

# THE CONSTITUTIONAL ISSUES OF PUBLISHING MUGSHOTS IN THE AGE OF SCREENSHOTS AND DIGITAL MEDIA

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*“In 2022, with all of the websites and all of the abilities to share photographs, once these mugshots are released, it’s literally a digital scarlet letter that follows you around for the rest of your life.”<sup>1</sup>*  
– Rep. Royce Duplessis (D – New Orleans)

*“The double-shot picture, with front and profile shots alongside each other, is so familiar, from ‘wanted’ posters in the post office, motion pictures and television, that the inference that the person involved has a criminal record, or has at least been in trouble with the police, is natural, perhaps automatic.”*  
– *Barnes v. United States*, F.2d 509, 510-11 (1966)

In 2018, Blake Mathesie was an undergraduate student at the University of Florida who held a part-time job as a bartender.<sup>2</sup> One night, Mathesie broke up a bar fight at work.<sup>3</sup> The party who initiated the fight decided to retaliate against Mathesie.<sup>4</sup> Weeks later, four to five police officers pulled up to Mathesie’s

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<sup>1</sup> Allison Allsop, *Senate Committee Moves Bill Limiting Publication of Police Mugshots*, KTBS (May 19, 2022), [https://www.ktbs.com/news/senate-committee-moves-bill-limiting-publication-of-police-mugshots/article\\_48f70e04-d792-11ec-a5b3-d77ecb284e89.html](https://www.ktbs.com/news/senate-committee-moves-bill-limiting-publication-of-police-mugshots/article_48f70e04-d792-11ec-a5b3-d77ecb284e89.html).

<sup>2</sup> See Leah Shields, *Former UF Student Behind New Law to Help People Remove Mugshots Online*, FIRST COAST NEWS (Jul. 5, 2021, 10:59 AM), <https://www.firstcoastnews.com/article/entertainment/television/programs/gmj/florida-law-student-new-law-help-people-remove-mugshots-online/77-ffdab900-d58d-4934-962e-70eafb41fbdc>.

<sup>3</sup> See *id.*

<sup>4</sup> See Matthew Konecky, *What is Florida Senate Bill 1046 and How Does It Affect Your Mugshot*, THE LAW OFFICES OF MATTHEW KONECKY, P.A., <https://www.matthewkoneckypa.com/blog/what->

house with an arrest warrant on the grounds of felony battery assault.<sup>5</sup> Upon arrest, the police booked him, which involved taking his mugshot.<sup>6</sup> A mugshot is a set of photos of someone arrested by the police which includes the person's identifying information, such as name, height, date of birth, references to the alleged crime, and more.<sup>7</sup> Ultimately, the judge dropped all charges writing, "[T]his court did not find the victim's testimony credible" – finding that Mathesie only involved himself to end the fight.<sup>8</sup> Although the court found Mathesie innocent, his mugshot lives online forever.<sup>9</sup> His mugshot was brought up during job interviews.<sup>10</sup> When he tried to remove it from websites, he reported that companies would demand money.<sup>11</sup> As a result, Mathesie contacted State Senator Aaron Bean (R-04) and State Representative Jason Fischer (R-16) to help change the law on accessing mugshots.<sup>12</sup>

In June 2021, the Florida House and Senate unanimously adopted bills HB 755<sup>13</sup> and SB 1046<sup>14</sup> (jointly "the bills") respectively, and Governor Ron DeSantis signed into law protections for Floridians who wish to remove their mugshots.<sup>15</sup> The bills state "if the photograph is not removed within 10 calendar days after receipt of the written request for removal [ . . . ] [t]he court may impose a civil penalty of \$1,000 per day for noncompliance."<sup>16</sup> This law is mainly aimed at websites that solely publish mugshots as their main business; the law does not challenge news websites.<sup>17</sup> Jennifer Mansfield, a constitutional lawyer based in Florida, argued that the new law is unconstitutional as it "chills speech [ . . . ] [and] . . . chills the reporting of news because people become afraid of the severe legal sanctions."<sup>18</sup> Further, she argued that the new law targets "a person or entity whose primary business model is the publishing or disseminating of

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is-florida-senate-bill-1046-.cfm (last visited on Nov. 18, 2022).

<sup>5</sup> See Shields, *supra* note 2.

<sup>6</sup> See Shields, *supra* note 2.

<sup>7</sup> *Mugshot Photographs and The Criminal Law*, HG.ORG, <https://www.hg.org/legal-articles/mugshot-photographs-and-the-criminal-law-53110> (last visited Dec. 17 2022).

<sup>8</sup> Konecky, *supra* note 4.

<sup>9</sup> See Konecky, *supra* note 4.

<sup>10</sup> See Haley Brown, *Gov. DeSantis Signs New Law That Helps Remove Their Online Mug Shot*, FLORIDA POLITICS (June 22, 2021), <https://floridapolitics.com/archives/437135-gov-desantis-signs-new-law-that-helps-people-remove-their-online-mugshot/>.

<sup>11</sup> See Shields, *supra* note 2.

<sup>12</sup> See Konecky, *supra* note 4.

<sup>13</sup> See H.B. 755, 123rd Reg. Sess. (Fl. 2021).

<sup>14</sup> See S.B. 1046, 123rd Reg. Sess. (Fl. 2021).

<sup>15</sup> See Joan Haughey, *New Florida Law Penalizes Publishers For Not Removing Mugshots On Demand*, THE CENTER SQUARE (June 22, 2021), [https://www.thecentersquare.com/florida/new-florida-law-penalizes-publishers-for-not-removing-mugshots-on-demand/article\\_08729f2c-d399-11eb-b5ec-7b98668259e9.html](https://www.thecentersquare.com/florida/new-florida-law-penalizes-publishers-for-not-removing-mugshots-on-demand/article_08729f2c-d399-11eb-b5ec-7b98668259e9.html).

<sup>16</sup> Shields, *supra* note 2.

<sup>17</sup> Shields, *supra* note 2.

<sup>18</sup> Leah Shields, *Lawyer says Florida's new mug shot law is unconstitutional*, FIRST COAST NEWS (Jul. 12, 2021, 08:52 AM), <https://www.firstcoastnews.com/article/news/local/lawyer-says-florida-mug-shot-law-unconstitutional/77-e01adc94-61d7-4a78-b21e-2e059c22e848>.

such photographs for a commercial purpose, and that “commercial purpose” is vague and can be used against the press.”<sup>19</sup>

Recently, the Sixth Circuit observed that “[m]ugshots now present an acute problem in the digital age.”<sup>20</sup> In this digital age, mugshots are not only published by local or national media, but these mugshots are also posted by private companies, private citizens, and police departments on their social media platforms. Even if the American people pay private, commercial websites to remove their mugshots on their site, these images can be resurfaced by a simple screenshot<sup>21</sup> on peoples’ tablets, smartphones, or laptops.

Academics, attorneys, constitutional activists, judges, lawmakers, scholars, and everyday Americans have discussed the issue of accessing photos of “the lowest point of someone’s life.”<sup>22</sup> The people, press, and private commercial websites cannot resurface mugshots without law enforcement agencies originally releasing the photos.<sup>23</sup> Whether and how these groups can obtain mugshots from state law enforcement agencies depends on each state’s open records laws.<sup>24</sup> People who are charged with federal crimes typically have their mugshots taken by the United States Marshal Services.<sup>25</sup> Therefore, the Freedom of Information Act – federal law – applies to the disclosure of federal mugshots as it relates to peoples’ privacy rights. This issue is of great American importance as nearly one of three American adults (77.7 million Americans) have been arrested.<sup>26</sup> Furthermore, according to article *Digitizing and Disclosing Personal Data: The Proliferation of State Criminal Records on the Internet*, in regards to pre-conviction data, every year there are over 10 million arrests, 4.5 million mugshots, and 14.7 million criminal court proceedings.<sup>27</sup> In regards to post-

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

<sup>20</sup> *Detroit Free Press Inc., v. U.S. Dep’t of Justice (Free Press II)*, 829 F.3d 478, 486 (6th Cir. 2016) (overruling *Detroit Free Press, Inc. v. U.S. Dep’t of Justice (Free Press I)*, 73 F.3d 93 (6th Cir. 1996)).

<sup>21</sup> Lauren North, *What Is A Screenshot?*, TECH SMITH, <https://www.techsmith.com/blog/screenshot/> (describing a screenshot, sometimes referred to as a screencap or screengrab, as an image that captures the exact contents of a computer display to share with others or reference later).

<sup>22</sup> Brown, *supra* note 10.

<sup>23</sup> See Kathryn Shephard, *Mug Shot Disclosure Under FOIA: Does Privacy or Public Interest Prevail?*, 108 NW. L. REV. 343, 345 (2013).

<sup>24</sup> See generally *Police Records: A Reporter’s State-by-State Access Guide to Law Enforcement Records*, REPORTER’S COMM. FOR FREEDOM OF THE PRESS (2008), <https://www.rcfp.org/wp-content/uploads/imported/POLICE.pdf> (discussing an empirical state by state study of how different states handle mug shot disclosure practices).

<sup>25</sup> See Shephard, *supra* note 23, at 346.

<sup>26</sup> See Gary Fields & John R. Emshwiller, *American Busted: As Arrest Records Mount, Consequences Last a Lifetime*, WALL ST. J., (Aug. 18, 2014), <https://www.wsj.com/articles/as-arrest-records-rise-americans-find-consequences-can-last-a-lifetime-1408415402>.

