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Mugshots and the Press-Privacy Dilemma

Amy Gajda

ESSAYS

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I. INTRODUCTION

If you had searched for the term "mugshots" in the *Chicago Tribune* online news database in December 2018, you would have found among the results two items from 2018, one literally above the other.[1] The first was a story about the website Mugshots.com with the headline: *Owners of Mugshots.com Accused of Extortion: They Attempted "to Profit Off of Someone Else's Humiliation."*[2] As the *Tribune* explained:

> Jesse [T.] is one of thousands of people across the country who California prosecutors say have been extorted by Mugshots.com. . . .
>
> . . . .
>
> Mugshots.com and similar websites say they are simply republishing arrest information that is already publicly available through government records. Mugshots.com shows a disclaimer in capitalized letters at the top of its Web page saying the information on its website is in no way an indication of guilt or evidence that an actual crime has been committed.
>
> But to many people whose photos have cropped up on the site, such disclaimers are not enough to make up for the damage to their reputation. Mugshots.com refuses to take down criminal record information unless

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* © 2019 Amy Gajda. Class of 1937 Professor of Law, Tulane University Law School, and a former journalist. Thanks for the superb editing work by the *Tulane Law Review* members.

1. Search done December 21, 2018, on chicagotribune.com.

2. Samantha Schmidt, *Owners of Mugshots.com Accused of Extortion: They Attempted 'to Profit Off of Someone Else's Humiliation,'* CHI. TRIB. (May 18, 2018), https://www.chicagotribune.com/business/ct-biz-mugshot-website-owners-extortion-20180518-story.html.

> that person pays a fee .... They make no exceptions—even if the person's charges were dismissed or if the arrest was due to a mistaken identity or law enforcement error, according to a law enforcement affidavit, which included interviews with 18 people.[3]

The next hit, just below, was the latest version of the *Chicago Tribune*'s own photo gallery, a weekly offering titled "Mugshots in the News."[4] Among the mugshots featured was one of a white man with graying hair who looked to be about fifty, named in full by the *Tribune*.[5] He had been arrested by a local sheriff's office for burglary.[6] That mugshot was one of 100 booking photos of people of different races, young and old, male and female, who had been arrested for everything from theft to rape to murder. Like the Mugshots.com website, the *Tribune* also explained that "[a]rrest does not imply guilt, and criminal charges are merely accusations. A defendant is presumed innocent unless proven guilty and convicted."[7]

These two examples—Mugshots.com and the *Tribune*'s mugshot gallery—help show the conflict that exists between the publication of information that was once considered very clearly public—an arrest and a resulting mugshot—and an increasing sense that a right to privacy might exist in a nonpublic individual's arrest-only run-in with police. Today, as the example of the alleged burglar from the *Tribune*'s mugshots gallery shows to some extent, many news organizations across the county receive booking photographs from local police departments and, as they have for years, publish some of those photographs for readers who are interested in local arrests. Effectively, in those circumstances, individuals' privacy interests have lost out to the public's interest in crime coverage. That coverage works in the way it has for decades: police departments give news media access to all mugshots and then news media decides which are newsworthy and, therefore, appropriate for publication.

Today, however, as the Mugshots.com example shows, some newer publishers, many of them online, have capitalized on this tradition of police trust in journalists' news judgment. They too have

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3. *Id.*

4. *Mugshots in the News*, CHI. TRIB., https://www.chicagotribune.com/news/chi-mugs-in-the-news-photogallery.html (last visited Mar. 2, 2019).

5. *Id.* In order to protect their privacy, especially given that charges may be dropped for reasons of innocence, I have not named those people whose mugshots were published and who were identified by name in the publications I cite.

6. *Id.*

7. *Id.*

access to all mugshots, just like mainstream journalism, but seem to publish every single one, regardless of news value. As the 2018 *Tribune* story about Mugshots.com explained, the website "mines publicly available arrest records from across the country" and publishes the mugshot and the individual's "full name, address and the reason for his detention"[8] with no apparent regard for the newsworthiness, motivated, it seems at least in large part, by making money.

This difference is more than just an interesting dichotomy between news media of the past and news media of the present. Courts have taken notice and are taking action in ways that will affect the future of news and information.

This Essay explores the history of privacy in booking photographs, why those photographs became more publicly available, and how courts today have started to limit access to them based in large part on privacy grounds. It proceeds in four parts. Part II looks at a key and surprising-to-some 1999 federal district court case from Louisiana in which a judge withheld the booking photograph of a public figure on privacy grounds. Part III looks at early court decisions and explains how judges even in the early days of so-called rogues' galleries struggled with exactly the sort of privacy interests/public interest balance as did the Louisiana-based federal court in 1999. Part IV looks at recent major mugshot-related legal updates, especially a federal appellate decision in which the United States Court of Appeals for the Sixth Circuit reversed course and, as has every other federal appellate court, held that some level of privacy rights exists in booking photographs. And, finally, Part V explains why this all has broader implications for media and the press-privacy question.

This Essay ultimately argues that the rather discrete and interesting example of mugshots nonetheless exemplifies the press-privacy conflict that was the focus of the 2018 Tulane University Law School conference titled *Privacy, News, and the Future of Freedom of the Press*.

II. NO ACCESS TO PUBLIC FIGURE'S MUGSHOT

In 1998, Edward DeBartolo pled guilty to a federal crime known rather confusingly as misprison of a felony,[9] a charge that the *New York Times* described precisely as "concealing an alleged extortion plot by

8. Schmidt, *supra* note 2.

9. Times Picayune Publ'g Corp. v. U.S. Dep't of Justice, 37 F. Supp. 2d 472, 474 (E.D. La. 1999).

[former Louisiana Governor Edwin] Edwards that involved the licensing of a riverboat casino."[10] The *Times* told its readers that DeBartolo was "tanned, silver-haired, [and] unwrinkled," but it did not use DeBartolo's mugshot to accompany stories about his guilty plea or its ramifications.[11] That's because the U.S. Marshals Service had refused to release DeBartolo's booking photograph to media—and because a federal court had thereafter decided in favor of the marshals.[12]

Perhaps what's most surprising about this is that DeBartolo was a public figure, "a well known businessman in connection with his ownership of the San Francisco Forty-Niners as well as other business dealings," as the court put it.[13] DeBartolo's association with football specifically propelled him into a national spotlight: he is in the National Football Hall of Fame for his role in the Forty-Niners's thirteen division titles, sixteen playoff appearances, ten NFC championship game appearances, and five Super Bowl victories.[14]

And yet, when he pled guilty in association with the Edwards investigation, his privacy interests prevented the release of his official booking photograph. Shortly after his guilty plea, federal authorities refused New Orleans *Times Picayune* reporters' request for a copy of the mugshot.[15] Access to such a photograph, the marshals argued, would violate the federal Freedom of Information Act (FOIA), the law that guarantees public access to many government documents but limits access to a limited selection of others.[16]

The marshals argued specifically that it was the privacy provision within FOIA that protected DeBartolo and his mugshot, one that exempts certain law enforcement records from public access, including those that raise certain undefined personal privacy interests: "records or information compiled for law enforcement purposes" are exempt from public access, the statute reads, "to the extent that the production of such law enforcement records or information . . . could reasonably

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10. Kevin Sack, *Owner of N.F.L. Team Ties Ex-Governor to Extortion*, N.Y. TIMES, Oct. 7, 1998, at A12.

