Online Mugshots:
Vulnerability, Commoditization, and Devastation

MPP Professional Paper

In Partial Fulfillment of the Master of Public Policy Degree Requirements
The Hubert H. Humphrey School of Public Affairs
The University of Minnesota

Jonathan Oppenheimer

May 9, 2017

Signature below of Paper Supervisor certifies successful completion of oral presentation and completion of final written version:

______________________________	____________________	____________________
Joe Soss, Paper Supervisor	Date, Oral Presentation	Date, Paper Completion

______________________________________	__________________
Josh Page, Committee Member	Date

TABLE OF CONTENTS

Page

Acknowledgements....3

Preface....5

Introduction....7

Minnesota's History in Addressing the Problem....10

The Advent of the Online Mugshots Industry....14

Stigma and Collateral Consequences....17

The Debate about Regulation....21
- Government Transparency....22
- First Amendment and Free Speech Rights....23
- A Right to Privacy....26
- Public Safety and Crime Deterrence....28

Minnesota Data Practices Act and Open Records Laws....31

Combatting the Problem across the Country....33
- Most Restrictive Laws....33
- Less Restrictive Laws....35
- Least Restrictive Laws....37

Recommendations for Minnesota....38
- Most Effective: Privatize Mugshots....38
- Effective: Remove Mugshots from Government Websites and Reduce Access....39
- Least Effective: Laws to Regulate the Online Mugshots Industry....42

Conclusion....43

Limitations and Further Research....44

Acknowledgements

I owe a debt of gratitude to the many people who supported me over the last several years and encouraged me to pursue my passion for criminal justice reform in my graduate studies and beyond.

The countless advocates and activists on the ground in the Twin Cities, especially Josh Esmay and Andy Sagvold, inspire me with their dogged determination to fight for the most vulnerable people ensnared in our criminal justice system. Their mentorship, guidance, and leadership has been invaluable, and I look forward to continuing to work alongside them in the future.

My peers in the professional paper workshop class at the Humphrey School of Public Affairs provided the support, insight, and friendship that made this paper possible. Deborah Levison was a sage, determined, and thoughtful guiding light. Emily, Amani, Mikki, Kate, and Alica were the editors I needed and valued every step of the way. I will forever be grateful that I had each of them at my side.

The many interview subjects who graciously spent time talking to me about my work deserve a hearty and heartfelt thanks. Kim Norton shared her deep legislative experience and insight. Mark Haase helped me to better understand how to affect change at the Capitol. Natasha Del Toro shared valuable resources gleaned from the investigative journalism work she tirelessly pursued in Florida. Tim Donnelly spent countless hours discussing the policies and legal efforts that have been made across the country to address the online mugshots problem. Jim Franklin kindly spoke with me in 2015 and again this year to provide me with a much-needed law enforcement perspective. Matt Ehling and Rich Neumeister were more than generous in speaking

at length about data privacy and government transparency concerns and laws. Sarah Lageson twice took phone calls from across the country to share her expertise on digital crime reporting and its consequences. Mark Anfinson was candid, engaged, and eager to talk to me on two occasions, both of which were a pleasure. Without these interviews I simply could not have wrapped my head around the complex and nuanced issues I sought to tackle.

Joe Soss and Josh Page were not only wonderfully supportive advisers, but they embody the kind of scholarship that is vitally important to addressing the massive inequalities and injustices in our society and institutions. There are no two people I would rather turn to for wise counsel and feedback on this topic.

Finally, without the unending support of my wonderful wife, Britta, and the smiles of my little man, Isaac, I would not be where I am today. Thank you and I love you both.

Preface

One of the major objectives of society as it is now constituted, and of the administration of our penal system, is the rehabilitation of the fallen and the reformation of the criminal. Under these theories of sociology it is our object to lift up and sustain the unfortunate rather than tear him down.[1]

Melvin vs. Reid, 1931

My research exploring the legislative debate around online mugshots began in 2015 while interning at the now defunct Council on Crime and Justice (CCJ). As a graduate student studying social work and public policy, I have a passion for criminal justice reform, and my supervisor at CCJ tasked me and a fellow intern with learning more about the proliferation of websites that were profiting from and exploiting open records laws throughout the country by legally obtaining and widely disseminating mugshots on the internet for profit. Our goal then was the same as mine remains today: Devise legislation to curb this practice and mitigate one of the many collateral consequences facing people who have entered the criminal justice system in America. We knew then we faced an uphill battle, with multiple bills dying in the Minnesota legislature in 2014 (Minnesota H.F. 1933, 2014; Minnesota H.F. 1940, 2014). As such, we set out to meet with the advocates and stakeholders whom we knew to have a strong stake in the debate, most notably lobbyists for First Amendment rights, government transparency, and the Minnesota Sheriff's Association. Only with these perspectives in hand could we consider approaching legislators and persuading them to put forth new legislation. After gathering these

[1] *Melvin vs. Reid*, 112 Cal. App. 285 (1931).

necessary and important perspectives, our work dissipated, due to our limited capacities and because the political landscape at the time was not ripe for addressing the issue.[2]

Today, in 2017, I return to the issue as part of my Master of Public Policy professional paper, with the same public policy goals in mind: Provide lawmakers with a comprehensive framework with which to clearly view and effectively combat the existence of online mugshots. Given that extensive research has previously been done – some of it by University of Minnesota graduate students (Lageson, 2015; Batchelder, 2014) – exploring the history, production, legal justifications, and consequences of digital crime reports, as well as the principal arguments for and against their dissemination, I will review this framework, but only to ground my more specific aims of affecting policy changes in Minnesota related to online mugshots. More pointedly, I hope to fill a gap in the research by answering the following questions:

- What kinds of laws have been passed across the country to address this issue prior to 2017?
- Have these laws had an impact in reducing the harmful effects of online mugshots on people who have been arrested and thus have a booking photo in a government database?
- What lessons can be learned from the legislative efforts in 2014 in Minnesota and used in crafting new policy that will be both effective in combatting the online mugshots problem and have the necessary support to ensure passage?

By aiding local lawmakers in better comprehending a well-rounded legislative, legal, and moral scope of the problem, I hope to better position their efforts to end it. My hope, too, is that this paper's research can serve other states moving forward, given that (barring the unlikely

[2] The principal statewide coalition for criminal justice reform, the Second Chance Coalition, was focused at the time (as they still are) on restoring the right to vote for people with criminal records, and the Council on Crime and Justice Board of Directors did not wish to add the issue to its legislative agenda in 2015.

passage of a new federal law) the battle to rid the internet of mugshots will mostly like be fought state-by-state.

Introduction

Bill Thompson once went by a different name[3]. He lived in Mankato, and despite being short of work and struggling to make ends meet, he had high hopes for his future. That was 2002, and back then he was known as Mark. One night he had the misfortune of being pulled over by police *and* sharing a name and date of birth with another person in Minnesota. The other Mark Thompson had a criminal record for check fraud. Like thousands of other people across America every night, Thompson was booked in the local jail and photographed, producing what's known as a mugshot, a part of one's criminal record that exists for identification purposes, but has come to mean so much more. Mark's mistaken identity was eventually resolved, but that night has haunted him to this day.

Mugshots are not inherently bad – not legally, ethically, or otherwise. In a perfect world, a mugshot is created upon one's arrest and remains a part of government records for a lifetime, but does not end up in private hands. The mere existence of a mugshot can aid the police in locating a fugitive, especially when tracking a person across state lines or into unknown territory. In other cases a mugshot can be widely disseminated to ensure public safety. But the evolution of government record access has meant that those same mugshots are widely available for private consumption. In most states, these records cost nothing to obtain, and in many locales they are

[3] The story of Bill Thompson is an amalgamation of several real-life stories I discovered in my research for this paper. The circumstances described have occurred in every state in America and continue to affect citizens in Minnesota today.

placed on the internet and require nothing more than a click of a mouse for them to pop up on a computer screen. In places where mugshots are not posted online, they can almost always be requested under open records laws. Legislators can choose to make such records private and inaccessible, but they never do. The effect of such policies meant that Mark Thompson's mugshot, like millions of others just like it, was legally accessed by unknown parties, only to find its way to a website called Mugshots.com. Once on the internet, the mugshot could never be undone or forgotten. Worse yet, the website made clear that only a payment of several hundred dollars could make the mugshot disappear, money he did not have. Otherwise his image would remain there, whether he liked it or not, staring back at future employers, landlords, relatives, partners, strangers, friends, and anyone with a mouse and a keyboard.

Bill Thompson changed his name to escape his past, an awful consequence of the mugshot that never should have been. Thousands of others like him across the country cannot or choose not to go that route. Either way, with every new job, apartment, or loan applied for, their past creeps back in, and they are left to wonder whether the lack of a call-back is due to their qualifications or false assumptions gleaned from a google search. For others, the mugshot is the result of a drug possession, a teenage fight, or a heated domestic dispute, and even when a punishment is warranted, the mugshot makes it worse. Among those who believe in firm, stern punishments for criminal behavior, most agree that eventually our past should become just that. But for those like Mark Thompson, who did nothing wrong but be born with the wrong name on the wrong day, the mugshot – created in response to a crime he did not commit – will forever be his worst enemy.

Placed in its proper legal, historical, political, and sociological contexts, the proliferation of websites devoted exclusively to mugshots galleries is not surprising. Entrepreneurs saw an

opportunity to exploit the public's fear of crime and voyeuristic tendencies, and they seized it (Batchelder, 2014; Kravets, 2011; Segal, 2013). First Amendment protections and government transparency laws provided these enterprises with generous legal cover, and the internet provided them with a massive market and little financial risk. The conditions thus became ripe for individuals behind the mugshots, often some of the most vulnerable and marginalized people in American society, to be preyed upon and targeted as a profitable symbol of criminality. This predation goes beyond any reasonable concerns about public safety, or even the simple humiliation of gawking at one's misfortune, to an even more sinister place: The websites profit from individuals desperate to have their images removed from the internet to avoid public shame, harmful stigma, and a host of collateral consequences (Batchelder, 2014; Lageson, 2015; Lageson; 2017).

