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Monetizing Shame: Mugshots, Privacy, and the Right to Access

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MONETIZING SHAME: MUGSHOTS, PRIVACY, AND THE RIGHT TO ACCESS

*Eumi K. Lee**

ABSTRACT

Created for the purpose of criminal identification and investigation, mugshots have become a commodity in the digital era, exploited for financial gain. Although much public attention has been focused on commercial mugshot websites and their practice of charging fees for the removal of these images, the problem is far more widespread. Law enforcement agencies, news outlets, and tabloids have created modern-day “rogues’ galleries” online, indiscriminately publishing mugshots of individuals, many of whom were never prosecuted or convicted. The mass publication of mugshots online permanently stigmatizes millions of Americans with the mark of criminality and undermines two basic principles of our criminal justice system—presumed innocence and redemption.

This Article explores the commodification and commercialization of mugshots and the constitutional and statutory laws that govern their availability. This Article asserts that current state laws fail to address the realities of the digital

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era and the greater privacy interests that are implicated through permitting open access to mugshots. Because the majority of states deem mugshots open records under their public records laws, mugshot companies and the press have the constitutional right to publish them. The Article proposes that the presumption should be switched and that mugshots should be deemed closed records that are generally not disclosed to the public. This change would be in line with the trend under federal law and would provide the protection necessary for the privacy interest at stake.

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INTRODUCTION

One terrifying night in 2011, Dr. Janese Trimaldi was attacked by her then-boyfriend. After locking herself in her bedroom, her boyfriend jimmed the door open with a steak knife he retrieved from her kitchen. Over a foot taller and more than double her weight, he lifted her and threw her “six feet backward.”¹ After he alleged that she had been the attacker, Dr. Trimaldi was arrested and charged with aggravated assault and battery domestic violence. The charges were dropped shortly thereafter. Little could she have known that the charges would continue to haunt her years later. Within months of the arrest, her booking photograph (commonly referred to as a “mugshot”)² appeared on a commercial mugshot website. After paying the website \$30 to take the image down, her mugshot was published on other mugshot websites, one of which demanded a \$400 removal fee. At the time of the 2013 *New York Times* article describing the mugshot industry and the experiences of Dr. Trimaldi and others,³ she had completed her residency and was applying for permanent positions. Preparing for her medical boards and saddled with \$200,000 of student loan debt, Dr. Trimaldi was fearful that all her hard work was for naught because of the mass publication of her mugshot online.⁴

1. David Segal, *Mugged by a Mug Shot Online*, N.Y. TIMES (Oct. 5, 2013), http://www.nytimes.com/2013/10/06/business/mugged-by-a-mug-shot-online.html?_r=0. I have deliberately chosen to rely on narratives of individuals who have chosen to share their experiences with news outlets. Although I have heard similar stories from my clients or those of other attorneys, I am not using their stories based on my concern that doing so would cause further reputational harm.

2. The term “mugshot” is defined as “[a] photograph of a person’s face, esp[ecially] one taken after the person has been arrested and booked.” *Mugshot*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“Also written *mug shot*.”). “To ‘book’ signifies the recordation of an arrest in official police records, and the taking by the police of fingerprints and photographs of the person arrested, or any of these acts following an arrest.” Cal. Op. Att’y Gen. No. 03-205 (July 14, 2003), 2003 WL 21672840.

3. Segal, *supra* note 1.

4. *Id.* Dr. Trimaldi had another arrest fifteen years earlier involving a different boyfriend’s illegal sale of steroids. She was never prosecuted, but her mugshot from this arrest was also online. *Id.* Both of these mugshots remain online. Search: *Janese A. Trimaldi*, MUGSHOTS.COM, <http://mugshots.com/search.html?q=Janese+A.+Trimaldi> (last visited May 8, 2018).

Dr. Trimaldi's experience is not unique; nor is it isolated. In recent years, prominent media outlets have drawn national attention to mugshot websites such as JustMugshots.com, BustedMugshots.com, and MugshotsOnline.com and the deleterious effects that the online posting of mugshots has had on the lives of individuals.⁵ Because of the inference of criminality and guilt society draws from these images, their postings not only embarrass and humiliate their subjects, but they also have wide-ranging potential consequences, including lost employment and educational opportunities. As demonstrated by Dr. Trimaldi's experience, efforts to remove the images prove futile. Even if an individual pays one website, another will post the same image and will charge yet another removal fee. In the end, the individual is forced to engage in a twisted and expensive version of the childhood game "whack-a-mole," desperately trying to permanently remove his mugshot from the web and inevitably failing.⁶

As the Sixth Circuit recently observed, "[m]ugshots now present an acute problem in the digital age."⁷ "[N]early one out of every three American adults"—77.7 million people—has been arrested and, thus, could be impacted.⁸ Once these images are online, whether posted initially by mugshot companies or law enforcement, they live on in perpetuity. They serve as the digital scarlet letter of our times, permanently affecting the reputation of those who have paid their debt to society and even may have expunged their criminal record, those who were found innocent, and those who were never prosecuted.

Many have likened the practices of these mugshot companies to extortion or bribery, i.e., the forced payment of money by threat of humiliation or shame. Privacy advocates have decried these websites, arguing that the publication of mugshots is another erosion into privacy

5. Susanna Kim, *Businesses Charge Hundreds to Remove Mug Shots Online*, ABC NEWS (Apr. 23, 2012), <http://abcnews.go.com/Business/businesses-make-profit-copying-mug-shots-online-critics/story?id=16157378>; David Kravets, *Mug-Shot Industry Will Dig Up Your Past, Charge You to Bury It Again*, WIRED (Aug. 2, 2011, 1:52 PM), <https://www.wired.com/2011/08/mugshots/>.

6. Segal, *supra* note 1. This Article refers to individuals affected by these practices by the non-gender-neutral terms of "he," "him," or "his" because the majority of criminal defendants in the United States are men. See U.S. SENTENCING COMM'N, OVERVIEW OF FEDERAL CRIMINAL CASES 3 (2017) ("In fiscal year 2016, 86.2 percent of all [federal] offenders were men, compared with 86.8 percent in fiscal year 2012, and 86.5 percent in fiscal year 2007.").

7. *Detroit Free Press, Inc. v. U.S. Dep't of Justice (Detroit Free Press II)*, 829 F.3d 478, 486 (6th Cir. 2016) (en banc) (Cole, C.J., concurring), *overruling* *Detroit Free Press, Inc. v. U.S. Dep't of Justice (Detroit Free Press I)*, 73 F.3d 93 (6th Cir. 1996), *cert. denied*, 137 S. Ct. 2158 (2017).

8. Gary Fields & John R. Emshwiller, *America Busted: As Arrest Records Mount, Consequences Last a Lifetime*, WALL ST. J., Aug. 19, 2014, at A1.

in this digital era. Other critics argue that these images stigmatize individuals with the label of “criminal,” making successful (re)integration into the community challenging. On the other hand, free speech advocates, media outlets, and victims’ rights organizations urge for open access to these records, arguing that the public has the right to know about arrests. They argue that the images are newsworthy. Some assert that the public distribution of mugshots serves an important public safety role by encouraging assistance in criminal investigations and deterring future criminality. Others contend that open access is necessary for a just, democratic society.⁹

Little has been written about mugshots and privacy within the legal academy.¹⁰ And what has been written has focused largely on the previous federal circuit court split concerning the United States Marshals Service’s protective policy to withhold mugshots under the Freedom of Information Act (“FOIA”).¹¹ However, the vast majority of mugshots are taken and disclosed by state and local, not federal, law enforcement agencies. Although state laws vary greatly, the majority of states consider mugshots open public records and provide easy access to mugshot websites and the media. In addition, recent state legislative efforts targeted at the “mugshot racket” are ineffective because they do not address the root cause of the problem—public access to mugshots in the Internet era.¹² Despite any efforts to remove these images from one

9. See *infra* Section I.D.

10. See, e.g., JAMES B. JACOBS, THE ETERNAL CRIMINAL RECORD 81–88, 197–99 (2015) (describing the mugshot industry and later the disclosure of mugshots under the FOIA); Allen Rostron, Commentary, *The Mugshot Industry: Freedom of Speech, Rights of Publicity, and the Controversy Sparked by an Unusual New Type of Business*, 90 WASH. U. L. REV. 1321, 1325–28 (2013) (discussing the uncertainty of liability under criminal and tort law); Morgan Vasigh, Note, *Smile, You Are Under Arrest: The Misappropriation and Misuse of Mug Shots Online*, 22 INFO. & COMM. TECH. L. 277, 278–86 (2013) (arguing that the mugshot industry violates the Florida right of publicity statute).

11. This topic has been the discussion of numerous student notes. See, e.g., Jane E. Bobet, Note, *Mug Shots and the FOIA: Weighing the Public’s Interest in Disclosure Against the Individual’s Right to Privacy*, 99 CORNELL L. REV. 633 (2014); Lisa Chinai, Note, *Picture Imperfect: Mug Shot Disclosures and the Freedom of Information Act*, 9 SETON HALL CIR. REV. 135 (2012); Cameron T. Norris, Note, *Your Right to Look Like an Ugly Criminal: Resolving the Circuit Split over Mug Shots and the Freedom of Information Act*, 66 VAND. L. REV. 1573 (2013); Kathryn Shephard, Note, *Mug Shot Disclosure Under FOIA: Does Privacy or Public Interest Prevail?*, 108 NW. U. L. REV. 343 (2014); Gregory Nathaniel Wolfe, Note, *Smile for the Camera, the World Is Going to See That Mug: The Dilemma of Privacy Interests in Mug Shots*, 113 COLUM. L. REV. 2227 (2013). As discussed *infra* in Section III.A.2, this circuit split was resolved in 2016.

12. See *infra* Section III.C.2. But see Deanna K. Shullman & Mark R. Caramanica, *Mug Shots on Lockdown: Government and Citizen Backlash to “Exploitation” Websites Surges, Free Speech Is the Casualty*, 30 COMM. LAW., June 2014, at 13, 13–15 (describing state legislative efforts and advocating for maintaining or broadening access to mugshots).

site or another, the reality is that once the mugshot is published online, there is no means of erasing it from cyberspace.

This Article explores the commodification and monetization of these images by the mugshot industry and media outlets, and the state and federal laws that govern their availability. The Article asserts that society must recognize the greater privacy interests at stake in the digital era and limit public access to mugshots. Because the majority of states consider mugshots presumptively open records under their public records laws, mugshot companies and the press have the constitutional right to publish them. The Article suggests that the presumption should be switched and that mugshots should be deemed presumptively closed records that are generally not disclosed to the public, as is the current federal standard.

Part I provides an overview of the use of mugshots in the United States and examines the commodification of mugshots in the digital era. It describes the rise of the mugshot industry, as well as the publication of mugshot galleries by law enforcement, media, and tabloid websites. This Part then explores the effect such publication has on individuals and the contours of the current debate regarding mugshots.

Part II argues that the only means of addressing this problem is by limiting the right of access. Although the mugshot industry enjoys a broad First Amendment right to publish mugshots, there is no constitutional right to access them. The Part examines the constitutional and common law rights to access and then provides a survey of state public records laws, which largely govern the disclosure of mugshots. It contrasts these state laws with federal policy and cases in which mugshots are deemed closed records under Exemption 7(C) of the FOIA. Under Exemption 7(C), the disclosure of mugshots is considered an unwarranted invasion of privacy and is not permitted absent a specific law enforcement need (e.g., circulating the mugshot of a dangerous fugitive).

Part III proposes that the current default presumption that mugshots are open records in the majority of states should be changed such that mugshots are deemed presumptively closed. This would follow the trend in the federal courts as exemplified by the recent decision in *Detroit Free Press, Inc. v. United States Department of Justice (Detroit Free Press II)*,¹³ in which the Sixth Circuit overturned its prior precedent and recognized the greater privacy interest in mugshots at stake in the digital age. The Article provides two proposals. The preferred proposal would be the adoption of a federal law akin to the Driver's Privacy

13. *Detroit Free Press II*, 829 F.3d 478, 485 (6th Cir. 2016) (en banc), cert. denied, 137 S. Ct. 2158 (2017).

Protection Act of 1994, which prevents states from disclosing driver's license pictures (and other information) to the public except in limited circumstances.¹⁴ In the alternative, the Part urges state legislatures, agencies, and courts to give greater weight to the privacy interests under existing public records laws, recognizing the effects of the Internet in distributing these government records and the marginal value disclosure adds in providing government oversight. It then explains why other attempts to address the problem, such as lawsuits and recent legislation prohibiting the charging of removal fees, are unworkable. Finally, the Part concludes by suggesting that there is a basis for the Supreme Court to revisit its previous decision that mugshots do not implicate a constitutional right to privacy.

I. BACKGROUND: THE RISE OF THE MUGSHOT INDUSTRY AND ITS EFFECTS

Although created for the purposes of criminal identification and investigation, mugshots have become a commodity in this digital era, commercialized by a wide variety of private entities from newspapers to websites focusing on the posting of criminal records for profit. The devastating effects of this commercialization on millions of Americans require us to reexamine the public accessibility of these records. This Part provides a brief history of the inception of mugshots in the United States and the commercialization of them in the digital era, before exploring the arguments on both sides of the public debate concerning their accessibility.

A. *A Brief History of Mugshots in the United States*

Mugshot galleries have a long history in the United States, beginning in the mid-to-late nineteenth century. As early as 1854, "the San Francisco Police Department began daguerreotyping prisoners," followed quickly by other city police departments across the nation.¹⁵ Police compiled these images, along with their criminal histories and biographical information, into leather-bound books referred to as "rogues' galleries."¹⁶ By 1857, the New York police had opened a physical gallery

14. 18 U.S.C. § 2721 (2012).

15. JONATHAN FINN, CAPTURING THE CRIMINAL IMAGE: FROM MUG SHOT TO SURVEILLANCE SOCIETY 6 (2009). French police began producing images as early as 1841. At the time, the images were produced using daguerreotyping. *Id.*

16. *Id.* Perhaps the most famous of these books was New York chief detective Thomas Byrnes' PROFESSIONAL CRIMINALS OF AMERICA, published in 1886, which included images and colorful descriptions of the crimes. *Id.* at 6–7 (discussing Thomas Byrnes'

where the public could come and view these images as a means of deterrence and crime prevention. The public would come to gawk at others' misfortunes, leading some to leave New York for fear of being recognized.¹⁷ As the sheer volume of mugshots increased with advancements in photography, police departments struggled to find a method of systemizing and cataloguing their ever-growing collections of thousands of mugshots.¹⁸

This answer was provided by Alphonse Bertillon in Paris, France, in the late nineteenth century, who used mugshots as part of a "signaletic" system of identification.¹⁹ This system included recording "eleven detailed anthropometric measurements" such as height, head length, and arm span, as well as photographs taken of forward-facing and profile.²⁰ Bertillon focused on using these measurements and images to categorize and identify criminals.²¹ Bertillon's system was quickly adopted across Europe and North America.²² His work derived in part from "the new field of criminal anthropology" that emphasized "the physical pathologies of the body."²³ One of his contemporaries was Francis Galton, the father of eugenics.²⁴ Although the Bertillon system was replaced by fingerprinting as the dominant means of criminal identification in the

PROFESSIONAL CRIMINALS OF AMERICA); THOMAS BYRNES, PROFESSIONAL CRIMINALS OF AMERICA (1886), <https://archive.org/details/cu31924096989177>.

17. As stated in a news article from 1857: "Already, some arrests have been made by means of these portraits, and three or four of the thieves so unenviably distinguished have quitted New York for parts unknown, convinced that Daguerre had put an end to their chances of success in this locality." Randy Kennedy, *Grifters and Goons, Framed (and Matted)*, N.Y. TIMES (Sept. 15, 2006), <http://www.nytimes.com/2006/09/15/arts/design/15mugs.html?pagewanted=all> (quoting an 1857 *New York Times* article). The New York police chief even produced an album of mugshots for public distribution with the stated purpose of stopping crime. FINN, *supra* note 15, at 10.

18. FINN, *supra* note 15, at 10.

19. *Id.* at 23.

20. *Id.* at 23–26. The forward-facing and profile positions became the standard. *See id.* at 23–26, 33.

21. *Id.* at 23–28.

22. *Id.* at 28.

23. *Id.* at 11, 29.

24. *Id.* at 11–28 (describing the history of criminal anthropometry and the works of Cesare Lombroso, Galton, and Bertillon). Eugenics was the pseudoscience that used features to infer certain human traits as early as ancient Greece, but its popularity declined sharply after 1945. SEVASTI TRUBETA, PHYSICAL ANTHROPOLOGY, RACE AND EUGENICS IN GREECE (1880S–1970S) 263 (2014); Matthew D. Martin III, *The Dysfunctional Progeny of Eugenics: Autonomy Gone AWOL*, 15 CARDOZO J. INT'L & COMP. L. 371, 373 (2007). Bertillon himself distanced his work from this movement. *See* Nick Clark, *Man Who Invented the Mug Shot: The Ground-Breaking Work of Alphonse Bertillon*, INDEPENDENT (Feb. 22, 2015), <http://www.independent.co.uk/news/science/man-who-invented-the-mug-shot-the-ground-breaking-work-of-alphonse-bertillon-10057215.html>.

1920s, mugshots continue to be used for purposes of investigation, including in photo line-ups and to locate fugitives.²⁵

Even after physical galleries fell into disuse, mugshots continued to enter the public realm, however, in a more limited manner. True-crime magazines ran stories “on public enemies like Pretty Boy Floyd and Bonnie and Clyde.”²⁶ And newspapers published mugshots to accompany their front-page articles.²⁷ Outside of these select mugshots, the great majority of mugshots were never seen by the public. Rather, they remained in police files, gathering dust until the twenty-first century.²⁸

B. *The Digital Age and the Commercialization of Mugshots*

The digital age and its various technologies ushered in a new era of mugshot use. Digital photographs, for example, allowed for quick and easy access and transferability. But it was the Internet that was the real game changer, introducing limitless publication and preservation. Before, mugshots in newspapers and flyers were eventually thrown away; with the Internet, mugshots live on indefinitely in the public sphere.

Initially, these technological advances affected the limited few who had their mugshots in news articles, but this quickly changed with the commercialization of mugshots. In the past decade, an industry developed around the online publication of mugshots and other criminal records, indiscriminately publishing them for commercial gain. However, it is not only the mugshot industry that has profited from this practice. Newspapers, tabloids, and other online websites have capitalized on the

25. FINN, *supra* note 15, at 31–32.

26. Megan Abbott, *Our Love Affair with the Mug Shot*, N.Y. TIMES (July 19, 2014), <https://www.nytimes.com/2014/07/20/opinion/sunday/why-we-cant-resist-mug-shots.html>.

27. By the mid 1930s, mugshots were the majority of the photographs published on newspaper front pages. Michael W. Singletary, *Newspaper Photographs: A Content Analysis, 1936-76*, 55 JOURNALISM Q., 585, 586 (1978). A study of five U.S. newspapers in 1986 similarly found that almost fifty percent of all front-page photographs were mugshots. Paul Martin Lester, *Front Page Mug Shots: A Content Analysis of Five U.S. Newspapers in 1986*, 9 NEWSPAPER RES. J. 1 (1988) (finding that out of 1,148 front page photographs, 520 were mugshots).

28. The Naked Truth, *Mugged: The Sordid, Racially Charged History of Police Mugshots*, FUSION: THE NAKED TRUTH (Mar. 6, 2016), <http://fusion.net/video/277324/mugged-brief-history-of-mugshots>; see also Nancy S. Marder, *From “Practical Obscurity” to Web Disclosure: A New Understanding of Public Information*, 59 SYRACUSE L. REV. 441, 456–57 (2009) (“The Web, with its unlimited reach across time and place, can bring information to people’s fingertips, which they can use for good or ill Information that was public but practically obscure will no longer be practically obscure on the Web, and the question with each new issue is whether this matters.”).

public's voyeuristic fascination with mugshots, creating modern day online "rogues' galleries."²⁹

1. The Mugshot Industry

Websites focused on posting mugshots for direct commercial gain emerged into prominence around 2011.³⁰ This cottage industry, which I describe as "the mugshot industry," originally posted mugshots and charged a fee for their removal. In 2013, there were over eighty mugshot websites such as Mugshots.com, MugshotsUSA.com, BustedMugshots.com, and more local versions like Florida.Arrest.org. One of the largest sites, Mugshots.com, has between fifteen and twenty million mugshots available for viewing on its site.³¹ These companies use automated software that scrapes mugshot images from local law enforcement websites and seamlessly transfers them to an online mugshot gallery, without human assistance.³² Unlike law enforcement websites that often post a mugshot for a limited time period,³³ these mugshot websites have no end date. In addition to scraping law enforcement websites, companies collect mugshots from state and local agencies through broad public records requests.³⁴ Thus, some of the posted mugshots are for "decades-old arrests."³⁵

29. Because of their scope and reach, and the impact of their practices, this Article focuses on the online iterations of these businesses. In addition to the online mugshot galleries, there are also tabloid-style magazines, which are sold at local convenience stores. Debbie Elliott, *The Newest Magazine Fad: The Mug Shot Tabloid*, NPR (Nov. 23, 2011, 10:16 AM), <http://www.npr.org/2011/11/23/142701001/the-newest-magazine-fad-the-mug-shot-tabloid>. With titles such as *Cellmates*, *Jailbirds*, and *The Slammer*, they are quite profitable. *The Slammer*, which covers Central Arkansas, sells 7000 copies a week. *Id.*

30. Segal, *supra* note 1.

31. *Id.*; Cord Jefferson, *How People Profit from Your Online Mug Shot and Ruin Your Life Forever*, GIZMODO (Oct. 8, 2012, 12:00 PM), <http://gizmodo.com/5949333/how-people-profit-from-your-online-mug-shot-and-ruin-your-life-forever>.

32. These software applications are described as "bots," i.e., "an automated application used to perform simple and repetitive tasks that would be time-consuming, mundane or impossible for a human to perform. Bots can be used for productive tasks, but they are also frequently used for malicious purposes." *Internet Bot*, TECHOPEDIA, <https://www.techopedia.com/definition/24063/internet-bot> (last visited May 8, 2018).

33. See, e.g., *Public Mugshots*, MARICOPA COUNTY SHERIFF'S OFF., <https://www.mcso.org/Mugshot> (last visited May 8, 2018) (displaying a mugshot archive of only a few days).

34. Stephanie Fox, *"Busted Paper" and Other Mugshot Magazines: Why They Are—and Will Likely Remain—Legal*, TWIN CITIES DAILY PLANET (Apr. 7, 2013), <http://www.tcdailyplanet.net/busted-paper-and-other-mugshot-magazines-why-they-are-and-will-likely-remain-legal>.

35. Detroit Free Press II, 829 F.3d 478, 482 (6th Cir. 2016) (en banc) (providing BustedMugshots and JustMugshots as examples), *cert. denied*, 137 S. Ct. 2158 (2017).

Typically, the mugshot websites post these photographs along with the date and location of the arrest and the alleged offenses.³⁶ Not included on the page is what happened after the arrest, i.e., whether charges were filed by the prosecutor; whether charges were later dismissed; whether the person was acquitted; or whether a conviction was later reversed on appeal, vacated, or expunged.

Initially, many mugshot websites generated revenue by charging fees for the removal of photographs. One survey from 2013 found that removal fees ranged from \$178 to \$399 per arrest, depending on the type of crime for which the person was arrested.³⁷ Paying a removal fee to one website would not solve the problem for the arrestee, however. Those who paid to have a mugshot removed from one website would often find their mugshot appearing on another, sometimes affiliated, website.³⁸ As described by one individual who tried to remove his image: “[The websites] come like a mushroom after the rain”³⁹

Investigative reports, by *Wired* and *The New York Times* in 2011 and 2013 respectively, drew national attention to the mugshot industry. Commentators argued that the removal fees were comparable to “extortion” and that the companies were profiting off of the shame and humiliation of others.⁴⁰ Private lawsuits were of limited success. Not only were defendants difficult to locate and litigation costs prohibitive, but the First Amendment right to publish served as a defense in tort actions against the companies.⁴¹ State lawmakers began proposing legislation to crack down on the mugshot industry.⁴² Since 2013, seventeen states have

36. Often, the same page will provide links to download additional criminal history information or the actual arrest records, as well as a link to unpublish the mugshot.

37. See Jose Pagliery, *Mug Shot Extortion Sites Still Up and Running . . . for Now*, CNN (Oct. 16, 2013, 9:29 AM), <http://money.cnn.com/2013/10/16/technology/mug-shot-websites>.

38. See Segal, *supra* note 1. In fact, it is not uncommon for a single person or entity to own numerous websites. See, e.g., Vasigh, *supra* note 10 at 282; Stephanie Francis Ward, *Hoist Your Mug: Websites Will Post Your Name and Photo; Others Will Charge You to Remove Them*, ABA J. (Aug. 2012), http://www.abajournal.com/magazine/article/hoist_your_mug_websites_will_post_your_name_and_photo_others_will_charge_yo.

39. Josh Green, *Mugshots Inc: ‘Legalized Extortion’ or Constitutional Privilege?*, GWINNETT DAILY POST (July 20, 2012), http://www.gwinnettdailypost.com/archive/mugshots-inc-legalized-extortion-or-constitutional-privilege/article_e5655e0d-0a1e-5b28-b1e1-364383c0cfa4.html.

40. Segal, *supra* note 1; see also Kravets, *supra* note 5.

41. See John Caniglia, *Ohio Lawsuit over Online Mug Shots Reaches Settlement; Suit Was One of Several Filed Nationally*, CLEVELAND.COM (Jan. 7, 2014, 6:21 AM), http://www.cleveland.com/metro/index.ssf/2014/01/ohio_lawsuit_over_online_mug_s.html (discussing the efforts of one of the first attorneys to bring a suit against the mugshot companies). The right to publish and the First Amendment in these actions are discussed *infra* Sections II.A.1, III.C.

42. Segal, *supra* note 1; see also Kurtis Ming, *Call Kurtis Investigates: Mug Shot Extortion*, CBS SACRAMENTO (May 6, 2014, 11:22 AM), <http://sacramento.cbslocal.com/>

enacted legislation, largely aimed at prohibiting removal fees.⁴³ However, as discussed below, none of the measures fully address the reality that once the mugshots had been published, whether by newspapers or mugshot companies, the bell could not be unrung.⁴⁴

The mugshot industry quickly figured out how to end-run these state efforts. Many ceased charging removal fees and began focusing their efforts on driving traffic to their sites, discovering that they could generate more revenue from advertising than from removal.⁴⁵ For example, LocalBlotter.com stopped accepting payments for removal, but it then directed the affected individuals to InternetReputation.com, a paid advertiser on its site “who specializes in removing unwanted information from the internet.”⁴⁶

And so reputation management companies, with names such as RemoveMyMug.com, cropped up in the wake of legislative efforts to curb mugshot websites. These companies offer a bevy of services from supposed removal of mugshot and other arrest records to removal from infidelity (described as “cheater”) websites to general online reputation monitoring.⁴⁷ Fees range from the low hundreds to the thousands of dollars. One website provides a range of \$3200 to \$5000, “depending on the case.”⁴⁸ Many of these sites guarantee that they will erase mugshots and arrest records from the Internet. However, this is often simply not true.