11. *Id.*

12. *Times Picayune*, 37 F. Supp. 2d at 474, 482.

13. *Id.* at 473.

14. *Edward DeBartolo, Jr.*, PRO FOOTBALL HALL FAME, https://www.profootballhof.com/players/edward-debartolo-jr/ (last visited Mar. 2, 2019).

15. *Times Picayune*, 37 F. Supp. 2d at 474.

16. *Id.*; *see* 5 U.S.C. § 552 (2012).

be expected to constitute an unwarranted invasion of personal privacy."[17]

The newspaper argued in response that this particular mugshot had not been compiled for law enforcement purposes at all and was not part of an ongoing investigation, given that DeBartolo had pled guilty and that the photograph had been taken only after the plea.[18] It also argued that such a mugshot could not be considered an "unwarranted invasion of personal privacy," given that DeBartolo was a well-known person whose photographs routinely appeared in media.[19] Moreover, the newspaper argued that there was public interest in a famous person's crimes and what had happened to him and how he appeared in police custody—perhaps given perks or perhaps physically abused—which is information that a booking photograph could help reveal.[20] Finally, it argued that even if access to a mugshot would be an invasion of privacy, such an invasion would not be "unwarranted" under FOIA, given the balance in this particular case between a celebrity's more limited privacy interests and the very real public interest in a man very much in the headlines for multiple reasons.[21]

The United States District Court for the Eastern District of Louisiana ruled against the newspaper for each argument—and it apparently was not even close.

First, the court decided that the marshals had indeed taken DeBartolo's photograph for a law enforcement purpose despite it being taken after a guilty plea. The marshals had a good policing-type reason to take such a photograph, the court ruled, "for the purpose of fulfilling [their] legal mandate to facilitate the enforcement of federal laws through processing of individuals charged with federal crimes."[22] Second, though DeBartolo's photograph had appeared in newspapers with regularity before, the court explained that this particular photograph, taken in law enforcement custody, would raise privacy concerns unlike DeBartolo's previous photographs.[23]

Third, the court found the newspaper's argument regarding the strong public interest in the photo unpersuasive, suggesting that FOIA was meant to reveal information about government work and keep

17. 5 U.S.C. § 552(b)(7)(C); *Times Picayune*, 37 F. Supp. 2d at 474-75.
18. *Times Picayune*, 37 F. Supp. 2d at 475.
19. *Id.* at 474-75 (quoting 5 U.S.C. § 552(b)(7)(C)).
20. *See id.* at 479-80.
21. *See id.* at 481.
22. *Id.* at 475.
23. *Id.* at 477-78.

citizens informed about the workings of their elected officials, not to shed light on any particular individual who had been arrested by the government, no matter how famous he might be.[24] Fourth, it rejected a more substantive balancing test of press interests and privacy interests in this particular case, suggesting that any sort of public interest in DeBartolo's mugshot was "purely speculative."[25]

When it made those rulings, the court used language that made clear how it felt about mugshots more generally and the damage that might be caused by them:

> [A] mug shot is more than just another photograph of a person. Mug shots in general are notorious for their visual association of the person with criminal activity. Whether because of the unpleasant circumstances of the event or because of the equipment used, mug shots generally disclose unflattering facial expressions. They include front and profile shots, a backdrop with lines showing height, and, arguably most humiliating of all, a sign under the accused's face with a unique Marshals Service criminal identification number.[26]

Moreover, the court wrote, such a picture "is worth a thousand words," here to include the mugshot's "stigmatizing effect" that could well last years beyond the arrest.[27] "A mug shot preserves, in its unique and visually powerful way," the court explained, "the subject individual's brush with the law for posterity."[28] Therefore, "[i]t would be reasonable for a criminal defendant, even one who has already been convicted and sentenced, to object to the public disclosure of his or her mug shot."[29]

In its decidedly anti-access and pro-privacy decision, the court relied in part on *United States Department of Justice v. Reporters Committee for Freedom of the Press*, a case decided by the United States Supreme Court a decade earlier in which the Court held that so-called "rap sheets" could be withheld from journalists, given the privacy interests of the individuals involved.[30] "Rap sheets," the Court explained, contained certain information concerning an arrested individual, including "date of birth and physical characteristics, as well as a history of arrests, charges, convictions, and incarcerations of the

24. *Id.* at 479.
25. *Id.* at 482.
26. *Id.* at 477.
27. *Id.*
28. *Id.*
29. *Id.*
30. 489 U.S. 749, 749-50 (1989).

subject."[31] The Court ruled that such information could indeed be kept private by government officials and in doing so used language that swept beyond rap sheets:

> [W]e hold as a categorical matter that a third party's request for law enforcement records or information about a private citizen can reasonably be expected to invade that citizen's privacy, and that when the request seeks no "official information" about a Government agency, but merely [asks for] records that the Government happens to be storing, the invasion of privacy is "unwarranted."[32]

The remarkable part about that Supreme Court decision, as the Eastern District of Louisiana itself noted,[33] was that the Court had found strong privacy interests even in information that was at least once public, including an individual's birthdate and his arrest information.[34] Moreover, the Eastern District wrote, "the mug shot sought is not in the public domain at all," meaning that there was a stronger reason to deny access to such a photograph.[35]

The Supreme Court in *Reporters Committee* had also found strong privacy interests in information that was nonetheless strongly newsworthy. The journalists involved in the Supreme Court case had wanted access to the rap sheets of persons allegedly involved with organized crime, and there may have been congressional involvement.[36] Therefore, when the Eastern District ruled as it did, to protect DeBartolo's privacy despite the inherent news value and public interest in the underlying story, it aligned itself with the Supreme Court that had decided the same in what was seemingly even a bigger potential story.

Finally, the fact that it was the press that had requested both the rap sheets and DeBartolo's mugshot made little difference to either court. This is because FOIA and most similar state statutes give access to everyone regardless of journalistic or other status, meaning that what is available to the press under FOIA is available to every single member of the public no matter the reason for the request. As the Supreme Court had explained in *Reporters Committee*, if journalists were given access to another's criminal history, "any other member of the public [would be] entitled to the same disclosure—whether for writing a news

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31. *Id.* at 752.
32. *Id.* at 780.
33. *Times Picayune*, 37 F. Supp. 2d at 477 n.3.
34. *Reporters Comm.*, 489 U.S. at 752, 762-65.
35. *Times Picayune*, 37 F. Supp. 2d at 477 n.3.
36. *Reporters Comm.*, 489 U.S. at 757.

story, for deciding whether to employ [him], to rent a house to him, to extend credit to him, or simply to confirm or deny a suspicion" regarding him.[37]

In DeBartolo's case, therefore, no one would be given access because, in the court's assessment, the privacy interests in the mugshot outweighed the public's interest in the information. Period.

As will become apparent, the Eastern District's ruling was both forward-looking and antiquated. In the years to come after 1999, all other federal courts that would hear cases involving access to mugshots followed the Eastern District's lead and similarly ruled that privacy interests trumped, or had the very real potential to trump, the public's interest in seeing photographs of arrested individuals. This included the Sixth Circuit, a court that had previously ruled that mugshots were public documents open to all. These later opinions are discussed in Part IV.

