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How routine police stops are becoming viral social media fodder

Police body cameras were supposed to ensure justice. They've turned into YouTube content.

by **Jack Meserve**

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Paige Vickers/Vox; Getty Images; Stills from YouTube channels Body Cam Watch and Code Blue Cam

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If you're arrested in America for a minor charge — say, for speeding or loitering — the punishment from the legal system might end up being the least of your worries. You might wake up a few months later and see your arrest, filmed through a police body camera, with a million views on TikTok or YouTube. A few days later, it might have 5 million views, or 20 million. Your face would be next to dozens of other faces of the recently arrested, all on monetized, for-profit social media channels. And it would be almost impossible to get the videos taken down.

Like so much of the algorithm-driven internet, this particular subsection can be easy to miss. But it's massive. A popular YouTube channel like Code Blue Cam averages over 10 million views a video, and has totaled more than a billion across hundreds of videos. Another, Midwest Safety, has totaled over 1.5 billion views. There are dozens like this, all with similar names: "Body Cam Watch," "PoliceActivity," "EWU Bodycam." At least one channel is represented by an agency that represents more traditional influencers.

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These channels are now well-known enough that recent arrestees have posted specifically about the fear of ending up on these channels. “I literally have panic attacks about this,” one posted on Reddit. “If my video was released I’d go off the deep end.” Another: “I feel like it will not only affect my chances of getting into a good career, but that millions of people would see me acting like a drunken idiot.”

RELATED: What do we want police body cams to do?

Each channel gets its content from the same basic model: Someone uses public records requests to obtain video from police arrests, lightly edits the video, adding maybe a brief AI narration or captions, and then hits “publish.” Many videos take the same shape: somebody drunk or otherwise intoxicated yelling, speeding, throwing things, hitting cops; that person being arrested while crying, screaming, spitting, and so on. That said, there are videos of people being arrested for just about anything, from shoplifting to murder and kidnapping cases.

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The faces of the people who are arrested are almost never blurred, and, depending on the channel and state of the footage, bystanders' or family members' faces often aren't blurred either. Some channels give judicial outcomes, others don't. Some have full names of those arrested, others redact. There's little rhyme or reason. Even videos of cases of alleged child abuse feature entirely unblurred children as they're questioned by police about their father, whose full name is given. And, of course, at the time of their arrest, none of these people have been convicted of a crime.

In a world where civilians make TikToks about embarrassing conversations they overheard on the train, it's easy to argue that people deserve their privacy. But in this case, granting it might come with a cost. Access to video involving police, who can and do commit misconduct and crimes, has a real value to journalists and to the public. It's difficult to know how to balance immense and cruel public embarrassment with the right of the public to monitor law enforcement.

This phenomenon of YouTube body camera channels illuminates multiple strange trends in American life: the public becoming the hyperpublic, the use and misuse of

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the long history of Americans enjoying video of people getting handcuffs slapped on them.

A new, endless supply of public domain content

Body-worn cameras have had a remarkably rapid uptake by police. The first US pilot programs began in 2012, but their popularity surged after the 2014 killing of Michael Brown in Ferguson, Missouri, when the Obama administration authorized \$75 million in funding for local police departments to buy and deploy these cameras.

The cameras have enjoyed high support among the public over the years, sometimes exceeding 90 percent. Between 2022 and 2023, over 80 percent of local police officers reportedly wore cameras.

This creates a nearly endless supply of footage, which can be obtained through state transparency and open-records laws. But the people requesting the most usually aren't on a crusade for justice. They are interested in having footage of someone's shoplifting arrest rack up millions of views for profit.

Every state has its own laws regarding public access to body camera footage, and the specific application and interpretation of each of those laws is the subject of frequent litigation between news organizations and police departments. Trying to get a video that shows potential police misconduct? Even if you file an open records request, if

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According to a ProPublica investigation, “departments across the country have routinely delayed releasing footage, released only partial or redacted video or refused to release it at all.” That’s one reason police reformers have long been skeptical of the utility of transparency alone, and studies showed that cameras resulted in muddled effects at best, whether in reducing police misconduct or in better uncovering it after the fact.

But whatever the aggregate statistics show, there clearly are individual cases of misconduct being uncovered via open records requests. Traditional media use the same public records laws in their reporting, which certainly does uncover misconduct and generally inform the public.

Cases of county sheriffs drinking and driving, questionable shootings by officers, and other cases of potential misconduct appear on some of these body cam channels.

Yet on these channels, videos of possible police misconduct are dwarfed by lurid arrests for often minor charges. Police departments won’t resist public records requests that merely show ordinary citizens being embarrassed and officers in a sympathetic light. And an average YouTube viewer probably prefers to be titillated rather than depressed by police violence. So while you wait for videos of abusive police behavior, in the meantime, you can get footage for videos like “Karen Trashes Dollar General When She Doesn’t Get Hired” or “Drunk 18-Year-Old Girl Completely Loses It During Arrest” or “Woman Sets Porta Potty On Fire Because She Doesn’t Like It.”

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Humiliating the arrested via government disclosure has a long history in the United States. “Publish-for-pay” websites acquire mugshots through public records, post them with name and arrest information, and then require payment to remove them.

Numerous states have tried to either restrict the release of mugshots or require sites to remove them for free if requested, but it remains a live problem, and reforms have been undone in the name of being tough on crime. Plenty more sites publish tens of thousands of mugshots with no option for removal, presumably just for ad revenue.

Any sufficiently old reader will remember “mugshot galleries,” a staple of many even legitimate news outlets because they were reliable generators of user clicks through endless slideshows. Most newsrooms have drastically scaled back the use of mugshots, especially since the murder of George Floyd, but they’re still widespread online, with multiple cottage industries selling services to remove them, suppress them via Google search result alterations, and so on.

Beyond photos, *Cops*, the 1990s television staple that ran until 2020, is a remarkably similar format to modern body cam channels, with footage of arrests with no narrator or presenter, and at least the appearance of an unedited, cinema verite style. (In reality, police departments screened footage before it was ever broadcast and had final cut privileges.) It was a source of constant controversy for its endless depictions of people who are poor or have a mental illness as something to be gawked at. The podcast *Running From Cops* found numerous apparent misrepresentations on *Cops*, including “a young woman was denied a bail bond until she signed the form giving *Cops*

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Running From Cops's analysis also found that, compared to generic arrest statistics, *Cops* showed 10 times more arrests than you'd expect for sex work, probably for the sleazy reason you would guess. That pattern has continued on these body cam channels, where it is impossible not to notice just how many videos are of young women, sometimes with the single most revealing frame of the video being used as the thumbnail.

The problem for police

Police in general have to deal with the staggering number of records requests, which takes time and money even for the videos that merely show them doing their jobs. Each request can include multiple cameras taking hours of footage that needs to be reviewed and redacted by department staff. For example, one New Jersey town had over 1,500 requests in just the month of June, requiring more than 300 hours of work to review.

Faced with a deluge of requests for police footage, states like Ohio and Wisconsin have passed laws allowing police departments to charge fees to body cam requesters, which might seem like common sense — until you realize that highly lucrative channels would probably find it the easiest to pay, while local journalists and newspapers would find it the hardest.

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In general, states have not found solutions that provide both privacy and transparency, and reading through state legislature debates leaves one with whiplash. In Alabama, where body cam footage is not broadly accessible, footage of the death of an 18-year-old shot by police has been withheld for months. As a result, the state is debating legislation to require its release within 30 days. And in Rhode Island, watchdogs have questioned “inexplicable gaps” in footage of police shootings, 30 minutes of “missing audio” from footage of police cooperation with US Immigration and Customs Enforcement, and other discrepancies that rely on loopholes in state law.

But in New Jersey, where footage is much easier to obtain, legislators have considered tightening the rules to require consent of the arrestee to publish footage. This came after a channel “only requested DWI stops involving young women, some being underage,” and, at least according to news reports, offered to remove one woman’s video only if she paid for its removal, an echo of mugshot extortion.

The dichotomy between potentially profound, even criminal, police misconduct and admittedly embarrassing but often harmless arrest footage understandably leads some to say we have to accept the release of the latter in order to get the former. That’s the conclusion of a thoughtful essay by Scott Gordon in Tone Madison, an independent and local news outfit in Wisconsin whose reporters’ abilities to do their jobs have been affected by the state’s imposition of fees for footage. He writes: “A YouTuber making a

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What does transparency without voyeurism look like?

Is there any kind of middle ground here?

The Electronic Frontier Foundation was an early critic of body-worn cameras worn without safeguards. Their fear at the time (and today) was primarily of police misuse, through retention of footage, facial recognition technology, and other technologies allowing widespread state surveillance.

In an interview, EFF's privacy litigation director Adam Schwartz laid out something close to first principles around release of footage that seem reasonable:

- If footage depicts a particular person, then that person must have access to it.
- If footage depicts police use of force, then all members of the general public must have access to it, without being charged an unreasonable fee.
- If a person seeks footage that does not depict them or use of force, then whether they may have access must depend on a weighing by a court of 1) the benefits of disclosure to police accountability, and 2) the costs of disclosure to the privacy of a depicted member of the public. If the footage does not depict police misconduct, then disclosure will rarely have a police accountability benefit.
- Blur civilian faces, with the exception of high-profile people.

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These guidelines, while reasonable, would likely require more funding for police and court systems in order to be implemented properly. And even under these guidelines, a reasonably large number of videos would still wind up online. That's because of just how many arrests, even for fairly minor crimes, involve police using force of *some* kind — whether a taser, pepper spray, less-lethal ammunition, or standard ammunition — without falling into misconduct. It's also because these channels do in fact also publish content in the public interest.

What do the channels themselves say about all this? Alex Smith is the founder of Midwest Safety, one of the largest channels, and the only one I contacted that was willing to answer written questions on the record. Midwest Safety employs around 50 people, and Smith says they spend between eight and 80 hours per video, which explains their noticeably high production values. In defense of the channel, Smith cited multiple videos Midwest Safety published that show misconduct by law enforcement and those in a “position of trust” like a pastor. He also provided a description of their internal “right to be forgotten” policies, which depend on “severity of crime and the public interest in the incident.” He described internal rules that limit but do not prohibit, for instance, footage of self-harm or domestic violence.

Midwest Safety is likely the most responsible of these channels, and whatever thoughtfulness they have is not the norm. They were, for instance, the only channel I could find with any listed process for a video to be removed. And they also still publish videos like “Extreme Karen Goes Crazy on Fast Food Employees” which primarily

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Whatever one thinks of the right balance when it comes to police body cam footage, this problem seems unlikely to stay limited to arrest footage. Modern technology has mutated public access and transparency into a kind of hyperpublic. Consider courtrooms, a setting that almost anyone would think *has* to be open to the public. When Covid-19 shut down in-person courtrooms, some judges understandably opened their hearings to public YouTube streams for that very principle. But *public* to a person who is willing to physically go and sit in a courtroom and watch proceedings and *public* to anyone willing to open YouTube are so drastically different that they may as well be different words.

Predictably, some of those judges have clearly become enamored with their online audience. In Detroit, a judge chatted with YouTube commenters during cases, including during child sexual assault cases, until live chat while streaming was banned by a higher court. In Texas, defense attorneys have taken to printing cards to warn clients appearing before a particular judge that they're being watched on livestream, because his honor has repeatedly gone viral for reprimanding defendants with lines like, "I will put you over my knee like a little child and I'm going to spank you." Even if a judge *would* act like this without a camera, why does it need to be broadcast? Does the principle of public access to courtrooms *really* mean 9 million views for a hearing about a misdemeanor that required four hours of community service?

Defendants might need to be handed cards warning them they're being filmed in court, but fear of YouTube arrest infamy is starting to become common knowledge.

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around in an admittedly dangerous way, used a lighter on fake plants, which are very flammable.

No one was hurt, but the store's merchandise was totaled for a \$7.6 million loss. She ended up serving 60 days in jail and getting eight years of probation. In the video, the visibly distraught 17-year-old says, "I didn't take my meds today," "I'm really sorry," "I thought it would just die out," "I don't want to kill myself," in between weeping.

She then asks the officer, "Do you have a body camera? Oh, Jesus Christ, this is so embarrassing, is this going to be published to YouTube?" The officer responds, "No, no..." then corrects himself, "Well, I can't promise that."

It has over 6 million views in six months.

This story was originally published in The Highlight, Vox's member-exclusive magazine. To get early access to member-exclusive stories every month, join the Vox Membership program today.

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Police Records



A reporter's
state-by-state
access guide to
law enforcement
records



Although most states provide for the release of information about arrests and criminal convictions, there have been at least two recent movements aimed at hiding this valuable information from public view.

In Nashville, Tenn., a Vanderbilt University law professor has sought enforcement of a more than 30-year-old federal consent decree that shields arrest information from disclosure.

At the same time, an American Bar Association commission recommended numerous restrictions on criminal records before withdrawing the resolution from consideration by the ABA House of Delegates in August 2007.

In the early 1970s, a class-action lawsuit in Nashville, Tenn., resulted in two consent decrees (a mix between a contractual agreement and a court order) that limited how the city, county and state governments could use arrest information.

Specifically, in 1973 the government agreed not to use information about arrests that did not result in criminal convictions in considering applications for employment with the Metropolitan Government or its board of education.

Additionally, in 1974, the government entities agreed not to disseminate information about arrests made by the Metropolitan Government except to law enforcement agencies for law enforcement purposes.

Jump ahead more than 30 years to 2007 and *Doe v. Briley* is active again after a law professor who represented the class in the original case sought to have the consent decree enforced.

James F. Blumstein, a law professor at

Vanderbilt University, said he learned via a newspaper article in spring 2006 that the Metropolitan Nashville Police Department was displaying on a department Web site pictures, names and other information about men arrested for solicitation of prostitution.

"I had moved on," Blumstein said. "I hadn't monitored this. I thought and assumed that they would act in good faith; we negotiated this in good faith. Every once in a while you would see some arrest information come out, but I thought that came through the court system because news media have access to court records."

Blumstein said the reason behind the case is the protection of the interest an individual holds in being able to obtain employment, and not having an arrest that does not result in a criminal conviction hamper that interest.

"The evidence we developed at the time and was conceded by the government, and there's still pretty good evidence of that, is that people can be discriminated against in their employment when arrest records are available," Blumstein said.

He said that when raw arrest information is released, it does not afford the arrestee a chance to defend the arrest.

However, media groups have argued in court documents that changes in law since the consent decrees were accepted require the agreements to be modified.

Citing a United States Supreme Court decision (*Paul v. Davis*, 424 U.S. 693 (1976)), attorneys for Nashville's NewsChannel 5 have argued that one's reputation is not a liberty or property interest protected by the Constitution. They have also argued, citing a Sixth Circuit case from 1996, that there is no privacy interest "in one's criminal record."

Although Blumstein agreed that a change in law could be grounds for a modification to the consent decrees, he said the time to raise such an argument has come and gone. He said the appropriate time for that argument "would have been sometime after 1976," when Paul was decided.

The television station, however, has also argued that the information should be released under the Tennessee Public Records Act, which provides access to "all state, county and municipal records" unless a state statute provides otherwise, according to the station's court filings.

"Moreover, subsequent Tennessee case law has made it clear that the agreement to enter into the Consent Decree by the Metropolitan Government and by the State itself is unenforceable and a violation of public policy," NewsChannel 5 wrote in court documents.

The television station also pointed out that the Tennessee Court of Appeals has

"held that a governmental entity cannot enter into confidentiality agreements with regard to public records."

The station also argued that the decrees operate as a form of prior restraint in violation of the First Amendment.

Frank Gibson, director of the Tennessee Coalition for Open Government, said he believes advocates for overturning or redrafting the consent decrees have a good shot at winning.

"The government lawyers, who are on our side in this particular case, probably said it best in their argument before the federal judge," Gibson said. "The public has a right to know about crime in their neighborhoods. And, if the police department can't report that they've arrested someone in a crime that might be of great public interest then the public doesn't know about it."

Gibson also expressed concern that the consent decrees could negatively impact programs such as Crime Stoppers.

"This would make such programs as Crime Stoppers obsolete," he said. "Most Crime Stoppers are looking for people who've been charged with a crime, but haven't been convicted. This consent decree says the police department cannot identify anybody arrested for a crime until they are convicted."

Blumstein disagreed with Gibson's assessment, saying that the consent decrees do not prevent officials from releasing information about suspect who have yet to be arrested. He further said that the decrees do not prevent the police from announcing an arrest, they just cannot name the specific individual who has been arrested.

The case is still pending in federal District Court in Nashville.

'Guilt isn't the only measure'

Sparked by a speech by U.S. Supreme Court Justice Anthony Kennedy, the American Bar Association created two commissions to examine the national criminal justice system.

The first produced recommendations in 2004 related to sentencing procedures, specifically calling for the repeal of mandatory minimum sentences.

The current commission, the ABA Commission on Effective Criminal Sanctions, has made recommendations to restrict access to criminal history information.

These recommendations were to be presented to the ABA's House of Delegates in August 2007, but were withdrawn at the last minute.

In its recommendations, the commission urged governments to limit access, within the limits of the First Amendment to criminal cases where charges are dropped or not pursued, those that result in acquittal, where

Police Records Winter 2008

The Reporters Committee is grateful to legal intern Sean Hill for his work in updating the introduction to this guide. He built on the work of previous fellows and interns.

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convictions are overturned, or where confessions are set aside.

The commission also had recommended that access to misdemeanor and felony convictions not involving “substantial violence, large scale drug trafficking, or conduct of equivalent gravity” be restricted after “the passage of a specified period of law-abiding conduct.”

One recommended exception would have allowed such convictions to be used in later prosecutions or sentencing hearings. The commission had also recommended that judges should be able to grant access to records for “good cause shown” or where “public welfare support[s] revocation” of restriction.

The recommendations had also stated that disclosure of restricted records need not be made to employers or anyone else questioning an individual’s criminal background, except for law enforcement. The commission had also recommended that liability for an employer’s negligence in hiring be removed so long as the relevant records had been restricted.

The commission also recommended that credit reporting agencies be prohibited from releasing information about restricted records.

Chris Joyner, a reporter at The Clarion Ledger in Jackson, Miss., said he opposes any attempt to close access to records, but that the ABA commission’s recommendations scared him.

“In these specific recommendations, they scare me because they place the documents entirely on one side of the ledger in the hands of law enforcement,” Joyner said prior to the withdrawal of the recommendations. “That provides no opportunity for the press or for individual citizens to provide some sort of check on that power. It requires us to place a mount of trust on the court system that the court generally does not require.”

Joyner said court records are among the most important held by the government because they reflect how individuals are judged innocent or guilty.

He said it is important for court records to remain open not only to see who has been convicted, but also to see who has been



AP PHOTO BY LEFTERIS PITRAKISA

Availability of arrest records varies widely from state to state; some make little information available, while others make arrest information and entire ‘rap sheets’ available to the public.

found innocent.

“Innocence is a measure that is important for the press to be able to audit,” Joyner said. “If they close these records where someone is charged and found innocent, we’re sort of going around half blind.”

He said what impact these recommendations would have, if adopted by local governments, would be delayed. He said the impact may not be noticed until someone wants to look at large-scale issues within the court system.

“A big part of the watchdog function of the press is to go back and look at large numbers of cases to see what they tell us about the way the system is working for people,” Joyner said. “If those records are then sealed after the fact, we’re going to lose that ability.”

Sources for information about crimes, criminals

Information about crimes, criminals and their victims is a staple for most local newspaper and broadcast news operations. Reporters obtain it from police, the courts and

other sources, often with little difficulty.

If a charge has been filed and the case has been turned over to a court, access may be greater because the U.S. Constitution and many state constitutions guarantee public access to the criminal judicial system. But if the information you seek is in law enforcement officials’ hands, obtaining it can be more difficult.

Information may be kept in several different forms at a police station. Often there is a “blotter” -- a log of all calls for assistance received by police. It may provide rudimentary information about the location of an event, the time and a brief description of the caller’s request.

For additional information about an item on the blotter, you may want to see the incident report filed by the officer who answered the call. In some police departments all reports are kept in one office. In others, the reports may be filed in the office that will investigate the incident further. For example, a report about a robbery would go to the “crimes against persons” office and a report about prostitution or drugs would go to the vice squad.

A third source of information is the arrest or “booking” log, which provides basic information about individuals charged with crimes. Often it includes the name, address and age of the suspect and brief descriptions of charges filed against the individual.

To determine whether a person is being held in jail or has been released on bail, you may have to inquire at another office at the police station or the clerk’s office in the court where suspects are arraigned.

Cultivate your local police

In practice, getting to know members of the police force could be the most important step in learning about events, criminal and noncriminal, and getting access to police records.

At the scene of a crime, accident or other emergency, a friendly officer may provide information that you will not find in an incident report until hours later, if at all.

But be careful. Some of the information may be incomplete or not entirely accurate. Publishing such material without verification might lead to a libel suit. You should read the actual incident report, or contact higher officials who can confirm the information, before writing your story.

In most states, fair and accurate reports of the contents of official documents, including police records, are privileged. In those states, a news organization that accurately reports the contents of an official police document containing false information cannot be held liable for the inaccuracies. In a few cases courts have ruled that a reporter who has not read the report from which the information

was obtained cannot invoke the privilege.

Therefore, even if a police official has provided information from an incident or arrest report over the telephone, it is a good practice to visit the police station and read the document yourself.

At headquarters, police personnel may alert you to a seemingly innocuous blotter entry that could be a page one story. Your source may let you read the relevant reports or refer you to someone else who has them.

Laws and rules govern access

The open records laws in most states guarantee that police records are open unless some specific exemption would allow officers to deny access to the information. Some of those laws entitle you to inspect records during regular business hours.

Others allow you to ask for copies. The time limit for providing copies will vary from state to state.

If, in your state, an open records request would compel you to wait for paper copies of information, you may want to invoke the access laws only as a last resort.

Individual police officers may not be aware of the requirements of the state's open records laws. Be prepared to point to statutory provisions that entitle you to inspect and copy public records.

Most police agencies also have written policies concerning what information is public and who may release arrest and incident reports. Acquaint yourself with those policies so that you can invoke them when needed.

If the policies are at odds with the requirements of the open records law, you

may want to bring this to the attention of the city, county or state attorney.

Statutes and case law on media access to police records vary greatly from state to state. Some states' open records laws, including Indiana's, Minnesota's and Oregon's, go into great detail about access to arrest records, incident reports and "rap sheets."