<sup>27</sup> See Sarah E. Lageson, Elizabeth Webster & Juan R. Sandoval, *Digitizing and Disclosing Personal Data: The Proliferation of State Criminal Records on the Internet*, CAMBRIDGE UNIVERSITY PRESS (Jan. 29, 2021) <https://www.cambridge.org/core/journals/law-and-social-inquiry/article/digitizing-and-disclosing-personal-data-the-proliferation-of-state-criminal-records-on-the-internet/0D7B9A42DA08BADB223D2DE206413585>.

conviction data, approximately 6.5 million current and formerly incarcerated people and 12.5 million people with a felony conviction have a record on the Internet.<sup>28</sup>

This paper takes the position that American people's Due Process rights are violated when their mugshots are digitally disseminated prior to a conviction. The press's First Amendment rights are not violated by not having access to pre-conviction booking photos because the press can report on other publicly accessible information. The same conclusion can be made relating to private citizens and private companies who assert that their Freedom of Speech rights are violated by not having access to obtain, publish, and disseminate pre-conviction mugshots. Existing scholarship has addressed the issue of publishing mugshots with privacy arguments related to the Freedom of Information Act (FOIA). However, this Article, for the first time, addresses the issue solely in the context of the Constitution, evaluating issues from the 1<sup>st</sup> Amendment, 4<sup>th</sup> Amendment, 5<sup>th</sup> Amendment, 6<sup>th</sup> Amendment, 8<sup>th</sup> Amendment, and 14<sup>th</sup> Amendment.

This paper will specifically examine the constitutional issues which arise from publishing mugshots in the age of screenshots and digital media – and not the privacy issues concerned with the matter. In doing so, Part I of this paper will provide a brief history of the utility of mugshots and rise of mugshots in the digital age. Part II of this paper will analyze the claims of Due Process violations when the people, police departments, the press, and private companies publish mugshots. Part III of this paper will analyze the First Amendment issues attached to publishing mugshots in the digital age – particularly Freedom of Press and Freedom of Speech positions on both sides of the issue. Part IV of this paper will analyze a court case's Eight Amendment violation claim. Part V of this paper will highlight recent laws that addressing publishing mugshots in different U.S. states. Lastly, Part VI of this paper will provide recommendations rooted in the constitutional interest of the American people.

#### PART I: A BRIEF HISTORY OF THE UTILITY OF MUGSHOTS FROM THE 1800S – PRESENT

The concept of mugshots began in the 1800s in France where photos as a “signaletic” system of identification by recording “. . . [d]etailed anthropometric measurements” such as arm span, head length, and height, as well as forward-facing photograph to categorize and identify people who were accused of breaking the law.<sup>29</sup> Shortly after, parts of Europe and the United States followed suit.<sup>30</sup> In its inception, mugshots typically remained in police files.<sup>31</sup> Around

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<sup>28</sup> *See id.*

<sup>29</sup> *See* Eumi K. Lee, *Monetizing Shame: Mugshots, Privacy, and the Right to Access*, 70 RUTGERS L. REV. 557, 564 (2018).

<sup>30</sup> *See id.* at 563.

<sup>31</sup> *See Mugshot Photographs and The Criminal Law*, *supra* note 7.

the mid-1800s, police departments began to compile mugshots, along with an arrested person's biographical information and histories, into leather-bound books called "rogues' galleries."<sup>32</sup> By 1857, in New York, these rogues' galleries were publicly accessible in physical galleries for public consumption as a means of deterrence and crime prevention.<sup>33</sup> As a result, some people whose photos were displayed in the gallery were so embarrassed that they left New York for fear of being recognized and ridiculed.<sup>34</sup>

Eventually, the display of mugshots via physical galleries became obsolete; however, these photos continued to enter the public realm.<sup>35</sup> Newspapers and tabloid magazines would publish mugshots in local news articles, which affected the few who had their mugshots in the paper, for a limited period until time had passed and the newspapers were eventually tossed away.<sup>36</sup> The rise of the commercialization of mugshots coupled with the rise of the digital age ensured that mugshots would have limitless publication and preservation in the public sphere.<sup>37</sup>

#### A. *The Mugshot Industry: Private Companies and the Digital Media*

Mugshots are widely accessible because many U.S. states have laws requiring open access to public records and are viewed as public records information.<sup>38</sup> Across the country, many cities and counties publish mugshots online, including posting these photos on police or sheriff departments' websites.<sup>39</sup> Private websites that make a lucrative business out of collecting peoples' mugshots can collect peoples' mugshots through "screen scrapping programs to expeditiously snag every new and old [mugshot] from a department's system, and then post them to their own sites."<sup>40</sup> While some of these mugshots are taken from recent arrests, other posted mugshots stem from "decades-old arrests."<sup>41</sup>

These private, commercial websites launched an industry of posting public mugshots for direct commercial gain around 2011.<sup>42</sup> At one point, these private companies also benefitted from "search engine optimization" techniques which allowed them to tag photos that could show up at the top results when someone

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<sup>32</sup> See Lee, *supra* note 30, at 563.

<sup>33</sup> See Lee, *supra* note 30, at 564.

<sup>34</sup> See Lee, *supra* note 30, at 564.

<sup>35</sup> See Lee, *supra* note 30, at 565.

<sup>36</sup> See Lee, *supra* note 30, at 565.

<sup>37</sup> See Lee, *supra* note 30, at 565.

<sup>38</sup> See Allen Rostron, *The Mugshot Industry: Freedom of Speech, Rights of Publicity, and the Controversy Sparked by an Unusual New Type of Business*, 90 WASH. L. REV. 1321, 1323 (2013).

<sup>39</sup> See *id.* at 1323.

<sup>40</sup> See *id.*

<sup>41</sup> See *Detroit Free Press Inc. v. U.S. Dep't of Justice*, 829 F.3d 478, 482 (6th Cir. 2016) (en banc) (providing BustedMugshots and JustMugshots as examples), *cert denied*, 137 S. Ct. 2158 (2017).

<sup>42</sup> See Eumi K. Lee, *Monetizing Shame: Mugshots, Privacy, and the Right to Access*, 70 RUTGERS U.L. REV. 557, 566 (2018).

enters a person's name into an internet search engine, say Google.<sup>43</sup> According to Florida's SB 1046 five-page staff analysis, the report made note that 77 percent of employers google a job applicant's name during the hiring process.<sup>44</sup>

Further, these private companies make money by charging fees which can range from \$178-\$399 to remove a person's photos from the website.<sup>45</sup> Separate reputation management companies offer many services including supposed removal of mugshots and arrest records; their fees can range from the low hundreds up to \$5,000.<sup>46</sup> Paying a removal fee for either the private companies that publish mugshots or reputation companies are ineffective because oftentimes mugshots can be found on affiliated websites.<sup>47</sup>

Digital journalism sites also leverage computer technology for commercial purposes because some newspapers today will publish online mugshots to "drive traffic to their websites", which profits their digital newspaper.<sup>48</sup> In a 2016 survey comprised of 74 U.S. newspapers, the results of the data found that 40 percent of the surveyed newspapers published galleries of mugshots.<sup>49</sup> The digital newspaper's push in publishing mugshots is believed to have started in 2009, when the *Tampa Bay Times* created "screen scrapping" software, which transferred mugshots from law enforcement sites to the newspaper's online gallery of mugshots.<sup>50</sup> The gallery gave the newspaper millions of extra views for \$150/month.<sup>51</sup> The *Tampa Bay Times* became a blueprint for several other newspapers whose editors would call for advice on how to create their own galleries.<sup>52</sup>

After profiting from mugshots for four years, on June 15, 2020, the *Tampa Bay Times* reported that their digital newspaper "would no longer publish mugshot galleries of those arrested" in the Tampa Bay area.<sup>53</sup> Mark Katches, the Executive Editor of the *Tampa Bay Times*, noted, "[T]he galleries lack context and further negative stereotypes. [ . . . ] We think the data is an important resource that our newsroom will continue to analyze and watch carefully, but the galleries alone serve little journalistic purpose."<sup>54</sup> Katches added that this decision

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<sup>43</sup> *Id.* at 569.

<sup>44</sup> See Fla. S. Comm. on Rules, CS for SB 1046 (2021) Post-Meeting Staff Analysis (Mar. 23, 2021), <https://www.flsenate.gov/Session/Bill/2021/1046/Analyses/2021s01046.rc.PDF>.

<sup>45</sup> See Lee, *supra* note 42 at 567.

<sup>46</sup> See Lee, *supra* note 42, at 568.

<sup>47</sup> See Lee, *supra* note 42, at 567.

<sup>48</sup> See Lee, *supra* note 42, at 569.

<sup>49</sup> See Lee, *supra* note 42, at 570.

<sup>50</sup> See Lee, *supra* note 42, at 570.

<sup>51</sup> Eumi K. Lee, *Monetizing Shame: Mugshots, Privacy, and the Right to Access*, 70 RUTGERS U.L. REV. 557, 570 (2018).

<sup>52</sup> See *id.*

<sup>53</sup> See Times Staff Writer, *Tampa Bay Times Drops Mugshot Galleries*, TAMPA BAY TIMES (June 15, 2020), <https://www.tampabay.com/news/2020/06/15/tampa-bay-times-drops-mugshot-galleries/>.

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

would not diminish the *Tampa Bay Times*' commitment to covering significant news.<sup>55</sup>

During this time, several news organizations also discontinued such galleries amid criticism that the galleries disproportionately showed Black and brown faces.<sup>56</sup> A similar sentiment was made by Kevin Hobbs, a Teacher's Assistant in Urbana School District 116.<sup>57</sup> On December 4, 2018, the Rantoul police pulled him over for a malfunctioning headlight.<sup>58</sup> Upon the officers running his license, Hobbs' name elicited an arrest warrant for a small claims violation relating to a sanitation bill from years ago.<sup>59</sup> Hobbs had not been aware of the court summoning him due to an overdue bill, as the summons was sent to the wrong address.<sup>60</sup> The Rantoul police took Kevin Hobbs into custody, and he was released shortly.<sup>61</sup> According to Hobbs, the police were cordial with him, yet frustration occurred the following day when Hobbs' mugshot was posted in the News-Gazette.