Purveyors of this trade may do so in the name of public safety, free speech, and government accountability, but their profit motives have been exposed (Batchelder, 2014; Kravets, 2011; Lageson, 2015; Segal, 2013). The business model and profit structure have changed in recent years, but the outcomes have not. People who are arrested for crimes, up to a quarter of whom will have their cases dismissed, are stuck both paying to rid the internet of their mugshots and fighting the stigma of them being found in the first place (Cohen & Kyckelhahn, 2010). Given that over 150,000 Minnesota mugshots are stored in the Mugshots.com database alone,[4] the number of people in the state with a mugshot but no criminal record is most certainly in the thousands, most likely higher. And with approximately one-third of all Americans now arrested by the age of 23, the scope of this problem nationwide is massive (Brame et. al., 2012).

[4] A google search for "Minnesota mugshots" was performed May 1, 2017, and the Mugshots.com website was the top result.

We are left, then, to face a stark new reality: Anonymous website owners across the world legally post mugshots of everyday citizens, many of whom are innocent or low-level criminals, and then seek money to remove the image; google searches reveal the mugshots, often with incorrect or little background information; and the subject faces the prospect of indefinite harm to his reputation and difficulty accessing jobs, housing, and various social services – unless he pays a hefty fee, which may or may not solve the problem. In the process, no piece of evidence exists that the mugshots improve public safety, reduce recidivism, or expose government wrongdoing. If anything, the mugshots industry makes society less safe and stable, as the violent criminal, non-violent drug user, and innocent arrestee all become indistinguishable.

All of this leaves legislators with a clear choice, in Minnesota and elsewhere: Do nothing and allow the problem to continue to harm constituents, or fight to end a practice that few support and yet few have managed to stop.

Minnesota's History in Addressing the Problem

The key to that whole negotiation [in 2014] was our conclusion that the problem was real. It was serious. We were trying to be part of a solution. And to the extent that you continue to allow unimpeded, unrestricted, unqualified access to these mugshots, there was not going to be a solution.[5]

Mark Anfinson, 2017

In 2014, Minnesota State Representative Kim Norton's bill, H.F. 1940, generated momentum and support at the Capitol, but could not gain enough traction in the Senate to

[5] Anfinson, M., personal communication, April 28, 2017

become law. Several lobbyists representing quite diverse constituencies publicly opposed the bill as it was initially written, but they then worked with Norton to find a compromise with tentative but nearly unanimous support. (Anfinson, 2014; Ehling, 2014; Franklin, 2014; McQuitty, 2014; Minnesota H.F. 1940, 2014). Alas, the bill was not meant to be. As Norton told me in an email regarding its demise, "The short answer is that the Senate refused to hear the bill and so my bill sat on the General Register but was never brought to a vote because there was no Companion bill in the Senate. It COULD have been put in an omnibus bill, but the chair wasn't sure it was getting the support from all parties yet" (Norton, K., personal communication, March 30, 2017). In other words, she believes HF 1940 was not far from becoming policy.

Kim Norton's proposed bill, like those that have seen governors' signatures in 14 states so far, was warmly received for its noble aims, but criticized for its mechanisms of action. In its final iteration, the bill called on the requester of a mugshot to submit detailed personal information, along with disclosures about the proposed use of the mugshots and any publications or websites in which they might appear. Furthermore, the bill contained a requirement that if the mugshot changed hands, both its original and new recipients must notify the state agency that originally housed the photo, and the new owner must meet the personal and publication disclosure requirements. The information to be gathered from these reporting requirements would then be used to hold people accountable if they violated several provisions in the second section of the bill. Among those requirements were that websites and their owners not be able to charge a take-down fee; had to remove photographs if a person could show they were acquitted or had charges dismissed; and were required to post only first name and last initial of people who had been convicted of a crime. If any of those provisions were violated, civil fines could be assessed (Minnesota H.F. 1940, 2014).

When the bill came before the Public Safety Finance and Policy committee on March 20, 2014, the bill had been re-worked to accommodate concerns from its first reading, but a new dissenting view emerged. Among those who had testified in front of the Civil Law committee a month earlier with concerns about the bill – including lobbyists from the Minnesota Newspaper Association, the Minnesota Sheriff's Association, and the League of Minnesota Cities – none of those parties re-emerged to voice their dissent. At that point the lone dissenting voice was Matt Ehling, of the Minnesota Coalition on Government Information (MNCOGI), who believed that the bill's reporting requirements violated the egalitarian principles of the Data Privacy Act: To carve out a mugshots exception for access and reporting requirements, he said, would portend future efforts to make exceptions for other public data (Ehling, M., 2014). No one will ever know how or if Ehling's legitimate concerns would have been incorporated into the bill. That day would be the last anyone ever heard of HF 1940.

The silver lining to the collapse of Norton's bill is the very real possibility that it would have failed in practice. Karmen McQuitty, an attorney with the University of Minnesota's Student Legal Services and a staunch opponent of the online mugshots industry, actually opposed HF 1940, because she believed mugshot companies were evolving to outwit that type of legislation (McQuitty, 2014). As she pointed out three years ago in testimony at the Capitol and again recently in an interview with me, by 2014 the profit model for many of the online companies had changed, and the enforcement mechanisms in the bill would have proven themselves outdated from the start (McQuitty, 2014; McQuitty, K., personal communication, March 27, 2017). As is the case in other states' policies addressing the problem, this bill included language that prohibited companies from accepting a fee or other consideration for the removal of a mugshot; yet websites like Mugshots.com were already shifting in 2014 toward a revenue

model that evaded this restriction on technical grounds. Instead of directly accepting a take-down fee, the companies were using advertisements and behind-the-scenes agreements with reputation defender companies to generate revenue. So here we stand in 2017, and despite lawsuits pending across the country to stem this practice, websites like Mugshots.com continue to operate with impunity.

Despite the setbacks of 2014, with hard work in 2017 and beyond, a legislative solution can be found in Minnesota. I have spoken with four of the five people who testified about Representative Norton's bill, and all of them remain interested in coming to the table, sharing their views and expertise, and trying to find common ground. Rarely in today's era of fierce partisanship do policy issues find widespread support across party lines, but the online mugshots problem does just that. The opportunity to find a solution is made greater by the fact that many of the concerns people have from a policy perspective were debated and hashed out three years ago. The media lobby remains committed to having access to mugshots for mainstream media outlets. Advocates for government transparency insist that mugshots remain in the public domain and that a solution does as little as possible to alter the Data Practices Act. The law enforcement lobby is concerned that county sheriffs across the state are not forced to do more paperwork or be held liable for mugshots ending up in the wrong hands. All of them agree, though, that the practices of websites like Mugshots.com serve only to do harm, and with compromise and hard work from all sides, effective legislation to solve (or at least put a dent in) the problem is a real possibility.

The Advent of the Online Mugshots Industry

That the outer man is a picture of the inner and the face an expression and relation of the whole character, is a presumption likely enough in itself, and therefore a safe one to go by: evidenced as it is by the fact that people are always anxious to see anyone who had made himself famous by good or evil…Photography, on that very account of such high value, affords the most complete satisfaction of our curiosity.[6]

Arthur Schopenhauer, 1851

Photographs of criminals were logged by American police departments as far back as the 1850s, but Alphonse Bertillon, a clerk at the Prefecture of Police in Paris and a significant figure in 19th century criminal anthropology, created the modern-day mugshot towards the turn of the century (Finn, 2009; Frazer, 1909). The process grabbed an image of an arrestee both head-on and from a profile view and paired it with other identifying individual characteristics and measurements, thus setting a powerful standard for forensic photography still used today (Farebrother & Champkin, 2014; Papi, 2006). In the 1890s, when the mugshot first made its way to America, it served primarily to surveil criminals and identify past criminality in case a person reentered the justice system (Finn, 2009). Beyond basic policing, though, the use of mugshots – especially through rogues galleries and mass media – quickly became a tool for a combination of public humiliation, punishment, and spectacle, which together have captivated societies since the crucifixion of Christ (Lashmar, 2014).

Throughout the 20th century, mugshots and other forms of criminal photography became more and more pervasive in society, as much a tool for voyeurism as public safety (Lashmar,

[6] Schopenhauer, A. (1915). *Religion: A dialogue and other essays* (T.B. Saunders, Trans.). New York: The Macmillan Co. (Original work published 1851).

2014). From print on to television – and primetime stalwarts in the 1980s like *America's Most Wanted* and *Cops* – the public relished in consuming tantalizing stories of deviant criminals in our midst (Batchelder, 2014). The internet was simply the next medium employed to shame those who enter the criminal justice system by broadcasting millions of mugshots across the globe.

The publication of this type of material is thus nothing new, but today's vast online networks for distribution revolutionized its scope and the market for it. The current mugshot industry got its start, by all accounts, in 2010 with a site called florida.arrests.org and a man named Craig Robert Wiggen (Segal, 2013). With an eye towards finding new work after spending 3 years in prison for credit card fraud, he spawned an industry that today counts dozens of websites that profit solely from posting on the internet millions of mugshots of everyday people. The entire online mugshots industry, in fact, is the product of people who have a mugshot themselves – people who are likely to understand the social stigma attached to it and thus the opportunity to exploit its powerfully stigmatizing effects (Fusion, 2016; Goffman, 1963; Segal, 2013; Tanner, 2012).

