), available at [www.justice.gov/olp/ag\\_bgchecks\\_report.pdf](http://www.justice.gov/olp/ag_bgchecks_report.pdf) (noting “problems with the accuracy and completeness of the records being disseminated from commercial databases”); Rebecca Oyama, Note, *Do Not (Re)enter: The Rise of Criminal Background Tenant Screening as a Violation of the Fair Housing Act*, 15 MICH. J. RACE & L. 181, 188 (2009) (“Commercial criminal record databases and services . . . have been found to be rife with error and may report irrelevant arrest records or outdated convictions that have been expunged from an individual’s history.” (footnotes omitted)); Scott Michels, *Advocates Complain of Background Check Errors*, ABC NEWS (Oct. 13, 2008), [abcnews.go.com/TheLaw/story?id=6017227&page=1#.Tz55C-S4KSp](http://abcnews.go.com/TheLaw/story?id=6017227&page=1#.Tz55C-S4KSp) (“[A] review of court records by ABC News found dozens of lawsuits, on behalf of hundreds of people, filed in the last two years against the major criminal records database companies, alleging that background checks contain inaccurate information about criminal convictions.”).

<sup>10</sup> Amy Solomon, Statement at the U.S. Equal Employment Opportunity Commission Meeting on Arrest and Conviction Records as a Barrier to Employment 3 (July 26, 2011), available at [www.ojp.usdoj.gov/newsroom/testimony/2011/11\\_0726asolomon.pdf](http://www.ojp.usdoj.gov/newsroom/testimony/2011/11_0726asolomon.pdf) (noting that, although

In this context, the statutory remedy for removing an arrest from a person's record places an undue burden upon a person who has never been found guilty of a crime. California Penal Code section 851.8 mandates that an arrested person prove her factual innocence before the arrest record may be sealed and destroyed.<sup>11</sup>

This Comment examines the injustice of this section 851.8 requirement that an arrested person prove her innocence before the arrest record will be destroyed. Part I considers the probative value of an arrest record measured against its impact on the arrested person's life, focusing on the disparate impact of arrests on marginalized communities of color. Part II examines the provisions of section 851.8 and the cases interpreting the factual innocence standard. Part III challenges section 851.8 under the Due Process Clause of the California Constitution and the procedural due process analysis provided by the State's high court in *People v. Ramirez*.<sup>12</sup> Finally, Part IV proposes a statutory revision in light of the recent shift in California criminal justice away from the "tough on crime" mentality, toward a more enlightened approach.

#### I. CALIFORNIA LAW SANCTIONS SEVERAL USES OF THE ARREST RECORD THAT PROMOTE THE ERRONEOUS BELIEF THAT AN ARREST IS PROBATIVE OF CRIMINAL CULPABILITY

It is widely assumed that an arrested person, though not convicted of a crime, must be guilty of something.<sup>13</sup> This assumption is problematic for several reasons. First, the evidentiary standard for a lawful arrest falls far short of the evidence necessary to convict a person of a crime.<sup>14</sup> This "fluid" standard<sup>15</sup> undermines the argument that a person who triggers police suspicion is culpable of criminal activity. Although guilty persons are sometimes released or acquitted because the

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African-Americans account for less than 13% of the U.S. population, they account for 28% of all arrests).

<sup>11</sup> CAL. PENAL CODE § 851.8(b) (Westlaw 2013).

<sup>12</sup> *People v. Ramirez*, 599 P.2d 622 (Cal. 1979).

<sup>13</sup> Andrew D. Leipold, *The Problem of the Innocent, Acquitted Defendant*, 94 NW. U. L. REV. 1297, 1297 (2000) (stating that one of the "few things about the criminal justice system [that] command widespread agreement . . . is that most people who are arrested and charged with crimes are guilty of something.").

<sup>14</sup> *Illinois v. Gates*, 462 U.S. 213, 235 (1983) ("[T]he term 'probable cause' . . . means less than evidence which would justify condemnation." (internal quotation marks omitted) (quoting *Locke v. United States*, 11 U.S. 339, 348 (1813) (Marshall, C.J.)).

<sup>15</sup> *People v. Thompson*, 135 P.3d 3, 7 (Cal. 2006) (quoting *Gates*, 462 U.S. at 232).

prosecution failed to meet its high burden of proof,<sup>16</sup> it does not follow that all releases and acquittals result from the government's inability to prove guilt beyond a reasonable doubt. Proof of erroneous arrests, faulty evidence, and the disproportionate policing of certain communities caution against fostering a belief that guilt may be assumed by virtue of the arrest.

Yet, the California Legislature and courts have sanctioned uses of the arrest record that effectively legitimize the assumption that an arrest is probative of guilt. Law enforcement agencies use arrest records to justify subsequent police questioning, detentions, and arrests.<sup>17</sup> Many public employers and licensing agencies may lawfully consider arrest records in decisions regarding a person's employment eligibility.<sup>18</sup> Moreover, substantial errors in reporting criminal record information greatly increase the likelihood that an arrestee will be denied employment based on an arrest record.<sup>19</sup>

#### A. AN ARREST RECORD MAY REFLECT ERRONEOUS, UNLAWFUL, OR BIASED POLICE ACTION AND, THEREFORE, FAILS AS A UNIFORM MEASURE OF CRIMINAL CULPABILITY

Even when the police act lawfully, the quantum of evidence sufficient to justify an arrest fails to provide sufficient basis to assume an arrestee's culpability.<sup>20</sup> Although probable cause for an arrest requires more than mere suspicion, the "more" equates to a requirement that the

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<sup>16</sup> Leibold, *supra* note 13, at 1299 ("[W]e strongly suspect that many defendants who are acquitted were in fact guilty but were not convicted because of the prosecutor's high burden of proof, because of guileless jurors, or because of some other social values that conflict with the truth-seeking function.").

<sup>17</sup> See discussion *infra* Part I.B.i.

<sup>18</sup> See discussion *infra* Part I.B.ii.

<sup>19</sup> See *infra* notes 104-117 and accompanying text.

<sup>20</sup> *People v. Hurtado*, 52 P.3d 116, 121 (Cal. 2002) ("The term 'probable cause' has an established meaning in connection with criminal proceedings, and signifies a level of proof below that of proof beyond a reasonable doubt, or even proof by a preponderance of the evidence."); *People v. Fischer*, 317 P.2d 967, 970 (Cal. 1957) ("The test in such case is not whether the evidence upon which the officer made the arrest is sufficient to convict but only whether the prisoner should stand trial."); *In re Trinidad V.*, 261 Cal. Rptr. 39, 40 (Ct. App. 1989) ("There is a great difference between the sufficiency of the evidence to justify an arrest and the evidence necessary for a conviction."); see also *Von Stein v. Brescher*, 904 F.2d 572, 578 n.9 (11th Cir. 1990) ("'Probable cause' defines a radically different standard than 'beyond a reasonable doubt,' and while an arrest must stand on more than suspicion, the arresting officer need not have in hand evidence sufficient to obtain a conviction.").

suspicion be honest and reasonably formed.<sup>21</sup> Probable cause to arrest “deals in probabilities and does not require a prima facie showing of proof beyond a reasonable doubt.”<sup>22</sup> “Room for doubt” may lawfully coexist with probable cause.<sup>23</sup> The elasticity of this standard acknowledges that officers must make swift determinations based on cursory appraisals of particular situations.<sup>24</sup> Even when an officer relies on erroneous information to make the arrest, the arrest will be upheld if the officer acted in reasonable reliance on that information.<sup>25</sup>

The frequency of erroneous arrests is difficult to establish, but their occurrence is undisputed.<sup>26</sup> The advent of pre-conviction DNA testing has uncovered innumerable instances where police wrongfully charged an innocent person of a criminal offense.<sup>27</sup> Erroneous arrests may be caused by “[e]yewitness misidentification, unvalidated or improper forensics, false confessions, lying snitches or informants, bad lawyering

<sup>21</sup> *People v. Kraft*, 5 P.3d 68, 103 (Cal. 2000) (“Probable cause to arrest exists if facts known to the arresting officer would lead a person of ordinary care and prudence to entertain an honest and strong suspicion that an individual is guilty of a crime.”).

<sup>22</sup> *People v. Boissard*, 8 Cal. Rptr. 2d 738, 740 n.2 (Ct. App. 1992); *see also* *Michigan v. DeFillippo*, 443 U.S. 31, 36 (1979) (“The validity of the arrest does not depend on whether the suspect actually committed a crime; the mere fact that the suspect is later acquitted of the offense for which he is arrested is irrelevant to the validity of the arrest. We have made clear that the kinds and degree of proof and the procedural requirements necessary for a conviction are not prerequisites to a valid arrest.”).

<sup>23</sup> *Fischer*, 317 P.2d at 970.

<sup>24</sup> *See* LAWRENCE TAYLOR & ROBERT TAYAC, CALIFORNIA DRUNK DRIVING DEFENSE § 10:3 (2012) (“Police officers do not apply the concept of reasonable doubt; they generally don’t get the entire story. . . . [T]he concept of probable cause to arrest somebody is clearly different and has a different role in our country than proof beyond and to the exclusion of every reasonable doubt.”).

<sup>25</sup> *DeFillippo*, 443 U.S. at 37.

<sup>26</sup> *See* DiFilippo, *supra* note 1 (“No one tracks how often erroneous arrests occur . . . . But they happen frequently enough that the National Institute of Justice has funded a major study . . . in which researchers will create a database of wrongful arrests and convictions and recommend ways authorities can avoid them.”); *see also* Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1124 (2008) (“There is no longer any serious question that innocent people are charged with and convicted of crimes. These instances of wrongful conviction . . . likely affect thousands of people per year nationwide.” (footnote omitted) (citing Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1343 (1997))).

<sup>27</sup> *DNA Exonerations Nationwide*, INNOCENCE PROJECT, [www.innocenceproject.org/Content/Facts\\_on\\_PostConviction\\_DNA\\_Exonerations.php#](http://www.innocenceproject.org/Content/Facts_on_PostConviction_DNA_Exonerations.php#) (last visited May 17, 2013) (“Since 1989, there have been tens of thousands of cases where prime suspects were identified and pursued—until DNA testing (prior to conviction) proved that they were wrongly accused.”); *see also* Leipold, *supra* note 13, at 1298 (“More troubling, there is increasing evidence that the number of innocent defendants who end up convicted is unacceptably large. The string of recent stories about people convicted of crimes they apparently did not commit, coupled with persistent questions about the validity of eyewitness identification and confessions, continue to raise questions about the judicial truth-seeking mission.” (footnotes omitted)).

and government misconduct.”<sup>28</sup> A recent *Los Angeles Times* investigation revealed that, in the last five years, law enforcement errors resulted in at least 1,480 wrongful detentions in Los Angeles County alone.<sup>29</sup>

Although an erroneous arrest may be lawful, other arrests may be the result of unlawful police action.<sup>30</sup> There is a dearth of reliable statistics indicating the frequency of police misconduct, primarily due to state laws protecting the confidentiality of such information.<sup>31</sup> Yet, this shortage of data has not hindered public recognition that false arrests and criminal accusations occur with striking frequency.

In 2009, David Packman, a private researcher, founded the National Police Misconduct Statistics and Reporting Project (NPMSRP) to fill this statistical void.<sup>32</sup> With no access to law enforcement records on incidents of police misconduct, NPMSRP bases its statistical compilations and analyses on credible media reports of unlawful police action.<sup>33</sup> In 2010, NPMSRP recorded “4,861 unique reports of police misconduct that involved 6,613 sworn law enforcement officers and

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<sup>28</sup> DiFilippo, *supra* note 1; *see also* *DNA Exonerations Nationwide*, *supra* note 27 (“While DNA testing was developed through extensive scientific research at top academic centers, many other forensic techniques — such as hair microscopy, bite mark comparisons, firearm tool mark analysis and shoe print comparisons—have never been subjected to rigorous scientific evaluation. Meanwhile, forensics techniques that have been properly validated—such as serology, commonly known as blood typing—are sometimes improperly conducted or inaccurately conveyed in trial testimony.”); Leipold, *supra* note 13, at 1298 n.5 (referencing a case study that found in a majority of cases where DNA evidence later established innocence, the defendant’s guilt was based on erroneous eyewitness identification); Bowers, *supra* note 26, at 1131 (noting that over three quarters of post-conviction DNA exonerations overturned convictions based, at least partly, on inaccurate eyewitness identification evidence).

<sup>29</sup> *Report: Hundreds Wrongly Imprisoned in LA County*, CBS LOS ANGELES (Dec. 25, 2011), [losangeles.cbslocal.com/2011/12/25/report-hundreds-wrongly-imprisoned-in-la-county/](http://losangeles.cbslocal.com/2011/12/25/report-hundreds-wrongly-imprisoned-in-la-county/) (noting that the most common error was a mistake in the identity of the arrested person). In some cases, it took days and even weeks to release the wrongfully detained person. *Id.*

<sup>30</sup> DiFilippo, *supra* note 1.

<sup>31</sup> *See* David Packman, *2010 Q3 National Police Misconduct Statistical Report*, CATO INST. (Nov. 7, 2010), [www.policemisconduct.net/2010-q3-national-police-misconduct-statistical-report/](http://www.policemisconduct.net/2010-q3-national-police-misconduct-statistical-report/) (“Despite becoming a more prominent issue in landscape of American public opinion, police misconduct is still a largely unstudied issue and no other sources of current statistical and trending data exist . . . to analyze the nature, persistence, and prominence of police misconduct in America. . . . [M]ost states currently have laws that prevent the examination of police misconduct information recorded by individual agencies themselves by the public and no other agency tracks police misconduct data in any publicly available way.”).

<sup>32</sup> *About*, CATO INST., [www.policemisconduct.net/about/](http://www.policemisconduct.net/about/) (last visited Apr. 8, 2013) (noting that Packman transferred his ownership rights to the Cato Institute in 2012).

<sup>33</sup> *Reporting Project—FAQs*, CATO INST., [www.policemisconduct.net/about/npmsrp-faq/](http://www.policemisconduct.net/about/npmsrp-faq/) (last visited Apr. 8, 2013).