Hobbs felt he had no other choice but to defend himself on Facebook with a status which went locally viral.<sup>62</sup> He shared that his own story was a microcosm of a larger issue that the digital media reports crime first without devotion to accuracy and the full context.<sup>63</sup> Also, as a Black man, Hobbs made the point that posting mugshots with "reckless abandon" perpetuates the idea that Black people are criminals by having Black faces repeatedly shown in the mugshot section of a newspaper.<sup>64</sup> As a result, negative stereotypes are reinforced in the minds of readers. Further, Hobbs noted, "[i]t's one thing to say that this practice isn't good for people of color, but it isn't good for anybody."<sup>65</sup> After sharing his story on Facebook, he was approached by people with similar stories.<sup>66</sup> Even though several companies joined the *Tampa Bay Times* by discontinuing the practice of publishing mugshot galleries, mugshots are still publicly accessible on law enforcements' websites which can be resurfaced and preserved in the public sphere with a simple screenshot.

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<sup>55</sup> *See id.*

<sup>56</sup> *See id.*

<sup>57</sup> Ben Chapman, *Mugshots Sometimes Harm Local Lives*, MAHOMET DAILY (Mar. 18, 2019), <https://mahometdaily.com/mugshots-sometimes-harm-local-lives/>.

<sup>58</sup> *See id.*

<sup>59</sup> *See id.*

<sup>60</sup> *See id.*

<sup>61</sup> *See id.*

<sup>62</sup> *See id.*

<sup>63</sup> *See* Chapman, *supra* note 57.

<sup>64</sup> *See id.*

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

<sup>66</sup> *See id.*

## PART II: DOES THE DIGITAL AND PUBLIC DISSEMINATION OF MUGSHOTS VIOLATE AMERICANS' RIGHTS TO DUE PROCESS?

Not only are mugshots too prejudicial to be admitted into evidence, but the public dissemination of mugshots from police departments has led to adjacent civil rights violations in federal court and proliferation of mugshots of Black Americans produces racial bias that compounds the presumption of innocence interference which could even further impact who serves on a jury. Thus, the digital and public dissemination of mugshots should be rethought as a violation of the American peoples' Due Process rights. Under the tenets of the Due Process Clause of the Fifth and Fourteenth Amendments, a suspect in a criminal trial is presumed to be innocent until proven guilty beyond a reasonable doubt.<sup>67</sup> According to Blake Mathesie, "[T]he publication of these mugshots not only violates Due Process, but it hurts the personal and professional prospects of those affected."<sup>68</sup> Another voice on this matter is Senior Editor of Law and Policy at *Rewire*, Imani Gandy, who asserted that criminality is associated when viewers see a mugshot.<sup>69</sup> In the courts, the Tenth and Eleventh Circuit also recognized that mugshots strongly implicate criminal guilt.<sup>70</sup>

According to Cameron T. Norris, author of *Your Right to Look Like An Ugly Criminal: Resolving the Circuit Split over Mugshots and the Freedom of Information Act*, "[t]he remarkably consistent characteristics of [mugshots], coupled with the secondary meaning society has ascribed to them, attach a stigma of criminality to the suspect featured in the picture."<sup>71</sup> Even if the arrested person is innocent of the accused crime, Norris points out that most people assume that the arrestee was doing something illegal.<sup>72</sup> In fact, social science research conducted an experiment in which participants assessed trustworthiness based on photos of headshots of all Caucasian men.<sup>73</sup> The researchers cropped the mugshot photos to make them appear like the "non-mugshot headshots."<sup>74</sup> Still, the participants rated the men with the mugshots twenty percent more

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<sup>67</sup> Collin Hardee, *Mugshots & the Degradation of the Presumption of Innocence*, CAMPBELL L. OBSERVER (Feb. 26, 2021), <http://campbelllawobserver.com/mugshots-the-degradation-of-the-presumption-of-innocence/>.

<sup>68</sup> Brown, *supra* note 10.

<sup>69</sup> Keri Blakinger, *Mugshots Stay Online Forever. Some Say The Police Should Stop Making Them Public.*, NBC NEWS (Nov. 11, 2021 at 10:36 AM), <https://www.nbcnews.com/news/us-news/mugshots-police-public-online-rcna4897>.

<sup>70</sup> See *World Publ'g Co. v. U.S. Dep't of Justice*, 672 F. 3d 825, 827-28 (10th Cir. 2012); see also *Karantalis v. U.S. Dep't of Just.*, 635 F. 3d 497, 503 (11th Cir. 2011).

<sup>71</sup> Cameron T. Norris, *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, 1591 (2013).

<sup>72</sup> See *id.* at 1591-92.

<sup>73</sup> See Nicholas O. Rule et al., *Accuracy and Consensus in Judgment of Trustworthiness from Faces: Behavioral and Neural Correlates*, 104 J. PERSONALITY & SOC. PSYCHOL. 409, 411 (2013) (explaining method in which the experiment was conducted).

<sup>74</sup> See *id.* at 411 (highlighting how researchers cropped photos in the experiment to the extremes of the head).

untrustworthy than the men in the “non-mugshot headshots,” which is a statistically significant deviation.<sup>75</sup> These perceptions of untrustworthiness tend to lead into perceptions of criminality.<sup>76</sup>

The perceptions of criminality attribute to why mugshots are not automatically admissible in evidence at criminal trials, as courts have held that mugshots can substantially interfere with the Constitutional presumption of innocence.<sup>77</sup> For starters, “the Sixth Circuit’s own caselaw demonstrates judicial concern with the tendency of mugshots to associate with criminality.”<sup>78</sup> The Sixth Circuit acknowledged that mugshots are generally not admissible under the Federal Rules of Evidence:

“Even if relevant, a [mugshot] tends to make people believe that a person is “[b]ad,” and therefore can be unfairly prejudicial. Moreover, the visual impact of a mugshot, apart from mere references to a prior conviction, can leave a lasting, although illegitimate impact on the jury. Accordingly, the use of mugshots at trial is highly disfavored.”<sup>79</sup>

Alternatively, courts have come to different conclusions involving prejudicial pre-trial publicity. In 1807, Aaron Burr was accused of treason. His arrest resulted in widespread newspaper coverage of his presumed guilt.<sup>80</sup> Burr’s attorneys called on Supreme Court Justice John Marshall (the trial judge at the time) to exclude jurors with knowledge or opinions of the case.<sup>81</sup> Marshall stated that jurors should enter the courtroom with “minds open” to the testimony without holding “strong and deep impressions which will close the mind against the testimony.”<sup>82</sup> At the same time, Marshall stated that simply having some knowledge of the case (“light impressions”) would not necessarily disqualify a person from serving on a jury.<sup>83</sup> These words guided juries for approximately 150 years until the 1960s, when a sensational murder trial resulted in new rules for judges to follow to ensure that jurors are not prejudiced by publicity before and during a trial.<sup>84</sup>

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<sup>75</sup> See *id.* at 412 (showing the statistical significance formula of mugshots being rated more untrustworthy than non-mugshots).

<sup>76</sup> See Norris, *supra* note 71 at 1593.

<sup>77</sup> See Jon Katz, *Mugshots are not Automatically Admissible in Evidence*, JON KATZ P.C. (Nov. 30, 2009), <https://katzjustice.com/mugshots-are-not-automatically-admissible-in-evidence/>; see also *Bishop v. United States*, 983 A.2d 1029 (D.C. 2009).

<sup>78</sup> See Norris, *supra* note 71 at 1593.

<sup>79</sup> *Id.* (citation omitted).

<sup>80</sup> See *Is A Fair Trial Possible in the Age of Mass Media*, CONSTITUTIONAL RIGHTS FOUNDATION, <https://www.crf-usa.org/bill-of-rights-in-action/bria-11-1-a-is-a-fair-trial-possible-in-the-age-of-mass-media> (last visited Dec. 17, 2022).

<sup>81</sup> See *id.*

<sup>82</sup> *Id.* (citation omitted).

<sup>83</sup> See *id.*

<sup>84</sup> See *id.*

In *Sheppard v. Maxwell*,<sup>85</sup> Sam Sheppard, a wealthy Cleveland doctor, was accused of murdering his wife—his arrest resulted in intense, national press coverage.<sup>86</sup> During his trial, the media continuously interfered with the proceedings. The trial judge did little to weed out jurors who had formed opinions from the pretrial publicity or to shield the jurors from the intense media coverage that occurred during the trial.<sup>87</sup> At the conclusion of the trial, the jury convicted Sheppard.<sup>88</sup> Eventually, Sheppard petitioned to the U.S. Supreme Court, arguing that he did not receive a fair trial. The Supreme Court agreed, holding that when there is a “reasonable likelihood” that a fair trial will not occur, judges must take legal steps to protect their courts from outside influences by enlisting “remedies” to counter the prejudicial effects of publicity on jurors.<sup>89</sup>

However, the *Reporters Committee for Freedom of the Press* have pointed to empirical studies and court opinions that suggest that “large jury pools rarely become completely partial because of media coverage and the effects of publicity have very little impact on juries in practice”, thus not impacting the American peoples’ Sixth Amendment rights.<sup>90</sup> Courts may transfer cases to a different venue as a result of a high-profile case, at a defendant’s request. For example, the trial of the Oklahoma City bomber, Timothy McVeigh, was moved to Denver, Colorado.<sup>91</sup> However, other courts have denied transfer requests of John Walker Lindh’s prosecution following the World Trade Center bombing of 1993, which indicates that relying on courts to change venue may be inconsistent.<sup>92</sup>

In essence, the Sixth Circuit considers mugshots to be too prejudicial for the eyes of a jury in a criminal trial where the defendant must be convicted beyond a reasonable doubt.<sup>93</sup> Further caselaw supports this conclusion. In *Bishop v. United States*, Jabari Bishop appealed his lengthy prison sentence when convicted and sentenced for threatening to do damage property and do bodily harm.<sup>94</sup> He appealed on the grounds of “the admission of his mugshot as part of a photo array constituted an abuse of discretion meriting reversal because (1) the government had no demonstrable need to introduce the photo array, (2) the mug shot, by itself, implied that he had a criminal record, and (3) the manner in

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<sup>85</sup> See *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

<sup>86</sup> See *supra* note 80 (noting the widespread news regarding the case when Sam Sheppard was arrested).