But the Eastern District's 1999 ruling is also reminiscent of judicial opinions from decades before. There is a surprisingly strong early history of protection for mugshots in the United States based in large part on the same sort of privacy grounds that were so important to the court in DeBartolo's case. These earlier decisions are discussed in the next Part.

III. A HISTORY OF PROTECTION

Nearly a century before the Eastern District decided *Times Picayune v. United States Department of Justice* in a way that protected a booking photograph on privacy grounds, courts around the United States had decided similar cases in similar ways.

Back then, it was a time when cameras were relatively new and rogues' galleries, collections of images of known and suspected wrongdoers, were the way police shared information about ne'er-do-wells. As a New York court explained in 1899, such official sharing of photographs of alleged criminals helped "to preserve the public peace, prevent crime, detect and arrest offenders, and protect the rights of persons and property" because police could "know [those] who are habitual criminals" and could give witnesses actual faces to look at as they described the perpetrator of a crime.[38] After citing to *A Treatise on the Limitations of Police Power in the United States* and that

37. *Id.* at 775.

38. People *ex rel.* Joyce v. York, 59 N.Y.S. 418, 418 (N.Y. Sup. Ct. 1899).

treatise's suggestion that a "phase of police supervision" included "photographing alleged criminals, and sending copies of the photographs to all detective bureaus," the court ruled that police did indeed have the right to photograph certain arrestees and use those photographs in certain ways.[39]

But the particular plaintiff in that New York case—the one whose photograph was at issue—was indeed a rogue: he had been convicted of assault, had been sent to a workhouse, and had repeatedly associated with other criminals.[40] Moreover, the court suggested that if for some reason police were wrong and had included an innocent person's photograph in a rogues' gallery, that person would have an action against police for libel.[41] What this reasoning suggested was that, while a real rogue belonged in a rogues' gallery and his image could be shared among police, a person who had been wrongly labelled a rogue would have a viable tort action against anyone, including the police, who had labelled him as such.

That early New York decision, or at least its sensibilities, gave life to other mugshot-related lawsuits. One year later, in 1900, the Indiana Supreme Court decided that photographs of an alleged forger taken by a sheriff and sent to other police authorities before any proof of his involvement in the underlying crime would not support a libel lawsuit against the sheriff—but seemingly only because the lawsuit had been brought in part upon a bond and its sureties.[42] Because of the bond entanglement, the court explained, it would not answer whether the sheriff's action in sharing the arrestee's image with others would be libelous.[43]

Shortly thereafter, similarly placed plaintiffs—those whose photographs had been taken by police before conviction—began to recognize the viability of causes of action springing not from libel but from a right to privacy.

In 1903, a plaintiff in a position similar to that of the plaintiff in Indiana—a man who had been photographed by police but had not been convicted of the underlying crime—brought a lawsuit in New York against the police department that had photographed him.[44]

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39. *Id.* (quoting CHRISTOPHER G. TIEDMAN, A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES § 48 (The Lawbook Exch., Ltd. 2001) (1886)).

40. *Id.*

41. *Id.*

42. State *ex rel.* Bruns v. Clausmier, 57 N.E. 541, 541-42 (Ind. 1900).

43. *See id.* at 542.

44. Owen v. Partridge, 82 N.Y.S. 248, 249-50 (N.Y. Sup. Ct. 1903).

Charges against him had been dropped, and yet he later saw his picture in a rogues' gallery published in the newspaper.[45] There, the court refused to answer what it suggested was the by-no-means-clear question of whether such photographs of mere suspects would ever be proper,[46] but only because the plaintiff's right-to-privacy claim had no basis in New York law.[47] New York's highest court had just written "that the so-called right of privacy has not as yet found an abiding place in [New York] jurisprudence"[48] and that in New York, therefore, "any invasion of one's right to be let alone [could] be remedied only by a statutory enactment."[49] Once again, a court had suggested that an action—here, privacy—was potentially viable, just not in this particular case given New York's unique law.

Stronger success for an arrestee came two years later. A man who had been photographed by police after his arrest brought a right-to-privacy claim before police could publish his mugshot in their rogues' gallery.[50] A lower court had enjoined the police action in an unpublished opinion and the Louisiana Supreme Court had denied certiorari, in effect sustaining it.[51] One of the justices, however, wrote separately and very clearly stated that "[e]very one who does not violate the law can insist upon being let alone (the right of privacy)" and that "[i]n such a case the right of privacy is absolute."[52] An arrestee, therefore, the justice explained, could enjoin the publication of his photograph before broader publication.[53]

The underlying action found its way to the Louisiana Supreme Court again in 1906.[54] By this time, lower courts had ordered that all negatives of the man's booking photographs be returned to him and that all existing photographs be destroyed.[55] The police appealed, arguing that police duties included citizen protection and crime investigation and that the sharing of mugshots helped with this.[56] But

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45. *Id.* at 249.
46. *Id.* at 252.
47. *Id.* at 252-53.
48. *Id.* at 253 (quoting Roberson v. Rochester Folding Box Co., 64 N.E. 442, 447 (N.Y. 1902)).
49. *Id.*
50. Itzkovitch v. Whitaker, 39 So. 499, 500 (La. 1905).
51. *Id.* at 499-500.
52. *Id.* at 500.
53. *Id.*
54. Itzkovitch v. Whitaker, 42 So. 228, 229 (La. 1906).
55. *Id.*
56. *See id.*

the Louisiana Supreme Court sided with the plaintiff: Even though he had been arrested "a number of times" for other crimes and seemed therefore to be "a very active man," he was not a "hardened criminal," so mugshot sharing would be improper.[57] "The complaints against him ha[d] been frequent," the court wrote, but "before conviction his picture should not be posted, for then it would be a permanent proof of [his] dishonesty."[58]

In a parallel case decided the same day, the Louisiana Supreme Court held that a pawnbroker who had been frequently arrested but never convicted could also prevent his photograph from being shared by police as part of a rogues' gallery.[59] "The taking of pictures, as proposed," the court wrote, "and placing them in the rogues' gallery before conviction, may prove useful in some cases, but it may lead to abuses and injustice in others."[60] In short, the court determined, before a conviction, a "picture should not be taken" by police.[61]

These court holdings and their privacy-based sensibilities seemed to catch on. "I am of the opinion that unless an accused becomes a fugitive from justice there exists no right to publish or disseminate his . . . photographs . . . in advance of conviction," a New Jersey court wrote in 1945, and "any attempt to do so constitutes an unnecessary and unwarranted attack upon his character and reputation, and violates his natural right of privacy, since it serves no useful or necessary public need."[62] In Indiana, too, the state's supreme court wrote just a year later that mugshots should be filed away and released only in exceptional circumstances in which the public interest in the information outweighs an individual's privacy rights.[63]

But two decades later, in the 1960s, Congress passed the Freedom of Information Act.[64] FOIA opened doors to public access to government information, including documents produced by

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57. *Id.*

58. *Id.*; *see* Bingham v. Gaynor, 126 N.Y.S. 353, 357 (N.Y. App. Div. 1910) (highlighting the potential harm a rogues' gallery might do to a young person by stating that "this boy must get redress from this criminal official wrongdoing and oppression or be ruined for life" because "he and his parents have lived in daily dread of the day his employer would learn that his picture is in the 'Rogues' Gallery' and discharge him").