6,826 alleged victims.”<sup>34</sup> These numbers reflect an “indeterminate amount of under-reporting” by the news media of police misconduct, but NPMSRP remains the only compilation of credible, publicly available data on the issue.<sup>35</sup>

Over the last two decades, criminal exonerations have resulted in the public exposure of incriminatory acts by police and prosecutors. In New York, almost two thirds of the 175 DNA-exonerated defendants had been convicted in cases where police or prosecutorial misconduct “played an important role.”<sup>36</sup> State misconduct included suppression of exculpatory evidence, knowing use of false testimony, witness coercion, evidence fabrication, and false statements to the jury.<sup>37</sup> In Los Angeles, approximately 100 to 150 criminal defendants were exonerated between 1999 and 2001 by the testimony of Officer Rafael Perez regarding the misconduct of police officers in the Community Resources Against Street Hoodlums (CRASH) unit of the Los Angeles Police Department’s Rampart division.<sup>38</sup> According to Perez, the officers “routinely lied in arrest reports, shot and killed or wounded unarmed suspects and innocent bystanders, planted guns on suspects after shooting them, fabricated evidence, and framed innocent defendants.”<sup>39</sup>

Stories of police falsification are so pervasive that the moniker “testilying” has developed to describe the practice of giving false testimony.<sup>40</sup> Such police dishonesty recently prompted the Boston Police Commissioner to issue a “bright line rule” that makes lying a “firing offense.”<sup>41</sup> But acts of deceit by the police are not limited to oral

<sup>34</sup> 2010 Annual Report, CATO INST., [www.policemisconduct.net/statistics/2010-annual-report/#\\_Summary](http://www.policemisconduct.net/statistics/2010-annual-report/#_Summary) (last visited Apr. 8, 2013).

<sup>35</sup> *Reporting Project—FAQs*, *supra* note 33.

<sup>36</sup> THE SENTENCING PROJECT, RACIAL DISPARITIES IN CRIMINAL COURT PROCESSING IN THE UNITED STATES 8 (Dec. 2007), *available at* [www.sentencingproject.org/doc/publications/CERD%20December%202007.pdf](http://www.sentencingproject.org/doc/publications/CERD%20December%202007.pdf) (quoting James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030 (2000)).

<sup>37</sup> *Id.*

<sup>38</sup> Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 533-34 (2005).

<sup>39</sup> *Id.* at 534.

<sup>40</sup> See I. Bennett Capers, *Crime, Legitimacy, and Testilying*, 83 IND. L.J. 835, 836 (2008) (noting that, in New York, a commission founded to investigate police corruption found that perjury was “so common in certain precincts that it has spawned its own word: ‘testilying’”); Clifford Krauss, *Bratton Announces Plan To Train Officers To Testify*, N.Y. TIMES, Nov. 15, 1995, *available at* [www.nytimes.com/1995/11/15/nyregion/bratton-announces-plan-to-train-officers-to-testify.html](http://www.nytimes.com/1995/11/15/nyregion/bratton-announces-plan-to-train-officers-to-testify.html) (“In some places the practice is so widespread that officers have a name for it: testilying.”).

<sup>41</sup> Dick Lehr, Op-Ed., *A New “Bright Line Rule” Against Lying*, BOSTON GLOBE, July 31, 2009, [www.boston.com/bostonglobe/editorial\\_opinion/oped/articles/2009/07/31/a\\_new\\_bright\\_line\\_rule\\_against\\_lying/](http://www.boston.com/bostonglobe/editorial_opinion/oped/articles/2009/07/31/a_new_bright_line_rule_against_lying/).

perjury. Police officers have also falsified police reports, an act branded by the Boston police as “creative writing.”<sup>42</sup>

Moreover, pervasive bias amongst law enforcement agencies results in the disproportionate policing of minority communities.<sup>43</sup> Recent research reveals a disparity in policing practices regarding drug-related arrests.<sup>44</sup> African-Americans make up 13% of the national population and 14% of monthly drug users, yet they represent 37% percent of the persons arrested for drug offenses and 56% of persons in prison on drug convictions.<sup>45</sup> These higher arrest rates reflect law enforcement’s emphasis on inner-city areas, where drug use is more likely to occur in “open-air drug markets.”<sup>46</sup> This reliance on visibility as a measure of the drug sales in a neighborhood “greatly overestimates the degree to which African-Americans are involved in the drug trade and discounts the active drug selling economy in majority white communities that tends to take place behind closed doors and out of public view.”<sup>47</sup>

Data from California mirrors that of the rest of the nation, with law enforcement agencies disproportionately targeting minority communities.<sup>48</sup> A 2010 study found that California law enforcement agencies excessively target young African-Americans for marijuana

<sup>42</sup> *Id.* (stating that an off-duty Boston police officer approached the author after a talk at a bookstore to discuss the practice of falsified police reports, a practice that police officers refer to as “creative writing”).

<sup>43</sup> Until recently, law enforcement agencies have successfully resisted efforts to quantify the frequency and impact of racial profiling practices. Samuel R. Gross & Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 MICH. L. REV. 651, 656 (2002). However, significant state and federal reforms reflect the widespread recognition that racial profiling is a problematic practice of law enforcement. *Id.* at 656-57 (“[I]n the last few years . . . racial profiling has become an increasingly powerful political issue . . . . As of this writing, at least twelve states and hundreds of cities have passed laws requiring racial record keeping, and several additional jurisdictions must keep such records under consent decrees entered into after being sued by the United States Department of Justice.”).

<sup>44</sup> See THE SENTENCING PROJECT, *supra* note 36, at 19, 19 n.63.

<sup>45</sup> *Id.* at 19.

<sup>46</sup> *Id.* at 20; see also ALEX HAROCOPOS & MIKE HOUGH, U.S. DEP’T OF JUSTICE, DRUG DEALING IN OPEN-AIR MARKETS 7 (June 2012), available at [www.cops.usdoj.gov/Publications/06127482.pdf](http://www.cops.usdoj.gov/Publications/06127482.pdf) (“Open-air drug markets operate in geographically well-defined areas at identifiable times so buyers and sellers can locate one another with ease . . . [where] there will be few barriers to access, and anyone who looks like a plausible buyer will be able to purchase drugs. . . . However, the nature of open markets means that market participants are vulnerable [to] police enforcement . . .”).

<sup>47</sup> See THE SENTENCING PROJECT, *supra* note 36, at 20.

<sup>48</sup> HARRY G. LEVINE, JON B. GETTMAN & LOREN SIEGEL, MARIJUANA ARREST RESEARCH PROJECT, ARRESTING BLACKS FOR MARIJUANA IN CALIFORNIA (2010), available at [www.drugpolicy.org/docUploads/ArrestingBlacks.pdf](http://www.drugpolicy.org/docUploads/ArrestingBlacks.pdf); CTR. ON JUVENILE & CRIMINAL JUSTICE, SAN FRANCISCO’S HIGH AFRICAN AMERICAN ARREST RATE (2006), available at [www.cjcrj.org/uploads/cjcrj/documents/SF\\_High\\_African\\_American\\_Arrest\\_Rate.pdf](http://www.cjcrj.org/uploads/cjcrj/documents/SF_High_African_American_Arrest_Rate.pdf).

offenses.<sup>49</sup> The study covered twenty-five of California's major cities and found that the police in those cities arrested blacks "at four, five, six, seven, and even twelve times the rate of whites."<sup>50</sup> With the data showing that black youth use marijuana at lower rates than white youth, these statistics paint a picture of injustice.<sup>51</sup>

In 2006, the *San Francisco Chronicle* published an article that sent "shock waves" through the community;<sup>52</sup> it reported that the city's law enforcement agencies arrest African-Americans at much higher rates than in California's other big cities.<sup>53</sup> The numbers were alarming: "Black people in San Francisco are arrested for felonies at nearly twice the rate they are in Sacramento. They are arrested at twice the rate of black people in Fresno, three times the rate in San Jose, Los Angeles, Long Beach and San Diego, and four times the rate in Oakland."<sup>54</sup> A subsequent study debunked any plausible denials of this discriminatory practice in citywide drug arrests,<sup>55</sup> finding that African-Americans constitute about one fourth of the city's drug abuse deaths and hospitalizations, whereas 57% percent of drug arrests are African-American.<sup>56</sup>

Like the disproportionate rate of lawful arrests, the rate of false drug arrests in California is "substantially higher" for African-Americans and Hispanics than for white communities.<sup>57</sup> Not surprisingly, the "great majority" of exonerated defendants in the CRASH scandal were young Hispanic men who had pled guilty to false gun or drug charges.<sup>58</sup>

<sup>49</sup> LEVINE, GETTMAN & SIEGEL, *supra* note 48, at 4.

<sup>50</sup> *Id.* at 3, 7 (citing, among others, the following statistics for marijuana possession arrests: Los Angeles arrests blacks at seven times the rate of whites; San Diego arrests blacks at six times the rate of whites; and Pasadena arrests blacks at 12.5 the rates of whites).

<sup>51</sup> *Id.* at 4.

<sup>52</sup> Nanci Clarence, *BASF Takes a Critical Look at San Francisco's African American Arrest Rates*, S.F. ATT'Y, Fall 2007, at 6, available at [www.sfbar.org/forms/sfam/q32007/pres\\_column\\_q3\\_2007.pdf](http://www.sfbar.org/forms/sfam/q32007/pres_column_q3_2007.pdf).

<sup>53</sup> Susan Sward, *High Black Arrest Rate Raises Call for Inquiry*, S.F. CHRON., Dec. 17, 2006, available at [www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2006/12/17/MNGF8N04MD1.DTL&ao=all](http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2006/12/17/MNGF8N04MD1.DTL&ao=all) ("The disparity between San Francisco's black felony arrest rates and the seven other largest cities' . . . is so large that many experts and civic leaders who reviewed the numbers said they are 'disturbing' and require an investigation.")

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

<sup>55</sup> LEVINE, GETTMAN & SIEGEL, *supra* note 48, at 5 ("African Americans' arrest levels for drugs far exceed their contribution to the city's drug abuse problem.")

<sup>56</sup> *Id.* at 7.

<sup>57</sup> Barry Steinhardt, *Law Opens Door to Abuse*, USA TODAY, Jan. 2, 2001, at 10A ("A study done for the California Assembly showed that there was a substantially higher rate of false arrests for drug crimes for blacks and Hispanics, than for whites. Racial profiling continues to be a factor in these arrests.")

<sup>58</sup> Gross et al., *supra* note 38, at 534.

The story of Jose Delacruz, a Bronx deli worker and father of two, exemplifies the injustice that can result from law enforcement error and bias.<sup>59</sup> Mr. Delacruz possesses the same birth name and birthday as a deported drug dealer who goes by the nickname “El Toro.”<sup>60</sup> The mistaken identification of Mr. Delacruz as “El Toro” has led to four wrongful arrests, an FBI interrogation, and near-deportation. His physical appearance and fingerprints do not match El Toro, and he carries a court-certified document on his person that attests to his correct identity.<sup>61</sup> Nonetheless, he continues “getting arrested after routine traffic stops and background checks, roughed up by disbelieving cops and accused of crimes he never committed.”<sup>62</sup> In April 2011, Mr. Delacruz was nearly deported to the Dominican Republic after federal agents detained him for four days before determining they had arrested the wrong person.<sup>63</sup>

This persistent police harassment caused Mr. Delacruz’s own daughters to believe that he was “guilty of something.”<sup>64</sup> Moreover, the erroneous arrests are a significant barrier to his attempts to find better employment.<sup>65</sup> The New York City Taxi and Limousine Commission denied his application for a taxi license based on their belief that he is a “wanted criminal.”<sup>66</sup> Meanwhile, Mr. Delacruz awaits an ever-elusive resolution: “I just want to clear my name.”<sup>67</sup>

#### B. AN ARREST RECORD BURDENS THE ARRESTEE WITH CONTINUED LAW ENFORCEMENT SCRUTINY AND EMPLOYMENT BARRIERS

Every year, a significant number of Californians are arrested but ultimately not convicted of a crime. In 2010, 31% of felony arrestees in California—93,015 of 298,647 adult felony arrests—were ultimately not found guilty of the offense for which they were arrested.<sup>68</sup> Although a

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<sup>59</sup> Kevin Deutsch, *Deli Worker Wrongly Arrested Four Times Because He Has Same Name as Deported Drug Dealer “El Toro,”* N.Y. DAILY NEWS, Aug. 15, 2011, available at [articles.nydailynews.com/2011-08-15/news/29907484\\_1\\_drug-rap-drug-dealer-deli-worker](http://articles.nydailynews.com/2011-08-15/news/29907484_1_drug-rap-drug-dealer-deli-worker).

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

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

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

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

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

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

<sup>67</sup> *Id.*

<sup>68</sup> CAL. DEP’T OF JUSTICE, CRIME IN CALIFORNIA 50 (2010) (showing that 9,980 felony arrestees were released by law enforcement, 46,054 felony complaints were denied, 36,378 felony cases were dismissed by the court, and 603 felony arrestees were acquitted of the charges).

number of those arrestees may have had previous contact with the criminal justice system,<sup>69</sup> many arrested persons have never been convicted of a crime.<sup>70</sup> Every year, an unacceptable number of Californians are burdened with a criminal record at the moment of their arrest.<sup>71</sup> Indeed, all arrests of any individual will be reported on that person's criminal record.<sup>72</sup> For those 93,015 Californians arrested for but not convicted of a felony in 2010, two tangible injustices exist: the arrest record may be used by law enforcement to justify future arrests and by certain employers to deny employment.

### 1. *Law Enforcement's Use of the Arrest Record*

Despite the tenuousness of an arrest record's relevance to a person's criminal culpability, California's legislative provisions permit the retention and use of arrest records in future law enforcement actions against the arrestee. In section 13100 of the Penal Code, the California Legislature declared that state criminal justice agencies require "complete criminal record information,"<sup>73</sup> which includes a summary of arrests.<sup>74</sup> Section 13100 further mandates that criminal justice agencies and courts have "speedy access" to all felony and select misdemeanor arrests, including their final dispositions.<sup>75</sup> For felony arrests followed by the filing of a complaint, the Legislature authorizes criminal justice agencies to receive regular access to the detailed criminal history of the arrestee.<sup>76</sup>

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<sup>69</sup> Bowers, *supra* note 26, at 1125 (noting that, in 2002, seventy-six percent of state-court felony defendants from the nation's seventy-five largest counties had a criminal history).

<sup>70</sup> Solomon, *supra* note 10, at 1.

<sup>71</sup> See CAL. DEP'T OF JUSTICE, *supra* note 68, at 50 (showing that, from 2005 to 2009, thousands of felony arrestees were not found guilty of the offense for which they were arrested: 87,755 of 319,587 adult felony arrests in 2005; 93,095 of 319,818 adult felony arrests in 2006; 96,797 of 332,647 adult felony arrests in 2007; 90,776 of 325,241 adult felony arrests in 2008; and 92,258 of 306,170 adult felony arrests in 2009); Solomon, *supra* note 10, at 1 ("[W]hat is often forgotten is that many people who have been arrested—and therefore technically have a criminal record that shows up on a background check—have never been convicted of a crime. This is true not only for those charged with minor crimes, but also for individuals arrested for serious offenses.").