Open records laws in some states make no mention of law enforcement records. In some of these states, court opinions specify the law enforcement records that are open.

Often the records law will exempt "investigatory" records. An informal poll of state press associations showed that their foremost concern in gaining access to police records is the broad and frequent interpretation of police records as "investigatory," even when release would clearly not harm investigations.

State-by-state guide to access

The following summaries of state laws are derived from the "police records" section of the Reporters Committee's "Open Government Guide," available online at www.rcfp.org/ogg. These guides are written by attorneys in each state who often litigate these issues on behalf of journalists.

Alabama

Since police departments and their officers can properly be considered "public officers and servants of counties and municipalities" within Alabama Code § 36-12-1 (2001), all police records that are not expressly made confidential by statute or that must be kept confidential to protect a pending criminal investigation should be open.

Accident reports (Alabama Uniform Traffic Reports) are available to the public.

The police blotter is a public record under the authority of *Birmingham News Co. v. Watkins*, No. 38389 (Cir. Ct. of Jefferson County, Ala., Oct. 30, 1974) (based upon the First Amendment, not Public Records Law, with discretion for police department to withhold portions of records or entire records if and as necessary to prevent "actual interference" with law enforcement).

There is no specific Alabama statutory provision or case law authority regarding public access to 911 tapes, but the Alabama Attorney General has held that 911 tapes are public records, Op. Att'y Gen. Ala., No. 2001-086 (Jan. 26, 2001), and Alabama media have been able to obtain access to such tapes in several instances in recent years.

Law enforcement "investigative reports and related investigatory material" are not

public records. Ala. Code § 12-21-3.1(b) (Supp. 2005). However, there is authority for public access to complaint reports, including the front side of incident/offense reports subject to the right of the sheriff to withhold or redact certain information on a case-by-case basis depending on the nature of the case, the status of the investigation, whether the victim would be subject to threats or intimidation, or when public disclosure would hinder the investigation; *Washington County Publications v. Wheat*, No. CV-99-94 (Cir. Ct. of Washington County, Ala., May 1, 2000); as well as search and arrest warrants, with supporting affidavits and depositions, after a search warrant or arrest warrant is executed and returned. 197 Op. Att'y Gen. Ala. 13 (Oct. 10, 1984).

There is no specific statutory or case law authority regarding public access to records of closed investigations.

There is authority for public access to the following arrest records: arrest reports, with redaction of witness identification and witness reports at the discretion of the police department, *Birmingham News Co. v. Deutsch*, CV 85-504-132 JDC (Cir. Ct. of Jefferson County, Ala., Equity Div., Aug. 19, 1986) (consent order); and arrest warrants and search warrants, with supporting affidavits and depositions, after execution and return. 197 Op. Att'y Gen. Ala. 13 (Oct. 10, 1984).

Compilations of criminal histories by the Alabama Criminal Justice Information Center (ACJIC) are available to only those persons with a "right to know" or "need to know" as determined by the ACJIC Com-

mission. Op. Att'y Gen. Ala. No. 2005-042, 2005 Ala. AG LEXIS 9 (Jan. 18, 2005); Ala. Code § 41-9-590 *et seq.* (2000); Ala. Code § 41-9-636 to 642 (2000).

There is statutory or case law authority for closure of the following records regarding crime victims: Court files regarding crime victim's petition hearing that reveals the victim's address, telephone number, place of employment, and related information, Ala. Code § 15-23-69 (1995); Crime Victims Compensation Commission reports and information obtained from law enforcement officers and agencies, Ala. Code § 15-23-5 (1995); child abuse reports and records, Ala. Code § 26-14-8(c) (Supp. 2005); and complainant identification on arrest reports. *Birmingham News Co. v. Deutsch*, CV 85-504-132 JDC (Cir. Ct. of Jefferson County, Ala., Equity Div., Aug. 19, 1986).

Alabama Attorney General opinions have approved closure of information gathered about a crime victim who is also a witness to a crime. Op. Att'y Gen. Ala. No. 2000-225, 2000 Ala. AG LEXIS 166 (Aug. 30, 2000); Op. Att'y Gen. Ala. No. 2000-203, 2000 Ala. AG LEXIS 136 (Aug. 8, 2000).

There is no statutory or case law authority regarding public access to records of confessions.

Rule 3.9 of the Alabama Rules of Criminal Procedure protects the identity of confidential informants when sworn testimony is taken to support the issuance of a search warrant.

There is no statutory or case law authority regarding public access to records of police techniques; however, the Alabama Crimi-



AP PHOTO BY GEORGE WIDMAN

Dispatchers work inside a 911 call center in Manheim, Pa. Recordings of the calls are often only released if police think there will be a benefit in doing so, although in many states they will not be released at all.

nal Justice Information Center's proposed changes to the Law Enforcement Officers' Handbook state that a law enforcement agency may redact information from Alabama Uniform Incident/Offense Reports that "would reveal investigatory techniques." See ACJIC, *Law Enforcement Officers' Handbook*, Part III (proposed changes) (October 2005), available at <http://www.alabamapress.org/alapress/forms/LEOfficersHandbook.pdf>.

Amug shot in a police computer database is a public record. Op. Att'y Gen. Ala. No. 2004-108, 2004 Ala. AG LEXIS 35 (Apr. 1, 2004).

State law requires each sheriff to keep in the sheriff's office, subject to public inspection during office hours, a well-bound book that must include a description of each prisoner received into the county jail. Ala. Code § 36-22-8 (2001).

Alaska

Statutes requiring or authorizing the withholding of police records include the Public Records Act, the Criminal Justice Information Systems Privacy and Security Act (Alaska Stat. [hereinafter "AS"] 12.62), and AS 28.15.151, dealing with drivers' records and traffic reports.

These laws are dealt with in the comprehensive survey of the law governing access to police records contained in the Nov. 25, 1994, Op. Att'y Gen. No. 663-93-0039 (referred to hereafter as "1994 Police Records AG Opinion.").

Police records are specifically addressed in the Public Records Act, as a result of a 1990 amendment that added AS 40.25.120(6). This exception to the general public right to inspect public records provides that an agency may withhold law enforcement records that: could reasonably be expected to interfere with enforcement proceedings; would deprive a person of a right to a fair trial or an impartial adjudication; could reasonably be expected to constitute an unwarranted invasion of the personal privacy of a suspect, defendant, victim or witness; could reasonably be expected to disclose the identity of a confidential source; would disclose confidential techniques and procedures for law enforcement investigations or prosecutions; or would disclose guidelines for law enforcement investigation or prosecution if the disclosure could reasonably be expected to risk circumvention of the law.

The addition of subsection 120(6) (which mirrors the federal FOIA provisions for law enforcement records, and was substantially

copied by subsequent amendment of the Anchorage Municipal Code) simply codified what was generally understood to be the prevailing common law, and was consistent with an earlier superior court case granting access to a police tape recording. *Anchorage Daily News v. Municipality of Anchorage*, 11 Media L. Rptr. 2173 (Alaska Super. Ct., 3rd Jud. Dist., April 26, 1985). There, the court ordered release of tape recorded conversations between a police officer and a municipal assembly member stopped for a traffic violation. The court stated that in order to construe the municipal ordinance exempting police records as being consistent with state law, police records must be disclosed, at least when a case is closed and in the absence of other circumstances that compel continued withholding, such as endangerment of witnesses and disclosure of confidential informants or investigative techniques.

Records that are otherwise public remain subject to disclosure when they are used for, included in, or relevant to law enforcement proceedings and other litigation. AS 40.25.122.

The Alaska Rules of Court were revised in 1989 to exempt search warrants and related affidavits, receipts and inventories from dis-



closure until after an indictment is returned, except upon a showing of good cause, and to make these documents presumptively public after charges are filed. Ak.R.Cr.P. 37(e).

Accident reports are presumably open, subject to the restrictions permitted by AS 40.25.120(a)(6).

Police blotters are presumably open under the public records statute, and case law interpreting similar statutes.

911 tapes are presumably available on the same basis as other police records, and have been obtained by news media, but in any given case access may be subject to arguments based on the Victim's Rights Act, and balancing of personal privacy interests in individual cases.

The state public records law, in AS 40.25.120(a)(6)(A) (and a similar provision in the Anchorage Municipal Code and some other municipal ordinances) exempts from disclosure law enforcement records or information that "could reasonably be expected to interfere with enforcement proceedings." The statute does not expressly distinguish between active and closed investigations, but records from a closed case are less likely to interfere with proceedings.

Arrest records are presumably public. See 1994 Police Records AG Opinion, § C; see also, Jan. 1, 1989, Op. Att'y Gen. No. 663-89-0142.

The names of victims of sexual assaults or kidnapping can no longer be given out. In addition, the business and residence addresses and phone numbers of victims or witnesses of any crimes cannot be given out. See generally, Article 2 of the Victim's Rights Act, AS 12.61.100 - .150.

Nothing in the statute specifically exempts confessions, but as a practical matter disclosure of confessions by police and prosecutors is governed by standards issued by the American Bar Association. Confessions often become public when they are attached to court pleadings filed in connection with motions to suppress their use as evidence in a trial.

The Public Records Act specifically provides that an agency may withhold records or information compiled for law enforcement purposes that could reasonably be expected to disclose the identity of a confidential

source, or that would disclose confidential techniques and procedures for law enforcement investigations or prosecutions. AS 40.25.120(6)(D), (E). See 1994 Police Records AG Opinion, § A.1.a.

The Public Records Act specifically authorizes an agency to withhold records or information compiled for law enforcement purposes that could reasonably be expected to interfere with enforcement proceedings, or that would disclose confidential techniques and procedures for law enforcement investigations or prosecutions. AS 40.25.120(6)(A)(E)(F). See 1994 Police Records AG Opinion, § A.1.b.

The Public Records Act does not specifically address photographs or mug shots within the context of law enforcement records, but as these would be within the general definition of public records, there is no apparent reason why mug shots would not be available or unavailable according to the criteria set forth in AS 40.25.120(6).

Arizona

The release of police records is governed by the Arizona Public Records Law. A.R.S. §§ 39-121 to -125.

Executive orders 98-6, 98-4 and 95-5 have prohibited the release of accident reports for commercial purposes.

911 tapes are public records and thus presumed open for inspection and copying.

In *Cox Arizona Publications Inc. v. Collins*, 175 Ariz. 11, 14, 852 P.2d 1194, 1998 (1993), the Arizona Supreme Court reversed the court of appeals' ruling that the public is not entitled to examine police reports in "an active ongoing criminal prosecution." The Arizona Supreme Court held that such a "blanket rule . . . contravenes the strong policy favoring open disclosure and access." Thus, public officials bear the "burden of showing the probability that specific, material harm will result from disclosure" before it may withhold police records. *Mitchell v. Superior Court*, 142 Ariz. 332, 335, 690 P.2d 51, 54 (1984).

However, A.R.S. § 13-2813 prohibits disclosing "an indictment, information or complaint . . . before the accused person is in custody or has been accused."

A person who has been wrongly "arrested, indicted or otherwise charged," can have the arrest record cleared and such information shall not be released to any person. A.R.S. § 13-4051.

A.R.S. § 41-619.54(C) provides that all criminal history records in the hands of the Board of Fingerprinting are private and not subject to A.R.S. § 39-121. Further, it provides that any good cause exception hearing is also private and not subject to A.R.S. § 39-121.

Arizona does not specifically prohibit the

disclosure of a victim's identity contained in police records. Accordingly, the general provisions of Arizona's Public Records Law governs.

Confessions in police records are public records and thus presumed open for inspection and copying.

Records of reports of criminal activity "to a silent witness, crime stopper or operation game thief program" are not public. A.R.S. § 12-2312.

Wiretapping activity cannot be revealed except to specific public officials involved in the investigation. A.R.S. § 13-3011.

Mugshots are public records and thus presumed open for inspection and copying.

Arkansas

The Arkansas Freedom of Information Act ("FOIA") exempts "[u]ndisclosed investigations by law enforcement agencies of suspected criminal activity." Ark. Code Ann. § 25-19-105(b)(6). A record must be investigative in nature to fall within the exemption, *Hengel v. City of Pine Bluff*, 307 Ark. 457, 821 S.W.2d 761 (1991), and only records of "ongoing criminal investigations" are exempt. *Martin v. Musteen*, 303 Ark. 656, 799 S.W.2d 540 (1990); *McCambridge v. City of Little Rock*, 298 Ark. 219, 766 S.W.2d 909 (1989).

By statute, traffic accident reports completed by a police agency must be made available for public inspection "at all reasonable times." Ark. Stat. Ann. § 27-53-305(a). A separate statute provides that accident reports by the state police are open to the public. Ark. Code Ann. § 27-53-209.

Police blotters are open, as are incident reports, dispatch logs, and similar "routine" records. *Hengel v. City of Pine Bluff*, 307 Ark. 457, 821 S.W.2d 761 (1991); Ark. Op. Att'y Gen. No. 87-319.

Emergency calls recorded by a publicly supported 911 communications center are open. Ark. Op. Att'y Gen. Nos. 99-409, 95-018, 94-120, 94-100, 90-236. However, a statute exempts "subscriber information" from disclosure. Ark. Code Ann. § 12-10-317(a)(2).

The FOIA's law enforcement exemption, Ark. Code Ann. § 25-19-105(b)(6), applies to records that are investigative in nature, *Hengel v. City of Pine Bluff*, 307 Ark. 457, 821 S.W.2d 761 (1991), but only if the investigation remains ongoing. The *Hengel* case indicates that information, such as an officer's speculation about a suspect's guilt, his or her views as to the credibility of witnesses, and statements by informants fall within the exemption. See also Ark. Op. Att'y Gen. No. 99-110 (exemption applies to opinions and impressions of investigating officer).

Arrest records are open. *Hengel v. City of Pine Bluff*, 307 Ark. 457, 821 S.W.2d 761

(1991). However, records of the arrest or detention of a juvenile are exempt unless disclosure is authorized by written order of the juvenile division of circuit court or the juvenile is formally charged with a felony in the criminal division. Ark. Stat. Ann. § 9-27-352.

So-called “rap sheets” are exempt from disclosure by virtue of Ark. Code Ann. § 12-12-1003(e). This information, which is maintained by the Arkansas Crime Information Center, cannot be obtained from prosecutors, local police departments, or other authorized persons who have received it from the center. *E.g.*, Ark. Op. Att’y Gen. No. 94-054.

A statute passed in 1997 provides that the address and telephone number of a victim of a sex offense, a victim of any violent crime, a minor victim of any offense, or a member of the victim’s family “shall be exempt from the Arkansas Freedom of Information Act.” Ark. Code Ann. § 16-90-1110(c)(2).

Records reflecting confessions are apparently open to the public, unless the particular record is considered “investigative” in nature. *See* Ark. Op. Att’y Gen. No. 89-158.

The FOIA does not contain a specific exemption for the identities of confidential informants, although such information is exempt under the law enforcement exemption, Ark. Code Ann. § 25-19-105(b)(6), so long as an investigation is in progress. Ark. Op. Att’y Gen. No. 2002-149, 90-305.

Generally, the FOIA’s law enforcement exemption will not apply to agency manuals that contain policies and instructions to law enforcement personnel, since they are not investigative in nature. *Cf. Hengel v. City of Pine Bluff*, 307 Ark. 457, 821 S.W.2d 761 (1991). The attorney general has opined that law enforcement manuals are exempt only if they are “part of an ongoing investigation.” Ark. Op. Att’y Gen. No. 85-134.

Mugshots are open. The FOIA definition of “public record” is broad enough to include photographs, *see* Ark. Code Ann. § 25-19-103(5)(A), and a mug shot is not sufficiently investigative to qualify for protection under the law enforcement exemption. *Cf. Hengel v. City of Pine Bluff*, 307 Ark. 457, 821 S.W.2d 761 (1991).

California

Open records law in California is represented by statute primarily through the California Public Records Act (“CPRA”),



AP PHOTO BY DAVID KIDWELL, POCONO RECORD

Journalists rely on access to the records created during police investigations and other information gathered from crime scenes to report on important stories.

Cal. Gov’t. Code §§ 6250 through 6276.48, and by the state’s constitution through the Sunshine Amendment, Cal. Const. Art. I, § 3(b), passed by voters in 2004.

Accident reports are exempt. Cal. Veh. Code § 20012. Abstracts of accident reports required to be sent to the state are open to the public for inspection at the DMV during office hours. Cal. Veh. Code § 1808.

A police blotter is a public record as to information that is expressly stated to be subject to disclosure in the statute. Cal. Gov’t Code § 6254(f)(1), (2) and (3).

911 tapes are public as to most information contained in tape but tape itself arguably not required to be disclosed under investigatory records exemption. Cal. Gov’t Code § 6254(f)(1), (2), and (3).

Specified facts from investigatory or security records, without disclosure of the records themselves, must be disclosed unless disclosure would endanger the successful completion of an investigation, or related investigation, or endanger a person involved in the investigation. Cal. Gov’t Code §§ 6254(f)(1), (f)(2) and (f)(3).

For arrests, the agency must disclose such facts as the name, occupation and detailed physical description of every individual arrested by the agency, as well as the time and date of arrest, the time and date of booking, the location of the arrest, the factual circumstances surrounding the arrest, the amount of bail set, the time and manner of release or the location where the individual

is currently being held, and all charges the individual is being held upon, including any outstanding warrants from other jurisdictions and parole or probation holds. Cal. Gov’t Code § 6254(f)(1).

For complaints or requests for assistance, the agency must disclose such facts as the time and nature of the response, the time, date and location of occurrence, the time and date of the report, the name and age of the victim, the factual circumstances surrounding the crime or incident, and a general description of any injuries, property or weapons involved. Cal. Gov’t Code § 6254(f)(2).

The California Public Records Act’s exemption for investigatory files does not terminate when the investigation terminates. *Williams v. Superior Court*, 5 Cal. 4th 337, 362, 852 P.2d 377, 19 Cal. Rptr.2d 882 (1993).

Arrest records, including a list of specific details, must be released, except to the extent that disclosure of a particular item of information would endanger the safety of a person involved in an investigation or would endanger the successful completion of the investigation or a related investigation. Cal. Gov’t Code § 6254(f)(1); *see also County of Los Angeles v. Superior Court (Kusar)*, 18 Cal. App. 4th 588, 22 Cal. Rptr. 2d 409 (1993).

Local summary criminal history information (a “rap sheet”) is exempt from disclosure. Cal. Penal Code § 13300.

The name and age of victims shall be made public, unless disclosure would endanger the



safety of a person involved in an investigation. However, the name of any victim of certain crimes defined by various provisions of the Penal Code relating to sex offenses may be withheld at the victim's request, or at the request of the victim's parent or guardian if the victim is a minor. Cal. Gov't Code § 6254(f)(2).

If a confession is part of an agency's investigatory records compiled for correctional or law enforcement purposes, this information is not required to be disclosed. However, once introduced into evidence in a criminal proceeding, other than a grand jury proceeding, public access to the information is presumed absent a constitutional showing justifying closure.

The identity of confidential informants and any statements made by them are expressly exempt from disclosure by the CPRA. Cal. Gov't Code § 6254(f).

Police techniques or "security procedures" are expressly exempt from disclosure. Cal. Gov't Code § 6254(f).

Access to mug shots appears to be discretionary. *See* Cal. Op. Att'y Gen. No. 03-205 (2003) (sheriff has discretion to furnish copies of mug shots to public or media but once released a copy must be made available to all who make request). In California, law enforcement agencies routinely make mug shots available to the press.

Colorado

Accident reports filed with the Motor Vehicle Division are public records under Colo. Rev. Stat. §§ 42-4-1610 and 42-1-206.

Records of official actions, including records of arrests on a "police blotter," are public records under Colo. Rev. Stat. §§ 24-72-303 and 24-72-304.

911 tapes are subject to release. *See* Colo. Rev. Stat. §§ 24-72-303 and 24-72-304.

For police investigatory records, public access is discretionary with the custodian, Colo. Rev. Stat. § 24-72-305(5), who may deny inspection if disclosure would be "contrary to the public interest." *See Pretash v. City of Leadville*, 715 P.2d 1272 (Colo. App. 1985). The statute does not differentiate between active and closed investigations.

Arrest records are open under Colo. Rev. Stat. § 24-72-303(1), unless sealed by

the court under Colo. Rev. Stat. § 24-72-308(1).

Compilations of criminal history are open under Colo. Rev. Stat. § 24-72-303.

Victims' identities, insofar as they are part of police records, are public records subject to inspection. The only exception is the name of victims of sexual assault. Colo. Rev. Stat. § 24-72-304(4).

Confessions are public records if procured during an official action by a criminal justice agency.

Confidential informants' identities and statements are subject to withholding if their disclosure may harm an ongoing investigation or cause other injury to the public interest. Colo. Rev. Stat. § 24-72-305(5). *See Pretash v. City of Leadville*, 715 P.2d 1272 (Colo. App. 1985).

Records of security procedures may be withheld under Colo. Rev. Stat. § 24-72-305(5) if disclosure would be contrary to the public interest.

Mug shots taken at the time of arrest should be deemed open because they are "photographs... which are made, maintained or kept by any criminal justice agency for use in the exercise of functions required or authorized by law," and they are records of an "official action." Colo. Rev. Stat. § 24-72-303(1), §§ 24-72-302(4) & (7).

Connecticut

As per the Connecticut Freedom of Information Act ("FOIA," codified as amended at Conn. Gen. Stat. §§ 1-200 through 1-241), law enforcement records are exempt if "compiled in connection with the detection or investigation of crime, if the disclosure of said records would not be in the public interest because it would result in the disclosure of (A) the identity of informants not otherwise known or the identity of witnesses not otherwise known whose safety would be endangered or who would be subject to threat or intimidation if their identity was made known, (B) signed statements of witnesses, (C) information to be used in a prospective law enforcement action if prejudicial to such action, (D) investigatory techniques not otherwise known to the general public, (E) arrest records of a juvenile, which shall also include any investigatory files, concerning the arrest of such juvenile, compiled for law enforcement purposes, (F) the name and address of the victim of a sexual assault... or (G) uncorroborated allegations..." Conn. Gen. Stat. § 1-210(b)(3).

In *Calibey v. State Police*, Do. #FIC 86-310 (Jan. 28, 1987), the Freedom of Information Commission held that a report of a fatal motor vehicle accident was not exempt from disclosure under FOIA.