59. Schulman v. Whitaker, 42 So. 227, 228 (La. 1906).

60. *Id.*

61. *Id.* at 227.

62. McGovern v. Van Riper, 43 A.2d 514, 525 (N.J. Ch. 1945).

63. State *ex rel.* Mavity v. Tyndall, 66 N.E.2d 755, 761-63 (Ind. 1946).

64. Act of July 4, 1966, Pub. L. No. 89-487, 80 Stat. 250 (codified at 5 U.S.C. § 552 (2012)).

government, in a significant way. Its "general philosophy [was] of full agency disclosure unless information [was] exempted under clearly delineated statutory language," the Supreme Court explained in 1976, quoting the Act's legislative history.[65] FOIA's purpose, that legislative history showed, was government openness, public access, and revelation of information.[66]

State laws passed around the same time as FOIA similarly reflected the importance of access and openness over government secrecy. As one example, in Illinois, the statute starts in part with the presumption that all government documents are open to the public: "All records in the custody or possession of a public body are presumed to be open to inspection or copying."[67] More specifically, the statute allows[68] access to all arrestee mugshots, mandating that police make accessible to requesters arrestees' names, addresses, and booking photographs within seventy-two hours after arrest.[69]

These statutes and others like them bolstered the idea that, despite some common law history recognizing an individual's privacy rights in booking photographs, such images should in modern times be open to any requester.[70] As one media attorney put it, seemingly without condition, "[a] mug shot is 'quintessential public information,' no different than the name of the accused."[71]

Of course, such laws built on the openness of public information and such absolutism regarding mugshots specifically meant that access to police booking photos was often given to everyone who asked. And everyone meant anyone from the journalists at the *Chicago Tribune* to the creators of the Mugshots.com website. And that, arguably, is where the trouble started.

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65. Dep't of the Air Force v. Rose, 425 U.S. 352, 360-61 (1976) (quoting S. REP. NO. 89-813, at 38 (1965)).

66. *Id.*

67. 5 ILL. COMP. STAT. 140/1.2 (West 2019).

68. But see statutory changes that occurred in early 2019, described in Part IV.

69. 5 ILL. COMP. STAT. 140/2.15 (West 2019).

70. "[T]he majority of [state authorities] disclose booking photographs to the media upon request." Detroit Free Press Inc. v. U.S. Dep't of Justice, 829 F.3d 478, 493 (6th Cir. 2016) (en banc) (Boggs, J., dissenting).

71. Joe Guillen, *Feds: Mug Shots Too Revealing to Be Made Public*, DETROIT FREE PRESS (Apr. 22, 2017), https://www.freep.com/story/news/2017/04/22/federal-mugshots-public-privacy-foia/100790840 (quoting Herschel Fink, *Free Press* lawyer).

IV. THE SIXTH CIRCUIT ALLOWS MUGSHOT ACCESS THEN CHANGES ITS MIND

In 1993, the *Detroit Free Press* asked the Justice Department for eight mugshots.[72] The eight people photographed by federal officials had been indicted and were awaiting trial on charges stemming from alleged bookmaking and money laundering.[73] The district court decided the matter succinctly and with no handwringing about any sort of privacy concerns: "[T]he faces of persons arrested and charged with crimes" the court noted in granting the newspaper's request for access to the photos, "are not private matters."[74]

The Justice Department appealed that decision to the Sixth Circuit, arguing that the indicted individuals had personal privacy interests in their booking photographs.[75] After all, Justice Department lawyers argued, FOIA did carve out exceptions to certain government records based on privacy grounds, specifically that "records or information compiled for law enforcement purposes" were generally open unless such records "could reasonably be expected to constitute an unwarranted invasion of personal privacy"[76] and, more generally in parallel language, that government files were open, unless disclosure "would constitute a clearly unwarranted invasion of personal privacy."[77]

But the Sixth Circuit ultimately sided with media and, therefore, public access to the mugshots. It put the issue it was deciding squarely: whether it could possibly be an invasion of personal privacy to release booking photographs when the individuals at issue had already been identified in open court.[78] The answer, the court decided, was no. In such circumstances, the court wrote, "[W]e believe that no privacy rights are implicated."[79]

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72. Detroit Free Press, Inc. v. Dep't of Justice, 73 F.3d 93, 95 (6th Cir. 1996), *overruled by Detroit Free Press*, 829 F.3d 478; *see Release of Mug Shots Does Not Violate Defendants' Privacy*, REPORTERS COMMITTEE FOR FREEDOM PRESS (Jan. 29, 1996), https://www.rcfp.org/release-mug-shots-does-not-violate-defendants-privacy/.

73. *Release of Mug Shots Does Not Violate Defendants' Privacy*, *supra* note 72.

74. Detroit Free Press, Inc. v. U.S. Dep't of Justice, No. 93 CV 74692 DT (E.D. Mich. Apr. 29, 1994).

75. *Detroit Free Press*, 73 F.3d at 95-96.

76. 5 U.S.C. § 552(b)(7)(C) (2012).

77. *Id.* § 552(b)(6).

78. *See Detroit Free Press*, 73 F.3d at 97.

79. *Id.*

Then the Sixth Circuit went further, even though it did not need to.[80] "[H]ad an encroachment upon personal privacy been found, however," the court wrote, "a significant public interest in the disclosure of the mug shots of the individual awaiting trial *could*, nevertheless, justify the release of that information to the public."[81] In addition to general public interest in arrests, it reasoned that booking photographs were helpful in that their access and publication could reveal that the wrong person had been arrested for the crime or that police had beaten the person being held in custody.[82] In the end, in 1996, it gave the news media exactly what it had asked for.

But something else was happening in the United States and around the world in the mid-1990s that would have rippling effects on such access. Literally the month before the Sixth Circuit handed down its decision in *Detroit Free Press v. Department of Justice* regarding open access to mugshots, *Newsweek* magazine's year-end issue proclaimed 1995 the year of the Internet.[83] "Remember when surfing was something you did outdoors, in a bathing suit?" the accompanying article asked.[84] "That was 1994. Now it's what you do on the Internet—the worldwide network of computers that in 1995 was embraced as the medium that will change the way we communicate, shop, publish and (so the cybersmut cops warned) be damned."[85]

Suddenly, everyone not only had broad access to government information through FOIA, they could publish everything that they received from the government in one click. And, just as *Newsweek* had warned, this came to include damning information such as cybersmut, criminal records, and mugshots.

Therefore, by 2016, twenty years after the Sixth Circuit decision in *Detroit Free Press, Inc.* had, in effect, released mugshots to anyone who asked for them,[86] and twenty years after *Newsweek* introduced readers to the future of something called the Internet, things had

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80. *See id.*

81. *Id.* at 97-98.

82. *See id.* at 98.

83. *The Year of the Internet*, NEWSWEEK (Dec. 24, 1995), https://www.newsweek.com/year-internet-180242.