<sup>87</sup> See *id.*

<sup>88</sup> See *id.*

<sup>89</sup> See generally *Sheppard v. Maxwell*, 384 U.S. 333, 363 86 S. Ct. 1507 (1966).

<sup>90</sup> See Steven Senne, *Pre-trial Publicity’s Limited Effect on the Right to a Fair Trial*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS (last visited on Dec. 17, 2022), <https://www.rcfp.org/journals/pretrial-publicity-limited/>.

<sup>91</sup> See *id.*

<sup>92</sup> See *id.*

<sup>93</sup> See generally *United States v. George*, 160 F. App’x 450, 456 (6th Cir. Dec. 20, 2005) (internal citation omitted).

<sup>94</sup> See *Bishop v. United States*, 983 A.2d 1029, 1030 (D.C. 2009).

which the photo array was introduced drew attention to the police source of the photograph and the implication that appellant had a criminal record".<sup>95</sup> In its holding, *Bishop* confirmed after applying the three prong test, the standard was not met.<sup>96</sup> The Court overturned Bishop's conviction, finding that the above balancing test was thrown out of balance by the judge's instruction to the jury, which plainly noted that Mr. Bishop's police photo was included in the photo array.<sup>97</sup>

In a digital world with the ability to screenshot photos, these issues carry over to the modern age and have resulted in lawsuits. In August 2020, Julie Levitch, 52-year old mother of two with no prior record of criminal activity, went to her boyfriend's house to return his phone.<sup>98</sup> Noticing that the doorbell was broken, she knocked on the cracked window where her hand broke through it leaving a bloody gash.<sup>99</sup> When Phoenix law enforcement arrived, although the couple attempted to explain the situation, the officers arrested and charged Levitch with misdemeanor criminal damage.<sup>100</sup> Her mugshot was publicly accessible online, as Maricopa County Sheriff's Office routinely posts photos of people booked into the local lockup, pre-conviction.<sup>101</sup> While in jail, Levitch reported being sexually harassed, cavity searched and tossed in solitary confinement for nearly sixteen hours.<sup>102</sup> Three months later, prosecutors decided to drop the charges.<sup>103</sup> Levitch responded by filing a lawsuit in the United States District Court for the District of Arizona as a result of the county jail publishing her mugshot online.<sup>104</sup>

Mugshots can also be viewed by potential jurors of a criminal trial months before *voir dire*, and if prospective jurors overly influenced by pretrial publicity, judges will exclude the prospective jurors from jury duty.<sup>105</sup> Digital media companies play a role in exposing the American people to pretrial publicity. For example, Blavity Inc. is a Los Angeles-based media company that focuses on Black culture.<sup>106</sup> This company's reach is global, as the company uses

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<sup>95</sup> *Id.* at 1030.

<sup>96</sup> *See id.*

<sup>97</sup> *See Katz, supra* note 77.

<sup>98</sup> *See* Keri Blakinger, *Mugshots Stay Online Forever. Some Say That The Police Should Stop Making Them Public*, THE MARSHALL PROJECT (Nov. 11, 2021), <https://www.themarshallproject.org/2021/11/11/mugshots-stay-online-forever-some-say-the-police-should-stop-making-them-public>.

<sup>99</sup> *See id.*

<sup>100</sup> *See id.*

<sup>101</sup> *See id.*

<sup>102</sup> *See id.*

<sup>103</sup> *See id.*

<sup>104</sup> *See* Complaint at 3, *Levitch v Maricopa County*, No. 2:21-CV-01418 (D. Ariz. Aug. 17, 2021).

<sup>105</sup> *See* CONSTITUTIONAL RIGHTS FOUNDATION, *supra* note 80.

<sup>106</sup> *See* Connie Loizos, *Blavity Has a Big Opportunity With Black Millennials, Despite Struggling to Fit The VC 'Formula'*, TECH CRUNCH (July 8, 2020, 2:23 AM), <https://techcrunch.com/2020/07/07/blavity2020/>.

Facebook Live to unlock new audience growth.<sup>107</sup> In fact, “Blavity Inc. has continued to lead the media’s portrayal of the Black experience across its five digital properties” that reportedly reaches approximately 60-80 million people per month.<sup>108</sup> Recently, Blavity has reported on how several people in the Young Slime Life (YSL) affiliation have been arrested and charged with violations of the Racketeer Influenced and Corrupt Organizations (RICO) Act, including world renowned rappers Young Thug and Gunna.<sup>109</sup> The articles noted that both rappers will be held without bond until their trials will commence on January 9, 2023.<sup>110</sup> Blavity decided to share Gunna’s mugshot in Fulton County Jail, which was originally posted by a Fox 5 reporter’s Twitter account<sup>111</sup> and another Blavity article decided to share a photo of Young Thug in jail awaiting trial, provided by the Daily Loud’s Twitter account.<sup>112</sup>

According to a June 2020 study commissioned by the University of California Berkeley School of Law, nearly four decades after the Supreme Court established a precedent meant to eliminate racial discrimination in jury selection, the problem remains widespread.<sup>113</sup> The most common practice is through preemptory challenges, which allows an attorney to strike a potential juror without having to state a reason.<sup>114</sup> Even without instances of preemptory challenges, the widespread dissemination of mugshots could impact who sits on the jury – based on who may have already seen the mugshots online. According to media attorney and Adjunct Professor at the University of Utah College of Law, Jeffery J. Hunt, the professor does not believe that banning pretrial mugshots is necessary to ensuring that someone receives a fair trial, entrusting in judges’ “number of tools at their disposal to protect the defendant’s right to a fair trial.”<sup>115</sup> He argued that thoroughly questioning prospective jurors to make sure

<sup>107</sup> See James Edward Murray, *How Blavity Inc. Used Facebook Live to Unlock New Audience Growth*, META (June 22, 2020), <https://www.facebook.com/journalismproject/blavity-facebook-live>.

<sup>108</sup> See *id.*

<sup>109</sup> See Nick Fenley, *Young Thug Is Focused on His Faith and Mental Health While in Jail*, BLAVITY (June 7, 2022), <https://blavity.com/young-thug-focused-on-his-faith-and-mental-health-while-in-jail?category1=blavity-u&category2=entertainment&item=1>.

<sup>110</sup> See *id.*; see also Nick Fenley, *Gunna Accused of Being In A Position of Command; in RICO Case, Denied Bond*, BLAVITY (May 23, 2022, 2:44 pm), <https://blavity.com/gunna-accused-of-being-in-a-position-of-command-rico-case?category1=blavity-u&category2=entertainment&item=2>.

<sup>111</sup> See Nick Fenley, *Gunna Accused of Being In A Position of Command; in RICO Case, Denied Bond*, BLAVITY (May 23, 2022, 2:44 pm), <https://blavity.com/gunna-accused-of-being-in-a-position-of-command-rico-case?category1=blavity-u&category2=entertainment&item=2>; see also Kaitlyn Pratt (@Fox5Kaitlyn), TWITTER (May 11, 2022, 6:45 AM), <https://twitter.com/Fox5Kaitlyn/status/1524339926363426816?s=20&t=OCpoaYAV70zt0tg8KV5hCQ>.

<sup>112</sup> See Fenley, *supra* note 109; see also Daily Loud (@DailyLoud), TWITTER (June 2, 2022, 7:27 PM), <https://twitter.com/DailyLoud/status/1532504324395384832?s=20&t=Ras9EVFJgKT17I2oCGIMVg>.

<sup>113</sup> See Elisabeth Semel et al., *Whitewashing the Jury Box*, BERKELEY LAW DEATH PENALTY CLINIC (June 2020), <https://www.law.berkeley.edu/wp-content/uploads/2020/06/Whitewashing-the-Jury-Box.pdf>.

<sup>114</sup> See *id.*

<sup>115</sup> Geoff Liesik, *Attorney for Mormon Bishop Challenges Constitutionality of Mugshots*, DESERT

the jurors have not been exposed to photographs or other materials that might result in prejudice against the person accused is an appropriate remedy.<sup>116</sup> The Supreme Court may also agree, citing *Skilling v. United States*.<sup>117</sup> In *Skilling*, the former CEO of Enron Corporation was convicted of 19 counts of financial fraud.<sup>118</sup> Upon appeal to the U.S. Supreme Court that he did not receive a fair trial, the court observed that a trial in a city of more than 4.5 million jury-eligible people in Houston suggests that the jury selection process can locate twelve impartial individuals for trial.<sup>119</sup> The Court applied the same logic in cases in the District of Columbia and Las Vegas, where it held that a jury pool in the hundreds of thousands or millions nearly eliminated the chance of jury prejudice.<sup>120</sup>

Does the analysis change if the photos become widespread from social media? According to Professor Leslie Y. Garfield Tenzer, Professor of Law at Pace University, since approximately 2014, a number of defendants have introduced social media posts to support their claims of unconstitutional bias in their community.<sup>121</sup> Despite the defendants' introduction of negative social media in support of their claims, these same courts have yet to include social media in their evaluation of pretrial publicity bias, despite social media being another form of media.<sup>122</sup> Professor Tenzer concludes that social media content poses a constitutional threat to defendants' rights equal to that of the traditional news media, and courts are violating defendants' Sixth Amendment rights by failing to consider it.<sup>123</sup>

Notably, it is not Blavity Inc.'s fault that Gunna's mugshot and photos of Young Thug are already on the internet, but the online publication should consider the impacts of resurfacing these photos to their platforms. Access to these pre-trial photos could, as mentioned by Professor Hunt, either prejudice potential jurors or absolve their target audience members from participating with their civic duty by already having access to their mugshots. As Executive Editor of the *Tampa Bay Times*, Mark Katches, admits the decision to not publish people's pre-conviction mugshot does not interfere with the integrity of covering significant news of crime.<sup>124</sup>

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NEWS (Mar. 7, 2012), <https://www.deseret.com/2012/3/7/20499587/attorney-for-mormon-bishop-challenges-constitutionality-of-mugshots>.