In *Town of Trumbull v. FOIC*, 5 Conn. L. Trib. No. 34 (1979), the Superior Court held

that daily activity sheets, after the deletion of certain exempt information, were not exempt from disclosure under FOIA.

There are no specific provisions or reported authorities regarding 911 tapes.

In *Gifford v. FOIC*, 227 Conn. 641, 631 A.2d 252 (1993) the Supreme Court ruled that reports prepared by police in connection with arrests were not required to be disclosed to the public during the pendency of the related criminal prosecution, but Connecticut law other than the FOIA law requires limited data to be released regarding arrests.

There are no specific provisions or decisions regarding mug shots, and are presumed open unless a specific exemption applies.

District of Columbia

Open records law in the District of Columbia derives primarily from the District of Columbia Freedom of Information Act of 1974. D.C. Code Ann. § 2-531 *et seq.* ("D.C. Act").

The privacy exemption, D.C. Code Ann. § 2-534(a)(2), investigatory records exemption, *id.* at § 2-534(a)(3), and arson reporting exemption, *id.* at § 2-534(a)(9), may apply. Complaints and other specified police records shall be open for public inspection under D.C. Code Ann. § 5-113.06.

The mayor's office has ruled that when a defendant has pleaded guilty to a charge and a videotaped confession was never used against him in court, the privacy rights of the police officers involved and the victim's family bring the videotape under the privacy exemption of the D.C. act. The defendant was found to have forfeited his privacy rights, and parts of the tape could be made public that merely identified him as the perpetrator. *In re Appeal of Molly Pauker, Esq.*, (unnumbered FOIA App.) (Office of the Mayor, Nov. 3, 1989).

No sex offender registration information is available as a public record except those records made public by regulations promulgated by the Mayor. D.C. Code Ann. § 22-4017.

Delaware

Delaware open records law derives by statute through the state's Freedom of Information Act. 29 Del. C. § 10001 *et seq.* (the "Act" or "FOIA").

Statutory exemptions related to criminal records and files are poorly worded and contradictory. Police agencies are willing to release general statistical information but are reluctant to release individual files, often relying on the investigatory records exception. *See* 29 Del. C. § 10002(g)(3).

Accident reports are exempt only if the disclosure would constitute an invasion of personal privacy or constitute an investigative file. *See* 29 Del. C. § 10002(g)(3); 29

Del. C. § 10002(g)(6).

Police blotters are not exempt; 911 tapes may not be exempt.

Investigatory records in active investigations are exempt under the third exemption the investigatory files exemption. *See* 29 Del. C. § 10002(g)(3). Closed records may also still be exempt. *See* Del. Op. Att’y Gen., No. 99-ib14 (Nov. 5, 1999).

Arrest records are exempt under open records exemption four except an individual’s own record. 29 Del. C. § 10002(g)(4).

Past practice suggests that compilations of criminal histories may be released. *Bd. of Managers of Delaware Justice Info. Sys. v. Gannett Co.*, 808 A.2d 453 (Del. Super. 2002).

As a matter of practice, investigatory reports are released to victims, though the Act appears to treat the information as exempt. *See* 29 Del. C. § 10002(g)(3).

Confessions are exempt under both exemption three and exemption four. *See* 29 Del. C. §§ 10002(g)(3), (4).

Information on confidential informants is exempt if the disclosure would constitute an endangerment to local, state or national welfare and security under open records exemption five. 29 Del. C. § 10002(g)(5).

Police techniques could be exempt under open records exemptions five. 29 Del. C. § 10002(g)(5), (16). *See also* Del. Op. Att’y Gen., No. 05-ib19 (Aug. 1, 2005).

Mug shots may be exempt under exemption four. 29 Del. C. § 10002(g)(4).

Florida

The Florida open records law is codified at Fla. Stat. sections 119.01 to 119.15. As a general rule, accident reports are subject to chapter 119 disclosure requirements. However, police accident records often encompass exempt information, such as confessions or investigatory data.

Police blotters are subject to public inspection.

To the extent that records of 911 tapes are not otherwise statutorily exempt from the mandates of the Public Records Law (Chapter 119) (i.e., confessions, etc.), they are subject to public inspection.

The Legislature has exempted from pub-



AP PHOTO BY MICHAEL PROBST

Information from active investigations can be withheld under most state open records acts.

lic inspection certain criminal intelligence and investigative records and files. Fla. Stat. sec. 119.07(3)(f). The police investigative/intelligence records exemption only applies when such records are active. Fla. Stat. sec. 119.07(3)(b). Criminal intelligence/investigative information is considered to be “active” while such information is directly related to pending prosecutions or appeals. Fla. Stat. sec. 119.011(d). Once the conviction and sentence have become final, the exemption no longer applies. *State v. Kokal*, 562 So.2d 324 (Fla. 1990). Records disclosed to a criminal defendant are not exempt as investigative or intelligence information. Fla. Stat. sec. 119.011(3)(c)(5).

The following information relating to arrest records is not considered to be criminal intelligence/investigative information and is available for inspection: the name, sex, age and address of a person arrested; the time, date and location of the incident and of the arrest; the crime charge; documents given or required by law or agency rule to be given to the person arrested; and information and indictments except as provided in Fla. Stat.

secs. 905.26 119.011(3)(c).

Juvenile records traditionally have been treated differently from other records within the criminal justice system. The Florida Juvenile Justice Act exempts most information pertaining to juveniles. Fla. Stat. sec. 39.045(5). However, Fla. Stat. sec. 39.045(9) authorizes a law enforcement agency to release for publication the records of a child taken into custody under certain limited circumstances, such as where the juvenile has been taken into custody for a violation of law which would be a felony if committed by an adult.

Criminal histories, like other non-exempt public records, are subject to the statutory disclosure requirements of the Public Records Law, Chapter 119. However, courts have the power to seal or expunge records containing criminal history information under statutorily specified circumstances. Fla. Stat. sec. 943.058.

The name, sex, age and address of the victim of a crime is open to public inspection under the Public Records Law. Fla. Stat. sec. 119.011(3)(c)(2), but other information concerning victims, such as the victim’s telephone number or address or personal assets, is exempt, Fla. Stat. 119.03(3)(s).

Information revealing the “substance of a confession” of a person arrested or of witness lists exchanged pursuant to the provisions of Fla. R. Crim. P. 3.220 is not subject to the disclosure requirements until such time as the charge is finally determined by adjudication, dismissal or other disposition. Fla. Stat. sec. 119.07(3)(k).

Information revealing the identity of confidential informants or sources is exempt from the provisions of Chapter 119. Fla. Stat. sec. 119.07(3)(c).

Information revealing police surveillance techniques, procedures or personnel, and information revealing undercover personnel of any criminal justice agency is not subject to public inspection. Fla. Stat. sec. 119.07(3)(d).

Mug shots are subject to public inspection unless they are exempt criminal intelligence information or are otherwise exempt. Fla. Stat. § 119.011(1); Fla. Stat. § 119.07(3)(b).

Georgia

The Georgia Open Records Act (“the Act”) specifically provides that “initial police arrest reports and initial incident reports”



are public records and must be disclosed. O.C.G.A. § 50-18-72(a)(4).

In 1999, the General Assembly limited access to individual Uniform Motor Vehicle Accident reports to those parties named in the report or those that otherwise have a “need” for the report as defined by statute. O.C.G.A. § 50-18-72(4.1).

The Act permits access to public records of an emergency “911” system, except information which would reveal the name, address, or telephone number of a person placing the call. O.C.G.A. § 50-18-72(a)(16).

The Act exempts records of pending investigations. O.C.G.A. § 50-18-72(a)(4). Records related to closed or terminated investigations are therefore subject to disclosure under the Act.

The Act specifically provides that initial police arrest reports are public records. O.C.G.A. § 50-18-72(a)(4).

Under O.C.G.A. § 35-3-34(d.2) the public may obtain access to records of in-state felony convictions through the Georgia Crime Information Center or local law enforcement agencies. *See Napper v. Georgia Television Co.*, 257 Ga. 156, 356 S.E.2d 640 (1987).

The Act exempts records the disclosure of which would reveal the identity of a confidential source. O.C.G.A. § 50-18-72(a)(3).

The Act does not exempt records of confessions, records identifying crime victims, records revealing police techniques, or mug shots.

Hawaii

Open records law in Hawaii is represented by the state’s Uniform Information Practices Act (“UIPA”). Act 262, 14th Leg., Reg. Sess. (1988), *reprinted in* 1988 Haw. Sess. Laws 473 (codified at Haw. Rev. Stat. ch. 92F (Supp. 1991)).

The government may justify a denial of a request for police records by invoking particularly one of two UIPA exemptions. It may cite Section 92F-13(2), which excepts “[g]overnment records pertaining to the prosecution or defense of any judicial or quasi-judicial action to which the State or any county is or may be a party, to the extent that such records would not be discoverable.” Haw. Rev. Stat. § 92F-13(2) (emphasis added). In

other instances it may cite Section 92F-13(3), which excepts “[g]overnment records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function.” Haw. Rev. Stat. § 92F-13(3).

Monthly supplemental homicide reports prepared by county police departments must be made available for public inspection and copying. Supplemental Homicide Reports, Office of Information Practices (“OIP”) Op. Ltr. No. 94-1 (Mar. 11, 1994). The reports contain information concerning the age, gender, and race of the victim(s) and offender(s); the weapon used; and the circumstances of the homicides.

Copies of traffic citations are available for public inspection and copying. Public Access to City and County of Honolulu Traffic Citations, OIP Op. Ltr. No. 95-20 (Aug. 21, 1995).

Police blotters, chronological records of police arrests, are public records when they concern adults. Public Access to Police Blotter Information, OIP Op. Ltr. No. 91-4 (Mar. 25, 1991).

In *Burnham Broad. Co. v. County of Hawaii*, Civ. No. 92-0161 (Haw. 3d Cir. Mar. 1992), a Hawaii court found that a county government agency was required to release 911 tapes and that its failure to do so created agency liability for the media plaintiffs’ court costs and attorneys’ fees, but privacy concerns could outweigh the public’s interest in agency accountability when 911 tapes involve living individuals.

Investigative reports are confidential if their disclosure would likely interfere with agency law enforcement activities, frustrate a legitimate government function, or reveal deliberative processes. An examination of all factors is necessary to determine whether such reports must be disclosed. *See, e.g.*, RFO 98-004 - Honolulu Police Department; Request for Opinion on *The Honolulu Advertiser; Request for Internal Affairs Reports*, OIP Op. Ltr. No. 98-5 (Dec. 20, 1998). Investigatory records regarding closed criminal investigations should be made available after redaction of information identifying the victim, witnesses and defendant’s Social Security number, home address, and home telephone number. Release of Police Records, OIP Ltr. Op. No. 99-2 (Apr. 5, 1999).

Section 831-3.1 prohibits the dissemination by the state of any record of arrest that is not followed by a valid conviction, convictions which have been expunged, convictions in which no sentence is imposed, and misdemeanor convictions after the lapse of 20 years. *Cf.* Request for Written Opinion Regarding Disclosure of Arrest Records, OIP Op. Ltr. No. 97-5 (June 10, 1997).

Disclosure of a confession while a case is still open may be denied if its disclosure

might threaten to frustrate a legitimate government function or interfere with law enforcement measures.

The UIPA has no *specific* general exception for information compiled for law enforcement purposes that would, if disclosed, identify a confidential informant or reveal confidential investigative techniques. Nevertheless, the OIP has exempted from disclosure agency records that would interfere with investigative or law enforcement procedures of agencies.

Standards of police conduct are not confidential unless they concern purely internal matters. Disclosure of case-specific police techniques, on the other hand, may be protected if disclosure would frustrate the legitimate government function of law enforcement. *See* Public Access to General Order Nos. 528, 601, 602, 604, 606, 804, and 805, OIP Op. Ltr. No. 95-13 (May 8, 1995).

Mug shots are government records for the purposes of the UIPA. Police Department Mug Shots, OIP Op. Ltr. No. 94-12 (June 29, 1994). However, when an arrest record which includes the mug shots is expunged, the mug shots must remain confidential. OIP Op. Ltr. 03-09 (June 26, 2003). Moreover, after one year from the date of a person’s arrest, the mug shot is protected from disclosure unless: (1) an active prosecution of the charge is pending, or (2) the arrest results in a conviction.

Idaho

Police records are subject to disclosure pursuant to Idaho Code § 9-335, which generally exempts active and inactive investigatory records.

Accident reports should be available to the public under the terms of the statute, although they are not expressly discussed.

Police blotters should also be available to the public under the terms of the statute, although they are not expressly discussed.

911 tapes are handled in an erratic manner by Idaho law enforcement agencies. Although there is no express exception that applies to such tapes, agencies claim that release of the tapes would constitute an invasion of privacy.

Records of active investigations compiled for law enforcement purposes by a law enforcement agency are generally exempt, Idaho Code § 9-335(1), but only to the extent that the production of such records would: (a) Interfere with enforcement proceedings; (b) deprive a person of a right to a fair trial or an impartial adjudication; (c) constitute an unwarranted invasion of personal privacy; (d) disclose the identity of a confidential source or confidential information furnished only by the confidential source; (e) disclose investigative techniques or procedures; or (f)

endanger the life or physical safety of law enforcement personnel. Records of inactive investigations shall be disclosed unless the disclosure would violate the same provisions. Idaho Code § 9-335(2).

Arrest records should be available for public inspection and generally there is little difficulty in obtaining such records.

The identity of a crime victim is generally kept confidential by law enforcement agencies until the filing of a criminal complaint. This is based upon agency claims that the victim's privacy rights must be protected. There is no express exemption in the statutes, however, which specifically exempts the name of a crime victim from disclosure.

Confessions are not specifically addressed in the Idaho open records statutes. Most law enforcement agencies and prosecutors consider confessions to be "investigative records" and therefore exempt from disclosure, unless and until the confession is filed with the court or introduced in open court.

Names of confidential informants are exempt from disclosure pursuant to Idaho Code § 9-335(1).

Information concerning police techniques is exempt from disclosure pursuant to Idaho Code § 9-335(1).

Mug shots should be, and generally are, available to the public under the public records act.

Illinois

Open records law in Illinois is codified primarily through the state's Freedom of Information Act at 5 ILCS 140/1 to 11.

Traffic accident reports, rescue reports and records that identify witnesses to traffic accidents may be provided by agencies (except in a case for which a criminal investigation is ongoing) without constituting a clearly unwarranted per se invasion of personal privacy, which would otherwise

make the records exempt. See 5 ILCS 140/7(1)(b)(v).

Police blotters and chronologically maintained arrest records are open. See 5 ILCS 140/7(1)(d)(I). Arrest information is also to be provided to the news media under the arrest reports provision of the State Records Act, 5 ILCS 160/4a; the article of the Civil Administrative Code of Illinois concerning the Department of State Police, 20 ILCS 2605/2605-302; the Local Records Act, 50

or provide information to administrative, investigative, law enforcement or penal agencies." See 5 ILCS 140/7(1)(b)(v). This includes community liaisons to the police department. *Chicago Alliance for Neighborhood Safety v. City of Chicago*, 348 Ill. App. 3d 188, 808 N.E. 2d 56, 283 Ill. Dec. 506 (1st District, 2004). Also, releasing the identity of victims of most crimes probably would not be considered an invasion of privacy under the common law.

Confessions are possibly closed until admitted in court. See 5 ILCS 140/7(1)(c)(I) to (iii).

Records related to confidential informants and police techniques are closed. See 5 ILCS 140/7(1)(c)(iv) and (v).

The Act does not specifically address mug shots, but they are generally open.



Access to mug shots is inconsistent, even from town to town in the same state. The City of Los Angeles reportedly refuses to release mug shots unless investigators decide a picture will help with a criminal investigation, but neighboring jurisdictions and county and state officials often release them. Top, from left: Nick Nolte, Mel Gibson, Hugh Grant; bottom, from left: Paris Hilton, Nicole Richie, Lindsay Lohan.

ILCS 205/3b; and the Campus Security Act, 110 ILCS 12/15.

911 tapes are not specifically exempt, so they are open unless, possibly, a law enforcement agency invokes exemptions under 5 ILCS 140/7(1)(b)(c), (e) or (v).

Investigatory records are closed. See 5 ILCS 140/7(1)(c)(i) to (viii). The statute makes no distinction between active and closed files.

Compilations of criminal histories are closed except for specific exemptions listed in the Act. See 5 ILCS 140/7(1)(d)(I) to (v).

The Act seals the identity of victims and other "persons who file complaints with

complaints, as well as the time, substance and location of all complaints or requests for assistance received by the agency, as well as victim information in most cases. Ind. Code § 5-14-3-5(c).

The law does not specifically address 911 tapes. Presumably these tapes would be available unless they were deemed to be investigatory records. See also Ind. Code § 16-31-2-11.

The statute leaves it to the discretion of the police agency whether it will release or hold confidential its investigatory records. Ind. Code § 5-14-3-4(b)(1). There is no distinction made between open or closed

Indiana

Although the Indiana Access to Public Records Act does not specifically address written reports of accident investigations (as opposed to the notation of an accident on a police blotter), Ind. Code § 9-26-2-3 provides a right of access to reports created under the motor vehicle code.

Police agencies must maintain and disclose a daily log or record that lists suspected crimes, accidents or com-



investigations.

The following information must be made available on arrest: identifying information (including name, age and address), the charges on which the arrest is based, and information relating to the circumstances of the arrest (such as the time and location of the arrest, the arresting officer, and the arresting law enforcement agency). Ind. Code § 5-14-3-5(a).

The statute requires the disclosure of the name and age of any victim, unless the victim is a victim of a sex crime. Ind. Code § 5-14-3-5(c)(3)(B).

There is no specific provision on the disclosure of confessions, confidential informants, records containing police techniques, or mug shots. These would fall in the general category of discretionary police investigative records.

Iowa

Open records law by statute in Iowa can be found in chapter 22 of the state code.

Accident reports filed by law enforcement officers (not individuals involved in the accident) are available to any party to an accident, the party's insurer, agent, attorney or the attorney general upon written request and payment of \$4.00 fee. Iowa Code § 321.271. 70 Op. Att'y Gen. 420, 421.

Investigative records, including blotter information, is confidential, but the date, time, specific location, and immediate facts and circumstances surrounding a crime or incident shall not be kept confidential, except in those unusual circumstances where disclosure would plainly and seriously jeopardize an investigation or pose a clear and present danger to the safety of an individual. Iowa Code § 22.7(5).

Records of closed investigations are ordinarily treated by law enforcement as public, subject to applicable exceptions.

911 tapes are presumably public information, but information about criminal activity which peace officers receive from third parties is confidential. *State Ex Rel. Shanahan v. Iowa District Court*, 356 N.W. 2d 523, 528 (Iowa 1984).

Records of current and prior arrests are public records. Iowa Code § 22.7(9).

Records of police techniques are closed.

Iowa Code § 21.5(1)(g) and (h).

Mug shots are not addressed in the act but are presumably public.

Kansas

Open records law in Kansas is codified through the Kansas Open Records Act, K.S.A. 45-215, *et seq.*, ("KORA").

Accident reports are open to the public. K.S.A. 45-217(b). *See also* Op. Atty. Gen. 79-17 (1979)).

Police blotters are open to the public. K.S.A. 45-217(b). The incident based reporting system code sheet used by law enforcement agencies is a public record that must be disclosed upon request. Op. Atty. Gen. 93-9 (1993).

911 tapes are not specifically addressed, but presumably open unless part of a criminal investigation. K.S.A. 45-221(a)(10).

Investigatory records are generally closed to the public.

However, a district court may order disclosure in an action brought under K.S.A. 45-222 (civil remedies to enforce KORA) if the court finds that disclosure, among other things, is in the public interest and would not compromise investigations. K.S.A. 45-221(a)(10).

Records compiled in the process of detecting, preventing or investigating violations of criminal law are not open. Mug shots are not open. Op. Atty. Gen. 87-25 (1987).

Documents stating charges filed against individuals in municipal court and specifying scheduled court dates are open. Op. Atty. Gen. 87-145 (1987). Jail books listing persons in jail are open. Op. Atty. Gen. 87-25 (1987). However, correctional records pertaining to an identifiable inmate are exempt from disclosure. K.S.A. 45-221(a)(29). Op. Atty. Gen. 84-124 (1984). Op. Atty. Gen. 82-226 (1982).

Juvenile offender records generally cannot be disclosed unless a K.S.A. 38-1608(a) statutory exception applies. Op. Atty. Gen. 95-94 (1995).

The name, address, phone number or any other information which would specifically identify the victim of a sexual offense, pursuant to K.S.A. 21-3501 *et seq.*, may not be revealed. K.S.A. 45-221(a)(10)(F). Information concerning other victims is not specifically addressed and is presumably open for inspection unless part of a criminal investigation. K.S.A. 45-221(a)(10).

Confessions are not specifically addressed, but presumably open unless they are part of a criminal investigation. K.S.A. 45-221(a)(10).

The identity of an undercover agent or informant is confidential. K.S.A. 45-221(a)(5).

Mug shots are not open. Op. Atty. Gen. 87-25 (1987).

Kentucky

As per the Kentucky Open Records Act ("ORA"), police records relating to ongoing or prospective investigations are exempt from disclosure. Once the investigation is completed, the records are open to inspection. *See* KRS 61.878(1)(h). Police records of juveniles are exempt. *See* 93-ORD-42 (discussing exemption mandated by KRS 610.320(3)).

Accident reports are presumably open. Police blotters are presumably open unless "the disclosure of the information would harm the agency by revealing the identity of informants not otherwise known or by premature release of information to be used in a prospective law enforcement action or administrative adjudication." KRS 61.878(1)(h).

911 tapes are generally open; nondisclosure of any tape "must be justified with specificity and with reference to the particular statutory exemption upon which the agency relies." 94-ORD-144.

Arrest records are open. 93-ORD-42.

An administrative regulation forbids the release of "[c]entralized criminal history records maintained by the Kentucky Justice Cabinet . . . except as provided in KRS 17.150." 200 KAR 1:020 § 4(6).

Records identifying victims are open under the records law. *See* 94-ORD-133.

Confessions are open unless they would disclose informants or release information to be used later "in a prospective law enforcement action or administrative adjudication." KRS 61.878(1)(h). Records identifying confidential informants are exempt. *See* KRS 61.878(1)(h).

Mug shots are presumably open.

