The Rights of the Innocent Arrestee: Sealing of Records under California Penal Code Section 851.8

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THE RIGHTS OF THE INNOCENT ARRESTEE:
SEALING OF RECORDS UNDER CALIFORNIA
PENAL CODE SECTION 851.8

Introduction: The Extent of the Evil

The Lingering Threat in an Arrest Record

Consider the predicament of an innocent person who finds himself arrested and charged with committing a crime which he in fact did not commit. Perhaps he was in the wrong place at the wrong time: waiting for a friend in a park late at night.\(^1\) Perhaps no crime was in fact committed: an apparent murder victim later being identified as a suicide.\(^2\) Perhaps it was a case of mistaken identity or blatant misconduct by the arresting officer.\(^3\) In any event, the arrested person is taken to the police station and booked, which usually includes taking his photograph and fingerprints.\(^4\) Information concerning his arrest is then routinely dispatched to various law enforcement agencies, local, state, and the Federal Bureau of Investigation.\(^5\) As of that moment, the person has acquired a "criminal" record.

In the period between the time of a person's arrest and the final disposition of the charges against him, courts have recognized a legitimate public interest in reporting the circumstances of the arrest.\(^6\) The fact of the arrest may be reported by the news media, whose rights to publish such information are guaranteed by the first amendment and the Freedom of Information Act.\(^7\) The arrest record will also be used as an investigative tool by the police in efforts to obtain further evidence.

\(^1\) Menard v. Saxbe, 498 F.2d 1017 (D.C. Cir. 1974).
\(^5\) Id. See generally Karabian, Record of Arrest: The Indelible Stain, 3 PAC. L.J. 20, 26 (1972).
and to solve similar crimes. Such uses of arrest records do not violate individual interests or constitute an invasion of the constitutional right to privacy.

However, after the charges against a person have been dismissed or he has been acquitted following a trial, law enforcement agencies continue to use the arrest record, even though the arrested person may have been completely exculpated. Moreover, the record remains in the computerized files of the FBI, which "circulates information to more than 14,500 private and public agencies as well as the United States Civil Service Commission, and all branches of the Armed Services." Thus, even though an arrested person was never convicted of any crime, his arrest record remains on file.

The existence of an arrest record results in a number of potential disadvantages for the arrestee. Because his photograph and fingerprints remain on file and are used in investigating other crimes, a person with an arrest record has increased chances of becoming a suspect in police investigations. As one court noted, "it is common knowledge that a man with an arrest record is much more apt to be subject to police scrutiny—the first to be questioned and the last eliminated as a suspect in an investigation." Because an arrestee's photograph may be among the mug shots shown to witnesses regarding other crimes, there is a continuing danger of his being mistakenly identified and suspected of criminal activity.

This problem is illustrated by *White v. State*, in which a person with a record of one prior arrest was identified two years later from a photograph as someone who had passed a forged check. Because White was in another state and the amount of money involved was small, the prosecutor elected not to prosecute, but the fact that White had been identified was added to his record. As a result, White lost one police job and was turned down for others. A judgment of nonsuit was affirmed in White's subsequent attempt to sue the state for libel and negligence, with the court noting that the state was protected from tort

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liability by a conditional privilege. In dissenting, Justice Friedman noted that statutory provisions for final disposition reports to be added

15. Significantly, White's initial efforts were aided by the governor and a state assemblyman, as noted by the court: “In 1967, plaintiff went to the Bureau seeking to examine his record as he believed it contained erroneous information. He was shown his file, and he denied that the record was his. He was advised by the Bureau that if information in the file was incorrect he should have the agency which submitted the information so advise the Bureau; that the information would not be deleted solely on his claim that it was false.

“In 1967, at plaintiff's request for assistance, the Governor and others advised plaintiff to go to the Bureau to have the matter looked into, and Assemblyman Zenovich's office inquired into what the record contained in an attempt to assist plaintiff in his claim that the record was incorrect.” Id. at 624, 95 Cal. Rptr. at 117. White was an upright citizen; he had unquestionably sought to assume an affirmative role in actively protecting society by serving as a police officer. Yet because he was identified from a "mug shot" photograph (taken as a juvenile) as a suspect in a check forgery case—a case which was never followed up on, thus denying him any opportunity to respond to a mere suspicion that he was never even aware of—he was denied employment as a police officer and society lost the potential contributions of this individual.

The author cannot resist adding a further example of the kind of information which may be stored away in a computer and which may pose a potential threat to individuals of good character such as White. Recently, a group of police officers were touring a police records department. After hearing an explanation of how data could be obtained from the computer by the mere entry of a person's name, one officer requested that his name be entered so he could see the system operate. Although it was suggested that such a demonstration would be pointless because the officer would have no record, the request was complied with. To everyone's surprise, particularly the officer who had made the request, the computer responded that the person had once been suspected of being a "peeping tom." Understandably upset, the officer immediately commenced an investigation to discover why this entry was on his record. He eventually learned the explanation. At one time a woman living in an apartment complex reported a peeping tom, and as a matter of course the names of all the male residents of the apartment complex were put on a list of "suspects." The officer, since he resided in the apartment complex at the time, was included in this list. He was never contacted, questioned, or even aware of being a suspect. Nevertheless this information became part of his computer record.

Upon becoming aware of such incidents as this one and the one which led to the discharge of White, one can only wonder what a computer might have in its memory banks about each of us, and whether it will ever surface to haunt us.

A final point to be noted in this regard is the holding of the Court of Appeal in Younger v. Berkeley City Council, 45 Cal. App. 3d 825, 119 Cal. Rptr. 830 (1975). In response to the arrest record problem, the Berkeley City Council adopted a resolution establishing a procedure under which Berkeley residents could obtain access to their state arrest records contained in the files of the Berkeley Police Department and could challenge the accuracy of entries on these records, including entries based upon arrest data not supplied by the Berkeley police. The Court of Appeal held that the resolution went beyond municipal affairs and attempted to address a subject which was preempted by state law authorizing state retention and dissemination of arrest data. Emphasizing the state interest in arrest records, the court affirmed an order permanently enjoining implementation of the resolution. Id. See notes 218-22 & accompanying text infra.

to arrest records offered insufficient protection of individual interests:

Our nation's current social developments harbor insidious evolutionary forces which propel us toward a collective, Orwellian society. One of the features of that society is the utter destruction of privacy, the individual's complete exposure to the all-seeing, all-powerful police state. Government agencies, civilian and military, federal, state and local, have acquired miles and acres of files, enclosing revelations of the personal affairs and conditions of millions of private individuals. Credit agencies and other business enterprises assemble similar collections. Information peddlers burrow into the crannies of these collections. Microfilm and electronic tape facilitate the storage of private facts on an enormous scale. Computers permit automated retrieval, assemblage and dissemination. These vast repositories of personal information may easily be assembled into millions of dossiers characteristic of a police state. Our age is one of shrieved privacy. Leaky statutes imperfectly guard a small portion of these monumental revelations. Appellate courts should think twice, should locate a balance between public need and private rights, before deciding that custodians of sensitive personal files may with impunity refuse to investigate claims of mistaken identity or other error which threaten the subject with undeserved loss. The office of judges is to strike that balance rather than pursue sentiments of indignation or sympathy. It is obvious, nevertheless, that an unwarranted record of conviction, even of arrest, may ruin an individual's reputation, his livelihood, even his life.17

The White case illustrates the potential problem a person with an arrest record may face in later being suspected of other criminal activity. We now turn to the disadvantages of an arrest record in the event that a person is arrested again and reenters the criminal justice system.

The existence of a prior arrest record is a factor which influences decisions made at a number of stages in the criminal process. The fact of a previous arrest, even if not followed by a conviction, may be used along with other information to support a finding of probable cause for another arrest.18 A district attorney often takes a prior arrest record into account in deciding whether to file charges, whether to prosecute as a felony or misdemeanor, whether to accept a plea bargain, and whether to recommend a person as eligible for a diversion program.19 Arrest data are also used by judges in deciding whether to release a person without bail. Arrest records additionally play a significant role in post-trial proceedings. Probation officers consider arrest records in deciding whether or not to recommend a convicted felon for probation and what

19. Id.
conditions should be imposed, and judges likewise use arrest records in deciding whether to grant probation. Similar use is made of arrest records by the state adult authority in its determination of when to release a person on parole. In view of these multiple uses of arrest records within the criminal justice system, such a record poses a substantial and undeserved handicap for an innocent arrestee.

An arrest record may also have repercussions outside the criminal justice context. With the advent of computer technology and the dissemination of arrest data retained in FBI files to numerous public and private agencies, an arrest record may constitute a serious disadvantage for individuals seeking employment, credit, admission to schools, or licenses to enter various trades or professions, although recently enacted legislation may help to alleviate these problems. Even in the absence of direct economic loss, an arrest record leaves a blemish on the arrestee's reputation. As one federal court observed, "There is an undoubted 'social stigma' involved in an arrest record."

The existence of an arrest record thus includes a lingering threat of potential hardship for a person who may have been entirely innocent of any wrongdoing. The dilemma of an innocent arrestee was eloquently described by a federal court in United States v. Dooley:

Any citizen, even one with an absolutely clean lifetime record of not violating the law, through a series of circumstances could find himself charged with a violation of the law even though he may be entirely innocent of the charges. Our system of criminal justice will in due course bring out the truth and he will be cleared. But his record will not be cleared. And although he has been cleared under our laws, at any future time the cloud of the prosecution against him will remain to all who one way or another gain access to it: be it inquiries concerning employment, security clearance, political office or investigations concerning other criminal offenses.

24. Menard v. Saxbe, 498 F.2d 1017, 1024 (D.C. Cir. 1974). However, in Loder v. Municipal Court the supreme court suggested that "the stigma may be measurably less when the person is an . . . adult. . . ." 17 Cal. 3d 859, 869 n.7, 533 P.2d 624, 631, 132 Cal. Rptr. 464, 471.
And whether or not the information is disclosed, the fear of the subject person that it will be or may be is always there.\textsuperscript{26} The question raised by such cases is how to afford sufficient protection of the rights and interests of the innocent arrestee. The scope of the present inquiry will include an examination of remedies made available by judicial and legislative action, focusing upon the approach which has been adopted in California.

**Remedies: Expungement and Record Sealing**

The problem posed by the continued existence of arrest records is not new to the legislatures or the courts. In early cases,\textsuperscript{27} courts permitted the return of an exonerated arrestee’s portrait which had been placed in a “rogue’s gallery.” Currently, however, an arrest record involves much more than mere display of a photograph and fingerprints, in that the name of the individual and the charge underlying his arrest will have been disseminated to qualifying law enforcement agencies and entered in the memory banks of countless computers. In response to the hardship such a record potentially creates, two basic types of remedies have emerged: expungement and record sealing.

**Definitions**

The basis of the distinction between expungement and sealing is that the former implies physical destruction or obliteration of records, whereas sealing preserves the records themselves but prohibits dissemination.\textsuperscript{28} It must be noted at the outset that while this distinction is

\textsuperscript{26} Id. at 78-79.

\textsuperscript{27} See, e.g., State ex rel. Mavity v. Tyndall, 224 Ind. 364, 66 N.E.2d 755 (1946).