<sup>72</sup> See *infra* notes 73-76 and accompanying text.

<sup>73</sup> CAL. PENAL CODE § 13100(a) (Westlaw 2013).

<sup>74</sup> CAL. PENAL CODE § 13102 (Westlaw 2013). Local law enforcement agencies are required to report arrests to the Department of Justice (DOJ). CAL. PENAL CODE § 13150 (Westlaw 2013). Section 13125 provides the information that state and local agencies must record, including personal identification information, arrest data, police disposition information, and information about further proceedings. CAL. PENAL CODE § 13125 (Westlaw 2013).

<sup>75</sup> CAL. PENAL CODE § 13100(c) (Westlaw 2013).

<sup>76</sup> CAL. PENAL CODE § 13100(d) (Westlaw 2013).

In *Loder v. Municipal Court*, the California Supreme Court sanctioned several law enforcement uses of information obtained from arrest records.<sup>77</sup> Law enforcement agencies may lawfully obtain and retain the arrestee's fingerprints, photograph, and "vital statistics."<sup>78</sup> Information obtained at the arrest may be used by the police when investigating subsequent criminal activity.<sup>79</sup> The arrest record may lawfully be used as a justification to suspect an arrested person of future offenses,<sup>80</sup> and to support a finding of probable cause to re-arrest a person on different charges.<sup>81</sup> Courts have upheld arrests based on no more than the person's arrest history and one additional—and arguably innocuous—observation about the arrestee's activities such as the "comings and goings" from the individual's home.<sup>82</sup>

The use of arrest records to justify subsequent arrests contributes to the reality that persons with a criminal record constitute the great majority of criminal defendants generally.<sup>83</sup> They are "common first targets" at the beginning of a criminal investigation or when seen by police on the public sidewalk or in the building lobbies of high-crime

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<sup>77</sup> *Loder v. Mun. Court*, 553 P.2d 624, 628-30 (Cal. 1976).

<sup>78</sup> *Id.* at 628. *Loder* and the current statutory definition of "book" fail to provide further detail regarding the statistical information taken from an arrestee other than the person's fingerprints and photograph. *Id.*; CAL. PENAL CODE § 7(21) (Westlaw 2013) ("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.").

<sup>79</sup> *Loder*, 553 P.2d at 628 ("[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. . . . [A]nd the same identification function is served, of course, by the arrestee's fingerprints and other recorded physical description.").

<sup>80</sup> *Id.* at 628-29 ("Often the prior arrest is not an isolated event but one of a series of arrests of the same individual on the same or related charges. This is especially true when the crime in question is typically subject to 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>81</sup> *Id.* 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, . . . still a suspect's reputation as being involved in illicit drug traffic based on prior arrests may be considered." (internal quotation marks omitted) (quoting *People v. Buchanan* 103 Cal. Rptr. 66, 79 (Ct. App. 1972)); *see, e.g.*, *People v. Aho*, 212 Cal. Rptr. 686, 691 (Ct. App. 1985) ("Under California law, a suspect's narcotic arrest record always has been considered relevant to the magistrate's determination of probable cause."); *People v. Kershaw*, 195 Cal. Rptr. 311, 317 (Ct. App. 1983) ("A suspect's narcotics arrest record is relevant to the magistrate's determination of probable cause.").

<sup>82</sup> *Kershaw*, 195 Cal. Rptr. at 317; *see also* *People v. Mikesell*, 54 Cal. Rptr. 2d 708, 712 (Ct. App. 1996) (finding the existence of probable cause based on the "functional equivalent" of a drug arrest record and observations of heavy traffic to and from the defendant's home).

<sup>83</sup> *See Bowers, supra* note 26, at 1125-26 ("[P]olice are prone to arrest recidivists on less concrete evidence, because police often start with the recidivists—for instance, by directing crime victims to mug-shot books composed exclusively of prior arrestees").

areas.<sup>84</sup> Moreover, an arrest of a person with a criminal record is likely to be based on less reliable evidence.<sup>85</sup> When police need to take swift action on a committed crime, or when they simply need higher arrest numbers, they “round up the usual suspects.”<sup>86</sup> Consequently, these “usual suspects” constitute the majority of persons wrongfully accused of a criminal offense.<sup>87</sup>

Compounding the lawful uses of the arrest record by police, employers may gain access to the arrest record and use it to bar the arrestee from a job opportunity.

## 2. *Employers’ Uses of the Arrest Record*

The September 11, 2001, attacks (9/11) resulted in a proliferation of criminal background checks by employers.<sup>88</sup> Following 9/11, Congress passed legislation requiring expanded background checks for myriad employees such as port workers, airline and airport employees, and truck drivers who transport hazardous materials.<sup>89</sup> Federal agencies subsequently issued guidelines recommending that criminal background checks be conducted on all employees.<sup>90</sup> Over 80% of private companies use criminal background checks in their hiring processes.<sup>91</sup> Upon uncovering an applicant’s criminal history, an employer is not likely to

<sup>84</sup> *Id.* at 1125.

<sup>85</sup> *Id.* at 1126.

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

<sup>87</sup> *See id.* at 1125 (“[T]his recidivist majority is overrepresented among the population of wrongfully accused, because institutional biases select for erroneous arrest, prosecution, and trial conviction of recidivist defendants.”). Even when the evidence against the arrestee is most weak, prosecutors can “go forward with charges and anticipate pleas because they know that recidivists cannot easily fight charges at trial under existing evidence rules.” *Id.* at 1127.

<sup>88</sup> SEARCH, REPORT OF THE NATIONAL TASK FORCE ON THE COMMERCIAL SALE OF CRIMINAL JUSTICE RECORD INFORMATION 1 (2005), available at [www.search.org/files/pdf/RNTFCSCJRI.pdf](http://www.search.org/files/pdf/RNTFCSCJRI.pdf); see also Jon Bonné, *Most Firms Now Use Background Checks*, MSNBC (Jan. 21, 2004), [www.msnbc.msn.com/id/4018280/](http://www.msnbc.msn.com/id/4018280/) (“Sept. 11 clearly triggered many new concerns among employers. More than a third said they grew more concerned about workplace security after the terror attacks.”).

<sup>89</sup> SEARCH, *supra* note 88 at 1.

<sup>90</sup> *Id.* (“The Food and Drug Administration (FDA), for example, has issued nonbinding ‘good practice’ guidelines recommending that food establishment operators conduct criminal background checks on all employees.”).

<sup>91</sup> Bonné, *supra* note 88. This high percentage reflects, in part, that employers may face liability for not conducting background checks of the persons they hire. U.S. DEP’T OF JUSTICE, *supra* note 9, at 38 (“Employers and organizations are, for example, subject to potential liability under negligent hiring doctrines if they fail to exercise due diligence in determining whether an applicant has a criminal history that is relevant to the responsibilities of a job and determining whether placement of the individual in the position would create an unreasonable risk to other employees or the public.”).

hire that applicant over a person without a record.<sup>92</sup> This is especially true for African-Americans and Latinos.<sup>93</sup>

Most employers are not authorized to receive information collected from the California Department of Justice (DOJ) regarding arrests that did not lead to a conviction.<sup>94</sup> However, statutory exceptions allow a significant number of employers to view the entire arrest history of an employee or applicant.<sup>95</sup> Additionally, California law explicitly authorizes the DOJ to provide licensing authorities the arrest history of applicants for several professional licenses.<sup>96</sup> These provisions create barriers for arrested persons in numerous and varied professional fields, such as teaching,<sup>97</sup> private security,<sup>98</sup> child day-care,<sup>99</sup> nursing home care,<sup>100</sup> real-estate appraisal,<sup>101</sup> nursing assistants,<sup>102</sup> and chiropractic medicine.<sup>103</sup>

Despite being connected to the arrested person's fingerprints, the criminal record information provided by the DOJ is not without error.<sup>104</sup> Commonly, arrest records fail to report the final disposition of the

<sup>92</sup> See Harry J. Holzer, Steven Raphael & Michael A. Stoll, *Perceived Criminality, Criminal Background Checks, and the Racial Hiring Practices of Employers*, 49 J.L. & ECON. 451, 453 (2006) (“Over 60 percent of employers indicate an aversion to hiring ex-offenders.”); see also *Research on Reentry and Employment*, NAT’L INST. JUST. (Apr. 3, 2013), [nij.gov/topics/corrections/reentry/employment.htm](http://nij.gov/topics/corrections/reentry/employment.htm) (referencing a study conducted in New York City finding that a criminal record reduces the likelihood of a callback or job offer by nearly 50%).

<sup>93</sup> Solomon, *supra* note 10, at 2.

<sup>94</sup> CAL. PENAL CODE § 11105 (Westlaw 2013); CAL. LAB. CODE § 432.7 (Westlaw 2013).

<sup>95</sup> CAL. LAB. CODE § 432.7(b) (Westlaw 2013) (providing that the protections do not inhibit disclosure of arrests to a government agency employing a peace officer); CAL. LAB. CODE § 432.7(e) (Westlaw 2013) (providing that the protections do not apply to “persons seeking employment for positions in the Department of Justice or other criminal justice agencies”); CAL. LAB. CODE § 432.7(f) (Westlaw 2013) (authorizing a health facility employer to receive information on arrests for certain criminal offenses); CAL. PENAL CODE § 11105(m) (Westlaw 2013) (providing for disclosure of the full criminal record and any subsequent arrest records to employers that are licensed as a community care facility, residential care facility for the elderly, or child care center).

<sup>96</sup> See *infra* notes 97-103 and accompanying text.

<sup>97</sup> CAL. EDUC. CODE § 44346.5 (Westlaw 2013).

<sup>98</sup> CAL. BUS. & PROF. CODE § 7574.11 (Westlaw 2013).

<sup>99</sup> CAL. HEALTH & SAFETY CODE § 1596.871 (Westlaw 2013).

<sup>100</sup> CAL. HEALTH & SAFETY CODE § 1265.5 (Westlaw 2013).

<sup>101</sup> CAL. BUS. & PROF. CODE § 11343 (Westlaw 2013).

<sup>102</sup> CAL. HEALTH & SAFETY CODE § 1338.5 (Westlaw 2013).

<sup>103</sup> CAL. CODE REGS. tit. 16, § 321.1 (Westlaw 2013).

<sup>104</sup> See *Justice Records Improvement Program*, BUREAU JUST. STAT. (2008), [bjs.ojp.usdoj.gov/content/nchip2.cfm](http://bjs.ojp.usdoj.gov/content/nchip2.cfm) (“The California Department of Justice will . . . improve the accuracy and accessibility of the state’s criminal history records through improving court disposition reporting and transmissions of disposition data to the FBI.”); *Gresher v. Anderson*, 25 Cal. Rptr. 3d 408, 421 (Ct. App. 2005) (“The Department [of Social Services] also conceded that . . . there were errors in the criminal record information it received from the Department of Justice. The Department admitted it had developed a form letter for use in such cases of error.”).

arrest—a dire omission for applicants or employees who were never convicted of the offense for which they were arrested.<sup>105</sup>

California law prohibits most private-sector employers from accessing the criminal history information compiled and maintained by the DOJ.<sup>106</sup> However, those employers may conduct criminal background checks through the use of commercial reporting agencies (CRAs), which compile criminal history information from public sources.<sup>107</sup> CRAs overwhelmingly misreport information on criminal background checks.<sup>108</sup> These reports have been found to be “rife with error,” inaccurately reporting arrest records and expunged convictions.<sup>109</sup> Unlike the criminal history information retained by the DOJ, the information collected by a CRA is not connected to the applicant’s fingerprints.<sup>110</sup> CRAs send “runners” to the courthouses and police departments of the counties wherein the applicant or employee previously lived; the runners then search the public records for the individual’s name.<sup>111</sup>

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<sup>105</sup> See CRAIG N. WINSTON, *THE NATIONAL CRIME INFORMATION CENTER: A REVIEW AND EVALUATION* 14 (2005), available at [www.besthire.com/Forms/NcicReportJuly252005.pdf](http://www.besthire.com/Forms/NcicReportJuly252005.pdf) (“Serious problems remain in the process to link dispositional information to the proper case and charge.”); U.S. DEP’T OF JUSTICE, *supra* note 9, at 3, 86 (“Although the FBI maintains criminal history records submitted by all states and territories with criminal records on more than 48 million individuals, FBI criminal history records are not complete. Only 50 percent of arrest records in [its database] have final dispositions.”); SEARCH, *supra* note 88, at 34 (“It is the custom of courts and criminal justice agencies to simply provide the information they have on file at the time it is requested. That information, however, may in some cases be missing dispositions or other data that may not be apparent to an end-user.”).

<sup>106</sup> CAL. PENAL CODE § 11105(b) (Westlaw 2013) (delineating the entities and individuals to whom the DOJ must provide criminal record information). Aside from private defense attorneys and humane societies, the enumerated recipients are public agencies or officials. *Id.* When required by statute, the DOJ must provide criminal record information to persons or entities not specified in section 11105. *Id.* § 11105(b)(13); see *supra* notes 97-103 and accompanying text.

<sup>107</sup> U.S. DEP’T OF JUSTICE, *supra* note 9, at 43 (stating that CRAs collect and report “criminal history information, such as arrest and conviction information. . . . by going to original public sources of the information, such as courts, or from databases that have aggregated the information obtained in bulk, for a fee, from public agency sources”).

<sup>108</sup> See U.S. DEP’T OF JUSTICE, *supra* note 9, at 54 (noting “problems with the accuracy and completeness of the records being disseminated from commercial databases”); Michels, *supra* note 9 (“[A] review of court records by ABC News found dozens of lawsuits, on behalf of hundreds of people, filed in the last two years against the major criminal records database companies, alleging that background checks contain inaccurate information about criminal convictions.”).

<sup>109</sup> Oyama, *supra* note 9, at 188.

<sup>110</sup> U.S. DEP’T OF JUSTICE, *supra* note 9, at 53 (“[S]earches of commercially available databases are name-based and do not provide for positive identification through a fingerprint comparison.”).