Louisiana

As per the Louisiana Public Records Act, accident reports are available to parties to accidents, insurers, attorneys, and "news-gathering organizations." La. Rev. Stat. Ann. § 44:4(24); § 32:398(H), (K)

Police blotters and booking information summaries shall always be open for public inspection. *Id.*; La. Rev. Stat. Ann. § 44:3(A)(4); Op. Att'y Gen. 78-1159. The information contained in an outstanding warrant is public record, and is not outweighed by privacy interests. Op. Att'y Gen. 95-294.

Despite their historical treatment as public records (Ops. Att'y Gen. 97-233, 96-89, 93-152, 92-209, 90-576), the state First Circuit recently held that 911 tapes are protected under the "privileged communications between a health care provider and patient" exception in the Public Records Act. *Hill v. East Baton Rouge Parish Dep't of Emergency Med. Servs.*, No. 2005 1236, 2005 La. App. LEXIS 2611 (La. App. 1st Cir. Dec. 22, 2005) (citing La. R.S. § 44:4.1(B)(5)).



AP PHOTO BY THE EXPRESS-TIMES

Bethlehem, Pa., Police Commissioner Francis R. Donchez pulls a criminal records file at police headquarters for a reporter who requested information as part of a 2005 statewide FOIA audit.

Records of active investigations are exempt, except for the initial police report. La. Rev. Stat. Ann. § 44:3(A)(1), (4). Records of closed investigations are public records only after pending or reasonably anticipated litigation is finally adjudicated or settled. La. Rev. Stat. Ann. § 44:3(A)(1).

Arrest records are exempt until the arrested party has been adjudged or pleads guilty. La. Rev. Stat. Ann. § 44:3. Op. Att’y Gen. 97-417.

Compilations of criminal histories are public information, if they do not pertain to a pending or reasonably anticipated criminal prosecution. *See* Op. Att’y Gen. 77-1370 and *State v. Sanders*, 357 So. 2d 1089 (La. 1978).

The act does not require that victims be identified in the initial investigation report. Nor does it prohibit disclosure in that report of the identity of victims except for victims of sexual crimes. La. Rev. Stat. Ann. § 44:3(A)(4)(b).

Confessions are exempt during pendency of criminal litigation. La. Rev. Stat. Ann. § 44:3(A)(1).

Records identifying confidential informants are exempt. La. Rev. Stat. Ann. § 44:3(A)(2).

Records disclosing police techniques are exempt. La. Rev. Stat. Ann. § 44:3(A)(3). But a general assertion that certain documents

reveal investigative techniques is insufficient to justify the privilege.

An opinion of the Attorney General suggests that mug shots are not available for inmates or ex-offenders without special authorization from the Department of Corrections. Op. Att’y Gen. 94-338.

Maine

Open records law in Maine is codified through the state’s Freedom of Access Act (“FOAA”) in sections 401-410 of Title 1 of the Maine Revised Statutes Annotated.

Accident reports are generally available.

When a police blotter is used, it is generally an available record.

Transcripts of 911 calls are available to the public. The transcript will not contain names, addresses or telephone numbers of persons placing the call or receiving assistance. Upon good cause shown by the requester, a court may release the audio tape. 25 M.R.S.A. § 2929.

Records of active and inactive investigations are subject to the same statute. Pursuant to 16 M.R.S.A. § 614(1), reports or records that contain intelligence and investigative information and that are prepared by, prepared at the direction of or kept in the custody of a criminal justice agency are confidential and may not be disseminated if there is a

reasonable possibility that public release or inspection of the reports or records would interfere with law enforcement or invade personal privacy.

Arrest records are available. 16 M.R.S.A. §§ 611-622.

The identity of a victim generally receives no special treatment under the FOAA statute or any related law. However the identity of minor victims of sexual offenses is confidential and prosecutors shall refrain from unnecessary pre-trial publicity that might reveal the minor’s identity. 30-A M.R.S.A. § 288.

The availability of a confession is controlled by the availability of investigatory records of the offense involved. 16 M.R.S.A. §§ 611-622.

Records revealing confidential informants are not available. 16 M.R.S.A. §§ 611-622.

Records describing police techniques are confidential. 16 M.R.S.A. § 614(1)(G).

Mug shots are available. 16 M.R.S.A. §§ 611-622.

Maryland

Open records law in Maryland is codified through the state’s Public Information Act (“PIA”), Md. Code Ann., State Gov’t §§ 10-611 to 10-628.

Accident reports are closed to attorneys



or their agents or employees for marketing or soliciting legal services, or to anyone working on behalf of such. § 10-616(h)(2). Otherwise, accident reports are open for public inspection.

Police blotters are not exempt from disclosure, because they are not records of investigations or investigatory files. *See* §§ 10-616(h), 10-618(f).

911 tapes are public records, except for those portions exempted from disclosure for other reasons. 71 Op. Att’y Gen. 288 (1986).

Investigatory records may be closed under specified circumstances. § 10-618(f). The State’s Attorney is neither required nor authorized to disclose a police investigative report or any part of it that was used for grand jury proceedings. *Office of the State Prosecutor v. Judicial Watch Inc.*, 356 Md. 118, 133, 737 A.2d 592, 600 (1999). Records of active investigations conducted by the Attorney General, a State’s Attorney, city or county attorney, police department or sheriff may be closed. § 10-618(f). Once an investigation is closed, investigatory files are subject to disclosure, based upon an amendment to the comparable FOIA exemption. *See Fioretti*, 351 Md. at 83, 716 A.2d at 267; *Bowen v. Davison*, 135 Md. App. 252, 761 A.2d 1013, 1015 (2000).

Arrest records are open, because they are not records of investigations or investigatory files. 63 Op. Att’y Gen. 543 (1978); *see also* § 10-616(h), 10-618(f).

Compilations of criminal histories are open, since they are not records of investigations or investigatory files. *See* §§ 10-616(h), 10-618(f).

Victims’ names and addresses are open to disclosure under the PIA. *See* §§ 10-616(h), 10-618(f). However, the custodian of such a record would be required under the PIA to consider not only the privacy interests of the victim, but also assertions about the public interest in disclosure that are made by the requester. 77 Op. Att’y Gen. 227 (1992).

Disclosure of confessions, if part of an investigatory file, may be denied. § 10-618(f). Otherwise, the confession is a non-exempt and, therefore, producible part of the police record. § 10-616(h).

Records relating to or disclosing confi-

dential informants may be closed to disclosure pursuant to § 10-618(f)(2)(d).

Records relating to or disclosing police or other law enforcement investigative techniques may be closed pursuant to § 10-618(f)(2)(v).

Mug shots that are part of police records are subject to disclosure. § 10-616(h).

Massachusetts

Accident reports are routinely available. *See* General Law c. 66, § 10(a).

Police logs listing, in chronological order, responses to valid complaints, crimes reported, names and addresses of persons arrested and charges against such persons, are public records. G.L. c. 41, § 98F.

911 tapes are available subject to investigatory exceptions.

Investigatory records for active investigations are normally not available. G.L. c. 4, § 7, cl. 26(f). Records of closed investigations are available if disclosure would not “probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest.” G.L. c. 4, § 7, cl. 26(f).

A police log record of arrests is open. G.L. c. 41, § 98F.

Criminal Offense Record Investigation (CORI) exemptions may apply to certain records relating to criminal histories, including criminal charges, arrests, pre-trial proceedings or other judicial proceedings where the information sought was recorded as a result of the initiation of criminal proceedings. G.L. c. 6, § 167-178B. If information being requested does not concern a crime for which incarceration is possible, then the record is public. CORI law also does not apply to evaluative information (records primarily used in connection with bail, pre-trial or post-trial release proceedings, sentencing, correctional and rehabilitative planning, probation, or parole) or intelligence information (records and data compiled by a criminal justice agency for the purpose of criminal investigation). *See* G.L. c. 6, § 167.

Criminal records may be obtained if evidence is offered that the public interest in disseminating the requested CORI outweighs the personal privacy interests of the subjects whose information is sought. Such information can be obtained only from the Criminal History Systems Board in Boston.

Names of victims of rape and sexual assault are confidential. G.L. c. 41, § 97D.

No statutory restriction applies to confessions but they are normally not available. It is unethical for a lawyer or District Attorney to make pre-trial announcement or release of such information. Massachusetts Rules of Professional Conduct Rule 3.6 (*cited in* Supreme Judicial Court Rule 3:07).

Names of confidential informants are normally not available. Massachusetts recognizes an absolute informant privilege, *Worthington v. Scribner*, 109 Mass. 487 (1872); *District Attorney v. Flatley*, 419 Mass. 507, 510, 646 N.E.2d 127, 129 (1995), except in the case of non-confidential information and informants, *Commonwealth v. Congdon*, 265 Mass. 166, 174, 165 N.E. 467, 469 (1928).

Information on police techniques and procedures is available if released by police. Otherwise, probably not. *See* G.L. c. 4, § 7 cl. 26(f); c. 39, § 23B(4).

There are no statutory or case law restrictions on release of mug shots, although the investigatory exception may apply in some circumstances. Generally, release is probably discretionary with law enforcement authorities.

Michigan

Open records law in Michigan is codified through the state’s Freedom of Information Act (“FOIA”), Mich. Comp. Laws Ann. (“MCLA”) §§ 15.231 - .246.

The names and addresses of persons who had been injured, potentially injured or killed in automobile accidents are subject to the FOIA privacy exemption. *Baker, P.C. v. City of Westland*, 245 Mich. App. 90, 627 N.W.2d 27 (2001).

Police incident reports are generally public unless the public body can justify the application of a FOIA exemption. *See Evening News Ass’n v. City of Troy*, 417 Mich. 481, 339 N.W.2d 421 (1983).

According to the Attorney General, a law enforcement agency may refuse to release the name of a person who has been arrested, but not charged, in a complaint or information, with commission of a crime, on the grounds that disclosure would result in a “clearly unwarranted invasion of privacy.” 1979-80 Op. Att’y Gen. 255, 282 (1979). Similarly, a public body may withhold records showing the final disposition of an arrest record of a person found not guilty or where there was a decision not to prosecute, because disclosure would constitute a clearly unwarranted invasion of an arrested person’s right to privacy in the absence of a public interest in his or her record. 1979-80 Op. Att’y Gen. at 282-83.

Since a sex crime complainant’s past sexual history would concern intimate details of a highly personal nature, it would be exempt from disclosure as an unwarranted invasion of personal privacy, as would the complainant’s address and telephone number and the names of parents and their address and telephone number. *Pennington v. Washtenaw County Sheriff*, 125 Mich. 556, 336 N.W.2d 828 (1983).

Confessions are presumably open.

Records identifying confidential in-

formants are generally exempt. See MCLA § 15.243(1)(b)(iv) and MCLA § 15.243(1)(s)(i).

The FOIA does not create any prohibition against the release of file photographs taken of criminal suspects by law enforcement officials. 1979-80 Op. Att’y Gen. 468, 470 (1979). However, while such photographs are public records under the FOIA, they may in some circumstances be exempt--as where a clearly unwarranted invasion of privacy may occur in the release of such photographs (MCLA § 15.243(1)(a)). Nevertheless, booking photos have been held not to be entitled to exemption from disclosure under the FOIA where the subject involved had been arrested, charged in open court and was awaiting trial. *Detroit Free Press v. Oakland County Sheriff*, 164 Mich. App. 656, 418 N.W. 2d 124 (1987).



AP PHOTO BY BOB MACDONNELL, THE HARTFORD COURANT

Universal health care protesters were handcuffed and arrested in front of the Conn. governor's office in the State Capitol in 2007.

Minnesota

Open records law in Minnesota is primarily codified through the Minnesota Data Practices Act (“MGDPA”).

In regard to police-related records, access to public records is governed by the Section entitled “comprehensive law enforcement data.” § 13.82. Section 13.82 attempts to categorize specific actions and information that involve law enforcement functions and that would, in most cases, form the nucleus of official actions. For example, subdivision 2 of the section identifies public “arrest data.” Subdivision 3 requires that “request for service data,” or data documenting service requests by the public, be accessible. Subdivision 4 allows access to “response or incident data,” which document action taken by the law enforcement agency.

There is no specific provision that deals with accident reports. Since accidents would normally fall within arrest data or response to incident data, and since response or incident data include “responses to traffic accidents,” data contained on accident reports would generally be public. § 13.82, subd. 4.

“Police blotter” data are not separately identified in the Act. To the extent that a “police blotter” would include arrest data, such as agency action, resistance encountered, charge or other legal basis for the action, identity and place of custody of arrestee, it would be public.

Generally, audio recordings of 911 telephone calls are not public. A written transcript is available upon request. § 13.82, subd. 4.

Section 13.82, subd. 7 protects “investigative data” collected to prepare a case against a person as confidential, as long as

the investigation is active. Subdivision 7 also allows any person to bring action to compel access to investigative data.

“Inactive investigative data” are public. Along with the expiration of formal time periods, an investigation becomes inactive when the agency decides “not to pursue the case.” § 13.82, subd. 7.

Section 13.82, subd. 2 identifies “arrest data” that are public. Such data include the actions of the agency, such as resistance encountered or pursuit, the charge, arrest, warrants or other legal basis for the action, the identity of the person arrested or cited and all matters relating to the custody of that person.

Criminal histories, or “rap sheets,” have, as a matter of practice, always been available either with respect to an arrested person or generally from the Bureau of Apprehension (BCA). Section 13.87 specifies the criminal history data that are available from the BCA.

Section 13.82 has specific subdivisions protecting the identity of victims of child abuse or neglect or vulnerable adult maltreatment from disclosure. Section 13.82 also protects the identities of victims of criminal sexual conduct, child abuse and vulnerable adults. Subdivision 17 also protects those other victims or witnesses who have requested that they not be identified.

There is no specific provision within § 13.82 that deals with access to “statements” or “confessions.” If the statement is given at or about the time of arrest and is documented as a part of the initial report on the incident, it would likely be public under § 13.82, subd.

2 and 6. If the statement or confession was collected while the investigation was active, it would probably be protected from disclosure. § 13.82, subd. 7.

Section 13.82, subd. 17(c) protects the identity of informants “if the agency reasonably determines that revealing the identity of the informant would threaten the personal safety of the informant.”

Section 13.82, subd. 25 indicates that “deliberative processes or investigative techniques of law enforcement agencies are confidential.”

Booking photographs, meaning the “image” taken by law enforcement officials to identify someone in connection with their arrest, are public. § 13.82, subd. 26.

Mississippi

As per the state’s Public Records Act, police records are generally permitted to be closed by law, but frequently open in practice. See § 45-29-1. Accident reports are open.

Access to police blotter information, 911 tapes, and confessions depends on the contents of the report, and whether any of the material is subject to other exemptions.

Criminal case files and records related to those cases are generally exempt from the act. Op. Att’y Gen. March 2, 2001 to Carter.

Arrest records are open.

Records that may identify victims are still open, if they are not investigatory record.

Records that would reveal confidential informants may be closed.

Records revealing police techniques may be closed. See Op. Att’y Gen. Sept. 7,



1995 to Jerry A. Evans (policy on vehicle searches).

Mug shots are generally open.

Missouri

Open records law in Missouri is primarily codified through the Sunshine Law, Mo. Rev. Stat. §§ 610.010-.035, Arrest Records Law, Mo. Rev. Stat. §§ 610.100-.126, and the Public Records Law, Mo. Rev. Stat. §§ 109.180-.190.

Certain information regarding accident reports may be available if maintained on a law enforcement agency's daily log. Mo. Rev. Stat. § 300.125.

Local law enforcement agencies that maintain a daily log or record that lists suspected crimes, accidents, or complaints are required to make certain limited information available to the public, including the time, substance and location of all complaints or requests for assistance and information relating to the underlying occurrence. Mo. Rev. Stat. § 610.200.

911 tapes are inaccessible to the general public. Mo. Rev. Stat. § 610.150.

Investigation reports are closed records until the investigation becomes "inactive." Mo. Rev. Stat. § 610.100.2. The term "inactive" is defined to include a decision by a law enforcement agency not to pursue a case, the expiration of the applicable statute of limitations, or the finality of convictions and exhaustion of all appeals. Mo. Rev. Stat. § 610.100.1(3).

All arrest reports and incident reports are public records. Mo. Rev. Stat. § 610.100.2. However, if a person who is arrested is not charged with an offense within thirty days, or if the charge is dismissed or the person is found not guilty, official records of the arrest and of any confinement incidental to that arrest become closed records.

Law enforcement agencies are afforded discretion to withhold arrest, incident, or other reports or records if they contain information that is "reasonably likely to pose a clear and present danger to the safety of any victim, witness, undercover officer or other person." Mo. Rev. Stat. § 610.100.3.

Law enforcement agencies are afforded discretion to withhold arrest, incident, or other reports or records if they contain in-

formation that is "reasonably likely to pose a clear and present danger to the safety of any victim, witness, undercover officer or other person." Mo. Rev. Stat. § 610.100.3.

Montana

As mandated through a state constitutional provision and open records statutes, police records including accident reports, police blotters, 911 tapes, and initial arrest records are all public criminal justice information. See *Barr v. Great Falls Intern. Airport Authority*, 326 Mont. 93, 107 P.3d 471 (2005) (holding arrest record from Alaska contained in national computer database was public criminal justice information). For arrest records, also see *Barr v. Great Falls Intern. Airport Authority*, 326 Mont. 93, 107 P.3d 471 (2005) (holding arrest record from Alaska contained in national computer database was public criminal justice information).

Investigative records, active and closed, computation of criminal histories, confessions, confidential informants, and police techniques are all confidential criminal justice information subject to the balancing test. See also Montana Criminal Justice Information Act of 1979, Mont. Code Ann. §§ 44-5-101 to -515 (1987); *Engrav v. Cragun*, 769 P.2d 1224 (1989); 42 A.G. Op. 119 (1988).

Nebraska

As codified within Nebraska Revised Statutes, accident reports appear to be available for inspection in the absence of a specific exemption stating otherwise.

Police blotter information was specifically made public record by Neb. Rev. Stat. § 29-3521(2) (Reissue 1995).

Copies of 911 tapes are occasionally withheld, although there is no statutory authority for such withholding. Some law enforcement agencies take the position that all tapes are investigative records.

"Records developed or received by law enforcement agencies and other public bodies charged with duties of investigation or examination of persons, institutions, or businesses, when the records constitute a part of the examination, investigation, intelligence information, citizen complaints or inquiries, informant identification, or strategic or tactical information used in law enforcement training" are exempt from disclosure. The public records law does not distinguish between active and closed files.

Arrest records are available for public inspection as a part of criminal history information, notwithstanding the language of the exception for investigatory records. See Neb. Rev. Stat. §§ 29-3506; 29-3520 (Reissue 1995).

Compilations of criminal histories are public records. Neb. Rev. Stat. § 29-3520

(Reissue 1995).

No specific statutory provision addresses records that identify victims, confidential informants, or police techniques. To the extent that such information is part of law enforcement investigatory files, it may be withheld from disclosure.

Confessions admitted in evidence at a court hearing closed to the public pursuant to Nebraska Supreme Court guidelines may be sealed.

Mug shots are public records. Neb. Rev. Stat. § 29-3521(1) (Reissue 1995).

Nevada

Active investigation records are not specifically closed by statute, but the balancing test set forth in *Donrey of Nevada v. Bradshaw*, 106 Nev. 630, 798 P.2d 144 (1990), generally weighs in favor of closure. Inactive investigation records are more likely to be considered open under the balancing test.

Compilations of criminal histories are closed to the general public, but must be disclosed to any "reporter for the electronic or printed media in his professional capacity for communication to the public." N.R.S. 179A.100(5)(l).

Records such as accident reports, police blotters, 911 tapes, arrest records, confessions, mug shots are presumably open. Records identifying victims are presumably open but some police agencies are slow to release victim information.

Records that would identify confidential informants may be closed. Protecting confidential sources is specifically listed as a balancing test factor in *Donrey of Nevada v. Bradshaw*, 106 Nev. 630, 798 P.2d 144 (1990).

Records revealing police techniques may be closed. Protecting confidential police techniques is specifically listed as a balancing test factor in *Donrey of Nevada v. Bradshaw*, 106 Nev. 630, 798 P.2d 144 (1990).

New Hampshire

The New Hampshire "right to know" law is contained within RSA Ch. 91-A, as amended, and is entitled "Access to Public Records and Meetings" (hereinafter "Statute").

The status of investigatory records is controlled by the law enforcement records of the Federal FOIA, 5 U.S.C. Sec. 552(b)(7), adopted by *Lodge v. Knowlton*, 118 N.H. 574 (1978), meaning that they are presumably open unless they interfere with investigations or invade personal privacy.

Arrest records, by custom and practice, are considered public, unless the government can establish an exemption under *Lodge v. Knowlton*, 118 N.H. 574 (1978).

The statute does not explicitly cover accident reports or police blotters, but the

general practice is that these records are public.

There are no reported decisions involving 911 tapes, identities of victims, confessions, confidential informants, police techniques or mug shots.

The status of criminal history record information is governed by the State Security and Privacy Plan.

New Jersey

As per the state's Open Public Records Act ("OPRA"), accident reports are public records under N.J.S.A. 39:4-131.

The Appellate Division has held that a 911 tape was a government record, did not constitute a criminal investigatory record and was thus accessible, but noted that the decision was based on the particular circumstances in the case. *Serrano v. South Brunswick Tp.*, 358 N.J. Super. 352 (App. Div. 2003).

N.J.S.A. 47:1a-1.1 exempts from the definition of government record and thus from access criminal investigatory records which are defined as a record not required by law to be made, maintained or kept on file that is held by a law enforcement agency pertaining to any criminal investigation or related civil enforcement proceeding.

Criminal investigatory records are generally confidential and only information regarding the type of crime, time, location and type of weapon may be released. In the case of a closed investigation, while the records are not statutory public records, police reports and internal police records are considered common law public records which may be subject to disclosure following an *in camera* review and balancing of interests by the court. See *Shuttleworth v. City of Camden*, 258 N.J. Super. 573, 610 A.2d 985 (App. Div. 1992); *Asbury Park Press Inc. v. Borough of Seaside Heights*, 246 N.J. Super. 62, 586 A.2d 870 (Law Div. 1990).

When an arrest is made the public is entitled to the suspect's name, age, residence, occupation, marital status, the charges, the amount of bail and the circumstances surrounding arrest, but not to prior arrest record. N.J.S.A. 47:1A-4.