<sup>116</sup> *See id.*

<sup>117</sup> *See generally* *Skilling v. United States*, 561 U.S. 358 (2010) (holding that pretrial publicity did not prevent the Skilling from having a fair trial).

<sup>118</sup> *See id.*

<sup>119</sup> *See id.* at 382.

<sup>120</sup> *See Senne, supra* note 90.

<sup>121</sup> *See* Leslie Y. Garfield Tenzer, *Social Media, Venue, and the Right to a Fair Trial*, 71 BAYLOR L. REV. 420, 423 (2019).

<sup>122</sup> *See id.* at 422.

<sup>123</sup> *See id.* at 465.

<sup>124</sup> *See* Times Staff Writer, *supra* note 53.

PART III: WOULD A BAN ON THE DIGITAL AND PUBLIC DISSEMINATION OF MUGSHOTS VIOLATE THE PEOPLES', POLICE DEPARTMENTS', THE PRESS'S, AND PRIVATE COMPANIES' FIRST AMENDMENT RIGHTS?

The press's First Amendment rights are not violated by not having access to pre-conviction booking photos because the press can report on other publicly accessible information. Similarly, private citizens and private companies' rights are not violated who assert that they have Freedom of Speech protections to access to obtain, publish, and disseminate pre-sentencing booking photos. According to the First Amendment of the United States Constitution, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the [G]overnment for a redress of grievances."<sup>125</sup> In essence, the First Amendment generally "protects openness in information flow."<sup>126</sup> The people, press, and private companies have the constitutional right to publish government records "once the government makes information public, [then] the government cannot subsequently sanction its further disclosure."<sup>127</sup> The government can do little to prevent their publication or contain the widespread dissemination through the Internet.<sup>128</sup>

For example, in *Cox Broadcasting Corp. v. Cohn*,<sup>129</sup> the U.S. Supreme Court struck down a Georgia law that prohibited publishing or broadcasting the name of a rape victim.<sup>130</sup> The Court opined that if states want to protect the privacy of rape victims, then their names must be out of public records rather than releasing the information and then trying to prohibit the press from repeating it.<sup>131</sup> Similarly, in *Florida Star v. B.J.F.*,<sup>132</sup> the Court extended the same protection to a newspaper that published the name of a rape victim obtained from a report made available in a police department's pressroom.<sup>133</sup> While some critics argue that the publication and dissemination of mugshots is an intrusion to a person's personal life which brands an individual without due process, others stress the importance of government transparency, open access to public records, and the oversight function of the press in monitoring law enforcement and the government.<sup>134</sup> This part of the paper will analyze the

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<sup>125</sup> U.S. CONST. amend. I.

<sup>126</sup> Daniel J. Solove, *Access and Aggregation: Public Records, Privacy and the Constitution*, 86 MINN. L. REV. 1137, 1194 (2002).

<sup>127</sup> *Id.* at 1201.

<sup>128</sup> See Lee, *supra* note 29 at 577.

<sup>129</sup> See *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975).

<sup>130</sup> See *id.* at 471, 496–97.

<sup>131</sup> See *id.* at 496.

<sup>132</sup> See *Florida Star v. B.J.F.*, 491 U.S. 524 (1989).

<sup>133</sup> See *id.* at 527, 540–41.

<sup>134</sup> See Lee, *supra* note 29 at 576.

Freedom of Press arguments, Freedom of Speech arguments, and issues relating to the First Amendment Right to Access mugshots.

*A. Freedom of Press and People to Publish*

“The people and the press have the constitutional right to publish government records, which have been placed in the public domain or can be lawfully accessed by the public”.<sup>135</sup> Circling back to Florida’s 2021 law, constitutional lawyer, Jennifer Mansfield, noted that “the First Amendment says Congress and the states shall make no law to abridge the freedom of speech or the press.” This [new law] abridges that [right] because you can’t publish something that is already in your possession.”<sup>136</sup> She adds, “[I]t’s beneficial for the public to have information about how our legal justice system works and that includes the arrest process.”<sup>137</sup>

Is access to the mugshot itself “beneficial for the public to have” in today’s age of screenshots? On one hand, some advocates could point to caselaw to conclude that the First Amendment does not allow the government to regulate content simply on the grounds of it being distasteful.<sup>138</sup> Further, in *Detroit Press Inc. v. United States*, the Honorable Danny J. Boggs of the Sixth Circuit noted in his dissent that

“[t]he majority’s emphasis on embarrassment misses the point. Information can be both public and embarrassing...and the fact that a record is embarrassing does not answer the question whether an individual can reasonably expect that record to remain private. [. . .] In an age in which law enforcement routinely makes booking photographs available to the press, the public has come to expect that such photographs will be accessible.”<sup>139</sup>

On the other hand, the Eleventh Circuit noted that mugshots capture a person in the “vulnerable and embarrassing moments immediately after being accused, taken into custody, and deprived of most liberties.”<sup>140</sup> Embarrassment is a cognizable privacy interest. Even though this paper is not analyzing the

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<sup>135</sup> *Id.* at 578; see Leah Shields, *Lawyer says Florida’s new mug shot law is unconstitutional*, FIRST COAST NEWS (July 12, 2021 at 11:28 am), <https://www.firstcoastnews.com/article/news/local/lawyer-says-florida-mug-shot-law-unconstitutional/77-e01adc94-61d7-4a78-b21e-2e059c22e848>.

<sup>136</sup> See Shields, *supra* note 135.

<sup>137</sup> *Id.*

<sup>138</sup> See Jillian Stonecipher, *A Proposed Florida Law Targets Mugshot Sites But Hits Journalists First Amendment Rights*, NIEMAN LABS (Feb. 25, 2013 at 10:53 am), <https://www.niemanlab.org/2013/02/a-proposed-florida-law-targets-mugshot-sites-but-hits-journalists-first-amendment-rights/>.

<sup>139</sup> Josh Gerstein, *Court Ends Routine Access to Federal Mugshots*, POLITICO (Jul. 14, 2016 at 3:28 PM), <https://www.politico.com/blogs/under-the-radar/2016/07/mugshots-federal-criminal-suspects-225546>.

<sup>140</sup> *Karantalis v. United States DOJ*, No. 09-CV-22910, 2009 U.S. Dist. LEXIS 126576 at \*12 (S.D. Fla. Dec. 14, 2009).

privacy issues, this paper looks to how embarrassment could be a cognizable privacy concern under the Fourth Amendment.

Norris, author of *Your Right to Look Like An Ugly Criminal: Resolving the Circuit Split over Mug shots and the Freedom of Information Act*, highlights that the Fourth Amendment requires police to knock and announce their presence before entering a home to “protect individuals against the fear, humiliation, and *embarrassment* of being aroused from their beds in states of partial or complete undress.”<sup>141</sup> Similarly, the Court found that a school violated a student’s Fourth Amendment rights by strip-searching her for drugs because she found it “*embarrassing, frightening, and humiliating.*”<sup>142</sup> The Court also cited embarrassment as a reason why a police checkpoint at the U.S.-Mexico border was unconstitutional.<sup>143</sup>

Websites like Mugshots.com have millions of mugshots available. Has anyone ever benefitted from having their mugshot taken and published? Sure, maybe two people. In one case, in 2014, Jeremy Meeks was arrested for felony weapon charges which resulted in his mugshot being taken by the Stockton Police Department.<sup>144</sup> When the police department posted the mugshot on their Facebook page, thousands of people deemed him online as “Hot Felon” among other names.<sup>145</sup> As a result, while incarcerated, Meeks received approximately 45 contracts for jobs which ranged from modeling to movie deals and received up to 400 letters per day.<sup>146</sup> When released from prison, Meeks recalled that he began walking “the biggest fashion shows” as well as shooting five movies in 10 months.<sup>147</sup> Two years later, Mekhi Alante Lucky was arrested for speeding in a stolen vehicle.<sup>148</sup> After avoiding jailtime, his viral mugshot led him to sign a contract with the modeling agency for a new life.<sup>149</sup> However, the vast majority of people whose mugshots are published by police departments are not on the pathway to a modeling contract. These citizens are the ones experiencing the embarrassment of knowing that their pre-trial mugshot is going to be eternally displayed to the world. Norris suggests that courts should re-examine the potential for embarrassment and ridicule when evaluating the privacy concerns related to the disclosure of mugshots.<sup>150</sup>

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<sup>141</sup> Norris, *supra* note 71 at 1594.

<sup>142</sup> *Safford United Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 374-75 (2009) (emphasis added).

<sup>143</sup> *See United States v. Ortiz*, 422 U.S. 891, 895 (1975).

<sup>144</sup> *See* Jess Hardiman, *How Jeremy Meeks Accidentally Became an Internet Meme*, LAD BIBLE (Mar. 2, 2021 at 10:14 AM), <https://www.ladbible.com/entertainment/celebrity-how-jeremy-meeks-accidentally-became-an-internet-meme-20210302>.

