If a Picture Is Worth a Thousand Words, Your Mugshot Will Cost You Much More: An Argument for Federal Regulation of Mugshots

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I. INTRODUCTION

For over a year, Jesse T., of Sonoma County, California, unsuccessfully applied for a number of jobs, from construction to electrical positions.[1] Knowing something was amiss, Jesse decided to search his name on Google.[2] The top search result was a post on Mugshots.com, which is a website that submits freedom of information requests and searches online databases to obtain criminal records.[3] Even though Jesse was never convicted of any charge, Mugshots.com still posted his booking photo along with his full name, address, and information regarding his arrest.[4] The only way to remove his mugshot from the website was to pay $399.[5] In fact, the $399 unpublishing fee was *per charge*.[6]

Mugshots.com is not the only website that publishes booking photos. Other sites include Busted Newspaper, Arrests.org, Florida.arrests.org, and Phoenixmugs.com, among many others.[7] It is not uncommon for a person to pay the unpublishing fee on one website, only for the person's mugshot to pop up on another, a problem that has been compared to a game of "whack-a-mole."[8] A person can spend thousands of dollars before realizing it is a scam.[9] Although some people can afford a lawyer to help take their mugshots down, most of those arrested cannot.[10]

Because there were over 10.3 million arrests in the United States in 2018 alone, companies like Mugshots.com impact a large portion of our population.[11] One in three Americans eligible for employment have some sort of criminal record, including arrests not resulting in a conviction.[12] These websites "humiliate their subjects . . . because mugshots create a powerful

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1. 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 [https://perma.cc/2FN3-YXR3].
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. Olivia Solon, *Haunted by a Mugshot: How Predatory Websites Exploit the Shame of Arrest*, GUARDIAN (June 12, 2018, 3:01 PM), https://www.theguardian.com/technology/2018/jun/12/mugshot-exploitation-websites-arrests-shame [https://perma.cc/4UEG-79C2].
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. Erin Duffin, *USA – Number of Arrests for All Offenses 1990-2018*, STATISTA (Oct. 10, 2019), https://www.statista.com/statistics/191261/number-of-arrests-for-all-offenses-in-the-us-since-1990/ [https://perma.cc/AJ2W-VSRU].
12. Katie Rose Quandt, *Pennsylvania County Owes $67 Million After Man Finds Arrest Records on Mugshots.com*, APPEAL (Aug. 27, 2019), https://theappeal.org/pennsylvania-county-owes-67-million-after-man-finds-arrest-records-on-mugshots-com/ [https://perma.cc/6KKW-M2UK].

visual association between the subject and criminal activity, regardless of guilt."[13] In fact, courts are unlikely to show juries defendants' mugshots because the familiarity of mugshots from media leads to "the inference that the person involved has a criminal record, or has at least been in trouble with the police."[14] According to the New York Civil Liberties Union, the consequences of having a mugshot taken can affect a person for years "after an arrest, no matter how a charge was resolved, and to no discernable public benefit, [it] can impact the subject's personal and romantic life, child custody, job prospects, college or other educational opportunities, rental or license applications, and career advancement."[15] Indeed, some states even automatically disqualify individuals with certain criminal records from obtaining professional licenses, such as roofing and barbering.[16]

Furthermore, the posting of mugshots online is especially a problem for those who have their records sealed or expunged. Six states passed "clean slate" statutes that automatically seal eligible criminal records.[17] Although well-intended, these statutes are ineffective if an employer can still find your mugshot with a quick Google search. Expungement and record sealing allow individuals to withhold from employers the fact that they have a record; however, after a Google search, the employer will be able to find the mugshot and then will conclude the person is "a liar and a criminal."[18]

Companies like Mugshots.com are not the only ones profiting off public access to mugshots. "[R]eputation management firms, mugshot removal services, media companies that publish mugshot galleries and search engines like Google" all benefit from the further humiliation of a significant part of our population.[19] This exploitive mugshot industry has generated several lawsuits and has caused elected officials to rethink classifying mugshots as public records.[20] As a result, mugshot websites have switched from charging takedown fees to selling "reputation management services."[21] They also rely on advertising revenue from those who visit these sites.[22] In addition,

13. Solon, *supra* note 6 ("The [criminal] association is deemed so powerful that courts try to avoid showing mugshots to juries to avoid prejudice.").