<sup>111</sup> See U.S. DEP’T OF JUSTICE, *supra* note 9, at 39 (“[E]mployers, or credit reporting agencies acting on their behalf, will conduct name-based searches of courthouses at the county level in an applicant’s past places of residence.”); SEARCH, *supra* note 88, at 9; Ben Geiger, Comment, *The*

This name-based search method is fraught with opportunities for inaccuracy.<sup>112</sup> A principal concern for an arrested person is the possibility that the runners may retrieve information about arrests that did not lead to a conviction.<sup>113</sup> California law prohibits disclosure of such information to private-sector employers,<sup>114</sup> yet these arrests may appear on the criminal background report in such a fashion that makes them nearly indistinguishable from bona fide conviction entries.<sup>115</sup> Nevertheless, this method—involving vendor review and summarizing of the criminal history information—is likely the “most accurate” service provided by CRAs.<sup>116</sup> An even more troublesome practice of some CRAs is to provide employers with the court’s raw data on a prospective employee.<sup>117</sup> If the “most accurate” method of reporting such information is fraught with error, accuracy can hardly be expected from a service that provides undeciphered, comprehensive criminal record information directly to the employer.

In this context of lawful access to arrest information, and inaccurate or improper reporting of past arrests, the remedy provided by California Penal Code section 851.8 offers a complete solution: the sealing and

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*Case for Treating Ex-Offenders as a Suspect Class*, 94 CALIF. L. REV. 1191, 1199 n.47 (2006) (noting that Choicepoint, one of the major commercial reporting agencies, sends “runners . . . to manually retrieve criminal history information and build its own private database of criminal records” (internal quotation marks omitted)).

<sup>112</sup> SEARCH, *supra* note 88, at 2 (noting the accuracy implications of using name-based searches in lieu of fingerprint-based searches).

<sup>113</sup> Geiger, *supra* note 111 at 1199 n.47.

<sup>114</sup> CAL. CIV. CODE § 1786.18(a)(7) (Westlaw 2013) (barring consumer reporting agencies from reporting arrests that did not lead to convictions). Arrests may be reported if the information is to be used in the underwriting of life insurance involving an amount at or above \$250,000. *Id.* § 1786.18(b)(1). An arrest may also be reported by a CRA if it is to be used by an employer who is “explicitly required by a governmental regulatory agency to check for records that are prohibited by subdivision (a) when the employer is reviewing a consumer’s qualification for employment.” *Id.* § 1786.18(b)(2).

<sup>115</sup> Interview with Meredith Desautels, Attorney and Director of the Second Chance Legal Clinic at the Lawyers’ Committee for Civil Rights of the San Francisco Bay Area (Apr. 29, 2013) (noting that it is “exceedingly common” for arrest records to appear on the commercial background check in cases where criminal charges were filed then dismissed by the prosecutor, because the arrest information is accessible to CRAs through the public court files).

<sup>116</sup> SEARCH, *supra* note 88, at 12 n.61 (“[T]he most accurate method of criminal record retrieval may be through an in-person review of actual court docket records, however this service is typically more time consuming and expensive. The vendor’s review and handling of criminal record information before delivery to the client will also affect pricing.”).

<sup>117</sup> *Id.* (“Clients who retrieve records through direct vendor access are usually provided raw data or record information. This type of service results in a low acquisition cost for the client but requires additional effort by the client to validate the accuracy of the record and its connection with the subject.”).

eventual destruction of the arrest record.<sup>118</sup> However, section 851.8 imposes a standard on arrestees that often presents a complete obstacle to this remedy.

## II. CALIFORNIA PENAL CODE SECTION 851.8

A remedial statute, California Penal Code section 851.8 provides a standard and procedure under which a person may petition to seal and destroy the record of an arrest that did not lead to a conviction.<sup>119</sup> If a section 851.8 petition is granted, the petitioner's arrest record is sealed for three years and then permanently obliterated by any court, agency, entity, or person with a record of the arrest.<sup>120</sup>

### A. THE PROCEDURE FOR PETITIONING FOR RELIEF UNDER SECTION 851.8

#### 1. *Any Arrested Person Who Was Not Convicted of the Criminal Offense May Petition to Seal and Destroy the Arrest Record*

The section 851.8 remedy is available to persons who were arrested and not formally charged of a crime,<sup>121</sup> whose formal charges were dismissed,<sup>122</sup> or who were acquitted of the charges after court proceedings.<sup>123</sup> To seek the sealing and destruction of an arrest record under section 851.8, an arrestee must submit a petition to the appropriate agency or court that provides the basic identifying information of the person and arrest.<sup>124</sup> Additional documents—such as declarations,

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<sup>118</sup> CAL. PENAL CODE § 851.8(a), (b) (Westlaw 2013).

<sup>119</sup> CAL. PENAL CODE § 851.8 (Westlaw 2013).

<sup>120</sup> CAL. PENAL CODE § 851.8(a), (b), (j) (Westlaw 2013). Once a section 851.8 petition is granted, the arresting agency and DOJ must request the destruction of arrest records given to “any local, state, or federal agency, person or entity.” *Id.* § 851.8(a), (b). In addition to the arrest record, the destruction request must be destroyed. *Id.*

<sup>121</sup> CAL. PENAL CODE § 851.8(a) (Westlaw 2013).

<sup>122</sup> CAL. PENAL CODE § 851.8(c) (Westlaw 2013).

<sup>123</sup> CAL. PENAL CODE § 851.8(e) (Westlaw 2013).

<sup>124</sup> *Petition to Seal and Destroy Adult Arrest Records (Penal Code 851.8)*, CAL. DEP'T OF JUSTICE, (July 2006), available at [ag.ca.gov/idtheft/forms/bcii\\_8270.pdf](http://ag.ca.gov/idtheft/forms/bcii_8270.pdf) (requiring the petitioner to provide the date(s) of arrest, the arresting agency, agency case number(s), charge(s), and disposition).

affidavits, and police reports—may be submitted in support of the petition.<sup>125</sup>

The procedure to petition for section 851.8 relief depends on whether the prosecutor formally charged the arrestee with a criminal offense.<sup>126</sup> Persons who were arrested but not formally charged must first petition the arresting agency to seal and destroy the arrest record.<sup>127</sup> Petitions denied or ignored<sup>128</sup> by the arresting agency may thereafter be brought in the court that possesses territorial jurisdiction over the matter.<sup>129</sup> Additionally, persons whose formal charges were dismissed or who were acquitted after criminal proceedings may directly petition the court for section 851.8 relief.<sup>130</sup> When filing in court, the petitioner must serve both the arresting agency and prosecuting attorney with notice and a copy of the petition no later than ten days prior to the hearing.<sup>131</sup>

## 2. *The Interface Between the Different Time Limitations That Apply to a Section 851.8 Petition*

If the petitioner was not formally charged, she must first petition the arresting agency, which may respond within sixty days “after the running of the relevant statute of limitations.”<sup>132</sup> If the arresting agency fails to respond, the petition is deemed denied and the petitioner may resubmit the petition in court.<sup>133</sup> This time limit has been subject to confusing applications. Under one interpretation, the petition would be deemed denied if the agency failed to respond within sixty days of receiving it.<sup>134</sup> The other interpretation allows the arresting agency to respond as late as

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<sup>125</sup> CAL. PENAL CODE § 851.8(b) (Westlaw 2013); Brian Dinday, *Petitioning for Factual Innocence*, CAL. LAW., June 2009, available at [www.callawyer.com/clstory.cfm?pubdt=NaN&eid=901853&evid=1](http://www.callawyer.com/clstory.cfm?pubdt=NaN&eid=901853&evid=1).

<sup>126</sup> CAL. PENAL CODE § 851.8(a), (c), (d) (Westlaw 2013) (providing for different procedures depending on whether an “accusatory pleading” had been filed).

<sup>127</sup> CAL. PENAL CODE § 851.8(a) (Westlaw 2013); Dinday, *supra* note 125. The petitioner must also serve a copy of the petition upon the prosecuting attorney of the county or city with jurisdiction over the offense. CAL. PENAL CODE § 851.8(a) (Westlaw 2013).

<sup>128</sup> Dinday, *supra* note 125 (stating that it is “typical” for law enforcement agencies to ignore § 851.8 petitions).

<sup>129</sup> CAL. PENAL CODE § 851.8(b) (Westlaw 2013).

<sup>130</sup> CAL. PENAL CODE § 851.8(c), (e) (Westlaw 2013).

<sup>131</sup> CAL. PENAL CODE § 851.8(b) (Westlaw 2013).

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> EDWARD A. RUCKER & MARK E. OVERLAND, 5 CAL. CRIMINAL PRACTICE: MOTIONS, JURY INSTRUCTIONS AND SENTENCING § 60:1 (2012).

sixty days after the statute of limitations on the criminal offense has run.<sup>135</sup>

The following example illustrates how the latter interpretation of the arresting agency's time frame would play out. A person arrested for petty theft may be formally charged by the district attorney no later than one year after the arrest.<sup>136</sup> As long as no formal charges are issued, the arrestee may petition the arresting agency to seal and destroy the record,<sup>137</sup> and the agency may wait to respond until one year and sixty additional days after the date of arrest.<sup>138</sup> If the time limitation for prosecuting the offense has passed, the arresting agency must respond no later than sixty days after receiving the petition.<sup>139</sup>

A separate statute of limitations applies to the section 851.8 petition itself. Arrestees may petition for section 851.8 relief up to two years after the date of the arrest or the filing of criminal charges, whichever is later.<sup>140</sup> In order to file after this time period has passed, an arrestee must show good cause for the delay and that the delayed petition will not prejudice law enforcement or the prosecutor.<sup>141</sup>

<sup>135</sup> CAL. PENAL CODE § 851.8(b) (Westlaw 2013) (providing that an arresting agency may respond within sixty days of "the running of the relevant statute of limitations" or within sixty days "after receipt of the petition in cases where the statute of limitations has previously lapsed"); Dinday, *supra* note 125 ("If no charges were filed following an arrest, the petitioner must first submit a [petition] to the arresting police agency . . . . If the police ignore the [petition] (which is typical), the arrestee must wait until 60 days after the statute of limitations for the offense expires, and then file the [petition] in court.").

<sup>136</sup> See CAL. PENAL CODE §§ 487, 488, 490 (Westlaw 2013) (providing that petty theft is punishable by fine or six months in jail, or both); CAL. PENAL CODE § 802(a) (providing that the prosecution of any offense not punishable by "death or imprisonment in the state prison or pursuant to subdivision (h) of section 1170 shall be commenced within one year after [its] commission").

<sup>137</sup> CAL. PENAL CODE § 851.8(a) (Westlaw 2013).

<sup>138</sup> See CAL. PENAL CODE § 851.8(b) (Westlaw 2013); see *id.* §§ 487, 488, 490, 802.

<sup>139</sup> CAL. PENAL CODE § 851.8(b) (Westlaw 2013) (stating that if the law enforcement agency fails to respond "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").

<sup>140</sup> CAL. PENAL CODE § 851.8(l) (Westlaw 2013).

<sup>141</sup> *Id.* Although the accepted construction of section 851.8 applies this time limit to all section 851.8 petitions, the statutory language is internally inconsistent on this point. See *People v. Bermudez*, 264 Cal. Rptr. 60, 63 n.5 (Ct. App. 1989); *People v. Gerold*, 94 Cal. Rptr. 3d 649, 653 (Ct. App. 2009) (citing *Bermudez* for the notion that the two-year time limitation applies to all section 851.8 petitions). See generally Dinday, *supra* note 125. Subsection (l) of the statute indicates that the two-year limitation applies to all section 851.8 petitions. CAL. PENAL CODE § 851.8(l) (Westlaw 2013) (stating that the two-year limitation applies to "petitions for relief under this section"). Conversely, subsection (c) seems to indicate that *no time limitation* applies to defendants who were acquitted of the charges or whose formal charges were dismissed. CAL. PENAL CODE § 851.8(c) (Westlaw 2013) (stating that such persons may petition for relief "at any time after dismissal of the action").

Prior to 2009, no courts had attempted to resolve this discrepancy. *People v. Bermudez*, 91 Cal. Rptr. 3d 510, 512-13 (Ct. App. 2009). In *Bermudez*, the First District Court of Appeal

The two-year limitation on filing a section 851.8 petition interfaces with the prosecution's statute of limitations to create legal and practical consequences for the section 851.8 petitioner. The statute of limitations for prosecuting many offenses is three years or more.<sup>142</sup> A person arrested for but not convicted of robbery,<sup>143</sup> for example, must either petition for section 851.8 relief before the prosecutor is time-barred from filing formal charges, or wait until the three-year time limitation on the offense has run and hope that the court will find that good cause existed for the delay.<sup>144</sup>

Although it is likely a court would find that the underlying time limitation provides good cause to delay the section 851.8 petition,<sup>145</sup> this finding is not guaranteed.<sup>146</sup> Moreover, the statute authorizes delayed petitions supported by good cause *and* in the absence of prejudice to the prosecution.<sup>147</sup> Should the prosecution mount a convincing argument, the court may find that prejudice overrides good cause and deny the petition.<sup>148</sup>

Additionally, the arresting agency's timeframe for responding to a petition may prevent the arrestee from filing with the court before the termination of the two-year time limitation on the petition. For example, a person arrested for but not charged with first-degree burglary must first petition the arresting agency for section 851.8 relief.<sup>149</sup> Pursuant to

addressed whether the two-year time limitation from subsection (*l*) would apply to persons who were formally charged but not convicted of the crime. *Id.* at 513. Based on the statute's legislative history—which indicated the intent that the two-year time limit apply to all section 851.8 petitions—and the lack of statutory language limiting the scope of the two-year limitation, the *Bermudez* court concluded that it applies to anyone who petitions for relief under section 851.8. *Id.* at 513-14.

<sup>142</sup> Dinday, *supra* note 125 (“For most common felonies the applicable statute of limitations is three years.” (citing CAL. PENAL CODE § 801)).

<sup>143</sup> See CAL. PENAL CODE §§ 211, 213, 801 (Westlaw 2013).

<sup>144</sup> See *supra* note 141 and accompanying text.

<sup>145</sup> See *Bermudez*, 91 Cal. Rptr. 3d at 514 n.6 (“One 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.”); *Gerold*, 94 Cal. Rptr. 3d. at 654 (“[T]he section 851.8, subdivision (*l*), time frame is more akin to a filing deadline for which relief from default may regularly be granted.”).

<sup>146</sup> See *People v. Bermudez*, 264 Cal. Rptr. 60, 62-63 (Ct. App. 1989) (finding no good cause for the delay when the defendant filed his section 851.8 petition sixteen years after the dismissal of the rape charges against him and four years after he had obtained a letter from his former trial counsel in support of his petition to seal the arrest record).