These reputation management sites work in one of two ways. The first is the actual removal of the mugshot from a specific website. Reputation management companies advertise that they are able to do so quickly and efficiently through “a trade secret” and that the task of

2014/05/06/call-kurtis-investigates-mug-shot-extortion (citing California Senator Jerry Hill calling the websites' practice of charging removal fees “extortion”); Carl Willis, *State Lawmaker Vows to Fight Mug Shot Sites*, WSB-TV 2 ATLANTA (June 25, 2012, 6:12 AM), <http://www.wsbtv.com/news/local/state-lawmaker-vows-fight-mug-shot-sites/242742558> (quoting Georgia State Representative Roger Bruce describing the websites' practice as “a crime in and of itself”).

43. See *infra* Section III.C.2.

44. See *infra* Section III.C.

45. Tyler Dukes, *Under Scrutiny, Mug Shot Publishing Industry Evolves*, WRAL.COM (June 24, 2014), <http://www.wral.com/under-scrutiny-online-mugshot-industry-evolves/13756083>; Vasigh, *supra* note 10, at 280–83. One website boasted as many as “15 million pageviews per month.” *Id.* at 281.

46. See, e.g., LocalBlotter.com, *34-Year-Old of MN Recently Busted*, LOCALBLOTTER.COM (Nov. 19, 2013, 11:23:48 PST), <http://www.localblotter.com/news/minnesota/suspect-busted/8869586.html> [<http://archive.is/pwOzq>].

47. See, e.g., REPUTATION REPAIR, <http://www.reputationrepair.com> (last visited Apr. 15, 2018) [<https://web.archive.org/web/20180410193714/http://www.reputationrepair.com>].

48. REMOVEMYMUG.COM, <http://www.removemug.com/mugshot-removal-service> (last visited May 8, 2018).

removing the mugshots from the Internet takes “a tremendous amount of work.”⁴⁹ However, the reality is “a symbiotic relationship” between the mugshot and reputation management sites, whereby the former are given a cut of the fees charged by the latter.⁵⁰ The process for removal is often a simple URL for an automated takedown.⁵¹ Because specific reputation management companies are affiliated with mugshot companies, the removal is often limited to a particular site or set of sites.⁵²

In the alternative, some reputation management companies “bury” the negative information.⁵³ These companies flood the Internet with new, positive content about the individual, filling the front pages of search results and bumping the less favorable information to later pages.⁵⁴ The assumption is that “Page 12 [of a web search] looks a lot like Siberia” and that “[n]o one is going to look that long and that hard for someone’s vital data.”⁵⁵ Thus, despite some companies’ guarantees of removal, the mugshot remains, even after the individual has spent hundreds or thousands of dollars.

2. Newspapers and Tabloids

In the past decade, newspapers and tabloids have also leveraged computer technology for commercial purposes.⁵⁶ In 2009, newspapers began publishing online mugshot galleries to drive traffic to their websites. “With the advent of the internet, a lot of [newspaper] editors and publishers started noticing that stories that had crazy looking mugshots tended to do really well, and people started clicking on them

49. Kravets, *supra* note 5.

50. Rostron, *supra* note 10, at 1324–25.

51. Kravets, *supra* note 5.

52. See, e.g., Daryl Nelson, *Mugshot.com and UnpublishArrest.com: Partners in Crime Info?*, CONSUMER AFF. (Dec. 17, 2012), <https://www.consumeraffairs.com/news/mugshotcom-and-unpublisharrestcom-partners-in-crime-info-121712.html>. For example, UnpublishArrest.com admits to an “established working relationship” with Mugshots.com. *Id.* Their removal services are limited to Mugshots.com, and they share an attorney and other individuals in the organization. *Id.*; The Naked Truth, *supra* note 28.

53. As described by ReputationDefender.com, the site will “[p]ush negative content or misleading search results down to pages where virtually nobody will ever see them.” REPUTATION DEFENDER, <https://www.reputationdefender.com/personal> (last visited May 8, 2018).

54. Steve Henn, *Fixing Your Online Reputation: There’s an Industry for That*, NPR (May 29, 2013, 5:49 PM), <http://www.npr.org/sections/alltechconsidered/2013/05/29/187080236/Online-Reputation>.

55. Jean Dion, *Is the Mugshot Industry Really Dead & Buried?*, SEARCH ENGINE J. (Nov. 21, 2013), <https://www.searchenginejournal.com/mugshot-industry-really-dead-buried/73693>.

56. See *supra* note 29 and accompanying text.

...⁵⁷ For example, the *Tampa Bay Times* created scraping software in 2009, which transferred mugshots from law enforcement sites to the newspaper's online mugshot gallery. The gallery gave the newspaper millions of extra views for the mere cost of \$150 per month.⁵⁸ The *Tampa Bay Times* gallery was so successful that the newspaper received numerous calls for the software from other editors looking to create their own galleries.⁵⁹

Other newspapers quickly followed suit. In one 2016 survey of seventy-four U.S. newspapers, forty percent of them published mugshot galleries.⁶⁰ These galleries accounted for up to five percent of some newspapers' total web traffic.⁶¹ These newspapers are not limited to any geographic region, and they range from local newspapers to those that are nationally known, such as the *Chicago Tribune*.⁶² Often, there is no additional substantive content beyond what is published on commercial mugshot websites, and there are no corrections, updates, or means to request removal.⁶³ In some instances, newspapers have curated the galleries to appeal to the entertainment value, adding headlines such as the "Best of the Worst: Mug Shot Hall of Shame."⁶⁴ Other times, the newspaper's decision to publish mugshots of certain arrestees but not others reflects and reinforces biases within our society.⁶⁵

57. Ingrid Rojas & Natasha Del Toro, *Should Newspapers Make Money Off of Mugshot Galleries?*, FUSION TV: THE NAKED TRUTH (Mar. 9, 2016, 3:32 PM), <http://fusion.net/story/278341/naked-truth-newspapers-mugshot-galleries> (quoting University of Nebraska journalism professor Matt Waite).

58. *Id.*

59. *Id.* This was the same type of automated software later used by mugshot websites.
Id.

60. *Id.*

61. *Id.*

62. *Right2Know*, ARK. ONLINE, <http://www.arkansonline.com/right2know/crime> (last visited May 8, 2018); *Mugs in the News*, CHI. TRIB., <http://www.chicagotribune.com/news/chi-mugs-in-the-news-photogallery.html> (last visited May 8, 2018).

63. Will Simmonds, *Online, You Are Guilty Even After Being Proven Innocent*, ONLINE PRIVACY | ABINE (July 17, 2017), <https://www.abine.com/blog/2017/online-guilty-before-proven-innocent>.

64. *Best of the Worst: Mug Shot Hall of Shame*, KTXS-12 ABC, <http://ktxs.com/archive/best-of-the-worst-mug-shot-hall-of-shame> (last visited May 8, 2018); Matt Coker, *Smile for the 10 Ugliest Police Mugshots of 2011*, OC WKLY. (Dec. 19, 2011), <http://www.ocweekly.com/news/smile-for-the-10-ugliest-police-mugshots-of-2011-6469093>.

65. See John Paul Brammer, *Public Sex 'Sting Operation' Leads to Naming and Shaming of 18 Men*, NBC NEWS (June 8, 2017, 2:40 PM), <https://www.nbcnews.com/feature/nbc-out/public-sex-sting-operation-leads-naming-shaming-18-men-n769946> (describing how some Florida newspapers published the mugshots and other personal information of men arrested for lewd activities in county parks); Lauren O'Neil, *Status and Race in the Stanford Rape Case: Why Brock Turner's Mug Shot Matters*, CBC NEWS (June 11, 2016, 1:52 PM), <http://www.cbc.ca/news/trending/brock-turner-mugshot-stanford-rape-case->

In addition to newspapers, tabloids have focused on using mugshots to attract followers. For example, *The Smoking Gun*, an online tabloid publishing government and law enforcement documents, has extensive mugshot galleries arranged by categories such as “fogeys,” “topless women,” “pretty perps,” “cleavage,” and “weepy.”⁶⁶

Even some law enforcement agencies have followed suit, posting mugshots on their websites or on social media.⁶⁷ In one of the most egregious examples, the Maricopa County Sheriff’s Office, under the leadership of former Sheriff Joe Arpaio, held a daily competition entitled “Mugshot of the Day.” Viewers voted *American Idol*-style for the photograph they found most appealing.⁶⁸ As described by one commentator, “[i]ndividual humiliation comes as the expense for voyeurism,”⁶⁹ and these websites capitalize on the public’s fascination with these images.⁷⁰

images-sex-assault-1.3629147 (criticizing the media’s portrayal of black versus white arrestees and the images used by the media).

66. *About the Smoking Gun*, SMOKING GUN, <http://www.thesmokinggun.com/about> (last visited May 8, 2018); *Mug Shots*, SMOKING GUN, <http://www.thesmokinggun.com/mugshots> (last visited May 8, 2018).

67. Denise Lavoie, *Should Police Be Allowed to Shame Subjects on Facebook?*, ASSOCIATED PRESS (July 14, 2017), <https://apnews.com/ca79ccc2adfe41679e72e91b9e910915/Should-police-be-allowed-to-shame-suspects-on-Facebook?>

68. This practice continued for about five years. See Ray Stern, *Sheriff Joe Arpaio Halts Public Voting for Jail “Mugshot of the Day” After Website Redesign*, PHX. NEW TIMES (Sept. 28, 2016, 2:01 PM), <http://www.phoenixnewtimes.com/news/sheriff-joe-arpaio-halts-public-voting-for-jail-mugshot-of-the-day-after-website-redesign-8690032>.

69. Sarah Lageson, *The Enduring Effects of Online Mug Shots*, SOC’Y PAGES (May 19, 2014), <https://thesocietypages.org/roundtables/mugshots> [hereinafter Lageson, *Enduring Effects*].

70. The public has always had a fascination with mugshots, finding them sordid and titillating. They pique the curiosity of the public and tap into our righteousness and judgment, all while providing amusement and entertainment. Lageson, *Enduring Effects*, *supra* note 69 (quoting Travis Linnemann, who remarked that there is a “punitive urge to view, consume, judge, and mock the misfortune of others”). Even when the mugshots are flattering, the subjects are commodified and objectified. Christopher Brennan, *Arkansas Woman’s Attractive Mugshot Earns Her the Nickname ‘Prison Bae’*, NY DAILY NEWS (May 27, 2016, 12:50 PM), <http://www.nydailynews.com/news/national/arkansas-woman-mugshot-earns-nickname-prison-bae-article-1.2651647>. Known by millions as the “hot mugshot guy,” Jeremy Meeks rose to fame after his mugshot was posted by the Stockton Police Department and went viral. Described as “one of the most violent criminals in the Stockton area” by the department, Meeks landed two Hollywood agents upon his release. Peter Holley, *The ‘Hot Mugshot Guy’ Is Free: It’s Almost as if Being in Jail for So Long Made Him Hotter*, WASH. POST (Mar. 13, 2016), <https://www.washingtonpost.com/news/morning-mix/wp/2016/03/13/the-hot-mugshot-guy-is-free-its-almost-as-if-being-in-jail-for-so-long-made-him-hotter>.

C. *Effects on Individuals Portrayed in Mugshots*

As the adage goes, “a picture is worth a thousand words.” Mugshots do just this, capturing the subject at one of his most “vulnerable and embarrassing moments immediately after being accused, taken into custody, and deprived of most liberties.”⁷¹ “Mug shots in general are *notorious* for their visual association of the person with criminal activity.”⁷² Despite being taken immediately upon arrest and well before the resolution of a case, society draws a strong inference of guilt from mugshots. Because “viewers so uniformly associate booking photos with guilt and criminality,” courts “strongly disfavor showing such photos to criminal juries.”⁷³ Mugshots “effectively eliminat[e] the presumption of innocence and replac[e] it with an unmistakable badge of criminality.”⁷⁴

Given the association with criminality, it is not surprising that a mugshot’s “stigmatizing effect can last well beyond the actual criminal proceedings.”⁷⁵ These stigmatizing effects occur on multiple fronts. Individuals are ridiculed for their appearance and ostracized because of their presumed guilt.⁷⁶ The subjects of the photos are left embarrassed, frustrated, and anxious, wondering how they will be judged and perceived.⁷⁷ Their children are taunted by their peers, and the parents are sometimes barred from volunteering at their children’s schools.⁷⁸ The distribution of mugshots has serious financial implications for the individuals and their families. Individuals have difficulty finding

71. *Karantalis v. U.S. Dep’t of Justice*, 635 F.3d 497, 503 (11th Cir. 2011).

72. *Times Picayune Pub. Corp. v. U.S. Dep’t of Justice*, 37 F. Supp. 2d 472, 477 (E.D. La. 1999) (emphasis added).

73. *Detroit Free Press II*, 829 F.3d 478, 482 (6th Cir. 2016) (en banc), *cert. denied*, 137 S. Ct. 2158 (2017).

74. *United States v. Irorere*, 69 F. App’x 231, 235 (6th Cir. 2003) (quoting *Eberhardt v. Bordenkircher*, 605 F.2d 275, 280 (6th Cir. 1979)).

75. *Times Picayune*, 37 F. Supp. 2d at 477.

76. See Sarah Esther Lageson, *Crime Data, the Internet, and Free Speech: An Evolving Legal Consciousness*, 51 LAW & SOC’Y REV. 8, 24–25 (2017) [hereinafter Lageson, *Evolving Legal Consciousness*] (describing the reactions of individuals whose mugshots were published online); Sarah E. Lageson & Shadd Maruna, *Digital Degradation: Stigma Management in the Internet Age*, 20 PUNISHMENT & SOC’Y 113, 124 (2018) (describing same). Although mugshot websites usually include general disclaimer language that individuals who appear are innocent until proven guilty, this has little impact.

77. See Lageson, *Evolving Legal Consciousness*, *supra* note 76, at 26; Sarah E. Lageson, *Found Out and Opting Out: Consequences of Online Criminal Records for Families*, 665 ANNALS AM. ACAD. POL. & SOCIAL SCI. 127, 132 (2016) [hereinafter Lageson, *Found Out*]; Lageson & Maruna, *supra* note 76, at 123–24.

78. Segal, *supra* note 1 (describing the experience of Princess Matthews, whose daughter was taunted by schoolmates after they discovered her mother’s mugshot online); Sarah Esther Lageson, *Digital Punishment’s Tangled Web*, CONTEXTS, Winter 2016, at 24, 25–26; Lageson, *Found Out*, *supra* note 77, at 132.

housing, pursuing educational opportunities, joining the military, and finding and maintaining employment.⁷⁹

The advent of the Internet greatly magnified these impacts both in terms of *who* is affected and *how* they are affected. Before, newspapers or publishers would have to request a mugshot from individual law enforcement agencies, or if the mugshots were older, search aged records or microfiche. Now, they can upload an unending stream of mugshots from law enforcement websites and publish them instantly. Thus, rather than affecting a few select high-profile crimes or individuals whose arrests were deemed newsworthy by the press, millions of Americans are now indiscriminately affected.⁸⁰ To give a sense of scope, “according to the Office of the California Attorney General, 932,540 people were arrested in California in 2011, but no charges were filed or no convictions were made against 545,737 of those individuals.”⁸¹ Although less than half were convicted, all may have their mugshots posted.

Beyond volume, the publication of mugshots on the Internet means the impact is greater in magnitude because the images reach a much wider audience, and the impact lasts indefinitely. Before the Internet, individuals experienced the negative effects only immediately following an arrest. Few people saw the mugshots, and inevitably memories would fade.⁸² Now the public can easily search for these images online, and they live “permanently” online. As described by the Sixth Circuit:

A disclosed booking photo casts a long, damaging shadow over the depicted individual. In 1996, . . . booking photos appeared on

79. Lageson, *Evolving Legal Consciousness*, *supra* note 76, at 13; Lageson, *Found Out*, *supra* note 77, at 129, 131; Lageson & Maruna, *supra* note 76, at 117, 126. The negative effects of criminal records on employment opportunities and earnings has been well documented. See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 140, 148–51 (2012); Keith Finlay, *Effect of Employer Access to Criminal History Data on the Labor Market Outcomes of Ex-Offenders and Non-Offenders*, in NAT'L BUREAU OF ECON. RESEARCH, *STUDIES OF LABOR MARKET INTERMEDIATION* 89, 122 (David H. Autor ed., 2009); JACOBS, *supra* note 10, at 88–89. Studies have generally focused on the impact of arrest and criminal records and have not isolated the impact of mugshots alone.

80. Fred H. Cate, *Government Data Mining: The Need for a Legal Framework*, 43 HARV. C.R.-C.L. L. REV. 435, 435 (2008) (“Much of the ‘privacy’ Americans have enjoyed results from the fact that it was simply too expensive or laborious to find out intimate data about them.”).

81. Press Release, Office of Senator Jerry Hill, Governor Signs Senator Jerry Hill’s Bill Barring Mug Shot ‘Shakedown’ by Websites (Aug. 15, 2014), <http://sd13.senate.ca.gov/news/2014-08-15-governor-signs-senator-jerry-hill-s-bill-barring-mug-shot-%E2%80%98shakedowns-websites>.

82. Peter A. Winn, *Online Court Records: Balancing Judicial Accountability and Privacy in an Age of Electronic Information*, 79 WASH. L. REV. 307, 316–17 (2004) (discussing the practical obscurity of public records in the pre-digital age).

television or in the newspaper and then, for all practical purposes, disappeared. Today, an idle internet search reveals the same booking photo that once would have required a trip to the local library's microfiche collection. . . . Potential employers and other acquaintances may easily access booking photos on these websites, hampering the depicted individual's professional and personal prospects.⁸³

Because mugshots are taken upon arrest, the impacts are not limited to those who were convicted.⁸⁴ Even individuals who are falsely accused continue to live with the consequences of their arrest.⁸⁵ The case of Kareem Alleyne demonstrates the damning effects of one's online reputation, even when one tries to clear his name. Alleyne was wrongly arrested and charged with vehicular homicide and involuntary manslaughter in the death of Marc Brady, a Philadelphia police officer.⁸⁶ At the time, Alleyne had been dating Brady's ex-girlfriend. The court dismissed the charges against Alleyne for lack of evidence, and two years later a Philadelphia jury awarded him more than \$1 million, finding that he was improperly arrested and recklessly charged in the car-bike crash.⁸⁷ Despite this seeming victory, Alleyne struggled to find a job not only after his arrest, but even after the acquittal.⁸⁸ A Google search of his

83. Detroit Free Press II, 829 F.3d 478, 482–83 (6th Cir. 2016) (en banc) (citation omitted), *cert. denied*, 137 S. Ct. 2158 (2017).

84. See Segal, *supra* note 1 (describing the experiences of Maxwell Birnbaum, a college freshman who successfully completed a pretrial diversion program after being arrested for possession of ecstasy pills).

85. For example, there was the news story of Jimmy Thompson, who was pulled over for an expired license plate tag. During the stop, the officer incorrectly confused Jimmy Thompson with another "James Thompson" who unfortunately had outstanding arrest warrants. Jimmy Thompson was arrested and spent eight days in jail as a result of the identity mix-up. His lawyer eventually cleared his name, and the sheriff's department removed his mugshot from their site. Thompson then discovered that his mugshot remained posted on Mugshots.com and that he would have to pay at least \$399 for removal. Unable to get a job, he did not have the funds to pay the fee. At the same time, he could not find a job because his mugshot was online. The Naked Truth, *supra* note 28; see also Dukes, *supra* note 45 (describing the experience of a woman who was arrested when a friend used her identity to scam a department store).

86. *Driver Arraigned After Off-Duty Philly Cop on Bicycle Is Killed*, CBS PHILLY (July 17, 2012, 10:02 AM), <http://philadelphia.cbslocal.com/2012/07/17/police-arraign-driver-who-fatally-struck-off-duty-philadelphia-cop>.

87. Chris Palmer, *Jury Awards More than \$1M to Driver for Improper Arrest*, PHILLY.COM (Apr. 21, 2016 1:08 AM), http://www.philly.com/philly/news/20160421_Jury_awards_more_than_1M_to_driver_in_crash_that_killed_cop.html; Daniel Rivero, *Police Ruined this Man's Online Reputation, and There's Nothing He Can Do About It*, SPLINTER (May 12, 2016, 7:42 AM), <https://splinternews.com/police-ruined-this-mans-online-reputation-and-theres-n-1793856757>.

88. Palmer, *supra* note 87.

name resulted in multiple copies of his mugshot, often juxtaposed with a clean-cut picture of a uniformed Brady.⁸⁹

D. *The Public Debate Concerning Online Publication*

Much of the public debate concerning the online publication of mugshots has been focused on the mugshot industry. Politicians and commentators have roundly criticized the industry, describing it as a “racket” and their practice of charging removal fees as “extortion” and bribery.⁹⁰ Critics view this as an intrusion into one’s personal life, where one of the worst moments in one’s life is used to humiliate and shame for financial gain. It is viewed as the modern-day “scarlet letter,” branding an individual without any due process of law.

In responding to such criticism, the mugshot industry has relied heavily on the First Amendment. As stated by one lawyer representing Mugshots.com, “[t]hese are perilous times for the First Amendment We need to defend everybody’s First Amendment rights.”⁹¹ They argue that publishing mugshots and arrest records ensures government transparency, raising the specter of “star chambers” and secret arrests, and also advances public safety.⁹²

Freedom of the press advocates have also argued for the “unfettered access to the[se] images, no matter how obscure the arrestee and no matter the ultimate disposition of the case.”⁹³ As the former director of the Reporters Committee for Freedom of the Press (“Reporters Committee”) stated: “It’s an effort to deny history I think it’s better if journalists and the public, not the government, are the arbiters of what the public gets to see.”⁹⁴ The Reporters Committee and other news organizations emphasize the role of the press in preventing government

89. Rivero, *supra* note 87.

90. See, e.g., Segal, *supra* note 1; see also Sharon Bernstein, *Mugshot ‘Extortion’ Websites May Soon Be Illegal in California*, REUTERS (Apr. 28, 2014, 8:51 PM), <http://www.businessinsider.com/r-california-bill-targets-websites-engaged-in-mug-shot-racket-2014-28>.

91. Becky Yerak, *Lawsuit: Mug Shot Website Posts Incomplete Records So Sister Site Can Solicit ‘Takedown’ Fees*, CHI. TRIB. (Mar. 13, 2017, 8:28 AM), <http://www.chicagotribune.com/business/ct-mug-shot-websites-0312-biz-20170310-story.html>; see also Anonymous & Saundra Sorenson, *There’s a Public Shaming Industry (and It Held Me Hostage)*, CRACKED (Aug. 15, 2016), <http://www.cracked.com/personal-experiences-2366-shady-people-put-my-mugshot-online-extorted-me-money.html> (discussing the popularity of these sites, a victim’s experience, and the overly close relationships between mugshot websites and reputation defenders).

92. MUGSHOTS.COM, <http://mugshots.com/faq.html> (last visited May 8, 2018).

93. Segal, *supra* note 1.

94. *Id.*; accord Shullman & Caramanica, *supra* note 12, at 14.

secrecy, dating back to the Revolutionary War.⁹⁵ They stress the importance of government transparency, open access to public records, and the oversight function of the press in monitoring the police and the government.

However, the newspaper's current mugshot galleries are a far cry from government investigation and oversight. Like commercial mugshot websites, the mugshot galleries in newspapers contain little or no substantive content and are merely used as vehicles to drive traffic to the website. This melding—where mugshot websites attempt to add more content to look like newspapers and newspapers add mugshot galleries to their websites to attract more readers—have created strange bedfellows.⁹⁶

Finally, some have noted that mugshots are “cultural artifacts” that are historical in nature and can be used for artistic or political purposes.⁹⁷ Others have responded that this is a heavy and unwarranted price for individuals to pay in the digital era.⁹⁸

Beyond the public debate, the access and publication of mugshots reflects three broader questions facing our society. The first is the changing concept of privacy in the digital era. The second is how to balance personal privacy with open access in the day of electronic government records and the Internet. The third is the tension between criminal justice reform, focusing on the discriminatory impact of mass incarceration and the need for successful reentry,⁹⁹ and those who believe that society has the right to know.

95. Rojas & Del Toro, *supra* note 57; Tracie Powell, *Some News Sites Suffer from an Online Mugshot Crackdown*, COLUM. JOURNALISM REV. (Oct. 14, 2013), http://www.cjr.org/behind_the_news/news_mugshot_sites.php?page=all.

96. In *The First Amendment Bubble*, Amy Gajda warns against First Amendment absolutism by newspapers and journalists in light of the Internet, the rise of quasi-journalism, and websites with significant commercial interests, such as the mugshot industry. AMY GAJDA, *THE FIRST AMENDMENT BUBBLE: HOW PRIVACY AND PAPARAZZI THREATEN A FREE PRESS* 128–32, 206–21 (2015).

97. See Kennedy, *supra* note 17 (discussing LEAST WANTED: A CENTURY OF AMERICAN MUGSHOTS (Mark Michaelson & Steven Kasher eds., 2006)).

98. See Lageson & Maruna, *supra* note 76, at 127–28; see also John Del Vecchio, *The Digital Scarlet Letter: Responding to Mug Shot Publishers*, 71 BENCH & B. MINN., Sept. 2014, at 23, 23–24.

99. See generally ALEXANDER, *supra* note 79, at 140–77 (detailing the discriminatory effects of mass incarceration); DAVID DAGAN & STEVEN M. TELES, *PRISON BREAK: WHY CONSERVATIVES TURNED AGAINST MASS INCARCERATION* 2–4 (2016); JACOBS, *supra* note 10, at 81–90; JOAN PETERSILIA, *WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY* 105–12 (2003); JEREMY TRAVIS, *BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY* 83–86 (2005).

II. THE LEGAL FRAMEWORK FOR MUGSHOTS

At the heart of the public debate about mugshots and their commercialization is the issue of access. As with most government information, the press and the public enjoy a broad First Amendment right to publish mugshots once they have access to them.¹⁰⁰ If mugshots are publicly available, as they are in many jurisdictions, mugshot companies and newspapers are entitled to disseminate them as they see fit based on the broad First Amendment protections for publication. The government can do little to prevent their publication or curtail their widespread dissemination through the Internet.

But there is no constitutional right to access mugshots. Thus, any right to access is through either the common law or statutory authority. Courts have been reluctant to place a duty to disclose on the government and largely defer to legislatures. For these reasons, the accessibility of mugshots is generally governed by the Federal FOIA or its state-law equivalents. Under these statutes and the common law, there is often a balancing of the individual's privacy interest and the public interest in disclosure. As with other government records,¹⁰¹ this weighing of interests has become increasingly complex in the digital era, and I argue that the existing laws do not address the current realities.