\textsuperscript{28} An interpretation of the sealing remedy as it operates to limit dissemination is offered in the court's opinion in *T.N.G. v. Superior Court*, where the court discussed § 781 of the Welfare and Institutions Code: “Section 781 provides that the juvenile court shall send its sealing order to 'each agency and official named' in the petition for sealing, 'and each such agency and official shall seal records in its custody as directed by the order, shall advise the court of its compliance, and thereupon shall seal the copy of the court's order for sealing of records that it or he received.' Hence, at the conclusion of the sealing process, no agency in this state, other than the juvenile court which ordered sealing, may retain any information which might provide a link between a particular juvenile and any contact with the juvenile court. A California court, however, may not be able to compel the Federal Bureau of Investigation to destroy detention records it has received from California law enforcement authorities. Nevertheless, after a California court has issued a sealing order under section 781, the juvenile record loses all force and effect, and the juvenile may file an action in federal court to have the record removed from FBI files.” 4 Cal. 3d 767, 777 n.12, 484 P.2d 981, 987, 94 Cal. Rptr. 813, 819 (1971) (emphasis in original and citations omitted). In regard to current federal regulations providing that the FBI will change its records upon notification from the contributing agency, see note 118 & accompanying text *infra.*
recognized in some states,\textsuperscript{29} including California,\textsuperscript{30} other states do not differentiate between expungement and sealing.\textsuperscript{31} Moreover, there are different varieties of relief which do not fit neatly into either category.\textsuperscript{32} Nonetheless, two general approaches to the arrest record problem are clearly ascertainable.

The first approach, expungement, involves ordering the destruction or erasure of all records of arrest, including fingerprints and photographs, as well as any related court files.\textsuperscript{33} A closely related remedy consists of ordering the return of fingerprints and photographs to the exonerated arrestee.\textsuperscript{34} The effect of either the physical destruction of arrest records or their return to the arrestee is to permanently remove any possibility of future access to these records. In addition to destruction of local and state arrest records, the remedy of expungement may provide for notifying all recipient agencies to whom the record was disseminated.\textsuperscript{35}

The alternative remedy of record sealing offers protection of individual interests without destruction of official records. This protection is achieved by severely restricting or totally eliminating access to arrest records by placing them in locked files or removal to a separate secured area, and by notifying agencies which received the arrest data of the sealing order.\textsuperscript{36}

In California, motions for expungement or return of arrest records have consistently been denied.\textsuperscript{37} Moreover, in \textit{People v. Chapman},\textsuperscript{38} the court of appeal implied that a legislative provision for "destruction" of arrest records\textsuperscript{39} might be unconstitutional as a violation of the separa-
tion of powers doctrine,40 asserting that "[t]he integrity of the court system requires that the courts have sole custody and control of their own records."41 The court restricted its holding to a refusal to interpret Health and Safety Code section 11361.5(b) as requiring the destruction of records when a sentence or period of probation was not yet served. However, the court's implied criticism of expungement was reflected in the comment:

When valuable records of the court are destroyed or portions thereof obliterated, the integrity of the court system is sacrificed and the records no longer conform to the truth. This conflicts with the duty of the judiciary to establish the truth.42

Apart from the solitary reference to destruction of records in Health and Safety Code section 11361.5(b), the California legislature has adopted the second alternative of record sealing,43 coupled with special statutory provisions for the dissemination of final disposition reports to agencies which receive initial arrest information.44

Having initially delineated the two alternative remedies to the arrest record problem, it remains to examine the circumstances under which the courts have granted relief and then to examine legislative treatment of the problem.

Judicial Conclusions in the Absence of Legislative Relief

When confronted with a petition for return or destruction of arrest records, the courts have frequently been reluctant to act in the absence of legislative provisions for such relief, adhering to the judicial doctrine that the court's role is not to encroach on the law-making functions of the legislature.45 Nevertheless, in the past decade the question of expungement of arrest records has been addressed by a number of courts. A brief summary of some of the decisions arrived at by federal and state courts provides a useful insight into the factors considered in the determination of whether relief is to be granted.

provides the possibility of petitioning for a court order which would "order each court of this state, state agency, and local public agency having records pertaining to the arrest or conviction to destroy all records thereof in the possession of the court or agency . . ." People v. Chapman, 62 Cal. App. 3d 251, 254, 132 Cal. Rptr. 831, 832 (1976), petition for hearing granted, Crim. No. 19710 (Sup. Ct., Nov. 24, 1976) (emphasis added).

41. 62 Cal. App. 3d at 255, 132 Cal. Rptr. at 833.
42. Id. at 257, 132 Cal. Rptr. at 834.
44. CAL. PEN. CODE §§ 11105, 11115-17 (West Supp. 1976).
45. See, e.g., United States v. Linn, 513 F.2d 925, 927 (10th Cir. 1975); Sterling v. City of Oakland, 208 Cal. App. 2d 1, 24 Cal. Rptr. 696 (1962).
The Federal Courts: Paving the Way for Relief

The issue of record expungement has been raised in the federal courts in a variety of contexts, ranging from mass arrests of antiwar demonstrators\(^46\) to a motion by an attorney acquitted of charges of mail fraud and conspiracy.\(^47\) Although there is no specific federal statutory provision for expungement of arrest records, the power of a federal court to order expungement has been recognized in a number of cases.\(^48\) However, the courts tend to view this power as one which should be exercised sparingly, and the decision on whether the remedy of expungement will be allowed depends on the circumstances of each particular case. As the court in \textit{United States v. Linn}\(^49\) observed, there is "no definitive, all-purpose rule to govern requests of this nature, and to a considerable degree each case must stand on its own two feet."\(^50\)

To arrive at an understanding of what kind of circumstances are viewed as warranting an order of expungement of arrest records, one must turn to the facts of the cases where the issue of expungement has been raised. The cases brought to the federal courts may be viewed as consisting of two general types. The first category encompasses cases involving mass arrests for the purpose of harassment or multiple arrests made without probable cause. An early example of this type of case was \textit{United States v. McLeod},\(^51\) in which the court found that a series of arrests and prosecutions of blacks had been aimed at intimidating them so that they would not register to vote. In addition to directing the return of all fines and reimbursement of court costs incurred, the court ordered the expungement of all arrest and prosecution records. A similar case involving expungement was \textit{Hughes v. Rizzo},\(^52\) in which a series of arrests made to rid a park of hippies was found to have been invalid. Because the arrests had been illegal, the court directed expungement of all arrest records and ordered that all related photographs be returned or destroyed. Large scale arrests of antiwar demonstrators were similarly found to be illegal in \textit{Sullivan v. Murphy},\(^53\) in which the court ordered that maintenance and dissemination of records of the arrests should be limited, noting that "the very presence of these records carries the strong implication that the underlying arrest and detention were somehow justified."\(^54\)

\(^{46}\) Sullivan v. Murphy, 478 F.2d 938 (D.C. Cir. 1973).
\(^{47}\) United States v. Linn, 513 F.2d 925 (10th Cir. 1975).
\(^{49}\) 513 F.2d 925 (10th Cir. 1975).
\(^{50}\) Id. at 927.
\(^{51}\) 385 F.2d 734 (5th Cir. 1967).
\(^{53}\) 478 F.2d 938 (D.C. Cir. 1973).
\(^{54}\) Id. at 969.
A final example of the multiple arrest type of cases is *Wilson v. Webster*. In *Wilson*, the plaintiffs in a class action alleged that they had been arrested without justification in Isla Vista during a period of unrest at the Santa Barbara campus of the University of California. The district court refused to issue an injunction against the sheriff and other county officials and dismissed a request for an order directing the cancellation of arrest records of plaintiffs where there had been an acquittal or the charges had been dismissed. On appeal, the Ninth Circuit affirmed the denial of injunctive relief against county officials on the grounds of mootness but held that the district court should not have summarily dismissed the record cancellation issue. Instead, the court suggested that the plaintiffs were entitled to a "full hearing" on the issue of expungement, noting that "fundamental rights" of the arrested persons might be impaired by the continued existence of the arrest records.

While the courts have found expungement to be readily justified by the circumstances in mass arrest cases where the initial arrests could be characterized as harassment of unpopular groups, the process of justification becomes more elaborate in cases involving a single arrestee. In this second type of case, the courts have approached the expungement question as one of balancing individual rights and interests against the government's need for a record-keeping function in the course of its law enforcement activities. While some courts have granted expungement as a means of protecting the individual's right of privacy, other courts have suggested that expungement is warranted only when there are other extraordinary circumstances, such as the illegality of the initial arrest.

The question of whether an individual's right of privacy was violated by the existence of arrest records was initially raised in *United States v. Kalish*. The plaintiff had been arrested when he appeared for a habeas corpus hearing in which he sought to test the constitutionality of the draft. Subsequently he moved for an order to expunge the record of his arrest and to destroy all related photographs and fingerprints, noting that he had acted on advice of counsel in his initial refusal to submit to induction and that he had willingly gone into the army after the dismissal of his habeas corpus petition. The court distinguished the nature of the individual's interest in privacy before and after exoneration, concluding that an individual's interest in privacy was not constitutionally

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55. 467 F.2d 1282 (9th Cir. 1972).
56. *Id.* at 1283 (school year had ended, curfew had been rescinded, thus repetition in the future of official misconduct considered unlikely).
57. *Id.* at 1283-84. As to the continued viability of this view, see *Paul v. Davis*, 424 U.S. 693 (1976). See text & accompanying notes 83-90 *infra*.
protected at the time of arrest. However, after he had been exonerated, the individual again had a right to privacy which was not outweighed by legitimate government interests:

There can be no denying of the efficacy of fingerprint information, photographs, and other means of identification in the apprehension of criminals and fugitives. Law enforcement agencies must utilize all scientific data in society's never-ending battle against lawlessness and crime. When arrested, an accused does not have a constitutional right of privacy that outweighs the necessity of protecting society and the accumulation of this data, no matter how mistaken the arrest may have been.

However, when an accused is acquitted of the crime or when he is discharged without conviction, no public good is accomplished by the retention of criminal identification records. On the other hand, a great imposition is placed upon the citizen. His privacy and personal dignity is invaded as long as the Justice Department retains "criminal" identification records, "criminal" arrest, fingerprints and a rogue's gallery photograph. . . . The preservation of these records constitutes an unwarranted attack upon his character and reputation and . . . violates his dignity as a human being.59

To protect the plaintiff's right of privacy, the court ordered the records destroyed.