The original business practice conceived of by these types of websites was more overtly predatory and more closely resembled extortion or blackmail[7] than today's primary money-making scheme, but new laws and public pressure have changed the industry. In the early days, circa 2011, these websites directly offered a take-down service at a cost of several hundred dollars per transaction: If a person paid, say, $399, the website would remove the mugshot. Today, to conform to newer laws and others on the horizon, the websites generate revenue

[7] Minnesota Statute 609.281 defines blackmail as a "threat to expose any fact or alleged fact tending to cause shame..." but because websites have already posted mugshots online, no lawsuits against mugshot publishing companies have ever been brought forth.

through back channels, typically via companies advertising on these websites that pledge to restore one's reputation online by helping to get the mugshots removed. The fee structure used today to take down a mugshot still requires a hefty sum and still comes with no guarantee that a new site won't pop up the next day with the same image (McQuitty, 2014). Whether the mugshots and reputation companies are colluding behind the scenes, as lawsuits have alleged, is beside the point: The rules may have changed, but the game remains the same – and the outcome is rigged (Yerak, 2017). These companies will find a way to profit off people desperate to leave their past behind them.

In deciphering these networks and the people who manipulate them, one can easily get lost in a web of foreign addresses, hard-to-locate lawyers, and business owners who refuse to speak to anyone asking questions (Fusion, 2017). But one truth, hiding in plain sight, is the reality that many mainstream newspapers use these same mugshots to earn advertising revenue and drive traffic to their websites, because the lure of increased website traffic is too strong to resist (Fusion, 2017). Websites of the *Chicago Tribune* and the *Tampa Bay Times*, among others, use pages of local mugshots to drive thousands of visitors to their websites every month, one tool in the arsenal of newspapers desperate to stay alive.

Without a hint of irony, the *Chicago Tribune* recently published an article about the damage done to citizens who have difficulty finding work due to an online mugshot (Yerak, 2017). Meanwhile, when the Editor of the *Tampa Bay Times*, a Pulitzer Prize Board Member named Neil Brown, was recently confronted with questions about the journalistic integrity of its mugshots gallery, he adamantly defended the practice as reputable journalism, while also acknowledging its useful profitability (Fusion, 2017). This profit model of using provocative content, under the guise of newsworthiness, to attract unique website visitors may be different

from that of the non-mainstream media outlets; but it still perpetuates the exploitation of vulnerable people and shows little regard for the long-term damage it creates.

The power of the internet's underbelly is devastating, swallowing up even those who are never convicted of a crime and leaving little distinction between noteworthy news and tabloid exploitation. And the victims remain the same people who are most vulnerable throughout society. The same people most likely to enter the criminal justice system in the first place, who are disproportionately people of color and without high school diplomas. The same people who then seek second chances, having paid their debts to society, and find that a simple arrest – never mind a lengthy criminal record – will haunt them forever, tearing down prospects for jobs, housing, relationships, and myriad other opportunities.

Stigma and Collateral Consequences

The subject of a mug shot is a potentially always-and-everywhere surveilled person; she is an affected, shamed, and stigmatized person. Today more than ever before, her criminal self is constructed by forces beyond her control.[8]

Kate West, *Society Pages*

Erving Goffman's enduring 1963 book *Stigma: Notes on the Management of Spoiled Identity*, captured and dissected a reality as real then as it is today for stigmatized people in America, one of being vulnerable at every turn in a society that deems them deviant (Goffman, 1963). For people who unwittingly have their images entered into a public database of mugshots, the fact that they are disproportionately black or brown means the stigma they face is multiplied:

[8] Lageson, S. (2014, May 19). The enduring effects of online mugshots. *Society Pages.* Retrieved from: https://thesocietypages.org/roundtables/mugshots/

The existing otherness they have worn their entire lives, skin color, is darkened by a reinforcing and compounding symbol of criminality (Carson & Anderson, 2016). Goffman names as distinct these different forms of stigma – people with criminal records fall victim to perceived "blemishes of individual character perceived as weak will, domineering or unnatural passions, treacherous and rigid beliefs, and dishonesty," while people of color suffer from the "tribal stigma of race" – but the outcomes are similarly pernicious in a world that shuns and shames people in such personal, public, and provocative ways (Goffman, 1963).

Racial markers in America are stubbornly persistent precisely because of their unavoidable visibility, but government institutions and officials have great power over how criminal symbols are created, revealed, and sustained. Whereas countries in the European Union have hashed out a legally enshrined right to have previously public information forgotten, a history of state and federal laws in America has mostly veered toward more openness and transparency (Ambrose & Ausloos, 2013; European Union, 2012). The result is a web of systems in the United States that allow easy access to mugshots, the flashiest of all criminal symbols (Kravets, 2017). As a person with a mugshot navigates these systems seeking jobs, housing, public benefits, higher education, or the basic right to vote, she is faced with a wave of denials; barriers to success in life and re-entry from prison; and counterproductive collateral consequences that contribute to higher rates of recidivism (Decker et. al., 2015). The stigma that undergirds these structures of social control also serves to perpetuate and reinforce them, and the cycle of unacceptance in society only hardens.

The stigmatizing effects of a mugshot can be felt at three distinct levels in society – social, structural, and self – each of which presents its own set of impediments to health and well-being (Link & Phelan, 2001). Structural stigma encompasses institutional barriers that may

contribute to difficulty in obtaining employment or housing; social stigma is felt by the ways in which community members may label a person as morally inferior; and self-stigma influences how a person will act based on how he perceives that the world views him. The ways in which these three forms of stigma work to reinforce one another find their roots in labeling theory made popular by sociologist Howard Becker in the 1960s: As a means of social control, society labels as deviant people whose behavior does not fit the norm, and that label serves to perpetuate deviance by infiltrating one's negative image of self (Becker, 1963). While certain legal protections exist to mitigate this perpetuation of stigma and the resulting deviance among people with criminal records – Ban the Box (2013) legislation being the prime example in Minnesota, which discourages hiring practices that excessively punish formerly incarcerated individuals – the reality is that a single Google search easily overrides such noble policy. The result is a photograph that at once serves as a reminder to employers, landlords, colleagues, neighbors – and the subject himself – that the person behind the photo is unworthy and dangerous.

To be labeled in America as unworthy and dangerous, while potentially debilitating for people of all races and classes, has particularly disparate impacts for people of color. Given that Americans are prone to viewing black people in America as criminal and violent in nature (Sniderman & Piazza, 1993; Devine & Elliot, 1995), combined with the highly disproportionate rates of arrest and incarceration for blacks (Carson & Anderson, 2016), the resulting stigma of these combined characteristics is particularly harmful. In the employment sector, for example, Devah Pager's well-publicized research comparing the effects of race and criminal record on people applying for jobs found clear evidence of discrimination on both fronts: The most notable statistics revealed that whites with a criminal record – who were already 50% less likely to get a call-back than whites without one – received more responses for entry-level jobs than blacks

without a record (Pager, 2003). The research also found that the ratio of call-backs for blacks without a criminal record compared to blacks with a record, keeping all other factors equal, was 3:1, a disparity greater than that seen between white subjects with and without criminal records (Pager, 2003). Pager's work was so valuable because it laid bare the blatant discrimination faced by people of color and people with criminal records when seeking employment. Larger sociological debates carry on about the extent to which criminal justice involvement and incarceration create social disadvantage compared to how much they are a reflection of existing disadvantage – and Pager's findings reveal that the answer lies somewhere in the middle (Wakefield & Uggen, 2010). In any case, it paints a picture of black Americans faring worse before incarceration; being more likely to be arrested and go to prison; and then being more likely to suffer the collateral consequences of a criminal record.

As long as American society continues to allow people caught up in the criminal justice system to be stigmatized and exposed as deviants for life, the sentences they face will carry on beyond their physical freedom, probation, or parole. Part of this punishment involves a burden they must carry with them wherever they go, an awareness that if their history of supposed criminality is revealed, those Goffman (1963) terms "normals" will refuse to accept them as equals and recognize their dignity. It is precisely this burdensome fear that is exploited by websites like Mugshots.com, as the subjects of mugshots pay big money to remain "normal" and fit into a world that will discriminate against and demonize them if they are found out (Goffman, 1963). Given the explosion of easily accessible criminal records in recent decades, the ubiquity of mugshots may someday lead to an environment in which this symbol of deviancy no longer carries such power. Unless and until that day comes, though, the problem is exacerbated by the unforeseen consequences of mugshots in the digital age.

The Debate about Regulation

Let's face it: When people are arrested and or booked and or there is a mugshot taken of them that is a criminal charge, a criminal record, behavior…and it is a factual document of that snapshot in time when they were charged with a crime of some sort or arrested or some sort of criminal behavior…The public has a right to know all of those things. The question is the dissemination of this information in a profiteering racket or market, if I can use those terms, is revolting and is disgusting. As opposed to it is a factual thing you were arrested, and what have you done over the last five years and you have had stellar behavior – yes that was a blemish on your record way back when, but you know, it is history.[9]

Jim Franklin, *Minnesota Sheriff's Association*

In considering new legislation to combat the existence of online mugshots, several valid competing and overlapping arguments arise. Opponents of various legislative proposals to alleviate the problem have legitimate concerns about potentially unforeseen consequences. These concerns deserve serious consideration by lawmakers and must be viewed in their historical, political, geographic, and legal contexts. The debate outlined below combines judicial and statutory documentation, local and national interviews, and evidence-based research, in order to present a comprehensive overview of the debates that drive this legislative issue. Four principal categories of debate are detailed below: 1) Government Transparency; 2) First Amendment Rights; 3) a Right to Privacy; and 4) Public Safety.

Government Transparency

[9] (Franklin, J., personal communication, April 3, 2017)

One of the most potent arguments in the 2014 legislative debate over HF 1940 remains an obstacle to effective legislation today: Any requirements placed upon people requesting a mugshot take us down a slippery slope towards less open government. This line of thinking holds that the Data Practices Act was created to ensure government be held accountable, and public information like mugshots must be accessible to all and without restrictions on its use.