Access to the State Criminal History Record Information File is limited to specifically authorized agencies. N.J.A.C. 13:59-1.1.



AP PHOTO BY COREY S. KRASKO, THE SOUTHWEST TIMES RECORD

Two Arkansas state troopers look over an accident reconstruction sketch in 2008. Another trooper was killed in the accident.

If an arrest has been made, information as to the name, address and age of any victim is required to be released unless the victim's family has not been notified or if release of the information would jeopardize the victim's safety or impair an on-going investigation. N.J.S.A. 47:1A-4.

Information regarding a confession is a confidential criminal investigation record until utilized in court proceedings or until the investigation is closed.

Information regarding a confidential informant generally is privileged unless otherwise ordered by a court. See N.J.S.A. 2A:64A-28; *Shuttleworth v. City of Camden*, 258 N.J. Super. 573, 610 A.2d 985 (App. Div. 1992).

N.J.S.A. 47:1A-1 exempts from the definition of a government record security measures and surveillance techniques which, if disclosed, would create a risk to the safety of person's property.

Police photographs and mug shots are exempt from disclosure under Kean Executive Order No. 123 (1985) and thus exempt under OPRA.

New Mexico

As per the state's Inspection of Public Records Act, accident reports are open. § 29-10-7(5), NMSA 1978.

Police blotters are open; § 29-10-7(2), NMSA 1978.

911 tapes are open, pursuant to the At-

torney General's Compliance Guide and unpublished court decisions.

Investigatory records are confidential if the records reveal confidential sources, methods, information or individuals accused but not charged with a crime, without regard to whether the investigation is active or closed. § 14-2-1(D), NMSA 1978.

Arrest records are open; see generally § 29-10-7 and § 14-2-1(D), NMSA 1978.

Compilations of criminal histories are presumably open; see generally § 29-10-7 and § 14-2-1(D), NMSA 1978.

Records that would identify victims are generally open, but subject to closure if disclosure reveals confidential sources, methods or information that would seriously interfere with the effectiveness of an investigation.

Records of confessions are not clearly open; there is no precedent available.

Records that would reveal confidential informants are not public; § 14-2-1(D), NMSA 1978.

Records containing police techniques are not public if disclosure would reveal a confidential method; § 14-2-1(D), NMSA 1978.

Mug shots are open; see generally § 29-10-7 and § 14-2-6(E), NMSA 1978.

New York

Open records law in New York derives from the state's Freedom of Information Law ("FOIL").



Leather-bound books of “police activity logs” in which police officers recorded all of their work-related activities are agency records subject to disclosure under FOIL, even though officers themselves maintained physical possession of the activity logs. *Gould v. New York City Police Dep’t*, 89 N.Y.2d 267, 653 N.Y.S.2d 54 (1996).

Accident reports are open, but names and addresses of accident victims can be deleted on privacy grounds.

Police blotters are presumably open.

The Committee on Open Government has expressed the opinion that 911 tapes can be viewed as records compiled in the ordinary course of business and as such, should generally be subject to disclosure. Comm. Open Gov’t, FOIL-AO-3734(1985); FOIL-AO-3540 (1984).

An agency may deny access to records or portions thereof that are compiled for law enforcement purposes and which, if disclosed, would interfere with law enforcement investigations or judicial proceedings. N.Y. Pub. Off. Law § 87(2)(e)(i) (McKinney 1988).

Arrest records are generally open.

The FOIL does not directly exempt from disclosure compilations of criminal histories. The New York State Division of Criminal Justice Services, which compiles criminal histories, is governed by a statutory directive to adopt measures to assure the security and privacy of identification and information data in its possession. N.Y. Exec. Law § 837(8) (McKinney 1982). The division has relied upon this statutory provision to promulgate regulations exempting information in its criminal history files from disclosure on the basis that disclosure would result in an unwarranted invasion of personal privacy. 9 N.Y.C.R.R. 6150.4(b)(6) (1978).

Convictions records are available under FOIL. See *Geames v. Henry*, 173 A.D.2d 825, 572 N.Y.S.2d 635 (2d Dep’t 1991).

Records including victim information are generally open; one court rejected a sheriff’s practice of withholding reports of offenses when the person reporting the offense indicated a preference that the incident not be released to media. *Johnson Newspaper Corp. v. Call*, 115 A.D.2d 335, 495 N.Y.S.2d 813 (4th Dep’t 1985).

An agency may deny access to records or portions thereof that are compiled for law enforcement purposes and which, if disclosed, would identify a confidential source or disclose confidential information relating to criminal investigations. N.Y. Pub. Off. Law § 87(2)(e)(iii) (McKinney 1988).

An agency may deny access to records or portions thereof that are compiled for law enforcement purposes and which, if disclosed, would reveal criminal investigative techniques or procedures, except routine techniques and procedures. N.Y. Pub. Off. Law § 87(2)(e)(iv) (McKinney Supp. 1988).

There are no cases on whether mug shots must be made available.

North Carolina

Section 132-1.4 of the General Statutes governs criminal investigations and intelligence information records, which generally are not public records. Certain information, however, *is* public, including the time, date, location, and nature of an apparent violation of the law; the name, sex, age, address, employment, and alleged violation of law of a person arrested, charged, or indicted; the circumstances surrounding an arrest; and the contents of “911” calls, except for information that would identify the caller. G.S. § 132-1.4.

Motor vehicle accident reports are public records and are routinely available from the Division of Motor Vehicles. G.S. § 20-166.1.

There is no requirement that law enforcement keep a “police blotter” or “log.” The Public Records Law does not contain any exclusion or exemption for such documents.

Many details from arrest records are public information. G.S. § 132-1.4(c). The public records law expressly provides that absent a court order sealing them, the following records are public: arrest and search warrants that have been returned by law enforcement agencies, indictments, criminal summons, and nontestimonial identification orders. G.S. § 132-1.4(k).

Criminal histories as reflected in the records maintained in the offices of the various clerks of court are public records. G.S. 7A-109(a) specifically states that records maintained by clerks of court are open to public inspection. By contrast, criminal history records stored in the computerized Police Information Network (PIN) are not open to public inspection.

Names of victims and complaining witnesses disclosed in arrest documents, charges, indictments, applications for search warrants and similar documents are matters of public record. G.S. § 132-1.4(c)(6).

The public records law does not con-

tain any provision specifically relating to confessions. Ordinarily, the existence of a confession becomes a matter of public record when it is the subject of a pre-trial suppression hearing or when it is offered in evidence at trial.

The public records law provides that information pertaining to confidential informants is within the definition of “records of criminal investigations,” which are not public records. G.S. § 132-1.4(b).

The public records law does not address the status of documents disclosing “police techniques.” However, it is anticipated that the Attorney General would take the position that information concerning law enforcement techniques is part and parcel of the law enforcement agency’s “investigative files,” and thus is not a matter of public record.

Mug shots are not explicitly treated under the public records law. Photographs are included within the definition of public records, but they are also included within the definition of records of criminal investigations, which would make them exempt from disclosure. In practice, many law enforcement agencies routinely release mug shots.

North Dakota

North Dakota Century Code § 44-04-18.7 provides that “active criminal intelligence information and active criminal investigative information” are exempt from the open records law. Such information does not include: the arrestee description, including name, date of birth, address, race, sex, physical description, and occupation of arrestee; facts concerning the arrest, including the cause of arrest and the name of the arresting officer; conviction information; disposition of all warrants; a chronological list of incidents, including initial offense report information showing the offense, date, time, general location, officer, and a brief summary of what occurred; a crime summary; radio log; and general registers, including jail booking information.

Accident reports and police blotters are open under N.D.C.C. § 44-04-18.7.

Names, addresses, and telephone numbers that must be provided to a 911 public service answering point under N.D.C.C. § 57-40.6-06, may be used only for verifying the location or identity, or both, for response purposes only, of a person calling a 911 answering point for emergency help. N.D.C.C. § 57-40.6-07.

Criminal intelligence and investigative information that is not considered “active” can be closed to the extent that the information is personal information. When an investigation is inactive with no expectation that it will recommence, there is no ongoing investigation and information regarding the

investigation is open to the public. N.D.C.C. § 44-04-18.7.

The state law does not specifically address whether records including victim information, confessions, confidential informants, or police techniques are open.

Mug shots are open under N.D.C.C. § 44-04-18.7.

Ohio

Routine incident reports are not exempt. *State ex rel. Steckman v. Jackson*, 70 Ohio St. 3d 420, 639 N.E.2d 83 (1994).

“Nine-one-one tapes in general . . . are public records which are not exempt from disclosure and must be immediately released upon request.” *State, ex rel. Cincinnati Enquirer v. Hamilton County*, 75 Ohio St. 3d 374, 662 N.E.2d 334 (1996).

Ohio law makes no distinction between active and inactive or closed investigations, and the exemption applies even where authorities have decided not to file charges. *State ex rel. Thompson Newspapers Inc. v. Martin*, 47 Ohio St. 3d 28, 546 N.E.2d 939 (1989); *State ex rel. Polovischak v. Mayfield*, 50 Ohio St. 3d 51, 552 N.E.2d 635 (1990).

However, investigatory records may lose exemption status after an investigation leads to a prosecution, and all appeals and post-conviction relief are exhausted. *See State ex rel. Steckman v. Jackson*, 70 Ohio St. 3d 420, 639 N.E.2d 83 (1994).

Arrest records are open. *State ex rel. Outlet Communications Inc. v. Lancaster Police Dept.*, 38 Ohio St. 3d 324, 528 N.E.2d 175 (1988).

Criminal histories compiled by the Federal Bureau of Investigation or by the Ohio Bureau of Criminal Identification and Investigation are not available to the public. 42 U.S.C. § 3789g; Ohio Rev. Code § 109.57.

Arrest histories compiled by local governments are public records. *State ex rel. Lippitt v. Kovacic*, 70 Ohio App. 3d 525, 591 N.E.2d 422 (1991).

Information about victims possessed by the police department is not exempt. *Pinkava v. Corrigan*, 64 Ohio App. 3d 499, 581 N.E.2d 1181 (1990).

Confessions are not exempt per se, but can be withheld to protect the defendant's constitutional right to a fair trial. *State ex rel. Vindicator Printing Co. v. Watkins*, 66 Ohio St. 3d 129, 609 N.E.2d 551 (1993).

The identities of confidential informants is exempt where promises of confidentiality are reasonable. Ohio Rev. Code §§ 149.43(A)(2)(a), (A)(2)(b).

Confidential, non-routine police investigative techniques are exempt. Ohio Rev. Code § 149.43 (A)(2)(c).

Mug shots are not exempt.

Oklahoma

A chronological list of all traffic accidents, including date, time and general location of incident as well as the name of the officer and a brief summary of what occurred is public information. 51 Okla. Stat. Supp. 2005, § 24A.8.A.5. However, collision reports are not public records under the act.

Jail blotter or booking information is open. 51 Okla. Stat. Supp. 2005, § 24A.8.A.8.

While not specifically addressed, 911 tapes would appear to fall under records of public calls recorded or radio logs. 51 Okla. Stat. Supp. 2005, §§ 24A.8.6 and 7.

Investigatory records of the attorney general, county and municipal attorneys are confidential except as required by law to be made public. 51 Okla. Stat. 2001, § 24A.12. Investigatory files are not listed among the files which must be released by law enforcement agencies and thus are presumptively closed unless required by law to be made public or where a court finds that the public interest or the interest of an individual outweighs the reason for denial. 51 Okla. Stat. Supp. 2005, § 24A.8.B. *See also* 1999 Okla. Op. Att'y Gen. 58. However, a public record cannot be removed from the public domain by placing it in an investigatory file. 51 Okla. Stat. 2001 § 24A.20.

A description of arrestees and facts concerning arrests are open. 51 Okla. Stat. Supp. 2005 §§ 24A.8.A.1, 2, 5, 6.

Names of persons convicted of criminal offenses are public. 51 Okla. Stat. Supp. 2005 § 24A.8.A.3.

Upon the request of a victim or the district attorney, the court may order the victim's personal information kept confidential if necessary to protect the victim or victim's immediate family and if the information is not necessary to a defense. 22 Okla. Stat. 2001 § 984.2.

Confessions have not been specifically exempted by statute.

No specific statutory authority protects a confidential informer unless the informer objects to the release of information and the agency makes a good faith finding that its release could be damaging to the objecting individual. 1986 Okla. Op. Att'y Gen. 39; *see also* 12 Okla. Stat. 1991, § 2510.

Oklahoma law does not address whether police techniques and mug shots are open.

Oregon

Disclosure of arrest information or a report of a crime may be delayed if a clear need is shown, including protection of the victim or complaining party. O.R.S. 192.501(3).

Accident reports and police blotters are subject to disclosure.

911 tapes are subject to disclosure (if investigatory material is included, dis-

closure might be withheld under ORS 192.501(3)).

Investigatory records may be exempt under ORS 192.501(3). Arrest records are generally subject to disclosure. ORS 192.501(3).

Compilations of criminal histories may be available under special circumstances pursuant to ORS 181.540; specifically ORS 181.540(b) concerning computerized criminal offender information, which allows some public availability under rules adopted by the state police.

The name of a crime victim is subject to disclosure. ORS 192.501(3)(d). Criminal victim compensation records are not subject to disclosure, under ORS 147.115.

Under ORS 192.501(3), confessions are not available from law enforcement agencies as investigatory records until evidence of the confession has been submitted in a judicial proceeding or the confession is voluntarily disclosed by the agency. However, his information may be sought under Oregon's open courts constitutional provision, Article I, section 10.

Confidential informant information generally is not subject to disclosure. *See* ORS 192.502(3) and ORS 192.501(3).

Investigatory information compiled for criminal law purposes is generally exempt. ORS § 192.501.

Mug shots are open, subject to ORS 192.501(3).

Pennsylvania

Police records are generally unavailable if they fall within the “investigation exception” of the Right to Know Act. However, there are some circumstances where records may be available.

Accident reports are open, at least so long as they do not serve as a confidential basis for further action. *City of Philadelphia v. Ruczynski*, 24 Pa. D.&C.2d 478 (Phila. Cty. C.P. 1961).

Police blotters specifically have been held to be “public” records, but the request must be directed to the proper custodian. *See Commonwealth v. Mines*, 680 A.2d 1227 (Pa. Cmwlth. 1996); *Lebanon News Publ'g Co. v. City of Lebanon*, 451 A.2d 266 (Pa. Cmwlth. 1982). Whether they would be subject to any exception in the law must be determined on a case-by-case basis. Police incident reports are also public records under the act. *Tapco Inc. v. Township of Neville*, 695 A.2d 460, 465 (Pa. Cmwlth. 1997).

911 tapes may not be “public records” under the act if they do not fulfill the requirement that they form the basis for an agency's decision. *See North Hills News Record v. Town of McCandless*, 722 A.2d 1037 (Pa. 1999).

Investigatory records are non-public under the act. The Act does not distinguish



between active and closed investigatory files.

Arrest records must be disclosed on request, for a fee, to individuals, after certain specified "outdated" information, such as arrests when there has been no disposition after 18 months, has been expunged. 18 Pa. Cons. Stat. § 9122.

State police regulations and policy statements regarding the responsibilities of bureaus and divisions and regarding the use of deadly force do not fall within the investigation exception and thus are accessible to the public.

Rhode Island

Open records law in Rhode Island derives from the state's Access to Public Records Act ("APRA"). R.I. Gen. Laws §§ 38-2-1 *et seq.*

Records for criminal law enforcement are generally excluded from disclosure by Exemption (D) to the extent that disclosure could interfere with criminal investigations or enforcement proceedings, would deprive a person of a fair trial or impartial proceedings, could reasonably be expected to disclose a confidential source, would disclose investigation or prosecution techniques or procedures, or could endanger the life or safety of an individual. R.I. Gen. Laws § 38-2-2(4)(i)(D).

Accident reports are presumably open; there is no specific exemption.

Any records reflecting the initial arrest and any complaint against an adult filed in court by a law enforcement agency are expressly not exempt pursuant to Exemption (D). *See* R.I. Gen. Laws § 38-2-2(4)(i)(D).

All telephone calls and all tapes shall remain confidential and be used only for the purpose of handling emergency calls and public safety. *See* R.I. Gen. Laws §§ 39-21.1-17.

Records relating to investigations of crimes are exempt only to the extent that the disclosure could interfere with criminal investigation or enforcement proceedings, would deprive a person of a fair trial or impartial adjudication, could reasonably be expected to constitute a unwarranted invasion of personal privacy, could reasonably be expected to disclose the identity of

a confidential source or the information furnished by such a source, would disclose investigation or prosecution techniques or procedures or law enforcement guidelines, or could reasonably be expected to endanger the life or safety of an individual. R.I. Gen. Laws § 38-2-2(4)(i)(D).

Adult initial arrest records are public. *See* R.I. Gen. Laws § 38-2-2(4)(i)(D).

Compilations of criminal histories are presumably open, subject to qualifications as set forth in Exemption (D); no specific exemption. *See* R.I. Gen. Laws § 38-2-2(4)(i)(D).

Records identifying victims are open, subject to qualification as set forth in Exemption (D). *See* R.I. Gen. Laws § 38-2-2(4)(i)(D).

Confessions are open, subject to qualification as set forth in Exemption (D). *See* R.I. Gen. Laws § 38-2-2(4)(i)(D).

Records that could reasonably be expected to disclose a confidential source are exempt from disclosure pursuant to Exemption (D). *See* R.I. Gen. Laws § 38-2-2(4)(i)(D).

Records that would disclose investigation or prosecution techniques are exempt from disclosure pursuant to Exemption (D). *See* R.I. Gen. Laws § 38-2-2(4)(i)(D).

There is no provision regarding mug shots; they are presumably open subject to the above stated restrictions. *See* R.I. Gen. Laws § 38-2-2(4)(i)(D).

South Carolina

Automobile accident reports are public, but may not be used for commercial solicitation. S.C. Code Ann. § 56-5-1275.

Police reports that disclose the nature, substance and location of any crime or alleged crime reported as having been committed are public. S.C. Code Ann. § 30-4-50(A)(8).

911 tapes are available under the definition of public records, which includes "tapes." S.C. Code Ann. § 30-4-20(c).

Active investigative records may be sheltered from disclosure if the public disclosure of the records would interfere with a prospective law enforcement action. S.C. Code Ann. § 30-4-40(a)(3); *Turner v. North Charleston Police Dept.*, 351 S.E.2d 583 (S.C. App. 1984). The Supreme Court has rejected the argument that such records, even when the investigation is closed, can be automatically exempt; instead, each report must be examined to determine if portions are subject to the mandatory disclosure requirements of the act. *Newberry Observer v. Newberry County Comm'n. on Alcohol and Drug Abuse*, 417 S.E.2d 870, 20 Media L. Rep. 1420 (S.C. 1992).

Arrest records are subject to disclosure.

Criminal histories are available from the South Carolina Law Enforcement Division. S.C. Ann. § 23-3-130.

Information regarding victims of crime

may be redacted from police reports if the release of the information would endanger the life, health or property of any person. S.C. Code Ann. § 30-4-40(a)(3)(D).

There is no specific exemption regarding confessions, but a law enforcement agency may claim that premature release would interfere with a prospective law enforcement action. S.C. Code Ann. § 30-4-40(a)(3).

The identity of confidential informants not otherwise known is sheltered from mandatory disclosure. S.C. Code Ann. § 30-4-40(a)(3).

Investigative techniques not known outside the government are not subject to mandatory disclosure. S.C. Code Ann. § 30-4-40(a)(3).

There is no specific exemption for mug shots, and they would be available unless the premature release would interfere with a prospective law enforcement action. S.C. Code Ann. § 30-4-30(a)(3).

South Dakota

Accident reports are open. S.D.C.L. §§ 32-34-13, 13.1.

Police blotters are traditionally open. *See* S.D.C.L. § 9-18-2 regarding records of municipal officers generally.

It is not clear whether 911 tapes are required to be open.

Investigatory records are closed, whether active or inactive. S.D.C.L. § 23-5-10.

Arrest records are open in practice. *Also see* S.D.C.L. § 9-18-2 regarding records of municipal officers generally.

Compilations of criminal histories are closed. S.D.C.L. § 23-6-14.

Records that include victim information are generally open, but victims in sex-crimes can suppress their names until an arraignment. S.D.C.L. § 23A-6-22.

Confessions are presumably closed during the investigative stage.

It is uncertain whether records identifying confidential informants are open, but *see* S.D.C.L. § 23A-35-4.1 regarding the temporary sealing of an affidavit in support of a search warrant.

Access to mug shots is restricted. S.D.C.L. § 23-5-7.

Tennessee

As per the state's Public Records Act, accident reports are generally open. T.C.A. § 55-10-108.

Police blotters are presumably open.

911 tapes are presumably open. *See* Op. Att'y Gen. No. 93-65 (Nov. 29, 1993).

Investigatory records are closed. Tenn. R. Crim. P. 16. The state high court has ruled that closed investigative files not relevant to pending or contemplated criminal action are not excepted by Rule 16.

Arrest records are presumably open,

and compilations of criminal histories are presumably open.

Records identifying victims are presumably open.

Confessions are presumably open, if not part of an active investigatory file.

Mug shots, records identifying confidential informants, or records describing police techniques are presumably open unless contained in an active investigation file.

Texas

Accident reports revealing the date of the accident, the persons involved, and its location along with towing records and 911 call records are privileged and confidential. Tex. Gov't Code Ann. § 550.065.

Police dispatch reports are public information that must be released. *City of Lubbock v. Cornyn*, 993 S.W.2d 461, 465-66 (Tex. App.-Austin 1999, no pet.).

The police "blotter," "showup sheet," and arrest sheet are not exempt from disclosure while the offense report, arrest record, and personal history are exempt. *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177, 185 (Tex. Civ. App.-Houston [14th Dist.] 1975).

Tape recordings of calls made to 911 constitute public information. Tex. Att'y Gen. ORD-519 (1989). Such records are subject to public disclosure even if they are held by a "911 network district" established under the Emergency Communication District Act. Tex. Health & Safety Code Ann. §§ 772.201-772.300 (formerly Tex. Rev. Civ. Stat. Ann. art. 1432d); Tex. Att'y Gen. ORD-519 (1989).