Protection of individual interests was also a justification for expungement in Kowall v. United States,60 in which a conviction for failure to report for induction was set aside by the trial court, which also ordered that the arrest records be expunged. The government argued that the right of privacy was outweighed by the public's interest in maintaining criminal identification files. In response to this argument, the court noted the numerous adverse effects which an arrest record could have on an individual's reputation, economic opportunities, and future contacts with the criminal justice system:

Even if no direct economic loss is involved, the injury to an individual's reputation may be substantial. Economic losses themselves may be both direct and serious. Opportunities for schooling, employment, or professional licenses may be restricted or nonexistent as a consequence of the mere fact of an arrest, even if followed by acquittal or complete exoneration of the charges involved. An arrest record may be used by the police in determining whether subsequently to arrest the individual concerned, or whether to exercise their discretion to bring formal charges against an individual already arrested.61

The court also referred to uses of arrest records for impeachment of witnesses and the impact of such records on decisions of whether to

59. Id. at 970.
61. Id. at 214-15.
release an arrestee on his own recognizance.\textsuperscript{62} In view of these potential disadvantages to the individual posed by the retention of the arrest record, the court affirmed the expungement order.\textsuperscript{63}

The repercussions of an arrest record resulting from its retention and dissemination by the FBI were subjected to judicial scrutiny in the cases of \textit{Menard v. Saxbe}\textsuperscript{64} and \textit{Tarlton v. Saxbe}.\textsuperscript{65} In \textit{Menard}, a nineteen year old man was waiting for a friend in a park late at night when he was approached by police and questioned. Despite the subsequent arrival of the friend, the young man was arrested and detained for two days. No complaint was ever filed, but the police department routinely forwarded the arrestee's fingerprints to the FBI along with the notation that he was arrested for burglary and released. An action was brought to compel the FBI to remove the fingerprints and notation of the arrest from FBI files. The district court denied relief.\textsuperscript{66} On appeal, the court of appeals reversed, rejecting the argument that the plaintiff had suffered mere personal distress rather than legal injury, and observing that "[a]lthough Menard cannot point with mathematical certainty to the exact consequences of his criminal file, we think it clear that he has alleged a 'cognizable legal injury.'"\textsuperscript{67} Noting the FBI's position that the decision to expunge must be made at the local level, the court did not order expungement but suggested that such an action should be maintained against the local law enforcement agencies. However, the court did order the transfer of Menard's records from the FBI's criminal index to the neutral index upon notification that the arrestee had merely been detained and released.\textsuperscript{68}

In \textit{Tarlton v. Saxbe},\textsuperscript{69} the question of incomplete FBI records was raised in an action seeking to expunge entries of arrests without final disposition reports. The plaintiff, who was serving a prison sentence, alleged that the arrest record information supplied by the FBI influenced the court in sentencing him and affected the United States Parole Board's decision to deny parole. Interpreting 28 U.S.C. section 534,\textsuperscript{70}

\begin{itemize}
\item \textsuperscript{62} \textit{Id.} at 215.
\item \textsuperscript{63} \textit{Id.} at 214.
\item \textsuperscript{64} 498 F.2d 1017 (D.C. Cir. 1974).
\item \textsuperscript{65} 507 F.2d 1116 (D.C. Cir. 1974).
\item \textsuperscript{66} 498 F.2d at 1019.
\item \textsuperscript{67} \textit{Id.} at 1028.
\item \textsuperscript{68} \textit{Id.} at 1023.
\item \textsuperscript{69} 507 F.2d 1116 (D.C. Cir. 1974).
\item \textsuperscript{70} 28 U.S.C. \S\ 534 (1970) provides: "(a) The Attorney General shall (1) acquire, collect, classify, and preserve identification, criminal identification, crime, and other records; and (2) exchange these records with, and for the official use of, authorized officials of the Federal Government, the States, cities, and penal and other institutions.

"(b) The exchange of records authorized by subsection (a)(2) of this section is
which authorizes the Attorney General to keep criminal identification records, the court found that the FBI had a duty to take reasonable measures to ensure that its files were accurate. Asserting that to permit the FBI to disseminate inaccurate information would be tantamount to allowing individuals to be accused of criminal conduct without providing them the opportunity to disprove the charges, the court implied a possible due process consideration.\textsuperscript{71} The court also discussed possible infringements of the individual’s constitutional right of privacy and referred to the common law principle forbidding defamation of innocent individuals.\textsuperscript{72} The court then reversed and remanded, holding that a cause of action existed relating to a duty of inquiry placed on the FBI.\textsuperscript{73}

The \textit{Kalish}, \textit{Kowall}, \textit{Menard}, and \textit{Tarlton} cases are similar in that concern for protecting individual privacy was the basis of judicial action aimed at counteracting the adverse effects of arrest records. However, other courts have concluded that individual interests did not warrant judicial intervention in this area.

In \textit{United States v. Dooley},\textsuperscript{74} the court held that expungement could not be granted in the absence of extraordinary circumstances.\textsuperscript{75} The court based its decision on the view that the legislature was the proper body to make the remedy of expungement available, but it voiced concern for individuals mistakenly arrested who would be unable to clear their records. The court saw no legitimate government interest in retaining records of arrests not resulting in conviction:

Unresolved arrest records generally may well have significance for law enforcement purposes . . . But charges resulting in acquittal clearly have no legitimate significance. Likewise, other charges which the government fails or refuses to press or which it withdraws are entitled to no greater legitimacy.\textsuperscript{76}

Nevertheless, the court reluctantly declined to grant expungement in view of the lack of legislation providing this remedy.

\textsuperscript{71} “Dissemination of inaccurate criminal information without the precaution of reasonable efforts to forestall inaccuracy restricts the subject’s liberty without any procedural safeguards designed to prevent such inaccuracies.” 507 F.2d at 1123.

\textsuperscript{72} Id. at 1124.

\textsuperscript{73} Id. at 1131.

\textsuperscript{74} 364 F. Supp. 75 (E.O. Pa. 1973).

\textsuperscript{75} Id. at 78-79. In referring to the absence of extraordinary circumstances, the court noted cases allowing expungement where the arrests were made without probable cause or for purposes of harassment, as distinguished from the “typical” or “normal” cases. \textit{Id.} at 78.

\textsuperscript{76} Id. at 77.
A narrower position was adopted in *United States v. Rosen*,\(^7\) in which the court refused to order the return of photographs, fingerprints, and arrest records of two defendants who had been charged with unlawful importation and receipt of wigs. One of the defendants was acquitted, and other charges against the two defendants were dismissed. The court held that in balancing the equities between the individual right of privacy and the right of law enforcement officials to perform their duties, the law enforcement interest was paramount in view of the failure to allege economic injury, harassment, or improper use of the records. With regard to the dismissed charges, the court pointed out that “[a] dismissal does not necessarily go to a consideration of the merits.”\(^7\)\(^8\) Moreover, even in cases of acquittal the court felt that arrest records should be retained in the absence of a statute or an illegal arrest.\(^7\)\(^9\) This view was reiterated in *United States v. Linn*,\(^8\)\(^0\) in which an attorney, acquitted of 65 counts of such charges as mail fraud and conspiracy, sought expungement, noting the danger to his professional reputation and asserting an invasion of his right to privacy. Asserting that “an acquittal, standing alone, is not in itself sufficient to warrant an expungement of an arrest record . . . .”,\(^8\)\(^1\) the court suggested that relief “should be reserved for the unusual or extreme case.”\(^8\)\(^2\)

Viewing the cases of individual arrestees together, it would appear that early cases paved the way for the granting of relief based primarily on a consideration of the individual’s right to privacy. However, a narrower view was taken in some cases which suggested that expungement should be granted only in extraordinary circumstances. Under these later decisions, it would appear that protecting the right of privacy would alone be insufficient grounds for judicial action; the threat to privacy must be coupled with some other actual or threatened injury.

The question of what weight to give the individual right to privacy in the balancing process is further complicated by the Supreme Court’s recent holding in *Paul v. Davis*.\(^8\)\(^3\) This case involved a claim for relief under section 1983 of the 1866 Civil Rights Act,\(^8\)\(^4\) based on the inclusion of Mr. Davis’ name and photographs on a flyer of “active shoplifters” which was circulated to some 800 merchants in the vicinity of Louisville, Kentucky. Mr. Davis had been arrested by a store security

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78. *ld.* at 806.
79. *Id.* at 808.
80. 513 F.2d 925 (10th Cir. 1975).
81. *Id.* at 927-28.
82. *Id.* at 927.
guard for shoplifting in June, 1971. He was arraigned in September of that year and pleaded not guilty, at which time the charge was "filed away with leave [to reinstate]." The flyer including Mr. Davis' name and picture was issued in November 1972. Shortly after circulation of the flyer, a judge finally dismissed the shoplifting charge. In upholding the district court's dismissal of Davis' civil rights claim on the ground that it failed to allege deprivation of any constitutional right, the Supreme Court held that damage to Davis' "reputation" resulting from dissemination of the flyer did not deprive him of liberty or property within the meaning of the fourteenth amendment and did not intrude on the constitutionally protected zones of privacy recognized by previous decisions. Although there is room for disagreement, the ruling has been taken to mean that there is no right of privacy in arrest records under the United States Constitution.

In assessing the impact of Paul v. Davis on expungement cases, it is clear that the Supreme Court's holding that the interest in "reputation" alone will not be given constitutional protection could be relied on as grounds for denying motions for expungement. However, Paul v. Davis does not require a departure from cases permitting expungement. A significant difference between Paul v. Davis and the expungement cases is the nature of the relief sought. The plaintiff in Paul v. Davis sought damages as well as injunctive relief, a remedy which could have been obtained by a common law claim for defamation, as the Court suggested. An underlying motive of the decision appears to be to avoid expanding liability of government officers under section 1983. However, a more critical distinction which may be identified is the nature of the individual interest in privacy asserted by Davis. At the time the circular was issued, the charges against Davis had not been finally dismissed, but remained outstanding. In United States v. Kalish, the court distinguished between the rights of an individual before and after exoneration and concluded that the constitutionally protected right of privacy which justified expungement did not arise until after the arrestee had been acquitted or discharged. Thus, even under the expungement cases, no recognition was given to the individual right of privacy prior to final dismissal of charges underlying an arrest, and dissemination of arrest information in this pre-exoneration period would not be precluded.

85. 424 U.S. at 696.
86. Id. at 712-13.
87. See text accompanying notes 159-65 infra.
89. 424 U.S. at 697.
Expungement addresses the question of whether the government has a legitimate interest in disseminating arrest information after the arrestee has been exonerated. The issue of the individual right to privacy after acquittal or discharge is not directly determined by *Paul v. Davis*. Nevertheless, this decision may effectively block the road to relief in future federal cases on expungement if the Supreme Court's language is broadly construed.

**Other States: Eddy v. Moore, Davidson v. Dill, and United States v. Hudson**

This section does not purport to address the development of expungement case law in all state courts; instead, only three cases will be examined, all of which addressed the arrest record problem in terms of the individual right to privacy.

In *Eddy v. Moore*, the Washington Court of Appeals considered a petition for the return of fingerprints and photographs after charges of assault had been dismissed. The court pinpointed the problem of increased police scrutiny as a primary disadvantage flowing from an arrest record:

An individual who has been arrested and then acquitted has an undeniably greater visibility to the police than other persons. His fingerprints, and more particularly his photograph, are available to be shown to other citizens as a potential suspect to be chosen in prearrest lineups, an identification procedure frequently used by law enforcement agencies. Increased police scrutiny resulting from an arrest record and its potential invasion of the individual's private life, if it occurs, should rest upon rational factors.

The court then determined that when an arrested person had been acquitted of criminal charges, there remained no rational basis for the retention of fingerprints and photographs. Turning to an evaluation of the exonerated person's right to privacy, the court made reference to the fundamental principle that an accused is presumed innocent until proven guilty beyond a reasonable doubt and concluded:

We believe the right of an individual, absent a compelling showing of necessity by the government, to the return of his fingerprints and photographs, upon an acquittal, is a fundamental right implicit in the concept of ordered liberty and that it is as well within the penumbras of the specific guarantees of the Bill of Rights... Pursuant to this conclusion, the fingerprints and photographs were ordered returned.

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92. *Id.* at 344, 487 P.2d at 216.
In *Davidson v. Dill*, the Supreme Court of Colorado considered a motion for return or expungement of arrest records following a jury’s acquittal of the plaintiff who had been charged with loitering. Noting the increased threat of personal or economic harm posed by dissemination of computerized arrest records, the court considered whether the individual's right to privacy outweighed the public interest in retaining arrest records of acquitted defendants:

> The complaint presents an extremely important issue . . . involving a constitutional right of the highest magnitude—an individual's right to privacy vis-a-vis the propriety of the police retaining that person's arrest records in police files after he had been acquitted of criminal conduct.