Additionally, those who promote the rights of people who have been arrested or convicted of a crime fear that restrictions on access to government data are problematic. Attorney Josh Esmay of The Legal Rights Center notes that the importance of access to mugshots can sometimes outweigh secrecy, especially as it allows the public to document patterns of discriminatory and abusive policing. Additionally, he told me, easy access to criminal records enables people to locate loved ones when they are missing and may be incarcerated (Esmay, J, personal communication, 2015). In sum, these arguments stand on the side of more, not less, government data being available, with a recognition that potential abuse of such data – via online mugshots websites, for example – is an unfortunate collateral consequence.

Many observers at the state level are unaware that federal law and court cases support the position that mugshots should not be public in the first place. The federal Freedom of Information Act (FOIA) was codified into law in 1966 as a means of promoting transparency in government, but not to allow access to information that will inflict injury to the public (Watkins, 2013). One way in which such injury is avoided is through the FOIA's Exemption 7(C), which pertains directly to the protection of personal data in law enforcement records. The Justice Department, in its *FOIA Guide, 2016,* recognizes that disclosure of this information must be balanced against public interests (Department of Justice, 2016). As outlined in *National Records*

and Archives Admin. vs. *Favish* (2004)*,* the burden of proof falls on the requester of information to show that the public interest sought to be advanced is a significant one and that the requested information is likely to advance that interest. Furthermore, in *Department of Justice* vs. *Reporters Committee for Freedom of the Press* (1989)*,* the *compelling evidence* doctrine was used to shore up the ruling by noting that the requester must show that government is potentially hiding something or engaged in illegal activity to justify the release of private data (Wolfe, 2013).

First Amendment and Free Speech Rights

The First Amendment to the United States Constitution declares that "Congress shall make no law…abridging the freedom of speech, or of the press…" (U.S. Const., amend. I). With few exceptions, the Supreme Court has stood on the side of protecting the right of the public to legally obtain truthful information and then re-publish it under the protections of the First Amendment. As recently as 6 years ago in *Snyder* vs. *Phelps* (2011), the Supreme Court ruled that the First Amendment protects even the most vile speech. The case involved the Phelps family of Westboro Baptist Church (WBC) fame, known for picketing fallen soldiers' funerals with provocative signs, such as those that celebrate soldiers' deaths (Rostron, 2013). While the speech that emanates from WBC protesters is universally derided as offensive, the Supreme Court ruled in favor of the family, because none of the few Free Speech exceptions were met (Rostron, 2013).

Other Supreme Court cases have also set a precedent in favor of the press, despite offensive or harmful speech: In *Cox Broadcasting Corporations* vs. *Cohn* (1975), the Supreme

Court ruled 8-1 in favor of Cox, concluding that its dissemination of a rape victim's name contained within a legally obtained public document was within the bounds of the law (Rostron, 2013). States have the right to restrict access to certain kinds of records, and they have done so, but *Cohn* reflects the fact that when obtained legally, public information can lawfully be published without any civil or criminal penalty. Matt Ehling of MNCOGI was adamant in our conversation that once truthful information is in the public domain, the law should not impose restrictions on how such information is spread (Ehling, 2014; Ehling, M., personal communication, April 10, 2017). Mr. Ehling's position, taken further, holds that the state should not require that a person requesting a mugshot declare where it will or will not appear; that no limits be put on the kinds of websites on which data can appear; and that no requirements be made stipulating that a party must investigate the truthfulness or claims contained within legally obtained data. To preserve these First Amendment rights and still address the problem, he told me, requires a singular focus on creating barriers to mugshot access in the first place (Ehling, M., personal communication, April 10, 2017).

A legitimate debate exists about whether First Amendment rights extend to the practice of publishing mugshots and accepting a fee to remove them, and whether this practice amounts to extortion – but mugshots websites no longer profit in this manner.[10] Websites like Mugshots.com now generate revenue through advertising and back-channel agreements with companies like Removearrest.com, and so the concern among freedom-of-the-press advocates has become one of ensuring access to mugshots for good actors and barriers for bad ones. Accomplishing this balancing act is no easy feat, not least because defining the good actors is

[10] *Supra* note 5

naturally a subjective exercise. Mark Anfinson, of the Minnesota Newspaper Association, further explains this issue from the perspective of the media lobby:

> "The view always was that the news media stood in the same shoes as the general public in terms of access to government records and that the media should not have special privileges. My position on that has changed in the last several years because of the emergence of entities and individuals calling themselves news organizations. It creates a form of chaos. The choice becomes losing public access completely or singling out bona fide news organizations for special treatment. My own view is that the latter choice is the better one. After all, the First Amendment to the U.S. Constitution singles out the media for special treatment. I don't like it, but sometimes, if you don't accept that as a special option, you lose everything" (Anfinson, M., personal communication, April 28, 2017).

Matt Ehling, of MNCOGI, opposes any distinctions between the different types of actors who seek public data – insisting that the prevailing view Anfinson mentions should remain in place – and that the answer to the problem lies in regulating how the data can be accessed (Ehling, M., personal communication, April 10, 2017).

All of the Minnesota stakeholders whom I spoke to acknowledge that, regarding access to information, First Amendment concerns are not black-and-white. While the First Amendment guarantees the right of the press to exist, nowhere does it define the press; guarantee unfettered access to all government data; or stipulate how information should be made available to the media. Karmen McQuitty, who as a lawyer represents students who have been arrested, told me, "I get freedom of speech, but I am in the business of trying to minimize consequences long-term for my clients, and I would like to see a little bit more control in not letting this information go everywhere when [it comes about] as a result of a simple arrest" (McQuitty, K., personal

communication, March 27, 2017). Matt Ehling, Jim Franklin, and Mark Anfinson all expressed varying degrees of sympathy to Ms. McQuitty's concerns. They were also in agreement that mugshots absolutely belong in the public realm. The defining question, for them, becomes: Can a law be written that ensures individuals and the mainstream media are able to inspect and use mugshots, but in such a way that mugshots websites will no longer make the effort to do so themselves?

A Right to Privacy

The modern conception of one's right to privacy dates back to the *The Right to Privacy,* an 1890 paper by Warren and Brandeis, which lays out the case for a common law definition of privacy to account for its absence in the nation's founding documents (Chinai, 2012). No explicit mention of a person's right to privacy exists in the Constitution, which begs the question: If the Founding Fathers intended for such a right to exist, why was it not detailed in the Bill of Rights? Warren and Brandeis argue that laws are constantly adapting to the times and responding to the demands of technology, and thus certain common law principles must be articulated to protect one's dignity and allow a person to prosper (Warren & Brandeis, 1890). The authors, in response to the advent of photography and tabloids, outlined the anguish that can result from the publishing of private facts; unwanted publicity of private individuals; intrusion into one's life and affairs; and the misappropriation of one's name or likeness for pecuniary gain.

Various rights to privacy exist in the 1st, 4th, 5th, 9th, and 14th Amendments, and the Supreme Court has declared as much in the past 50 years. In *Griswold* vs. *Connecticut* (1965), *Stanley* vs. *Georgia* (1969), and *Roe* vs. *Wade* (1973), the Court found that the one's right to

privacy – regarding contraception, pornography, and most famously, abortion – outweighed the state's *compelling government interest*[11] to intervene in one's private affairs. Courts have also protected private information throughout the past century when it was sought for the sole purposes of curiosity, and they have invoked privacy rights in protecting rape victims, juvenile records, and grand jury investigations (Watkins, 2013).

One of the most relevant aspects of the privacy arguments that exists in the mugshot debate is that significant federal judicial precedence exists in favor of keeping criminal records private. Three appellate cases in the 6th, 10th, and 11th districts – *Detroit Free Press* (2016), *Karantsalis* (2011) and *World Publishing* (2012) – provide striking rulings which recognize the harm that can be done with the release of personal information. As a result of these cases, mugshots of defendants in federal court cannot be obtained by the public. As Judge Deborah Cook wrote in her 2016 *Detroit Free Press* decision, "Individuals enjoy a non-trivial privacy interest in their booking photos." These rulings point to the need to balance privacy rights with public interest when disclosing data, with the barometer being whether such information may actually pierce the veil of government secrecy, and thus serve a public interest. The unified conclusion in each case is that a mugshot does not meet that threshold.

In my discussions with Minnesota advocates who testified in 2014 about Kim Norton's H.F. 1940 bill, the various stakeholders all recognize the serious privacy concerns, but ultimately believe that mugshots should remain public record. Minnesota Newspaper Association lawyer Mark Anfinson summed up the complexity of the debate: "Why this is such an interesting area, privacy and public access law, and what makes it so interesting and intellectually dynamic is

[11] This concept, dating back to the 1930s, is part of the Strict Scrutiny doctrine, and it provides heightened protections to certain Constitutional rights by requiring government to show that there's a compelling state interest to intervene in one's private affairs (Siegel, 2006).

you have, in effect, two very valuable positive important interests in conflict. It's not good versus bad: It's good versus good, and balancing that properly is difficult in many cases. It's the nature of the beast" (Anfinson, M., personal communication, April 28, 2017). Each of the interviewees maintained that the importance of some sort of public access to mugshots outweighed privacy concerns, but they were fully committed to ensuring that mugshots websites could not easily abuse this access.

Public Safety and Crime Deterrence

High-profile abduction, sexual assault, and murder cases over the past quarter-century have led to more widespread public dissemination of criminal records and information (Duwe & Donna, 2008). This trend stems from the belief that the more the public is made aware of predators in its midst, the more vulnerable people can protect themselves from perpetrators of heinous violence (Duwe & Donna, 2008). Two prominent crimes leading to laws that made criminal record information more accessible were the abduction of Jacob Wetterling in Minnesota in 1989 and the murder of Megan Kanka in New Jersey in 1994. Federal laws were enacted in 1994 and 1996 that called for people convicted of sex crimes to report their whereabouts to law enforcement and for law enforcement to disseminate this criminal history information to local residents (Violent Crime Control and Law Enforcement Act of 1994; Megan's Law, 1996). In the case of Megan Kanka, Megan's Law fit perfectly with this public safety narrative, given that her killer had a history of sexual assault and lived across the street, unbeknownst to her parents. The man who kidnapped and killed Jacob, on the other hand, had no

prior criminal history, and thus the law passed in Jacob's name, if enacted earlier, would have had no bearing on his fate[12] (Freemark, 2016).