<sup>147</sup> See *supra* note 141 and accompanying text.

<sup>148</sup> See *People v. Collins*, No. A132034, 2012 WL 5378649, \*3-4 (Cal. Ct. App. Nov. 2, 2012) (upholding the trial court's determination that the prosecution was prejudiced by the defendant's eleven-year delay in filing the section 851.8 petition, because the court, police, and prosecutorial records had been destroyed within the statutory timeframe for destroying those records).

<sup>149</sup> CAL. PENAL CODE § 851.8(a) (Westlaw 2013).

section 851.8 and the time limitation for prosecuting first-degree burglary, the arresting agency could wait three years and sixty days to grant or deny the petition.<sup>150</sup> By that time, the two-year limitation on the section 851.8 petition would have run, necessitating that the court waive it.<sup>151</sup>

Unlike a person who was never formally charged, a person whose charges were dismissed may directly petition the court upon the dismissal of the charges.<sup>152</sup> However, the petitioner faces the troublesome reality that the prosecutor can re-file charges before the statute of limitations on the offense has run.<sup>153</sup> Prosecutors generally resist curtailing the statute of limitations to file charges against an arrested person.<sup>154</sup> For the section 851.8 petitioner, the possibility of being re-charged for the offense is particularly challenging if the statute of limitations for the offense is greater than two years.<sup>155</sup> Accordingly, the petitioner must either file within section 851.8's two-year time limitation and face the possibility of being thwarted by new charges *or* wait to file after the statute of limitations on the offense has run and face the possibility that the court will not waive the two-year limitation.<sup>156</sup>

These conflicting time limitations create very real barriers for section 851.8 petitioners and may entirely prevent them from the opportunity to seek relief. Even more burdensome, however, is the requirement that a petitioner prove her factual innocence before the court or arresting agency will grant the section 851.8 petition.<sup>157</sup>

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<sup>150</sup> CAL. PENAL CODE §§ 459, 461, 801, 851.8(b) (Westlaw 2013).

<sup>151</sup> CAL. PENAL CODE § 851.8(l) (Westlaw 2013).

<sup>152</sup> CAL. PENAL CODE § 851.8(c) (Westlaw 2013); Dinday, *supra* note 125.

<sup>153</sup> See CAL. PENAL CODE § 1387 (Westlaw 2013).

<sup>154</sup> Dinday, *supra* note 125 (stating that a prosecutor may respond to a section 851.8 petition by asserting the "right to file criminal charges up until the expiration of the statute of limitations" and that prosecutors often "express reluctance at the surrender of that right").

<sup>155</sup> The statute of limitations for many criminal offenses exceeds the two-year filing limitation on section 851.8 petitions. See Dinday, *supra* note 125 ("For most common felonies the applicable statute of limitations is three years" (citing CAL. PENAL CODE § 801)); CAL. PENAL CODE § 17(a) (Westlaw 2013) (noting that felonies are punishable by state prison or "imprisonment in a county jail under the provisions of subdivision (h) of Section 1170"); CAL. PENAL CODE § 801 (Westlaw 2013) (prosecution for such offenses "shall be commenced within three years after commission of the offense").

<sup>156</sup> See *supra* notes 140-148 and accompanying text.

<sup>157</sup> CAL. PENAL CODE § 851.8(a), (b) (Westlaw 2013).

## B. THE SECTION 851.8 PETITIONER'S ONEROUS BURDEN: FACTUAL INNOCENCE

A section 851.8 petitioner must make a showing of factual innocence by adducing evidence that proves “no reasonable cause exists to believe that [he or she] committed the offense for which the arrest was made.”<sup>158</sup> “Reasonable cause” exists when a person of “ordinary care and prudence” would “believe and conscientiously entertain an honest and strong suspicion that the person is guilty of a crime.”<sup>159</sup>

The section 851.8 petitioner bears the initial burden of proving that no reasonable cause existed to believe that she committed the offense.<sup>160</sup> To do so, the petitioner may put forth any evidence that is “material, relevant, and reliable.”<sup>161</sup> Even evidence, such as hearsay testimony, that would be inadmissible in a court proceeding on the petitioner’s guilt is allowed.<sup>162</sup> If the court finds that the petitioner has met this burden, it then shifts to the prosecutor to show that reasonable cause does exist to believe that the petitioner committed the offense.<sup>163</sup>

In 2003, the California Supreme Court decided *People v. Adair*, validating several narrow appellate interpretations of the section 851.8 factual innocence standard.<sup>164</sup> The *Adair* court found that the standard precludes a trial court from granting a petition if the court finds that *any* reasonable cause warrants belief in the petitioner’s guilt.<sup>165</sup>

Accordingly, a section 851.8 petitioner cannot establish factual innocence by presenting a viable defense to the crime charged.<sup>166</sup> Nor is

<sup>158</sup> CAL. PENAL CODE § 851.8(b) (Westlaw 2013).

<sup>159</sup> *People v. Adair*, 62 P.3d 45, 51 (Cal. 2003); *accord* *People v. Matthews*, 9 Cal. Rptr. 2d 348, 350-51 (Ct. App. 1992); *People v. Scott M.*, 213 Cal. Rptr. 456, 462-63 (Ct. App. 1985).

<sup>160</sup> CAL. PENAL CODE § 851.8(b) (Westlaw 2013); *see also* *People v. Medlin*, 100 Cal. Rptr. 3d 810, 817 (Ct. App. 2009); *People v. Chagoyan*, 107 Cal. App. 4th 810, 816 (Ct. App. 2003) (“[T]he arrestee bears the preliminary burden of establishing that no reasonable cause exists to believe that [he or she] committed the offense.” (internal quotation marks omitted) (citing CAL. PENAL CODE § 851.8(b))).

<sup>161</sup> CAL. PENAL CODE § 851.8(b) (Westlaw 2013).

<sup>162</sup> *Adair*, 62 P.3d at 51 (referring to the statutory language that permits the admission of “otherwise inadmissible evidence—such as police reports and evidence suppressed pursuant to section 1538.5” in a section 851.8 proceeding); *Medlin*, 100 Cal. Rptr. 3d at 817 (“Even suppressed evidence is considered.”); *see also* CAL. PENAL CODE § 851.8(b) (Westlaw 2013); Dinday, *supra* note 125 (noting that section 851.8 specifically allows petitioners to submit police reports as supporting evidence and that because police reports “frequently contain significant hearsay, the statute appears to authorize the use of hearsay evidence”).

<sup>163</sup> CAL. PENAL CODE § 851.8(b) (Westlaw 2013).

<sup>164</sup> *See generally Adair*, 62 P.3d 45; Leipold, *supra* note 13, at 1325 (noting that the section 851.8 factual innocence standard has been “applied rigorously” by the courts).

<sup>165</sup> *Adair*, 62 P.3d at 50.

<sup>166</sup> *Id.* at 51 (quoting *People v. Matthews*, 9 Cal. Rptr. 2d 348, 350 (Ct. App. 1992)).

factual innocence established by the prosecution's failure to prove guilt beyond a reasonable doubt, or even to some less burdensome standard.<sup>167</sup> Indeed, a jury verdict in favor of the petitioner, without more, fails to meet the evidentiary threshold to seal and destroy the arrest record.<sup>168</sup> The section 851.8 petitioner must adduce evidence that proves her actual innocence of the charged offense<sup>169</sup>—“[i]n sum, the record must exonerate, not merely raise a substantial question as to guilt.”<sup>170</sup>

The courts have based this narrow interpretation on a determination that the Legislature intended to limit section 851.8 relief to only those individuals who have not committed a crime.<sup>171</sup> In *People v. Glimps*, the state appellate court found that the factual innocence requirement reflects legislative recognition that a prosecutor may fail to meet the burden of proof beyond a reasonable doubt, resulting in the acquittal of a defendant who is not innocent.<sup>172</sup>

Notwithstanding the Legislature's intent that section 851.8 relief be granted only to those arrestees who are innocent of the charges, the “nearly-prohibitive” burden placed on petitioners likely prevents even the innocent from receiving the section 851.8 remedy.<sup>173</sup>

#### C. DOES SECTION 851.8 PROVIDE RELIEF SOLELY TO INDIVIDUALS WHO WERE WRONGFULLY ARRESTED?

In *Adair*, the California Supreme Court sanctioned a series of appellate court statements that required a section 851.8 petitioner to

<sup>167</sup> *Id.* at 54 (quoting *People v. Glimps*, 155 Cal. Rptr. 230, 235 (Ct. App. 1979)).

<sup>168</sup> *People v. Scott M.*, 213 Cal. Rptr. 456, 462 (Ct. App. 1985) (“The jury’s verdict, which simply indicates that the prosecution did not prove the defendant’s guilt beyond a reasonable doubt, does not directly address whether he committed the charged offense . . . . The trial court does not ‘disagree’ with the jury’s verdict when it denies a section 851.8 petition. 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 of proof.” (citations omitted)), *disapproved on other grounds by Adair*, 62 P.3d at 53 n.6.

<sup>169</sup> *Id.* at 463; *see Adair*, 62 P.3d at 54; *Glimps*, 155 Cal. Rptr. at 235 (“‘[F]actually innocent’ as used in the section does not mean a lack of proof of guilt beyond a reasonable doubt or even by a ‘preponderance of evidence.’”).

<sup>170</sup> *Adair*, 62 P.3d at 54.

<sup>171</sup> *Id.* at 51; *see also* Legis. Counsel’s Digest, Assemb. B. 2861 (1979–1980 Reg. Sess.) 4 Stats. 1980, Summary Digest 383 (“This bill would provide a procedure whereby a person who has been arrested or detained and is factually innocent may request a law enforcement agency or the court to provide for the sealing and destruction of the arrest record.”), quoted in *People v. Bermudez*, 91 Cal. Rptr. 3d 510, 513 (Ct. App. 2009).

<sup>172</sup> *Glimps*, 155 Cal. Rptr. at 234–35.

<sup>173</sup> *See* Leipold, *supra* note 13, at 1324–25, 1325 & n.97 (noting that “the extremely high burden of proof required by the California vindication scheme is sufficiently daunting that it precludes most acquitted defendants from even considering an innocence petition”).

prove no reasonable cause existed *at the time of the arrest*.<sup>174</sup> For example, the *Adair* court adopted the position that section 851.8 permits sealing the arrest record when petitioners can show “that the state should never have subjected them to the compulsion of the criminal law—because no objective factors justified official action.”<sup>175</sup> Additionally, the court ratified the notion that proving factual innocence “entails 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 [the petitioner] in the first place*.”<sup>176</sup> These statements, in effect, direct that factual innocence may only be found in those cases where the police had no lawful basis to arrest the section 851.8 petitioner.

Indeed, the defining language for the section 851.8 factual innocence standard parallels the language that defines probable cause to arrest.<sup>177</sup> Probable cause to arrest a suspect exists when “the facts known to the arresting officer 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>178</sup> By this language, a showing that no reasonable cause existed to arrest the petitioner equates to a showing that the petitioner was arrested without probable cause.

Nevertheless, the *Adair* court qualified this unequivocal language in a footnote stating that “[i]n the context of a defendant who seeks a finding of factual innocence *notwithstanding probable cause to arrest*, facts subsequently disclosed may establish the defendant’s innocence.”<sup>179</sup> Rather than clarifying the court’s position, however, this qualifying statement directly conflicts with the mandate that a petitioner show “there was no reasonable cause to arrest [the petitioner] in the first place.”<sup>180</sup>

State appellate decisions following *Adair* have resolved this conflict by emphasizing the statute’s use of the present tense form of “exist” when requiring a showing that no “reasonable cause exists to believe” that the petitioner is guilty.<sup>181</sup> In *People v. Laiwala*, the court found that

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<sup>174</sup> *Adair*, 62 P.3d at 51.

<sup>175</sup> *Id.* (quoting *People v. Scott M.*, 213 Cal. Rptr. 456, 463 (Ct. App. 1985)).

<sup>176</sup> *Id.* (emphasis added) (quoting *People v. Matthews*, 9 Cal. Rptr. 2d 348, 350 (Ct. App. 1992)).

<sup>177</sup> *Id.*; accord *Matthews*, 9 Cal. Rptr. 2d at 350; *Scott M.*, 213 Cal. Rptr. at 462-63.

<sup>178</sup> *People v. Harris*, 540 P.2d 632, 635 (Cal. 1975) (internal quotation marks omitted).

<sup>179</sup> *Adair*, 62 P.3d at 51 n.4 (emphasis added).

<sup>180</sup> *Id.* at 51.

<sup>181</sup> *People v. Laiwala*, 49 Cal. Rptr. 3d 639, 642 n.3 (Ct. App. 2006); *People v. Gerold*, 94 Cal. Rptr. 3d 649, 656 (Ct. App. 2009).

use of the word “exists” necessitates finding that the existence of reasonable cause depends on current evidence as well as the evidence that existed at the time the arrest occurred.<sup>182</sup> Under the *Laiwala* framework, then, section 851.8 relief would be available to persons who were lawfully arrested but nevertheless innocent of the offense.

Although this statutory interpretation resolves the otherwise conflicting statements in *Adair*, *Adair* remains the most recent comprehensive treatment of the section 851.8 factual innocence standard by the State’s high court.<sup>183</sup>

### III. SECTION 851.8 VIOLATES PROCEDURAL DUE PROCESS UNDER THE CALIFORNIA CONSTITUTION

The California Constitution guarantees that no person may be “deprived of life, liberty, or property without due process of law.”<sup>184</sup> Unlike its federal equivalent,<sup>185</sup> procedural due process protection under the California Constitution is not limited to situations involving the deprivation of a liberty or property interest.<sup>186</sup> Rather, California’s due process protection focuses generally on “deprivative governmental action.”<sup>187</sup>

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<sup>182</sup> *Laiwala*, 49 Cal. Rptr. 3d. at 642 n.3.

<sup>183</sup> Since *Adair*, four California Supreme Court cases have cited but not discussed section 851.8. See *People v. Cole*, 95 P.3d. 811, 844 (Cal. 2004); *People v. Sapp*, 73 P.3d 433, 473 n.3 (Cal. 2003); *People v. Butler*, 79 P.3d 1036, 1040 (Cal. 2003); *People v. Stowell*, 79 P.3d 1030, 1034 (Cal. 2003).

<sup>184</sup> CAL. CONST. art. I, § 7(a).