After weighing the issue, the court reversed the dismissal of the plaintiff's action for failure to state a claim upon which relief could be granted.

One of the most interesting cases dealing with the arrest record problem was *United States v. Hudson*, decided by a superior court in the District of Columbia. The plaintiff sought expungement of records of his arrest for murder after proof that the victim was a suicide led to a dismissal of the charges against him. The court rejected the suggested alternative of entering a notation indicating no conviction as being "unrealistic," commenting, "[t]he existence of an arrest record, whether amplified or not, and whether or not followed by a conviction, will subject the arrestee to a host of disabilities . . . ." The court further concluded:

> Besides leading to the practical disabilities discussed earlier, failure to expunge an innocent person's arrest record violates constitutional protections, including the rights to privacy and due process. The courts have a special obligation, within their area of jurisdiction, to call a halt to the indiscriminate accumulation of information that threatens privacy and liberty.

The court raised several new questions, including whether permitting retention of arrest records could deprive the arrestee of due process in violation of the fifth amendment and constitute a denial of equal protection. The court further noted that there could be cases in which retention of arrest records would be warranted, as in dismissals of criminal charges due to suppression of vital evidence or the death of an essential witness. However, under the circumstances presented in the case at bar, the court felt that concern for the individual's right of

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96. Id. at 132, 503 P.2d at 162.
98. Id. at 2468.
99. Id. at 2469.
100. Id.
privacy and due process dictated an order that the arrest record be expunged.

In the three cases just discussed, the courts responded to the arrest record problem by providing judicial relief to protect the right of privacy of individuals who had been exonerated of criminal charges. We now turn to California's response.

California: The Failure of Judicial Relief

The first California case to address the arrest records problem was *Sterling v. City of Oakland*,\(^1\) decided in 1962 by the court of appeal. Mrs. Sterling had taken a taxi home, and, upon reaching her destination, attempted to pay the $1.90 fare with a twenty dollar bill. The taxi driver would not accept the bill, commenting that she should know better, and stating that he would take Mrs. Sterling to a place where she could get change and would charge her the extra fare. Mrs. Sterling refused to pay the extra amount. The taxi driver in turn refused to let Mrs. Sterling leave the cab, called the police, and made a citizen's arrest. Mrs. Sterling was booked for a misdemeanor,\(^2\) but the case was dismissed when the taxi driver did not appear to testify. Mrs. Sterling filed a civil action against the cab company for false imprisonment and malicious prosecution and obtained verdicts in her favor. She then brought an action against the City of Oakland seeking the return of her fingerprints and photograph and the destruction of her arrest record.\(^3\)

As an adult against whom criminal charges have been dismissed, Mrs. Sterling was (and still would be) outside the class of persons to whom the remedy of record sealing has been made available by legislation. The court refused to order the return of her fingerprints and photograph, noting that no California statute prescribed such action and distinguishing early cases from other jurisdictions which concerned the return of pictures publicly exhibited in a "rogue's gallery."\(^4\) Likewise, the court refused to order the return or expungement of Mrs. Sterling's arrest record, commenting upon the absence of legislation providing this remedy and suggesting that the statutory requirement for a disposition report\(^5\) to be included in criminal records afforded sufficient protection of Mrs. Sterling's interests.

The position taken by the court in *Sterling* was recently reiterated


\(^{103}\) 208 Cal. App. 2d at 3, 24 Cal. Rptr. at 697.

\(^{104}\) Id. at 6, 24 Cal. Rptr. at 699.

\(^{105}\) CAL. PEN. CODE §§ 11115-17 (West Supp. 1977).
by the California Supreme Court in *Loder v. Municipal Court.*\(^{106}\) Loder had been arrested for obstructing a police officer, battery, and disturbing the peace after he attacked a police officer who was beating Loder's wife with a nightstick. The officer was reported for the incident and temporarily suspended from duty. The complaint against Loder was subsequently dismissed in consideration for Loder's execution of a covenant not to sue. Loder then sought an order to compel the return or erasure of his arrest record and notification to all agencies which had received arrest data to do likewise, alleging that the receipt of this information by the San Diego school district resulted in his not being rehired.

The California Supreme Court opened its discussion of the *Loder* case by noting that there was no statute requiring erasure or return of arrest records and that, furthermore, there was a statute specifically prohibiting the destruction, alteration, or removal of government records.\(^{107}\) The court then discussed the multiple uses of arrest records in a number of stages of the criminal justice system, finding these uses to constitute a substantial government interest.\(^{108}\) Citing legislation\(^{109}\) directed at diminishing the risks of inaccuracy, improper dissemination, and economic disadvantages, the court concluded that the individual right of privacy was outweighed by concern for the promotion of more efficient law enforcement through limited retention and dissemination of arrest records.\(^{110}\) Noting that the legislature had recently failed to adopt a proposal to allow sealing of arrest records where charges were dismissed,\(^{111}\) the court reiterated the *Sterling* position that judicial intervention was unwarranted\(^{112}\) and affirmed the denial of Loder's request.

In view of *Loder v. Municipal Court,* a judicially created remedy of expungement or return of arrest records is not likely to be reached in California in the near future. Existing legislation does not provide the remedy of sealing to innocent persons against whom charges were brought and subsequently dismissed, although a recent statute offers this possibility for acquitted arrestees.\(^{113}\) Thus in California, there remains no recourse for the likes of Mrs. Sterling.


\(^{107}\) CAL. GOV'T CODE § 6200 (West Supp. 1977).

\(^{108}\) 17 Cal. 3d at 864-68, 553 P.2d at 628-30, 132 Cal. Rptr. at 468-70.

\(^{109}\) See, e.g., CAL. PEN. CODE §§ 11115-17 (disposition reports), §§ 11120-26 (examination by subjects of criminal records), §§ 11141-43 (unauthorized furnishing or receipt of records a misdemeanor) (West Supp. 1977); CAL. BUS. & PROF. CODE §§ 461, 475 (prohibiting denial of professional licenses) (West Supp. 1977); CAL. LABOR CODE § 432.7 (prohibiting use by employers of records of detention or arrest not resulting in conviction) (West Supp. 1976).

\(^{110}\) 17 Cal. 3d at 868-69, 553 P.2d at 630-31, 132 Cal. Rptr. at 470-71.

\(^{111}\) See note 150 & accompanying text, *infra.*

\(^{112}\) 17 Cal. 3d at 876, 553 P.2d at 636, 132 Cal. Rptr. at 476.

\(^{113}\) CAL. PEN. CODE § 851.8 (West Supp. 1976).
Statutory Schemes: Legislative Treatment of the Problem

The arrest record problem has not gone unnoticed in Congress and state legislative bodies. A thorough survey of existing legislation will not be attempted here, inasmuch as other commentators have catalogued the types of relief provided by state and federal statutes. However, an examination of a few examples of legislative responses to the arrest record problem outside California will be provided by way of introduction to the response of the California state legislature.

Federal Regulations and the Privacy Act

Although there is a limited provision for record cancellation provided by federal statute, it has been criticized as ineffective and is seldom invoked. Instead, the major reforms of the practice of widespread dissemination of arrest records by the FBI have been wrought by administrative action. Under recently added sections of the Code of Federal Regulations, the subject of an FBI record can request a copy of his record. If he believes the record to be incorrect and wishes to change it, he must apply to the contributor (usually the local law enforcement agency) of the questioned information; the FBI will change the record only upon receipt of an official communication from the contributing agency. A more significant change is the FBI’s new policy not to include arrest data over a year old in the records it disseminates for purposes of employment and licensing unless there has been a report of final disposition. However, this limitation does not apply to the dissemination of arrest information to law enforcement offices and agencies of the federal government.

A further measure directed at reducing the potential for individual harm resulting from dissemination of arrest records is the Privacy Act of 1974. This statute aims to limit dissemination unrelated to law enforcement purposes and establishes civil and criminal remedies for intentional disclosures in violation of the statute. A federal court recently interpreted this statute in Tennessean Newspaper, Inc. v.


118. Id. § 16.34.

119. 28 C.F.R. § 50.12(b) (1976).

120. Id. § 50.12(c).

Levi"^{122} as requiring the application of a balancing test to determine whether an invasion of privacy is unwarranted.

The net effect of these recent additions to federal regulations and statutes is to provide the remedy of limiting dissemination of FBI records and to curtail disclosure of incomplete arrest data outside the law enforcement context. However, any change in the records themselves must be made at the local level. Thus, state expungement or sealing statutes assume an important role.

State Legislative Remedies: Some Examples

The problems raised by arrest records have elicited responses from a number of state legislatures in the form of laws aimed at alleviating the burden on arrested persons discharged without conviction. The solutions provided include provisions for the destruction, return, or sealing of arrest records, or limitations on dissemination. Aside from these differences in the nature of relief granted, there are further distinctions to be drawn in the various states' approaches to record expungement or sealing. Whereas the relief is automatically provided in some states,\textsuperscript{123} in other states the exonerated arrestee must petition for relief.\textsuperscript{124} Some states provide for a hearing and judicial determination on whether to grant relief.\textsuperscript{125} Relief may be restricted to persons with no prior record.\textsuperscript{126} No attempt will be made to survey the variety of remedies available in the various states.\textsuperscript{127} Instead, attention will be focused on a few selected examples of legislative responses.

A first example of a statute providing for automatic relief is Connecticut's recently enacted legislation which provides for immediate erasure of all police and prosecution records relating to an arrestee who was subsequently acquitted or discharged without conviction.\textsuperscript{128} Under the statute, notice of erasure is forwarded to all agencies to which the arrest information is known to have been disseminated, and

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122. 403 F. Supp. 1318 (M.D. Tenn. 1975). However, the court found that the facts of the case (routine dissemination of arrest information to the news media) were insufficient to compel nondisclosure. Such routine disclosure did not violate the Privacy Act and was required by the Freedom of Information Act, 5 U.S.C. § 552 (1970 & Supp. V 1975).
125. Id.
127. For a discussion of remedies provided in various jurisdictions, see Comment, Criminal Procedure: Expunging the Arrest Record When There is No Conviction, 28 Okla. L. Rev. 377, 386-87 (1975).
the records themselves are either put in locked files or, at the exonerated individual's request, physically destroyed. Moreover, the relief is made retroactive, so that pre-1969 arrest records will be erased at the request of the arrested person. However, erasure is not allowed for a count for which a nolle probeui was entered, where the arrestee was convicted on other counts arising from the same transaction, and there is a thirteen month waiting period preceding the erasure of records of other charges terminated by entry of a nolle probeui. A comparable automatic sealing statute has been adopted in Missouri, under which records are sealed whenever an arrested person is found not guilty or the charges against him are followed by entry of a nolle probeui or dismissal. Missouri has further provided for automatic sealing within thirty days of records relating to a detention, and such records must be expunged after a year. In contrast to automatic relief, other states have provided for expungement upon the petition of the exonerated arrestee. In Maryland, a person who was detained and released can request expungement by written notice to the law enforcement agency involved, which must investigate the request. In the event of a denial, the arrestee can petition for a judicial hearing on the matter. Where there was an acquittal, dismissal, or nolle probeui, a hearing is held on the issue of expungement upon the filing of a petition by the arrestee. The court's decision can be appealed by both the state and the arrested person. Expungement is not allowed if the arrestee is subsequently convicted of another crime or is a defendant in a pending criminal proceeding, and there is a three year waiting period unless the arrestee waives any tort claims arising as a result of the arrest. A comparable provision allowing record sealing at the petition of an arrestee filed thirty days after dismissal or acquittal exists under Nevada law. Under this statute, there is a hearing on the issue at which the prosecutor may testify and present evidence. Following the hearing, the court may order the records sealed.