84. *Id.*

85. *Id.*

86. Many requesters asked for federal booking photographs through Sixth Circuit courts. As the Sixth Circuit would later explain, "'Straw man' requesters in Michigan, Ohio, Kentucky, and Tennessee . . . exploited the policy to obtain photos maintained in other jurisdictions, securing Bernie Madoff's booking photo in one prominent example." Detroit Free Press Inc. v. U.S. Dep't of Justice, 829 F.3d 478, 481 (6th Cir. 2016) (en banc).

changed markedly. Newspapers such as the *Tribune* routinely published mugshots not only as a part of news stories, but also as a sort of public rogues' gallery, including photographs of people arrested the day before and, therefore, not convicted.[87] Perhaps more significantly, websites such as Mugshots.com published them too, and with seemingly greater abandon.[88] Some of the more outrageous websites even made a literal game out of mugshots, asking readers to link booking photos of individuals with the purported crimes at issue.[89]

It was in this environment that the *Free Press* again asked federal marshals for booking photographs, this time those of four police officers who had been charged with federal bribery and drug-related crimes.[90] This time, again, the marshals refused, and again, the newspaper appealed to a trial court. This time, again, the district court held in favor of the journalists and, again, the Sixth Circuit affirmed.[91]

That is where the similarities between the cases ended, however. First, though the Sixth Circuit panel affirmed the decision of the district court, deciding that the *Free Press* could indeed receive the booking photos, the panel also urged the full court to reconsider that decision and the precedent for it set by *Detroit Free Press*.[92] "Booking photographs convey the sort of potentially embarrassing or harmful information protected by the exemption: they capture how an individual appeared at a particularly humiliating moment immediately after being taken into federal custody,"[93] the court wrote in language markedly different from that it had used in the mid-90s, explaining that its earlier decision left it no choice but to order release. An en banc review would right what it sensed was a now-outdated wrong: "We doubt that the [mid-90s] panel accounted for Internet search and storage capabilities,"[94] the court wrote, because that precedential opinion had come "nearly two years before Google registered as a domain."[95]

Second, during the resulting en banc rehearing, the Sixth Circuit described its earlier decision that had opened booking photographs to

87. *See supra* notes 4-6 and accompanying text.
88. *See* Schmidt, *supra* note 2.
89. *See, e.g.*, *Mugshots in the News*, *supra* note 4.
90. *Detroit Free Press*, 829 F.3d at 481.
91. *Id.* at 478.
92. Detroit Free Press, Inc. v. U.S. Dep't of Justice, 796 F.3d 649, 650 (6th Cir. 2015), *rev'd en banc*, 829 F.3d 478.
93. *Id.* at 652.
94. *Id.* at 652 n.1.
95. *Id.*

everyone as "untenable" and therefore overruled it.[96] More specifically, the en banc panel wrote in rejecting its earlier decision, "[i]ndividuals enjoy a non-trivial privacy interest in their booking photos."[97]

Things had indeed changed. In the twenty years between the two Sixth Circuit decisions, two additional federal appeals courts had ruled against access to mugshots,[98] and more importantly, the Internet and its publishers had grown to include those with nefarious motives. This was not unrelated to this new change in the law of mugshots, at least in the Sixth Circuit's assessment:

> A disclosed booking photo casts a long, damaging shadow over the depicted individual. In 1996, when we decided *Free Press I*, 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. In fact, mug-shot websites collect and display booking photos from decades-old arrests: BustedMugshots and JustMugshots, to name a couple. 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. Indeed, an online-reputation-management industry now exists, promising to banish unsavory information—a booking photo, a viral tweet—to the third or fourth page of internet search results, where few persist in clicking. The steps many take to squelch publicity of booking photos reinforce a statutory privacy interest.[99]

Booking photographs, in fact, the court wrote, "fit squarely within th[e] realm of embarrassing and humiliating information" and should be protected for those reasons as well.[100] It rejected the newspaper's arguments that the Constitution and longstanding access in common law supported continued access and suggested that, even though the public may want to see such images, there can exist both strong public interest and strong privacy interests in any booking photograph—and that privacy interests can indeed win out.[101]

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96. *Detroit Free Press*, 829 F.3d at 480.

97. *Id.*

98. World Publ'g Co. v. U.S. Dep't of Justice, 672 F.3d 825, 825 (10th Cir. 2012); Karantsalis v. U.S. Dep't of Justice, 635 F.3d 497, 498-99 (11th Cir. 2011) (per curiam).

99. *Detroit Free Press*, 829 F.3d at 482-83 (citations and footnote omitted).

100. *Id.* at 482.

101. *Id.* at 483-84.

Therefore, the Sixth Circuit wrote, a case-by-case balancing approach would be best in such cases, one that considers the public interest in the mugshot and compares it with the individual's privacy interests in keeping the embarrassing, humiliating mugshot from public view.[102] While that may sound like a balancing test media could live with, the decision strongly recognizes the latter and dismisses in most cases the former—especially given the possibility of modern Internet-based harms. "In 1996," the court wrote, "this court could not have known or expected that a booking photo could haunt the depicted individual for decades. [But e]xperience has taught us otherwise."[103]

A concurring judge agreed with even greater specificity:

> Twenty years ago, we thought that the disclosure of booking photographs, in ongoing criminal proceedings, would do no harm. But time has taught us otherwise. The internet and social media have worked unpredictable changes in the way photographs are stored and shared. Photographs no longer have a shelf life, and they can be instantaneously disseminated for malevolent purposes. Mugshots now present an acute problem in the digital age: these images preserve the indignity of a deprivation of liberty, often at the (literal) expense of the most vulnerable among us.[104]

With that decision, the Sixth Circuit effectively closed access to mugshots on privacy grounds—government information that two decades before it had opened to the public while literally explaining that such access did not raise any significant privacy concerns.[105]

Today, courts are not alone in taking notice of the misuse and potential misuse of mugshots and the privacy interests inherent in them. In January 2019, for example, an Illinois statute closed the door on certain access to mugshots despite the longstanding Illinois law that presumes that all government documents there are open to public inspection:

> Notwithstanding the requirements of [an earlier subsection], a law enforcement agency may not publish booking photographs, commonly known as "mugshots", on its social media website in connection with civil offenses, petty offenses, business offenses, Class C misdemeanors [including assault], and Class B misdemeanors [including trespass] unless the booking photograph is posted to social media to assist in the

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102. *Id.* at 484-85.

103. *Id.* at 485 (citation omitted).

104. *Id.* at 486 (Cole, J., concurring).

105. *Id.* at 485-86; Detroit Free Press, Inc. v. Dep't of Justice, 73 F.3d 93, 97 (6th Cir. 1996), *overruled by Detroit Free Press*, 829 F.3d 478.

> search for a missing person or to assist in the search for a fugitive, person of interest, or individual wanted in relation to a crime other than a petty offense, business offense, Class C misdemeanor, or Class B misdemeanor.[106]

The law also prevents websites from charging a fee to remove criminal information.[107] Its sponsor suggested that the 2019 legislation was meant to protect those whose arrests and mugshots remained accessible to the public even years later and even after an acquittal.[108] A limit on public access to mugshots, the sponsor believed, would limit the possibility of such long-after harm.[109]

In other words, by 2019, all federal appellate courts that had decided the matter had found that real privacy interests exist in mugshots and that they are appropriately withheld from the public for privacy reasons. Legislation has also been enacted to protect booking photographs in various ways, including restrictions on access to them and punishment for those who misuse them. In short, the law regarding mugshots has returned in some sense to where it began—an embrace of privacy rights that caused the Louisiana Supreme Court more than 100 years before to find privacy interests in booking photographs, given that they would serve as "permanent proof of dishonesty"[110] and "lead to abuses and injustice."[111]

But what hampers access also hampers news coverage, and that is a problem for journalists. As the Reporters Committee for Freedom of the Press explained in its unsuccessful brief asking the Supreme Court to hear and overturn the 2016 Sixth Circuit decision, "Because members of the news media rely on booking photos to effectively report on arrests and other aspects of the criminal justice system, limitations on access could hinder the new media's ability to provide the public with important information."[112]

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106. 5 ILL. COMP. STAT. 140/2.15 (West 2019).