<sup>145</sup> *See id.*

<sup>146</sup> *See id.*

<sup>147</sup> *See id.*

<sup>148</sup> *See* Hidrèlèy, *Another Hot Felon Named “Prison Bae” Just Got A Modeling Contract Thanks To His Mug Shot And Heterochromia*, BORED PANDA, [https://www.boredpanda.com/criminal-with-heterochromia-mugshot-prison-bae/?utm\\_source=google&utm\\_medium=organic&utm\\_campaign=organic](https://www.boredpanda.com/criminal-with-heterochromia-mugshot-prison-bae/?utm_source=google&utm_medium=organic&utm_campaign=organic) (last visited Oct. 5, 2022).

<sup>149</sup> *See id.*

<sup>150</sup> *See* Norris, *supra* note 71 at 1595.

Beyond considerations for embarrassment, advocates on both sides argue whether the publication and dissemination of mugshots is newsworthy. Courts have held that the basic uniformly-based principle is that “the First Amendment bars appropriation liability for the uses of a name or likeness in a publication that concerns matters that are newsworthy or of legitimate public concern.”<sup>151</sup> The “newsworthiness” aspect becomes the “essential balancing point” between individuals’ privacy rights and society’s interest in freedom of the press and speech.<sup>152</sup> However, determining what is deemed newsworthy has not led to consistent decisions.<sup>153</sup>

On one hand, crime and law enforcement is obviously an issue of public interest with extensive coverage from the media oftentimes involves the use of mugshots. Additionally, some people will argue that mugshots are “cultural artifacts” that have historical, cultural, or political relevance in society – and some people will argue that access to mugshots can mean the public safety of knowing who is committing what crime or the public safety of law enforcement accountability.<sup>154</sup> For example, media attorney Jeffery J. Hunt, posited that in addition to a jail’s need for a current photo of an arrestee, mugshots keep people informed about law enforcement activity in their communities.<sup>155</sup> According to Hunt, “[t]here is a legitimate public interest in scrutinizing that process – verifying the identity of individuals who have been arrested and having the public know who they are.”<sup>156</sup> Similarly, the Sixth Circuit in *Detroit Free Press, Inc. v. U.S. Department of Justice*, speculated that a mugshot of Rodney King would be essential in moving public opinion if there had been no videotape of his beating while in the presence of the police.<sup>157</sup>

On the other hand, private companies, digital newspapers, and people who screenshot mugshots share these photos to generate traffic to their websites or participate in the humiliation and shame of others. Although mugshots can be viewed as artistic, cultural, or political artifacts, some people have responded that there is a heavy and unwarranted price for people to pay in this digital era.<sup>158</sup> The promise of the second chance or starting over cannot be genuine if there is open access to a prior mugshot plastered on the Internet, whether a person was wrongfully detained, committed their first crime, or have been in and out of the criminal legal system. Also, from another angle, mugshots could be viewed as law enforcement accountability but also could negatively impact the family of

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<sup>151</sup> *Battaglieri v. Mackinac Ctr. for Pub. Policy*, 680 N.W.2d 915, 919 (Mich. Ct. App. 2004).

<sup>152</sup> Amy Gajda, *Judging Journalism: The Turn Toward Privacy and Judicial Regulation of the Press*, 97 CALIF. L. REV. 1039, 1061 (2009).

<sup>153</sup> See Clay Calvert, *Every Picture Tells A Story, Don't It? Wrestling with the Complex Relationship Among Photographers, Words, and Newsworthiness in Journalistic Storytelling*, 33 COLUM. J.L. & ARTS 349, 355 (2010).

<sup>154</sup> See Lee, *supra* note 29, at 576.

<sup>155</sup> See Liesik, *supra* note 115.

<sup>156</sup> *Id.*

<sup>157</sup> *Detroit Free Press, Inc. v. U.S. Dep't of Justice*, 73 F.3d 93, 98 (6<sup>th</sup> Cir. 1996).

<sup>158</sup> See Lageson & Maruna, *supra* note 76, at 127–28.

who is detained. The parents of late Glenn Foster Jr., a former New Orleans Saints football player, mentioned that his mugshot was the last image of their son that his four children saw.<sup>159</sup> Glenn Foster Jr. died in police custody in Alabama after allegedly speeding and eluding police.<sup>160</sup> Although some people may assert that mugshots keep people informed about law enforcement activity in their communities, it must also be taken into account the community impact that is attached to the publication and dissemination of mugshots in the digital age.

However, it is admittedly a high standard to make First Amendment claims against the people and the press who are not the original publishers of the mugshots. In *United States v. Stevens*, the Supreme Court rejected a “free floating test for First Amendment coverage based on [. . .] balancing of relative social costs and benefits.”<sup>161</sup> Courts have explained society must live with different forms of speech in order to “provide adequate breathing room for valuable, robust speech – the kind that enriches the marketplace of ideas, promotes self-government, and contributes to self-determination.”<sup>162</sup> Publishing mugshots can be argued to be the “breathing room” that is requisite by the Constitution. As described by a 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.”<sup>163</sup> Specifically, courts have held that government action to “punish the publication of truthful information seldom can satisfy constitutional standards.”<sup>164</sup> As stated in *Fla. Star v. B.J.F.*, “Where the government has made [mugshots] publicly available,” it would be “highly anomalous” to sanction a subsequent publisher.<sup>165</sup> Notably, when the government is the original publisher, “a less drastic means than punishing truthful publication almost always exists.”<sup>166</sup>

On the other hand, as the Honorable Eumi K. Lee pointed out in her article, *Monetizing Shame: Mugshots, Privacy, and the Right to Access*, the private companies nor the press have a qualified constitutional right to access mugshots, unless the information is pertinent to criminal proceedings and associated documents.<sup>167</sup> In *Houchins v. KQED, Inc.*, the Court rejected KQED Inc.’s argument that the incorporation had a constitutional 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

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<sup>159</sup> See Allsop, *supra* note 1.

<sup>160</sup> See *id.*

<sup>161</sup> *United States v. Stevens*, 559 U.S. 460, 470 (2010).

<sup>162</sup> J.S. ex rel. Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 941 (3<sup>rd</sup> Cir. Ct. App. 2012).

<sup>163</sup> Lee, *supra* note 29, at 580.

<sup>164</sup> *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103 (1979).

<sup>165</sup> *Fla. Star v. B.J.F.*, 491 U.S. 524 (1989).

<sup>166</sup> *Id.*

<sup>167</sup> See Lee, *supra* note 29, at 580.

government abuse.<sup>168</sup> Instead, the Court held 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.”<sup>169</sup> Similarly, in *Los Angeles Police Department v. United Reporting Publishing Corp.*,<sup>170</sup> the Supreme Court in dicta stated that the government has no constitutional obligation to disclose arrest information, stating that it is “nothing more than a governmental denial of access to information in its possession.”<sup>171</sup> The Court further noted 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.”<sup>172</sup>

As previously mentioned, a mugshot attaches and includes the person’s identifying information, such as name, height, date of birth, references to the alleged crime, and more.<sup>173</sup> The government can choose to grant selective access to the information by statute, and access may be limited based on use.<sup>174</sup> Therefore, access to newsworthy information could be the identifying information and not the photo attached, as unfortunately has been exemplified in *Cohn* and *Florida Star*. As noted by Mark Katches, the Executive Editor of the *Tampa Bay Times*, “[T]he galleries lack context and further negative stereotypes. [ . . . ] [and] the galleries alone serve little journalistic purpose [ . . . ]” that does not affect the integrity of reporting nor the profession as a whole.<sup>175</sup> However, once the access is granted, constitutional protections for publication, of course, are broad and, as described by an ACLU staff attorney, “[ . . . ] getting them back into the box is extraordinarily difficult.”<sup>176</sup>

#### PART IV: DOES THE DIGITAL AND PUBLIC DISSEMINATION OF MUGSHOTS VIOLATE AMERICANS’ EIGHT AMENDMENT RIGHTS AGAINST CRUEL AND UNUSUAL PUNISHMENT?

According to the U.S. Constitution, the Eighth Amendment states that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.”<sup>177</sup> Essentially, every U.S. state constitution has its own prohibitions against such penalties.<sup>178</sup> The cruel and unusual

<sup>168</sup> See *Houchins v. KQED, Inc.*, 438 U.S. 1, 14 (1978) (plurality opinion).

<sup>169</sup> *Id.* at 15.

<sup>170</sup> See *Los Angeles Police Dep’t v. United Reporting Publ’g Corp.*, 528 U.S. 32, 40 (1999).

<sup>171</sup> *Id.* at 40.

<sup>172</sup> *Id.* at 32.

<sup>173</sup> See HG.ORG, *supra* note 31.

<sup>174</sup> See Lee, *supra* note 29, at 584.

<sup>175</sup> *Id.*; see Joe Concha, *Tampa Bay Times Will Stop Publishing Mug Shot Galleries*, THE HILL (Jun. 15, 2020), <https://thehill.com/homenews/media/502803-tampa-bay-times-dropping-mug-shot-galleries/>.

<sup>176</sup> *Id.* at 580.

<sup>177</sup> U.S. CONST. amend. VIII.