More than protecting one's own physical safety, the prevailing American tendency towards greater public access to personal information resides in a core belief that businesses and individuals have a right to make informed decisions about whom they associate and do business with (Jacobs & Larrauri, 2014). Banks, for example, would seemingly want to know if a potential employee has a penchant for theft and wire fraud. A nursing home would surely want to make sure its employees had no history of abusing or neglecting vulnerable adults. Parents would want to make sure that their kids' soccer coach is no criminal. These arguments are difficult to object to, but questions remain as to whether vast databases with photographs of people – who often are only *arrested* for crimes – address these aforementioned scenarios. For example, would government-run search engines that turn up names and criminal record information for anyone *convicted* of a crime, but minus the mugshot, suffice in the public's view?

The public safety argument in favor of disclosure of criminal records also focuses on deterrence. Scholars have long argued that the prospect of being publicly shamed for one's misdeeds serves as a significant deterrent to future criminal acts (Jacobs & Larrauri, 2014). Granting that a person's desire to avoid such stigma and discrimination is natural and likely, the question that follows is whether part of the effort to avoid shame and maintain a positive reputation actually prevents crime. Furthermore, the question of stigma as crime deterrence may depend on whom the target is, because the presence of crime stigmatization has been shown to

[12] In the 2016 hit podcast, *In the Dark,* Jacob Wetterling's mother, Patty, expresses her unease with the consequences of the law passed in her son's name. She notes that not only would such a law have not saved her son, but it detracts from greater danger to children posed by people known to victims.

reduce future offending by people without criminal records, but increase recidivism among those with records (Funk, 2004). If indeed stigma has opposite effects on different populations, determining whether it is a worthy goal becomes much more problematic.

Many proponents of restricting public access to criminal record information believe that recidivism is reduced by lessening post-incarceration stigma and collateral consequences, and more generally by maintaining the dignity of people who have encountered the criminal justice system in one form or another (Jacobs, 2006). This argument assumes that one of the primary barriers to successful re-entry and reductions in recidivism rates is the elimination of stigma, as opposed to a person's predisposition towards criminality or inability to thrive in the workplace. Compelling evidence exists to support the argument that how people with criminal records are labeled, for example, affects recidivism: For people with identical criminal histories, those who receive felony sentences – and are thus forever labeled "felons" – have higher rates of re-offending in the future than those who receive lesser punishment (Chiricos et. al., 2007). Furthermore, extensive research has shown that having gainful employment – which is more difficult to achieve with a mugshot and its accompanying stigma – is tied to lower rates of recidivism (Berg & Huebner, 2011). As such, a compelling public safety argument exists to support efforts to reduce the shame and stigma experienced by people with criminal records.

To parse out safety concerns and put forth policy recommendations also requires a recognition that while recidivism rates may be high, the likelihood of recidivating diminishes the longer one spends on the outside (Blumstein & Nakamura, 2009). Once mugshots enter the public domain, however, they can exist forever on the internet, punishing people far beyond the point at which people are likely to recidivate and be a threat to public safety. Despite no direct evidence linking mugshots to a safer society, or of mugshots being used widely to protect against

predators, public safety concerns are real – if only in the mind of the public. As such, the debate about whether or not mugshots promote safety is nuanced and complicated, and both sides make reasoned arguments in their favor.

Minnesota Data Practices Act and Open Records Laws

The Minnesota Government Data Practices Act (2016) provides direction on the rights of the general public to access government data, along with the particular ways in which those data are managed, distributed, and maintained for accuracy. More specifically, this statute dictates that data are "easily accessible for convenient use." Government data are "all data collected, created, received, maintained or disseminated by any government entity regardless of its physical form, storage media or conditions of use." Government data are classified into three categories – *public, private,* and *confidential* – that define who has access to what information. Only data classified as *public* would be available to the press and thus might make its way into a newspaper or onto the internet.

Further, the Data Practices Act (2016) outlines the duties of the state to provide the requested information in a timely manner; to limit the costs that the government agency can charge; and to provide records in an electronic format if the data already exist in that form. Upon request for public data, the entities responsible for dissemination and response to these requests are obliged to respond within a certain amount of time, and if the request is denied, a reason must be given as to the reason for the denial. As such, for mugshot requests, local county sheriffs' offices are compelled to quickly provide hundreds or thousands of mugshots at a time to the person requesting them, and because the photos are stored electronically, they must be

disseminated via CD or other electronic means (Eastham, J. personal communication, June 10, 2015). Also, there are limits on the costs that can be charged for distributing public data; those costs must reflect the actual time required of the department to fulfill the request. When Hennepin County officials attempted to charge excessive per-mugshot fees to curb the electronic bulk requests of an online mugshots website operator, a judge ruled in an administrative law hearing that sufficient evidence existed that the County had violated the Data Practices Act (*Prall vs. Hennepin County*, 2012).

Today, Minnesota law clearly states that mugshots are public record (Government Data Practices Act, 1995). Prior to this 1995 designation, though, the law was far less clear: Minnesota's Information Policy Analysis Division (IPAD), which issues advisory opinions on the Act to assist government entities in properly adhering to the law and to inform individuals of their data privacy rights, struggled to interpret whether mugshots should be private or public. In 1994 IPAD Commissioner Debra Rae Anderson advised that mugshots were public data under state law, except when they were being used for an active criminal investigation (Anderson, 1994). A year later, the new IPAD Commissioner, Elaine Hansen, penned a ruling acknowledging conflicting language in different parts of the Data Practices Act, but concluding that they should remain public: Based on vague language in the Data Practices Act, she wrote, a legitimate argument could be made that mugshots were personal corrections data and thus private[13]; but for both public safety objectives and to avoid any confusion among state agencies

[13] Statute 13.85(2) includes the following language: "Unless the data are summary data or arrest data, or a statute specifically provides a different classification, corrections and detention data on individuals are classified as private to the extent that the release of the data would…disclose …personal information not related to [individuals'] lawful confinement." In other words, this part of the Statute, which focuses on Corrections and Detention Data, could be interpreted to mean that mugshots are private data.

or conflict with Commissioner Anderson's previous opinion, they should remain public (Hansen, 1995). And so they do today.

Combatting the Problem across the Country

In order to fully understand how certain legislation may play out in Minnesota, one must look at other states that have passed laws to keep mugshots from creating undue harm to the person behind the photo. Beginning in 2012, states across the country began proposing legislation to stop this emerging problem in its tracks. Now five years later, 14 states have passed laws to chip away at the ability of private enterprises to act freely in publishing mugshots ("Mug Shots," 2017).[14] The spectrum of restrictions imposed on these actors includes laws ensuring the accuracy of criminal record data on mugshots websites; laws prohibiting mugshots websites from charging a fee to take down the photograph; laws requiring that mugshots websites remove photographs of people whose criminal record has been expunged; and laws that seek to prevent mugshots from getting onto private websites in the first place (Mugshots, 2017). More generally the laws, as outlined below, fall into three main strategies of tackling the problem, though there are nuanced differences within these categories and laws that span more than one category. They are listed in the order of most to least restrictive.

Most restrictive laws: Those laws that attempt to prevent mugshots from getting into the hands of nefarious actors in the first place via two methods: 1) Ensure that the official custodian of the mugshot not post it to a government-controlled website and/or 2) Require a person

[14] See Appendix A

requesting a mugshot via open records laws to sign a document that says that he will not charge fees to remove a mugshot: Utah HB 408 (2013); Georgia HB 150 (2013) and Georgia HB 845 (2014); Colorado HB 1047 (2014).

The three states that succeeded in passing some version of a bill to keep mugshots housed in government databases have had mixed results. Notably, Utah's HB 408 (2013) was either written poorly or it was written in a way that allowed each county to decide whether to restrict access to mugshots. As written, the bill "prohibits county sheriffs from providing a copy of a booking photograph to a person if the photograph will be placed in a publication or posted on a website that requires a payment in order to remove the photograph." The wording of this bill allows a sheriff in one county to post mugshots online and reasonably argue that he does not know where they will end up; in these cases, mugshots websites can simply re-post photographs found online. But in places like Salt Lake County, where Sheriff Jim Winder[15] chooses not to post the mugshots to the county website, the department is within the law to require a requesting party to sign a form affirming the mugshot will not be monetized using a take-down fee. Salt Lake County further combats the online mugshot industry by allowing only one mugshot request at a time (Skogg, C., personal communication, April 10, 2017).

Conversely, Georgia's HB 845 (2014) and Colorado's HB 1047 (2014) have achieved the aims of keeping mugshots off of government websites. In Georgia, the law makes explicitly clear that mugshots cannot be posted to a government website. In Colorado, government officials cannot distribute mugshots without signed forms stating that the photos will not be reposted on a website that requires a fee or other consideration to take it down. Requests for mugshots in both

[15] Sheriff Winder testified in favor of HB 408, because he believed that the posting of mugshots by the sheriff's office was causing great harm to constituents when their mugshot ended up on a site like Mugshots.com

states can still be made by individuals throughout the country, and bulk requests are allowed. The laws do not absolutely prevent websites like Mugshots.com from obtaining mugshots, but the extra steps of making the request and signing a form appear to have mostly eliminated the problem.[16]

For people like Mark Anfinson of the Minnesota Newspaper Association, these types of bills are the most appropriate way to address the problem without infringing on First Amendment rights. This argument starts from the premise that government should not be in the business of regulating *if* truthful public information is disseminated (whether or not an arrest was justified, it did indeed happen, making it true) and how it is used; but by restricting cheap and easy access, mugshots websites may no longer find their business profitable. Because the main method by which websites gather mugshots is by "scraping"[17] the internet – meaning website owners never have to make actual public records requests – the simple act of having to make an open records request and sign a form appears to be enough of a deterrent. Additionally, if a state office has the name of the requesting party, the likelihood becomes much higher of enforcing civil penalties if the mugshot is used to solicit take-down fees in the future. Otherwise, the state or local jurisdiction tasked with tracking down an anonymous website owner in another state or country will have minimal enforcement mechanisms.