14. Barnes v. United States, 365 F.2d 509, 510–11 (D.C. Cir. 1966).

15. *Legislative Memo: "Mugshot" and Booking Information Ban,* N.Y. CIVIL LIBERTIES UNION, https://www.nyclu.org/en/legislation/legislative-memo-mugshot-and-booking-information-ban (last visited Nov. 19, 2019) [https://perma.cc/TZV2-HHLF].

16. Quandt, *supra* note 12.

17. *See id.*

18. *Id.* (quoting Daryoush Taha).

19. Solon, *supra* note 6.

20. Sarah Esther Lageson, *It's Time for the Mug-Shot Digital Economy to Die*, SLATE (Mar. 12, 2019), https://slate.com/technology/2019/03/mug-shot-economy-cuomo-proposal.html [https://perma.cc/R5C9-GQGC] (N.Y. Gov. Andrew Cuomo proposed exempting mugshots from public records laws; C.A. A.G. Xavier Becerra brought criminal charges against operators of Mugshots.com for extortion, money laundering, and identity theft; a federal court found "that a Pennsylvania county violated state criminal record law by posting thousands of inmate mug shots on the local jail's website.").

21. *See id.*

22. *See id.*

Mugshots.com now displays the word "news" in its logo, which is an example of how mugshot websites are gearing up to make First Amendment arguments.[23] Local newspapers also profit from advertising revenue after posting mugshots, and these mugshots often end up on social media.[24] Although newspapers have broad First Amendment protections, it is unclear why an array of photos with zero context is considered newsworthy.

Because of how pervasive and widespread the circulation of mugshots has become—enough so that it birthed an entire industry—Congress should enact a statute that keeps up with the Internet Age. Before the Internet, a person could be arrested, acquitted, and then successfully move on with their life because arrests did not generally appear on pre-employment checks.[25] However, today, most employers Google applicants before offering them a job.[26] When a mugshot is available online indefinitely, even for those arrests which do not result in a conviction, this poses a significant hinderance to employment, housing, and interpersonal relationships.[27] Because making mugshots freely available imposes significant privacy costs and other burdens well in excess of any public benefit, Congress has, and should exercise, authority to limit the release and distribution of mugshots at both the federal and state levels. This Note will first examine federal treatment of booking photos and freedom of information requests, followed by state treatment of booking photos. Then it will offer two solutions for how Congress may address the mugshot industry: first, Congress should enact a statute prohibiting law enforcement from releasing booking photos until after a person is convicted of an offense, unless there is a compelling need to distribute a person's mugshot, such as attempting to find a fugitive; and second, Congress should carve out an exception to Section 230 of the Communications Act that would allow a plaintiff to seek equitable relief from the court in order to require search engines to remove links to websites with exploitative removal practices.

II. BACKGROUND

A. Federal Authorities Recognize the Privacy Interest in Booking Photos

Although mugshots seem engrained into our culture, their disclosure at the federal level is actually considered an "unwarranted invasion of privacy"

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23. *Id.*
24. *Id.*
25. *See* Dan Clark, *How Many U.S. Adults Have a Criminal Record? Depends on How You Define It*, POLITIFACT (Aug. 18, 2017), https://www.politifact.com/new-york/statements/2017/aug/18/andrew-cuomo/yes-one-three-us-adults-have-criminal-record/ [https://perma.cc/T4CC-EXQ4].
26. *See* Susan P. Joyce, *What 80% of Employers Do Before Inviting You for an Interview*, HUFFPOST (May 1, 2014), https://www.huffpost.com/entry/job-search-tips_b_4834361 [https://perma.cc/LQ5F-ZSYZ].
27. *Legislative Memo*, *supra* note 15.

for the purpose of Freedom of Information Act (FOIA) requests.[28] This section will first examine the U.S. Marshals Service's (USMS) decision to prohibit disclosure under FOIA, then it will examine the federal circuit-level opinions upholding this decision. It will also examine Supreme Court decisions that focus on disclosure of criminal histories.