This Part begins with a discussion of the dual First Amendment rights—the right to publish and the right to access. Although the mugshot industry heavily relies on the mantle of the First Amendment, it only affords them protection insofar as the right to publish publicly-available information. This Part then explores the common law right to access before focusing on federal and state public records laws. Whereas mugshots have been deemed “closed” records that are exempt from disclosure under federal law, the overwhelming majority of states consider them “open” public records. Because the vast majority of mugshots are taken by state and local agencies,¹⁰² the right to access mugshots in these states must be limited in order to address the problem.

100. For the press, this is a particularly unfettered First Amendment right and reaches materials that are classified and sensitive in nature. *N.Y. Times Co. v. United States*, 403 U.S. 713, 714–15, 717 (1971) (per curiam).

101. Marder, *supra* note 28, at 456–57 (discussing court documents and campaign contributions).

102. For comparison, in 2015 the incoming caseload for prosecutors on the state level was over 14,502,495 “newly filed, reopened, and reactivated cases.” NAT’L CTR. ST. CTS., http://www.ncsc.org/Sitecore/Content/Microsites/PopUp/Home/CSP/CSP_Criminal (last visited May 8, 2018) (tabulating the total number from individual state data). In contrast, United States Attorneys filed 54,928 new cases during the fiscal year ending September 30, 2015. U.S. DEPT OF JUSTICE, UNITED STATES ATTORNEYS’ ANNUAL STATISTICAL REPORT 4

A. Federal Constitution

The First Amendment of the U.S. Constitution generally “protects openness in information flow.”¹⁰³ This manifests itself in two different forms—the right to access and the right to publish. Regarding the right to publish, the freedom of speech and of the press prohibit restrictions on the dissemination of publicly-available information absent a compelling state interest that meets the strict scrutiny test. On the other hand, the constitutional right to access government records is far more limited and does not include criminal investigatory records such as mugshots.

1. First Amendment Right to Publish

The press and the public have the constitutional right to publish government records, which have been placed in the public domain or can be lawfully accessed by the public. In other words, “once the government makes information public, the government cannot subsequently sanction its further disclosure.”¹⁰⁴

In *Florida Star v. B.J.F.*, the Supreme Court squarely addressed the issue of publicly-available arrest records.¹⁰⁵ In that case, a sexual assault victim’s full name was published by a newspaper after the press was accidentally given full access to the police report. The victim sued the sheriff’s department and the newspaper under a state statute that made it unlawful to print or publish “in any instrument of mass communication’ the name of the victim of a sexual offense.”¹⁰⁶ The newspaper moved to dismiss the action based on its First Amendment right to publish.¹⁰⁷ The Court held that imposition of civil damages on the

(2015), <https://www.justice.gov/usao/file/831856/download>. Thus, the total state filings were over 260 times greater than the federal filings in 2015.

103. Daniel J. Solove, *Access and Aggregation: Public Records, Privacy and the Constitution*, 86 MINN. L. REV. 1137, 1201 (2002).

104. *Id.* at 1209. However, the Court has refused to draw an absolute rule that “truthful publication may never be punished consistent with the First Amendment.” *Fla. Star v. B.J.F.*, 491 U.S. 524, 532–33 (1989) (citing to various scenarios where the First Amendment right may not trump, including location of military troops and private libels).

105. *Fla. Star*, 491 U.S. at 532 (distinguishing the facts of *Cox Broadcasting* and noting the information in that case was “from a police report prepared and disseminated at a time at which . . . no adversarial criminal proceedings [had] begun”). In *Cox Broadcasting Corp. v. Cohn*, the Supreme Court held that the press had the First Amendment right to publish the victim’s name contained in official court records open to the public. 420 U.S. 469, 496–97 (1975).

106. *Fla. Star*, 491 U.S. at 526–28 (quoting FLA. STAT. § 794.03 (1987)).

107. *Id.* at 528.

newspaper under the statute violated the First Amendment.¹⁰⁸ The Court emphasized that “[i]f a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further *a state interest of the highest order*.”¹⁰⁹ In applying this strict scrutiny analysis, the Court further emphasized the three considerations set forth in its prior decision, *Smith v. Daily Mail Publishing Co.*, finding that the information had to be lawfully obtained, publicly available, and truthful.¹¹⁰

In reaching this decision, the Court noted that “press freedom and privacy rights are both ‘plainly rooted in the traditions and significant concerns of our society.’”¹¹¹ Consistent with its prior holding in *Cox Broadcasting Corp. v. Cohn*,¹¹² the Court found that resolution between these rights was best left to policymakers. As stated in *Cox Broadcasting*:

If there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information. Their political institutions must weigh the interests in privacy with the interests of the public to know and of the press to publish. Once true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it.¹¹³

108. *Id.* at 532–41 (applying the standard for lawfully obtained, truthful information from *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97, 103 (1979)). In order to apply the standard set forth in *Daily Mail*, a court will weigh the following three considerations: (1) the published information was lawfully obtained, (2) punishing the publisher for dissemination of information that is publicly available is unlikely to advance the interest that the State seeks to further, and (3) punishing the press may result in “timidity and self-censorship” in publishing. *Id.* at 534–36 (quoting *Cox Broad.*, 420 U.S. at 496).

109. *Fla. Star*, 491 U.S. at 533 (emphasis added) (quoting *Daily Mail*, 443 U.S. at 103).

110. *Id.* at 533–36 (citing *Daily Mail*, 443 U.S. at 103).

111. *Id.* at 533 (discussing *Cox Broad.*, 420 U.S. at 491). However, there is no constitutional right to privacy in one’s mugshot. *Paul v. Davis*, 424 U.S. 693, 695, 712–13 (1976); *see also infra* Section III.D.

112. 420 U.S. at 469–70.

113. *Id.* at 496–97 (footnote omitted) (holding that the First and Fourteenth Amendments barred the state (Georgia) from making the defendant’s broadcast of the name of the rape victim the basis of civil liability (i.e., an invasion of privacy claim) when the name had been obtained through court documents open to public inspection); *see also Doe v. City of New York*, 15 F.3d 264, 268–69 (2d Cir. 1994); *Walls v. City of Petersburg*, 895 F.2d 188, 193 (4th Cir. 1990).

Not only is the press shielded, but mugshot companies also cannot be sanctioned for publishing publicly-accessible mugshots.¹¹⁴ As described by an American Civil Liberties Union (“ACLU”) staff attorney, “First Amendment protections are so strong that once these images are made available, getting them back into the box is extraordinarily difficult.”¹¹⁵ Such downstream use of lawfully-obtained public records is difficult, if not impossible, to limit.

2. First Amendment Right to Access

However, neither the mugshot companies nor the press have a constitutional right to access mugshots. As a general matter, there is no *constitutional* right to access government information. The one exception to this general principle is the qualified constitutional right to access criminal proceedings and associated documents. As discussed below, it is unlikely that this qualified right would be extended to mugshots.

This general principle was discussed in *Houchins v. KQED, Inc.*,¹¹⁶ which was the culmination of cases in the 1970s concerning the media’s right to access penal institutions.¹¹⁷ In *Houchins*, KQED, a news broadcasting outlet, sought access to a county jail to investigate the suicide of an incarcerated individual. KQED argued that it had a constitutionally guaranteed right to access and gather information from jails because penal conditions were a matter of public importance and because an “informed public” was necessary to safeguard against government abuse.¹¹⁸ Although recognizing “[t]he public importance of conditions in penal facilities and the media’s role of providing information,”¹¹⁹ the Court rejected KQED’s argument, concluding that “[n]either the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government’s control.”¹²⁰

The Court’s reasoning in *Houchins* derived from the fundamental principles of executive authority and separation of powers. The Court

114. See, e.g., *Fla. Star*, 491 U.S. at 533; *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 609 (1978).

115. Kevin Collier, *Why the Online Mugshot Industry Will Never Die*, DAILY DOT: THE POLICE STATE (Dec. 7, 2014), <http://kernelmag.dailydot.com/issue-sections/features-issue-sections/11068/online-mugshot-extortion-industry/#sthash.ivZYNWeA.dpuf> (quoting Lee Rowland, a staff attorney at the ACLU).

116. *Houchins v. KQED, Inc.*, 438 U.S. 1, 14 (1978) (plurality opinion).

117. *Id.* at 14–16 (discussing the holdings in *Pell v. Procunier*, 417 U.S. 817, 834 (1974) and *Saxbe v. Wash. Post Co.*, 417 U.S. 843, 850 (1974)).

118. *Id.* at 8.

119. *Id.* at 9.

120. *Id.* at 15.

observed that there was “no discernible basis for a constitutional duty to disclose, or for standards governing disclosure of or access to information.”¹²¹ It emphasized that, without such guidance, judges would “be at large to fashion ad hoc standards”¹²² for disclosure, and that this was “clearly a legislative task which the Constitution has left to the political processes.”¹²³ Placing a fine point on this distinction, the Court quoted remarks by Associate Justice Potter Stewart in which he stated: “The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act.”¹²⁴ Thus, the general presumption has traditionally been that the government has no constitutional obligation to disclose information in its possession.

However in the 1980s, the Supreme Court explicitly recognized a qualified constitutional right to access certain judicial proceedings.¹²⁵ In *Richmond Newspapers, Inc. v. Virginia*,¹²⁶ the Court “firmly established for the first time that the press and general public have a constitutional right of access to criminal trials.”¹²⁷ A plurality of the Court recognized that “the right to attend criminal trials is implicit in the guarantees of the First Amendment,”¹²⁸ reasoning that “without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and ‘of the press could be eviscerated.’”¹²⁹ In reaching its conclusion, the plurality opinion focused on two factors: (1) the history of openness of criminal trials in the United States and Britain, and (2) the significant role that such access plays in the functioning and legitimacy of the judicial process and our democracy.¹³⁰

In *Globe Newspaper Co. v. Superior Court*, the Court affirmed the plurality opinion in *Richmond Newspapers*, but it recognized that trial

121. *Id.* at 14.

122. *Id.*

123. *Id.* at 12.

124. *Id.* at 14 (quoting Potter Stewart, “*Or of the Press*,” 26 HASTINGS L.J. 631, 636 (1975)).

125. *Press-Enter. Co. v. Superior Court (Press-Enter. II)*, 478 U.S. 1, 9–12 (1986) (extending the right of access to preliminary hearings by applying the “experience and logic” two-prong test); *Press-Enter. Co. v. Superior Court (Press-Enter. I)*, 464 U.S. 501, 511–13 (1984) (extending the right of access to jury selection); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 605–06 (1982) (discussing the two factors in determining whether the qualified First Amendment right to access should apply to criminal trials); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980) (plurality opinion) (holding that the First Amendment gives a right of access to criminal trials).

126. *Richmond Newspapers*, 448 U.S. at 580.

127. *Globe Newspaper*, 457 U.S. at 603.

128. *Richmond Newspapers*, 448 U.S. at 580 (footnote omitted).

129. *Id.* (quoting *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972)).

130. *Id.* at 569–72.

access was a qualified, not an absolute, right.¹³¹ The Court recognized that as a qualified right, courts can still deny access to a criminal trial if “the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.”¹³² The Court also applied the two factors articulated in *Richmond Newspapers*.¹³³ This two-prong analysis, now commonly referred to as the “experience and logic” or the *Press-Enterprise* test, is used to determine whether a First Amendment right applies.

The Supreme Court has not expanded this right beyond criminal trials and related proceedings.¹³⁴ A number of federal courts of appeals have extended the right to access to civil proceedings.¹³⁵ However, lower courts have largely cabined this qualified First Amendment right to judicial or quasi-judicial proceedings¹³⁶ and related records.¹³⁷ Neither the Supreme Court nor the lower courts have extended the *Richmond Newspapers* line of cases generally to criminal investigatory records, with some exceptions for search warrants based on judicial involvement in their issuance.¹³⁸

131. *Globe Newspaper*, 457 U.S. at 605–07.

132. *Id.* at 607 (striking down a state law mandating that all criminal trials involving juvenile victims be closed as overbroad).

133. *Id.* at 603–07.

134. *See supra* note 125 and accompanying text.

135. *See* *Courthouse News Serv. v. Planet*, 750 F.3d 776, 786 (9th Cir. 2014); *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 91 (2d Cir. 2004) (“Numerous federal and state courts have also extended . . . First Amendment protection . . . to particular types of judicial documents . . .”); *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988) (extending the right of access to summary judgment motions in civil cases); *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1061 (3d Cir. 1984) (“We hold that the First Amendment does secure a right of access to civil proceedings.”); *In re Cont’l Ill. Sec. Litig.*, 732 F.2d 1302, 1308 (7th Cir. 1984) (finding a right of access to litigation committee reports in shareholder derivative suits). *But see* *Ctr. for Nat’l Sec. Studies v. U.S. Dep’t of Justice*, 331 F.3d 918, 933–35 (D.C. Cir. 2003) (limiting the First Amendment right to access to criminal judicial proceedings); *Okla. Observer v. Patton*, 73 F. Supp. 3d 1318, 1323–25 (W.D. Okla. 2014) (recognizing that although other courts have applied the test more broadly, the Tenth Circuit has limited its reach to the criminal adjudication process).

136. *See, e.g.*, *N.Y. Civil Liberties Union v. N.Y.C. Transit Auth.*, 684 F.3d 286, 290, 297 (2d Cir. 2012) (applying the “experience and logic” test to New York City Transit Adjudication Bureau hearings). *See generally* Solove, *supra* note 103, at 1203 (“Courts have rarely applied the First Amendment right to access beyond court records to other public records.”).

137. *But see* *Leigh v. Salazar*, 677 F.3d 892, 898–900 (9th Cir. 2012) (applying the test to a Bureau of Land Management horse roundup).

138. There is a circuit split regarding whether the qualified right applies to search warrants and related materials. *Compare In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F.2d 569, 572–73 (8th Cir. 1988) (finding a presumption of access to search warrants), *with Times Mirror Co. v. United States*, 873 F.2d 1210, 1212–16 (9th Cir. 1989) (holding no First Amendment right to access). However, in its analysis,

It is doubtful that courts would extend this qualified constitutional right to mugshots.¹³⁹ In *Los Angeles Police Department v. United Reporting Publishing Corp.*,¹⁴⁰ the Supreme Court stated in dicta that the government has no constitutional obligation to disclose arrest information.¹⁴¹ In *United Reporting*, the Court addressed a facial challenge to a state public records statute that permitted selective access to arrestee information (i.e., name, address, and occupation) to members of the public for specific, non-commercial uses.¹⁴² A commercial publishing company, which had previously accessed this information, sued for declaratory and injunctive relief, arguing the statute violated the First and Fourteenth Amendments.¹⁴³ The Court held that the statute was facially valid, finding that the state could provide selective access to information in its possession.¹⁴⁴ The Court described the statute as “nothing more than a governmental denial of access to information in its possession.”¹⁴⁵ It further emphasized that although the government could choose to provide selective access to arrestee information, it “could [also] decide *not* to give out arrestee information *at all* without violating the First Amendment.”¹⁴⁶ Given this deference to the executive and legislative branches, courts would be reluctant to apply the “experience and logic” test to mugshots or other investigatory records.¹⁴⁷

the Eighth Circuit relied heavily on the fact that there is magistrate review of the search warrant application. *In re Search Warrant*, 855 F.2d at 573.

139. “Indeed, there are no federal court precedents requiring, under the First Amendment, disclosure of information compiled during an Executive Branch investigation” *Ctr. for Nat’l Sec. Studies*, 331 F.3d at 935. *But see* *Hous. Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App. 1975). In *Houston Chronicle*, the Texas Court of Civil Appeals (now the Texas Court of Appeals) held that “the press and the public have a [federal] constitutional right of access to information concerning crime in the community, and to information relating to activities [regarding] law enforcement agencies.” *Id.* at 186. The court applied a balancing test to determine the applicability of the federal constitutional right to access. *Id.* at 186–88. This decision was prior to the Supreme Court’s decisions in *Richmond Newspapers*, *Houchins*, and *United Reporting* (discussed *supra*), and it does not comport with the reasoning of those cases.

140. 528 U.S. 32, 40 (1999).

141. *United Reporting* was decided almost twenty years after *Richmond Newspapers* and its progeny. *Id.* at 32.

142. *Id.* at 34–35, 40.

143. *Id.* at 34–36.

144. *Id.* at 37–40.

145. *Id.* at 40 (citing *Houchins v. KQED, Inc.*, 438 U.S. 1, 14 (1978) (plurality opinion)).

146. *Id.* (emphasis added) (citing *Houchins*, 438 U.S. at 14).

147. The reach of the “experience and logic” test remains unclear. *See* Solove, *supra* note 103, at 1203 (“The rationale for the [constitutional] right to access turns on the need for knowledge about the government as an essential component of discourse about the government. . . . [This] rationale can be logically extended beyond such [judicial] proceedings.”).

In sum, there is no First Amendment right to access mugshots because they are investigatory records that are not part of the judicial process.¹⁴⁸ Because there is no constitutional right to access these records, the courts generally yield to the legislature to grant access by statute. Under *United Reporting*, the government may choose to grant selective access to this information by statute, and access may be limited based on use. Once access is granted, constitutional protections for publication are broad.

Thus, despite relying heavily on the First Amendment to defend the legality of its actions, the mugshot industry's constitutional defense is often imprecise and conflates the First Amendment's dual rights.¹⁴⁹ Access to mugshots is not constitutionally guaranteed, and the mugshot industry and other members of the public must rely on the common law or statutory authority to attain this information.

B. Common Law Right to Access

Courts have long recognized a common law right of access to government records and documents, including judicial documents and records.¹⁵⁰ The common law right is far from absolute and provides less "substantive protection to the interests of the press and the public as does the First Amendment."¹⁵¹ When the First Amendment provides a right to access, any restriction on access must meet the strict scrutiny analysis.¹⁵² In contrast, under the common law, the presumption of access can be overcome by "showing some significant interest that outweighs the presumption."¹⁵³ "[T]he decision as to access is . . . left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the . . . case."¹⁵⁴

148. *United Reporting*, 528 U.S. at 40; cf. *Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 935 (D.C. Cir. 2003).

149. Nor does the press enjoy a greater constitutional right to access than the general public. See *Houchins*, 438 U.S. at 11 ("[T]he First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally" (quoting *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972)); see also *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 609 (1978).

150. See, e.g., *State ex rel. Colescott v. King*, 57 N.E. 535, 538 (Ind. 1900); see also *State ex rel. Ferry v. Williams*, 41 N.J.L. 332, 336-39 (1879).

151. *Va. Dep't of State Police v. Wash. Post*, 386 F.3d 567, 575 (4th Cir. 2004).

152. *Id.*

153. *Id.* (internal quotation marks omitted) (quoting *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988)).

154. *Nixon*, 435 U.S. at 599.

While not clearly defined or wholly consistent among federal and state common law,¹⁵⁵ courts have generally applied a balancing test, weighing both “the requestor’s interest in disclosure”¹⁵⁶ and “any asserted reasons for confidentiality.”¹⁵⁷ Importantly, the interest in the records must be “legitimate” and cannot be for “improper purposes.”¹⁵⁸ For example, records should not be used “to gratify private spite or promote public scandal”¹⁵⁹ through their publication or “as sources of business information that might harm a litigant’s competitive standing.”¹⁶⁰ In weighing the interest in confidentiality, courts often weigh the privacy interests of individuals whose information is contained within the records.¹⁶¹

The common law right of access has been largely supplanted by the FOIA and state public records laws.¹⁶² However, the common law right has continuing relevance as a separate legal basis for access,¹⁶³ or where

155. As described by the Court in *Nixon*, “[i]t is difficult to distill from the relatively few judicial decisions a comprehensive definition of what is referred to as the common-law right of access or to identify all the factors to be weighed in determining whether access is appropriate.” *Id.* at 598–99. Thus, standards vary according to the jurisdiction. For example, certain states continue to abide by the English court requirement that the requestor have a proprietary interest in the documents or a need for them as evidence in a lawsuit. Solove, *supra* note 103, at 1154–56.

156. *In re N.J. Firemen’s Ass’n Obligation to Provide Relief Applications Under Open Pub. Records Act*, 166 A.3d 1125, 1138 (N.J. 2017).

157. *United States v. Kaczynski*, 154 F.3d 930, 931 (9th Cir. 1998). In *Loigman v. Kimmelman*, the New Jersey Supreme Court described this as an “exquisite weighing process.” 505 A.2d 958, 964 (N.J. 1986) (quoting *Beck v. Bluestein*, 476 A.2d 842, 851 (N.J. Super. Ct. App. Div. 1984)). It listed several factors that may be considered:

- (1) the extent to which disclosure will impede agency functions by discouraging citizens from providing information to the government;
- (2) the effect disclosure may have upon persons who have given such information, and whether they did so in reliance that their identities would not be disclosed;
- (3) the extent to which agency self-evaluation, program improvement, or other decisionmaking will be chilled by disclosure;
- (4) the degree to which the information sought includes factual data as opposed to evaluative reports of policymakers;
- (5) whether any findings of public misconduct have been insufficiently corrected by remedial measures instituted by the investigative agency; and
- (6) whether any agency disciplinary or investigatory proceedings have arisen that may circumscribe the individual’s asserted need for the materials.

Id. at 966–67.

158. *Nixon*, 435 U.S. at 598, 602. Under federal law, the legitimacy of the need for the disclosure is a threshold inquiry. *Kaczynski*, 154 F.3d at 931.

159. *Nixon*, 435 U.S. at 598 (quoting *In re Caswell*, 29 A. 259, 259 (R.I. 1893)).

160. *Id.* (citing *Schmedding v. May*, 48 N.W. 201, 202 (Mich. 1891)).

161. *Commonwealth v. Pon*, 14 N.E.3d 182, 199 (Mass. 2014).

162. Solove, *supra* note 103, at 1160; see also Roger A. Nowadzky, *A Comparative Analysis of Public Records Statutes*, 28 URB. LAW. 65, 69–70 (1996).

163. *Balt. Sun Co. v. Goetz*, 886 F.2d 60, 63–65 (4th Cir. 1989) (holding that there was no First Amendment right of access to an affidavit for a search warrant, but finding that

the applicability of the public records laws is in question.¹⁶⁴ Moreover, because the Supreme Court has declined to recognize a constitutional right to privacy in mugshots,¹⁶⁵ the common law and its consideration of privacy interests have served as a limitation on—or as an implied exception to—public records laws.¹⁶⁶ This doctrine would arguably have limited utility for mugshot companies or other mass publishers because of the fact specific, case-by-case inquiry analysis. Moreover, courts would likely find that in many cases the requestor's purpose, i.e., commercial gain, was illegitimate and improper, thus barring access under the common law.

C. Federal Statutes and the Right to Access

Federally, the disclosure of mugshots is governed by the Privacy Act of 1974 and the FOIA, the federal equivalent to the various state public records laws. Despite the similarity in legal frameworks, the outcome has been drastically different in terms of privacy protection.

When President Lyndon Johnson signed FOIA into law in 1966, he proclaimed that "democracy works best when the people have all the information that the security of the Nation permits. No one should be able to pull the curtains of secrecy around decisions which can be

the affidavits were judicial records that were subject to the common law presumption of openness); *see also Pon*, 14 N.E.3d at 199 (holding that there was a common law right to access judicial records that had been expunged, but that disclosure would be on a case-by-case basis depending on countervailing privacy interests and a strong government interest in successful rehabilitation and reentry).

164. In *Loigman v. Kimmelman*, the New Jersey Supreme Court encouraged the legislature to adopt clear laws to define the public's right to access specific government information. 505 A.2d 958, 967 (N.J. 1986) ("[W]e are in the position of having to resolve a dispute between a citizen and another branch of government. Rather than involving courts in balancing the interests involved, the better policy may be that of comprehensive freedom-of-information acts that give citizens an unqualified right of access to public records, subject to defined exemptions, without a showing of need. For now we must resolve the matter in accordance with existing precedent and policy.").

165. *Paul v. Davis*, 424 U.S. 693, 713 (1976); *infra* Section III.D; *cf. Loder v. Mun. Court*, 553 P.2d 624, 627-28 (Cal. 1976) (holding that law enforcement's retention of an arrest record of a person who had not been charged by the prosecutor did not violate the right to privacy under the California Constitution in light of the compelling government interests involved and the statutory safeguards).

166. *See, e.g., Carlson v. Pima Cty.*, 687 P.2d 1242, 1245-46 (Ariz. 1984) (en banc) (adopting common law limitations and public policy considerations on open disclosure, and applying a balancing test including confidentiality of information and privacy of persons); *Hathaway v. Joint Sch. Dist. No. 1*, 342 N.W.2d 682, 687 (Wis. 1984) (describing a presumption in favor of access "unless there is a clear statutory exception, . . . a limitation under the common law, or . . . an overriding public interest in keeping the public record confidential").

revealed without injury to the public interest.”¹⁶⁷ The purpose of FOIA is to ensure government transparency and to promote government accountability in our open society.¹⁶⁸ The disclosure of mugshots does little to further this purpose and comes at great injury to those portrayed.

As discussed in this Section, the U.S. Department of Justice (“DOJ”) has reached this same conclusion, finding that disclosure of mugshots constitutes an unwarranted invasion of privacy. The U.S. Marshals Service (“USMS”), the agency responsible for responding to such requests, adopted a nondisclosure policy in 1971 with a limited exception for law enforcement purposes. This policy has been upheld by the Tenth, Eleventh, and most recently the Sixth Circuits.

1. The Privacy Act of 1974 and the FOIA

The Privacy Act of 1974, codified as 5 U.S.C. § 552a, prohibits federal agencies from disclosing an individual’s personal information without authorization from the individual unless disclosure is permitted by one of twelve statutory exceptions.¹⁶⁹ One of these exceptions (where disclosure is permitted) is when release is required under the FOIA.¹⁷⁰ The FOIA requires that administrative agencies make information available to the public and includes nine exemptions from this mandate.¹⁷¹ Of the FOIA’s nine exemptions, Exemption 7(C) has been interpreted to apply to mugshots. Exemption 7(C) limits disclosure of “records or information compiled for law enforcement purposes . . . [that] could reasonably be expected to constitute an unwarranted invasion of personal privacy.”¹⁷²

The USMS, which is the custodian of federal arrest records and mugshots, has long considered mugshots to fall within the ambit of Exemption 7(C). In contrast to most of its state counterparts, the USMS operates under the presumption that disclosure of federal mugshots is generally prohibited by Exemption 7(C) and “constitute[s] an unwarranted invasion of privacy.”¹⁷³ USMS has determined that “[s]uch photographs generally reside in a system of records protected by the

167. Statement by the President upon Signing the Freedom of Information Act July 4, 1966, 2 WEEKLY COMP. PRES. DOC. 895 (July 11, 1996).

168. 5 U.S.C. § 552 (2012).

169. 5 U.S.C. § 552a(b)(1)–(12) (2012).

170. *Id.* § 552a(b)(2).

171. *Id.* § 552(b)(1)–(9).

172. *Id.* § 552(b)(7)(C).