<sup>185</sup> *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 569-70 (1972) (“The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment’s protection of liberty and property. . . . But the range of interests protected by procedural due process is not infinite.”). The federal procedural due process protection “is a safeguard of the security of interests that a person *has already acquired in specific benefits*.” *Id.* at 576 (emphasis added). The person seeking federal due process rights in a property interest must possess an “entitlement” to the claimed interest. *Id.* at 576-77; see also *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 756 (2005); Sara B. Tosdal, Note, *Preserving Dignity in Due Process*, 62 HASTINGS L.J. 1003, 1011, 1020 (2011). For this reason, the section 851.8 petitioner’s interest is not likely to trigger federal due process protections.

<sup>186</sup> *People v. Ramirez*, 599 P.2d 622, 624 (Cal. 1979) (stating that due process analysis is not concerned with a “judicial attempt to decide whether the statute has created an ‘entitlement’ that can be defined as ‘liberty’ or ‘property’”); *Ryan v. Cal. Interscholastic Fed’n-San Diego Section*, 94 Cal. App. 4th 1048, 1069 (Ct. App. 2001) (“Our state due process constitutional analysis differs from that conducted pursuant to the federal due process clause in that the claimant need not establish a property or liberty interest as a prerequisite to invoking due process protection.” (citing *Ramirez*, 599 P.2d at 624)); *San Jose Police Officers Ass’n v. City of San Jose*, 245 Cal. Rptr. 728, 731-32 (Ct. App. 1988).

<sup>187</sup> *Ramirez*, 599 P.2d at 627; *Hernandez v. Dep’t of Motor Vehicles*, 30 Cal. 3d 70, 81 n.12 (Cal. 1981).

In *People v. Ramirez*, the California Supreme Court set out the expansive standard for procedural due process under the state constitution.<sup>188</sup> The *Ramirez* court explicitly rejected the federal analysis<sup>189</sup> and based its holding on the broader principle that freedom from arbitrary adjudicative procedures is a “substantive element of one’s liberty.”<sup>190</sup> Under *Ramirez*, an individual who has been subjected to deprivatory governmental action “always has a due process liberty interest both in fair and unprejudiced decision making and in being treated with respect and dignity.”<sup>191</sup> Instead of focusing on the nature of the interest, the state due process analysis looks at the administrative process itself, with the intent to promote “accuracy and reasonable predictability” in governmental decisionmaking.<sup>192</sup>

#### A. THE INTEREST CLAIMED BY A SECTION 851.8 PETITIONER TRIGGERS STATE DUE PROCESS PROTECTION UNDER THE *RAMIREZ* ANALYSIS

Although *Ramirez* makes clear that a person need not show deprivation of a liberty or property entitlement to trigger due process protections, it provides little guidance for determining what deprivatory actions trigger due process safeguards:<sup>193</sup>

[W]hen a person is deprived of a statutorily conferred benefit, due process analysis must start not with a judicial attempt to decide whether the statute has created an “entitlement” that can be defined as “liberty” or “property,” but with an assessment of what procedural protections are constitutionally required in light of the governmental and private interests at stake.<sup>194</sup>

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<sup>188</sup> *Ramirez*, 599 P.2d 622.

<sup>189</sup> *Id.* at 625-27 (criticizing the federal due process analysis, which “fails to give sufficient weight to the important due process value of promoting accuracy and reasonable predictability in government decision making”); *see also Ryan*, 94 Cal. App. 4th at 1069 (“[P]rocedural due process under the California Constitution is ‘much more inclusive’ and protects a broader range of interests than under the federal Constitution.”); Tosdal, *supra* note 185, at 1014 (“[T]he California Supreme Court expressly critiqued the Supreme Court’s approach in *Roth* and set forth a new framework for procedural due process in California in *People v. Ramirez*.”).

<sup>190</sup> *Ramirez*, 599 P.2d at 624, 627.

<sup>191</sup> *Id.* at 627.

<sup>192</sup> *Id.* (“The touchstone of due process is protection of the individual against arbitrary action of government.”).

<sup>193</sup> *See Tosdal*, *supra* note 185, at 1016 (“[T]he language of the opinion naturally leads to multiple interpretations of the appropriate due process trigger.”).

<sup>194</sup> *Ramirez*, 599 P.2d at 624.

This language has been subject to confused and inconsistent applications by the lower courts.<sup>195</sup> Some courts have interpreted it to mean that a person must be deprived of a statutorily conferred benefit in order to trigger state due process protections.<sup>196</sup> Although the *Ramirez* analysis arose from a case involving governmental deprivation of the defendant's statutory interest,<sup>197</sup> the court did not mandate that a claimant allege the deprivation of a statutorily conferred interest to trigger procedural due process analysis.<sup>198</sup>

Subsequent decisions by the State's high court signal that due process review is triggered by *any* deprivatory governmental action upon a private individual.<sup>199</sup> These decisions focus on "balancing private and governmental interests, and on considerations of arbitrariness in existing

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<sup>195</sup> See Tosdal, *supra* note 185, at 1005, 1016-18.

<sup>196</sup> See Gresher v. Anderson, 25 Cal. Rptr. 3d 408, 418-19 (Ct. App. 2005) (stating that the claimant must "identify a statutorily conferred benefit or interest of which he or she has been deprived to trigger procedural due process under the California Constitution and the *Ramirez* analysis of what procedure is due"); Schultz v. Regents of Univ. of Cal., 206 Cal. Rptr. 910, 918 (Ct. App. 1984) (finding that *Ramirez* did not control because the plaintiff had not shown a "statutory interest subject to deprivation"); Ryan v. Cal. Interscholastic Fed'n-San Diego Section, 94 Cal. App. 4th 1048, 1071 (Ct. App. 2001) ("[T]he claimant must nevertheless identify a statutorily conferred benefit or interest of which he or she has been deprived to trigger procedural due process under the California Constitution and the *Ramirez* analysis of what procedure is due."); see also Tosdal, *supra* note 185, at 1018 ("Others have relied on the phrase 'statutorily conferred benefit' to limit the scope of the due process trigger.").

<sup>197</sup> *Ramirez*, 599 P.2d at 624, 624-25. The statutory interest was the right to remain confined at the California Rehabilitation Center (CRC) pursuant to California Welfare & Institutions Code section 3051. *Id.* The defendant had previously been committed to the CRC and was subsequently found unfit by the Director of Corrections for further confinement in the CRC. *Id.* at 624. In the appeal, he argued that the CRC procedures for excluding him constituted a denial of his constitutional right to procedural due process. *Id.* at 625. The court agreed, finding that the due process clause entitles the "patient-inmate" an opportunity to respond to the grounds for exclusion prior to the final determination. *Id.* at 631.

<sup>198</sup> See Tosdal, *supra* note 185, at 1016-17 (noting that the *Ramirez* court discussed the statutory benefit at issue in that case without clearly stating that a statutorily conferred interest is necessary to trigger due process protections). The case seemed to offer two alternative due process triggers: (1) the deprivation of a statutorily conferred interest, or (2) the balance between government and private interests. See *id.*; *Ramirez*, 599 P.2d at 627 (stating that due process looks to "what procedural protections are warranted in light of governmental and private interests").

<sup>199</sup> See *In re Jackson*, 731 P.2d 36, 42 (Cal. 1987) (quoting *Ramirez* and indicating that due process analysis is triggered by an assessment of the procedural protections required in light of the governmental and private interests at stake); Saleeby v. State Bar, 702 P.2d 525, 534 (Cal. 1985) (stating that the California due process analysis "focus[es] on the administrative process itself" and differentiating the state standard from its federal counterpart, which focuses on whether the claimant has a legitimate entitlement to a benefit); Van Atta v. Scott, 613 P.2d 210, 214 (Cal. 1980) ("In *People v. Ramirez*, this court held that the extent to which procedural due process relief is available under the California Constitution depends on a careful weighing of the private and governmental interests involved." (citation omitted)).

procedures.”<sup>200</sup> In *Saleeby v. State Bar*, the petitioner had applied for reimbursement from the Client Security Fund (CSF), a fund established by the California State Bar to reimburse clients for pecuniary losses caused by the dishonest conduct of licensed attorneys.<sup>201</sup> Although the *Saleeby* petitioner possessed no entitlement to reimbursement from the CSF, the lack of an entitlement was not dispositive of due process protections.<sup>202</sup> The State’s high court concluded that “the Bar’s exercise of discretion is reviewable to assure conformance to the purposes of the fund and to avoid the potential for arbitrary or discriminatory decisions.”<sup>203</sup>

Some lower courts have applied *Ramirez* narrowly to require a statutorily conferred interest before due process analysis is triggered.<sup>204</sup> In *San Jose Police Officers Association v. City of San Jose*, the court found that due process analysis was triggered by the claim of a retired police officer who had been denied a concealed weapons certificate, even though he possessed no right to the certificate.<sup>205</sup> Because the statute governing such certificates conferred a benefit on retired police officers, the court found that it “trigger[ed] procedural due process under the California Constitution and that *Ramirez* require[d] an analysis of what procedure is due.”<sup>206</sup> By contrast, in *Schultz v. Regents of the University of California*, the court denied due process protection to a hospital employee who challenged the downward classification of his position.<sup>207</sup> The plaintiff’s interest was in no way attached to a statute, and under the court’s interpretation of *Ramirez*, the failure to claim a statutory interest resulted in the failure of the due process claim altogether.<sup>208</sup>

Like the parties seeking relief in *Saleeby* and *San Jose Police Officers*, the section 851.8 petitioner seeks a statutory benefit for which

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<sup>200</sup> Tosdal, *supra* note 185, at 1020; *Jackson*, 731 P.2d at 42; *Scott*, 613 P.2d at 214; *Gresher*, 25 Cal. Rptr. 3d at 418-19.

<sup>201</sup> *Saleeby*, 702 P.2d at 527-28 (noting that the state bar was statutorily authorized to exercise discretion over the disbursement of monies from the CSF).

<sup>202</sup> *Id.* at 534.

<sup>203</sup> *Id.* at 533.

<sup>204</sup> See Tosdal, *supra* note 185, at 1021; see also *Schultz v. Regents of Univ. of Cal.*, 206 Cal. Rptr. 910, 918, 922 (Ct. App. 1984); *Ryan v. Cal. Interscholastic Fed’n-San Diego Section*, 94 Cal. App. 4th 1048, 1071 (Ct. App. 2001). However, these courts have not required that the statutory interest constitute an entitlement. See *Schultz*, 206 Cal. Rptr. at 918; *Ryan*, 94 Cal. App. 4th at 1069.

<sup>205</sup> *San Jose Police Officers Ass’n v. City of San Jose*, 245 Cal. Rptr. 729, 731 (Ct. App. 1988) (finding that the Chief of Police of the City of San Jose had statutory authority to deny the certificate).

<sup>206</sup> *Id.* at 732.

<sup>207</sup> *Schultz*, 206 Cal. Rptr. at 912.

<sup>208</sup> *Id.* at 918.

she possesses no presumptive entitlement.<sup>209</sup> Because the section 851.8 remedy is a statutorily conferred benefit, it falls under even the narrower application of *Ramirez* that requires a denial of a statutory benefit. Accordingly, a denial of the section 851.8 remedy would trigger due process analysis under *Ramirez*.

**B. ANALYZED UNDER THE *RAMIREZ* FRAMEWORK, SECTION 851.8 VIOLATES PROCEDURAL DUE PROCESS UNDER THE CALIFORNIA CONSTITUTION**

Having triggered due process analysis, the section 851.8 procedures must be examined under the standard provided by *Ramirez* and its progeny. To determine the sufficiency of a procedure under *Ramirez*, the arrested person's interests must be balanced against those of the government.<sup>210</sup> *Ramirez* requires that due process "maximize the accuracy of the resulting decision and respect the dignity of the individual subjected to the decisionmaking process."<sup>211</sup> Appropriate safeguards will vary with individual circumstances, but the primary purpose remains the same: to afford the impacted parties with a right to be heard at a "meaningful time and in a meaningful manner."<sup>212</sup>

*Ramirez* provided four factors to assess the sufficiency of procedure under the California Constitution:

- (1) the private interest that will be affected by the official action, (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards, (3) the dignitary interest in informing individuals of the nature, grounds and consequences of the action and

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<sup>209</sup> *Saleeby v. State Bar*, 702 P.2d 525, 527, 534 (Cal. 1985); *San Jose Police Officers Ass'n*, 245 Cal. Rptr. at 731-32. *But cf.* *Tosdal*, *supra* note 185 (discussing the federal due process requirement of an "entitlement" in the claimed interest).

<sup>210</sup> *People v. Ramirez*, 599 P.2d 622, 627 (Cal. 1979); *Van Atta v. Scott*, 613 P.2d 210, 214 (Cal. 1980) ("In *People v. Ramirez*, this court held that the extent to which procedural due process relief is available under the California Constitution depends on a careful weighing of the private and governmental interests involved." (citation omitted)); *see also San Jose Police Officers Ass'n*, 245 Cal. Rptr. at 732 ("*Ramirez* does not purport to require any particular level of procedural safeguards in any particular case. . . . [T]he level of procedural protection varies with the interests at stake, considered according to the balancing formula set out in *Ramirez*.").

<sup>211</sup> *Oberholzer v. Comm'n on Judicial Performance*, 20 Cal. 4th 371, 390 (Cal. 1999).

<sup>212</sup> *Ryan v. Cal. Interscholastic Fed'n-San Diego Section*, 94 Cal. App. 4th 1048, 1072 (Ct. App. 2001); *see also Mohilef v. Janovici*, 58 Cal. Rptr. 2d 721, 724 (Ct. App. 1996) ("We hold that due process is satisfied as long as the property owner receives adequate notice of the nature of the alleged nuisance and a meaningful opportunity to respond to the charges against him."); *People v. Arciga*, 227 Cal. Rptr. 611, 619 (Ct. App. 1986) (stating that *Ramirez* required that the defendant be provided a meaningful opportunity to respond to the grounds for exclusion from the CRC).

in enabling them to present their side of the story before a responsible governmental official, and (4) the governmental interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.<sup>213</sup>

These factors expand upon the federal test by including the private individual's dignitary interest.<sup>214</sup> *Ramirez* emphasized that the private individual's participation in the process protects the dignitary values that underlie due process—only through such involvement can a person gain a meaningful understanding of what is happening and why.<sup>215</sup> Moreover, by ensuring fairness in the “method of interaction” between the individual and government, due process affirmatively protects the individual's inherent dignitary interest.<sup>216</sup>

Using the four *Ramirez* factors, the balance between the arrested person's interest in the section 851.8 remedy and the government's interest in limiting section 851.8 relief weighs in favor of providing the arrested person with a more meaningful opportunity to achieve section 851.8 relief.