<sup>178</sup> See Micah Schwartzbach, *A Note From Our Editors: Your State’s Laws Might Offer More*

punishment clause measures a “particular punishment against society’s prohibition against inhumane treatment;” this clause prevents the government from imposing a penalty that is either barbaric or far too severe for the crime committed so long as the application follows the “evolving standards of decency” test.<sup>179</sup> In fact, in 1958, Chief Justice Ed Warren wrote that the clause “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”<sup>180</sup>

Have Eighth Amendment arguments made its way to the courts involving the publication and dissemination of mugshots? Yes, in 2012, a Utah Mormon bishop, Bishop Gordon Moon, was charged in the 8<sup>th</sup> District Court with witness tampering, a third-degree felony, and failure to report abuse, a class B misdemeanor.<sup>181</sup> His attorney, David Leavitt, made several pre-trial arguments, including some to prevent Moon from posing for a mugshot.<sup>182</sup> According to Leavitt, “[a] mugshot being taken of someone who is presumed innocent is probably the greatest punishment Bishop Moon could receive in this case.”<sup>183</sup> He added, “[g]iven the 21st century realities of mass communication and data storage, a mugshot posted to the Internet is a punishment – one that could never have been envisioned or imagined by either the United States or Utah constitutional founders – but a punishment nonetheless.”<sup>184</sup> Lastly, he argued that “[I]t-erally speaking, a mugshot of [Moon], which conveys him as a criminal, will remain on the Internet for as long as the Internet exists” and because mugshots have “become standard recognized marks of criminal activity” the impact will be heavy regardless of whether Moon is acquitted or convicted.<sup>185</sup>

However, the Duchesne County Jail Commander responded that a mugshot of an arrestee is “part of the booking process at jails throughout the state because it helps build the database that can be used to easily identify people”, referencing that fingerprints can sometimes take up to months to identify whereas mugshot photos can be used “on the spot.”<sup>186</sup> In his court filing, Leavitt suggested that, in lieu of a mugshot, Moon could submit a photo of himself to the jail, or the jail could use his driver’s license photo.<sup>187</sup> The Jail Commander responded that those are not viable options as “[m]ost people don’t carry a current photo of

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*Protections*, NOLO, <https://www.nolo.com/legal-encyclopedia/your-states-laws-might-offer-more-protections.html> (last visited on July 8, 2022).

<sup>179</sup> Micah Schwartzbach, *The Meaning of Cruel and Unusual Punishment*, NOLO, <https://www.nolo.com/legal-encyclopedia/the-meaning-cruel-unusual-punishment.html> (last visited on Dec 17, 2022).

<sup>180</sup> *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (emphasis added).

<sup>181</sup> See Liesik, *supra* note 155.

<sup>182</sup> See *id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> See Liesik, *supra* note 115, (stating that mugshots are part of the booking process at jails and that fingerprints take much longer).

<sup>187</sup> See *id.*

themselves [. . .] [and] [e]ven their driver's license [photo] could be up to four years old. That would really hinder us in positively identifying [the arrestee.]”<sup>188</sup> Both the felony and misdemeanor charges filed against Bishop Moon were dismissed by the 8<sup>th</sup> District Court of Utah based on the Duchesne County Attorney's Motion to Dismiss following how the County erred in handling evidence.<sup>189</sup>

A. *Eighth Amendment Analysis*

Does the publication and dissemination of the mugshots violate the cruel and unusual punishment clause of the Eighth Amendment? The “evolving standards of decency” test evaluates not only the nature of the punishment in each case but also at whether the punishment fits the severity of the crime.<sup>190</sup> Courts will compare sentences for other people convicted in the state where the crime took place and the sentences for the same crime in other states.<sup>191</sup> When more serious offenses result in less severe punishment than the punishment being discussed, or when other states punish the identical crime less severely, a court is likely to conclude that the punishment does not fit the crime and strike the sentence.<sup>192</sup>

In application, it likely depends on how mugshots are viewed – as punishment or part of the booking process. As mentioned by the Duchesne County Jail Commander, a mugshot is part of the booking process throughout the state as it provides an “on the spot” photo that helps build the database to easily identify people that have been arrested.<sup>193</sup> Suggested alternatives are not viable as part of the process as fingerprints can sometimes take up to months to identify and people do not carry around a current photo of themselves.<sup>194</sup> For those who carry their driver's license, passport, or state identification card, their photo is likely outdated. Therefore, taking mugshot photos upon arrest helps with the process of positively identifying an arrestee “on the spot” with a current photo.

On the other hand, some people will argue that the process of taking mugshots is not what needs to be evaluated under the “evolving standards of decency” test. Rather, the resulting publication and dissemination of the mugshots in a digital age where the photos can be resurfaced indefinitely is what needs to be reassessed. This practice can be viewed as punitive. As viewed by Bishop

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<sup>188</sup> *Id.*

<sup>189</sup> See Bob Mims, *Judge Drops Charges Against Mormon Bishop in Belated Report on Sex Abuse*, THE SALT LAKE TRIBUNE (May 11, 2012, 10:11 PM), <https://archive.sltrib.com/article.php?id=54095444&itype=CMSID>.

<sup>190</sup> See Schwartzbach, *supra* note 179, (noting that the “evolving standards of decency” test evaluates whether the punishment fits the severity of the crime along with the nature of punishment).

<sup>191</sup> See *id.*

<sup>192</sup> See *id.*

<sup>193</sup> See Liesik, *supra* note 115, (stating that mugshots help law enforcement build a database to identify those arrested).

<sup>194</sup> See *id.*

Moon's attorney, David Leavitt, the 21<sup>st</sup> century realities of posting mugshots to the Internet is a punishment that was unimaginable by the Framers of the U.S. Constitution and Utah constitutional founders.<sup>195</sup> However, "a punishment is not unconstitutional simply because it is severe."<sup>196</sup> Also, it must be considered whether the courts would interpret mugshots as a consequence of the arrest process rather than a punishment for being arrested because, the Eighth Amendment forbids only grossly excessive penalties.<sup>197</sup>

If the courts do recognize that mugshots are a form of punishment, then courts will likely consider public opinion in evaluating whether a punishment is cruel and unusual under the evolving standards of decency test. For example, the U.S. Supreme Court has supported its holding by looking to the states' legislatures and juries to find that the death penalty is an unconstitutional punishment for the crime of rape.<sup>198</sup> The Court rested its opinion in large part due to how only one of the fifty U.S. states authorized this sentence.<sup>199</sup> The Court similarly relied heavily on a trend toward abolishing the death penalty for people who were determined to be intellectually disabled as well as for children.<sup>200</sup> However, in *Atkins*, the Court noted that it will not ignore its own judgment as to whether a punishment is reasonable.<sup>201</sup> Because mugshots are taken at the booking phase and not a condition of the sentencing phase, it is unlikely that Eighth Amendment arguments will prevail.

#### PART V: RECENT ADAPTATIONS OF LAWS REGARDING PUBLISHING MUGSHOTS

According to the National Conference of State Legislatures, as of 2020, six states have laws in the books that restrict the release of mugshots while 14 states had recently passed laws that ban mugshot sites from charging removal fees.<sup>202</sup> Furthermore, American Express, Discover, and MasterCard all have reportedly cut ties with the private company websites and Google reportedly changed its search algorithms so that the websites do not show up as prominently in search results.<sup>203</sup> Since 2020, there has been further legislation on the matter. Notably, not all recent legislation looks the same. While several states have prohibited

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<sup>195</sup> *See id.*

<sup>196</sup> Schwartzbach, *supra* note 179.

<sup>197</sup> *See id.*

<sup>198</sup> *See Coker v. Georgia*, 433 U.S. 584, 592 (1977), (holding that rape is a cruel and unusual punishment disproportionate to the crime of rape).

<sup>199</sup> *See id.* at 586.

<sup>200</sup> *See Atkins v. Virginia*, 536 U.S. 304, 306, 317, 321 (2002); *see also Roper v. Simmons*, 543 U.S. 551, 555, 578 (2005).

<sup>201</sup> *See Atkins*, 536 U.S. at 312-13.

<sup>202</sup> *See Michael Turton, Mixed Reviews on Mug Shot Ban*, THE HIGHLANDS CURRENT (Apr. 19, 2019), <https://highlandscurrent.org/2019/04/19/mixed-reviews-on-mug-shot-ban/>.

<sup>203</sup> *See Mugshots and Booking Photo Websites*, NAT'L CONF. OF STATE LEGISLATURES (Dec. 28, 2022), <https://www.ncsl.org/research/telecommunications-and-information-technology/mug-shots-and-booking-photo-websites.aspx>.

law enforcement from releasing mugshots, other states have “prohibited websites from charging fees for the removal of mugshots from their websites or otherwise regulating these websites’ practices.”<sup>204</sup> This Part of the paper will identify some of the recent developments from roughly the past 10 years.

**2013** – Five states<sup>205</sup> enacted legislation to address mugshot accessibility concerns by banning private companies with commercial purposes to charge fees for removing inaccurate mugshots upon request or by banning sheriffs from releasing mugshots to sites that charge a fee.<sup>206</sup>

**2014** – California enacted a law which banned entities who publish criminal record information from soliciting or accepting a fee (or other consideration) to “correct, modify, or remove” that information. If violated, then California will institute civil penalties for violations. In Colorado and Georgia, the two states passed legislation banning anyone from obtaining a mugshot knowing that it will be posted to a website which requires a fee to remove the mugshot. In Missouri and Wyoming, the two states passed legislation requiring anyone publishing a mugshot on a website to remove it upon request from the person whose mugshot was published.<sup>207</sup>

**2015** – Maryland passed a law stating that a website may not charge a fee to remove a person’s mugshot from the website “under specified circumstances.” In Vermont, the state passed a law which prohibits a website from charging a fee for the removal of mugshots. In Virginia, the state passed a law which provides that any person who “disseminates, maintains, or publishes” mugshots who also “accepts, solicits, and requests” money for removing the information or mugshot is liable to the individual who is subject to the information for actual damages or a specified amount.<sup>208</sup>

**2016** – Florida enacted legislation which authorizes records custodians to choose not to electronically publish juvenile arrest as well as mugshots. In Kentucky, a passed law banned commercial use of mugshots and photographic records generated by law enforcement for identification purposes and also allows for a right of action for certain people requesting the removal of a mugshot. In South Carolina, the passed law provides that an entity that publishes on a website the “arrest and booking records” of an individual whose charges have been discharged or dismissed, or of an individual who is found not guilty of a charge, small, without fee or compensation, to remove the “arrest and booking records” within a certain period of time.<sup>209</sup>

**2017** – Florida passed a law providing those businesses which publish or mugshots through a “publicly accessible print or electronic medium” may not

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<sup>204</sup> *See id.*

<sup>205</sup> *See id.* (including the five states: Georgia, Illinois, Oregon, Texas, and Utah).