A final example representing another legislative answer to the arrest record problem is Arizona's provision for entering a notation that the arrestee was cleared and prohibiting the dissemination of the record where a person was "wrongfully arrested." An arrestee may petition the court for relief after obtaining a written statement from the prosecu-

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130. Id. § 610.100.
tor that the person will not be prosecuted. After a hearing on the petition, if the court believes that justice will be served by entry of a notation that the person was cleared, it can order such entry with an accompanying justification, after which no copies of the record may be released without a court order. While this statute does not provide for expungement, it offers protection for the limited class of persons arrested in error, but disallows this remedy for defendants who obtain dismissals on other grounds.

After this brief glance at a few of the solutions adopted by other states, we now turn to California's legislative response to the arrest record problem.

California's New Record Sealing Statute: Penal Code Section 851.8

In California, the legislature has made statutory provisions for the sealing of criminal records of a limited class of individuals. Until recently, the opportunity of having all official records sealed was available only to juveniles arrested for misdemeanors. Although the right to have one's record sealed has not been extended to persons released without being charged, Penal Code section 851.6 provides that records referring to such incidents as arrests will be deleted and they will be referred to only as detentions. Finally, in 1975, the legislature enacted section 851.8 of the Penal Code which provides the possibility of record sealing after acquittal where it appears to the judge that the defendant was "factually innocent."

In order to determine the value of this recent response to the arrest record problem, one must begin with an examination of the statute. Penal Code section 851.8 provides:

Whenever a person is acquitted of a charge and it appears to the judge presiding at the trial wherein such acquittal occurred that the defendant was factually innocent of the charge, the judge may order that the records in the case be sealed, including any record of arrest or detention, upon the written or oral motion of any party in the case or the court, and with notice to all parties to the case. If such an order is made, the court shall give to the defendant a copy of such order and inform the defendant that he may thereafter state that he was not arrested for such charge and that he was found innocent of such charge by the court. The relief offered by the new statute is not automatic but must be requested by motion or suggested by the court. While judicial review is indicated by the requirement that the arrestee must appear factually innocent to the trial judge, there is no specific provision for a hearing as


required in other states. However, if an arrestee's records are ordered sealed under this statute, all officers and agencies to which the arrest information was disseminated will be notified of the sealing order.\textsuperscript{136}

In considering how this new legislation serves to remedy the plight of the innocent arrestee, certain problems become apparent. Although the statute purports to offer relief to an acquitted arrestee, this relief is conditioned upon the trial judge's determination that the accused was "factually innocent." This limitation on the availability of sealing is comparable to the Arizona statute providing relief only to persons "wrongfully arrested."\textsuperscript{137} However, unlike the solution adopted in Arizona and other states, there is no mention of a hearing in the California statute, nor is there any express provision for appeal. Moreover, the California statute omits from the class of persons eligible for relief a number of potentially innocent persons wrongfully arrested but discharged by dismissal of charges. It is significant to note that the language of Penal Code section 851.8 is permissive, as contrasted with other sealing statutes. In Penal Code section 851.8, the judge is not required to order sealing if he believes the defendant to have been factually innocent; the statute only provides that "the judge may order that the records in the case be sealed." In contrast, the sealing remedy provided for under Penal Code section 851.7 for juveniles is codified in language suggesting that the remedy is mandatory: "If the court finds that the petitioner is eligible for relief under subdivision (a), it shall issue its order granting the relief prayed for." Likewise, Health and Welfare Code section 781 provides a mandatory sealing remedy if the eligibility requirements are satisfied.

The California remedy of sealing is thus available only to the few factually innocent persons who are forced to stand trial and are acquitted, and even those few are at the mercy of the court's discretion. There remains no relief for the likes of Mrs. Sterling.

\textbf{A Closer Look at the California Approach}

In view of the issues raised by newly enacted section 851.8 of the Penal Code and the holding in \textit{Loder v. Municipal Court},\textsuperscript{138} California's approach to the problem of arrest records deserves further analysis. In this inquiry, attention will first be focused on the background of the record sealing remedy in California. Then an attempt will be made to assess the substantive right created by Penal Code section 851.8 and to anticipate procedural considerations which will be important in giving

\begin{footnotes}
\item[136] \textit{Id.} § 11105.5. See note 28 \textit{supra}.
\item[137] \textit{ARIZ. REV. STAT. ANN.} § 13-1761 (Supp. 1976).
\end{footnotes}
effect to the statute. Finally, the discussion will turn to the shortcomings of the California approach, particularly the omission of any provision for relief for arrested persons against whom charges were never filed or were subsequently dismissed.

A Background of the Sealing Remedy in California

Record sealing was introduced as a remedy for juvenile offenders in the effort to ameliorate the handicap of a minor with a criminal record.139 Under section 851.7 of the Penal Code, sealing is required upon request to any minor arrested for a misdemeanor in cases where he was later released, acquitted, or the charges were dismissed.140 Sealing is also available in cases where a minor convicted of a misdemeanor in adult court finishes serving his sentence or successfully completes probation under Penal Code section 1203.45. Section 781 of the Welfare and Institutions Code extends the remedy to a minor subjected to the jurisdiction of the juvenile court upon a showing of rehabilitation five years after termination of the court's jurisdiction, or when the minor reaches the age of eighteen, so long as he has not been convicted of a felony or misdemeanor involving moral turpitude. It is significant that the courts were willing to expand the scope of these sealing statutes on equal protection grounds, rejecting the exclusion of certain crimes from the sealing remedy.141 However, in T.N.G. v. Superior Court,142 the supreme court rejected an argument that the imposition of a five year waiting period before sealing under Welfare and Institutions Code section 781, where no such requirement existed for minors tried in adult court, violated the equal protection clause of the fourteenth amendment.

One of the most innovative extensions of the record sealing remedy on equal protection grounds was the reasoning in McMahon v. Municipal Court.143 The case involved requests to seal the records of three juveniles who were arrested for statutory rape but who were later advised that no complaints would be filed against them. Penal Code

140. Note that since the reduction of the age of majority to eighteen, the remedy provided by Penal Code section 851.7 is available to a substantially smaller class because minors are seldom "arrested" for misdemeanors. The general practice is to subject minors to the jurisdiction of juvenile court in which case they are not deemed "arrested." See T.N.G. v. Superior Ct., 4 Cal. 3d 767, 484 P.2d 981, 94 Cal. Rptr. 813 (1971); CAL. WELF. & INST'NS CODE § 625 (West Supp. 1976). See also CAL. CIV. CODE § 25.1 (West Supp. 1976). But see CAL. PEN. CODE § 851.7(g) (West Supp. 1976).
142. 4 Cal. 3d 767, 484 P.2d 981, 94 Cal. Rptr. 813 (1971).
section 1203.45 provided for the sealing of records of misdemeanor convictions after completion of sentence or probation, but made no provision for sealing records of felony arrests followed by release or dismissal. The court of appeal reasoned that if the defendants had initially been arrested for statutory rape and burglary, but the rape charges were dropped and the arrestees had been convicted of misdemeanor burglary, they would have been entitled to petition for the sealing of the entire arrest record. After exploring this hypothetical, the court held that it could “find no rational basis for denying the right to seek relief to a minor arrested for rape, but never formally charged.” The court then declared Penal Code section 1203.45 void insofar as it excluded relief to juveniles arrested for felonies but not charged.

A recent case on expungement and record sealing is People v. Municipal Court (Blumenshine), in which a person arrested for a marijuana offense was subsequently discharged on the ground that there was insufficient cause to believe him guilty of a public offense. The municipal court granted the arrestee’s motion to have all records, including fingerprints and photographs, recovered and destroyed. The superior court set aside the order and the court of appeal affirmed, holding that the municipal court had no jurisdiction to order the destruction of records. However, the court suggested that the municipal court would have had the jurisdiction to order the arrest records sealed under Penal Code section 1203.45 after a hearing on the merits. The case was appealed to the California Supreme Court which initially granted a hearing, but the cause was subsequently retransferred to the court of appeal for reconsideration in light of footnote 12 in Loder v. Municipal Court. The Loder footnote refers to cases expanding juvenile record sealing on equal protection grounds but notes that the limiting of the remedy to juveniles was not a basis for an equal protection claim by Loder. Inexplicably, the Blumenshine opinion did not specify whether or not the arrestee was a juvenile, but the retransfer of the case in light of the Loder footnote indicates that this was most likely the case.

Considering the willingness of the courts to expand the record sealing remedy under statutes applying to juveniles, it is conceivable that an equal protection argument could be made for expanding the availability of relief for adults created by section 851.8 of the Penal Code. For example, one could argue that an innocent person whose case is dismissed is denied the protection afforded a person who was tried, acquit-
ted, and able to establish his factual innocence. However, the chances of succeeding in such an argument are admittedly negligible in view of the position taken by the supreme court in *Loder v. Municipal Court*. Notably, the court referred to the legislative history of Penal Code section 851.8 as supporting its holding that judicial intervention was unwarranted.

Tracing the history of section 851.8 of the Penal Code provides some potential rights regarding the underlying purpose of this legislation. Senate Bill 299 was first introduced in January of 1975 as an amendment to Penal Code section 851.7, which, as discussed above, allows sealing of records of misdemeanor arrests of juveniles where there was no conviction. The original bill extended the remedy of sealing to adults and applied to *any* offense where there had been a release, dismissal, or acquittal. The arrestee could move to have all records of the arrest sealed, but in the absence of such a motion, the court was required to make the motion in his behalf. The bill also proposed that the relief would be retroactive, thus applying to all prior cases where there had been a release, dismissal, or acquittal, including records held in California of arrests which had occurred in other states. A later version of the bill was amended to limit the availability of the relief by the provision, "Sealing shall not be ordered in any case unless the court finds that the interests of justice so require, and that there is not a preponderance of competent evidence establishing the guilt of the defendant." Subsequent revisions deleted all references to Penal Code section 851.7 and limited the availability of sealing to cases of acquittal.

As finally enacted, Penal Code section 851.8 provides that records may be ordered sealed following acquittal of a defendant who appeared factually innocent to the trial judge. The court is not required to order the records sealed if the acquitted person fails to make a motion for such an order, although it may order sealing on its own motion. The trial judge may deny the motion if he remains unconvinced of the defendant's innocence. In enacting Penal Code section 851.8, the legislature has created two critical areas of ambiguity: the scope of the substantive right and the procedure by which this right is to be protected.

**The Scope of the Substantive Right**

The substantive right created by section 851.8 of the Penal Code is the right of an accused to move for the sealing of all records following acquittal of criminal charges. However, the right to relief conferred by the statute is not absolute but conditional and permissive. The condi-

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149. See note 140 & accompanying text *supra*.
tion precedent to an acquitted defendant's right to have his record sealed is that he appear factually innocent to the judge presiding at the trial. Moreover, while the judge "may" grant the motion, he is not required to do so.\textsuperscript{152} The meaning of the prerequisite that the defendant appear factually innocent thus becomes of critical importance, since the defendant's right to relief is almost entirely left to the trial judge's discretion in granting or denying the motion.