107. 815 ILL. COMP. STAT. 505/2QQQ (West 2019).

108. *See Stadelman Proposal to Crack Down on Mugshot Websites Signed into Law*, ILL. ST. DEMOCRATS (Aug. 20, 2018), http://illinoissenatedemocrats.com/sen-stadelman-home/6653-stadelman-proposal-to-crack-down-on-mugshot-websites-signed-into-law?platform=hootsuite.

109. *See id.*

110. Itzkovitch v. Whitaker, 42 So. 228, 229 (La. 1906).

111. Schulman v. Whitaker, 42 So. 227, 228 (La. 1906).

112. Detroit Free Press v. Dep't of Justice, REPORTERS COMMITTEE FOR FREEDOM PRESS, https://www.rcfp.org/briefs-comments/detroit-free-press-v-dept-justice/ (last visited Mar. 2, 2019).

And given that timeliness is key in news coverage of an arrest, consider the full implication of the privacy-publicity balancing test suggested by the Sixth Circuit. By the time a court can hear a case regarding access to a mugshot, the news value in that mugshot will have evaporated to some extent if not completely. This, in effect, gives great power to the courts to decide questions of newsworthiness. An immediate court decision denying access or a court decision that lags but ultimately grants access means that the mugshot will not be included in the immediate story and any story following arrest.

That is a problem beyond access.

V. MUGSHOTS AND THE PRESS-PRIVACY DILEMMA

In 2018, journalists, newspaper businesspersons, media lawyers, and privacy and media scholars gathered at Tulane University Law School to discuss the future of press freedoms. The conference was designed to address the problems facing news media today and to attempt to find solutions from diverse voices with, at times, different and competing interests.

I have written extensively about my worries that a shift in media has led courts to rule in ways that will impact mainstream journalism.[113] I have been concerned that as a broadly defined media—especially the one that grew post-Internet—pushes against the traditional ethical boundaries that mainstream journalism has developed, courts have taken notice and have put up more roadblocks to access and coverage. Such decisions impact all media negatively, including traditional, ethics-abiding mainstream journalism.

I am not the only one who predicted this. Consider a remarkably prescient warning from Judge Abner Mikva of the United States Court of Appeals for the District of Columbia. He predicted in a law review article in 1995, the year of *Newsweek*'s *Year of the Internet*, that media needed to "Watch out!" because there was "a backlash coming" against First Amendment protections, sparked by news media's own transgressions.[114] Judge Mikva explained that several of his colleagues on the federal bench believed that the Supreme Court decision in *New*

113. *See, e.g.*, AMY GAJDA, THE FIRST AMENDMENT BUBBLE: HOW PRIVACY AND PAPARAZZI THREATEN A FREE PRESS (2015); Amy Gajda, *Judging Journalism: The Turn Toward Privacy and Judicial Regulation of the Press*, 97 CALIF. L. REV. 1039 (2009).

114. Hon. Abner J. Mikva, *In My Opinion, Those Are Not Facts*, 11 GA. ST. U. L. REV. 291, 296 (1995).

York Times Co. v. Sullivan,[115] one that is epitomic of press freedoms, protected the news media's "inaccurate and harmful reporting" too strongly.[116] He suggested that "the state of journalism" in more modern times, including a decline in standards for accuracy in reporting, had led certain federal judges in the mid-1990s to question traditionally strong protections for the press.[117]

If that was the case in the mid-1990s, at the time when the Sixth Circuit ruled in favor of the *Detroit Free Press*'s access to booking photographs, consider how those judges must feel today about media. The increased restrictions on access to mugshots springing from concerns about media's misuse of them seems some evidence that Judge Mikva's warning has come true.

Therefore, today, the shift away from mugshot access based on individual privacy interests and worries about what media will do with them seems to exemplify the press-privacy problem: those judges seemingly trust media less and are driven to protect individual privacy more. Recall the worries that the Sixth Circuit judge had about Internet-based media's instantaneous dissemination of mugshots for malevolent purposes.[118]

With regard to this change, I can speak with some experience. When I worked in newsrooms in the 1980s,[119] we would routinely publish mugshots of individuals who had been arrested, but only when we found the individual or his crime newsworthy. A mugshot of a mayor who had been arrested, for example, would be newsworthy, no matter the crime. A mugshot of a person arrested for murder would be newsworthy, no matter his status in the community, given the heinousness of the offense. I cannot recall any of my newsrooms ever publishing mugshots of someone arrested for more mundane and what we considered non-newsworthy crimes, unless that person had committed a string of those crimes, such as a number of burglaries. We may have had access to mugshots, but we did not routinely use them. It was a question of reasoned professional judgment that weighed the public interest in the information against the privacy interests of the individual.

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115. 376 U.S. 254 (1964).

116. Mikva, *supra* note 114, at 296-97, 301.

117. *Id.* at 296-97.

118. *See supra* note 104 and accompanying text.

119. I worked as a journalist in seven different newsrooms in five different states throughout the 1980s.

My own experience is not unique. This sort of weighing was done and is done with the most sensitive stories in most newsrooms across the country. Today's Society of Professional Journalists Code of Ethics, for example, tells reporters to "[b]alance a suspect's right to a fair trial with the public's right to know" and to "[c]onsider the implications of identifying criminal suspects before they face legal charges."[120] And this, ultimately, is why courts came to trust journalism: when journalists had in their hands acutely embarrassing and humiliating information, they generally would not publish it unless they found it, in their reasoned and newsroom-collective judgment, newsworthy.

As courts came to recognize this and trust the news media, they gave journalists the ability to decide for themselves what was newsworthy and in the public interest in a legal sense. As the Restatement of Torts explained, the legal definition for what was in the public interest came to be judged by the day's headlines: "Included within the scope of legitimate public concern are matters of the kind customarily regarded as 'news.' To a considerable extent, in accordance with the mores of the community, the publishers and broadcasters have themselves defined the term, as a glance at any morning paper will confirm."[121]

It was not just the Restatement authors who deferred to the press. In the past, courts would write quite literally that they hesitated to "blue pencil" the press, concerned about the implications of such judicial assessments, including a narrowing of news coverage.[122] As the United States Court of Appeals for the Fifth Circuit wrote in 1989 in a case involving news media's publication of a rape victim's name and photograph, one in which they ruled against that plaintiff, "[e]xuberant judicial blue-pencilling after-the-fact would blunt the quills of even the most honorable journalists."[123]

That sort of hesitation by courts to second-guess the news assessments of journalists had a significant history. In 1940, for example, the United States Court of Appeals for the Second Circuit decided *Sidis v. F-R Publishing Corp.*,[124] a case in which the *New Yorker* magazine published a *Where Are They Now?* column looking

120. *SPJ Code of Ethics*, SOC'Y PROF. JOURNALISTS, https://www.spj.org/ethicscode.asp (last visited Apr. 1, 2019).