<sup>206</sup> *See id.*

<sup>207</sup> *See id.*

<sup>208</sup> *See id.*

<sup>209</sup> *See* Mugshots and Booking Photo Websites, *supra* note 203.

solicit or accept a fee or other form of payment to correct, modify, or remove such mugshots. As a result, these entities could be subject to civil action and damages for violations. In Illinois, passed legislation exempts the inspection and copying law enforcement records of other persons requested by an individual who was committed to the Department of Corrections or a county jail, including mugshots, with some exceptions. In New Jersey and Ohio, the two states enacted legislation which prohibits an individual from tacking on a fee to stop the publication of mugshots. In South Dakota, state legislation provides for the release of certain mugshots.<sup>210</sup>

**2018** – Illinois enacted a law that provides for-profit publishers who make an individual’s criminal record information available on any public publication that charges a fee for correction or removal of the information must correct any errors in the person’s criminal history information within five (5) business days after notification of an error.<sup>211</sup>

**2019** – Illinois passed legislation which prohibits a law enforcement agency to publish mugshots on its social networking website – with exceptions. In New York, the states’ new law bans disclosure of mugshots unless public release severs a specific law enforcement purpose. In Utah, the state enacted a new law that requires a publication or website to destroy and remove a mugshot, within a specific period of time, when the person in the mugshot requests its destruction and removal.<sup>212</sup>

**2020** – According to the National Conference of State Legislatures, no bills were enacted during 2020.<sup>213</sup>

**2021** – Arkansas mandated that private companies which commercialize mugshots by accepting, requesting, or requiring payment of a fee must remove the mugshot from the website within five (5) business days of receipt of a written request. In California, the state passed legislation which prohibits “a police department or sheriff’s office” from sharing, on social media, mugshots of an individual arrest on suspicion that a person has committed a nonviolent crime, unless specified circumstances exist. In Florida, the new law expanded the applicability of provisions regarding the dissemination of *arrest* mugshots to include a person or entity whose primary business model is the publication or dissemination of such photos for a commercial purpose or pecuniary gain. In Montana, the state passed legislation to provide that mugshots are public criminal justice information, and require criminal justice agencies to charge a clerking fee for the release of certain booking photographs. On the other hand, in Oregon, the new law prohibits law enforcement agencies from releasing mugshots except in specified circumstances. Lastly, in Utah, new legislation protects

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<sup>210</sup> *See id.*

<sup>211</sup> *See id.*

<sup>212</sup> *See id.*

<sup>213</sup> *See id.*

photos taken of people during the booking process and also prohibits a sheriff from disclosing such photos.<sup>214</sup>

**2022** – The Louisiana Senate and Governmental Affairs Committee advanced a bill that would disallow law enforcement to “publish, release, or disseminate in any format a booking photograph to the public or to a private person or entity” unless an individual is convicted, deemed a threat, or a fugitive.<sup>215</sup> If Louisiana residents’ charges are acquitted, expunged, vacated, or pardoned, the residents may request that their mugshots be removed from “remove-for-pay” publications or websites.<sup>216</sup> Those entities then would have seven business days to comply. Later in the year, the state passed the law to prohibit a law enforcement agency from releasing mugshots, with some exceptions. The state also requires websites to remove a mugshot when a person in the mugshot requests the mugshot’s destruction and removal. Also, Louisiana prohibits charging a fee to do so.

#### PART VI: RECOMMENDATIONS

The solution to the digital accessibility of mugshots is an American issue as, “in relation to pre-conviction data, every year, there are over 10 million arrests, 4.5 million mugshots, and 14.7 million criminal court proceedings that are digitally released at no cost.”<sup>217</sup> As noted, regarding post-conviction data, “approximately 6.5 million current and former incarcerated people and 12.5 million people with a felony conviction have a record on the Internet.”<sup>218</sup> On a large scale, nearly one of three American adults (77.7 million Americans) have been arrested.<sup>219</sup> Yet, courts have held that government action to “punish the publication of truthful information seldom can satisfy constitutional standards.”<sup>220</sup> Consequently, “where the government has made [mugshots] publicly available,” it would be “highly anomalous” to sanction a subsequent publisher.<sup>221</sup> When the government is the original publisher, “a less drastic means than punishing truthful publication almost always exists.”<sup>222</sup> Different states have taken varying approaches to solve this pressing issue in the age of screenshots and digital media. As a result, this paper recommends the following:

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<sup>214</sup> *See id.*

<sup>215</sup> Allsop, *supra* note 159.

<sup>216</sup> *Id.*

<sup>217</sup> Lageson et al., *Digitizing and Disclosing Personal Data: The Proliferation of State Criminal Records on the Internet*, L. & SOC. INQUIRY (Aug. 2021), <https://www.cambridge.org/core/journals/law-and-social-inquiry/article/abs/digitizing-and-disclosing-personal-data-the-proliferation-of-state-criminal-records-on-the-internet/0D7B9A42DA08BADB223D2DE206413585>.

<sup>218</sup> *See id.*

<sup>219</sup> Gary Fields & John R. Emshwiller, *supra* note 26.

<sup>220</sup> *See Smith v. Daily Mail Pub. Co.*, 443 U.S. 97, 102 (1979).

<sup>221</sup> *Fla. Star v. B.J.F.*, 491 U.S. 524, 535 (1989).

<sup>222</sup> *Id.* at 534.

**Firm Federal Stance.** As Norris concluded, a firm federal stance on this issue could help end the practice at the state level.<sup>223</sup> If the federal government takes the lead on the issue, such movement could result similarly at the local level. Because some localities have removed mugshots from an online platform resulting from public pressure, the responsiveness of these jurisdictions could suggest that concern from the federal level could trickle down to the state and local level also.<sup>224</sup>

**Model Legislation from Key States.** In the event that there is a firm federal stance or in the event that a federal stance is not applied, states and local jurisdictions should consider modeling their legislation from key states. First, states should look to California's 2021 law which prohibits a police department or sheriff's office from sharing, on social media, mugshots of a person's arrest on suspicion of a nonviolent crime, with some exceptions.<sup>225</sup> The focus on the nonviolent crime respects the public interest of public safety while not making accessible mugshots of people accused of non-violent crimes. Also, legislation leading up to the new Louisiana law shares a similar view that mugshots in this digital age should not be accessible to the public unless the person arrested is convicted, deemed a threat, or a fugitive.<sup>226</sup> It is important to limit the public release of mugshots by law enforcement and enable people to get these mugshots removed. Further, more states now allow its residents to request the removal of their mugshots on commercial websites without paying a fee.<sup>227</sup> Furthermore, bills that address the issue of law enforcement agencies releasing mugshots digitally get to the root of the problem because as long as private citizens, private companies, and the media has access to the mugshots from law enforcement agencies, courts have held that commercial entities are not violating constitutional rights and that this action is constitutionally protected.

**Digital Media.** In the event that legislation leans its focus on digital media as opposed to law enforcement agencies, future statute could apply a legal analysis of press and speech rights which boils down to a more objective and determinate standard than judges' determinations about what is in good or bad taste. As Allen Rostron, the William R. Jacques Constitutional Law Scholar and Professor of Law at the University of Missouri – Kansas City, points out, “[t]he *Washington Post*'s approach to displaying mugshots is more serious and less sensationalistic than that of *The Slammer*.”<sup>228</sup> By making the newsworthiness inquiry focuses on whether a private entity is participating in the market of “pay-to-make-it-go-away,” courts can have a clear and consistent rule which avoids discrimination based on character, tone of the speaker, or viewpoint.<sup>229</sup> If digital

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<sup>223</sup> See Norris, *supra* note 150 at 1600.

<sup>224</sup> See *id.*

<sup>225</sup> See Allsop, *supra* note 215.

<sup>226</sup> See *id.*

<sup>227</sup> See *id.*

<sup>228</sup> Rostron, *supra* note 38, at 1332.

<sup>229</sup> *Id.*

media outlets requests these photos, courts should apply a clear balancing test which weighs both “the requestor’s interest in disclosure”<sup>230</sup> and “any asserted reason for confidentiality.”<sup>231</sup> The aim of this balancing test is to eliminate “improper purposes”<sup>232</sup> of access to mugshots, such as private spite or public scandal.

In May of 2022, Blake Mathesie graduated from Florida State University College of Law.<sup>233</sup> While in law school, he worked alongside state legislatures to create a better Florida for people who come after him, by advocating for laws which help people get their mugshots offline. Blake Mathesie was wrongfully arrested. Although the court eventually dismissed his charge, his mugshot lives online. Mugshots are still resurfaced because of, in part, our current laws and coupled with the ability to screenshot mugshots for the purposes of generating the limitless publication and preservation of these photos in the public sphere. The above recommendations should be considered to be enacted as well as considering the legal scholarship which challenges the privacy issues of the publication and dissemination of mugshots in the digital age within FOIA.

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<sup>230</sup> *In re* N.J. Fireman’s Ass’n Obligation to Provide Relief Applications Under Open Pub. Records Act, 166 A.3d 1125, 1138 (N.J. 2017).

<sup>231</sup> *U.S. v. Kaczynski*, 154 F. 3d 930, 931 (9th Cir. 1998).

<sup>232</sup> *Lee*, *supra* note 174 at 585.

<sup>233</sup> *See* Blake Mathesie, LinkedIn (Jul. 8, 2022), <https://www.linkedin.com/in/mathesie/>.