The factual innocence requirement poses a host of questions regarding the role of the trial judge. Assuming that a defendant was acquitted by a jury, does the statutory provision requiring factual innocence mean that the judge may deny the defendant's motion because he disagrees with the jury's verdict? Such a situation could potentially arise whenever the judge is inclined to disbelieve the testimony of defense witnesses or the defendant or where the defendant does not take the stand. A further problem presented by the factual innocence requirement is the consideration that the judge may have knowledge of evidence which was excluded from the trial, such as a confession obtained without sufficient \textit{Miranda} warnings or unconstitutionally seized evidence. Inevitably, this suppressed evidence of possible guilt, if believed by the trial judge, will influence his opinion of whether or not the defendant was factually innocent. Should a judge who is aware of evidence tending to establish the guilt of the defendant be prevented from considering it in determining whether to grant an order sealing the defendant's records? An attempt to answer such questions provides a means of delineating the boundaries of the substantive right of an acquitted arrestee to have his records sealed.

In addition to the express requirement that the defendant appear factually innocent of the charge, Penal Code section 851.8 makes a further reference to innocence by the provision that a defendant who is successful in moving to have his records sealed "may thereafter state . . . that he was \textit{found innocent of} such charge by the court."\textsuperscript{153} These express references to innocence suggest a legislative intent to provide the remedy of sealing only to persons who were mistakenly arrested and prosecuted. An acquittal is not necessarily equivalent to a finding of innocence, but really amounts to a finding that the prosecution has not sufficiently proved its case beyond a reasonable doubt. An order sealing the records of an acquitted arrestee, however, amounts to a finding of innocence by the court. Since relief under Penal Code section 851.8 is allowed only to individuals who appear factually innocent rather than to all acquitted defendants, it may be reasonably inferred that the trial judge's determination was intended to be made from all the evidence at his disposal.

\textsuperscript{152} See text accompanying notes 137-38 \textit{supra}.

\textsuperscript{153} \textsc{Cal. Pen. Code} § 851.8 (West Supp. 1976) (emphasis added).
Assuming that the judge may consider additional prosecution evidence excluded from the trial, the question remains as to whether he may also base his findings upon his personal disbelief of defense witnesses or the failure of the defendant to take the stand. Since the statute provides for sealing only when it "appears to the judge . . . that the defendant was factually innocent," it would seem that the court would be acting properly in basing a decision not to order the record sealed on its assessment of the credibility of defense witnesses. Evaluation of the defendant's failure to testify would also seem appropriate, as the fifth amendment privilege against self-incrimination would not be applicable. If a ruling may be made upon such considerations, the crucial issue posed is whether, after his acquittal, the defendant moving for a sealing order is entitled to present further evidence to establish his innocence.

In addressing this question, it should be recalled that during the trial, the prosecution has the burden of proving the defendant's guilt beyond a reasonable doubt; the defendant has no burden of proving his innocence and need not even testify on his own behalf. However, since section 851.8 of the Penal Code requires that the defendant appear factually innocent, it is conceivable that the judge may be unwilling to grant a motion for sealing in the absence of additional evidence tending to establish the defendant's innocence, where such evidence was not presented at the trial. It follows that the acquitted defendant should be given the opportunity to present additional evidence.

Unlike expungement and sealing statutes of other states, Penal Code section 851.8 does not expressly provide for a hearing in which the state and the defendant would have the opportunity to present evidence. However, authority for the proposition that a hearing is required may be found in the due process clause and considerations of protecting the freedom to choose to exercise the fifth amendment privilege against self-incrimination.

To argue that Penal Code section 851.8 involves an interest subject to due process considerations, it becomes necessary to distinguish this right from the "reputation" interest denied constitutional protection in Paul v. Davis. There are essentially two grounds for the argument that the record sealing opportunity provided in section 851.8 amounts to a fundamental right within the scope of constitutional protection. The

155. E.g. CAL. EVID. CODE § 413 (West 1966).
156. See text accompanying note 201 infra.
first ground for such an argument is the distinction between the factual and chronological contexts involved in *Paul v. Davis* and the California statute. In *Paul v. Davis*, the plaintiff was seeking tort damages (rather than sealing or expungement) for dissemination of arrest information before final disposition of the charges against him. As has been recognized by numerous decisions and codified by the Freedom of Information Act, there is no constitutionally protected right of privacy of arrest records in the period immediately following an arrest. Apart from due process issues, the press is guaranteed absolute freedom by the first amendment to report any facts pertinent to an arrest. In contrast to this unprotected interest before final disposition of the charges, Penal Code section 851.8 involves the interest in a sealing remedy to preserve the privacy and liberty interests of an arrestee after acquittal.

The distinction between pre-exoneration and post-exoneration privacy interests has not failed to receive judicial recognition. The difference was initially delineated by a federal district court in *United States v. Kalish*: When arrested, an accused does not have a constitutional right of privacy that outweighs the necessity of protecting society and the accumulation of this data, no matter how mistaken the arrest may have been. However, when an accused is acquitted of the crime or when he is discharged without conviction, no public good is accomplished by the retention of criminal identification records. . . . His privacy and personal dignity is invaded as long as the Justice Department retains "criminal" identification records, "criminal" arrest, fingerprints and a rogue's gallery photograph.

This distinction between pre-exoneration and post-exoneration interests was also enunciated by the court of appeal for the state of Washington which concluded that after exoneration there was a right of privacy which was within the penumbra of constitutional protection:

We believe the right of an individual, absent a compelling showing of necessity by the government, to the return of his fingerprints and photographs, upon an acquittal, is a fundamental right implicit in the concept of ordered liberty and that it is as well within the penumbras of the specific guarantees of the Bill of Rights.

Similarly, the Colorado supreme court considered the question of record expungement after acquittal as "involving a constitutional right of the highest magnitude—an individual's right to privacy." These exam-

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163. 271 F. Supp. at 970 (emphasis added).
amples of judicial recognition of a post-exoneration constitutional right to privacy in cases directly addressing the arrest record problem (in the absence of any statutory provisions for relief) suggest that an attempt to distinguish *Paul v. Davis* on this ground is not altogether unreasonable. However, it is obvious that to recognize the privacy interest of all exonerated defendants as being constitutionally protected would have dramatic ramifications and pose serious problems in the context of existing law enforcement practices and record dissemination procedures.

Notably, the decisions discussed above which found a post-exoneration constitutional right to privacy did so as a means of affording relief where there was no statutory provision. A possible second ground for arguing that the record sealing opportunity provided by Penal Code section 851.8 involves a constitutionally protected interest is the fact that the interest involved, by being given special statutory recognition, has a perceptively different status than the "reputation" interest in *Paul v. Davis*. It is significant that in finding no "liberty" or "property" interest to be given constitutional protection in *Paul v. Davis*, the Supreme Court expressly noted that Kentucky law "does not extend to respondent any legal guarantee of present enjoyment of reputation . . . ". The Court further noted that statutory recognition of an interest can bring it within the protection afforded by the fourteenth amendment:

> It is apparent from our decisions that there exist a variety of interests which are difficult of definition but are nevertheless comprehended within the meaning of either "liberty" or "property" as meant in the Due Process Clause. *These interests attain this constitutional status by virtue of the fact that they have been initially recognized and protected by state law, and we have repeatedly ruled that the procedural guarantees of the Fourteenth Amendment apply whenever the State seeks to remove or significantly alter that status.*

Thus the question posed is whether the "liberty" related privacy interest furthered by California Penal Code section 851.8 may have attained constitutional status by virtue of having been codified in a statute providing a sealing remedy.

Admittedly, there are serious obstacles to be faced in asserting that the interest codified by Penal Code section 851.8 is within the range of interests protected by procedural due process. An initial hurdle to be overcome in arguing that the statutory right afforded by Penal Code section 851.8 is constitutionally protected is the observation that due process safeguards have been invoked in connection with the revocation of statutory "liberty" and "property" interests, rather than their initial

166. 424 U.S. 693, 711 (1976).
167. *Id.* at 710-11 (emphasis added).
conferral. For example, in *Goldberg v. Kelly,* the Supreme Court held that the fourteenth amendment required a pre-termination evidentiary hearing to afford the welfare recipient his due process right to be heard before termination of his "property" interest in continuing to receive welfare. In *Morrissey v. Brewer,* the question of due process protection arose when the conditional grant of liberty to a parolee was to be summarily revoked. In these cases, the procedural protections of the fourteenth amendment applied to a subsequent loss of "property" or "liberty" interests which had previously been conferred. Thus it becomes problematic to assert that fourteenth amendment due process protections necessarily apply to require a hearing in the initial determination of whether to grant a sealing motion under Penal Code section 851.8.

Significantly, in at least one context, the California Supreme Court has held that due process applies to a proceeding held to determine whether a person will be granted an anticipatory interest. In *In re Sturm,* a case concerning the rights of prison inmates in parole release hearings, the court stated that some minimum incidents of due process must be observed by the Adult Authority. Recognizing that the presently enjoyed, albeit conditional, liberty interest of parolees facing possible revocation is more substantial than a "mere anticipation or hope of freedom," the court declined to impose all the procedures mandated for revocation proceedings by *Morrissey.* Without explaining why due process applied or expressly defining the anticipatory liberty interest as being of constitutional dimension, however, the court opened the door to expansion of procedural protections to situations involving the grant or conferral of interests significantly affecting the individual. There is thus authority for the proposition that due process safeguards

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168. An obvious explanation for the distinction adopted by the courts is found in the wording of the fourteenth amendment: "nor shall any State deprive any person of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. XIV (emphasis added).


171. *Id.* at 482. Footnote 8 in the court's opinion points out a cognizable distinction between the revocation of previously granted liberty and the anticipation of freedom prior to release.


173. *Id.* at 266, 521 P.2d at 102, 113 Cal. Rptr. at 366.

174. *Id.*

175. The United States Supreme Court recently granted certiorari to decide whether due process applies in parole release hearings. After the death of one petitioner and the parole of another, however, the case was remanded to the Sixth Circuit for consideration of the question of mootness. *Scott v. Kentucky Parole Bd.,* 429 U.S. 60 (1976). For a list of cases from the federal courts of appeals on the issue, see the dissenting opinion of Justice Stevens. *Id.* note 1.
may be required in conferral situations, and the fact that the proposed hearing under Penal Code section 851.8 would only involve the granting of a statutory right is not necessarily a basis for rejecting the claim for procedural due process.

The question of whether a non-tenured teacher had a due process right to a hearing when his contract was not renewed was answered in the negative by the United States Supreme Court in Board of Regents v. Roth. In Roth, the Court noted that the state did not stigmatize or defame Roth in the course of terminating his employment, the implication being that had it done so, Roth's constitutionally protected liberty interests would have been infringed:

The State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community . . . .

Similarly, there is no suggestion that the State, in declining to re-employ the respondent, imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities.

In Paul v. Davis, the Court quoted the above language from Roth and acknowledged that Roth could require a hearing on the issue of defamation in such situations. A situation which would seemingly be within the Roth hypothetical is present in the case of the denial of a section 851.8 motion. If it can be stated that in the course of seeking the statutory right created by Penal Code section 851.8, an acquitted defendant to whom the sealing remedy has been denied is left with an unanswered "charge against him," then his due process rights are violated unless he has been granted a hearing on that "charge." This is true despite the fact that neither defamation by the state nor denial of the sealing remedy would independently invoke the protections of the due process clause.