173. *Id.*

Privacy Act, 5 U.S.C. § 552a,¹⁷⁴ unless there is a specific law enforcement need.¹⁷⁵ This policy was adopted by the DOJ in 1971,¹⁷⁶ and has been in force for over forty years with limited exception.¹⁷⁷

In a December 2012 memorandum, the DOJ reaffirmed its policy that mugshots were presumptively closed records, which should only be disclosed to the media and public for law enforcement purposes. The memo examined three different time frames during the criminal process—pre-arrest, post-arrest, and after the end of the criminal proceeding. It explained that, if a fugitive has not been captured, USMS should determine whether release of the photo would serve a law enforcement purpose.¹⁷⁸ However, “[o]nce a prisoner has been arrested, the general rule is that no release should be made because release of photographs of that prisoner to the media or public would not serve law enforcement purposes.”¹⁷⁹ It recognized that there may be exceptions for post-arrest where disclosure is warranted for “the purpose of informing the public that a particularly notorious fugitive . . . has been apprehended.”¹⁸⁰ Finally, it noted that at some point after the conclusion of the proceedings or time had elapsed, there could no longer be “any legitimate law enforcement function.”¹⁸¹

2. Federal Case Law Applying Exemption 7(C)

USMS’ interpretation of Exemption 7(C), its applicability to mugshots, and its policy of non-disclosure have been upheld in all three of the federal courts of appeal that have considered the issue—by the Tenth and Eleventh Circuits, and most recently by the Sixth Circuit, which reversed its earlier precedent that had held that individuals had

174. Memorandum from Gerald M. Auerbach, Gen. Counsel, U.S. Marshals Serv., on Booking Photograph Disclosure Policy to All U.S. Marshals et al. 1 (Dec. 12, 2012), https://www.usmarshals.gov/foia/policy/booking_photos.pdf [hereinafter Auerbach Memo].

175. 28 C.F.R. § 50.2(b)(7) (2017).

176. Release of Information by Personnel of DOJ Relating to Criminal and Civil Proceedings, 36 Fed. Reg. 21,028 (Nov. 3, 1971) (codified at 28 C.F.R. pt. 50); 28 C.F.R. § 50.2(b)(7) (“Departmental representatives should not make available photographs of a defendant unless a law enforcement function is served thereby.”).

177. As discussed further below, for ten years, disclosure was permitted if the FOIA request originated in Kentucky, Ohio, Michigan, or Tennessee because of the Sixth Circuit’s decision in *Detroit Free Press, Inc. v. Department of Justice (Detroit Free Press I)*, 73 F.3d 93, 97, 99 (6th Cir. 1996).

178. See Auerbach Memo, *supra* note 174, at 1–2.

179. See *id.* at 1 (emphasis added).

180. See *id.* at 2.

181. See *id.*

no privacy interest in their mugshots.¹⁸² Each of their decisions was based on the reasoning and framework set forth in *United States Department of Justice v. Reporters Committee for Freedom of Press*, where the U.S. Supreme Court had held that rap sheets were categorically not subject to disclosure under FOIA.¹⁸³

In *Reporters Committee*, the Court found that rap sheets were law enforcement records subject to Exemption 7(C) and that their disclosure would constitute an unwarranted invasion of privacy.¹⁸⁴ In reaching this conclusion, the Court began with a preliminary determination of whether there was a personal “privacy interest at stake,”¹⁸⁵ and then balanced this privacy interest against the public interest in disclosure.¹⁸⁶ The Supreme Court found that there was a substantial privacy interest implicated “in avoiding disclosure of personal matters,”¹⁸⁷ maintaining “the individual’s control of information concerning his or her person,”¹⁸⁸ and “keeping personal facts away from the public eye.”¹⁸⁹ The Court rejected the Reporters Committee’s argument that because the events summarized may have been previously disclosed to the public, the privacy interest was diminished.¹⁹⁰ The Court emphasized the “privacy interest in maintaining the *practical obscurity* of rap-sheet information will always be high.”¹⁹¹

The Court then determined that the privacy interest far outweighed the minimal public interest in its disclosure. In finding that there was little or no public interest in the rap sheet, the Court stated that although the “rap sheet would provide details to include in a news story” or which might pique the public interest, this was “not the kind of public interest for which Congress enacted the FOIA.”¹⁹² The Court emphasized that the

182. *World Publ’g Co. v. U.S. Dep’t of Justice*, 672 F.3d 825, 828 (10th Cir. 2012); *Karantalis v. U.S. Dep’t of Justice*, 635 F.3d 497, 504 (11th Cir. 2011) (per curiam); *Detroit Free Press II*, 829 F.3d 478, 480 (6th Cir. 2016) (en banc), *cert. denied*, 137 S. Ct. 2158 (2017).

183. 489 U.S. 749, 780 (1989).

184. *Id.* (holding that disclosure of contents of a rap sheet would be an unwarranted invasion of privacy). Rap sheets are “criminal identification records” compiled and maintained by the FBI that “contain certain descriptive information . . . as well as a history of arrests, charges, convictions, and incarcerations.” *Id.* at 751–52.

185. *Id.* at 761 (quoting *Reporters Comm. for Freedom of the Press v. U.S. Dep’t of Justice*, 831 F.2d 1124, 1129 (D.C. Cir. 1987)).

186. *Id.* at 762.

187. *Id.*

188. *Id.* at 763.

189. *Id.* at 769.

190. *Id.* at 762–63.

191. *Id.* at 780 (emphasis added).

192. *Id.* at 774; *see also id.* at 770 (rejecting the notion that there was no interest because the event was “not wholly private.” (quoting William H. Rehnquist, *Is an Expanded Right*

core purpose of FOIA was to ensure transparency and the “public understanding of the operations or activities of the government.”¹⁹³

In other words, although there is undoubtedly some public interest in anyone’s criminal history, especially if the history is in some way related to the subject’s dealing with a public official or agency, the FOIA’s central purpose is to ensure that the *Government’s* activities be opened to the sharp eye of public scrutiny, not that information about *private citizens* that happens to be in the warehouse of the Government be so disclosed.¹⁹⁴

Thus, in balancing the substantial privacy interests of the individual versus the public interest in the rap sheet, which the Court found non-cognizable under FOIA, the Court found the privacy invasion unwarranted.¹⁹⁵

In applying the balancing test set forth in *Reporters Committee* to mugshots, the Sixth, Tenth, and Eleventh Circuits each found that there was a cognizable privacy interest in the mugshots.¹⁹⁶ For example, in *Karantsalis v. United States Department of Justice*, the Eleventh Circuit found that the subject had a substantial privacy interest in his mugshot, which was being sought by Reporters Committee. In describing this privacy interest, the court stated:

[A] booking photograph is a unique and powerful type of photograph that raises personal privacy interests distinct from normal photographs. A booking photograph is a vivid symbol of criminal accusation, which, when released to the public, intimates, and is often equated with, guilt. Further, a booking photograph captures the subject in the vulnerable and embarrassing moments immediately after being accused, taken into custody, and deprived of most liberties. Finally, . . . booking photographs taken by the Marshals Service are generally not

of Privacy Consistent with Fair and Effective Law Enforcement?, 23 KAN. L. REV. 2, 8 (1974))).

193. *Id.* at 775.

194. *Id.* at 774.

195. *Id.* at 780.

196. Each circuit described the weight of this privacy interest differently. The Eleventh Circuit described it as “substantial.” *Karantsalis v. U.S. Dep’t of Justice*, 635 F.3d 497, 504 (11th Cir. 2011). The Tenth Circuit stated that arrestees have “some privacy interest in booking photos.” *World Publ’g Co. v. U.S. Dep’t of Justice*, 672 F.3d 825, 827 (10th Cir. 2012). On the other hand, the Sixth Circuit stated that there is “a non-trivial privacy interest.” *Detroit Free Press II*, 829 F.3d 478, 480, 482, 484 (6th Cir. 2016) (en banc), *cert. denied*, 137 S. Ct. 2158 (2017).

available for public dissemination; an attribute which suggests the information implicates a personal privacy interest.¹⁹⁷

Each of the court of appeals also found that there was little or no public interest in the disclosure of the mugshots that comported with the core purpose of the FOIA, i.e., government transparency.¹⁹⁸ Rather than shedding light on the government's operations and activities, "the public obtains no discernable interest from viewing the booking photographs, except perhaps the negligible value of satisfying voyeuristic curiosities."¹⁹⁹ That public curiosity and fascination do not constitute a valid public interest, and the core purpose of the FOIA "is not fostered by disclosure of information about private citizens . . . that reveals little or nothing about an agency's own conduct."²⁰⁰ In balancing these interests—the subject's personal privacy against the public's interest in viewing the image—each of the courts found that the "the balance weighs heavily against disclosure."²⁰¹

D. State Law and Right to Access

Because states have no constitutional duty to disclose mugshots, state legislatures have the discretion to provide public access to mugshots by way of statute. The laws of the fifty states are far from consistent, however. In the overwhelming majority of states, the question turns largely on whether mugshots fall within the ambit of one of the exceptions to the state's equivalent to the FOIA.

Like their federal counterpart, the public record laws on the state level were adopted to ensure government transparency and to promote government accountability in our open society.²⁰² These laws are referred to by a variety of names on the state level, including "public records," "freedom of information," "sunshine," and "right-to-know" laws.²⁰³ As with the FOIA, the state statutes begin with a broad presumption of openness, then provide specific statutory exceptions that are narrowly

197. 635 F.3d at 503.

198. See, e.g., *id.* at 503–04.

199. *Id.* at 504.

200. *Detroit Free Press II*, 829 F.3d at 485 (omission in original) (quoting *Reporters Comm.*, 489 U.S. at 773).

201. *Karantalis*, 635 F.3d at 504.

202. See, e.g., CAL. GOV'T CODE § 6250 (West 2017).

203. See, e.g., ALA. CODE § 36-12-40 (2017); N.H. REV. STAT. ANN. § 91-A:4 (2017); N.Y. PUB. OFF. LAW § 87 (McKinney 2017); VA. CODE ANN. § 2.2-3706 (2017).

construed.²⁰⁴ The question is whether mugshots fall within each state's statutory exceptions.

Although many of these laws were modeled after the FOIA, the exceptions under these statutes differ from state to state. Some states have a general privacy exception.²⁰⁵ In other states, the law enforcement exception takes privacy into account, akin to Exemption 7(C) of the FOIA.²⁰⁶ Not only do the state laws vary as to their exceptions, but state courts have interpreted privacy exceptions differently as to mugshots or arrest records.²⁰⁷ Even where a state exception mirrors Exemption 7(C) of the FOIA, state courts have yet to determine whether mugshots fall within this exception.²⁰⁸

Not all states have an explicit privacy exception. In these states, the courts sometimes recognize implied "common law [or public policy] limitations to open disclosure."²⁰⁹ Thus, even without a specific exemption, courts still balance "the public's right to openness in government, and important public policy considerations relating to protection of either the confidentiality of information, privacy of persons or a concern about disclosure detrimental to the best interests of the state."²¹⁰

Given the range among states, this Section will provide a brief overview of the states and their laws, beginning first with the majority of states that have found mugshots to be presumptively open records, then the handful of states that are presumptively closed, and concluding with the remaining states. A survey of the state statutes and other relevant authority is provided in Appendix A.²¹¹

204. See, e.g., *Attorney Gen. v. Assistant Comm'r of the Real Prop. Dep't of Bos.*, 404 N.E.2d 1254, 1255–56 (1980) (describing the Massachusetts public records laws).

205. See, e.g., 5 ILL. COMP. STAT. 140/7(1)(c) (2017) (exempting "[p]ersonal information . . . , the disclosure of which would constitute a clearly unwarranted invasion of personal privacy").

206. See, e.g., ALASKA STAT. § 40.25.120(a)(6)(C) (2016); IDAHO CODE ANN. § 74-124(1)(c) (2017); R.I. GEN. LAWS § 38-2-2(4)(D)(c) (2017).

207. See, e.g., KY. REV. STAT. ANN. § 61.878(1)(a) (West 2017) (privacy exception); Ky. Op. Att'y Gen. No. 05-ORD-094 (May 17, 2005), 2005 WL 3844471 (rejecting the applicability of the privacy exception to a mugshot of a federal prisoner detained in county jail).

208. See, e.g., S.C. CODE ANN. § 30-4-40(a)(3) (2017); R.I. GEN. LAWS § 38-2-2(4)(D)(c).

209. See, e.g., *Carlson v. Pima Cty.*, 687 P.2d 1242, 1245 (Ariz. 1984) (adopting common law limitation to open disclosure).

210. See, e.g., *id.*; *Donrey of Nevada, Inc. v. Bradshaw*, 798 P.2d 144, 147–48 & n.2 (Nev. 1990) (applying a case-by-case balancing test that weighs "privacy or law enforcement policy justifications for nondisclosure against the general policy in favor of open government").

211. See *infra* Appendix A. The term "presumptively open" has traditionally been used in the context of trial and other court proceedings being open to the public. See, e.g., *Press-*

1. “Presumptively Open” States

In surveying the fifty states, approximately thirty states are “presumptively open” states, i.e., they deem mugshots as public records that are, or are likely to be, subject to disclosure.²¹² Of these, a few states have laws that explicitly provide for the release of mugshots. For example, Virginia’s public records law requires release of adult arrestee photographs “except when necessary to avoid jeopardizing an [ongoing] investigation in felony cases.”²¹³ North Dakota specifically excludes arrestee photos from the closed criminal investigation exemption of the state’s public records laws.²¹⁴ In Minnesota and Nebraska, the government data and criminal procedure statutes, respectively, provide that photos taken in conjunction with arrest or booking are public.²¹⁵

State courts or government agencies in the other “presumptively open” states have provided specific guidance regarding whether mugshots fall into the more general language of the state’s public records act.²¹⁶ For example, in Alabama, Florida, Maryland, and Oklahoma, state attorney general opinions have interpreted the public records act as including mugshots, noting that public records laws are liberally construed and that mugshots do not fall within the narrowly drawn exceptions of the statutes.²¹⁷ In Wisconsin, the state court of appeals

Enter. II, 478 U.S. 1, 21–22 (1986) (Stevens, J., dissenting). For purposes of the discussion below, “presumptively open” refers to those states where there is explicit authority indicating that mugshots are open to the public or are likely open given the statutory scheme or analogous case law or other authority. This includes the states listed as “open” or “likely open” in Appendix A. The term “presumptively closed” refers to states where there is explicit authority (i.e., specific language in the statute or an attorney general opinion on point) indicating that mugshots are closed to the public.

212. In a handful of these states, the disclosure of mugshots may be limited in certain circumstances. *See, e.g.*, ME. STAT. tit. 16, § 703 (2017) (distinguishing between confidential and public criminal history record information depending on the outcome of the criminal proceedings); Mass. Supervisor of Pub. Records, Opinion Letter No. SPR10/152 (Aug. 27, 2010) (distinguishing between mugshots taken before and after the initiation of the criminal proceeding).

213. VA. CODE ANN. § 2.2-3706(A)(1)(b) (2017); *see also* Va. Op. Att’y Gen. No. 9 (Aug. 30, 1990), 1990 WL 511491.

214. N.D. CENT. CODE § 44-04-18.7(2)(i) (2017) (containing an exemption for active criminal investigation information, but explicitly provides that arrestee photos open unless adversely affect a criminal investigation).

215. MINN. STAT. § 13.82(26)(b) (2017) (“[A] booking photograph is public data.”); NEB. REV. STAT. § 29-3521(1) (2017) (providing that “photographs taken in conjunction with an arrest” are public).

216. *E.g.*, COLO. COURTS, REFERENCE GUIDE TO STATE STATUTES GOVERNING ACCESS TO COURT RECORDS 4 (2008) (stating mugshots are public records).

217. Ala. Op. Att’y Gen. No. 2004-108 (Apr. 1, 2004), 2004 WL 771846 (analyzing the question under the state Open Records Law and *Stone v. Consolidated Publishing Co.*, 404 So. 2d 678 (Ala. 1981) (listing four exceptions including pending criminal investigations but

found that mugshots were a “record” within the meaning of the state public records law.²¹⁸ Finally, some states have been categorized as “presumptively open” because there is no specific exemption that appears applicable and, thus, mugshots fall within the general presumption of openness for government records.²¹⁹

2. “Presumptively Closed” States

In five states, mugshots are generally considered confidential and exempt from disclosure—Georgia, Kansas, Montana, New Jersey, and Washington.²²⁰ Each of these “presumptively closed” states deem mugshots either confidential criminal justice records or public records that are generally exempt from disclosure.

For example, under the Kansas Open Records Act,²²¹ public agency records must be open for inspection unless they fall within a category of records that are not required or are prohibited from being disclosed.²²² Like many jurisdictions, the jail book and the first page of the incident report are deemed public records subject to disclosure.²²³ However,

nothing that involved the privacy interests of the individual)); Fla. AGO 94-90 (Oct. 25, 1994), 1994 WL 681045 (stating booking photographs are not exempted from disclosure); 92 Md. Op. Att’y Gen. 26 (June 14, 2007), 2007 WL 1749003 (recognizing that the federal courts had reached a different conclusion despite the similar exceptions in both statutes); Okla. Op. Att’y Gen. No. 2012-22 (Dec. 13, 2012), 2012 WL 6560753 (concluding that mugshots fell into the explicitly open category of “arrestee description,” despite not being in the enumerated list under OKLA. STAT. tit. 51 § 24A.8 (2017)). The Maryland opinion concluded that mugshots were presumptively open “unless the custodian can articulate a reason why it would be ‘contrary to the public interest’ to allow inspection of the photograph.” 92 Md. Op. Att’y Gen. at 48–49, 2007 WL 1749003, at *12 (quoting MD. CODE ANN., STATE GOV’T § 10-618(a) (West 2017)) (noting that the open presumption might be overcome where charges were ultimately dropped).

218. *State ex rel. Borzych v. Paluszcyk*, 549 N.W.2d 253, 254 (Wis. Ct. App. 1996); *see also, e.g., Patterson v. Allegan Cty. Sheriff*, 502 N.W.2d 368, 369 (Mich. Ct. App. 1993) (holding that the mugshot of a county jail inmate is a public record under Michigan’s Freedom of Information Act).

219. *E.g., ARK. CODE ANN. § 25-19-105* (2017). In Connecticut, the law enforcement exception provides an extensive list of circumstances where records should be withheld, none of which are applicable to mugshots. CONN. GEN. STAT. § 1-210 (2017); *see also Comm’r of Pub. Safety v. Freedom of Info. Comm’n*, 93 A.3d 1142, 1161–62, 1161 n.28 (Conn. 2014) (*dicta*).

220. Until July 2017, all mugshots in South Dakota were deemed confidential. However, recent amendments to the statute made it such that “[a]ny criminal booking photograph for a crime classified as a felony . . . is a public record.” S.D. CODIFIED LAWS § 23-5-7 (2017).

221. KAN. STAT. ANN. §§ 45-215 to -223 (2017).

222. *Id.* § 45-221(a).

223. Kan. Op. Att’y Gen. No. 87-25 (Feb. 9, 1987), 1987 WL 290422; *see also* KAN. STAT. ANN. § 45-217(b) (2017).

mugshots are deemed “criminal investigation records,”²²⁴ which police and sheriff’s offices are not required to disclose except by court order.²²⁵ Both the criminal justice agency and the court will weigh six factors in making their discretionary determination, including whether disclosure is “in the public interest.”²²⁶

In the remaining “presumptively closed” states, mugshots are deemed non-public records exempt from disclosure. Recently, Georgia amended its public records laws to specifically exempt mugshots.²²⁷ In Montana, mugshots have long been deemed closed under the Montana Criminal Justice Information Act of 1979.²²⁸ The Act distinguishes between “[p]ublic”²²⁹ and “[c]onfidential criminal justice information.”²³⁰ The purpose of the Act was “to ensure the accuracy and completeness of criminal history information, and to establish effective protection of individual privacy in . . . criminal justice information collection, storage, and dissemination.”²³¹ Under the statute, mugshots are deemed “[c]onfidential,”²³² and dissemination “is restricted to criminal justice agencies, to those authorized by law to receive it, and . . . upon a written finding [by the district court] that the demands of individual privacy do not clearly exceed the merits of public disclosure.”²³³ If the person is not charged, if the charges do not result in conviction, or if the conviction is later invalidated, photographs and fingerprints taken must be returned by the state repository to the originating agency, “which shall return all copies to the individual from whom they were taken.”²³⁴

Similarly, in Washington, photographs are considered “confidential” criminal investigative information and cannot be disseminated or used by others except for “criminal justice agencies” or as part of the sex

224. Kan. Op. Att’y Gen. No. 87-25, at 1, 1987 WL 290422, at *2.

225. *Id.* at 4, 6, 1987 WL 290422, at *3, *4 (noting no Kansas court decision on point and citing *Hous. Chronicle Publ’g Co. v. Houston*, 531 S.W.2d 177 (Tex. Civ. App. 1975)); *see also* KAN. STAT. ANN. § 45-221(a)(10) (2017).

226. KAN. STAT. ANN. §§ 45-221(a)(10)(A) to -221(a)(10)(F); *see also* Kan. Op. Att’y Gen. No. 87-25, at 1, 1987 WL 290422, at *2 (stating mugshots are “criminal investigation records” that may be closed to public under the Kansas Open Records Act). Despite being presumptively closed, law enforcement agencies maintain the discretion to disclose them, and some appear to do so. A search by the author online found these photographs posted by mugshot sites. MUGSHOTS.COM, <http://mugshots.com/US-Counties/Kansas/Allen-County-KS> (last visited May 8, 2018).

227. GA. CODE ANN. § 50-18-72(a)(4) (2017) (enacted in 2014).

228. MONT. CODE ANN. § 44-5-101 (2017).

229. *Id.* § 44-5-103(13).

230. *Id.* § 44-5-103(3).

231. *Id.* § 44-5-102.

232. *Id.* § 44-5-103(3)(c).

233. *Id.* § 44-5-303(1) (emphasis added).

234. *Id.* § 44-5-202(8).

offender registration.²³⁵ Finally, New Jersey reached the same conclusion in 1997, pursuant to an order by then Republican Governor Christine Todd Whitman. Executive Order 69 provides that records such as “fingerprint cards, plates and photographs and other similar criminal investigation records . . . shall not be deemed to be public records” pursuant to New Jersey’s Open Public Records Act.²³⁶

3. Remaining States

The remaining states are a mixed assortment. In most of these states, disclosure of mugshots turns on whether mugshots fall within a privacy exemption in the public records statute. For example, New Hampshire’s Right-to-Know Law exempts “files whose disclosure would constitute invasion of privacy”²³⁷ and courts balance the public interest in disclosure against the individual’s privacy interest.²³⁸ In some states, privacy considerations are part of a law enforcement records exemption, akin to the FOIA.²³⁹ In other states, the question is whether mugshots fall into a category of criminal records that have been deemed confidential or exempt from disclosure.²⁴⁰ Unlike the presumptively open category, there is no clear authority from the judicial or executive branch regarding whether mugshots should be deemed open or closed under these exemptions.

235. WASH. REV. CODE § 70.48.100(2) (2017) (“[T]he records of a person confined in jail shall be held in confidence and shall be made available only to criminal justice agencies”); *id.* § 70.48.100(3) (permitting the use of booking photographs in criminal investigations and the dissemination of sex offenders’ photographs and information); see also *Cowles Publ’g Co. v. Spokane Police Dep’t*, 987 P.2d 620, 624 (Wash. 1999) (en banc) (“We conclude the specific language of RCW 70.48.100(2) limits the use of booking photos to legitimate law enforcement purposes only.”). Again, law enforcement is still required to maintain a jail register that is open to the public, which shares the name of the person confined in jail and the cause of their confinement, and the date and hour of their confinement and discharge. WASH. REV. CODE § 70.48.100(1).

236. N.J. Exec. Order No. 69 (May 15, 1997). Recent efforts to codify or reject this executive order have failed. See, e.g., Assemb. 2064, 216th Leg., 2014 Sess. (N.J. 2014) (exempting mugshots from public records law); Assemb. 2177, 216th Leg., 2014 Sess. (N.J. 2014) (explicitly making them open records).

237. N.H. REV. STAT. ANN. § 91-A:5(IV) (2017).

238. *Union Leader Corp. v. City of Nashua*, 686 A.2d 310, 312 (N.H. 1996). There are no published appellate decisions regarding mugshots.

239. See, e.g., DEL. CODE ANN. tit. 29, § 10002(1)(4) (2018) (including an exception for “criminal records, the disclosure of which would constitute an invasion of personal privacy”); IDAHO CODE ANN. § 74-124 (2017).

240. See discussion of Iowa, North Carolina, and Pennsylvania *infra* Appendix A.

In California,²⁴¹ the disclosure of mugshots has been left to the discretion of law enforcement agencies. Mugshots have been deemed to fall under the law enforcement investigatory records exemption of California's Public Records Act.²⁴² The exemption section of the Act includes a general catch-all provision whereby an agency can choose to release otherwise exempted documents.²⁴³ In Opinion 03-205, the California Attorney General found that although mugshots fell into the law enforcement exemption, sheriff's offices have the discretion to release them under this catch-all provision.²⁴⁴ Thus, in California, there is a wide range of practices among local law enforcement; some regularly post mugshots online whereas others release mugshots on a case-by-case basis.²⁴⁵

III. CHANGING COURSE: RECOGNIZING PRIVACY INTERESTS IN MUGSHOTS

Since the advent of the Internet, there has been growing concern about the erosion to personal privacy and the blurring line between private and public. Some of this is by choice. However, when it comes to government data, there is often not a choice, and the commercialization of this data is particularly troubling.²⁴⁶ The scope of this problem has increased with technological advances—easier and constant access to the Internet, quicker and more efficient algorithms and manipulation of them, and multiple devices that provide users constant online access. With a simple online search and a few clicks and scrolls, a searcher can

241. Although Kansas is a presumptively closed state, law enforcement agencies have the discretion to disclose, as they do in Maryland, which is a presumptively open state. See discussion of Kansas and Maryland *infra* Appendix A. Indiana and Mississippi may also be discretionary states, depending on which category of criminal records they fall within under the public records laws. See discussion of Indiana and Mississippi *infra* Appendix A.

242. CAL. GOV'T CODE § 6254(f) (West 2017).

243. *Id.* § 6254.

244. Cal. Op. Att'y Gen. No. 03-205 (July 14, 2003), 2003 WL 21672840.

245. See Ming, *supra* note 42 (noting that Lake County posts decade-old mugshots); *Recent Arrests*, LAKE COUNTY, CAL. SHERIFF'S OFF., <http://publicapps.lakecountycal.gov/lcsoMobile/arrests> (last visited May 8, 2018).

246. Solove, *supra* note 103, at 1189–90. Many have criticized the greater privacy concerns that are raised by the aggregation and the release of such information, suggesting that a new framework of what is deemed “private” must be considered. See, e.g., Marder, *supra* note 28, at 456–57; Solove, *supra* note 1033, at 1217–18. But see Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049, 1049–54 (2000) (warning that “[c]reating new free speech exceptions to accommodate information privacy speech restrictions could have many unfortunate and unforeseen consequences” although explicitly excluding closed government records).

easily pull up an individual's mugshot. This is the situation that is faced by millions of Americans who have criminal records.