The act specifically exempts records dealing with law enforcement agency investigations. § 552.108. This exception generally covers offense reports and personal history and arrest records maintained for internal use. See *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177, 185 (Tex. Civ. App.-Houston [14th Dist.] 1975, writ ref'd n.r.e.); Op. Tex. Att'y Gen. No. OR94-142 (1994). Section 552.108(a)(1) of the act exempts information and internal records held by a law enforcement agency relating to an active investigation. Specifically, information that would interfere with the detection, investigation or prosecution of a crime.

Section 552.108(a)(2) of the act exempts from disclosure information concerning an investigation that concluded in a result other than a conviction or a deferred adjudication.

"Arrest sheets" containing an arrestee's name, race, age, place of arrest, names of arresting officers and offense for which suspect is arrested are required to be released. *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 at 179-80, 188.

The Texas attorney general has noted that

"as a rule, . . . the names of complainants are public information. . . . Only in unusual instances, such as where the complainant was the victim of a sexual assault may the identity of a complainant be withheld." Tex. Att'y Gen. ORD-482 (1987).

A synopsis of a reported confession generally is exempt. See *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177, 185 (Tex. Civ. App.-Houston [14th Dist.] 1975).

Generally the identity of confidential informants is exempt. See *Houston Chronicle Publ'g Co.*, 531 S.W.2d at 187.

Internal law enforcement detection and investigation methods are generally exempt under section 552.108. *Ex parte Pruitt*, 551 S.W.2d 706, 710 (Tex. 1977).

In cases that are still under active investigation, section 552.108 exempts mug shots from disclosure. Op. Tex. Att'y Gen. No. OR94-087 (1994). Several attorney general decisions have concluded that when the mug shot was taken in connection with an arrest for which the arrestee was subsequently convicted and the case is closed, information may be withheld only if its release will unduly interfere with law enforcement or crime prevention. Tex. Att'y Gen. ORD-616 (1993).

Utah

Automobile and watercraft accident reports prepared by operators of vehicles involved in an accident, by witnesses to an accident, or by police officers investigating an accident, may be disclosed to certain groups and individuals, including the news media. Utah Code Ann. §§ 41-6-40(3)(a), 73-18-13(3) (2004). Information provided to the press or member of the broadcast news media, however, may only include the name, age, sex and city of residence of each person involved in the accident, the make and model year of each vehicle involved in the accident, whether each person involved in the accident had insurance coverage, the location of the accident, and a description of the accident. Utah Code Ann. § 41-6-403(d) (2004).

The chronological logs and initial contact reports of law enforcement agencies are generally public records. Utah Code Ann. § 63-2-301(2)(g) (2004).

The state high court in *Fox Television Stations Inc. v. Clary* held that two tape recordings of 911 telephone calls placed by a woman as she was being shot by her estranged husband were public records and ordered the Sheriff's Department to release complete, unredacted copies of the 911 tapes. *Id.* The court concluded that the interests favoring restriction of access, if any, did not clearly outweigh the interests favoring access. Since no other statutory or constitutional exemptions applied, the 911

tapes were presumed public.

Access to investigatory records may be restricted if release of such records (1) reasonably could be expected to interfere with the investigation; (2) reasonably could be expected to interfere with audits, disciplinary, or enforcement proceedings; (3) would create a danger of depriving a person of a right to a fair trial or impartial hearing; (4) reasonably could be expected to disclose the identity of a confidential source; or (5) reasonably could be expected to disclose confidential investigative or audit techniques. Utah Code Ann. § 63-2-304(9) (1997).

Arrest warrants after issuance are public records; however, a court may restrict access to the warrant prior to service. Utah Code Ann. § 63-2-301(2)(m) (2004).

Criminal history records and warrant arrest information are available to criminal justice agencies and some noncriminal justice agencies and individuals for specific purposes. The information "may only be used for the purposes for which it was provided and may not be further disseminated." Utah Code Ann. § 53-10-108 (2004).

Victim names are presumed public, although access may be restricted if release would constitute a clearly unwarranted invasion of personal privacy. See Utah Code Ann. §§ 63-2-103(13)(a)(ii) (1997), 63-2-301(2)(g), 63-2-302(2)(d) (2004).

There appears to be no Utah statute governing access to confessions, although law enforcement agencies may withhold confessions if release would interfere with an on-going investigation. See Utah Code Ann. § 63-2-304(9)(a) (2004).

Records that reasonably could be expected to disclose a confidential police informant are protected from public disclosure. Utah Code Ann. § 63-2-304(9)(d) (2004).

Records that reasonably could be expected to disclose investigative techniques not generally known outside of government are protected from public disclosure. Utah Code Ann. § 63-2-304(9)(e) (2004).

A jail booking photograph is a record under GRAMA. See *KSL-TV v. Juab County Sheriff's Office*, No. 98-01 (Utah State Rec. Comm. Feb. 20, 1998) (citing Utah Code Ann. § 63-2-103(18)). Because such records are not specifically exempted under GRAMA, these records are presumed public. See *id.* (citing Utah Code Ann. § 63-2-201(2) (2004)).

Vermont

Open records law in Vermont is codified at 1 V.S.A. §§ 315-320.

Accident reports, police blotters and arrest records are open.

911 tapes are presumed open, unless they are part of an investigation.

Investigatory records in active investi-



gations are closed; but records in closed investigations are presumed open.

Compilations of criminal histories are presumed open, to the extent comprised of past convictions.

Records identifying victims are presumed open, unless minors are involved.

Confessions are closed if part of an investigation.

Records identifying confidential informants are presumed closed.

Records revealing police techniques are open if related to the management and direction of law enforcement, but closed if part of an ongoing investigation or if release would compromise public safety.

Mug shots are presumed open.

Virginia

Accident reports held by the Department of Motor Vehicles must be released to persons involved in the accident, or their representatives, attorneys or insurance carriers. Va. Code Ann. § 46.2-380.

The act only compels the release of “criminal incident information” in felony cases. “Criminal incident information” is defined as “a general description of the criminal activity reported, the date and general location the alleged crime was committed, the identity of the investigating officer, and a general description of any injuries suffered or property damaged or stolen. Va. Code Ann. § 2.2-3706.(A), (B).

911 tapes qualify as public records and as non-criminal incident information. *See Tull v. Brown*, 255 Va. 177, 494 S.E.2d 855 (1998).

Section 15.2-1722(A) identifies certain personnel, arrest, investigative, and incident records held by sheriffs and chiefs of police. Such records previously were exempt from the act, but in 1999, the General Assembly deleted the language exempting these records.

Documents relating to a closed police investigation of possible misconduct by a named public official were held exempt from disclosure on the grounds that they were personnel records, pursuant to § 2.2-3705.1(1) (formerly § 2.2-3704(B)(3)), by a trial court of Virginia. *Moore v. Maroney*, 258 Va. 21, 27, 516 S.E.2d 9, 13 (1999).

Investigative information need not but may be disclosed unless disclosure is prohibited or restricted under § 19.2-11.2. Va. Code Ann. § 2.2-3706(D).

Chronologically listed records of completed arrests must be disclosed. 1977-1978 Va. Op. Atty. Gen. 486 (January 13, 1978).

Criminal history records shall be disseminated only to the individuals or groups listed in Va. Code Ann. § 19.2-389.

The identity of a victim may be disclosed unless prohibited by § 19.2-11.2, or by another section. Va. Code Ann. § 2.2-3706(D). Victim identity, provided to or obtained by staff in a rape crisis center or a program for battered spouses may be withheld. Va. Code Ann. § 2.2-3705.2(1).

Confessions are not addressed directly, but are often characterized as “evidence” not subject to disclosure by prosecutors and law enforcement agencies.

Records that would identify anonymous informants need not be disclosed. Va. Code Ann. § 2.2-3706(F)(4).

Records of law-enforcement agencies, to the extent that such records contain specific tactical plans, the disclosure of which would jeopardize the safety and security of law enforcement personnel or the general public may be withheld. Va. Code Ann. § 2.2-3705.2(4).

Adult arrestee photos are excluded from disclosure to the extent necessary to avoid jeopardizing an ongoing investigation in a felony case. Va. Code Ann. § 2.2-3706(F)(2).

Washington

Accident reports are normally not available as public records. RCW 46.52.080. *Guillen v. Pierce County*, 144 Wn.2d 696, 31 P.3d 628 (2001).

The police blotter, jail register and incident reports are generally available prior to case closure. However, the Public Records Act seals law enforcement records if nondisclosure “is essential to effective law enforcement or for the protection of any person’s right to privacy.” RCW 42.17.310(1)(d) (recodified as RCW 42.56.240(1), eff. 7/1/06).

The CRPA provides that records of convictions, other formal dispositions adverse to the subject and records of those currently in the criminal justice system (including those on parole) “may be disseminated without restriction.” Records on charges that have not resulted in conviction or other adverse disposition and for which formal proceedings are complete are closed to the public. RCW 10.97.050.

911 tapes are available to the extent not covered by the investigative records exemption. *See* RCW 42.17.310(1)(d) (recodified as RCW 42.56.240(1), eff. 7/1/06).

Specific investigative records, the non-disclosure of which is essential to law enforcement or to protect a person’s right to privacy, are exempt from disclosure. RCW 42.17.310(1)(d) (2000). Once the investigation is complete, the records are open. *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 580 P.2d 246 (1978).

The CRPA restricts access to pre-conviction and nonconviction records generally but not post-conviction records. Records of entry are accessible on a chronological basis, and records of those currently in the criminal justice system are not exempt. RCW 10.97.

The CRPA allows access to records of convictions and records of those currently in the criminal justice system; however, records on charges that have not resulted in conviction or other adverse disposition and for which formal proceedings are over are closed to the public. RCW 10.97.050.

The identity of witnesses, victims and people who file criminal or quasi-criminal complaints with agencies other than the Public Disclosure Commission is exempt if disclosure would endanger a person’s life, property or physical safety, so long as the complainant indicates at the time of filing the complaint that the complainant desires it to be confidential. RCW 42.17.310(1)(e) (recodified as RCW 42.56.240(2), eff. 7/1/06).

There are no specific restrictions on access to confessions unless they fall within the investigative records exemption under the Public Records Act, RCW 42.17.310(1)(d) (recodified as RCW 42.56.240(1), eff. 7/1/06), or the CRPA. RCW 10.97.050.

Records identifying confidential informants may be exempt pursuant to RCW 42.17.310(1)(d) (recodified as RCW 42.56.240(1), eff. 7/1/06).

Requesters have generally been able to obtain copies of mug shots as public records, although police, prisons and jails often delay access. RCW 70.48.100.

West Virginia

Police records are generally open; the exemption applies only to (1) “information compiled as part of an inquiry into specific suspected violations of the law” and (2) internal records which reveal “confidential investigative techniques and procedures.” Items such as mug shots, police blotters and 911 tapes normally would not meet these prerequisites for confidentiality, and thus should be subject to disclosure.

Records which are “generated pursuant to ‘routine administration, surveillance or oversight’” are not exempt.

Various statutes contain more specific provisions governing access to certain types of law enforcement records. Accident reports

which are filed by law enforcement officers with the state Department of Motor Vehicles are available for public inspection at DMV, W. Va. Code § 17A-2-14; 51 Op. Att'y Gen. 556 (1965), and also should be available under the FOIA from the officers directly.

Active investigatory records are exempt from disclosure, W. Va. Code § 29B-1-4(4). However, the exemption should no longer apply once the investigation has concluded. Arrest records and compilations of criminal histories maintained by the Criminal Investigation Bureau of the state police are exempt from disclosure under the provisions of W. Va. Code § 15-2-24, which denies public access to "fingerprints, photographs, records or other information" maintained by the CIB.

There is no specific provision in the FOIA regarding access to such information as confessions, or the identities of victims and informants. The general test -- whether the information was "compiled as part of an inquiry into specific suspected violations of the law" or reveals "confidential investigative techniques and procedures" -- will determine whether such records are open to public inspection. This test does not apply to information concerning alleged crimes reported to security or other officials at colleges and universities.

Wisconsin

Motor vehicle accident reports are subject to public inspection. Wis. Stat. § 346.70(4)(f). *State ex rel. Young v. Shaw*, 165 Wis. 2d 276, 477 N.W.2d 340 (Ct. App. 1991). Boating and snowmobile accident reports are open. Wis. Stat. § 30.67(4); 76 Wis. Op. Att'y Gen. 56 (Mar. 25, 1987).

Police blotters are subject to inspection in every case. *Newspapers Inc. v. Breier*, 89 Wis. 2d 417, 279 N.W.2d 179 (1979).

There is no authority with respect to 911 tapes *per se*. However, radiologs are generally subject to inspection. 67 Wis. Op. Att'y Gen. 12 (Jan. 25, 1978). Requests seeking copies of 911 tapes, like all other requests, must be reasonably limited and defined. See *Schopper v. Gebring*, 210 Wis. 2d 208, 213, 565 N.W.2d 187, 189-90 (Ct. App. 1997).

Investigatory records generally are subject to the common law balancing test. *Appleton Post-Crescent v. Janssen*, 149 Wis. 2d 294, 441 N.W.2d 255 (Ct. App. 1989). *Journal/Sentinel Inc. v. Aagerup*, 145 Wis. 2d 818, 429 N.W.2d 772 (Ct. App. 1988). Investigatory records in the hands of the district attorney are absolutely immune from public inspection. *State ex rel. Richard v. Foust*, 165 Wis. 2d 429, 477 N.W.2d 608 (1991).

When an investigation is closed and no prosecution or disciplinary action is either ongoing or contemplated, there is no risk that releasing a police report will interfere with

an enforcement proceeding or jeopardize anyone's right to a fair trial. *Linzmeier v. Forcey*, 2002 WI 84 ¶ 39, 254 Wis. 2d 306, 331, 646 N.W.2d 811, 821.

Records such as the police blotter reporting on arrests in chronological order are subject to inspection, but "rap sheets" compiling an individual's arrest history are probably not. *Newspapers Inc. v. Breier*, 89 Wis. 2d 417, 279 N.W.2d 179 (1979).

There is no statute restricting access to the identity of victims. The record created on procedures for the award of compensation to victims is generally subject to public inspection unless otherwise provided by law. Wis. Stat. § 949.16.

Confessions are subject to the balancing test.

Informants who have received a specific pledge of confidentiality are not subject to having their identities disclosed. *Mayfair Chrysler-Plymouth Inc. v. Baldarotta*, 162 Wis. 2d 142, 469 N.W.2d 638 (1991). See also Wis. Stat. § 905.10 providing informer privilege. Confidential informants' identities are not to be disclosed to subject of information. Wis. Stat. § 19.35(1)(am)2.b.

A mug shot is a "record" under the law, *State ex rel. Borzych v. Paluszcyk*, 201 Wis. 2d 523, 549 N.W.2d 253 (Ct. App. 1996), and inspection is likely to be allowed under *Newspapers Inc. v. Breier*, 89 Wis. 2d 417, 279 N.W.2d 179 (1979).

Wyoming

No provision directly deals with accident reports. The court in *Sheridan Newspapers*, 660 P.2d 785, made it clear that police records may not be withdrawn to protect the privacy of individuals. See Wyo. Stat. § 16-4-203(b).

Police blotters are open. See *Sheridan Newspapers*, 660 P.2d 785.

Information obtained through 911 telephone systems is not available for inspection except to the person in interest, law enforcement personnel, public agencies for the purpose of conducting official business, or pursuant to court order. Wyo. Stat. § 16-

4-203(d)(x) (1977 & Cum. Supp. 1996).

For investigatory records, a balancing test must be applied. See Wyo. Stat. § 16-4-203(b). The balancing test is applied whether the investigation is open or closed. Obviously, the harm caused by any interference with the investigation or prosecution is more likely to occur when the investigation is active.

In *Sheridan Newspapers*, 660 P.2d 785, the police department had a policy of denying access to its "rolling log" and case reports. The court held that the blanket denial of

access to these records was improper. *Id.* Access could be denied only on a case-by-case basis when the custodian determined that a particular record included sensitive investigatory material or material compiled for the purpose of prosecution. *Id.* The public interest balancing test must therefore be applied before denying access. *Id.*

"Criminal history records" may be disseminated by Wyoming Criminal Identification Division and local law enforcement agencies and agents for investigatory and intelligence purposes only. Wyo. Att'y Gen. Op. 86-



AP PHOTO BY LOUIS LANZANO

Actor Russell Crowe is taken in handcuffs from a New York police precinct in June 2005 after being arrested for assault.

008 (1986).

There is no provision for protecting victims from publicity, and case law does not appear to provide any protection. See *Sheridan Newspapers*, 660 P.2d 785.

Confessions might be exempt, subject to the custodian's discretion if it would interfere with the investigation or prosecution. See Wyo. Stat. § 16-4-203(b) and *Sheridan Newspapers*, 660 P.2d 785.

Records identifying confidential informants might be exempt, subject to the custodian's discretion. See Wyo. Stat. § 16-4-203(b) and *Sheridan Newspapers*, 660 P.2d 785.

Records revealing police techniques might be exempt, subject to the custodian's discretion. See Wyo. Stat. § 16-4-203(b) and *Sheridan Newspapers*, 660 P.2d 785.

There are no provisions for mug shots. See Wyo. Stat. § 16-4-203(b) and *Sheridan Newspapers*, 660 P.2d 785.

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THE CONFLUENCE OF SENSATIONALISM AND NEWS: MEDIA ACCESS TO CRIMINAL INVESTIGATIONS AND THE PUBLIC'S RIGHT TO 'KNOW'

Jimmy R. Moyer

A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.¹

This quote, by Associate Justice Tom C. Clark of the United States Supreme Court, describes the role enjoyed by the media in a society hungry for and driven by information. Most would agree that the media's interpretation of daily events, especially in the field of criminal justice has had a profound effect on society and its perceptions of crime. One only has to turn on the evening news to see the crime scene from a gruesome murder or read the daily newspaper to catch up on the latest rumor about a suspected criminal to recognize that a majority of news reporting revolves around crimes and ongoing criminal trials. A report released by the Center for Media and Public Affairs found that even though the homicide rate in the United States dropped by 20 percent from 1993 through 1996, major network² news coverage of murders increased on an average of 721 percent within the same time period.³ The First Amendment of the United States Constitution⁴

grants the press the freedom to serve as the eyes and ears of the masses by closely monitoring the criminal justice system and prohibiting the government from restricting freedom of speech and the press.⁵

The Supreme Court, however, has determined that an offspring of the freedoms of speech and press is the public's right of access to particular government proceedings and information.⁶ The Court established a two prong test in *Globe Newspaper Co. v. Superior Court*,⁷ to determine when the public right of access attaches to a proceeding or information.⁸ First, a court must determine whether a right of access adheres to a particular process and thus whether the process is presumptively open to the public.⁹ Two factors relevant for consideration in this inquiry are whether there is a historical tradition of public access to the proceeding or information; and second, whether there is a functional value associated with opening that proceeding or making the requested information available to the public.¹⁰ The second prong of the test is whether the government has asserted an interest sufficiently compelling to warrant closure.¹¹

The media's role as the "handmaiden of effec-

¹ Sheppard v. Maxwell, 384 U.S. 333, 350 (1966).

² See Howard Kurtz, *The Crime Spree on Network News: While Homicides Fell, Murder Coverage Swelled, A Survey Finds. Is It All O.J.'s Fault?*, WASH. POST, Aug. 12, 1997 at D1. "Major networks" are defined in this paper as inclusive of the American Broadcasting Company ("ABC"), the Columbia Broadcasting System ("CBS"), and the National Broadcasting Company ("NBC").

³ See *id.* The study also found that one out of every 20 network news stories over a 4 year period ending in 1996 was about a murder. *Id.* Crime coverage on major networks ranked sixth from 1990 to 1992, but jumped to first with 7,448 stories over four years, with 1,449 involving O.J. Simpson.

⁴ See generally U.S.CONST. amend. I.

⁵ See *id.* The First Amendment states that "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 to peacefully assemble, and to petition the Government for a redress of grievances."

⁶ See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980).

⁷ See generally 457 U.S. 596 (1982).

⁸ See *id.* at 607.

⁹ See *id.* at 605.

¹⁰ See *id.* at 605-06.

¹¹ See *id.* at 606-07.

tive judicial administration"¹² has come under fire, especially of late. The press, because it is driven to attract viewers and readers, can be less than responsible in covering criminal investigations. By printing and televising rumors and presenting one-sided coverage, the press can be as guilty of miscarriages of justice as any element of the criminal justice system. The media's sensationalistic reporting of ongoing investigations in the death of Diana, Princess of Wales,¹³ the Michael Irvin-Erik Williams alleged rape case,¹⁴ the JonBenet Ramsey murder case,¹⁵ and the media's handling of the Centennial Park bombing in Atlanta,¹⁶ all exemplify the lengths the media will go to sell newspapers and increase ratings without regard to the effect on the criminal investigative process. Critics argue that, if the media cannot responsibly and honestly report on ongoing criminal investigations, statutory provisions should restrict its access to all ongoing criminal investigative material, including police reports, witness statements, forensic tests and subsequent results, and any evidentiary material.¹⁷ The primary ob-

stacle to such a remedy is the public's First Amendment right of access to governmental proceedings and information. The Supreme Court has yet to consider whether the public, and therefore the media, has a First Amendment right of access to ongoing criminal investigative material.

This Comment argues that irresponsibility in media coverage of ongoing criminal investigations makes institutional restrictions on the constitutional right of public access to information during an ongoing criminal investigation not only justifiable, but a legal necessity. This Comment specifically deals with the question of whether ongoing criminal investigative material should be legally made available to the public, but does not address the issue of such material attained through illegal means. Part I of this Comment examines the three leading cases which form the basis for the press' constitutional right of access and the reasons for which the right may be curtailed. Part II suggests that when the right of access test is applied to ongoing criminal investigative material, the test will not be satisfied and therefore,

¹² Sheppard, 384 U.S. at 350.