Less Restrictive Laws: Those laws that require websites to take down mugshots or correct misinformation upon request in cases where people can prove they were acquitted or had their

[16] May 2, 2017 internet searches of Mugshots.com in Georgia and Colorado reveal no new mugshots since 2014.
[17] Scraping is a method by which software works to automatically download or extract select kinds of data from websites.

record dismissed or expunged: Oregon HB 3467 (2013); Wyoming SB 53 (2014); Maryland HB 744 (2015); South Carolina SB 255 (2016); Texas SB 1289 (2013).

This type of bill is the most common across the country – probably because it is among the least controversial arguments against the practice – but it is also the type that is least likely to stem the practice in any meaningful way. The argument is that if people can show that their arrest did not lead to a conviction, was dismissed, or led only to a civil penalty, then the presence of the mugshot is unduly harmful and misleading. The problems with holding mugshots websites accountable, ensuring removal of a mugshot, and preventing long-term damage to a person are many:

- How does one get in touch with the website, especially in cases where limited or no contact information exists on a website?
- How cumbersome is it to document one's innocence, assuming easy correspondence with the website?
- When and if the website takes down the photograph, how long until the photograph pops up elsewhere?
- How will a person know if a new website has sprouted up posting the same mugshot that had been previously removed?

Those who oppose these types of legislation on First Amendment grounds may not be appeased either, because some of these bills do not specify that only non-traditional media websites are responsible for taking down photos upon proper request. Newspaper lobbies are unlikely to warm to the notion that an arrest, whether it results in a conviction or not, is not newsworthy enough to remain part of the public record forever. Additionally, the bills, while

commendable, do next to nothing to end the commercialization of mugshots, and they do nothing to prevent the mugshots from appearing in the first place.

Least Restrictive Laws: Laws that deem practices unlawful which accept payment for removal, correction or modification of a record: Illinois SB 115 (2013); California SB 1027 (2014); Missouri HB 1665 (2014); Virginia SB 720 (2015); Kentucky HB 132 (2016); Vermont HB 105 (2015).

These laws make the practice of accepting money to change or remove criminal record information illegal, although some of the laws do not even make clear what the penalty is. These types of legislation, like others that impose civil or criminal penalties, face the problem of enforcement: How exactly will a business or individual be punished if based out-of-state or overseas, especially if the owner of the enterprise cannot be identified? The weakest characteristic of this type of legislation is that it addresses the outdated practice of directly soliciting a fee to take down a mugshot. For several years, websites like Mugshots.com have operated on a model that generates revenue through advertising and by owning sister companies like Removearrest.com that accept money and guarantee the mugshot is removed.

Recommendations for Minnesota

A disclosed booking photo casts a long, damaging shadow over the depicted individual. In 1996…booking photos appeared on 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. Desperate to scrub evidence of past arrests from their online footprint, individuals pay such sites to remove their pictures…The steps many take to squelch publicity of booking photos reinforce a statutory privacy interest.[18]

Judge Deborah Cooke, United States Court of Appeals, 2016

Most Effective: Privatize Mugshots

The majority ruling by the 6th District Court of Appeals in *Detroit Free Press* vs. *Department of Justice* (2016) could very well be used in support of new legislation in Minnesota to end the exploitive practices of the online mugshots industry – *and it should be*. When the Minnesota legislature amended the Data Practices Act in 1995 to codify into law the public status of mugshots, it could not have foreseen the explosion of the internet and all of its unintended consequences. In an attempt to balance the benefits of government transparency, public safety, and personal privacy interests, Minnesota legislators made a decision that was appropriate at the time and they came down on the side of greater disclosure. The rationales for promoting more openness are plausible ones: Minnesotans have a right to know that government is treating them fairly and equitably, and they should feel safe in their communities. Times have

[18] Detroit Free Press, Inc. vs. U.S. Dept. of Justice., 829 F.3d 478 (6th Cir., 2016).

changed in the past two decades, though, and the adverse consequences of mugshots in the public domain now clearly outweigh the benefits.

This proposal will not have public support, and it certainly will not have support from the stakeholders in Minnesota whom I spoke to, but it is the right thing to do. The safety of Minnesota's citizens is not at risk by taking this bold step of privatization. A small reduction in government transparency will not necessarily lead down a slippery slope of more government secrecy, and the criminal record data that accompany the mugshots will still exist for public dissemination and consumption. And like with the federal Freedom of Information Act, individuals and organizations could still go to court to demand access to mugshots if government abuses were suspected. Additional carve-outs to the law could be written in to allow law enforcement to release mugshots when public safety is at risk; to enable subjects of mugshots to request the photographs to show proof of police brutality or otherwise; and to ensure that government is held accountable in cases of police misconduct. The change in state law will mean principally that widespread public viewing of mugshots will disappear, and we will all be better off for this change.

If this proposal to fully eliminate mugshots from the public record proves too bold and controversial, slightly less radical changes would prove highly prudent as well. New legislation could stipulate that mugshots remain private unless or until a person is convicted of a crime, or only for those people charged with felony or sex offenses. In each of these cases, people convicted of low-level crimes or never convicted at all will be spared a lifetime of unnecessary fear, anxiety, and shame. The problem will not be fully eliminated, but the drastic improvement will be a step in the right direction.

Effective: Remove Mugshots from Government Websites and Change Means of Access

Short of privatization, which is unlikely given the dearth of support for it, the proposal that should be enacted – and the one that is most likely to gain some level of support from stakeholders in the debate – is a law that prevents county sheriff's offices from posting mugshots on public websites *and* allows only for viewing of mugshots at the sheriff's office. If the view-only option is taken off the table, then the policy should be that mugshot requests are made in person. The basic model for legislation of this sort originated in Georgia and Colorado, the only two states that make clear that mugshots cannot be posted to a government-run website, but Minnesota should go further. Matt Ehing proposes a law that allows only for inspection – no paper or electronic request – of the mugshot (Ehling, M., personal communication, April 7, 2017). If a researcher, citizen, or journalist wants a copy, she can go down to the sheriff's office and take a picture of the mugshot. Full access is preserved for everyone, and no First Amendment issues arise, because people are still free to do as they like once they have the photo. Mark Anfinson told me that the Minnesota Newspaper Association would be open to the possibility of a requirement that mugshot requests are made in-person (Anfinson, M., personal communication, April 28, 2017). I did not ask him about whether he would support an inspection-only policy, though it is likely that he would oppose such a proposal, due to the extra burden it would place on journalists. Finally, the Sheriff's Association would surely have to be convinced that an inspections-only policy would not greatly increase the workload of its employees.[19]

[19] Matt Ehling believes that such a policy would actually reduce the workload for sheriff's office employees, because he says most people who make public records requests do not want to come into an office to get them. He says the biggest complaints he hears from sheriff's office employees is that they have to make excessive numbers of copies (Ehling, personal communication, April 7, 2017).

The starting point for any policy detailed in this section should be taking mugshots off all government websites in Minnesota. There will be concerns, especially from the Minnesota Sheriff's Association, that taking *only* this step could lead to more work for counties that currently post mugshots online to avoid filling public records requests. In my conversations with sheriffs' offices in Georgia that have been working under that state's law for more than 2 years, no flood of work filling mugshots requests has occurred (Quigley, R., personal communication, April 3, 2017). Once the concerns of the Sheriff's Association are alleviated, this first step will likely gain widespread support. Removing mugshots from government websites must be the starting point in any discussion, though, because any less restrictive policies will be ineffective.

Other possible policies could be helpful in addressing the problem and should be considered, but they alone will not solve the problem, and opposition will exist. Limits could be placed on the number of mugshots that can be requested in a given time period to reduce bulk requests, though this stipulation would be unlikely to win support from either MNCOGI or the Minnesota Newspaper Association, for various reasons. Additionally, limiting bulk requests could actually flood sheriff's offices with hundreds of requests from angry mugshot website operators and sabotage the goals of such a policy. Finally, requiring signatures from those who request mugshots could serve as a small deterrent to nefarious actors, but because the revenue model has changed for the websites, a signature affirming that the photo will not be used to solicit take-down fees will have no real meaning.

The important take-away for legislators and stakeholders in this debate in Minnesota is that good options exist to address the problem, but those options are few. In order to have a real effect on the online mugshots industry, a state law must either privatize mugshots altogether or demand that they are removed from government-run websites. If we are to assume that

privatization is off the table, then in addition to removing them from websites, Minnesota should become a leader in this fight nationwide by allowing only in-person requests, or in-person inspection of mugshots without the option to make or obtain a copy. No longer will a person based in Florida be able to gather hundreds of thousands of mugshots from the Midwest. These types of legislation should render the industry unprofitable in Minnesota, while maintaining access to public records and the ability of the press to relatively easily obtain a mugshot to print in high-profile cases. Regarding public safety, law enforcement will be able to distribute mugshots as needed, just as previously. And if only mugshot inspection is allowed, the sheriff's offices across the state should actually see less work for themselves, because they will receive fewer public records requests from afar. Having discussed this topic at length with many reasonable, rational stakeholders, I believe that some combination of the policies mentioned here can be written into law in the next year – assuming the right legislative champion exists to lead the fight at the Capitol.