The Internet has transformed mugshots of ordinary citizens from public records that generally fell into "practical obscurity" except for a limited few, into commodities posted for entertainment and commercial gain.²⁴⁷ This commodification of government data is rent-seeking behavior, which adds little social value.²⁴⁸ On the other hand, the cost of this commodification is enormous and challenges our society's core beliefs in innocence and redemption.

As described in Chief Judge Cole's concurrence in *Detroit Free Press II*:

Twenty years ago, we thought that the disclosure of booking photographs, in ongoing criminal proceedings, would do no harm. But time has taught us otherwise. The internet and social media have worked unpredictable changes in the way photographs are stored and shared. Photographs no longer have a shelf life, and they can be instantaneously disseminated for malevolent purposes. Mugshots now present an acute problem in the digital age: these images preserve the indignity of a deprivation of liberty, often at the (literal) expense of the most vulnerable among us. Look no further than the online mugshot-extortion business. In my view, *Free Press I*—though standing on solid ground at the time—has become "inconsistent with the sense of

247. U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 748, 780 (1989). The commodification of personal data has been widely discussed. See, e.g., Paul M. Schwartz, *Property, Privacy, and Personal Data*, 117 HARV. L. REV. 2056, 2057 (2004) ("[A] strong conception of personal data as a commodity is emerging in the United States . . ."); see also Ryan Calo, *Privacy and Markets: A Love Story*, 91 NOTRE DAME L. REV. 649, 662 (2015).

248.

Rent-seeking refers to the act of investing economic resources to effect redistributive outcomes that favor the investor. Although these favorable outcomes may never materialize, such investment is privately rational: the investor expects to profit at others' expense. In this sense, the same motive that drives a profit-seeking entrepreneur drives a seeker of rents. The difference between the two forms of economic entrepreneurship is that profit-seeking activity generates positively-valued social product; rent-seeking does not.

David N. Laband & John P. Sophocleus, *The Social Cost of Rent-Seeking: First Estimates*, 58 PUB. CHOICE 269, 270 (1988).

justice.” These evolving circumstances permit the court to change course.²⁴⁹

In reversing *Detroit Free Press I*, the Sixth Circuit recognized that its prior finding that no privacy rights were implicated by mugshots embodied “an impermissibly cramped notion of personal privacy that is out of step.”²⁵⁰ Similarly it is time for federal and state lawmakers and courts to reexamine the privacy interests implicated by state and local mugshots and change course.²⁵¹

A. *Two Proposals to Recalibrate Privacy*

The only way to truly address the problem is to limit public access to state mugshots. Once the images are deemed open records under state laws, private entities can and will obtain mugshots and disseminate them for quick and easy economic profit. As discussed below, this restriction arguably comes with some cost. However, these costs are largely addressed by these proposals and outweighed by the benefits.

This Article suggests the best course is the enactment of a federal law that would prohibit the disclosure of mugshots nationally, except for law enforcement purposes or by court order. The alternative solution, although much less effective, would be a greater recognition by state governments and courts of the impact of modern technology when evaluating the right to access these images. Each proposal acknowledges that the advances in technology allow for mass dissemination of information in an unprecedented manner, thus implicating a greater privacy interest than previously considered.

1. Adoption of a Federal Law Prohibiting Access

The first and preferred option would be the enactment of a federal law, prohibiting governmental disclosure of mugshots taken by state and local law enforcement, except when there is a specific law enforcement need or by court order. This would codify DOJ policy on the state level. Under such law, mugshots taken by state and local entities would become

249. *Detroit Free Press II*, 829 F.3d 478, 486 (6th Cir. 2016) (en banc) (Cole, C.J., concurring) (citation omitted) (quoting BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 150 (1921)), *cert. denied*, 137 S. Ct. 2158 (2017).

250. *Id.* at 484 (majority opinion).

251. *Cf. Winn, supra* note 82, at 307–20 (examining the traditional balance courts have reached between disclosure and the need to limit disclosure and how this balance is upset by online information).

presumptively closed records, paralleling the law on federal mugshots or those in closed states such as Montana and Washington.²⁵²

This type of federal restriction on state information is not unprecedented. Based on similar concerns regarding commercialization of personal information, Congress passed the Driver's Privacy Protection Act of 1994 ("DPPA").²⁵³ The DPPA prohibits distribution of a driver's personal information, *including license photograph*, as well as his or her address, social security number, and telephone number, unless the driver explicitly consents.²⁵⁴ Congress passed the law to protect the privacy of drivers and to curtail the growing commercial use of drivers' personal information collected by states.²⁵⁵ This law was upheld by the Supreme Court in *Reno v. Condon* in 2000. The Court found that the personal, identifying information was "a 'thin[g] in interstate commerce'" and that "sale or release of that information in interstate commerce" was a "proper subject of congressional regulation" under the Commerce Clause.²⁵⁶ The commercialization of mugshots raises the same privacy concerns that arose with the commodification of drivers' personal information and are arguably greater because of the assumed criminality.

A federal law that would mandate consistency among states would greatly benefit affected individuals. As demonstrated above, states vary widely in their laws governing the accessibility of mugshots and rights in terms of removal. This lack of uniformity makes it difficult for affected individuals to know what their rights to demand removal are and how to vindicate those rights. Many mistakenly assume that once they expunge their criminal records or attain other clean slate remedies, these images will be removed. However, they are mistaken. Consistency among the federal and state governments would assure that one interaction with the law, which may or may have not resulted in a conviction, does not forever haunt them.

Moreover, as demonstrated by the recent legislative attempts to quell these practices, there is at least some degree of political will for such reform. The public's outcry over these practices and the legislators who have tried to address them span the political spectrum. As discussed later in this Part,²⁵⁷ over half of the states have considered such laws, and seventeen states have adopted legislation attempting, although failing,

252. 5 U.S.C. § 552(a)(b) (2012); MONT. CODE ANN. § 44-5-302(1) (2017); *Cowles Publ'g Co. v. Spokane Police Dep't*, 987 P.2d 620, 624 (Wash. 1999) (en banc).

253. 18 U.S.C. §§ 2721-2725 (2012).

254. *Id.* §§ 2721(a), 2725(3), (4).

255. *Reno v. Condon*, 528 U.S. 141, 143-44 (2000).

256. *Id.* at 148 (alteration in original) (quoting *United States v. Lopez*, 514 U.S. 549, 558-59 (1995)).

257. See discussion *infra* Section III.C.2.

to address this problem. States that have enacted legislation include Kentucky, South Carolina, Texas, and Utah, which are often considered “tough on crime” states. In addition, such reform would be occurring in the midst of larger societal discussions about mass incarceration and the need for successful reentry.²⁵⁸

2. Rebalancing of Privacy Interests on the State Level

The second proposal focuses on state-level reform. Under this alternative, access to mugshots would continue to be governed by state laws but with a greater recognition by state and local entities and state courts of the privacy interests at stake in the post-Internet era.

On the legislative level, this could take two forms. The more protective means would be to prohibit the disclosure of mugshots and to deem them presumptively closed records.²⁵⁹ This could be accomplished by creating a mugshot exemption to public records laws or by categorizing them as confidential criminal justice records under other state statutes.²⁶⁰ Legislators could still carve out certain exceptions to the closed presumption, such as immediate law enforcement need or by court order, whereby the requestor must demonstrate an actual need for disclosure. This type of access restriction was deemed permissible under *United Reporting*.²⁶¹

A less protective legislative solution would be for states that do not have an explicit privacy exemption to enact either a general privacy exemption or a law enforcement privacy exemption that parallels Exemption 7(C). However, for this to have any impact, state courts generally need to recognize the increased privacy interests in light of technology and hold requestors more accountable under public records acts.²⁶² This judicial recalibration of the balancing test is discussed further below.

Even if no new legislation is adopted, there are still steps that can be taken. State and local agencies are the initial gatekeepers of these

258. See, e.g., A.B.A COMM'N ON EFFECTIVE CRIMINAL SANCTIONS, SECOND CHANCES IN THE CRIMINAL JUSTICE SYSTEM: ALTERNATIVES TO INCARCERATION AND REENTRY STRATEGIES (2007); ALEXANDER, *supra* note 79; HADAR AVIRAM, CHEAP ON CRIME: RECESSION-ERA POLITICS AND THE TRANSFORMATION OF AMERICAN PUNISHMENT (2015).

259. Georgia has recently taken this step, exempting mugshots from its public records laws in reaction to their commercialization. GA. CODE ANN. § 50-18-72(a)(4) (2017).

260. See, e.g., MONT. CODE ANN. §§ 44-5-103, -302 (2017).

261. *L.A. Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32, 40–41 (1999).

262. For example, despite having a privacy exemption that parallels Exemption 7(C), a Maryland attorney general opinion still found that mugshots were presumptively open records. 92 Md. Op. Att'y Gen. 26 (June 14, 2007), 2007 WL 1749003 (recognizing the USMS' interpretation and finding it unpersuasive).

requests. These agencies should reexamine their policies and practices regarding the disclosure of mugshots, ensuring that they serve the purposes of open government and public accountability underlying public records acts, and that privacy rights are given fair weight. These agencies should examine public records requests with a more critical eye. They should be suspect of blanket requests that lack specificity as to subject and date. It appears that some agencies have begun to do this. In *In re Prall v. New York City Department of Corrections*, the Department refused a request from “Busted!” an online mugshot site, for all mugshots “arrested by and/or booked into all . . . jails, prisons, detention and/or correctional facilities” over a one-month period of time based on privacy grounds.²⁶³

At minimum, these agencies should cease the practice of posting mugshots online. This wholesale publication by some law enforcement agencies is easy fodder for the mugshot industry. Defenders of this practice suggest that it assists in public safety by helping solve crime. However, even the most vocal advocates of this practice have been unable to show that it has improved public safety.²⁶⁴ These two measures—a closer examination of these requests and the discontinuation of online posting by law enforcement—are particularly important because the subjects of mugshots are unable to challenge the granting of access until after the disclosure (and thus unfettered publication). They are not given notice nor an opportunity to object when agencies receive public records requests or when agencies are about to post their mugshots online.

State courts have a crucial role in protecting privacy interests against the commodification of mugshots. As discussed earlier, many states already have privacy exemptions—either standalone, as part of the law enforcement exception, or as a common law limitation—to the public records laws.²⁶⁵ In balancing the privacy interest against the public interest in disclosure,²⁶⁶ state courts should be more rigorous in

263. 971 N.Y.S.2d 821, 822–23 (Sup. Ct. 2013) (finding that the request was properly denied), *aff'd*, 10 N.Y.S.3d 332, 334–35 (App. Div. 2015) (affirming the trial court ruling on general privacy grounds rather than the specific exemptions). In its request for all mugshots from August 2011, “Busted!” asked for “the information to be prepared in their original electronic format, although we can accept virtually any electronic format,” as well as “the jail/arrest log for the same time period.” *Id.*

264. Recall *supra* note 68 and accompanying text. Then-sheriff Joe Arpaio of Maricopa County, Arizona, stated that he began the “Mugshot of the Day” competition on the Maricopa County Sheriff’s Office (“MCSO”) website to “draw more traffic to the site, which in turn would . . . potentially result in more crime suspects being spotted by witnesses or victims.” However, “[i]f ‘Mugshot of the Day’ ever led to a valid investigative lead, the MCSO never let the public know about it.” Stern, *supra* note 68.

265. See *supra* Section II.D.

266. See, e.g., ARIZ. REV. STAT. ANN. § 39-121.04 (2017).

evaluating the alleged public interest and should recalibrate the privacy interests at stake given modern realities.

In terms of the public interest, state courts should reject requestors' pro forma assertions that access to mugshots serves the public interest. The federal courts of appeals that have considered this issue in the past ten years have done so. For example, the Tenth Circuit in *World Publishing* rejected the newspaper's blanket assertions that disclosure of federal mugshots would significantly contribute to the public's understanding of federal law enforcement operations or assist the public in detecting government misconduct, including racial or ethnic profiling. Although the court recognized these could qualify as legitimate interests under the FOIA, the court refused to give weight to the "[m]ere speculation about hypothetical public benefits."²⁶⁷ Moreover, if government misconduct or abuse was an issue, the subject could simply consent to the release of the image or request the image themselves. Returning to the core purpose of FOIA, the court found that there was "little to suggest that disclosing booking photos would inform citizens of a government agency's adequate performance of its function."²⁶⁸

State courts recently have begun to follow suit, examining the alleged public interest involved. In *In re Prall*, the New York appellate court held that the Department of Corrections properly refused to provide mugshots to "Busted!"—a commercial website that generated revenue by posting arrest records and mugshots—under New York's Freedom of Information Law ("FOIL").²⁶⁹ The court found there was no "direct public interest in

267. *World Publ'g Co. v. U.S. Dep't of Justice*, 672 F.3d 825, 831 (10th Cir. 2012) (quoting *U.S. Dep't of State v. Ray*, 502 U.S. 164, 179 (1991)). In *World Publishing*, the newspaper argued the following public interests:

- (1) determining the arrest of the correct detainee[,] (2) detecting favorable or unfavorable or abusive treatment[,] (3) detecting fair versus disparate treatment[,] (4) racial, sexual, or ethnic profiling in arrests[,] (5) the outward appearance of the detainee; whether they may be competent or incompetent or impaired[,] (6) a comparison in a detainee's appearance at arrest and at the time of trial[,] (7) allowing witnesses to come forward and assist in other arrests and solving crimes[,] (8) capturing a fugitive[, and] (9) to show whether the indictee took the charges seriously

Id. The court noted that although "[i]nterests 2–6 are legitimate public interests under the FOIA, there [was] little to suggest that releasing booking photos would significantly assist the public in detecting or deterring any underlying government misconduct." *Id.*

268. *Id.*

269. *In re Prall v. N.Y.C. Dep't of Corr.*, 10 N.Y.S.3d 332, 333–35 (App. Div. 2015). The request by the "Busted!" was as follows:

[B]ooking photos/mugshots on every individual arrested by and/or booked into all of the New York City Department of Corrections' jails, prisons, detention and/or correctional facilities from August 1, 2011 to August 31, 2011, and I would like the information to be prepared in their original electronic format, although we can

disclosure” and that disclosure to a commercial website would constitute “an ‘unwarranted invasion of personal privacy.’”²⁷⁰

In addition, state courts should recognize that the Internet has brought mugshots out of “practical obscurity”²⁷¹ and that their disclosure now implicates a greater privacy interest. This recognition has been pivotal in decisions by the Sixth, Tenth, and Eleventh Circuits. Of particular note is the Sixth Circuit’s 2016 decision in *Detroit Free Press II*, in which it overruled its prior decision from 1996.²⁷²

In its 1996 decision in *Detroit Free Press I*, the Sixth Circuit held that mugshots did not fall within the ambit of Exemption 7(C) and should be disclosed under the FOIA because they implicated *no* privacy interest where the defendants had appeared in open court, their names had been publicly disclosed, and they were in ongoing proceedings.²⁷³ The court noted “that the personal privacy of an individual is not necessarily invaded simply because that person suffers ridicule or embarrassment from the disclosure of information.”²⁷⁴ The reasoning of the Sixth Circuit is reflective of the views of the few state courts that have previously addressed the issue of mugshots and privacy in the context of public records laws.

However, twenty years later in *Detroit Free Press II*, an en banc panel of the Sixth Circuit overturned its past precedent, holding that there was a “non-trivial privacy interest” in mugshots that needed to be weighed against the public interest on a case-by-case basis.²⁷⁵ In finding that there was indeed a privacy interest in mugshots, the court stated: “[e]mbarrassing and humiliating facts—particularly those connecting an individual to criminality” reflect cognizable privacy interests.²⁷⁶ In overruling *Detroit Free Press I*, the Sixth Circuit emphasized the effect of modern technology that “heightens the consequences of disclosure—in today’s society the computer can accumulate and store information that

accept virtually any electronic format. I would like to request the jail/arrest log for the same time period.

In re Prall v. N.Y.C. Dep’t of Corr., 971 N.Y.S.2d 821, 822–23 (Sup. Ct. 2013), *aff’d*, 10 N.Y.S.3d 332, 334–35 (App. Div. 2015) (alteration in original).

270. *In re Prall*, 10 N.Y.S.3d at 335 (quoting N.Y. PUB. OFF. LAW § 87(2)(b) (McKinney 2015)).

271. *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 748, 780 (1989).

272. *Detroit Free Press II*, 829 F.3d 478 (6th Cir. 2016) (en banc), *overruling* *Detroit Free Press I*, 73 F.3d 93 (6th Cir. 1996), *cert. denied*, 137 S. Ct. 2158 (2017).

273. *Detroit Free Press I*, 73 F.3d at 99.

274. *Id.* at 97.

275. *Detroit Free Press II*, 829 F.3d at 484–85.

276. *Id.* at 481.

would otherwise have surely been forgotten.”²⁷⁷ State courts should similarly recognize the unique impact of their limitless public dissemination.

In sum, the presumption that mugshots are closed records strikes the appropriate balance between the privacy interest of the individuals and the need for government insight, and state governments and courts should begin rebalancing these interests accordingly.

B. Addressing Criticisms to the Proposals

This Section addresses possible criticisms to the above proposals. Proponents of public access to mugshots have argued that the online publication of mugshots benefits the public by encouraging public safety and the openness and transparency of the criminal justice system.²⁷⁸ Others have argued that mugshots of criminal defendants and public figures who have been arrested are newsworthy and should be accessible to the public.²⁷⁹ This Section will address each of these arguments in turn.

Proponents of public access to mugshots argue that their distribution serves various public safety purposes, including assistance in criminal investigations and deterrence of crime generally. Both proposals largely address this concern by permitting disclosure for an immediate, specific law enforcement need.²⁸⁰ In fact, the DOJ’s policy has been in place for over forty years. While in place, there has been no indication that the federal policy has threatened public safety.

Nor is there any indication that the federal policy has increased criminal activity or that state open access practices have been a deterrent to crime. In one empirical study, Dara Lee Luca, a researcher at Mathematica Policy Research,²⁸¹ examined the effect of state-maintained online criminal databases on deterrence and recidivism.²⁸² She found

277. *Id.* at 482 (quoting U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 748, 771 (1989)).

278. MUGSHOTS.COM, *supra* note 92.

279. *E.g.*, Shullman & Caramanica, *supra* note 12, at 18.

280. There is no empirical evidence that the general, indiscriminate posting of mugshots assists in solving or prosecuting crimes, despite blanket assertions from law enforcement. Stern, *supra* note 68.

281. There is limited empirical research about the impact of online publication of mugshots on public safety. Dara Lee Luca, The Digital Scarlet Letter: The Effect of Online Criminal Records on Crime 2–3 (July 2015) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1939589 (surveying the existing research on the impact of public records on crime).

282. This study was not focused specifically on mugshots. Rather, it explored three different channels of obtaining criminal records: state online records, state criminal history information (including some photographs), and state courts. *Id.* at 2, 7–8. There has been

that online criminal records led to “a small net reduction [2.5%] in property crime rates, but also a marked increase of approximately 11 percent in recidivism” among those who had been previously convicted of a crime.²⁸³ She also found that the data “implic[ed] that first time offenses were reduced by approximately 8.7 percent.”²⁸⁴ Thus, it appears that any beneficial effect from the online publication of criminal records in terms of deterrence for those without criminal convictions was offset by increased recidivism.²⁸⁵

The argument regarding the public’s need to access mugshots as part of government transparency also falls short. In reality, the acquisition and publication of mugshots en masse illuminate little or nothing about our criminal legal system. This was the finding of each of the three federal courts of appeals that examined the question and rejected publishers’ broad requests for access to federal mugshots in those cases. The courts found that although there was a strong public interest in monitoring for police abuse and patterns and practices of discrimination, the publishers did not demonstrate that their requests would or were intended to serve those purposes.²⁸⁶

In addition, the mass publication of mugshots has a disproportionately negative effect on minority communities. It has been well-documented that African-Americans and Latinos are arrested at higher rates in our society.²⁸⁷ Thus, the widespread commercialization and dissemination of mugshots and the stigmatization that results has an indirect, discriminatory impact on these same communities.²⁸⁸ This

an extensive amount of research regarding the effect of sex offender registration laws and whether they have curbed recidivism, much of which has indicated that there has been little impact. Cf. Kelly K. Bonnar-Kidd, *Sexual Offender Laws and Prevention of Sexual Violence or Recidivism*, 100 AM. J. PUB. HEALTH 412 (2010).

283. Luca, *supra* note 281, at 1, 23.

284. *Id.* at 23.

285. *Id.* at 23–24.

286. *Detroit Free Press II*, 829 F.3d 478, 485 (6th Cir. 2016) (en banc), *cert. denied*, 137 S. Ct. 2158 (2017); *World Publ’g Co. v. U.S. Dep’t of Justice*, 672 F.3d 825, 831 (10th Cir. 2012); *Karantalis v. U.S. Dep’t of Justice*, 635 F.3d 497, 504 (11th Cir. 2011) (per curiam); see also *Times Picayune Publ’g Corp. v. U.S. Dep’t of Justice*, 37 F. Supp. 2d 472, 479–80 (E.D. La. 1999).

287. In 2008, the Pew Center found that although one in every one hundred adults in the United States was behind bars, the rates were drastically higher for black and Hispanic men. PEW CTR. ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008, at 3, 6 (2008) (finding that one in nine black men ages twenty to thirty-four and that one in thirty-six Hispanic men who were eighteen or older were incarcerated).

288. One notably troubling example of the use of mugshots, harkening back to its odious eugenics roots, was *Time Magazine’s* cover of O.J. Simpson on June 27, 1994. “*Time* altered [Simpson’s mugshot] by darkening his skin, further promulgating a racist stereotype that links criminal behavior with skin color.” FINN, *supra* note 15, at 1.

problem may be further heightened in jurisdictions, such as California, where the decision to disclose is left to the discretion of local law enforcement agencies with little guidance.²⁸⁹

Furthermore, both proposals would allow victims of police misconduct or discrimination and their advocates to access mugshots for purposes of litigation.²⁹⁰ Advocates would be required to show that the release of such “photos would significantly assist the public in detecting or deterring any underlying government misconduct.”²⁹¹ Advocates seeking evidence of discriminatory practices by law enforcement agencies could find this information more accurately and efficiently through public records requests for basic arrest information or through discovery requests in litigation. In addition, individuals affected by such practices could always seek this information themselves and share it with journalists, their lawyers, or others acting on their behalf.

Moreover, assuming that the fact of an arrest is a matter of public concern, basic arrest information is already publicly available in most states through jail logs or police blotters that are specifically exempted under public records laws and are accessible to the public.²⁹² Once charges are brought by the prosecution, and the individual is arraigned, the public and press have the constitutional right to access the proceedings (including the arraignment).²⁹³ The image of the person himself at the time of arrest is not ordinarily a matter of concern.

Finally, some have argued that mugshots should be accessible because of the public nature of the criminal process (especially for those

289. *E.g.*, Cal. Op. Att’y Gen. No. 03-205 (July 14, 2003), 2003 WL 21672840. This was illustrated by the public debate concerning the release of the mugshot of Brock Turner, the former Stanford swimmer convicted of three felony counts of sexual assault and sentenced to six months in county jail. Turner, who is white, was arrested in January 2015, but the photo was not released for sixteen months after mounting public pressure. Following the national public outcry over his lenient sentence, thousands on Twitter called for the release of the photo. Many were outraged that the mugshot had not been provided and that news organizations had used pictures from Turner’s yearbook and swim competitions in its stead, arguing that this would not have been the case for black arrestees. Elahe Izadi & Abby Ohlheiser, *Why You Are Only Now Seeing the Stanford Sex Offender’s Mugshots*, WASH. POST: THE INTERSECT (June 7, 2016), <https://www.washingtonpost.com/news/the-intersect/wp/2016/06/06/where-is-stanford-sex-offender-brock-turners-mugshot-here/>; O’Neil, *supra* note 65.

290. Under the first proposal, there would be an exception for court order. *See supra* Section III.A.1. Under the second, the public interest would outweigh the privacy interest at stake. *See supra* Section III.A.2. In addition, individuals can always consent to access being given.

291. *World Publ’g Co.*, 672 F.3d at 831.

292. *See, e.g.*, 18 PA. CONS. STAT. §§ 9102, 9121 (2017); WASH. REV. CODE § 70.48.100 (2017); JACOBS, *supra* note 10, at 194–95.

293. *See supra* Section II.A.2.

who are celebrities or public figures). However, mugshots are taken before public criminal proceedings have begun, and in fact, many individuals who are the subject of mugshots are never prosecuted.²⁹⁴ Photographs can be, and are, taken of defendants entering and leaving the court once charges have been filed.²⁹⁵ As described by one court, “[g]iven easy access to photographs and photography, surely there is little difficulty in finding another publishable photograph of a subject.”²⁹⁶ Although there may be a particular interest or curiosity in the mugshot image itself, this interest may be outweighed by the consequences of public access.

C. Unworkability of Other Solutions

Adoption of what this Article proposes is necessary because other attempts by the private sector,²⁹⁷ through tort litigation, and by state legislatures to quell the mugshot industry have failed. Given the strong First Amendment protections for publication and the quick adaptability of mugshot companies, tort liability has done little to deter mugshot companies and their practices. Moreover, attempts by the state legislatures targeted at the mugshot industry have proven equally ineffective as these companies have adjusted their revenue streams.

1. Tort Law

Current tort law is unable to effectively stem the commercialization of mugshots. Mugshot companies have used the First Amendment right to publish as a shield from tort liability.²⁹⁸ Lawsuits were brought in several states to challenge the practice of charging fees for removal.

294. See *supra* note 81 and accompanying text.

295. Some may want their mugshots posted for purposes of political protest or for notoriety. However, these arrestees can always obtain their own copy for publication.

296. *World Publ'g Co.*, 672 F.3d at 830.

297. Private companies such as American Express and PayPal have attempted to help curb these practices by refusing to do business with mugshot companies. JACOBS, *supra* note 10, at 88. However, as mugshot companies have readjusted their revenue streams, these efforts seem to have had little effect. In addition, after a *New York Times* article was published in 2013, Google attempted to adjust its search algorithm to discourage traffic to mugshot websites. “But inevitably, the sites have figured out ways around Google’s changes.” David Segal, *Trying to Minimize the Misery of Mug Shots*, N.Y. TIMES (Feb. 11, 2017), https://www.nytimes.com/2017/02/11/your-money/haggler-trying-to-minimize-the-misery-of-mug-shots.html?_r=0 (noting that although this worked for a short time, Google is now a “step behind” the companies).

298. Gene Policinski, *Mug Shot’ Sites Pose First Amendment Dilemma*, FREEDOM F. INST. (Oct. 26, 2012), <https://www.freedomforuminstitute.org/2012/10/26/mug-shot-sites-pose-first-amendment-dilemma/>.