1. *The Arrested Person Has a Legitimate Interest in Protecting Against Governmental Retention and Dissemination of the Arrest Record*

An arrested person has discrete, significant interests in destroying the arrest record—interests that have been recognized by both the California and United States Supreme Courts. In *Loder*, the California Supreme Court acknowledged the arrested person's legitimate interest in protecting against improper uses of her criminal record.<sup>217</sup> The court found the principal concerns to be “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

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<sup>213</sup> *Ramirez*, 599 P.2d at 627-28.

<sup>214</sup> *San Jose Police Officers Ass'n*, 245 Cal. Rptr. at 735 (“The *Ramirez* court's identification of a substantive ‘dignitary’ interest—‘an individual's due process liberty interest in freedom from arbitrary adjudicative procedures’—further differentiates California from federal law in the area of due process.”).

<sup>215</sup> *Ramirez*, 599 P.2d at 626-27, 632 (“[E]ven in cases in which [the individual's] participation is unlikely to affect the outcome of the decision, it nevertheless promotes important dignitary values that underlie due process.” (internal quotation marks omitted)).

<sup>216</sup> *Id.* at 627 (“[F]reedom from arbitrary adjudicative procedures is a substantive element of one's liberty.”).

<sup>217</sup> *Loder v. Mun. Court*, 553 P.2d 624, 630 (Cal. 1976).

arrestee business or professional licensing, employment, or similar opportunities for personal advancement.”<sup>218</sup>

Arrest records are subject to the inaccuracies and improper dissemination contemplated by *Loder*.<sup>219</sup> The criminal records maintained and disseminated by the DOJ are far from infallible.<sup>220</sup> Commercial background reports often report arrest records to private employers despite the laws that prohibit such disclosure.<sup>221</sup> Although many public entities are prohibited from considering arrest records in employment decisions, there are significant exceptions to this blanket prohibition.<sup>222</sup> Several public employers and licensing boards are statutorily authorized to view the arrest record in conjunction with an arrested person’s application.<sup>223</sup>

Although California law limits these uses, no law can preclude decisions made in the privacy of the decisionmaker’s mind. Once the arrest record has been viewed, the “improper inference of guilt will be the one frequently drawn.”<sup>224</sup> Logic and statistics dictate that an arrest

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<sup>218</sup> *Id.* Although *Loder* found that the arrestee’s legitimate interests were adequately protected by statute, this determination is inapposite to the present inquiry. *Id.* at 631. *Loder* decided whether to issue a writ of mandate to seal an arrest record upon the arrestee’s claim that its retention violated his constitutional right to privacy. *Id.* at 627-28. The extraordinary nature of mandamus relief counsels against applying *Loder*’s reasoning to a section 851.8 petition. *See id.* at 627 (noting that a grant of mandamus requires a clear and present duty on the part of the government and a “clear, present and beneficial right in the petitioner to the performance of that duty”). Moreover, the *Loder* court’s finding that arrestees receive adequate statutory protection came at a time when the referenced statutes were untested. *Id.* at 631 (citing “recent” legislative enactments).

<sup>219</sup> *See* discussion Part I, *supra*.

<sup>220</sup> *See Justice Records Improvement Program, supra* note 104 (“The California Department of Justice will . . . improve the accuracy and accessibility of the state’s criminal history records through improving court disposition reporting and transmissions of disposition data to the FBI.”); *Gresher v. Anderson*, 25 Cal. Rptr. 3d 408, 421 (Ct. App. 2005) (“The Department [of Social Services] also conceded that ‘on rare occasions’ there were errors in the criminal record information it received from the Department of Justice. The Department admitted it had developed a form letter for use in such cases of error.”).

<sup>221</sup> *See supra* notes 107-117 and accompanying text.

<sup>222</sup> *See supra* notes 94-103 and accompanying text.

<sup>223</sup> *See, e.g.*, CAL. PENAL CODE § 11105(m) (Westlaw 2013) (providing for disclosure of the full criminal record and any subsequent arrest records to employers that are licensed as community care facilities, residential care facilities for the elderly, or child care centers); CAL. BUS. & PROF. CODE § 7574.11 (Westlaw 2013) (security guard license); CAL. BUS. & PROF. CODE § 11343 (Westlaw 2013) (real estate appraiser’s license); CAL. EDUC. CODE § 44346.5 (Westlaw 2013) (teacher’s credentials); CAL. HEALTH & SAFETY CODE § 1338.5 (Westlaw 2013) (nursing assistant license); CAL. CODE REGS. tit. 16, § 321.1 (Westlaw 2013) (chiropractor’s license).

<sup>224</sup> *Utz v. Cullinane*, 520 F.2d 467, 480 (D.C. Cir. 1975).

record gives the employer an automatic basis to disqualify an applicant when there are ample employable applicants without an arrest record.<sup>225</sup>

The State's high court additionally recognizes the constitutional legitimacy of a person's interest in the unimpeded pursuit of employment.<sup>226</sup> Particularly relevant is the court's decision in *Endler v. Schutzbank*, wherein the plaintiff was barred from obtaining employment in his chosen field because a government official labeled him a criminal "on the basis of unproved accusations" and threatened disciplinary action against anyone who might employ him.<sup>227</sup> The court held that procedural due process requires that the government provide him "a full opportunity to present his defense."<sup>228</sup> Like the *Endler* allegations, an arrest record constitutes an "unproved accusation" of criminality. Accordingly, the state-authorized uses of a person's arrest record<sup>229</sup> require that the arrestee be given a meaningful opportunity to challenge the record.

Likewise, in *Doe v. Saenz*, the state appellate court found that the potentially negative impact of an inaccurate criminal record upon employment triggers due process protection.<sup>230</sup> The court stated that an employment denial based on the person's criminal record "alters an individual's preexisting status under state law by making a formal determination regarding his or her eligibility to work, drastically constrains future employment opportunities, and stigmatizes the individual as unfit."<sup>231</sup> These decisions signal that state-sanctioned use of an arrest record to deny employment constitutes a governmental deprivation of individual liberty.

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<sup>225</sup> See *id.*; Holzer, Raphael & Stoll, *supra* note 92, at 453 (2006) ("Over 60 percent of employers indicate an aversion to hiring ex-offenders."); NAT'L INST. JUST., *supra* note 92 (referencing a study conducted in New York City finding that a criminal record reduces the likelihood of a callback or job offer by nearly fifty percent).

<sup>226</sup> *Endler v. Schutzbank*, 436 P.2d 297, 302 (Cal. 1968) ("[T]he Fourteenth Amendment protects the pursuit of one's profession from abridgement by arbitrary state action."). In *Endler*, the court stated that "[i]t has long been recognized that the right to follow any of the common occupations is a large ingredient in the civil liberty of the citizen." *Id.* at 302 n.4 (internal quotation marks omitted); see also *Doe v. Saenz*, 45 Cal. Rptr. 3d 126, 148 (Ct. App. 2006) ("[T]he private interest at stake is the freedom to pursue a private occupation.").

<sup>227</sup> *Endler*, 436 P.2d at 299.

<sup>228</sup> *Id.* at 304.

<sup>229</sup> See discussion Part I.B, *supra*.

<sup>230</sup> *Saenz*, 45 Cal. Rptr. 3d at 148. *Saenz* involved the plaintiffs' request to receive a notice of the non-exemptible offenses on which the community care provider based its decision to deny her employment. *Id.* at 133-34. The court required the Department of Social Services to provide the specific convictions upon which the employment decision was based, because "[e]rrors in conviction records could be addressed immediately." *Id.* at 148 (internal quotation marks omitted).

<sup>231</sup> *Saenz*, 45 Cal. Rptr. 3d at 148.

Freedom from stigmatization by the government is also an interest that has been recognized by courts.<sup>232</sup> On this point, the United States Supreme Court has stated: “Where a person’s good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.”<sup>233</sup> In *Wisconsin v. Constantineau*, a police chief, acting on statutory authority, posted a notice in the town’s liquor stores that banned all sales or gifts of liquor to the plaintiff for one year.<sup>234</sup> The Court broadly found that such a label was “degrading” and could not be imposed without due process.<sup>235</sup>

Kenny Woods’s story exemplifies governmental interference with these employment and reputational interests. Publicly accused of the hit-and-run death of Daniel Giletta, Mr. Woods was charged with murder on little more than the fact that his palm print was found on the vehicle.<sup>236</sup> Within hours of the arrest, the “incriminating” evidence was revealed to be a phone that did not belong to Woods and an officer’s eyewitness testimony claiming to have viewed Woods passing him on the highway at night travelling at 100 miles per hour.<sup>237</sup> Nine months after his exoneration, Woods’ name was “all over the internet” linking him to the

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<sup>232</sup> *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971); *San Jose Police Officers Ass’n v. City of San Jose*, 245 Cal. Rptr. 728, 733 (Ct. App. 1988) (stating that, even though no stigma attached to the government’s decision to deny the petitioner a concealed weapons certificate, there would be a stigma if the statute “required the denial of a certificate to be based on the existence of a fact which impugned the retired officer’s good name, reputation, honor, or integrity”).

<sup>233</sup> *Constantineau*, 400 U.S. at 437.

<sup>234</sup> *Id.* at 434-35 (noting that the statute authorized “designated persons” to forbid the sale or gift of alcohol to a person who excessively drinks and thereafter causes certain unwanted conditions or exhibits specified traits). The Court found that such posting may be interpreted by some to be “merely the mark of illness, [but] to others it is a stigma, an official branding of a person.” *Id.* at 437.

<sup>235</sup> *Id.* at 437. It is unlikely that this interest continues to suffice as a trigger for federal due process. *See Paul v. Davis*, 424 U.S. 693, 701 (1976). Justice Rehnquist noted:

[w]hile we have . . . pointed out the frequently drastic effect of the ‘stigma’ which may result from defamation by the government . . . this line of cases does not establish the proposition that reputation alone, apart from some more tangible interests such as employment, is either ‘liberty’ or ‘property’ by itself sufficient to invoke the procedural protection of the Due Process Clause.

*Id.*

This lack of federal recognition is not fatal to the section 851.8 petitioner, as the due process protections afforded under the California Constitution recognize interests not safeguarded by the federal Due Process Clause. *See Part III.B, supra*.

<sup>236</sup> DiFilippo, *supra* note 1.

<sup>237</sup> *Id.*

death of Daniel Giletta.<sup>238</sup> He has applied to numerous jobs, but continues to find that “[n]obody wants to hire a killer.”<sup>239</sup>

2. *The Burdensome Standard for Sealing an Arrest Creates a Substantial Risk that the Arrested Person Will Be Subjected to an Erroneous Deprivation of Her Legitimate Interest in Sealing the Arrest Record*

Although the Kenny Woods story seems extraordinary, the occurrence of erroneous arrests and police misconduct is undisputed.<sup>240</sup> A substantial likelihood exists that any given arrest record creates a false indicator of the arrested person’s culpability.<sup>241</sup> Given the questionable value of these records for assessing a person’s guilt, a considerable risk exists that an arrested person will be erroneously deprived of her legitimate interests by the retention and dissemination of the arrest record.

In *Utz v. Cullinane*, the District of Columbia Circuit discussed the feeble constitutional basis for using an arrest record against the arrestee: “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.”<sup>242</sup> The court acknowledged conceivable legitimate purposes for police use of “unresolved” arrest records but found no legitimate law enforcement purpose in utilizing the record of an arrest that was dismissed or abandoned by law enforcement, or the record of an arrest resulting in acquittal.<sup>243</sup> Stating that they “lose any tendency to show probable cause,” the *Cullinane* court characterized such arrest records as no more than “gutter rumors when measured against any standards of constitutional fairness to an individual.”<sup>244</sup> Finally, the court recognized the danger of attaching probative value to records that are based on criminal accusations untested by the procedural safeguards inherent in constitutional criminal justice proceedings.<sup>245</sup>

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<sup>238</sup> *Id.*

<sup>239</sup> *Id.* (internal quotation marks omitted).

<sup>240</sup> See *supra* Part I.A.

<sup>241</sup> See discussion *supra* Part I.

<sup>242</sup> *Utz v. Cullinane*, 520 F.2d 467, 478 (D.C. Cir. 1975).

<sup>243</sup> *Id.* at 479.

<sup>244</sup> *Id.*

<sup>245</sup> *Id.* at 478 (“In our constitutional scheme, we operate under the salutary principle that an individual is presumed innocent of the charges of which he . . . stands accused unless he is found guilty via a process replete with substantial procedural safeguards. An arrest record, without more, is a fact which is absolutely irrelevant to the question of an individual’s guilt.” (footnote omitted)).

Against this infirm framework, sealing and destruction of the arrest record under section 851.8 is often the arrestee's sole remedy. To avoid retention and dissemination of the arrest information, the arrested person may petition the court to seal and destroy the record.<sup>246</sup> The existence of this remedy is itself a recognition of the arrested person's legitimate interests. Moreover, the statutory provision for a full hearing on the merits of the petition appears to be motivated by the goal of safeguarding against erroneously depriving a section 851.8 petitioner of her interests in sealing the arrest record.<sup>247</sup>

This opportunity for a full hearing on the section 851.8 petition belies the notion that, like books and their covers, a statute should not be judged on its face. In practice, section 851.8 denies due process by mandating that an arrested person prove her factual innocence of the charges before the record will be sealed and destroyed.<sup>248</sup> By imposing this substantial burden on the section 851.8 petitioner, the statute ensures that successful petitions under its purview are "rare" and that most arrested persons will be barred from its remedy.<sup>249</sup> This reality is augmented by the judiciary's rigorous application of the section 851.8 standard,<sup>250</sup> police resistance to section 851.8 petitions,<sup>251</sup> and the lack of awareness amongst eligible persons that this remedy exists.<sup>252</sup>

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<sup>246</sup> See generally CAL. PENAL CODE § 851.8 (Westlaw 2013). For a detailed account of the section 851.8 procedures, see *supra* Part II.A.

<sup>247</sup> CAL. PENAL CODE § 851.8(b), (c) (Westlaw 2013).

<sup>248</sup> See discussion *supra* Part II.B.