Least Effective: Laws to Regulate the Online Mugshots Industry

Any less restrictive efforts aimed at curbing the spread of mugshots online make for ineffective policy and are not worth pursuing. In the 11 states that impose restrictions on the use of mugshots or require that certain information be removed or corrected once on a private website, lawyers and the subjects of mugshots seeking recourse are more likely than not to come up empty-handed. During 3 months of research, I was unable to find any state-level court cases in the past 4 years in which Mugshots.com, the most active and prominent of the online mugshots websites, has been penalized for its actions. Websites simply adapt to new laws aimed

at curbing their source of profit and find new ways to monetize the data. Anecdotal evidence exists of people who have succeeded in having their mugshot deleted or accompanying information altered when they could prove misinformation, an expunction, or an acquittal; but the photograph still exists on the internet and could reappear on a new website at any point in the future. Some people who are passionate about this problem believe that any legislation is better than none, because it sends the message that mugshots websites cannot act with impunity, but the goal in making new policy should be to make laws that fulfill their intended outcomes (Donnelly, T., personal communication, March 23, 2017). As such, only laws that keep mugshots off the internet in the first place make sense to pursue.

Conclusion

Millions of people across America spend their lives knowing that their mugshot lives on the internet, whether or not they committed a crime. Once mugshots are on the web, they will be used for means that are at times benign, but more often harmful and humiliating. Urgency is required at the Minnesota State Capitol to address the harm that is dealt to subjects of the mugshots, as well as to a society that leaves people unnecessarily stigmatized and suffering beyond their criminal sentence. People ensnared in federal courts do not have their mugshots made public, and Minnesota legislators should take the bold step of following that example – especially for those who are never convicted of a crime and those convicted of a low-level offense. Short of that leap, a statewide law must be enacted that, at minimum, keeps mugshots off of government-run websites. Legitimate questions will arise about public safety concerns, workloads for sheriffs, mugshot access for the media, and changes to the Data Practices Act –

and those questions need to be worked through and addressed. Based on my conversations with several Minnesota-based stakeholders who clearly understand the debate, I believe that common ground and an effective solution can be found. The work on this problem started in 2014, with Kim Norton's Bill, laying the foundation for the work still to be done. Now is the time to finish the job.

Limitations and Further Research

With more time and capacity, I would pursue this research in greater depth and detail. In particular, I would seek to speak with more people outside of Minnesota who have been involved in developing existing legislation to address the online mugshots problem, including legislators, lobbyists, and law enforcement officials. The more we can learn about how the effects that other states' policies are having, the better legislators in Minnesota and elsewhere can make an informed decision about how to proceed with new state laws addressing the problem.

This research would also be strengthened by the perspectives of people in Minnesota who have directly been affected by their mugshot being posted online. I was unable to secure an interview with anyone who fits into this category, and their first-hand experience would strengthen my arguments about the consequences of the problem I describe. Conducting such interviews and identifying advocates on this issue is particularly difficult, because of the accompanying stigma and publicity that may arise from speaking out about one's mugshot and criminal record. But given that legislators naturally want to know that policies they propose will have a direct effect on their constituents, more local voices need to be heard.

To fully grasp how effective legislation has been in other states, I would need to identify and work with a person who has standing to challenge the practices of online mugshots websites under state statutes, and to sue if necessary. For example, if a woman in Texas has been granted an expunction, she would have standing under S.B. 1289 to demand that a business entity remove her mugshot. If she identified any misinformation attached to her mugshot, she would have standing to demand that it be corrected. If the business did not comply, she would then have standing to sue. Because these business entities are difficult to track down and ownership is not easily identifiable, a case would need to be filed by the state Attorney General or a private lawyer to ascertain whether the law can be enforced and civil penalties can be collected. This kind of experiment would need to be carried out in multiple states and against multiple business entities to better gauge the effectiveness of these types of laws.

Determining the legality of the new profit mechanism by which many online mugshots websites operate would be of great benefit to this body of research. Several states have enacted laws that stipulate that online mugshots websites cannot solicit or accept a fee to remove a mugshot, but the mugshots businesses no longer directly offer this removal service. Instead, they appear to either work closely with other businesses or operate sister business themselves, which advertise on the mugshots websites and promise to get one's mugshot taken down off the web.[20] The question that needs to be answered is whether laws prohibiting take-down fees apply to this practice, which appears to be designed specifically to evade the law. I was unable to identify any

[20] The business that advertises on Mugshots.com is Removearrest.com, which states on their website: "RemoveArrest.com Removes online mugshot listings, arrest record listings, documents, files and other unwanted public information listed on Google, Yahoo and other major Search Engines… RemoveArrest.com is faster and more thorough than any other source online. Reputation.com won't remove your mugshot listings, we will, GUARANTEED!"

court cases challenging this new profit mechanism, but further research and attention to possible future lawsuits is warranted.

Lastly, further research is needed to document lawsuits across the country that have either been successful in challenging the practices of online mugshots websites or are currently being litigated. The most notable of these cases was a class-action lawsuit brought forth by attorney Scott Ciolek in Ohio, which challenged several online mugshots entities under Ohio's Right of Publicity statute, claiming that the appropriation of mugshots for commercial purposes was unlawful. The case, *Lashaway* vs. *Mugshots* (2012), was settled in 2014 before it could be adjudicated, with one of the defendants agreeing to stop charging take-down fees on its two websites and pay the named plaintiffs $7,500 each.[21] One other notable case currently being litigated is *Gabiola* vs. *Mugshots* (2014), which was brought forth in Chicago's Northern District Court, and challenges the practices of Mugshots.com under the Fair Credit Reporting Act. This basis for opposing online mugshots websites has never been adjudicated, but it rests on the notion of accuracy in criminal record reporting as opposed to profiteering. The outcome of this court case could have nationwide ramifications on the practices of mugshots websites if the plaintiffs are victorious.

[21] The two websites that were part of the settlement, justmugshots.com and bustedmugshots.com, no longer exist.

References

Ambrose, M. & Ausloos, J. (2013). The Right to be Forgotten across the Pond. *Penn State University Press*, 3, 1-21.

Anderson, D. R. (1994). Advisory Opinion 94-020. *Minnesota Department of Administration.* Retrieved from: http://www.ipad.state.mn.us/opinions/1994/94020.html

Anfinson, M. (2014, Feb 26). State of Minnesota 23rd Meeting, Committee on Civil Law [testimony]. Retrieved from: http://www.house.leg.state.mn.us/cmte/minutes/minutes.aspx?comm=88003&id=5286&ls_year=88

Batchelder, C. (2014). *Busted mugs and bad lighting: Balancing First Amendment interests against claims for control of one's identity* (Master's Thesis). Retrieved from the University of Minnesota Digital Conservancy, http://conservancy.umn.edu/handle/11299/165422

Ban the Box, Chapter 61, S.F. No. 523. (2013).

Becker, H.S. (1963). *Outsiders; studies in the sociology of deviance.* London: Free Press of Glencoe.

Berg, M.T. & Huebner, B.M. (2011). Reentry and the ties that bind: An examination of social ties, employment, and recidivism. *Justice Quarterly*, 28(2), 382-410.

Blumstein, A. & Nakamura, K. (2009). Redemption in an era of widespread criminal background checks. *NIJ Journal*, No. 263.

Brame, R., Turner, M.G., Paternoster, R., & Bushway, S.D. (2012). Cumulative prevalence of arrest from ages 8 to 23 in a national sample. *Pediatrics*, 129(1), 21-27.

Cal. S.B. 1027, Session (2013-14), Chapter 194 (California Statute 2014).

Carson, E. & Anderson, A. (2016). Prisoners in 2015. *Department of Justice, Office of Justice Program, Bureau of Justice Statistics.* Retrieved from: https://www.bjs.gov/content/pub/pdf/p15.pdf

Chinai, L. (2012). Picture Imperfect: Mug Shot Disclosures and the Freedom of Information Act. *Seton Hall Circuit Review, 9(2),* 135-176.

Chiricos, T., Barrick, K., Bales, W., & Bontrager, S. (2007). The labeling of convicted felons and its consequences for recidivism. *Criminology*, 45(3), 547-581.

Cohen, T.H. & Kyckelhahn, T. (2010). Felony Defendants in Large Urban Counties, 2006. *Department of Justice, Office of Justice Programs, Bureau of Justice Statistics.* Retrieved from: https://www.bjs.gov/content/pub/pdf/fdluc06.pdf

Cox Broadcasting Corp. vs. Cohn, 420 US 469 (1975).

Col. H.B. 14-1047, Reg. Sess. (2014)

Corda, A. (2016). More justice and less harm: Reinventing access to criminal history records. *Howard Law Journal*, 60(1), 1-60.

Decker, S. Ortiz, N. Spohn, C. & Hedberg. E. (2015). Criminal Stigma, Race and Ethnicity: The consequences of imprisonment on employment. *Journal of Criminal Justice,* 42(3), 108-121.

Department of Justice. (2016). Guide to the Freedom of Information Act. Washington, DC.

Devine, P.G. & Elliot, A.J. (1995). Are Racial Stereotypes *Really* Fading? The Princeton Trilogy Revisited. *Personality and Social Psychology Bulletin,* 21(11), 1139-1150.

Detroit Free Press, Inc. vs. U.S. Department of Justice, 829 F.3d 478 (6th Circ. 2016)

Duwe and Donna (2008). The impact of Megan's Law on sex offender recidivism: The Minnesota Experience, *Criminology, 46(2),* 411-446

Ehling, M. (2014, Mar 20). State of Minnesota Forty-Third Meeting, Public Safety and Finance Committee [testimony]. Retrieved from: http://www.house.leg.state.mn.us/cmte/minutes/minutes.aspx?comm=88022&id=5485&ls_year=88

European Union (2012). *Factsheet on the "Right to be Forgotten" ruling.* Retrieved from: http://ec.europa.eu/justice/data-protection/files/factsheets/factsheet_data_protection_en.pdf

Farebrother, R. & Champkin, J. (2014). Alphonso Bertillon and the measure of man: More expert than Sherlock Holmes. *Significance,* 11(2), 36-39.

Finn, J.M. (2009). *Capturing the criminal image: From mugshot to surveillance society.* University of Minnesota Press.