121. RESTATEMENT (SECOND) OF TORTS § 652D cmt. g (AM. LAW INST. 1976).

122. Ross v. Midwest Commc'ns, Inc., 870 F.2d 271, 275 (5th Cir. 1989).

123. *Id.*

124. 113 F.2d 806 (2d Cir. 1940).

back at a famous child genius who, thirty years later, had become a recluse who shunned publicity.[125] The column, subtitled *April Fool*, was, in the court's assessment, "merciless in its dissection of intimate details of its subject's personal life."[126] Even so, the court agreed with the magazine that the information was newsworthy, despite the passage of time.[127] "[H]is subsequent history, containing as it did the answer to the question of whether or not he had fulfilled his early promise, was still a matter of public concern," the court wrote, supporting the *New Yorker*'s assessment of the story's news value.[128]

In 1984, a California appeals court decided *Sipple v. Chronicle Publishing Co.* as another example.[129] There, a man who had saved President Gerald Ford from an assassination attempt had been outed by the *San Francisco Chronicle* as gay, and the man sued the newspaper for invasion of privacy.[130] The court supported the *Chronicle*'s assessment of news value in the story: "[T]he record shows that the publications were not motivated by a morbid and sensational prying into appellant's private life but rather were prompted by legitimate political considerations," it wrote, "to dispel the false public opinion that gays were timid, weak and unheroic figures and to raise the equally important political question whether the President of the United States entertained a discriminatory attitude or bias against a minority group such as homosexuals."[131] There too, the court agreed with the journalists' arguments about what made the material newsworthy and in the public interest.

This sort of outcome favoring journalism became the norm. Multiple courts over the years decided that journalists should be able to decide for themselves what was newsworthy and what wasn't.[132] And, as seen in the mugshots decision from the Sixth Circuit in 1996, they gave news media access to a great amount of sensitive information because they trusted news media's ability to assess the newsworthiness of that information and, in effect and most times, publish responsibly.

But then came the Internet and the dawn of publishing-by-all and the resulting at times deeply invasive publications. Courts began to

125. *Id.* at 807.
126. *Id.*
127. *Id.* at 809.
128. *Id.*
129. 201 Cal. Rptr. 665 (Ct. App. 1984).
130. *Id.* at 666-67.
131. *Id.* at 670.
132. *See, e.g.*, GAJDA, *supra* note 113 (collecting cases).

feel more confident in critically assessing news and information in the public interest beyond what news media said was newsworthy.

Consider three examples, each involving crime coverage in some way, remarkable because crime is a type of news with strong public interest.

In 2009, as the first example, the United States Court of Appeals for the Eleventh Circuit decided that *Hustler* magazine would be liable for publishing twenty-year-old nude photographs of Nancy Benoit, a professional wrestler who had been murdered by her husband.[133] Benoit's family had objected to the nude photos that accompanied the short news story of her murder—what the court called "a brief biographical piece"[134]—and sued for the right to publicity, in effect, their right to control those images and to keep them private if they wished.[135] The court sided with the family. "[I]t seems clear," the court wrote, "that had [*Hustler*] published the nude photographs of Benoit by themselves—i.e., without a corresponding news article—the publication would not qualify within the newsworthiness exception. The fact of Benoit's nudity is not in and of itself newsworthy."[136] Because *Hustler* had published only a short mention of Benoit's murder, almost tangential to the nude images, the photographs served no "legitimate purpose of disseminating news . . . and needlessly expose[d] aspects of the plaintiff's private life to the public."[137] "Indeed," the court wrote, "people are nude every day, and the news media does not typically find the occurrence worth reporting";[138] therefore, the article about a woman's murder "cannot suffice to render [her] nude photographs newsworthy."[139]

And consider the court's final assessment of news judgment and the implication that assessment has on the publication of photographs including mugshots in news coverage more generally:

> [*Hustler*] would have us rule that someone's notorious death constitutes a carte blanche for the publication of any and all images of that person during his or her life, regardless of whether those images were

133. Toffoloni v. LFB Publ'g Grp., L.L.C., 572 F.3d 1201, 1201-02, 1204 (11th Cir. 2009).

134. *Id.* at 1209.

135. *Id.* at 1204.

136. *Id.* at 1209.

137. *Id.* (omission in original) (quoting McCabe v. Vill. Voice, Inc., 550 F. Supp. 525, 530 (E.D. Pa. 1982)).

138. *Id.*

139. *Id.* at 1210.

> intentionally kept private and regardless of whether those images are of any relation to the incident currently of public concern. We disagree.[140]

A few years later, the United States Court of Appeals for the Seventh Circuit decided *Dahlstrom v. Sun-Times Media, L.L.C.*, a second example involving crime coverage.[141] There, the *Chicago Sun-Times* had published a news article about a police lineup; the journalists suggested that the lineup had been rigged to protect the suspect, the Chicago mayor's nephew.[142] Witnesses to the assault at issue had described the perpetrator as the largest man they had seen, but the police lineup that included the suspect also included five police officers of similarly large build, complexion, hair color, and overall appearance.[143] The newspaper had headlined the article *Daley Nephew Biggest Guy on Scene, But Not in Lineup*.[144] And, indeed, witnesses did not pick the nephew out of the lineup as the man they had seen.[145]

In order to prove that the police officer "fillers" in the lineup very closely resembled the suspect and, therefore, made the lineup arguably defective, journalists had acquired the officers' physical descriptions from the state's drivers' license database.[146] This included "each officer's birth date, height, weight, hair color, and eye color."[147]

The police officers sued the newspaper for acquiring and publishing their information, and the Seventh Circuit found their lawsuit viable: "[W]e conclude," the court wrote, "that Sun-Times possesses no constitutional right either to obtain the officers' personal information from government records or to subsequently publish that unlawfully obtained information."[148]

First, the court held the newspaper had violated federal privacy law by prying into drivers' license records and found that to hold them liable for that behavior would be constitutional.[149] "Because limiting public access to driving records is rationally related to the government's legitimate interest in preventing 'stalkers and criminals [from] acquir[ing] personal information from state DMVs,' the

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140. *Id.*
141. 777 F.3d 937, 940 (7th Cir. 2015).
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.* at 940-41.
147. *Id.* at 939.
148. *Id.* at 940.
149. *Id.* at 949-50.

restriction easily satisfies the deferential rational basis standard," the court wrote.[150]

As for the newspaper's argument that the newsworthiness of the underlying story about the lineup should prevent any sort of liability on the part of the newspaper, the court would hear none of it. There was no authority for the *Sun-Times*'s argument that it could publish newsworthy information it had acquired unlawfully, the court explained: "[A]ll of the many cases on which Sun-Times relies involve scenarios where the press's initial acquisition of sensitive information was lawful."[151] "Although Sun-Times claims that, in acquiring and disclosing truthful information, it engaged only in 'perfectly routine, traditional journalism,'" the court wrote, "it cannot escape the fact that it acquired that truthful information *unlawfully*."[152]

Moreover, the court explained with the confidence of a seasoned news editor, the news article and accompanying photographs showed adequately what was needed to convey the information and did not need to include the physical information obtained from the state database.[153] "Sun-Times's publication of the Officers' personal details both intruded on their privacy and threatened their safety," the court explained, "while doing little to advance Sun-Times's reporting on a story of public concern. . . . and therefore does not override the government's substantial interest in privacy protection."[154] This sort of tangential addition of facts, the court reasoned, was not the sort of newsworthy information that the Supreme Court had protected in the past as significantly newsworthy.[155]

In the end, then, the Seventh Circuit decided that the privacy-based lawsuit against the newspaper could continue, despite what the journalists had argued was the news story's inherent newsworthiness supported in part by truthful information that they had obtained from the state driver's license database. "We do not opine as to whether, given a scenario involving lesser privacy concerns or information of greater public significance, the delicate balance might tip in favor of

150. *Id.* at 949 (alterations in original) (quoting Maracich v. Spears, 133 S. Ct. 2191, 2198 (2013)).