A crucial factor in determining whether the defendant has been stigmatized by the state is the consideration that the judge's failure to make a finding of innocence and refusal to order the record sealed amounts to an implied finding of guilt despite the verdict of not guilty. Thus the denial of a section 851.8 motion leaves the acquitted defendant with an arrest record amplified by an implied judicial determination of guilt, which clearly could be viewed as a "charge against him that might seriously damage his standing and associations in

177. Id. at 573 (emphasis added).
his community."181 When one considers the fact that an arrest record alone subjects the arrestee to continued police scrutiny and may be disseminated for purposes of employment and licensing by the FBI,182 it is clear that an arrest record coupled with an implied finding of guilt has a greater potential for causing future disadvantages which is well within the "stigma or other disability" criteria identified by Roth as invoking the need for procedural safeguards under the fourteenth amendment. The denial of a section 851.8 motion attaches a greater stigma to the defendant than he would have had if he had made no motion; the acquitted arrestee is left in a worse position than he would have been had the statute never been enacted. In light of this effect, some type of minimal hearing would seem to be required.

Apart from the fourteenth amendment, one may still find a requirement for hearing based upon considerations of the potential impairment of the freedom to exercise the fifth amendment privilege against self-incrimination. A frequent problem in criminal prosecutions is the practical inability of the defendant to take the stand in his own behalf due to the existence of prior convictions which may be introduced for impeachment purposes. Although the fifth amendment is violated by any suggestion at the trial that guilt may be inferred from a failure to testify,183 it is likely that a judge may properly consider this factor in deciding upon a section 851.8 motion.184 If the defendant's opportunity to testify is confined to the trial itself, a decision not to take the stand will be made at the cost of probably failing in a motion to seal the record upon acquittal. Thus, the absence of any provision for a post-acquittal hearing requires an individual facing trial to make a choice between the exercise of his fifth amendment right and the potential statutory right to an order sealing the record.

Constitutional problems may arise if Penal Code section 851.8 is not interpreted so as to give a criminal defendant who chooses not to take the stand a right to testify at a post-acquittal hearing. The constitutional validity of an application of the statute so as to deny a hearing may be questioned in light of United States v. Jackson,185 a case involving the death penalty provision of the Federal Kidnapping Act.186 Under that statute, the death penalty could be imposed only upon a jury's recommendation. Section 1201 of the Act thus "made the risk of death the price of a jury trial"187 and imposed "an impermissible burden

181. Board of Regents v. Roth, 408 U.S. at 573.
182. See text accompanying notes 166-67 infra.
184. See text accompanying notes 155-56 supra.
upon the exercise of a constitutional right . . . .”

As the Court subsequently noted:

Because the legitimate goal of limiting the death penalty to cases in which a jury recommends it could be achieved without penalizing those defendants who plead not guilty and elect a jury trial, the death penalty provision “needlessly penalize[d] the assertion of a constitutional right” . . . and was therefore unconstitutional.

Turning to the dilemma posed by Penal Code section 851.8, a criminal defendant who does not testify at the trial will in all likelihood be deprived of the statutory right to have his record sealed unless he is provided with the opportunity to testify at a post-acquittal hearing. A defendant intending to pursue the sealing remedy must choose between testifying at the trial and, hopefully, presenting evidence establishing the fact of his innocence in the mind of the trial judge, or asserting his fifth amendment privilege not to take the stand. The decision not to testify is thus made at the price of losing, as a practical matter, the statutory sealing remedy. That a burden is thereby imposed on the nontestifying defendant calls for further inquiry in light of the Jackson analysis. It must be determined whether the burden is “impermissible,” that is, whether there are other methods of achieving the goals of Penal Code section 851.8 without “needlessly penalizing” the exercise of the fifth amendment privilege. The legislative history and the plain language of the statute evidence a purpose to confine the sealing remedy to those arrested persons who were in fact innocent. This objective may be accomplished without impairing the defendant’s choice of exercising his fifth amendment rights at the trial. A simple and obvious alternative is to provide a post-acquittal hearing at which time the defendant is provided an opportunity to testify. Of course, if the defendant refuses to testify again at this post-acquittal hearing, the judge could hold this against him. Providing the defendant with an opportunity to testify after acquittal will thus not impede the statutory goal of restricting the sealing remedy to those who are innocent. This being the case, the Jackson analysis indicates that an acquitted defendant who does not testify at the trial must be given a chance to testify as to his innocence at a post-acquittal hearing.

190. See text accompanying notes 149-51 supra.
192. It may be argued that Jackson is distinguishable on its facts in that the death penalty is a far greater burden than the mere loss of a statutory sealing remedy. Nevertheless, the defendant’s constitutional rights are compromised by the fact that he must choose between asserting his fifth amendment privilege and obtaining the statutory remedy.
To recapitulate, section 851.8 of the California Penal Code serves to protect against potential infringements of fundamental privacy and liberty interests of innocent persons by a provision for ordering criminal records sealed after acquittal. In the requirement that sealing be allowed only to acquitted persons appearing factually innocent, the statute creates a serious problem for defendants whose motions under the statute are denied, for the failure to obtain a sealing order implies a judicial determination of guilt. Although an acquitted defendant has been provided an opportunity to establish a defense during his trial, it may be argued that fourteenth amendment due process or fifth amendment considerations require that a post-acquittal hearing be provided to allow him the opportunity to present further evidence to establish his innocence in order to obtain the benefit of the statute, especially where the defendant, in the exercise of his fifth amendment privilege, chose not to present such evidence in the course of the trial. The failure to provide an acquitted defendant the opportunity to present additional evidence would confine the trial judge to a consideration of evidence presented at the trial and possibly other excluded prosecution evidence. The lack of a full hearing on the issue may result in an unwarranted denial of the defendant's motion for record sealing.

To afford some protection of the substantive right to have one's records sealed, there must be some procedure by which the acquitted person is guaranteed an opportunity to present any additional evidence establishing his innocence. It is to the nature of this procedure that this inquiry must now turn.

Procedural Considerations

In addressing the problem of what procedure must be afforded an acquitted defendant moving to have his records sealed, it is necessary to review the context in which such a motion would arise. Penal Code section 851.8 provides that the motion to order records sealed may be made by the court or any party in the case. Conceivably, the prosecution or the trial judge may make a motion under the statute, but it may be safely assumed that in most cases the motion will be made by the acquitted defendant. Thus, the procedural questions which arise concern the rights of the exonerated defendant at a post-acquittal hearing, the standards governing evidence and proof, and the possibility of appellate review of the trial judge's decision on the motion.

193. The United States Supreme Court has held that "a statute creating a presumption which operates to deny a fair opportunity to rebut it violates the due process clause of the Fourteenth Amendment." Heiner v. Donnan, 285 U.S. 312, 329 (1932). The potential application of this case to the arrest record problem was proposed in Comment, Employment of "Criminal Record Victims" in Missouri: Restrictions and Remedies, 41 Mo. L. Rev. 349, 369 (1976).
In determining the rights of the acquitted defendant, it is important to recall that a post-acquittal hearing would take place after a trial on the merits. The position of the exonerated accused would no longer be that of a defendant facing criminal charges and possible imprisonment; thus some of the constitutional rights guaranteed to an accused in a criminal prosecution would probably no longer apply, these rights being applicable only at trial or other critical stages of a prosecution. Moreover, the hearing need not involve a presentation of all pertinent information, because the trial judge would already be familiar with all of the evidence presented at the trial, as well as other evidence held inadmissible. Since the statute specifically provides that the motion is to be decided by the judge who presided at the trial, it is clear that a post-acquittal hearing cannot be viewed as a retrial on the merits. Instead, the sole purpose of the hearing should be to enable the exonerated defendant to provide any additional information not presented at the trial, in the effort to establish the fact of his innocence. In view of these factors, the post-acquittal hearing can reasonably be expected to be more informal than a criminal trial. To determine the rights of the exonerated defendant at this hearing, reference must be made to other types of informal procedures.

The question of what minimum due process requirements govern informal hearings was considered by the United States Supreme Court in *Morrissey v. Brewer.* In *Morrissey,* the Court held that in parole revocation hearings, minimum due process requirements included the opportunity to be heard and to present witnesses and evidence, noting that "the process should be flexible enough to consider evidence including letters, affidavits, and other materials that would not be admissible in an adversary criminal trial." The Court also held that due process required a written statement giving the reasons for the decision. While the Court did not decide the question of whether there was a right to counsel in *Morrissey,* this issue has been addressed in several subsequent cases involving other types of informal proceedings, and in California the right to court-appointed counsel has been held applicable, on non-constitutional grounds, to probation and parole revocation hearings. These standards provide a useful starting point for considering what procedures might be adopted for a post-acquittal hearing on a record sealing motion.

194. *See,* e.g., Coleman v. Alabama, 399 U.S. 1 (1970) (preliminary hearing is "critical stage" at which accused is entitled to an attorney).
196. *Id.* at 489.
Since the primary purpose of the hearing would be to allow the acquitted person to provide information confirming his innocence, it is logical to conclude that evidentiary rules should be relaxed so as to enable the introduction of any exonerating evidence which may have been inadmissible or unavailable at the trial as is done in other administrative or quasi-judicial proceedings.199 This flexible approach to the right to present evidence is particularly warranted by the consideration that the judge is familiar with prosecution evidence held inadmissable.

Secondly, a strong argument can be made in support of a requirement that the trial judge state for the record the reasons for his decision on the motion. Such a requirement ensures the possibility of review of his decision.

Regarding the right to counsel, an important aspect of the post-acquittal hearing is that it immediately follows the trial. Once the verdict is in and the motion is made, the informal hearing is, in effect, ready to begin.200 Since the defendant will usually have been represented by counsel at the trial, and since the motion under section 851.8 will most probably be made by the defendant’s attorney, it would seem reasonable to allow the defendant to remain assisted by counsel. Another argument in support of a right to counsel is the consideration that the hearing is likely to be an adversary proceeding, in which the prosecution will be permitted to rebut new evidence, cross-examine new witnesses and the defendant, and present incriminating evidence excluded at the trial. However, it must be remembered that the post-acquittal hearing is not a retrial and the acquitted defendant is not jeopardized by any subsequent proof of his guilt. Thus, the position of an acquitted defendant is analogous to that of a plaintiff in a civil action for malicious prosecution. Since the acquitted person is immune from further prosecution, it is more likely that while he will be allowed to retain counsel, the right to court-appointed counsel will not apply.

A final question regarding the rights of individuals in post-acquittal hearings is whether the fifth amendment privilege against self-incrimination will apply. Since the hearing contemplated is not a


200. However, it is possible that situations will arise in which there is a substantial period of delay before the motion for record sealing is made, as in the case of written motions upon discovery of new evidence or inadvertence of counsel in failing to make the motion. The statute does not delineate any time period within which the motion must be made, nor does it refer to the possibility of retroactive application. While it is conceivable that a person acquitted prior to the enactment of Penal Code § 851.8 could avail himself of the statute, this possibility seems remote in the absence of an express provision for retroactive application of the relief.
criminal trial, and since the acquitted defendant does not face the possibility of incriminating himself, there is no reason to believe the privilege will apply. Thus the trial judge may be able to insist that the acquitted defendant testify, since the purpose of the hearing is to provide the judge with evidence sufficient to permit him to make a finding of innocence.

Turning from the issue of individual rights to the hearing itself, key questions for consideration include the burden of proof and the standard to be applied in the determination of the defendant's factual innocence. With regard to who has the burden of proof, it seems likely that the exonerated defendant will have the primary responsibility of establishing his innocence. Unlike a criminal case in which the prosecution must prove the defendant's guilt, the purpose of the hearing is to give the defendant an opportunity to present additional exculpatory evidence. Since there is no threat of further prosecution, it is arguable that the presumption of innocence will no longer apply, and, like the plaintiff in a civil action, the exonerated defendant must bear the burden of proof.