Plaintiffs have asserted claims ranging from torts such as right to publicity, defamation, and false light, to unfair business practice violations to RICO claims.²⁹⁹

Beyond practical considerations such as cost and logistics,³⁰⁰ these cases face a significant hurdle as to possible First Amendment defenses. Arguably, these companies can easily fulfill the considerations set forth in *Daily Mail*, i.e., that the mugshots are truthful and accurate representations of the time of the arrest, that arrests are a matter of public interest, and that these images were lawfully obtained.³⁰¹ Whether the mugshots are a matter of public interest, often referred to as “newsworthiness,” is the key issue in these cases.³⁰² It is likely that a court would agree with the companies and uphold their publication of

299. Lawsuits have also been filed in Florida, Illinois, and California. *See, e.g.,* Rogers v. Justmugshots.Com, Corp., No. BC530194, 2015 WL 5838403, at *1–2 (Cal. Ct. App. Oct. 7, 2015) (class action suit following the adoption of CAL. CIV. CODE § 1798.91.1(b) (West 2017), which prohibits removal fees); Shullman & Caramanica, *supra* note 12, at 15, 19 n.26 (citing Bilotta v. Citizens Info. Assocs., LLC, No. 8:13-cv-2811 (M.D. Fla. Nov. 1, 2013); Wakefield v. Citizens Info. Assocs., LLC, No. 1:13-cv-23754 (S.D. Fla. Oct. 16, 2013); Intihar v. Citizens Info. Assocs., LLC, No. 2:13-cv-720 (M.D. Fla. Oct. 11, 2013); Dolemba v. Citizens Info. Assocs., LLC, No. 1:13-cv-06939 (N.D. Ill. Sept. 26, 2013)).

300. These cases face logistical and cost challenges that sometimes render them unfeasible. In one of the first suits brought against mugshot web sites, *Lashaway v. D'Antonio III*, the attorney, Scott Ciolek, brought the suit on behalf of three plaintiffs against BustedMugshots.com and MugshotsOnline.com, alleging violations of Ohio's right to publicity statute, which prohibits the use of an individual's persona for commercial purpose and its Pattern of Corrupt Activities Act. Amended Complaint at 2–3, 11–12, *Lashaway v. D'Antonio III*, No. 13-1733 (Ohio Ct. Com. Pl. Jul. 8, 2013), ECF No. 4. Ciolek indicated that he had been contacted by hundreds of people who had struggled with finding or maintaining employment after their mugshots had been posted—many of whom were exonerated late. However, although he had hoped to file the case as a class action, he quickly realized that the “cost of long-term litigation would have far exceeded any potential recovery for the class.” Caniglia, *supra* note 41. Moreover, he was unable to file a complaint against one of the largest sites, Mugshots.com, because he could not identify an entity to serve. The case settled in January 2014, for the amount of \$7500 and the removal of the mugshots from the two websites. However, at the time of settlement, the two sites had already discontinued the practice of charging removal fees. *Id.*

301. *See* Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 103 (1979).

302. Rostron, *supra* note 10, at 1325–30 (discussing the uncertainty of liability under criminal and tort law). For these reasons, mugshot companies have made considerable efforts to make their websites look more like online newspapers. For example, the home page of Mugshots.com begins with a recounting of news stories involving salacious arrests and charges, even citing to news agency websites in their headlines. MUGSHOTS.COM, *supra* note 92. Even websites such as *The Smoking Gun*, which focuses primarily on posting mugshots for entertainment value, now have links to documents in the right-hand column, arguably making it look more “newspaper-like” in appearance. *See* SMOKING GUN, *supra* note 66.

these digital rogues' galleries.³⁰³ Based on *Florida Star*,³⁰⁴ a court would likely defer to the other branches of government to restrict access rather than limit the companies' right to publish this publicly available information. Thus, the only means of addressing the problem of the mass commercialization is limiting access.

2. Failed Legislative Efforts

In response to news investigations regarding the mugshot companies and the public's outraged response, legislatures across the nation have introduced bills aimed at the mugshot industry.³⁰⁵ Seventeen states have passed laws aimed at the mugshot industry.³⁰⁶ Other than Georgia that took the additional step of exempting mugshots from its public records laws,³⁰⁷ these laws fail to address the reality that once the mugshots had been published, the harm to the individuals could not be undone. Legislators attempted to address the problem using four methods: (1) restricting the right to access mugshots based on use, (2) prohibiting fees for removal, (3) requiring removal of mugshots either generally or in certain circumstances, and/or (4) requiring accurate information about

303. See Shullman & Caramanica, *supra* note 12, at 15.

304. *Fla. Star v. B.J.F.*, 491 U.S. 524, 534 (1989).

305. See S. 118, 2017 Leg., Reg. Sess. (Fla. 2017); S. 546, 2017 Leg., Reg. Sess. (Fla. 2017); H.R. 619, 100th Gen. Assemb., Reg. Sess. (Ill. 2017); H.R. 794, 2017 Leg., Reg. Sess. (Miss. 2017); H.R. 236, 65th Leg., Reg. Sess. (Mont. 2017); Assemb. 838, 2017 Assemb., Reg. Sess. (N.Y. 2017); H.R. 6, 132d Gen. Assemb., Reg. Sess. (Ohio 2017); H.R. 3481, 122d Gen. Assemb., Reg. Sess. (S.C. 2017); H.R. 2199, 52d Leg., 2d Reg. Sess. (Ariz. 2016); H.R. 529, 28th Leg., Reg. Sess. (Haw. 2015); Assemb. 258, 2015–2016 Leg., Reg. Sess. (Wis. 2015); H.R. 135, 2014 Leg., Reg. Sess. (Ala. 2014); S. 298, 2014 Leg., Reg. Sess. (Fla. 2014); H.R. 51, 2014 Gen. Assemb., 14th Reg. Sess. (Ky. 2014); S. 95, 2014 Gen. Assemb., 14th Reg. Sess. (Ky. 2014); H.R. 1933, 88th Leg., Reg. Sess. (Minn. 2014); H.R. 1940, 88th Leg., Reg. Sess. (Minn. 2014); S. 1863, 88th Leg., Reg. Sess. (Minn. 2014); Assemb. 2064, 216th Leg., Reg. Sess. (N.J. 2014); Assemb. 2177, 216th Leg., Reg. Sess. (N.J. 2014); Assemb. 2832, 216th Leg., Reg. Sess. (N.J. 2014); S. 7304, 2014 Leg., Reg. Sess. (N.Y. 2014); S. 493, 2013 Gen. Assemb., Reg. Sess. (N.C. 2014); S. 744, 2013 Gen. Assemb., Reg. Sess. (N.C. 2014); S. 700, 120th Gen. Assemb., Reg. Sess. (S.C. 2014); S. 137, 2014 Gen. Assemb., Reg. Sess. (Va. 2014); H.R. 677, 2013 Leg., Reg. Sess. (Fla. 2013); S. 1060, 2013 Leg., Reg. Sess. (Fla. 2013); Assemb. 4083, 215th Leg., Reg. Sess. (N.J. 2013).

306. CAL. CIV. CODE § 1798.91.1 (West 2017); COLO. REV. STAT. § 24-72-305.5 (2017); FLA. STAT. § 985.04 (2017); GA. CODE ANN. §§ 10-1-393.5, 35-1-19, 50-18-72 (2017); 815 ILL. COMP. STAT. 505/2QQQ (2017); KY. REV. STAT. ANN. § 61.8746 (West 2017); MD. CODE ANN., COM. LAW § 14-1324 (West 2017); MO. REV. STAT. § 407.1150 (2017); N.J. STAT. ANN. § 2A:58D-4 (West 2017); OHIO REV. CODE ANN. § 2927.22 (LexisNexis 2017); OR. REV. STAT. § 646A.806 (2017); S.C. CODE ANN. §§ 17-1-40, -60(D)(2) (2017); TEX. BUS. & COM. CODE ANN. § 109.005 (West 2017); UTAH CODE ANN. § 17-22-30 (LexisNexis 2017); VT. STAT. ANN. tit. 9, § 4191 (2017); VA. CODE ANN. § 8.01-40.3 (2017); WYO. STAT. ANN. § 40-12-601 (2017). For descriptions of these laws, see *infra* Appendix A.

307. GA. CODE ANN. § 50-18-72(a)(4) (2017).

the disposition of the criminal matter. As discussed below, none of these solutions effectively stem the problem.

Several states have attempted to curb the commercialization of mugshots by limiting the parties to whom law enforcement agencies may provide mugshots, often restricting access based on intended use.³⁰⁸ Utah enacted section 17-22-30 in 2013, which prohibits sheriff's offices from providing access to a person that "requires the payment of a fee or other consideration" for its removal.³⁰⁹ The party requesting a copy of such photo must submit a signed statement "affirming that the booking photograph will not be placed in a publication or posted to a website that requires the payment of a fee or other consideration in order to remove or delete the booking photograph from the publication or website."³¹⁰ In Colorado, which has a similar law, websites can be charged with an unclassified misdemeanor and may be required to pay a fee up to \$1000.³¹¹ Under *United Reporting*, these pre-access condition statutes are not violative of the First Amendment since the government is not constitutionally required to provide access to mugshots at all.³¹²

However, these pre-access conditions are of limited, if any, efficacy. Under these laws, newspapers continue to have access to mugshots and can post them online, and law enforcement is not restricted from posting them on their own websites or social media.³¹³ Thus, mugshot websites such as MugshotSearch.net can easily scrape this data, bypassing direct requests to law enforcement agencies, and charge a fee.³¹⁴ Websites that do not charge fees can continue to request and receive mugshots directly from law enforcement if they so choose, and then partner with their sister

308. COLO. REV. STAT. § 24-72-305.5 (purpose of commerce); GA. CODE ANN. § 50-18-72 (purpose of commerce); UTAH CODE ANN. § 17-22-30 (purpose of commerce).

309. UTAH CODE ANN. § 17-22-30.

310. *Id.*; see also COLO. REV. STAT. § 24-72-305.5 (also requiring affirmation). In Utah, submitting a false statement to this effect subjects the affiant to criminal liability. UTAH CODE ANN. § 17-22-30.

311. COLO. REV. STAT. § 24-72-305.5.

312. *L.A. Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32, 40 (1999) (holding that the government can statutorily place pre-access conditions on obtaining the information in legislatively granting access to such information without violating the First Amendment); see also Solove, *supra* note 103, at 1215–16.

313. See *Jail Mugs*, STANDARD-EXAMINER, <http://www.standard.net/Jail-Mugs> (last visited May 8, 2018); *Inmate Roster*, WEBER COUNTY SHERIFF'S OFF., <http://www.webercountyutah.gov/sheriff/roster/index.php> (last visited May 8, 2018).

314. An online search by the author in 2016 led to numerous booking photographs on commercial websites for arrests after 2013 when Utah's legislation was enacted. One, entitled UtahMugshots or Mugshotsearch.net, charged \$100 for removal of mugshots. MugshotSearch.net appears to have various Facebook pages for different states. See Utah Mugshots, FACEBOOK, <https://www.facebook.com/UtahMugshots> (last visited May 8, 2018).

reputation management companies or simply generate advertising revenue.

Approximately half of the states, including California, Illinois, Kentucky, Missouri, Ohio, and Vermont, have prohibited websites from charging fees either through amending their unfair business practice statutes or by creating a separate cause of action for such claims.³¹⁵ Again, punishment ranges from civil penalties to damages to criminal exposure.³¹⁶ Of note, Ohio's statute enacted in 2017 provides that either "[h]umiliation or embarrassment" is adequate to establish damages.³¹⁷ In these states, there is no right to removal. Thus, as long as no fee is charged, these websites can indefinitely post. Given that much of the revenue is now generated by advertising, these laws have the unintended outcome of mugshots permanently remaining online. Moreover, although mugshot websites cannot officially charge fees for removal, their partner reputation management companies arguably can.

Still other states such as Georgia, Maryland, Oregon, South Carolina, and Wyoming, are now requiring removal at no charge in specific circumstances.³¹⁸ For example, in South Carolina, a person or entity who publishes arrest and booking records must remove these records (including mugshots) upon return request of the subject with "certified documentation that the original charges stemming from the arrest were discharged, dismissed, expunged, or the person was found not guilty."³¹⁹ In Georgia, free removal is required if the prosecutor does not press charges, if charges are dismissed, in limited diversionary circumstances, or when the person is acquitted of all charges.³²⁰ In other states, such as

315. See *infra* Appendix A.

316. CAL. CIV. CODE § 1798.91.1 (West 2017) (California civil action available in addition to damages); 815 ILL. COMP. STAT. 505/2QQQ, 505/7 (2017) (civil remedies including damages, penalty, and injunction); KY. REV. STAT. ANN. § 61.8746 (West 2017) (civil penalty and/or damages); MO. REV. STAT. § 407.1150 (2017) (misdemeanor for publishing and accepting payment, \$10,000 damages); S.C. CODE ANN. § 17-1-40 (2017) (misdemeanor for violating the law that prohibits securing a mugshot of an expunged individual and, if convicted, a fine of "not more than one hundred dollars or imprisonment of not more than thirty days, or both"); *id.* § 17-1-60(C) (criminal penalty and civil action re: removal fee); VT. STAT. ANN. tit. 9, § 4191 (2017) (civil penalty, damages, and injunctive relief).

317. OHIO REV. CODE ANN. § 2927.22(E) (LexisNexis 2017) (providing further that "[n]o physical manifestation of either humiliation or embarrassment is necessary for damages to be shown").

318. GA. CODE ANN. § 10-1-393.5 (2017); MD. CODE ANN., COM. LAW § 14-1324 (West 2017); OR. REV. STAT. § 646A.806 (2017); S.C. CODE ANN. § 17-1-40 (2017); WYO. STAT. ANN. § 40-12-601 (2017).

319. S.C. CODE ANN. § 17-1-60(D)(1)(c) (2017).

320. GA. CODE ANN. § 10-1-393.5(b.1) (2017).

Maryland, the right to removal is an extension of expungement statutes that provide for the sealing of certain records upon relief.³²¹

It is unclear whether these statutes would pass constitutional muster. Given the strict scrutiny analysis applicable to use restriction on the right to publish, the courts would likely find that these laws violate the First Amendment following *Cox Broadcasting* and *Florida Star*.³²² Even if they were found constitutional, they still are not an effective remedy for those who seek relief. Although these statutes prevent the end run that the other statutory schemes allow, they still place an onerous burden on individuals to find the mugshot companies, which are often sham entities and challenging to track down, and petition them.³²³

Finally, some lawmakers have tried to address one aspect of the problem by requiring *accurate* records.³²⁴ In rejecting a much more expansive bill that would have required removal of records upon notification of dismissal, acquittal, expungement, or deferred adjudication, the Texas legislature imposed a duty to publish “complete and accurate” information and required companies to verify information with law enforcement upon 45 days of being notified of inaccuracies.³²⁵ In South Carolina, in addition to the right to removal in certain circumstances, companies are also required to revise the records *upon*

321. MD. CODE ANN., COM. LAW § 14-1324(b) (West 2017). Violation of this statute was deemed an unfair or deceptive trade practice subject to those enforcement and penalty provisions. *Id.* § 14-1324(g). Similarly, Texas affords a right of removal to individuals whose records were expunged. TEX. BUS. & COM. CODE ANN. § 109.005 (West 2017).

322. Eric P. Robinson, *Cash Cutoff for Mugshot Sites a Dangerous Idea*, DIGITAL MEDIA L. PROJECT (Oct. 17, 2013, 11:59), <http://www.dmlp.org/blog/2013/cash-cutoff-mugshot-sites-dangerous-idea> [<https://web.archive.org/web/20180306115613/http://www.dmlp.org/blog/2013/cash-cutoff-mugshot-sites-dangerous-idea>] (arguing that the Georgia and Oregon statutes are unconstitutional under *Daily Mail* and *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 658 (1994)); *cf.* Rostron, *supra* note 10, at 1226–33 (generally discussing the applicability of the right to publish to mugshot companies). Although a right to access case, in *Commonwealth v. Pon*, the Massachusetts Supreme Court held that there was no constitutional right to access records of closed cases that resulted in non-conviction, thus avoiding the First Amendment’s strict scrutiny test. 14 N.E.3d 182, 196 (Mass. 2014). The court found, however, that there was a presumption of public access under the common law, holding that the government (as well as the defendant) had a compelling governmental interest in keeping these documents private in hopes of reducing collateral consequences of an arrest. *Id.* at 196–200. These included “reducing recidivism, facilitating reintegration, and ensuring self-sufficiency by promoting employment and housing opportunities for former criminal defendants.” *Id.* at 199. These governmental interests could be taken into account in applying the strict scrutiny test under the First Amendment right to publish.

323. Yerak, *supra* note 91.

324. *E.g.*, S.C. CODE ANN. § 17-1-60(D) (2017); TEX. BUS. & COM. CODE ANN. § 109.003 (West 2017).

325. TEX. BUS. & COM. CODE ANN. §§ 109.003–.004. The legislation also provided the right to removal upon notice of expunction. *Id.* § 109.005.

notice that “the arrest [was] discharged or dismissed as a result of the person pleading to a lesser included offense.”³²⁶ Under most of these laws, the mugshots would still remain online, and the disposition information would simply be added. Although these statutes place the initial burden to maintain accurate records on the publishers, those affected must still monitor their information and then contact them when there are errors.³²⁷

In sum, none of these legislative efforts have succeeded in quelling the mugshot industry and its profiteering from public shaming. The online mugshot companies have quickly adapted to the various legislative attempts.³²⁸ They have adjusted their means of generating revenue by focusing on ad revenue from clicks and through partnerships with reputation management companies. As described by one mugshot site owner, “the pay-to-remove era [has] gone offline.”³²⁹ Moreover, state laws aimed at the removal fees or at companies that charge removal fees have the unintended consequence of making it more difficult, if not impossible, to remove one’s mugshots.³³⁰ Nor do any of these solutions address the online reality that these websites are shape shifters; it is quite easy to take down a site and launch a new one or have a sister site that will then post the same mugshot. Finally, these statutes place the burden on the affected individuals rather than the companies. Many of these individuals are the most disenfranchised in our society. Thus, these laws have little or no efficacy for many and benefit only the select few with the resources and wherewithal to pursue these remedies.

D. Another Possible Solution: Constitutional Right to Informational Privacy?

Another possible solution is the inclusion of mugshots within the constitutional right to privacy.³³¹ Although in 1976 the Supreme Court

326. S.C. CODE ANN. § 17-1-60(D)(2). Despite South Carolina having one of the more protective set of laws, i.e., prohibiting fees for removal and requiring removal in these circumstances, mugshots taken in South Carolina continue to be posted, although seemingly on a more limited basis. *South Carolina Mugshots*, FACEBOOK, <https://www.facebook.com/SouthCarolinaMugshots> (last visited May 8, 2018) (last mugshot posted March 25, 2017).

327. See Yerak, *supra* note 91.

328. See Dukes, *supra* note 45.

329. Collier, *supra* note 115.

330. Maximusbiz, *Mugshot Removal: States Laws Making It Harder to Bail Out of Google*, JUSTICENEWSFLASH.COM (Feb. 11, 2015), https://www.justicenewsflash.com/2015/02/11/mugshot-removal-states-laws-making-it-harder-to-bail-out-of-google_20150211134045.html.

331. An alternative possible solution that is not explored in this Article is a “right to be forgotten” akin to the European Union. Alex Hern, *ECJ to Rule on Whether ‘Right to Be*

refused to extend constitutional protection to mugshots in *Paul v. Davis*,³³² much has changed in the intervening forty years.

In *Paul*, the Court held that the plaintiff's allegations regarding the reputational harm and stigmatization arising from law enforcement's publication of his mugshot did not provide a basis for relief under 42 U.S.C. § 1983.³³³ The plaintiff, Edward Charles Davis III, had been arrested and arraigned for shoplifting.³³⁴ While charges were pending, the Louisville Division of Police included Davis' booking photograph in a five-page flyer of mugshots distributed to approximately 800 merchants in the Louisville Area.³³⁵ Davis was categorized as an "active shoplifter," and the flyer urged merchants to "watch for these subjects" as the holiday season approached.³³⁶ Charges against Davis were dismissed by the trial court, but the flyer had already been distributed.³³⁷

The Supreme Court determined that mugshots were not afforded constitutional protection under the "right to privacy" recognized under the Fourteenth Amendment.³³⁸ Of particular note is Justice William J. Brennan's dissent, in which he warned of the dangers caused by law enforcement's publication of mugshots and the majority's decision to permit it.

The Court today holds that police officials, acting in their official capacities as law enforcers, may on their own initiative and without trial constitutionally condemn innocent individuals as criminals and thereby brand them with one of the most stigmatizing and debilitating labels in our society. If there are no constitutional restraints on such oppressive behavior, the

Forgotten' Can Stretch Beyond EU, GUARDIAN (July 20, 2017, 5:19), <https://www.theguardian.com/technology/2017/jul/20/ecj-ruling-google-right-to-be-forgotten-beyond-eu-france-data-removed>. American law has a markedly different approach to the accessibility of criminal records from our European counterparts, and it is doubtful that there would be support for this. JACOBS, *supra* note 10, at 159–61, 190–93, 222–23.

332. 424 U.S. 693, 713–14 (1976).

333. *Id.* at 693.

334. *Id.* at 695–96.

335. *Id.* at 695.

336. *Id.* at 695.

337. *Id.* at 695–96.

338. *Id.* at 712–14. The Court's discussion in *Paul* was primarily focused on whether Davis' procedural due process rights under the Fifth and Fourteenth Amendments were violated. The Court found that there was no violation, emphasizing that the deprivation of a "liberty" or "property" interest must stem from a right or status conferred by federal or state law, rather than tort law, and that the reputational harm did not constitute a cognizable "liberty" or "property" interest. *Id.* at 711–12.

safeguards constitutionally accorded an accused in a criminal trial are rendered a sham³³⁹

These safeguards include some of our criminal justice system's most basic tenets—the presumption of innocence and proof beyond a reasonable doubt.³⁴⁰ Justice Brennan's concerns are even more acute today with commercial websites and other third parties, in addition to law enforcement, having this unilateral ability to label great portions of our citizenry with little restraint.

Although the Supreme Court largely settled the question of whether mugshots implicated a constitutional privacy interest in *Paul*, the Court's decision a year later in *Whalen v. Roe* provides an opportunity to revisit this question.³⁴¹ In *Whalen*, the Court expanded the interests that fell within the “zone of privacy.”³⁴² The Court recognized “at least two different kinds of interests” cognizable under the Fourteenth Amendment: (1) “the interest in independence in making certain kinds of important decisions”; and (2) “the individual interest in avoiding disclosure of personal matters.”³⁴³ The latter has been described as the “constitutional right to information privacy.”³⁴⁴ Four months later, the Court again referred to “the individual interest in avoiding disclosure” in *Nixon v. Administrator of General Services*.³⁴⁵ “[N]o other [Supreme Court] decision . . . squarely addressed a constitutional right to informational privacy” until *NASA v. Nelson*, in 2011.³⁴⁶

However, the Court's decision in *NASA* does not provide guidance about the contours of the “zone” of informational privacy. In *NASA*,

339. *Id.* at 714 (Brennan, J., dissenting). Justice Brennan's dissent focused on Davis' substantive due process rights, arguing that “the public branding of an individual implicates interests cognizable as either ‘liberty’ or ‘property,’” and that “such public condemnation cannot be accomplished without procedural safeguards.” *Id.* at 725 (citing *Jenkins v. McKeithen*, 395 U.S. 411 (1969)). However, he recognized that privacy notions were “inextricably interwoven” with affording these due process protections. *Id.* at 735 n.18.

340. *Id.* at 724.

341. 429 U.S. 589, 598–99 (1977).

342. *See id.* In *Paul*, the Court found that there was no privacy interest implicated because “the activities detailed . . . were ones very different from that for which respondent claim[ed] constitutional protection—matters relating to marriage, procreation, contraception, family relationships, and child rearing and education.” *Paul*, 424 U.S. at 713. This was a narrower reading of the right to privacy than in *Whalen*.

343. *Whalen*, 429 U.S. at 599–600.

344. Daniel J. Solove, *Privacy and Power: Computer Databases and Metaphors for Information Privacy*, 53 STAN. L. REV. 1393, 1436–37 (2001) [hereinafter Solove, *Privacy and Power*]; *see also* *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 457 (1977).

345. *Nixon*, 433 U.S. at 457 (citing *Whalen*, 429 U.S. at 599).

346. 562 U.S. 134, 146 (2011) (“A few opinions have mentioned the concept in passing and in other contexts.” (first citing *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 748 (1989); and then citing *New York v. Ferber*, 458 U.S. 747 (1982))).

federal contract employees alleged that employee background check questions about drug use, mental stability, and other matters violated their constitutional right to information privacy.³⁴⁷ The Court assumed for purposes of its analysis that the government's action "implicate[d] a privacy interest of constitutional significance" and then proceeded to find any interest was adequately protected by "the Privacy Act's safeguards against public disclosure" of the information.³⁴⁸ Thus, the scope of the constitutional right to informational privacy and whether it will be fully recognized by the Court remains uncertain.

Lower court decisions have generally limited this right to non-public, confidential records.³⁴⁹ For example, in *Cline v. Rogers*, the Sixth Circuit held that there was "no constitutional right to privacy in one's criminal record" rejecting the plaintiff's claim that his criminal record should be deemed a private "personal matter" under *Whalen*.³⁵⁰ In reaching this conclusion the court relied in part on the fact that "arrest and conviction information are matters of public record."³⁵¹

For the purposes of mugshots, this reasoning becomes somewhat circular.³⁵² If mugshots are deemed "public" or "non-confidential" records as they are in the majority of the states, then mugshots are not afforded constitutional protection. However, if mugshots were deemed "personal" or "confidential" records under state law, then they could potentially be afforded constitutional protection.³⁵³ This brings us back to the problems and the solutions presented in this Article.³⁵⁴

347. *Id.* at 138–44.

348. *Id.* at 147–48.

349. See Solove, *Privacy and Power*, *supra* note 344, at 1437 n.229.

350. 87 F.3d 176, 179 (6th Cir. 1996).

351. *Id.*

352. This is also true for arrest records more generally. See Solove, *Privacy and Power*, *supra* note 344, at 1437. The issue of arrest records is beyond the scope of this Article. Although arrest records raise similar concerns, the analysis regarding such information differs because of the extent that general arrest information has been deemed public information under state statutes. These records have a similar stigmatizing effect; however, the visual nature of mugshots has drawn greater public attention and curiosity.

353. It is worth noting that, even if the fact of arrest or conviction is deemed "public," this should not be sufficient to render the mugshots "public" and thus excluded from constitutional protection since the fact of the arrest versus the image taken at the time of the arrest are not one in the same.

354. Obviously, there remains a broader question regarding how privacy is viewed within our jurisprudence. See Solove, *Privacy and Power*, *supra* note 344, at 1437 ("The constitutional right to information privacy is constrained by the paradigm of privacy as protecting one's hidden world, and hence has not worked well to address the database privacy problem."); see also Daniel J. Solove, *Conceptualizing Privacy*, 90 CALIF. L. REV. 1087, 1105–09 (2002) (describing how defining privacy as correlative with "secrecy" is far too narrow and suggesting that *Reporters Committee* and its analysis of privacy interests under Exemption 7(C) offers a more nuanced approach). Privacy scholars such as Daniel J.