Franklin, J. (2014, Feb 26). State of Minnesota 23rd Meeting, Committee on Civil Law [testimony]. Retrieved from: http://www.house.leg.state.mn.us/cmte/minutes/minutes.aspx?comm=88003&id=5286&ls_year=88

Frazer, P. (1909). Identification of human beings by the system of Alphonse Bertillon. *Journal of the Franklin Institute,* 167(4), 239-259.

Freemark, S. (Producer). (2016, October 4). *In the Dark* [audio podcast]. Retrieved from: http://www.apmreports.org/story/2016/10/04/in-the-dark-6

Funk, P. (2004). On the effective use of stigma as crime-deterrent. *European Economic Review*, 48, 715-728.

Fusion. (2017, March 22). Mugged, a Naked Truth (Internet investigative television series). Doral, Florida: Fusion TV.

Gabiola et. al. vs. Mugshots.com (2014), Illinois Northern District Court, Case No. 1:14-cv-09351

Georg. H.B. 150, Reg. Sess. (2013-14), Act 188 (Georgia Stat. 2013).

Georg. H.B. 845, Reg. Sess. (2013-14), Act 627 (Georgia Stat. 2014).

Goffman, E. (1963). *Stigma: notes on the management of spoiled identity.* Englewood Cliffs, N.J.: Prentice-Hall

Government Data Practices, S.F. No. 1279, Chapter 259 (Minnesota Stat. 1995).

Government Data Practices Act, Chapter 13 (Minnesota Stat. 2016).

Griswold v. Connecticut, 381 U.S. 479 (1965).

Hansen, E. (1995). Advisory Opinion 95-004. *Minnesota Department of Administration.* Retrieved from: http://www.ipad.state.mn.us/opinions/1995/95004.html

Jacobs, J. (2006). Mass incarceration and the proliferation of criminal records. *University of St. Thomas Law Journal*, 3(3), 387-429.

Jacobs, J.B. & Larrauri, E. (2014). Are criminal convictions a public matter? The USA and Spain. *Punishment & Society*, 14(1), 3-28.

Karantsalis vs. U.S. Department of Justice, Case. No. 1:09-cv-22910 (11th Circ. 2011).

Kravets, D. (2011, Aug 2). Mug-shot Industry Will Dig Up Your Past, Charge You to Bury It Again. *Wired.* Retrieved from: https://www.wired.com/2011/08/mugshots

Kravets, D. (2017, Mar 11). There's now only one US state where mugshots aren't public record. *Ars Technica.* Retrieved from: https://arstechnica.com/tech-policy/2017/03/theres-now-only-one-us-state-where-mugshots-arent-public-records/

Kurlycheck, M. C., Brame, R., Bushway, S.D. (2006). Scarlett letters and recidivism: Does an old criminal record predict future offending? *Criminology & Public Policy*, 5(3), 485-504.

Kent. H.B. 132, Reg. Sess. (2016), Acts, ch. 101 (Kentucky Stat. 2016).

Lageson, S. (2015). *Digital Punishment: The Production and Consequences of Online Crime Reporting* (Doctoral Dissertation). Retrieved from the University of Minnesota Digital Conservancy, http://conservancy.umn.edu/handle/11299/1175223

Lageson, S. (2017). Crime Date, the Internet, and Free Speech: An Evolving Legal Consciousness. *Law and Society Review,* 51(1), 8-41.

Lashmar, P. (2014). How to humiliate and shame: a reporter's guide to the power of the mugshot. *Social Semiotics,* 24(1), 56-87.

*Lashaway vs. Mugshots (*2012). Court of Common Pleas, Lucas County, Ohio, Case No. 2012-6547

Link, B.G. & Phelan, J.C. (2001). Conceptualizing stigma*. Annual Review of Sociology*, 27, 363–385.

Mary. H.B. 744, Reg. Sess. (2015), ch. 453 (Maryland Stat. 2015).

Megan's Law of 1996. Pub. L. 103-322, 108 Stat. 1796, codified as amended at 42 U.S.C. 140071(d).

McQuitty, K. (2014, Feb 26). State of Minnesota 23rd Meeting, Committee on Civil Law [testimony]. Retrieved from: http://www.house.leg.state.mn.us/cmte/minutes/minutes.aspx?comm=88003&id=5286&1s_year=88

Minnesota H.F. 1933, 88th Session. (2014).

Minnesota H.F. 1940, 88th Session. (2014).

Miss. H.B. 1665, Reg. Sess. (2014).

Mugshots and Booking Photos Websites. (2017, February 3). Retrieved from: http://www.ncsl.org/research/telecommunications-and-information-technology/mug-shots-and-booking-photo-websites.aspx

National Archive and Records Administration vs. Favish. 541 U.S. 157 (2004).

Pager, D. (2003). The mark of a criminal record. *The American Journal of Sociology*, 108(5), 937-975.

Papi, G. (2006). *Under arrest: A history of twentieth century in mugshots* (J. Richards, Trans.). London: Granta Books. (Original work published 2004).

Prall vs. Hennepin County. (2012). OAH 0-0305-22638-DP. Retrieved from: https://mn.gov/oah/assets/030522638prall_tcm19-163883.pdf

Roe v. Wade, 410 U.S. 113 (1973).

Rostron, A. (2013). The Mugshot Industry: Freedom of Speech, Rights of Publicity, and the Controversy Sparked by an Unusual New Type of Business. *Washington University Law Review (90)4,* 1320-1334.

Segal, D. (2013, Oct 5). Mugged by a Mug Shot Online. *New York Times*. Retrieved from: http://www.nytimes.com/2013/10/06/business/mugged-by-a-mug-shot-online.html

Sherman, L.W. (1993). Defiance, deterrence, and irrelevance: A theory of the criminal sanction. *Journal of Research in Crime and Delinquency*, 30(4), 445-474.

Siegel, S. A. (2006). The origin of the compelling state interest test and strict scrutiny. *The American Journal of Legal History*, 48(4), 355-407.

Sniderman, P.M. & Piazza, T.L. (1993). *The scar of race.* Cambridge: Belknap Press of Harvard University Press.

South Car. S. 255, Session 121 (2015-16), Act 132 (South Carolina Stat. 2016).

Snyder v. Phelps, 562 U.S. 443 (2011).

Stanley v. Georgia, 394 U.S. 557 (1969).

Tanner, A. (2012, Sep 20). Shakedown or public service? Mug shot websites spread. *Reuters.* Retrieved from: http://www.reuters.com/article/net-us-usa-internet-mugshots-idUSBRE88J0R020120920

U.S. Const. amend. I.

Ver. H.B. 105, Session (2015-16), Act 62 (Vermont Stat. 2015).

Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, 108 Stat. 1796

Virg. S.B. 720, Session (2015), Chapter 414 (Virgina Statute 2015).

Wakefield, S. & Uggen, C. (2010). Incarceration and Stratification. *Annual Review of Sociology*, 36, 387-406.

Warren, S. & Brandeis, L. (1890). The right to privacy. *Harvard Law Review,* 4(5).

Watkins, J. (2013). My life is not my own: Do criminal arrestees' privacy interests in mug shots outweigh public's desire for disclosure? *The John Marshall Journal of Information, Technology and Privacy Law,* 30(2), 306-338.

Wolfe, G. (2013). Smile for the Camera, The World is Going to See that Mug: The Dilemma of Privacy Interests in Mug Shots, *Columbia Law Review, 113(8)*, 2227-2276

World Publishing Co. vs. U.S. Department of Justice, Case No. 4:09-cv-00574-tck-tlw (10th Circ. 2012).

Wyo. S.B. 53, Reg. Sess. (2014) Act. 35 (Wyoming Stat. 2014).

Yerak, B. (2017, Mar 13). Lawsuit: Mug shot website posts incomplete records so sister site can solicit ‘takedown’ fees. *Chicago Tribune.* Retrieved from: http://www.chicagotribune.com/business/ct-mug-shot-websites-0312-biz-20170310-story.html

Appendix A: State-by-State Analysis of Laws to Restrict Access to and Use of Mugshots

Note: Bolded polices are those intended to reduce the harm to individual caused by online mugshots websites

	CA	CO	GA	IL	KY	MD	MO	OR	SC	TX	UT	VT	VA	WY
	SB 1027	HB 1047	HB 845 HB 150	SB 115	HB 132	HB 744	HB 1665	HB 3467	SB 255	SB 1289	HB 408	HB 105	SB 720	SB 53
Allows mugshots to be posted online by government entities	yes	**no*** **	**no**	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes
Requires private websites to take down mugshots if record is expunged	no	no	no	No	no	**yes**	no	**yes**	**yes**		no	no	no	**yes**
Requires private websites to take down mugshots if no conviction	no	no	**yes***** **	No	no	no	no	**yes**	**yes**	no	no	no	no	**yes**
Private websites allowed to charge money to remove mugshots	yes	yes****	yes****	**No**	**no**	yes	**no**	yes	**no**	yes	yes	**no**	yes**	yes
Signature required to obtain mugshots	no	**yes**	**yes**	No	no	no	no	No		no	**yes***	no	no	no
Requires private websites to correct any misinformation about criminal record	no	no	no	No	no	no	no	No	**yes**	**yes**	no	no	no	no

*__Utah__: Signature requirement applies only to people forced to request a mugshot, not those who take a mugshot directly from a government website

**__Virginia__: Statute's only provision is that a website that charges a fee in order to remove the mugshot is liable for $500 to the subject of the mugshot

***__Colorado:__ Statute does not explicitly state that mugshot cannot be posted by government website, but has this effect by requiring signature to obtain document

****__Colorado and Georgia:__ Statutes penalize those individuals who sign form, obtain mugshot and re-post it to a site that accepts take-down fees; website not held liable

*****__Georgia:__ HB 150 also includes requirements that websites remove mugshots for those convicted of certain low-level drug offenses