With regard to the issue of the standard which should govern the judge's determination of factual innocence, it appears that a preponderance of evidence test should be adopted. The hearing would not be at all similar to cases in which fraud or criminal guilt was alleged, and there is no basis for imposing a higher standard than that governing most civil actions.

In determining the reviewability of a decision under Penal Code section 851.8, the first question to be answered is who may appeal the decision. In the event that the motion is denied, the exonerated person may base an appeal on the authority of Penal Code section 1237(2), which provides that "[a]n appeal may be taken by the defendant . . . [f]rom any order made after judgment, affecting the substantial rights of the party." The fundamental right created by Penal Code section 851.8 is clearly affected by a denial of the motion, thus permitting appeal of the order. Likewise, it is arguable that the prosecution could appeal the decision allowing sealing as "[a]n order made after judgment, affecting the substantial right of the people," in that the government has a substantial interest in maintaining arrest records, as recognized in Loder v. Municipal Court. Assuming that a denial of a

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203. See id. § 115.
motion under Penal Code section 851.8 is subject to review, the final question for consideration is the actual feasibility of appealing the decision.

For purposes of appellate review, the trial court's findings of fact are presumed to be correct, and the test on appeal is thus whether there is any substantial evidence, direct or indirect, contradicted or uncontradicted, which will support the finding. While it is possible that the transcript of the trial and the post-acquittal hearing may show the trial judge's determination to be "so lacking in evidentiary support that a reviewing court would be impelled to reverse it on appeal," such a result would be extremely rare. The trial judge who heard the criminal trial and the post-acquittal evidence will probably seldom, if ever, be reversed in his decision to grant or deny sealing of the record. The legislative intent that the trial judge make the determination of innocence is codified in the statute, and it is highly unlikely that an appellate court confronting a cold record will be willing to disturb that finding of fact.

A post-acquittal hearing, however, would at least ensure that an acquitted person would have an opportunity to be heard and present evidence of his innocence prior to a decision affecting his substantive right to have his record sealed. We now turn to the question of innocent persons who lack any substantive right to sealing of arrest records.

Shortcomings of the Statute: The Omission of Relief for Dismissals

As a response to the problem of the innocent arrestee, the primary flaw in the legislative solution provided by Penal Code section 851.8 is that it doesn't go far enough. The new statute provides the remedy of record sealing for a limited class of adult arrestees who are actually tried and acquitted and who are successful in satisfying the trial judge of their factual innocence. Omitted from the statute is a provision to afford the same protection to equally innocent persons whose arrests were followed by dismissal of the charges.

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208. Id.

209. It is conceivable that some cases of reversal would arise, as in instances in which the true offender is subsequently apprehended and this new evidence establishes the factual innocence of the exonerated defendant.

210. In addition, a court is not compelled to seal the record even if the exonerated person is found factually innocent. Thus, reversal will occur only in the extreme unlikelihood that a record exists showing that the court based its decision not to seal solely on a refusal to find the exonerated person factually innocent, a finding for which there is no substantial evidence. See text accompanying notes 137-38 supra.
The failure of the legislature to extend relief to arrestees in cases of dismissal was cited as a rationale for judicial inaction in *Sterling v. City of Oakland*211 and *Loder v. Municipal Court*. In *Sterling*, the court noted that a 1961 bill which would have provided for expungement of arrest records was never enacted. The 1961 bill was only one of numerous attempts in the legislature to expand the class of persons entitled to seek expungement of criminal records.213 One commentator suggested that a major reason for the rejection of such legislative proposals is the considerable cost and clerical difficulties which would be involved in processing the number of cases in which the records could be sealed.214 In *Loder*, the court viewed the omission of relief for dismissals as indicative of legislative intent, commenting:

But legislative history strongly suggests the omission was deliberate. In these circumstances we should defer to the implied determination of the lawmakers that the compelling state interests identified hereinabove outweigh the speculative significance of a dismissal "for lack of prosecution," a disposition which may be predicated on many grounds other than factual innocence.215

However, legislative omission of relief for dismissals was only one of the reasons given by the court in holding that judicial intervention was unwarranted. The court further held that the privacy interest of an arrestee following dismissal was counter-balanced by the government's interest in effective law enforcement and that in any event recent legislative and administrative action had decreased the potential for harm posed by the retention of arrest records.216

As pointed out by the supreme court in *Loder*, the legislature has enacted a number of statutes aimed at eliminating the danger of inaccuracy and improper use of arrest records. In the case of a person arrested but released without being charged, Penal Code section 851.6 provides that all references to the arrest must be deleted and replaced by the term "detention," and that notice of this disposition is forwarded to all recipient agencies.217 To alleviate the problems resulting from incorrect or incomplete records, statutory provisions have been made requiring the dissemination of disposition reports to all agencies to which arrest data was furnished,218 and permitting the subject of a criminal

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211. 208 Cal. App. 2d 1, 24 Cal. Rptr. 696 (1962).
216. Id. at 869, 553 P.2d at 631, 132 Cal. Rptr. at 471.
218. See id. §§ 11115-17.
record to inspect the record and request corrections. To diminish the use of arrest records outside the law enforcement context, legislation has been enacted limiting dissemination to agencies with authorized access and prohibiting denials of professional licenses or employment based on the existence of an arrest record.

While these statutes evidence legislative concern for correcting a number of the problems associated with arrest records, they leave an arrestee whose records are not sealed vulnerable to future harm from two sources. First, the FBI retains the arrest record in its files and continues to have the authority to disseminate this information to banks and to state and local governments "for purposes of employment and licensing." Secondly, the arrestee remains subject to continued police scrutiny as a result of the retention of his records in police files. In addition to the routine use of his mug shot and fingerprints in subsequent investigations of crimes of which the arrestee may have no knowledge, the arrestee will find his arrest records to be a disadvantage to him in various stages of the criminal process should he ever become entangled in it again.

In view of the remaining disadvantages which result from an arrest record, a person who is innocent may understandably wish to have his records sealed. However, under existing legislation, this remedy is available only if an arrestee is acquitted following a trial. Thus an innocent person against whom charges are brought but subsequently dismissed is unable to seek the remedy, even if the basis for dismissal was the prosecutor's decision not to prosecute after finding evidence which fully exculpated the arrestee.

One possible strategy for obtaining record sealing might be for the defendant to oppose the prosecution's motion to dismiss and insist upon a trial. The rationale for such opposition would be that the dismissal deprives the innocent defendant of the potential right to have his records sealed which would be available to him if he were tried and acquitted. The rule governing decisions on motions to dismiss is set out in Penal Code section 1385 which provides that a judge may grant a motion to dismiss "in the interests of justice." Prior to the enactment of section 851.8 of the Penal Code, it is unlikely that a defendant would have opposed a dismissal on the grounds that it was contrary to the interests of justice. However, in view of the potential right to seal arrest records in the event of an acquittal, it could be argued that the interests of

220. See id. §§ 11105, 11141-43.
224. See notes 18-21 & accompanying text supra.
justice would be better served by a trial which would enable the accused to prove his innocence, thus making him eligible for sealing. Given the congested trial calendars of the criminal courts, such an argument might understandably meet with a cool reception, although a receptive court might accede to such a request.

In view of Loder v. Municipal Court,225 a judicial expansion of relief to arrestees against whom charges were dismissed is not likely to be reached in California in the near future. Existing legislation and the supreme court's recent decision leave innocent persons like Mrs. Sterling without recourse to the remedy of record sealing. While section 851.8 of the Penal Code affords relief to persons who obtain acquittals, it is an ironic and unfortunate paradox of California law that the possibility of record sealing is afforded only to the few persons who appear so guilty that they are taken to trial.

Conclusion

Protecting the rights of the innocent has characteristically been a fundamental concern in the administration of criminal justice. The common law principle that an individual charged with commission of a crime is presumed innocent until proven guilty exemplifies this concern. Likewise, the requirement that guilt be proved beyond a reasonable doubt in criminal trials operates to protect against the conviction and incarceration of innocent individuals. By these and other procedural and substantive rules, the rights of the innocent are safeguarded during the course of the proceedings in which a defendant faces prosecution. However, upon finally leaving the courtroom, an exonerated person may find that certain rights have been left unprotected. Due to the existence of an arrest record, an innocent individual may remain vulnerable to unwarranted continued police scrutiny and investigation for other crimes. Moreover, there is a lingering threat in the existence of such a record in the files of the Federal Bureau of Investigation, which is authorized to disseminate information outside the law enforcement context.226

Although limited in scope, Penal Code section 851.8 represents a significant step in the protection of the rights of the innocent in California. The new statutory provision for sealing records of acquitted defendants who appear factually innocent serves to protect against potential hardships, for once a record is ordered sealed under Penal Code section 851.8, the Bureau of Criminal Identification and Investigation is required to "send notice of that fact to all officers and agencies that it had previously notified of the arrest or other proceedings against the

226. See note 223 & accompanying text supra.
If an acquitted defendant is provided a hearing in which to offer additional evidence of his innocence, it is likely that most of the eligible persons deserving relief under the statute will prevail in their motions for record sealing.

There remains, however, a class of innocent persons for whom there is no present legislative or judicial provision for protection. When a prosecutor discovers evidence confirming the innocence of an arrested person, the charges are usually dismissed. In such cases, although there may be overwhelming proof of the arrestee's innocence, the arrestee remains burdened with an arrest record. The provision for sealing allowed by Penal Code section 851.8 applies only to defendants who appeared so guilty that they were forced to undergo a trial. Thus, an obviously innocent person has a negligible chance of obtaining relief; instead he will join the ranks of dismissed arrestees like Mrs. Sterling for whom an arrest record remains a lingering threat.

In Loder v. Municipal Court, the supreme court denied a request for erasure or return of arrest records following dismissal of criminal charges. Although the relief sought was expungement rather than sealing, the decision represents a major obstacle to expanding the scope of Penal Code section 851.8. In Loder, the court concluded that the multiple uses of arrest records within the criminal justice system constituted a substantial government interest and noted that a dismissal may be predicated on many grounds other than factual innocence. While admittedly many cases are dismissed when the accused is not factually innocent, the effect of Loder is to deny relief in cases of dismissal where the arrested individual is innocent. The retention of arrest records for all dismissals and the subsequent use of such records by law enforcement agencies has the effect of "devising classifications that lump the innocent with the guilty." The purpose underlying the retention of arrest records for use by law enforcement agencies is to promote public safety; the retention of records of dismissals implies a presumption that an unconvicted arrestee is an unconvicted criminal from which society must be protected. This presumption of innocence is thus abandoned when the arrestee leaves the courtroom and his records remain unsealed.

To protect the rights of innocent persons after charges against them have been dismissed, the record sealing remedy now available in cases of

228. See, e.g., CAL. PEN. CODE § 1385 (West 1970).
231. See Comment, Removing the Stigma of Arrest: The Courts, the Legislatures and Unconvicted Arrestees, 47 WASH. L. REV. 659 (1972).
acquittal should be expanded. As in the provision for sealing under Penal Code section 851.8, such relief might be limited to cases in which the trial judge is satisfied that the arrested person was "factually innocent" of the charges. However, it is abundantly clear that some type of provision for relief is long overdue to protect innocent persons following dismissal of charges. The dilemma of Mrs. Sterling has gone unanswered for too long.

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