¹³ See Charles Trueheart, *Diana's Guard Can't Recall Paris Crash; French Investigation Secretive, Methodical*, WASH. POST, Sept. 20, 1997 at A1. On August 31, 1997, Princess Diana died of injuries sustained in a car accident in Paris, France. See *id.* Also killed in the crash were her companion Dodi Al-Fayed, and his driver, Henri Paul; a second bodyguard was the only survivor of the accident. See *id.* Within hours of their death, rumors in the media swirled about evidence and suspects, namely, several photographers allegedly chasing the Princess' Mercedes through the streets of Paris. See *id.* Within a few days, the media buzz began to focus on newly released evidence and deemed the driver, who allegedly had three times the legal alcohol blood level, to be culprit for the death of the Princess. See *id.*

¹⁴ *Accuser Charged in Cowboys Case: Woman Cited for Filing False Report of Sexual Misconduct*, WASH. POST, Jan. 15, 1997, at C1. On December 30, 1996, Nina Shahravan, a Dallas-area woman, implicated Michael Irvin and Erik Williams, both members of the Dallas Cowboys football organization, and a third unnamed suspect in her rape. See *id.* She claimed that Williams and the unnamed suspect raped her, while Irvin held her at gunpoint and videotaped the crime. See *id.* The media maligned the two players for their suspected involvement and also closely monitored the investigation by the Dallas Police Department. See *id.* Many elements of the investigation were made public, while repeated assertions of innocence by the two men were virtually ignored by the media. See *id.* On January 10, 1997, despite the negative media both men had received, Nina Shahravan admitted to police authorities that she committed perjury and had consensual intercourse with Erik Williams and that Michael Irvin was not present at Williams' home. See *id.*

¹⁵ See Tom Kenworthy, *Focus of Colorado Probe Turns to Parents of JonBenet Ramsey*, WASH. POST, April 20, 1997, at A3. JonBenet Ramsey, a six year old from Boulder, Colorado, was

found on December 26, 1996 in the basement of her parent's home. See *id.* She had been found eight hours after her mother discovered a ransom note demanding \$118,000. See *id.* The media has become fascinated with the murder of JonBenet Ramsey and has focused its attention on JonBenet's parent's as the main suspects. See *id.* Every step of the investigation has been scrutinized by the press. See *id.* Sensitive information such as the autopsy report, forensic tests, and other evidence, all allegedly pointing to the guilt of the Ramseys'. See *id.* Despite the media's accusations of guilt against the Ramseys', the Boulder Police only recently have named them suspects and have yet to formally file any charges against the Ramseys'. See *id.*

¹⁶ See Jerry Seper, *Reno 'Very Sorry' for Leaks in Jewell Case*, WASH. TIMES, Aug. 1, 1997, at A3. On July 27, 1996, a 40-pound pipe bomb exploded in Atlanta's Centennial Olympic Park. See *id.* Richard Jewell, a late-night security guard at the park, cleared the area before the bomb exploded. See *id.* He was first celebrated as a hero by the media and then was later considered a suspect. See *id.* The media hounded Mr. Jewell and labeled him the culprit mastermind behind the bombing. The constant media attention and blame ran contrary to the evidence. See *id.* Even though the press branded Mr. Jewell guilty, the Federal Bureau of Investigations eventually cleared him of any wrongdoing and have yet to name any formal suspects or file any charges. See *id.*

¹⁷ "Ongoing criminal investigative material" for the purposes of this article means any document deemed to be relevant to a criminal investigation that has yet to be resolved or closed by the controlling police authority. For a discussion on criticisms of the media and the way it handles criminal investigative material, see *Current Issues in Media and Telecommunications Law, Panel I: Accountability of the Media in Investigations*, 7 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 401 (1997); see also Gerald F. Uelman, *Leaks, Gags, and Shields: Taking Responsibility*, 37 SANTA CLARA L. REV. 943 (1997).

the public's access to such material should be restricted. Finally, this Comment concludes that if the Supreme Court should find the public has a right of access under the First Amendment to ongoing criminal investigative material, the Court will inevitably be faced with answering the question of which rights are more important, the defendant's right to a fair trial or the First Amendment freedoms of speech and press. This Comment posits that the Court would ultimately protect a defendant's due process right over the public's access to information.

I. THE EVOLUTION OF THE FIRST AMENDMENT RIGHT OF ACCESS

The First Amendment to the United States Constitution expressly forbids the government from abridging the freedom of speech or of the press.¹⁸ Implicit in the First Amendment is the right of the public to have access to particular government proceedings or pieces of information.¹⁹ The Supreme Court in *Globe Newspaper v. Superior Court* held that the government can curtail these freedoms only when there is a narrowly tailored, compelling government interest.²⁰ The Court enunciated that courts should use the *Globe Newspaper* test to determine whether the public's right of access attaches to government proceedings or information.²¹

A. Expanding the Public's Right to Access Government Proceedings and Information

The foundation for determining the public's constitutional right of access was laid in *Richmond*

Newspapers, Inc. v. Virginia.²² The case involved the criminal trial of a murder defendant.²³ The defendant was originally convicted of murder, but the conviction was overturned and two subsequent trials ended in mistrial.²⁴ The trial judge, applying a Virginia statute giving the judge discretion to exclude any person from the trial who would effect the defendant's ability to obtain a fair trial, ordered the courtroom cleared except for witnesses.²⁵ The appellants, publishers of a local newspaper, argued that constitutionally, before the court could order closure, it had to consider whether the rights of the defendant could be protected in any other way.²⁶ The Commonwealth of Virginia argued that neither the Constitution nor the Bill of Rights provides the public the right to attend criminal trials.²⁷ The Supreme Court agreed with the appellants holding that even though the Constitution contains no express terms guaranteeing the public a right to attend criminal trials, the right is implicit in the guarantees of the First Amendment.²⁸ Chief Justice Burger, joined by Justices White and Stevens, opined that an "unbroken, uncontradicted history" led to the conclusion that a presumption of openness in criminal trials was inherent in our system of criminal justice.²⁹ The Court also ruled that without an overriding governmental interest supported by the findings of the trial court, criminal trials must be made open to the public.³⁰

The Supreme Court further refined this principle in *Globe Newspaper Co. v. Superior Court*.³¹ The issue in *Globe Newspaper* centered around the criminal trial of a suspect who allegedly raped three minor girls.³² The trial court, applying a Massachusetts statute³³ providing for the exclusion of

¹⁸ See U.S.CONST. amend. I.

¹⁹ See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980).

²⁰ See *Globe Newspaper*, 457 U.S. at 606-07.

²¹ See *id.* at 609.

²² See *Richmond Newspapers*, 448 U.S. at 555.

²³ See *id.*

²⁴ See *id.* at 559. In July, 1976, Stevenson, the defendant, was convicted of second degree murder. See *id.* The Virginia Supreme Court reversed the conviction in October, 1977, on evidentiary error. See *id.* The defendant was retried in the same court and a mistrial was declared on May 30, 1978, when a juror asked to be excused and no alternate was available to serve. See *id.* The third trial commenced soon after and a mistrial was declared on June 6, 1978, because a prospective juror read about the retrial of the defendant and had informed other prospective jurors about the defendant's retrial. See *Richmond Newspapers*, 448 U.S. at 555.

²⁵ See *id.* at 560.

²⁶ See *id.*

²⁷ See *id.* at 575.

²⁸ See *id.* at 580. (explaining that "[w]e hold that the right to attend criminal trials is implicit in the guarantees of the First Amendment; 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.'" (Burger, C.J.)).

²⁹ *Richmond Newspapers*, 448 U.S. at 581. (holding that "[a]bsent an overriding interest articulated in findings, the trial of a criminal case must be open to the public." (Burger, C.J.)).

³⁰ See *id.* at 581.

³¹ See generally *Globe Newspaper*, 457 U.S. at 596.

³² See *id.* at 598.

³³ See *id.* See also MASS. GEN. LAWS ANN. ch. 278, § 16A (West 1981) (providing: "At the trial of a complainant or indictment for rape, incest, carnal abuse or other crime involving sex, where a minor under eighteen years of age is the

the public from trials of specified sexual offenses involving a victim under the age of 18, ordered the exclusion of the public and the press from the courtroom.³⁴ The Massachusetts Supreme Judicial Court upheld the decision of the trial judge,³⁵ however the United States Supreme Court reversed.³⁶ The Court, however, expanding upon its prior decision in *Richmond Newspapers*, invalidated the Massachusetts statute, ruling the public right of access should be broadly construed because it supports the "free discussion of governmental affairs."³⁷ The Court noted that the public's First Amendment right of access is not absolute and established a two-prong test to determine when the right of access attaches to a government proceeding or information.³⁸ The first prong of the test, whether the right of access adheres to a particular process and is presumptively open to the public, consists of two relevant factors: whether there is historical tradition of public access to the proceeding or information and whether there is probative value associated with opening the proceeding or information to the public.³⁹ The second prong addresses whether the government has presented a compelling enough interest to warrant restricting access to the proceeding or information.⁴⁰

The holding in *Globe Newspaper* was tested in *Press-Enterprise Company v. Superior Court*.⁴¹ In *Press-Enterprise*, a defendant on trial for murder moved to exclude the public from the preliminary hearing.⁴² The Magistrate granted the defendant's motion under a California statute⁴³ requiring preliminary hearings to be open unless "exclusion of the public is necessary in order to protect the defendant's right to a fair and impartial trial."⁴⁴ At the conclusion of the preliminary hearing, the Magistrate refused petitioner's request to release the transcript of the proceeding.⁴⁵ The Supreme Court struck down the California statute as viola-

tive of the First Amendment.⁴⁶ In delivering the opinion of the Court, Chief Justice Burger, applying the test established in *Globe Newspaper*, announced that a tradition of open preliminary hearings existed in California and that public access to such preliminary hearings was "essential to the proper functioning of the criminal justice system."⁴⁷

II. APPLYING THE *GLOBE* TEST TO ONGOING CRIMINAL INVESTIGATIVE MATERIALS

The Supreme Court has yet to provide the limits, if any, of the public's right of access to ongoing criminal investigative material. When applying the *Globe Newspaper* test to ongoing criminal investigative materials, it becomes clear that the public should not have a right of access to such data. The following sections elucidate that the right of access will not apply to criminal investigative material because there is no historical tradition of public access, there is little social probative value of making such information available, and the government has compelling interests in restricting the access of the public to ongoing investigative material.

A. Applying the First Prong of *Globe*: Is the Process Presumptively Open?

The first element of the *Globe Newspaper* test is whether the process is presumptively open to the public.⁴⁸ When determining the openness of the governmental process, a court must inquire into the historical tradition of public access to the proceeding and decide whether there is a societal value to opening the process.⁴⁹

While the press' historical access to ongoing criminal investigative material is neither long, nor

person upon, with or against whom the crime is alleged to have been committed, . . . the presiding justice shall exclude the general public from the court room, admitting only such persons as may have a direct interest in the case.").

³⁴ See *Globe Newspaper*, 457 U.S. at 599.

³⁵ See *id.* at 600.

³⁶ See *id.* at 611.

³⁷ *Globe Newspaper*, 457 U.S. at 604.

³⁸ See *id.* at 606-07.

³⁹ See *id.* at 605-07.

⁴⁰ See *id.* at 606-07.

⁴¹ See generally 478 U.S. 1 (1986).

⁴² See *id.* at 3. The defendant in the criminal trial, Robert Diaz, was charged with allegedly murdering 12 patients by ad-

ministering massive doses of a heart drug. The preliminary hearing took place on July 6, 1982, when the defendant moved to exclude the public from the proceedings under CAL. PENAL CODE § 868 (West 1985).

⁴³ See *Press-Enterprise*, 478 U.S. at 4.

⁴⁴ CAL. PENAL CODE § 868 (West 1985). The statute requires open hearings unless "exclusion of the public necessary in order to protect the defendant's right to a fair and impartial trial."

⁴⁵ See *Press-Enterprise*, 478 U.S. at 4-5.

⁴⁶ See *id.* at 15.

⁴⁷ *Id.* at 11-12.

⁴⁸ See *Globe Newspaper*, 457 U.S. at 605.

⁴⁹ See *id.* at 605-06.

impressive, the public's access to judicial proceedings has a long history.⁵⁰ In *Richmond Newspapers*, Chief Justice Burger traced the historical tradition of open, public trials as far back as the Norman Conquest of England.⁵¹ Justice Brennan, writing for the majority in *Globe Newspaper*, used the long history of open, public access to trials as a foundation for the Court's decision.⁵² In *Press-Enterprise*, the Court was able to trace the roots of preliminary hearings at least back to the trial of Aaron Burr for treason in 1807.⁵³

The media's involvement with ongoing criminal investigative material has had a mixed past.⁵⁴ For example, the St. Louis Post-Dispatch, through access to ongoing investigative material, helped expose the ongoing criminality of the Ku Klux Klan,⁵⁵ governmental corruption,⁵⁶ and even helped solve a murder.⁵⁷ Other newspapers, such as the *San Francisco Bulletin* and the *Chicago Daily News* were also integrally involved in using ongoing criminal investigative material.⁵⁸

The press has also used criminal investigative material negligently. For example, a San Francisco newspaper uncovered and publicized evidence which it wrongly thought linked a suspect to the commission of a crime.⁵⁹ The *Detroit Free Press*, *Denver Post*, *New York Tribune* and others have used their access to criminal investigative material to help create hysteria among readers, cover up government corruption and entangle innocent people in the criminal justice system.⁶⁰

The press does not have a lengthy tradition of

access to ongoing investigative material. The history of the press' access, as traced through landmark cases, although implying a truly *public* right of access, in fact established a more developed, deeply rooted tradition of involvement with open trials and preliminary hearings.⁶¹ Those historical traditions of access have become fundamental to the actual function of the criminal justice system.⁶²

In our current system of criminal justice, denying public access to ongoing criminal investigative material will not forestall the system from functioning. If the public did not have access to such information, the police could still conduct their investigation by interviewing witnesses, gathering evidence, administering forensic tests and other investigative processes, all leading to an eventual resolution of a committed crime.⁶³ However, because the trial process has been historically open, it would be virtually impossible to exclude members of the public from those processes.⁶⁴ Therefore, while the public's right to freely access the judicial system cannot be denied, the press has no established historical tradition of access to ongoing criminal investigative material.⁶⁵ Consequently, the first factor in determining whether public access attaches to governmental proceedings or information fails.

A second factor that must be examined is whether there is social value in making the governmental proceeding or information available to the public.⁶⁶ A critical quote from *Crime and Pub-*

⁵⁰ See *Richmond Newspapers*, 448 U.S. at 565-69.

⁵¹ See *id.* at 565.

⁵² See *Globe Newspaper*, 457 U.S. at 605.

⁵³ See *Press-Enterprise*, 478 U.S. at 10.

⁵⁴ See generally JOHN LOFTON, JUSTICE AND THE PRESS 139-142 (1966).

⁵⁵ See *id.* at 140-41.

⁵⁶ See *id.* at 141-42.

⁵⁷ See *id.* at 141.

⁵⁸ See *id.* at 142.

⁵⁹ See *id.*

⁶⁰ See LOFTON, *supra* note 54, at 141-42. The *Detroit Free Press* ran a story about recent race riots and about a gathering which drew 10,000 people. See *id.* At the gathering, one of the speakers advocated for an ordinance requiring that Negroes only live in certain sections of Detroit. See *id.* at 140. The story also announced a meeting to be held across the street from the newly purchased home of a Negro doctor, with the story urging people to meet in "self-defense." *Id.* The *New York Times* and *New York Tribune* both attempted to smother the United States Senate inquiry into the Teapot Dome Scandal. See *id.* at 142. The *Denver Post*, the first newspaper to uncover the Teapot Dome Scandal, stopped covering the scandal when its publisher was paid off. See *id.* The

four San Francisco newspapers, the *Chronicle*, *Examiner*, *Dealer* and *News*, all barraged the citizens with stories of a suspected rapist. See *id.* at 142-43. The stories continued, all but convicting the suspect; who was eventually exonerated of all charges. See LOFTON, *supra* note 54, at 142-43.

⁶¹ See *Richmond Newspapers*, 448 U.S. at 565-69; see also *Press-Enterprise*, 478 U.S. at 10-11.

⁶² See *Richmond Newspapers*, 448 U.S. at 565-69. The Court recounted the history of jury trials from before the Norman Conquest. For instance, the Court pointed out that after the Norman Conquest, it became the duty of all freedmen to attend trials to render judgment. The Court further traced the tradition through the 18th, 19th and 20th century. See *id.*

⁶³ In this instance, the criminal justice system would not cease to function if the public did not have access to this information. As stated, the system would continue along its normal course of business because the public has typically only gained access to such information illegally, namely, leaks.

⁶⁴ See generally *Richmond Newspapers*, 448 U.S. 555; *Globe Newspaper*, 457 U.S. 596; *Press-Enterprise* 478 U.S. 1.

⁶⁵ See *supra* text accompanying notes 48-62.

⁶⁶ See *Globe Newspaper*, 457 U.S. at 606.

licity⁶⁷ best summarizes the probative value of such information to the average American:

"Why publish all the news about crime anyway? It serves no social purpose; indeed, it is, if anything, injurious to the morals and behavior of the citizenry. Its publication merely breeds more crime and perversion. You publish it because it means more circulation, more money to you . . . and for no other reason."⁶⁸

There is little appreciable probative value in allowing the public access to such results because the press is not interested in a just outcome, but rather an interesting story.⁶⁹ As Friendly & Goldfarb suggest, it has become a source of circulation and ratings for the media. Prior history tells us that over-the-top reporting of ongoing criminal investigations has negative effects on the administration of the criminal justice system. A prime example appears in *Sheppard v. Maxwell*.⁷⁰ In 1954, the pregnant wife of wealthy socialite Doctor Sam Sheppard was found murdered in her bed.⁷¹ The two major newspapers in Cleveland, the *Cleveland Press* and the *Cleveland Plain Dealer*, used the case and the public frenzy surrounding it to compete for subscribers.⁷² Both papers ran an excessive amount of coverage on the case.⁷³ In the days after the murder, both papers printed large amounts of biased information, which could have only been revealed by the investigating police authorities.⁷⁴ Coverage of information favorable to the prime suspect, Doctor Sheppard, was purposely not printed.⁷⁵ Pressure on the murder in-

vestigation by the Cleveland media forced authorities to arrest and try Doctor Sheppard.⁷⁶ In all the excitement fostered by the media in the case, the media ultimately failed to do its job. Upon closer examination and eventual reversal of the defendant's murder conviction by the United States Supreme Court, there were many unreported miscarriages of justice.⁷⁷

The events surrounding the Sheppard Case are indicative of what the media can become in its most invasive and destructive manifestation, with sensationalist story after sensationalist story, developed purely to sell newspapers and increase ratings and not as a service designed to properly inform the public.⁷⁸ The publication of ongoing criminal investigative material has served to misinform and mislead the public.⁷⁹ Accordingly, there is little probative value to the public by allowing the public a right to access ongoing criminal investigative material.

B. The Second Prong of *Globe*: Does the government have compelling interests?

The second element of the *Globe Newspaper* test is whether the government has a narrowly tailored, compelling interest for denying public access to proceedings or information.⁸⁰ The government has two compelling reasons for restricting access to ongoing criminal investigative

⁶⁷ See generally ALFRED FRIENDLY & RONALD L. GOLDFARB, *CRIME AND PUBLICITY* 34-35 (1968).

⁶⁸ *Id.*

⁶⁹ A quote from *Justice and the Press*, by John Lofton, is apropos:

"Among those papers devoting the highest portion of their news columns to crimes of violence, this type of law breaking is certainly accorded exaggerated significance; and the resulting demands of their reading public for a violent crackdown may be expected to rise correspondingly. This kind of pressure on authorities is not necessarily conducive to justice".

See LOFTON, *supra* note 54, at 180.

⁷⁰ See generally 384 U.S. 333 (1966).

⁷¹ See FRIENDLY & GOLDFARB, *supra* note 67, at 13-15.

⁷² See *id.* at 14.

⁷³ See *id.* at 13-15. The *Cleveland Press* was the largest paper in Ohio, with a circulation of 310,000. See *id.* Circulation increased throughout the pretrial and trial period, culminating with a newsstand sellout of 30,000 extra copies the day the verdict announced. See *id.* The Sheppard Case was the lead page-one story twenty three days during the prearrest period. See *id.* Most stories had eight-column banner headlines and at least three times the case covered nearly all of page one and several inside pages. See FRIENDLY & GOLDFARB, *supra* note 67, at 13-15. The *Cleveland Plain Dealer* was the first to publish after the crime was committed. See *id.* That

story was given an eight-column banner headline on page one. See *id.* The *Plain Dealer* accorded the case a page-one banner headline on twelve out of twenty-six days. See *id.* On nine days, the murder was the lead page-one story, without a banner. See *id.* On four days, it was a page-one story, but not a lead story. See *id.* On one day of the twenty-six, no story of the case appeared in the *Plain Dealer*. See FRIENDLY & GOLDFARB, *supra* note 67, at 13-15.

⁷⁴ See *id.* at 15. This information included information by the coroner, who supplied most of the evidence, and his opinion on the investigation, to the *Cleveland Press*. See *id.* at 16. A long story was run about a detailed twelve-hour interrogation of Dr. Sheppard, which could only have been written from accounts by the police. See *id.* at 17.

⁷⁵ See *id.* at 15-17.

⁷⁶ See *id.* at 16.

⁷⁷ See LOFTON, *supra* note 54, at 142.

⁷⁸ See *supra* text accompanying notes 12-15.

⁷⁹ See *supra* text accompanying notes 12-15.

⁸⁰ See *Globe Newspaper*, 457 U.S. at 606-07. The Court ruled that if the government intended to deny public access to a criminal proceeding to which the First Amendment right of access applied, "it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." *Id.* This must be also be supported by specific findings that the compelling interest would be jeopardized by public disclosure. See *id.* at 609.

material: the right of the defendant to a fair trial and the protection of victims of crime.⁸¹

1. *Right of the Defendant to a Fair Trial*

The most compelling interest the government has in restricting public access to ongoing criminal investigative material is ensuring a defendant's right to a fair trial. The Supreme Court has determined that the states are charged with management of the criminal justice system,⁸² and the Due Process Clause of the Fourteenth Amendment requires that a defendant receive a fair trial.⁸³ The Court has interpreted the Due Process Clause as the right to a fair opportunity to defend against the accusations of the State.⁸⁴ Excessive media attention affects the ability of a defendant to adequately respond to the State's accusations in court.⁸⁵

One way in which the media can inadvertently contribute to denying a defendant a fair trial is by tainting the jury pool. During the course of a criminal investigation, police authorities discover various types of evidence. Not all evidence gathered by the police is necessarily relevant to the crime,⁸⁶ nor is it always admissible in determining

the guilt of a defendant.⁸⁷ Examples of such evidence include character evidence⁸⁸ or previous crimes or acts.⁸⁹ This is information that the jury might never see in the courtroom. If the press were allowed to publicize this information, though, any well-informed person would be exposed to prejudicial evidence. Those who are exposed to this information could be potential jurors and therefore, come into a trial with preconceived, often negative impressions of the defendant.⁹⁰ The Supreme Court has found that pre-trial publicity can create bias and prejudice in jury pools. In *Irvin v. Dowd*,⁹¹ the Court, for the first time, reversed a state conviction because of prejudicial pre-trial publicity.⁹² In that case, a murder trial was held in a small community overrun with negative publicity about the defendant prior to the trial about.⁹³ The defendant, charged with murder, sought two changes of venue because of the negative publicity, one of which was granted and the second of which was denied.⁹⁴ It was discovered that eight of the twelve jurors, as well as ninety percent of those community members brought in as potential jurors, admitted to having formed opinions based on the pre-trial publicity.⁹⁵ The defendant was

⁸¹ See *infra* text accompanying notes 77-120.