151. *Id.* at 950.

152. *Id.* at 951.

153. *Id.* at 953.

154. *Id.* at 953-54.

155. *Id.*; *see also* Bartnicki v. Vopper, 532 U.S. 514, 540-41 (2001) (finding that the news value in threats of violence surreptitiously recorded on a cellular telephone call outweighed the privacy implications).

disclosure," the court wrote.[156] "We hold only that, where members of the press unlawfully obtain sensitive information that, in context, is of marginal public value, the First Amendment does not guarantee them the right to publish that information."[157]

Consider the confidence with which that court assessed "of marginal public value"[158] the truthful information that had helped prove the key information within the underlying news story.

Finally, the third example involves a lower court decision from Pennsylvania, *Hartzell v. Cummings*.[159] It too involves a crime-related publication and a decision that the underlying information's news value did not trump the individual privacy interests involved—and perhaps is most surprising and most troubling for media should its outcome take hold.

In *Hartzell*, two related non-press websites had published a man's criminal history in an apparent effort to shame him, and a state trial court ordered that the websites be "immediately take[n] down, disable[d], and remove[d]" from the Internet.[160] In response to a motion by the defense arguing that such a demand would be unconstitutional, the court instead ordered only that the information regarding the plaintiff's criminal past be removed.[161] "The United States Supreme Court has long held that freedom of speech, as guaranteed by the First Amendment, does not include all modes of communication of ideas," the court wrote, but must be balanced with other interests, including individual privacy.[162] Here, the individual's "personal security" was at issue, even though the criminal record was public record.[163] "[D]etails about [the plaintiff's] past [were] likely not newsworthy twenty-five years after the fact," the court wrote.[164]

Given that outcome, one in which a criminal record alone was found to invade privacy, imagine what a similarly inclined court might do in a case involving the publication of an arguably even more deeply personal and embarrassing mugshot.

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156. *Dahlstrom*, 777 F.3d at 954.
157. *Id.*
158. *Id.*
159. No. 150103764, 2015 WL 7301962 (Pa. Ct. C.P. Nov. 4, 2015).
160. *Id.* at *1.
161. *Id.*
162. *Id.* at *3.
163. *Id.*
164. *Id.* at *4.

It would certainly find strongly supportive language in the FOIA mugshots cases. Even though such cases are ultimately different because they involve access and not publication, courts in such cases have, in effect, assessed the news value in the mugshot and have now mostly decided that individual privacy interests trump the public interest.

What makes this all the more interesting and troubling for media is that the arrests themselves are traditionally newsworthy, both with regard to newsroom judgment, as indicated above, and in a legal sense. Consider, for example, the Restatement's suggestion that legitimate news, meaning news that should not be subject to liability for publication, "includes publications concerning homicide and other crimes, arrests, police raids, . . . accidents, . . . a death from the use of narcotics, . . . a report to the police concerning the escape of a wild animal and many other similar matters of genuine, even if more or less deplorable, popular appeal."[165] There is repeated emphasis on crime coverage in that list of traditionally acceptable, newsworthy information.

It is this broad understanding of legally and journalistically "deplorable," perhaps, but "publicly appealing" crime coverage that has led to an increased use of mugshots in mainstream news publications today. That coverage extends far beyond the *Chicago Tribune*'s *Mugshots in the News* and the motivation for it, it seems, even in the minds of mainstream journalists reaches beyond its news value. Consider this vignette from a 2018 article in the *Columbia Journalism Review* (*CJR*) about journalism's modern use of mugshots and the ways in which such use can make media money:

> During a conference call with employees in the Lee Enterprises newspaper chain [in the summer of 2018], an editor at the *Times* of Northwest Indiana explained a secret behind her paper's online traffic boom. Mugshots, she shared in a presentation, had been a "game-changer" for the paper, which includes collections of booking photos below its crime stories and standalone galleries of recent arrestees.[166]

The *CJR* article, titled *Mugshot Galleries Might be a Web-Traffic Magnet. Does That Justify Publishing Them?*, highlighted multiple

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165. RESTATEMENT (SECOND) OF TORTS § 652D cmt. g (AM. LAW INST. 1976).

166. Corey Hutchins, *Mugshot Galleries Might Be a Web-Traffic Magnet. Does That Justify Publishing Them?*, COLUM. JOURNALISM REV. (Oct. 24, 2018), https://www.cjr.org/united_states_project/mugshots-ethics.php.

other newspapers with similar practices.[167] One editor, whose newspaper's feature is called *Mugshot Monday*, said it was often "the most popular thing on the website for that particular day."[168] More clicks or more users means increased ad revenue for the website, and in today's tough times for journalism, coverage that can lead to clicks and users can indeed be a "game-changer."[169]

Even so, the article noted, some newspaper websites and individual reporters have started to turn away from such coverage. "You're really preying on human suffering there," one editor told *CJR*.[170] A reporter who was interviewed suggested that he had quit his job rather than "shame" local residents who had been arrested.[171] Journalism ethics experts questioned whether wholesale publication of mugshots could ever be ethical and suggested at the very least that such coverage of arrests be followed up on and the mugshots removed if charges were dropped or the individuals were acquitted.[172]

And this seems to offer at least some glimmer of hope for the press-privacy dilemma and court pushback against media today. If media is more willing to restrict on its own the sort of coverage that gives courts pause, it could return at least in some small way to the days in which courts found journalism trustworthy and capable of assessing news value without judicial interference. I say some small way, of course, because any such confidence would require courts to decide what was a legitimate news website that covered crime in a journalistic sense and one that merely publishes mugshots to drive traffic. As this Essay has shown, that distinction is, at times, not an easy one.

VI. CONCLUSION

Today's federal appellate courts, all of which have found some level of privacy in individual mugshots, have returned in some sense to the early days in which courts hesitated to give police departments the right to share such photographs even as a part of police-access-only rogues' galleries, until the individuals had been convicted. Today's media, especially websites that exploit mugshots for profit, have contributed both to such restrictions on access and courts' confidence

167. *Id.*
168. *Id.* (quoting Elizabeth Cook, editor of North Carolina's *Salisbury Post*).
169. *Id.*
170. *Id.* (quoting Chris Quinn, President of Advance Ohio).
171. *Id.*
172. *Id.*

in assessing more general questions of newsworthiness and information of public concern. A renewed emphasis on media ethics, as shown in those newsrooms that have refused to publish non-newsworthy mugshots even though they have access to them and even though they drive readers to the websites, is a small glimmer of hope in a darkening time of lessened access and greater judicial restrictions on news coverage.

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