<sup>249</sup> See Tracey Kaplan, *Young Man Found "Factually Innocent" of Felony Charges*, SILICON VALLEY MERCURY NEWS, Aug. 20, 2009, available at [www.mercurynews.com/topstories/ci\\_13163390](http://www.mercurynews.com/topstories/ci_13163390) ("Findings of factual innocence are rare, even when charges are dropped."); Tracy Wilson, *Acquitted Pair Seek To Clear Names*, L.A. TIMES, Oct. 9, 2002, [articles.latimes.com/2002/oct/09/local/me-childs9](http://articles.latimes.com/2002/oct/09/local/me-childs9) ("Such petitions are rare . . . and typically pursued in cases in which a victim recants or other evidence clears the accused of wrongdoing."); Leipold, *supra* note 13, at 1324-25 (2000) ("California imposes a nearly-prohibitive burden of proof on the defendant. The requirement that defendant prove 'no reasonable cause' to believe that he committed the crime has been applied rigorously, and as a result, relatively few acquitted defendants even attempt to take advantage of the procedure.").

<sup>250</sup> See *supra* Part II.B-C; Leipold, *supra* note 13, at 1324-25 ("The requirement that defendant prove 'no reasonable cause' to believe that he committed the crime has been applied rigorously, and as a result, relatively few acquitted defendants even attempt to take advantage of the procedure.").

<sup>251</sup> It is very difficult to win a section 851.8 petition without submitting the police report as evidence, and some petitioners have encountered police resistance to providing a copy of the report. Interview with Meredith Desautels, *supra* note 115. This is especially the case when the alleged criminal offense involved a victim. *Id.* Moreover, law enforcement agencies typically ignore section 851.8 petitions. Dinday, *supra* note 125.

<sup>252</sup> Many arrested persons are unaware that the arrest will be reflected on their records and likewise are unaware of the section 851.8 remedy. Interview with Meredith Desautels, *supra* note 115; see also *People v. Collins*, No. A132034, 2012 WL 5378649, \*3 (Cal. Ct. App. Nov. 2, 2012)

This ostensible opportunity to challenge the government's deprivatory action lacks the meaning required by *Ramirez*.<sup>253</sup> Accordingly, state due process asks if any probable value exists in additional or substitute safeguards.<sup>254</sup> Fortunately, an additional safeguard readily exists in the current structure of the criminal justice system—the safeguard that protects the arrested person's dignitary interest in her constitutional right to the presumption of innocence.<sup>255</sup>

### 3. *The Arrested Person's Dignitary Interest in Due Process Protection Requires Modification of the Section 851.8 Standard To Seal and Destroy an Arrest Record*

Underpinning our nation's identity is the principle that “presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.”<sup>256</sup> This societal value can be traced back to “Deuteronomy through Roman law, English common law, and the common law of the United States.”<sup>257</sup> In practice, the presumption of innocence operates through the guarantee that an accused citizen may be found guilty of a crime only by proof beyond a reasonable doubt.<sup>258</sup> This guarantee reflects a fundamental principle in our society that “it is far worse to convict an innocent man than to let a guilty man go free.”<sup>259</sup>

Although an arrested person has not been convicted of the criminal charge, the government's subsequent use and dissemination of an arrest record “effectively permits the government to inflict punishment despite the fact that guilt was not constitutionally established.”<sup>260</sup> Such a scheme

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(noting that the section 851.8 petitioner argued that his petition was delayed because of his ignorance regarding the existence of the arrest record and the statutory remedy: “I get out, and I had no idea that this was still on my record, and I tried to find out how to get it out. . . . I just recently discovered this 851.8 a few months ago on my own, and that's when I first came to the court . . . .” (quoting petitioner)).

<sup>253</sup> See *Mohilef v. Janovici*, 58 Cal. Rptr. 2d 721, 724 (Ct. App. 1996) (“We hold that due process is satisfied as long as the property owner receives adequate notice of the nature of the alleged nuisance and a meaningful opportunity to respond to the charges against him.”); *People v. Arciga*, 227 Cal. Rptr. 611, 618 (Ct. App. 1986) (stating that *Ramirez* required that the defendant be provided a meaningful opportunity to respond to the grounds for exclusion from the CRC).

<sup>254</sup> *People v. Ramirez*, 599 P.2d 622, 627-28 (Cal. 1979).

<sup>255</sup> *Coffin v. United States*, 156 U.S. 432, 453 (1895).

<sup>256</sup> *Id.*

<sup>257</sup> *Taylor v. Kentucky*, 436 U.S. 478, 483 (1978).

<sup>258</sup> *Id.*

<sup>259</sup> *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring).

<sup>260</sup> *Utz v. Cullinane*, 520 F.2d 467, 481 (D.C. Cir. 1975).

offends the notion that the government bears the burden of proving criminal culpability.<sup>261</sup> By terminating criminal justice proceedings or exonerating an individual at trial, the government abandons the “proper forum” for adjudicating the arrestee’s guilt, and “the Constitution requires that he be treated as though he engaged in no criminal activity.”<sup>262</sup> Under section 851.8, this usual manner of criminal proceedings is inverted: the accused bears the burden of proving, beyond *all* doubt, her innocence of the offense.

Through a simple inversion of the section 851.8 standard and procedure, the arrested person’s interest may be safeguarded against improper deprivation. In those cases where, as the *Cullinane* court illustrated, the government has abandoned pursuit of the charges or the arrested person has been acquitted,<sup>263</sup> a presumptive right to seal the record could be constitutionally founded on the arrested person’s legitimate interest in protecting against improper use of her record. The government could 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. Such a scheme would eliminate the requirement of proving absolute innocence, or guilt, and the court would be the final arbiter of justice. Moreover, this suggested inversion of the current statutory scheme would properly account for the individual’s dignitary interest in a fair interaction between herself and the government.<sup>264</sup>

#### 4. *An Alternative Standard for Sealing the Arrest Would Further the Legislature’s Purpose, and Any Increase in the Government’s Administrative Burden Is Appropriate To Rectify the Current Imbalance*

The California Legislature enacted section 851.8 to protect against the danger that an innocent person may be wrongfully arrested for a crime.<sup>265</sup> By creating a presumptive right to an arrest seal for persons

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<sup>261</sup> *Id.* at 479 (noting the conflict between the assumption that arrest records have value for law enforcement purposes and the “constitutional presumption of innocence”).

<sup>262</sup> *Id.* at 480-81.

<sup>263</sup> *See id.* at 479.

<sup>264</sup> *People v. Ramirez*, 599 P.2d 622, 627 (Cal. 1979) (“[F]reedom from arbitrary adjudicative procedures is a substantive element of one’s liberty”).

<sup>265</sup> Legis. Counsel’s Digest, Assemb. B. 2861 (1979–1980 Reg. Sess.) 4 Stats. 1980, Summary Digest 383 1980 Cal. Stat. 1 (“This bill would provide a procedure whereby a person who has been arrested or detained and is factually innocent may request a law enforcement agency or the court to provide for the sealing and destruction of the arrest record.”), quoted in *People v. Bermudez*, 91 Cal. Rptr. 3d 510, 513 (Ct. App. 2009); *People v. Glimps*, 155 Cal. Rptr. 230, 234-35 (Ct. App.

who were acquitted of the charges or whose charges were dismissed, the alternative standard is more likely than the current scheme to further the Legislature's original purpose.

Furthermore, a modification to the burden and evidentiary standard under section 851.8 would not significantly increase the administrative burden on the courts. The current procedure under section 851.8 provides for an adversarial court hearing involving the prosecutor and the presentation of evidence.<sup>266</sup> Shifting the burden to the government would merely place the onus on the prosecutor to pursue only cases of true interest.

The creation of a presumptive right to an arrest seal may result in an increased administrative burden on law enforcement agencies and courts to initiate procedures to regularly expunge arrest records. *Ramirez* requires that any such increased administrative burden be weighed against the private interest in sealing and destroying the arrest record.<sup>267</sup> Constitutional due process mandates that the government, not the arrestee, bear the burden of proof. Accordingly, any increased administrative burden would be necessary and justified to appropriately rectify the unconstitutional imbalance of the current scheme.

#### IV. THE CALIFORNIA LEGISLATURE SHOULD AMEND SECTION 851.8 TO MIRROR THE STATE'S ENLIGHTENED APPROACH TO CRIMINAL JUSTICE

Over thirty years have passed since the enactment of section 851.8.<sup>268</sup> Despite the statute's laudable intent to protect the innocent accused, the means have clearly failed to live up to that intention. Whether the factual innocence standard survives or falters under judicial review,<sup>269</sup> the interests of justice call for a change to section 851.8. This

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1979); *see also* *People v. Adair*, 62 P.3d 45, 51 (Cal. 2003) ("Section 851.8 is for the benefit of those defendants who have not committed a crime. It permits those petitioners who can show that the state should never have subjected them to the compulsion of the criminal law—because no objective factors justified official action—to purge the official records of any reference to such action.").

<sup>266</sup> CAL. PENAL CODE § 851.8(b), (c) (Westlaw 2013).

<sup>267</sup> *Ramirez*, 599 P.2d at 627; *Van Atta v. Scott*, 613 P.2d 210, 214 (Cal. 1980) ("In *People v. Ramirez*, this court held that the extent to which procedural due process relief is available under the California Constitution depends on a careful weighing of the private and governmental interests involved." (citation omitted)); *see also* *San Jose Police Officers Ass'n v. City of San Jose*, 245 Cal. Rptr. 729, 732 (Ct. App. 1988) ("*Ramirez* does not purport to require any particular level of procedural safeguards in any particular case. . . . [T]he level of procedural protection varies with the interests at stake, considered according to the balancing formula set out in *Ramirez*.").

<sup>268</sup> CAL. PENAL CODE § 851.8 (Westlaw 2013) (enacted in 1980).

<sup>269</sup> Indeed, as outlined in this Comment, the courts have steadfastly interpreted section 851.8 so narrowly as to effectively bar individuals from its remedy. *See supra* notes 164-173 and

call arises from the thousands of persons who are arrested every year and whose arrest records are subsequently entered the state's criminal record database for a lifetime of future uses. It arises from the reality that imposing a burdensome standard on arrested persons means, in effect, inflicting an additional hardship on those minority communities that already face an uphill battle.

Moreover, this is a time of evolution in California's criminal justice regime. California State Attorney General Kamala Harris recently stated, "There seem to be two positions for DAs and AGs to take: tough on crime and soft on crime. I believe there's a third way forward: smart on crime."<sup>270</sup> This comment was made in the midst of a campaign to win support for A.B. 109, the criminal justice realignment bill.<sup>271</sup> California's realignment signals a "landmark transition from a generation's worth of tough-on-crime policies to a new, less expensive, more enlightened and more effective . . . approach."<sup>272</sup>

This shift toward a more enlightened criminal justice approach should involve a concomitant shift toward acknowledging the legitimate interests of accused persons who have not been convicted of a crime. In initiating such a shift, California would not be alone—other states already recognize the limited value of an arrest record in assessing a person's culpability.<sup>273</sup> In Maryland, for instance, a recently enacted statute provides that a court "shall" grant an arrestee's petition to expunge the arrest record, unless the prosecutor objects within thirty days of the petition.<sup>274</sup> This approach places the burden on the state to

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accompanying text. Given this history, it is unlikely that the courts will reverse direction. *See* *People v. Scott M.*, 213 Cal. Rptr. 456, 463 (Ct. App. 1985) ("If the Legislature had wanted to treat a verdict of acquittal as some sort of rebuttable presumption of factual innocence it could easily have so provided. Only in those cases where the defendant is actually innocent is the trial court justified in sealing and destroying a defendant's arrest records."), *disapproved on other grounds by Adair*, 62 P.3d at 53 n.6.

<sup>270</sup> Sharon Driscoll, *California Attorney General Kamala Harris Gives Public Talk at Stanford Law School*, STAN. REP., Oct. 31, 2011, [news.stanford.edu/news/2011/october/kamala-harris-law-103111.html](http://news.stanford.edu/news/2011/october/kamala-harris-law-103111.html).

<sup>271</sup> *Id.*; *see also* Criminal Justice Realignment, Assemb. B. 109 (Cal. 2011).

<sup>272</sup> Editorial, *Get Ready, California Counties, Here Come the Inmates*, L.A. TIMES, Aug. 30, 2011, [available at](http://articles.latimes.com/2011/aug/30/realestate/la-ed-re-entry-20110830) [articles.latimes.com/2011/aug/30/realestate/la-ed-re-entry-20110830](http://articles.latimes.com/2011/aug/30/realestate/la-ed-re-entry-20110830).

<sup>273</sup> ALICE KING, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION 11, 14 (2007), [available at](http://nyls.edu/user_files/1/3/4/30/59/65/68/capstone060704.pdf) [nyls.edu/user\\_files/1/3/4/30/59/65/68/capstone060704.pdf](http://nyls.edu/user_files/1/3/4/30/59/65/68/capstone060704.pdf) (noting that "Pennsylvania does not report arrests more than three years old where there was no conviction and there are no pending proceedings" and New York bars "most private and public employers and occupational licensing authorities [from asking] about arrests that did not lead to conviction").

<sup>274</sup> MD. CODE ANN., CRIM. PROC. § 10-105(d)(2) (Westlaw 2013); *see also* James Drew, *A Chance for a Clean Slate*, BALT. SUN, July 7, 2008, [available at](http://articles.baltimoresun.com/2008-07-07/news/0807060265_1_expungement-criminal-record-arrest-records) [articles.baltimoresun.com/2008-07-07/news/0807060265\\_1\\_expungement-criminal-record-arrest-records](http://articles.baltimoresun.com/2008-07-07/news/0807060265_1_expungement-criminal-record-arrest-records) ("Thousands of Marylanders

oppose the petition, after which the court must hold a hearing to determine whether to grant the expungement.<sup>275</sup>

#### CONCLUSION

If California is to follow the constitutional dictate that a person be presumed innocent until proven guilty, section 851.8 of the Penal Code must be changed. It is unacceptable to bestow a lifetime brand of suspicion on an individual based on an arrest that did not lead to a conviction, without giving the arrestee a *reasonable* opportunity to be heard. This injustice is compounded by the reality that minority communities are policed in California at rates greatly disproportionate to their rate of culpability.<sup>276</sup> Whether effected through the judicial or legislative process, California must change section 851.8 to more accurately reflect the longstanding principle—the “bedrock” of our criminal justice system—that we *presume* the innocence of persons who have not been found guilty beyond all reasonable doubt.<sup>277</sup>

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have had their arrest records removed from public view because of a new state law that requires automatic expungement for those who are detained and released without charge.”).

<sup>275</sup> MD. CODE. ANN., CRIM. PROC. § 10-105(e) (Westlaw 2013).

<sup>276</sup> See *supra* notes 43-58 and accompanying text.

<sup>277</sup> *In re Winship*, 397 U.S. 358, 363 (1970).