⁸² See *Irvin v. California*, 347 U.S. 128, 134 (1954).

⁸³ U.S. CONST. amend. XIV. "No State shall make or enforce any law which shall abridge the privileges or immunities; nor shall any State deprive any person of life, liberty or property, without due process of law . . ." *Id.*

⁸⁴ See *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973).

⁸⁵ See *infra* text accompanying notes 73-80.

⁸⁶ See FED. R. EVID. 401. Rule 401 of the Federal Rules of Evidence states: "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Id.*

⁸⁷ FED. R. EVID. 403. Rule 403 of the Federal Rules of Evidence states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

⁸⁸ See FED. R. EVID. 404(a). Rule 404(a) of the Federal Rules of Evidence states:

Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except: 1) Character of accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same; 2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

3) Character of witness. Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

Id.

⁸⁹ See FED. R. EVID. 404(b). Rule 404(b) of the Federal Rules of Evidence states:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Id.

⁹⁰ See *Irvin v. Dowd*, 366 U.S. 717 (1961).

⁹¹ See *id.*

⁹² See *id.*

⁹³ See *id.* at 726. The negative publicity against the defendant included information about prior criminal convictions, confessions to 24 burglaries and six murders and an unaccepted offer to plead guilty so as to avoid the death penalty. See *id.*

⁹⁴ See *Irvin*, 366 U.S. at 717-18. The second change of venue motion was apparently denied because the controlling Indiana statute allowed for only one change. See *id.* During voir dire, the defendant filed two additional change of venue motions and eight motions for continuance, all of which were denied by the court. See *id.*

⁹⁵ See *id.* at 727.

subsequently convicted of murder and sentenced to death.⁹⁶ The Supreme Court reversed the conviction, holding that the pre-trial publicity violated the constitutional right of the defendant to a fair trial.⁹⁷ The Court opined that "the pattern of deep and bitter prejudice" was shown by the defendant to be present throughout the community and was clearly reflected in the information submitted by the eventual jurors.⁹⁸

In order to protect a defendant's right to a fair trial, the press' access to any such information should be restricted. If the media were allowed to publicize investigative information, it could inadvertently publish evidentiary material that would otherwise be inadmissible against a defendant.⁹⁹ Potential jurors may be exposed to this published material and thus develop preconceived, negative impressions of the defendant.¹⁰⁰ This would affect the ability of jurors to fairly, and in an unbiased manner, sit in judgment of the defendant. This would prejudice the defense's case and may lead to a loss of life or liberty of an innocent person.¹⁰¹ Therefore, the government has a compelling interest in restricting the access of ongoing criminal investigative material to public.

The second factor that must be examined is whether denying the public its First Amendment right of access to criminal investigative material is narrowly tailored to serve the compelling governmental interest of preserving a defendant's right to a fair trial.¹⁰² Although "narrowly tailored" has not been formally defined by the Supreme Court, it has determined that a First Amendment restriction is not narrowly tailored when "a substantial portion of the burden [it places] on speech does not serve to advance the [State's] content-neutral goals,"¹⁰³ or when the regulation at issue has a less restrictive alternative.¹⁰⁴

The burden placed on the public, limiting the right of access to ongoing criminal investigative material, directly serves to advance the State's goal of preserving a defendant's right to a fair trial. As discussed earlier, allowing ongoing crimi-

nal investigative material to be publicized may expose potential jurors to prejudicial or irrelevant exculpatory evidence against the defendant.¹⁰⁵ This prejudicial or irrelevant exculpatory evidence may cloud the ability of potential jurors to fairly assess a case against the defendant, thus placing his life or liberty in justice and directly violating the Constitution.¹⁰⁶ Restricting public access would therefore legally protect the potential jury pool from contamination. Accordingly, restricting public access to ongoing criminal investigative material serves to advance the State's goal of insuring a defendant's right to a fair trial.

Next, a court must consider whether the regulation at issue is the least restrictive alternative.¹⁰⁷ Four hypothetical options available to the government in restricting public access to ongoing criminal investigative material include: delaying release of investigative material; making the material available to the press, but limiting the way in which it is publicized; forbidding the press from reporting on any crime until after the case has been made public in a court of law or if not, when the trial is finished; or restricting access of such information until a criminal case is no longer in its investigative stage.

Delaying the release of investigative material is not a feasible option. Merely delaying release of ongoing criminal investigative material still leaves the possibility of potential jurors being exposed and prejudiced by evidence within the case. To further complicate the issue, there is no feasible timetable by which delaying this information could be measured. For example, the investigation of the JonBenet Ramsey murder case has continued for almost a year,¹⁰⁸ while the investigation of the Michael Irvin-Erik Williams alleged rape case was concluded in under a week.¹⁰⁹ Delayed release of information in the Ramsey case could still complicate and possibly injure the investigation. As for a short investigation like that of the Irvin-Williams alleged rape case, delayed release can often only fuel rumor and innuendo, an

⁹⁶ See *id.* at 718.

⁹⁷ See *id.* at 717.

⁹⁸ Irvin, 366 U.S. at 727.

⁹⁹ See *supra* text accompanying notes 86-89.

¹⁰⁰ See, e.g., Irvin, 366 U.S. 717; Sheppard v. Maxwell, 384 U.S. 333 (1965).

¹⁰¹ See *supra* text accompanying notes 70-77.

¹⁰² See *Globe Newspaper*, 457 U.S. at 606-06.

¹⁰³ *Simon & Schuster, Inc. v. New York State Crime Vic-*

tims Bd., 502 U.S. 105, 122 (1991).

¹⁰⁴ See *Boos v. Barry*, 485 U.S. 312, 321 (1988).

¹⁰⁵ See *supra* text accompanying notes 79-94.

¹⁰⁶ See U.S. CONST. amend. XIV.

¹⁰⁷ See generally *Press-Enterprise*, 478 U.S. 1.

¹⁰⁸ See *Truehart*, *supra* note 14, at A3.

¹⁰⁹ See *Accuser Charged in Cowboys Case*, *supra* note 13, at C1.

especially grievous result given that both men involved were vindicated. Therefore, delaying the release of ongoing criminal investigative material is not a feasible option that will still protect the investigative process.

The second stated alternative was to make ongoing criminal investigative material available to the press, but limit the way in which the press may utilize the information. This option is not feasible because it directly conflicts with prior Supreme Court case law.¹¹⁰ In *Landmark Communications, Inc. v. Virginia*,¹¹¹ the Supreme Court held that a Virginia statute,¹¹² making it a crime to divulge information regarding proceedings before a state judicial review commission authorized to hear complaints about judges's disability or misconduct, was unconstitutional because where the press lawfully obtains information the court cannot thereafter prohibit the press from publishing it.¹¹³ For that reason, limiting the way in which the press may utilize ongoing criminal investigative material is not practicable.

The third alternative course of action would be to completely disallow the press to print on a criminal case until the information is made public in a court of law or until the case has been completed in its entirety. Proponents of this option point to the British system as a model to be followed with regard to limiting public access in this fashion.¹¹⁴ The British system, though tempting, is not a workable alternative in America. The British legal system functions differently than does its American counterpart,¹¹⁵ and to implement such

a change would mean changing some of the societal norms of the American judicial system.¹¹⁶ It would also go counter to the press's full access to trial participation.¹¹⁷

Finally, that leaves the most viable alternative, restricting access to ongoing criminal investigative material until the investigation is concluded. This alternative, unlike the first, ensures that the investigation will not be jeopardized because it is completed, nor will it violate the First Amendment or any other constitutional provisions, as does the second option.¹¹⁸ This plan is more viable than the third option because it would not serve to fundamentally change the way our criminal justice works nor would it radically affect the press.¹¹⁹ Accordingly, the fourth course of action is the most viable and least restrictive means of the four hypothetical options by which to protect the State's interest of ensuring a defendant's right to a fair trial. Thus, restricting access to ongoing criminal investigative material to preserve a defendant's right to a fair trial is narrowly tailored.

2. *Protecting Victims of Crime*

A second compelling governmental interest is protecting the victims of crime from needless exposure and embarrassment, as well as creating an atmosphere in which victims are not afraid to report crimes. Protecting victims of rape¹²⁰ is a prime example of this compelling governmental interest. Rape is such an emotionally draining, physically degrading crime that exposure of the

¹¹⁰ See *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978).

¹¹¹ See *id.*

¹¹² See VA. CODE ANN. § 2.1-37.13 (Michie 1973). The statute provided in relevant part:

"All papers filed with and proceedings before the [State Judicial Review] Commission, and under the two proceeding sections (§§ 2.1-37.11, 2.1-37.12), including the identification of the subject judge as well as all testimony and other evidence and any transcript thereof made by a reporter, shall be confidential and shall not be divulged by any person to anyone except the Commission, except that the record of any proceeding filed with the Supreme Court shall lose its confidential character." *Id.* "Any person who shall divulge information in violation of the provisions of this section shall be guilty of a misdemeanor." *Id.*

¹¹³ The case involved a publisher, who in his newspaper, printed an article accurately reporting on a pending inquiry by the Commission and identifying the judge whose conduct was being investigated, appellant was convicted under the above mentioned statute. See *id.* at 831-32.

¹¹⁴ See FRIENDLY & GOLDFARB, *supra* note 67, at 141-42. "At the heart of almost all the proposed remedies for prejudicial publicity discussed in the previous chapter is the concept of postponement-postponement of publication of certain news until it is made public at trial or, if it is not, until after the trial is completed." *Id.* at 141.

¹¹⁵ See *id.* at 143-47.

¹¹⁶ See *id.* The authors list four fundamental differences between American and British culture with regard to the criminal justice system: the complete quarantine of British justice from politics; the speed of the criminal process in the United States; the varying criminal climates in the two countries; the press' special role of monitoring the justice system in the United States. See *id.* at 142-43.

¹¹⁷ See generally *Richmond Newspapers*, 448 U.S. at 565-69.

¹¹⁸ See *supra* text accompanying notes 103-106.

¹¹⁹ See *supra* text accompanying notes 112-115.

¹²⁰ Black's Law Dictionary defines rape as the unlawful sexual intercourse with a person against his or her consent. See BLACK'S LAW DICTIONARY 1260 (6th ed. 1990).

victim's identity can be embarrassing and make it even more difficult for the victim to recover.¹²¹ Victims in notorious sex crimes often have their lifestyles, sexual tastes and the opinions of others printed about them.¹²² Helen Benedict, a panel member of a symposium entitled, "The Privacy Rights of Rape Victims in the Media and the Law" stated:

"Above all, it is not a crime to go the police and say, 'I've been attacked.' Yet, the media assumes that, by digging into the victim's past and personality, it will uncover something about the crime, just as it might when it digs into the accused's past and personality, it will uncover something about the crime . . . Every profile of a victim, every account of what that victim does or has done, is by implication, an assumption of the victim's complicity in the crime: the very act of profiling the victim treats her as if she is guilty until proven innocent."¹²³

This unwanted and unflattering attention provokes many rape victims into not even reporting the crime.¹²⁴ Why deal with the unwanted exposure and the shame of having your sexual conduct questioned? Why have your personality questioned? Many women, knowing the possibility of this negative attention, decline to report these crimes all together. By refusing to allow the press access to the identity of victims, especially with crimes such as rape, it raises the possibility that the investigation can move forward without being sidetracked by irrelevant considerations and gives the victim the privacy and dignity that they deserve in such a situation.

Though all crimes are not as serious as rape, it is equally as important to conceal the identities of the victims in connection with other crimes. Many crimes go unreported because of fear of reprisal. If victims knew that information surrounding a criminal investigation would be publicized, it would make them even more wary of reporting these crimes. A second issue faced by all crime victims is their treatment in the media. Many times, whether the treatment is positive or negative, the victim's personal life is constantly flashed before the eyes of the public. If nothing else, it is more difficult to cope with the crime because of

the constant attention that is now focused on the victim. A person who is a victim of crime does not by virtue of their status as a victim invite public scrutiny into their lives. Hence, the government has a strong interest in protecting the identities of victims of crime.

Next, this governmental interest must be examined as to whether it is narrowly tailored.¹²⁵ The government's goal of protecting the identity of crime victims is directly advanced by restricting the public's access to ongoing criminal investigative material. If the identities of crime victims were released publicly, it may expose the victim to unwanted and unnecessary scrutiny. Other victims of crime will see this and may not seek help from the authorities for fear of receiving the same treatment in the media. Victims of crime may also be wary of reporting crimes for fear of reprisal by the perpetrator. To publicize information surrounding a criminal investigation may jeopardize not only the investigation, but the health and welfare of the victim. By restricting the public's access to such information, it will directly remove the fears of public scrutiny and reprisal. The press would not have access to the material and thus would not crucify the victim. The restricted access to such material will benefit those frightened of reprisal by concealing the identities of victims and information surrounding the investigation. Hence, these restrictions will advance the State's goal of protecting victims of crime.

Finally, a court would inquire as to whether the regulations are the least restrictive means of addressing the State's interest. The alternatives available to the government almost mirror those options available to the government in discussing a defendant's right to fair trial. Those options are delaying the release of the victim's identity; release the victim's identity, but place limits on the way the press utilizes that information; or restrict the access to such material until the investigative phase of the criminal case is over.

Delaying the release of a victim's identity does

¹²¹ See generally Susan Estrich, *Press Should Zip its Lip in Rape Cases-Identifying Victim Serves No Purpose and Discourages Them From Coming Forward*, St. Louis Dispatch, Apr. 22, 1991, at 3B.

¹²² See Helen Benedict, *The Privacy Rights of Rape Victims in the Media and the Law*, 61 FORDHAM L. REV. 1141 (1993). The author used as two examples the media coverage of Jennifer Levin, the murder victim in the 1986 "Preppie Murder"; and the *New York Times* and their treatment of Patricia Bow-

man, the woman who accused William Kennedy Smith of rape.

¹²³ *Id.* at 1143.

¹²⁴ See Shawn J. Wallach, *Rape Shield Laws: Protecting the Victim at the Expense of the Defendant's Constitutional Rights*, 13 N.Y.L. SCH. J. HUM. RTS. 485, 489 (1997).

¹²⁵ See Simon and Schuster, *supra* note 103 at 122; Boos, *supra* note 104, at 321.

not alleviate the problem of how they are treated in the media. Victims will still have their past scrutinized and publicized as if they were the defendants. Releasing this information, even if delayed, only reinforces the problem that many victims face now with the endless dissection of a victim's personal life by the media.

Additionally, the delayed release of a victim's identity does not solve the problem of reprisal. If the identity is released a month after the crime or a year, it is possible that the victim could still be in some form of danger. Ergo, the delayed release of ongoing criminal investigative material is not viable.

As discussed earlier, the second option is not available because it conflicts with prior case law.¹²⁶ That leaves the third option which is restricting access to ongoing criminal investigative material. This is the least intrusive way of dealing with the issue because it will allow victims the privacy they deserve, and in some cases need, while an investigation is in progress; it allows the police authorities to fully conduct and complete its criminal investigations without being unfairly scrutinized in the media; and will benefit the media because it is not a complete bar to them receiving the information they crave. Therefore, restricting access to ongoing criminal investigative material to protect victims of crimes is narrowly tailored.

III. CONCLUSION

When the public's First Amendment right of access test is applied to ongoing criminal investigative material, the test is not satisfied and the public's access to such material should be restricted. The test fails because the press does not enjoy a historical tradition of access to such material, there is no probative value to society to release such information, and the government has compelling interests in restricting access to such data. The Supreme Court has yet to consider whether the public has a First Amendment right of access to ongoing criminal investigative material. If the Court is faced with such an issue, it will be faced with making a difficult choice: whether the First Amendment and the public's right to know is lesser or greater than the defendant's right to a fair trial and protection of the victim. It would be in the best interest of democracy that the Court rule against the public's right of access because the criminal justice system is founded on the principle of equity and fairness. The stakes are high when dealing with the criminal justice system: loss of life or liberty. That should outweigh any interest the public, much less the press, may have in monitoring the system.

¹²⁶ See generally *Landmark Communications*, 435 U.S. at 829.

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 jimmied 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.removemymug.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.arkansasonline.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 at 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 'Shakedowns' 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. *Karantsalis*, 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(l)(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.lakecountyca.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 “implie[d] 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); Karantsalis 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
Accessibility Under State Laws – Open “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 Stone v. Consol. Publ’g Co., 404 So. 678 (Ala. 1981) (setting forth a common law balancing test when considering privacy interests under the Open Records Law).
Recently Enacted Legislation – None
Alaska
Accessibility Under State Laws – Unclear 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> Patterson v. State, 985 P.2d 1007 (Alaska App. 1999), <i>overruled in part on other grounds</i> , Doe v. Dep’t of Public Safety, 92 P.3d 398 n.83 (2004) (holding that sex offender registration, including photographs, did not violate the state constitutional right to privacy).
Recently Enacted Legislation – None

research/telecommunications-and-information-technology/mug-shots-and-booking-photo-websites.aspx.

Arizona
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).
Recently Enacted Legislation – None
Arkansas
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.
Recently Enacted Legislation – None
California
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

dissemination of an arrest record <i>by the government</i> does not violate an individual’s state constitutional right to privacy. <i>Loder v. Mun. Court</i>, 553 P.2d 624, 637 (Cal. 1976); <i>see also</i> <i>Craig v. Mun. Court</i>, 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
Accessibility Under State Laws – Likely Open 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.</i> <i>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).
Recently Enacted Legislation – None
Delaware
Accessibility Under State Laws – Unclear 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.
Recently Enacted Legislation – None

Florida
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).
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.
Georgia
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> Hardaway Co. v. Rives, 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). Title 35 (Law Enforcement Officers and Agencies) was recently amended to prohibit law enforcement publication and distribution. <i>Id.</i> § 35-1-19(c).
Recently Enacted Legislation 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,

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

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.

Recently Enacted Legislation – None

Illinois

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. *Cf.* 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).

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.”

Indiana

Accessibility Under State Laws – Unclear/Discretionary

There is no case law, statutory exemption, executive order, or other authority explicitly addressing public access to mugshots. *Compare* 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

made public), *with* Lane-El v. Spears, 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

Accessibility Under State Laws – Unclear

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. *Id.* § 22.7(5). It has not been determined whether mugshots are deemed criminal identification files, records of arrests, or investigatory records.

Recently Enacted Legislation – None

Kansas

Accessibility Under State Laws – Close/Discretionary

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. *Id.* at 2–3 (citing § 45-221(a)(10)).

Recently Enacted Legislation – None

Kentucky

Accessibility Under State Laws – Open

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

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

Accessibility Under State Laws – Likely Open

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. *Id.* §§ 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. *Id.* § 703(2)(A)–(L). All other information, including basic arrest log information, is deemed public. *Id.* § 703(8); *see also* § 706 (arrest information). Thus, the mugshot of a convicted individual would likely be deemed public information. *Id.* § 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). *Id.* § 703(2).

Recently Enacted Legislation – None

Maryland

Accessibility Under State Laws – Open/Discretionary

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 *unless* 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." *Id.* at 49. The opinion reached this conclusion despite the fact that Maryland's Public Information Act contains an exemption parallel to

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.” <i>Id.</i> § 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. <i>Id.</i> ; 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
Accessibility Under State Laws – Open In <i>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> Detroit Free Press, Inc. v. Oakland Cty. Sheriff, 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.
Recently Enacted Legislation – None
Minnesota
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).
Recently Enacted Legislation – None
Mississippi
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

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
Accessibility Under State Laws – Closed 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).
Recently Enacted Legislation – None
Nebraska
Accessibility Under State Laws – Open 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).
Recently Enacted Legislation – None
Nevada
Accessibility Under State Laws – Likely Open 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”).

Recently Enacted Legislation – None
New Hampshire
Accessibility Under State Laws – Unclear 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").
Recently Enacted Legislation – None
New Jersey
Accessibility Under State Laws – Closed 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).
Recently Enacted Legislation – N.J. Stat. Ann. § 2A:58D-4 (West 2017) (enacted in 2017) 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

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)).

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.
Recently Enacted Legislation – None
North Carolina
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.
Recently Enacted Legislation – None
North Dakota
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).
Recently Enacted Legislation – None
Ohio
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),

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. <i>Id.</i> § 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.” <i>Id.</i> (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. <i>Id.</i> § 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
Accessibility Under State Laws – Unclear 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.
Recently Enacted Legislation – None
South Carolina
Accessibility Under State Laws – Likely Open South Carolina’s Freedom of Information Act includes two possibly relevant privacy exemptions: a more general privacy exception and a law enforcement records exception 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.
Recently Enacted Legislation S.C. CODE ANN. § 17-1-60 (2017) (enacted in 2016) 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. S.C. CODE ANN. § 17-1-40 (2017) (enacted in 2016)

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

Accessibility Under State Laws – Open

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. *Id.*

Recently Enacted Legislation – None

Tennessee

Accessibility Under State Laws – Likely Open

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); *see also id.* § 10-7-101 (defining "records"); *id.* § 10-7-504(a)(29)(C) (defining "personally identifying information"). *But see id.* § 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. *Id.* § 40-32-101(a)(1)(A). In *Fann v. City of Fairview*, 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 *Fann*, 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. *Id.* at 174 (reversing the grant of summary judgement as to one defendant).

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. <i>Id.</i> § 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
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).
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.
Washington
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).
Recently Enacted Legislation – None
West Virginia
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

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

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).

Recently Enacted Legislation – None

Wyoming

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).

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.

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. *See also id.* §§ 40-12-108, 113 (providing for private remedies and civil penalties).