CONCLUSION

The Internet has brought unforeseen changes in the accessibility, distribution, and use of mugshots. The resulting commodification and commercialization of these images affect the lives of millions of Americans, many of whom have never been charged or convicted, and others who have served their time and strive to move beyond their criminal record. For these individuals, the public shaming and the resulting personal and economic impacts represent an unwarranted intrusion on personal privacy interests and challenge the just operation of our criminal law system. These modern-day "rogues' galleries" require us to reexamine the public's right to access mugshots.

Due to the First Amendment protections afforded to the publishers of publicly-accessible documents, the statutory right to access should be limited in the first instance. This can be achieved in one of two ways. One is through the adoption of a federal law that prohibits state and local law enforcement agencies from disclosing mugshots except for immediate law enforcement needs or by court order. The second, but less preferred option, would be a state-level approach. Under this alternative, state legislatures would adopt laws prohibiting the disclosure of mugshots or shifting the presumption from open to closed records. Even under existing laws, state and local entities could provide greater protection by recognizing the privacy interests that are now implicated when applying the balancing test under current public records laws or the common law. Such protections would be in line with the U.S. Department of Justice's policy for the past forty-five years, and would be in accord with the analysis of the Sixth, Tenth, and Eleventh Circuits, all of which have found that individual privacy interests outweighed the minimal public interest, if any, served by their disclosure. These proposals would stem the commodification of mugshots, so that millions of Americans could finally move beyond their stigmatizing effects.

Solove have extensively critiqued the inadequacy of privacy laws in addressing the Information Era. *See, e.g., id.* at 1090-92 (arguing that the current conception of privacy is both too broad and too narrow and encouraging a pragmatic approach in re-conceptualizing privacy); *see also* Paul M. Schwartz, *Privacy and Democracy in Cyberspace*, 52 VAND. L. REV. 1609, 1611, 1632-47 (1999) (arguing that there are no legal standards "limiting the collection and utilization of personal data in cyberspace").

APPENDIX A³⁵⁵

This appendix contains two surveys of state laws: (1) the right to access mugshots under the state's public records or other laws, and (2) recently enacted legislation, if any, targeted at the mugshot industry. It is organized alphabetically by state with the relevant information for each survey underneath each state.

For the first survey, state laws regarding the right to access mugshots have been classified into one of the five categories: Open, Likely Open, Closed, Discretionary, or Unclear. Mugshots have been deemed "open" records in states where there is explicit authority (i.e., statutory, executive or administrative, or case law) addressing the accessibility of mugshots. In contrast, states have been deemed "likely open" where there has been no explicit authority addressing mugshots, but given the statutory framework or analogous case law, mugshots are likely accessible. Mugshots have been deemed "closed" records in states where there is explicit authority indicating that these records presumptively should not be disclosed. States have been categorized as "discretionary" where law enforcement or other agencies have been granted the discretion to disclose or withhold. Finally, states have been deemed "unclear" when there is insufficient legal authority to determine how a court would rule on the right to access an individual's mugshot.³⁵⁶

For the second survey regarding recently enacted legislation aimed at the mugshot industry, a summary of the relevant statute(s) and their enactment year have been provided.³⁵⁷

355. The information in this appendix is current through February 1, 2018. The Reporters Committee for Freedom of the Press has created the Open Government Guide, which is a "compendium of information on every state's open records and open meetings laws." *Open Government Guide*, REP. COMMITTEE FOR FREEDOM PRESS, <https://www.rcfp.org/open-government-guide> (last visited May 8, 2018). The guide includes information regarding mugshots and other police records and was last updated in 2011.

356. However, it is important to note that in many of the states categorized as "unclear," law enforcement agencies treat mugshots as open. *See, e.g.*, Kevin Collier, *Why the Online Mugshot Industry Will Never Die*, KERNAL (Dec. 7, 2014), <http://kernelmag.dailydot.com/issue-sections/features-issue-sections/11068/online-mugshot-extortion-industry>; *see, e.g.*, *South Mississippi Felony Arrest Mugshots for Sunday, March 25, 2018*, SUN HERALD (Mar. 26, 2018), <http://www.sunherald.com/news/local/crime/article206820289.html> (Mississippi); STARNEWSONLINE: MUGSHOTS, <http://www.wilmingtonmugshots.com> (last visited May 8, 2018) (North Carolina); *Arrests*, CRIMEWATCH PA. <https://www.crimewatchpa.com/arrests> (last visited May 8, 2018) (Pennsylvania).

357. The National Conference of State Legislatures regularly updates its website with pending and enacted legislation targeted at mugshot websites. *Mug Shots and Booking Photo Websites*, NAT'L CONF. ST. LEGISLATURES (Oct. 23, 2017), <http://www.ncsl.org/>

Alabama
<p>Accessibility Under State Laws – Open</p> <p>“A mugshot . . . is a public record that must be provided . . . under the Open Records Law [section 36-12-40 of the Alabama Code] unless it falls within a recognized exception.” Ala. Op. Att’y Gen. No. 2004-108, at 3 (Apr. 1, 2004), 2004 WL 771846 (responding to an inquiry as to whether mugshots in a police computer database must be provided to bail bonding companies, and if so, whether any privacy rights would be violated); see ALA. CODE § 36-12-40 (2017). See generally <i>Stone v. Consol. Publ’g Co.</i>, 404 So. 678 (Ala. 1981) (setting forth a common law balancing test when considering privacy interests under the Open Records Law).</p>
<p>Recently Enacted Legislation – None</p>
Alaska
<p>Accessibility Under State Laws – Unclear</p> <p>There is no explicit statutory exemption, executive order, case law, or other authority addressing public access to mugshots. Although the Alaska Public Records Act (“PRA”) favors broad disclosure, ALASKA STAT. § 40.25.110 (2016), the PRA also includes a law enforcement exemption akin to the Federal FOIA. <i>Id.</i> § 40.25.120(a)(6)(C) (exempting “records or information compiled for law enforcement purposes, but only to the extent that the production of the law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of the personal privacy of a suspect, defendant, victim, or witness”). This exemption has not been interpreted as to mugshots. <i>But cf.</i> <i>Patterson v. State</i>, 985 P.2d 1007 (Alaska App. 1999), <i>overruled in part on other grounds</i>, <i>Doe v. Dep’t of Public Safety</i>, 92 P.3d 398 n.83 (2004) (holding that sex offender registration, including photographs, did not violate the state constitutional right to privacy).</p>
<p>Recently Enacted Legislation – None</p>

Arizona
<p>Accessibility Under State Laws – Likely Open Arizona’s Public Records Act states that “[p]ublic records and other matters in the custody of any officer shall be open to inspection by any person at all times during office hours.” ARIZ. REV. STAT. ANN. § 39-121 (2017). The Act includes numerous statutory exceptions to disclosure; however, none appear applicable to mugshots. <i>See, e.g., id.</i> §§ 39-128(B)(1), 39-123.01(A). In <i>Carlson v. Pima County</i>, the Arizona Supreme Court recognized that the unlimited right to inspection of certain public records “might lead to substantial and irreparable private or public harm” and recognized a longstanding common law limitation to open disclosure. 687 P.2d 1242, 1245–46 (Ariz. 1985) (holding that jail offense report should be disclosed despite privacy concerns under the balancing test).</p>
Recently Enacted Legislation – None
Arkansas
<p>Accessibility Under State Laws – Likely Open There is no explicit statutory exemption, executive order, case law, or other authority addressing public access to mugshots. There is a general policy favoring disclosure under Arkansas’ FOIA, and exceptions are to be construed narrowly. <i>Hengel v. City of Pine Bluff</i>, 821 S.W.2d 761, 765 (Ark. 1991); <i>see also</i> ARK. CODE ANN. § 25-19-105 (2017). Because no statutory exemption appears applicable, mugshots are likely open records, and their disclosure is only limited by the common-law balancing test. <i>Hengel</i>, 821 S.W.2d at 765.</p>
Recently Enacted Legislation – None
California
<p>Accessibility Under State Laws – Discretionary Although mugshots have been deemed to fall within the “law enforcement investigatory records” exemption, the California Attorney General’s Office has indicated that mugshots may be furnished to members of the general public at the discretion of law enforcement. Cal. Op. Att’y Gen. No. 03-205, at 6 (July 14, 2003), 2003 WL 21672840 (discussing CAL. GOV’T CODE § 6250, 6252, 6253, 6254(f) (West 2017)). The California Supreme Court has held that the retention and</p>

dissemination of an arrest record *by the government* does not violate an individual's state constitutional right to privacy. *Loder v. Mun. Court*, 553 P.2d 624, 637 (Cal. 1976); *see also* *Craig v. Mun. Court*, 161 Cal. Rptr. 19, 23–24 (Cal. Ct. App. 1979).

Recently Enacted Legislation – CAL. CIV. CODE § 1798.91.1 (West 2017) (enacted in 2014)

Prohibits any publisher of mugshots from charging fees for removal, modification, or correction. Provides for civil penalties or actual damages and attorney's fees.

Colorado

Accessibility Under State Laws – Open

The Colorado Public Records Act provides that “records of official actions shall be maintained by the particular criminal justice agency which took the action and shall be open for inspection by any person at reasonable times, except as provided in this part 3 or as otherwise provided by law.” COLO. REV. STAT. § 24-72-303 (2017). The Colorado Judicial Branch classifies mugshots as “arrest records” and “arrest records” as “official actions.” OFFICE OF THE STATE COURT ADM’R, REFERENCE GUIDE TO STATE STATUTES GOVERNING ACCESS TO COURT RECORDS 4 (2008), https://www.courts.state.co.us/userfiles/file/media/accessguide_08-08_final.doc.

Recently Enacted Legislation – COLO. REV. STAT. § 24-72-305.5(2) (2017) (enacted in 2014 and amended 2015)

Prohibits a person from obtaining a mugshot for purposes of publishing and charging removal fees or “other exchange for pecuniary gain.” Renders it a misdemeanor to charge removal fees or falsely aver in the request.

Connecticut
<p>Accessibility Under State Laws – Likely Open</p> <p>There is no explicit statutory exemption, executive order, case law, or other authority addressing public access to mugshots. Connecticut’s FOIA provides that “[e]xcept as otherwise provided by any federal law or state statute, all records maintained or kept on file by any public agency, whether or not such records are required by any law or by any rule or regulation, shall be public records.” CONN. GEN. STAT. § 1-210 (2017). The Act includes one exemption for “[p]ersonnel or medical files and similar files the disclosure of which would constitute an invasion of privacy,” which is akin to Exemption 6 of the Federal FOIA. <i>Id.</i> § 1-210(b)(2); <i>Tillman v. Freedom of Info. Comm’n</i>, No. CV074044748S, 2008 WL 4150289, at *10 (Conn. Super. Ct. Aug. 15, 2008) (holding that an exonerated inmate’s correctional records were exempt from disclosure under this exception because they were not a legitimate matter of public interest and disclosure “would be highly offensive to a reasonable person”). There is also a law enforcement agency records exemption that specifies particular records. § 1-210(b)(3). Given the narrow scope of the law enforcement exemption, mugshots are likely subject to disclosure. <i>Cf. Comm’r of Pub. Safety v. Freedom of Info. Comm’n</i>, 93 A.3d 1142 (Conn. 2014) (discussing disclosure of arrest records during pending criminal case).</p>
<p>Recently Enacted Legislation – None</p>
Delaware
<p>Accessibility Under State Laws – Unclear</p> <p>Section 10003 of the Delaware Code provides that all public agency records are public unless they are exempted by section 10002. DEL. CODE ANN. tit. 29, § 10003(d)(1) (2018). Section 10002 deems non-public “criminal files and criminal records, the disclosure of which would constitute an invasion of personal privacy.” <i>Id.</i> § 10002(l)(4). It further states: “Any person may, upon proof of identity, obtain a copy of the person’s personal criminal record. All other criminal records and files are closed to public scrutiny.” <i>Id.</i> § 10002(l)(4). There is no case law or other authority interpreting this provision as to mugshots.</p>
<p>Recently Enacted Legislation – None</p>

Florida
<p>Accessibility Under State Laws – Open A 1994 attorney general opinion states that booking photographs are not exempted from general disclosure requirements. Fla. Op. Att’y Gen. No. AGO 94-90 (Oct. 25, 1994), 1994 WL 681045 (discussing FLA. STAT. §§ 119.011, 119.07 (1993) and whether mugshots are public records).</p>
<p>Recently Enacted Legislation – FLA. STAT. § 901.43 (2017) (enacted in 2017 and effective July 1, 2018) Prohibits any publisher of mugshots from soliciting or accepting a payment to remove the photographs. Requires removal within 10 days of receipt of a written request. Provides for “civil action to enjoin the continued publication or dissemination” if removal has been requested, a fine of \$1,000 per day for noncompliance with an injunction, and attorney’s fees.</p>
Georgia
<p>Accessibility Under State Laws – Closed Georgia’s Open Records Act, GA. CODE ANN. §§ 50-18-70 to -77 (2017), has a non-exhaustive list of fifty exemptions. <i>Id.</i> § 50-18-72; <i>see also</i> <i>Hardaway Co. v. Rives</i>, 422 S.E.2d 854, 856 (Ga. 1992) (“In suits under the Open Records Act . . . [If public records] are not exempt under the list of exemptions . . . , then the question is whether they should be protected by court order under § 50-18-70, but only if there is a claim that disclosure of the public records would invade individual privacy.” (citation omitted)). In 2014, section 50-18-72(a)(4) was amended to provide “that the release of booking photographs shall only be permissible in accordance with Code Section 35-1-18,” related to the reporting of missing persons. § 50-18-72(a)(4).</p> <p>Title 35 (Law Enforcement Officers and Agencies) was recently amended to prohibit law enforcement publication and distribution. <i>Id.</i> § 35-1-19(c).</p>
<p>Recently Enacted Legislation</p> <p>GA. CODE ANN. § 10-1-393.5(b.1) (2017) (enacted in 2016) Requiring commercial websites to remove mugshots of individuals who meet certain criteria (e.g., charges never filed, case dismissed,</p>

diversionary programs, acquittal) upon written request from that individual without charging a fee. Also requires removal of name, date of birth, and date of arrest in such circumstances. Provides for civil remedies under Georgia's Fair Business Practices Act.

GA. CODE ANN. § 35-1-19 (2017) (enacted in 2014)

Prohibits law enforcement agencies from posting mugshots on their websites. Also prohibits them from providing mugshots to publishers that charge removal fees.

Hawaii

Accessibility Under State Laws – Open

Hawaii's Office of Information Practices considers the disclosure of mugshots from arrests that resulted in convictions open records. Haw. Office of Info. Practices, Opinion Letter No. 94-12, at 1-2 (June 28, 1994) (finding that mugshots generally do not fall within the privacy exception of Hawaii's Uniform Information Practices Act ("UIPA") because the arrest is "a public, not a private[,] event"). However, mugshots of arrests that have been expunged are protected from disclosure. Haw. Office of Info. Practices, Opinion Letter No. 03-09 (June 26, 2003) (citing HAW. REV. STAT. § 92F-13(3) (1993) ("Frustration Exception") and § 831.3.2 (expungement statute)). The office also found mugshots that fell within the definition of "nonconviction data," as defined by section 846-1, could be withheld, but noted that disclosure is permitted if the arrest is less than one year old or if active prosecution is pending after a year. *Id.* at 8 (declining to apply the state law exception contained in HAW. REV. STAT. § 92F-13(4)).

Recently Enacted Legislation – None

Idaho

Accessibility Under State Laws – Unclear

There is no case law, statutory exemption, executive order, or other authority explicitly addressing public access to mugshots. Although the Idaho Public Records Act favors broad disclosure, it includes a law enforcement exemption akin to the Federal FOIA: "records compiled for law enforcement purposes by a law enforcement agency [may be exempt], but such exemption from disclosure applies only to the extent

<p>that the production of such records would . . . [c]onstitute an unwarranted invasion of personal privacy.” IDAHO CODE ANN. § 74-124(1)(c) (2017). This exemption has not been interpreted as to mugshots.</p>
<p>Recently Enacted Legislation – None</p>
<p style="text-align: center;">Illinois</p>
<p>Accessibility Under State Laws – Likely Open Illinois has a general privacy exception under its public records laws. 5 ILL. COMP. STAT. 140/7(1)(c) (2017) (exempting “[p]ersonal information . . . the disclosure of which would constitute a clearly unwarranted invasion of personal privacy”). There is no case law, executive order, or other authority explicitly addressing its applicability to mugshots. <i>Cf.</i> Nat’l Ass’n of Criminal Def. Lawyers v. Chi. Police Dep’t, 924 N.E.2d 564, 574–75 (Ill. App. Ct. 2010) (finding that disclosure of photographic police lineups, which included civilians, officers, and other individuals, after personal identifying information was removed, was not an invasion of privacy). In 2017, Illinois amended its Freedom of Information Act, exempting from disclosure “law enforcement records of other persons requested by a person committed to the Department of Corrections or a county jail, including . . . arrest and booking records [and] mug shots.” 5 ILL. COMP. STAT. 140/7(e-10).</p>
<p>Recently Enacted Legislation – 815 ILL. COMP. STAT. 505/2QQQ(a), (b)(2) (2017) (enacted in 2013) Amended the Consumer Fraud and Deceptive Business Practices Act in 2013. Provides that it is “an unlawful practice for any person engaged in publishing or otherwise disseminating criminal record information [including mugshots] . . . to solicit or accept the payment of a fee or other consideration to remove, correct, or modify said criminal record information.”</p>
<p style="text-align: center;">Indiana</p>
<p>Accessibility Under State Laws – Unclear/Discretionary There is no case law, statutory exemption, executive order, or other authority explicitly addressing public access to mugshots. <i>Compare</i> IND. CODE § 5-14-3-5(a)(1) (2017) (requiring “[i]nformation that identifies the person including the person’s name, age, and address” be</p>

made public), <i>with Lane-El v. Spears</i> , 13 N.E.3d 859, 870 (Ind. Ct. App. 2014) (noting that the “APRA [Access to Public Records Act] exempts ‘investigatory records’ from this disclosure requirement at the discretion of the agency holding the record” (quoting § 5-14-3-4(b)(1))).
Recently Enacted Legislation – None
Iowa
<p>Accessibility Under State Laws – Unclear</p> <p>The Iowa open records laws provide that “[c]riminal identification files of law enforcement agencies” are confidential, “[h]owever, records of current and prior arrests . . . shall be public records.” IOWA CODE § 22.7(9) (2018). There is also a law enforcement exemption for investigatory reports for ongoing investigations. <i>Id.</i> § 22.7(5). It has not been determined whether mugshots are deemed criminal identification files, records of arrests, or investigatory records.</p>
Recently Enacted Legislation – None
Kansas
<p>Accessibility Under State Laws – Close/Discretionary</p> <p>A 1987 attorney general opinion states that “[m]ug shots . . . are criminal investigation records which may be closed to the public.” Kan. Op. Att’y Gen. No. 87-25 (Feb. 9, 1987), 1987 WL 290422 (discussing KAN. STAT. ANN. §§ 19-1904, 22-4701, 38-1601, 38-1608, 45-215, 45-217, 45-221 (1987) with respect to whether law enforcement records, jail books, standard offense reports, and mugshots are open records). The district court may order disclosure of criminal investigation records under section 45-222. <i>Id.</i> at 2–3 (citing § 45-221(a)(10)).</p>
Recently Enacted Legislation – None
Kentucky
<p>Accessibility Under State Laws – Open</p> <p>Although the Kentucky Open Records Act favors broad disclosure, KY. REV. STAT. ANN. § 61.872(1) (West 2017), it includes a privacy exemption: “Public records containing information of a personal nature where the public disclosure thereof would constitute a clearly</p>

unwarranted invasion of personal privacy . . .” *Id.* § 61.878(1)(a). A 2005 attorney general opinion found that the mugshot of a federal prisoner who was detained in county jail must be disclosed, rejecting the applicability of this privacy exception. Ky. Op. Att’y Gen. No. 05-ORD-094, at 5–6 (May 17, 2005), 2005 WL 3844471 (discussing § 61.878(a)(1) and citing Ky. Op. Att’y Gen. No. 2-260 (June 8, 1983), 1983 WL 166469).

Recently Enacted Legislation

KY. REV. STAT. ANN. § 61.8746 (West 2017) (enacted in 2016)

Prohibits individuals from utilizing a mugshot for “a commercial purpose” where the mugshot “will be placed in a publication” or posted online and a removal fee is charged.

Provides for civil action to enjoin the continued publication or dissemination if removal has been requested and attorney’s fees. Also provides for a daily statutory fine for violations beginning at \$100 per day and increasing to \$500 per day.

KY. REV. STAT. ANN. § 61.870(4)(b) (2017) (definitions section)

Explicitly excludes publication by a newspaper or periodical as a “commercial purpose,” thus allowing mugshot galleries on those websites.

Louisiana

Accessibility Under State Laws – Likely Open

The Louisiana Public Records Act exempts the “records of the arrest of a person . . . until a final judgment of conviction or acceptance of a plea.” LA. STAT. ANN. § 44:3(A)(4)(a) (2017) (providing that booking records are public); *see also* LA. CODE CRIM. PROC. ANN. art. 228 (2017) (outlining booking procedures). *But cf.* La. Op. Att’y Gen. No. 94-338 (June 30, 1994), 1994 WL 379539 (determining that under Department of Corrections regulations photographs of sex offenders could not be released to the general public without special authorization from the Parole Board and implicitly suggesting that this restriction could further limit the mugshots of inmates and ex-offenders generally).

Recently Enacted Legislation – None

Maine
<p>Accessibility Under State Laws – Likely Open</p> <p>There is no case law, statutory exemption, executive order, or other authority explicitly addressing public access to mugshots. Maine’s Freedom of Access Act provides open access to records “[e]xcept as otherwise provided by statute.” ME. STAT. tit. 1, § 408-A (2017). The Criminal History Record Information Act, ME. STAT. tit. 16, §§ 701–710 (2017), distinguishes between “confidential” and “public” criminal history record information. <i>Id.</i> §§ 702, 703(2), (8). Information arising from various circumstances where there is no resulting conviction (e.g., no charges filed, no prosecution initiated, dismissals, acquittals, mistrials) or where the person has been pardoned or granted amnesty is deemed confidential. <i>Id.</i> § 703(2)(A)–(L). All other information, including basic arrest log information, is deemed public. <i>Id.</i> § 703(8); <i>see also</i> § 706 (arrest information). Thus, the mugshot of a convicted individual would likely be deemed public information. <i>Id.</i> § 703(3) (exempting photographs from the definition of criminal history record information only “to the extent that the information does not indicate formal involvement of the specific individual in the criminal justice system”). However, if the person has not been convicted, the mugshot may be confidential if it falls within section 703(2). <i>Id.</i> § 703(2).</p>
<p>Recently Enacted Legislation – None</p>
Maryland
<p>Accessibility Under State Laws – Open/Discretionary</p> <p>A Maryland attorney general opinion from 2007 indicates that mugshots are presumptively open and “should be disclosed in response to a Public Information Act request <i>unless</i> the department determines that disclosure would be contrary to the public interest.” 92 Md. Op. Att’y Gen. 26, 26, 28–30 (June 14, 2007), 2007 WL 1749003 (emphasis added) (discussing MD. CODE ANN., STATE GOV’T §§ 10-611(g), 10-612, 10-613(a), 10-615, 10-616, 10-617 (West 2007)). The opinion provides several factors, which a department might consider, including whether disclosure of the arrest photograph would constitute an unwarranted invasion of privacy, noting that where the person was acquitted or the charges were dropped, “the privacy interest will be stronger in light of the embarrassing circumstances that the photograph depicts.” <i>Id.</i> at 49. The opinion reached this conclusion despite the fact that Maryland’s Public Information Act contains an exemption parallel to</p>

Exemption 7(C) of the FOIA.

Recently Enacted Legislation – MD. CODE ANN., COM. LAW § 14-1324(b)(2)(i)–(iii) (West 2017) (enacted in 2015)

Provides that an individual may request removal of a mugshot if the records have been “expunged under Title 10, Subtitle 1 of the Criminal Procedure Article;” the individual had successfully petitioned the court for protection or removal of the photograph from public inspection; or the individual had “successfully petitioned a court to vacate the judgment that resulted from the arrest or detention.”

Massachusetts

Accessibility Under State Laws – Likely Open

The law enforcement exception to the “public records” definition is not applicable to mugshots. MASS. GEN. LAWS ch. 4, § 7(f) (2017) (providing an exemption for investigatory materials if disclosure would be harmful to law enforcement). There is also an exception akin to Exemption 6 of the Federal FOIA that exempts personnel and medical information, as well as “other materials” that “may constitute an unwarranted invasion of personal privacy.” *Id.* § 7(c). This exemption has not been interpreted as to mugshots. However, an opinion letter by the Public Records Division of the Secretary of the Commonwealth indicated that mugshots taken prior to the initiation of criminal proceedings (i.e., filing of the complaint) do not fall within the criminal offender records information (“CORI”) exemption for public records. Mass. Supervisor of Pub. Records, Opinion Letter No. 10/152 (Aug. 27, 2010) (citing GEN. LAWS ch. 6, § 172 (CORI statute); GEN. LAWS ch. 4, § 7(26)(a)). Thus, mugshots “created subsequent to the initiation of criminal proceedings” (including the filing of the complaint) are exempt as CORI. *Id.*; GEN. LAWS ch. 6, § 172(a)(6) (2017) (providing generally that CORI may be disclosed upon a commissioner’s finding that it would “serve[] the public interest”).

Recently Enacted Legislation – None

Michigan
<p>Accessibility Under State Laws – Open <i>In Patterson v. Allegan County Sheriff</i>, the Michigan Court of Appeals held that a mugshot of a county jail inmate is a public record under Michigan’s Freedom of Information Act. 502 N.W.2d 368, 369 (Mich. Ct. App. 1993) (discussing MICH. COMP. LAWS §§ 15.231–246 (state FOIA), 15.232(c), (e) (1993)); <i>see also</i> <i>Detroit Free Press, Inc. v. Oakland Cty. Sheriff</i>, 418 N.W.2d 124, 127–30 (Mich. Ct. App. 1987) (holding that booking photograph of a person arrested, charged with a felony and awaiting trial did not fall within the unwarranted invasion of privacy exception set forth in section 13(1)(a) of Michigan’s Freedom of Information Act, § 15.243(1)(a)); Mich. Op. Att’y Gen. No. 5593 (Nov. 14, 1979), 1979 WL 36923.</p>
<p>Recently Enacted Legislation – None</p>
Minnesota
<p>Accessibility Under State Laws – Open There is express statutory authority declaring that mugshots are open public records in Minnesota’s Data Practices statutes. MINN. STAT. § 13.82(26)(b) (2017) (stating that “a booking photograph is public data” subject only to a temporary law enforcement investigatory delayed release).</p>
<p>Recently Enacted Legislation – None</p>
Mississippi
<p>Accessibility Under State Laws – Unclear/Discretionary Mississippi’s Public Records Act favors disclosure in the absence of an exemption. MISS. CODE ANN. § 25-61-1 (2017) (including explicit language regarding access to electronic records). Mississippi’s Public Records Act contains an exemption for investigative reports. <i>Id.</i> § 25-61-12(2)(a) (“[I]nvestigative reports shall be exempt from [disclosure]; however, a law enforcement agency, <i>in its discretion</i>, may choose to make public all or any part of any investigative report.” (emphasis added)); <i>see also id.</i> § 25-61-3(f) (defining “investigative report”). The “investigative report” exemption has not been interpreted with respect to mugshots. However, the other category of law enforcement records is “incident reports,” which are open records, and mugshots do not</p>

appear to fall within that definition. *Id.* §§ 25-61-3(e) (defining “incident report” as a “narrative” report or a document akin to an arrest log), 25-61-12(2)(c) (stating that “[a]n incident report shall be a public record”). Thus, mugshots are most likely “investigative reports” and, thus, closed records subject to discretionary disclosure by law enforcement agencies.

Recently Enacted Legislation – None

Missouri

Accessibility Under State Laws – Likely Open

Missouri’s Sunshine Law favors broad disclosure, declaring that “records . . . of public governmental bodies be open to the public unless otherwise provided by law.” MO. REV. STAT. § 610.011(1) (2017). The statute includes a chapter on arrest records, but this chapter has not been interpreted with respect to mugshots. Mugshots most likely fall within the definition of an “arrest report,” *id.* § 610.100.1(2), which are generally open records, unless the person is “not charged with an offense . . . within thirty days of the person’s arrest.” *Id.* § 610.100.2(3); *see also id.* § 610.122 (setting forth a high standard for the expungement of arrest records). Additionally, the Missouri Supreme Court has held that booking videotape is public record subject to disclosure. *Hemeyer v. KRCG-TV*, 6 S.W.3d 880, 881–83 (Mo. 1999) (en banc) (refusing to reach the question of whether the booking videotape constitutes an “investigative report” because it was not properly raised on appeal); *see also* § 610.100.2(2) (providing that “mobile video recordings and investigative reports of all law enforcement agencies are closed records until the investigation becomes inactive”).

Recently Enacted Legislation – MO. REV. STAT. § 407.1150 (2017) (enacted in 2014)

Prohibits individuals publishing or disseminating “criminal record information,” including mugshots, from charging removal fees or other consideration to correct such information. Renders doing so a misdemeanor offense and provides for civil remedies including an amount up to \$10,000 or actual and punitive damages.

Montana
<p>Accessibility Under State Laws – Closed</p> <p>There is explicit statutory language regarding mugshots. Montana’s Law Enforcement statute declares that “[c]riminal history record information may not be disseminated to agencies other than criminal justice agencies” absent consent, court order, or other limited circumstances. MONT. CODE ANN. § 44-5-302(1) (2017). “‘Criminal history record information’ . . . includes identification information, such as fingerprint records or photographs . . .” <i>Id.</i> § 44-5-103(4)(a).</p>
<p>Recently Enacted Legislation – None</p>
Nebraska
<p>Accessibility Under State Laws – Open</p> <p>There is explicit statutory authority addressing mugshots. “[I]nformation consisting of the following classifications shall be considered public record for purposes of dissemination: (1) Posters, announcements, lists for identifying or apprehending fugitives or wanted persons, or photographs taken in conjunction with an arrest for purposes of identification of the arrested person . . .” NEB. REV. STAT. § 29-3521 (2017).</p>
<p>Recently Enacted Legislation – None</p>
Nevada
<p>Accessibility Under State Laws – Likely Open</p> <p>Nevada Revised Statutes section 239.010 mandates “unlimited disclosure of all public records,” unless the record falls within one of the cited statutory exclusions or is subject to common law limitations. <i>Donrey of Nev., Inc. v. Bradshaw</i>, 798 P.2d 144, 147–48 & n.2 (Nev. 1990) (applying a case-by-case balancing test that weighs “privacy or law enforcement policy justifications for nondisclosure against the general policy in favor of open government”). Of note, “reporter[s] for the electronic or printed media in a professional capacity” enjoy a particularly broad right to access the “records of criminal history” under Nevada’s criminal procedure statutes. NEV. REV. STAT. § 179A.100(7)(l) (2016); <i>see also id.</i> § 179A.070 (defining “record of criminal history”).</p>

Recently Enacted Legislation – None
New Hampshire
<p>Accessibility Under State Laws – Unclear</p> <p>There is no case law, statutory exemption, executive order, or other authority explicitly addressing public access to mugshots. New Hampshire’s Public Records Act favors disclosure: “The purpose of this chapter is to ensure both the greatest possible public access to the actions, discussions and records of all public bodies, and their accountability to the people.” N.H. REV. STAT. ANN. § 91-A:1 (2017). Mugshots are not listed as an explicit exemption to disclosure; however, they could potentially fall within the catch-all provision for privacy. <i>Id.</i> § 91-A:5(IV) (permitting exemption for “other files whose disclosure would constitute invasion of privacy”).</p>
Recently Enacted Legislation – None
New Jersey
<p>Accessibility Under State Laws – Closed</p> <p>An executive order from 1997 provided that mugshots are closed records. “The following records shall not be deemed to be public records subject to inspection and examination and available for copying pursuant to the provisions of Chapter 73, P.L. 1963, as amended: fingerprint cards, plates and photographs and similar criminal investigation records that are required to be made, maintained or kept by any State or local governmental agency.” N.J. Exec. Order No. 69 (1997) (discussing N.J. Exec. Order No. 9, §3(e) (1963), N.J. Exec. Order No. 123 (1983), and the New Jersey Open Public Records Act, N.J. STAT. ANN. §§ 47:1A-1 to -13 (West 2017)). Efforts to codify or reject this executive order have failed. <i>See, e.g.</i>, Assemb. 2064, 216th Leg., Reg. Sess. (N.J. 2014) (exempting mugshots from public records law); Assemb. 2177, 216th Leg., Reg. Sess. (N.J. 2014) (explicitly providing that mugshots are open records).</p>
<p>Recently Enacted Legislation – N.J. Stat. Ann. § 2A:58D-4 (West 2017) (enacted in 2017)</p> <p>Provides that a person may not solicit “any pecuniary benefit in consideration for refraining from the disclosure of personal identifying information of any person which identifies, . . . the person as having been arrested, charged, prosecuted, or convicted</p>

of any criminal offense including” mugshots. Also provides for civil liability, actual and punitive damages, and attorney’s fees.

New Mexico

Accessibility Under State Laws – Likely Open

There is no case law, statutory exemption, executive order, or other authority explicitly addressing public access to mugshots. A 1994 attorney general opinion discussed “the confidentiality of information in police reports regarding the identity of persons arrested for or suspected of committing crimes” under the Arrest Record Information Act, N.M. STAT. ANN. §§ 29-10-1 to -8 (2017), and the Inspection of Public Records Act, N.M. STAT. ANN. § 14-2-1 to -12 (2017). N.M. Op. Att’y Gen. No. 94-02, 1 (Apr. 25, 1994). The opinion concludes that neither statute “authorizes a law enforcement agency to protect the identity of persons who have been arrested or charged with a crime. Section 29-10-4 of the Arrest Record Information Act protects the confidentiality of [identity information] *only if* that information has been collected in connection with an investigation of, or otherwise relates to, another person who has been charged with committing a crime.” *Id.* at 4 (emphasis added). However, the opinion notes that “information in other records which identifies a person accused but not charged with or arrested for a crime may be protected from public disclosure under the Inspection of Public Records Act.” *Id.*

Recently Enacted Legislation – None

New York

Accessibility Under State Laws – Unclear

There is no statutory exemption explicitly addressing public access to mugshots. However, a recent decision by the Supreme Court, Appellate Division, held that mugshots were confidential as to a request made by a commercial website, applying a general balancing test and finding that the privacy interests at stake outweighed the public interest in disclosure. *In re Prall v. N.Y.C. Dep’t of Corr.*, 10 N.Y.S.3d 332, 334–35 (N.Y. App. Div. 2015) (examining applicability of privacy exception under N.Y. PUB. OFF. LAW § 87(2)(b) (McKinney 2015)). The court emphasized that the agency has the “burden of demonstrating that the material requested falls within a statutory exemption” and that there must be a “particularized and specific justification.” *Id.* at 334 (quoting *In re Baez v. Brown*, 1 N.Y.S.3d 376, 379 (N.Y. App. Div. 2015)).

<p>Because of the case-by-case analysis, it is unclear how the Department of Corrections and state courts will generally view the privacy interest at stake.</p>
<p>Recently Enacted Legislation – None</p>
<p>North Carolina</p>
<p>Accessibility Under State Laws – Unclear There is no case law, statutory exemption, executive order, or other authority explicitly addressing public access to mugshots. “Records of criminal investigations” are exempt from disclosure and are released only by order of a court of competent jurisdiction. N.C. GEN. STAT. § 132-1.4(a) (2016). “Records of criminal investigations” are defined as “all records or any information that pertains to a person or group of persons that is compiled by public law enforcement agencies for the purpose of attempting to prevent or solve violations of the law, including information derived from witnesses, laboratory tests, surveillance, investigators, confidential informants, <i>photographs</i>, and measurements.” <i>Id.</i> § 132-1.4(b)(1) (emphasis added). This exemption could potentially apply to mugshots.</p>
<p>Recently Enacted Legislation – None</p>
<p>North Dakota</p>
<p>Accessibility Under State Laws – Open There is explicit statutory authority. “Active criminal intelligence information and active criminal investigative information are not subject to [general disclosure; however,] . . . [c]riminal intelligence and investigative information does not include: . . . [a]rrestee photograph, if release will not adversely affect a criminal investigation.” N.D. CENT. CODE § 44-04-18.7(1), (2)(i) (2017).</p>
<p>Recently Enacted Legislation – None</p>
<p>Ohio</p>
<p>Accessibility Under State Laws – Likely Open There is no case law, statutory exemption, executive order, or other authority explicitly addressing public access to mugshots. Ohio’s Public Records Act, OHIO REV. CODE ANN. § 149.43 (LexisNexis 2017),</p>

excludes “[c]onfidential law enforcement investigatory records” from the definition of a “[p]ublic record.” *Id.* § 149.43(1)(h). The “[c]onfidential law enforcement investigatory record” exemption includes “any record that pertains to a law enforcement matter of a criminal, quasi-criminal, civil, or administrative nature, but only to the extent that the release of the record would create a high probability of disclosure of any of the following: (a) The identity of a suspect who has not been charged with the offense to which the record pertains, or of an information source or witness to whom confidentiality has been reasonably promised.” *Id.* § 149.43(2)(a). Thus, mugshots of individuals who are charged are likely open public records. Access to these records may be restricted by an expungement order. *Bound v. Biscotti*, 663 N.E.2d 1376, 1382 (Ohio Mun. Ct. 1995).

Recently Enacted Legislation – OHIO REV. CODE ANN. § 2927.22 (LexisNexis 2017) (enacted in 2017)

Prohibits the publisher of “criminal record information” from charging removal fees. Provides for criminal liability and civil remedies, including actual and punitive damages and attorney’s fees. Of note, the statute provides that “[h]umiliation or embarrassment shall be adequate to show that the plaintiff has incurred damages. No physical manifestation of the harm is required.”

Oklahoma

Accessibility Under State Laws – Open

A 2012 attorney general opinion found that mugshots should be deemed open records because they are “arrestee descriptions.” Okla. Op. Att’y Gen. No. 2012-22 (Dec. 13, 2012), 2012 WL 6560753 (addressing whether mugshots are open public records under the Oklahoma Open Records Act, OKLA. STAT. tit. 51, § 24A.1–24A.30 (2012)). Section 24A.8.A provides: “Law enforcement agencies shall make available for public inspection and copying, if kept, the following records: 1. An arrestee description, including the name, date of birth, address, race, sex, physical description, and occupation of the arrestee.” *Id.* § 24A.8(A)(1).

Recently Enacted Legislation – None

Oregon

Accessibility Under State Laws – Likely Open

Under the public records law, OR. REV. STAT. §§ 192.311–431 (2017), “[i]nvestigatory information compiled for criminal law purposes” is exempt from disclosure. *Id.* § 192.345(3). However, the “record of an arrest or the report of a crime shall be disclosed unless and only for so long as there is a clear need to delay disclosure in the course of a specific investigation.” *Id.* (providing examples of a “record of an arrest”). Neither of the terms “investigatory information” or “record of arrest” has been interpreted as to mugshots. However, given section 646A.806, which passed in 2013, mugshots are likely open records.

Access to juvenile sex offender photographs have been exempted from the sex offender registry and general release. *Id.* § 163.225(1)(a).

Recently Enacted Legislation – OR. REV. STAT. § 646A.806 (2017) (enacted in 2013)

Provides that websites that charge a fee for the removal of mugshots shall remove them without charging a fee upon written request by an individual who was acquitted, whose charges were reduced to violations, or whose conviction was expunged or set aside. Requires the subject of the photograph to provide the documentation to prove that the above conditions have been met. Also provides that failure to remove the mugshots is an unlawful business practice under section 646.608.

Pennsylvania

Accessibility Under State Laws – Unclear

There is no case law, statutory exemption, executive order, or other authority explicitly addressing public access to mugshots. Pennsylvania’s Right-to-Know Law contains an exemption for a “record of an agency relating to or resulting in a criminal investigation.” 65 PA. STAT. AND CONS. STAT. ANN. § 67.708(b)(16)(i)–(vi) (West 2017). This exception has not been interpreted as to mugshots.

Recently Enacted Legislation – None

Rhode Island
<p>Accessibility Under State Laws – Unclear</p> <p>There is no case law, statutory exemption, executive order, or other authority explicitly addressing public access to mugshots. However, Rhode Island’s Access to Public Records Act provides: “All records maintained by law enforcement agencies for criminal law enforcement and all records relating to the detection and investigation of crime . . . [shall be deemed public.] . . . Provided, however, such records shall not be deemed public only to the extent that the disclosure of the records or information . . . (c) could reasonably be expected to constitute an unwarranted invasion of personal privacy . . .” 38 R.I. GEN. LAWS § 38-2-2(4)(D)(c) (2017). This exception is akin to Exemption 7(C) under the Federal FOIA, but has not been interpreted.</p>
<p>Recently Enacted Legislation – None</p>
South Carolina
<p>Accessibility Under State Laws – Likely Open</p> <p>South Carolina’s Freedom of Information Act includes two possibly relevant privacy exemptions: a more general privacy exemption and a law enforcement records exemption where disclosure “would constitute an unreasonable invasion of personal privacy.” S.C. CODE ANN. 1976 § 30-4-40(a)(3)(C) (2017) (law enforcement records privacy exemption); <i>id.</i> § 30-4-40(a)(2) (“Information of a personal nature where the public disclosure thereof would constitute unreasonable invasion of personal privacy.”). These are akin to Exemptions 6 and 7(C) of the Federal FOIA. Neither of these exemptions have been interpreted as to mugshots. However, South Carolina has adopted extensive legislation focused on mugshot websites, implying that public access to mugshots is generally permitted.</p>
<p>Recently Enacted Legislation</p> <p>S.C. CODE ANN. § 17-1-60 (2017) (enacted in 2016)</p> <p>Prohibits any person or entity from obtaining a mugshot where the records will be published and removal or revision fees will be charged. Requires removal where the charges are expunged or dismissed upon request of the subject. Includes an explicit exception for news and media outlets. Provides for civil and criminal penalties.</p> <p>S.C. CODE ANN. § 17-1-40 (2017) (enacted in 2016)</p>

Provides that if a person's record is expunged, arrest and booking records including mugshots, are "not a public document and [are] exempt from disclosure, except by court order."
South Dakota
<p>Accessibility Under State Laws – Open</p> <p>Although previously a closed state, section 23-5-7 was enacted in 2017, and explicitly excepts mugshots for felony arrests from criminal identification materials that are deemed confidential. S.D. CODIFIED LAWS § 23-5-7 (2017). Thus, mugshots for those charged with felonies are accessible to the public. <i>Id.</i></p>
Recently Enacted Legislation – None
Tennessee
<p>Accessibility Under State Laws – Likely Open</p> <p>Mugshots do not appear to fall within the records that are deemed "confidential" under its public records statute. TENN. CODE ANN. § 10-7-504 (2017); <i>see also id.</i> § 10-7-101 (defining "records"); <i>id.</i> § 10-7-504(a)(29)(C) (defining "personally identifying information"). <i>But see id.</i> § 10-7-504(a)(2)(A) (deeming all "investigative records of the Tennessee bureau of investigation" confidential). There is, however, an expunction statute that allows individuals to petition to remove and destroy their public arrest records if charges were dismissed, the grand jury did not indict, or the person was arrested but not charged. <i>Id.</i> § 40-32-101(a)(1)(A). In <i>Fann v. City of Fairview</i>, the Tennessee Court of Appeals held that while a common law right to privacy exists, "there can be no invasion of a common law right of privacy by publishing information which is already a matter of public record." 905 S.W.2d 167, 171 (Tenn. Ct. App. 1994) (indicating that mugshots are public records). In <i>Fann</i>, the court held that although the newspaper could not be held liable under the common law, there remained a genuine issue of material fact regarding whether the city manager released the mugshot in violation of the access restriction in the expunction statute. <i>Id.</i> at 174 (reversing the grant of summary judgement as to one defendant).</p>
Recently Enacted Legislation – None

Texas

Accessibility Under State Laws – Open

Mugshots are “not protected by either constitutional or common law privacy under section 552.101 [of the Texas Government Code].” Tex. Op. Att’y Gen. No. OR2001-5580, at 2 (Nov. 30, 2001), 2001 WL 1529310 (citing TEX. GOV’T CODE ANN. § 552.101 (West 2001)). A series of Texas attorney general opinions addressed this question, relying in part on *Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177 (Tex. App. 1975). Tex. Op. Att’y Gen. No. OR2011-02525, at 2–3 (Feb. 18, 2011), 2011 WL 669797; Tex. Op. Att’y Gen. No. OR2001-5580, at 2; Tex. Op. Att’y Gen. No. OR2001-0442, at 2 (Feb. 2, 2001), 2001 WL 995866; Tex. Op. Att’y Gen. No. ORD-616, at 3 (Aug. 13, 1993), 1993 WL 733171 (“We do not believe that the requested ‘mug shot,’ which was taken in connection with an individual’s arrest for an offense for which he was subsequently convicted and is currently serving time, is intimate or embarrassing.”). *But see supra* note 139 (questioning the authority of *Houston Chronicle Publishing Co.*). Interestingly, the 2011 opinion involved a request “for booking photos and mug shots on every individual arrested during a specified time period and the jail log for the same time period.” Tex. Op. Att’y Gen. No. OR2011-02525, at 1. This request was likely for a commercial purpose. Yet the opinion concluded again that the requested mugshots did not “implicate any individual’s right to privacy.” *Id.* at 2 (noting that the only exception might be under section 552.108(a)(1) for information that would interfere with the investigation and prosecution of crimes (citing GOV’T § 552.108(a)(1))).

Recently Enacted Legislation – TEX. BUS. & COM. CODE ANN. §§ 109.001–.008 (West 2017) (enacted in 2013)

Regulates businesses engaged in the publication of criminal records and requires that the criminal record information is “complete and accurate.” *Id.* §§ 109.002, 109.003. Provides an avenue of disputing the completeness and accuracy of records, and prohibits removal fees. *Id.* § 109.004. Does not address advertising revenue. Provides for civil liability and penalties for violations. *Id.* §§ 109.005, 109.006.

Utah

Accessibility Under State Laws – Open

In an administrative appeal before the Utah State Records Committee, the Committee concluded that a jail booking photograph was a public record. KSL-TV, Decision and Order No. 98-01 (State Records Comm. of the State of Utah Feb. 20, 1998), <http://www.archives.state.ut.us/src/srcappeal-1998-01.html> (interpreting UTAH CODE ANN. §§ 63-2-10.3(18)(a), 63-2-201(2), 63-2-304(9)(10) and (12) (LexisNexis 1997) (renumbered, respectively, as §§ 63G-2-103(22)(a), 63G-2-201(2), 63G-2-305(10), (11) and (13), as of the 2017 code)).

Recently Enacted Legislation – UTAH CODE ANN. § 17-22-30 (LexisNexis 2017) (enacted in 2013)

Prohibits the sheriff from providing a copy of the mugshot to a person who will publish it or post it online and charge a fee for removal. Subjects a person who falsely states their purpose for obtaining the mugshot to criminal liability pursuant to section 76-8-504 of the Utah Code.

Vermont

Accessibility Under State Laws – Unclear

There is no case law, statutory exemption, executive order, or other authority explicitly addressing public access to mugshots. Vermont's Public Records Act provides that "records relating to management and direction of a law enforcement agency; records reflecting the initial arrest of a person, including any ticket, citation, or complaint issued for a traffic violation, as that term is defined in 23 V.S.A. § 2302; and records reflecting the charge of a person shall be public." VT. STAT. ANN. tit. 1, § 317(c)(5)(B) (2017). There is also an exception for investigatory criminal records that is akin Exemption 7(C) of the Federal FOIA. *Id.* § 317(5)(A). Neither of these exemptions have been interpreted as to mugshots. However, Vermont has enacted legislative focused on the removal fees for mugshot websites.

Recently Enacted Legislation – VT. STAT. ANN. tit. 9, § 4191 (2017) (enacted in 2015)

Prohibits individuals who post or otherwise disseminate mugshots from soliciting a removal fee. Provides for fines and actual damages, and attorney's fees and costs.

Virginia
<p>Accessibility Under State Laws – Open There is an explicit statute, mandating the release of mugshots in Virginia. “All public bodies engaged in criminal law-enforcement activities shall provide requested records in accordance with this chapter as follows: . . . [a]dult arrestee photographs taken during the initial intake following the arrest and as part of the routine booking procedure, except when necessary to avoid jeopardizing an investigation in felony cases until such time as the release of the photograph will no longer jeopardize the investigation . . .” VA. CODE ANN. § 2.2-3706(A)(1)(b) (2017).</p>
<p>Recently Enacted Legislation – VA. CODE ANN. § 8.01-40.3 (2017) (enacted in 2015) Prohibits the publisher of “criminal history record information” including mugshots from charging removal fees. Provides for fines or actual damages, and attorney’s fees and costs.</p>
Washington
<p>Accessibility Under State Laws – Closed Section 70.48.100 of the Washington Code requires that law enforcement maintains a jail register, which is open to the public, and makes closed all other “records of a person confined in jail.” WASH. REV. CODE § 70.48.100(2) (2017); <i>see also id.</i> § 70.48.100(3) (allowing use of booking photographs to assist in criminal investigations and sex offender registration); <i>Cowles Publ’g Co. v. Spokane Police Dep’t</i>, 987 P.2d 620, 624 (Wash. 1999) (en banc) (holding mugshots could only be used for “legitimate law enforcement purposes” and that they were not disclosable under Washington’s Public Disclosure Act).</p>
<p>Recently Enacted Legislation – None</p>
West Virginia
<p>Accessibility Under State Laws – Unclear There is no case law, statutory exemption, executive order, or other authority explicitly addressing public access to mugshots. West Virginia’s Freedom of Information Act includes two possibly applicable exemptions: “(2) Information of a personal nature such as that kept in a personal, medical or similar file, if the public disclosure of the</p>

information would constitute an unreasonable invasion of privacy, unless the public interest by clear and convincing evidence requires disclosure,” and “(4) Records of law-enforcement agencies that deal with the detection and investigation of crime and the internal records and notations of such law-enforcement agencies which are maintained for internal use in matters relating to law enforcement.” W. VA. CODE §§ 29B-1-4(a)(2), (4) (2017); *see also* Manns v. City of Charleston Police Dep’t, 550 S.E.2d 598, 603–04 (W. Va 2001) (per curiam) (applying the privacy exemption in subclause (2) to internal investigation records about alleged police misconduct and setting forth a five-factor test). Neither of these exemptions have been interpreted to mugshots and none of the other exemptions apply to mugshots.

Recently Enacted Legislation – None

Wisconsin

Accessibility Under State Laws – Likely Open

Mugshots are likely not considered criminal investigation files, which are covered by “a blanket exemption from the public records law, but denial of access may be justified on a case-by-case basis.” *Cf.* 77 Op. Att’y Gen. 42, 42 (1988), 1988 WL 483351 (discussing sheriff’s criminal investigation files generally). A distinction has been drawn in the AG opinions and case law based on whether the records are “required by law to be kept.” *Id.* at 42–43 (quoting 67 Op. Att’y Gen. 12, 13 (1978), 1978 WL 33973). Where records are required to be kept by law, the public enjoys an absolute right to access. 77 Op. Att’y Gen. at 43 (citing *State ex rel. Bilder v. Twp. of Delavan*, 334 N.W.2d 252, 260 (Wis. 1983)). If the records are not required, then there is a presumption in favor of access unless there is a “clear statutory exception,” “a limitation under the common law,” or “an overriding public interest in keeping the public record confidential.” *Hathaway v. Joint Sch. Dist. No. 1*, 342 N.W.2d 682, 687 (Wis. 1984); *see* WIS. STAT. § 19.35 (2017) (Wisconsin public records law).

The sheriff of a county is not required to take mugshots. WIS. STAT. § 59.27 (“Sheriff; duties”). Thus, mugshots are considered presumptively open records that may only be withheld on a case-by-case basis. *State ex rel. Borzych v. Paluszcyk*, 549 N.W.2d 253, 254 (Wis. Ct. App. 1996) (assuming mugshots were open records for purposes of discussing fees that a sheriff’s department could charge for copies); *cf.* 77 Op. Att’y Gen. at 47 (discussing the possibility of a

<p>common law limitation on sheriff's records where the release could have "substantial and undue adverse impact on a person's reputation" especially when they were unsubstantiated by credible evidence).</p>
<p>Recently Enacted Legislation – None</p>
<p style="text-align: center;">Wyoming</p>
<p>Accessibility Under State Laws – Open Wyoming's criminal procedure statutes declare that "the Wyoming department of corrections and county jails may release the following information regarding any individual, except juveniles charged with a status offense as defined by W.S. 14-6-201(a)(xxiii), who is or has been committed to the supervision or custody of the department or county jails, unless release of the information could compromise the physical safety of the individual: (i) Name and other identifying information; (ii) Photograph and physical description . . ." WYO. STAT. ANN. § 7-19-106(m)(i), (ii) (2017).</p>
<p>Recently Enacted Legislation WYO. STAT. ANN. § 40-12-601 (2017) (enacted in 2014) Prohibits charging removal fees where the person was not convicted or where the conviction was set aside or expunged.</p> <p>WYO. STAT. ANN. § 40-12-105(a)(xvi) (2017) (enacted in 2014) Amends the consumer protection laws to make violations of § 40-12-601 an unlawful deceptive trade practice. <i>See also id.</i> §§ 40-12-108, 113 (providing for private remedies and civil penalties).</p>