Congress passed FOIA in 1966 which, according to the legislative history, was designed "to permit access to official information long shielded unnecessarily from public view" and "to create a judicially enforceable public right to secure such information from possibly unwilling official hands."[29] FOIA's principal aim is government transparency. Exemption 7(C), however, prohibits disclosure of "records or information compiled for law enforcement purposes . . . to the extent that the production . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy."[30] This exemption requires courts to balance public interest in disclosure against the privacy interest Congress intended the exemption to protect.[31]

The USMS is the agency responsible for responding to FOIA requests regarding federal criminal records.[32] Beginning in 1971, the USMS adopted a nondisclosure policy for booking photos based on the assertion that disclosure would constitute an unwarranted invasion of personal privacy that exemption 7(C) sought to protect.[33]

In 1996, the Sixth Circuit held in *Detroit Free Press, Inc. v. United States Department of Justice* (*Free Press I*), that the USMS could not prevent disclosure of booking photos because criminal defendants did not have any privacy interest in the photos.[34] Thus, exemption 7(C) of FOIA does not apply.[35] Because *Free Press I* specifically dealt with individuals under indictment and awaiting trial, the Court stated that it "need not decide today whether the release of a mugshot by a government agency would constitute an invasion of privacy in situations involving dismissed charges, acquittals, or completed criminal proceedings."[36] There seems to be a certain level of skepticism about whether public access would serve any legitimate purpose in those circumstances.[37]

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28. *See* Detroit Free Press, Inc. v. U.S. Dep't of Justice, 829 F.3d 478, 485 (6th Cir. 2016) [hereinafter *Free Press II*]; Karantsalis v. U.S. Dep't of Justice, 635 F.3d 497, 503 (11th Cir. 2011); World Publ'g Co. v. U.S. Dep't of Justice, 672 F.3d 825, 831–32 (10th Cir. 2012). Federal recognition of an important privacy interest in mugshots will serve as a backdrop for this Note's proposed legislation.

29. EPA v. Mink, 410 U.S. 73, 80–81 (1973).

30. 5 U.S.C. § 552(b)(7)(C).

31. Eumi K. Lee, *Monetizing Shame: Mugshots, Privacy, and the Right to Access*, 70 RUTGERS U. L. REV. 557, 577 (2018).

32. *Id.* at 587.

33. *Id.*

34. Detroit Free Press, Inc. v. U.S. Dep't of Justice, 73 F.3d 93, 96–97 (6th Cir. 1996).

35. *Id.*

36. *Id.* at 97.

37. *See id.* at 98 (finding that public disclosure of mugshots can serve the purpose of government oversight "in limited circumstances," such as incidents where the government detains the wrong person or in cases of police brutality).

Twenty years later, the Sixth Circuit recognized *Free Press I* as untenable because of the accessibility of mugshots online: "In 1996, this court could not have known or expected that a booking photo could haunt the depicted individual for decades. Experience has taught us otherwise."[38] Relying on Supreme Court precedent, it stated that exemption 7(C) needs to be understood "in light of the consequences that would follow from unlimited disclosure."[39] Because courts also consider "potential derivative uses" of the information sought,[40] the Sixth Circuit recognized the damaging personal consequences of mugshot websites and the "online-reputation-management industry."[41] A concurring judge found the dissemination of the photos "for malevolent purposes" problematic and stated that "these images preserve the indignity of a deprivation of liberty, often at the (literal) expense of the most vulnerable among us."[42] The court also agreed with the USMS's case-by-case approach to the release of booking photos.[43] Under this approach, the public's interest must be within the scope of the core purpose of FOIA: government transparency.[44]

Between *Free Press I* and *Free Press II*, two other circuit courts decided the question of whether booking photos constituted an unwarranted invasion of privacy. In 2011, the Eleventh Circuit stated that a booking photo "is a unique and powerful type of photograph" that creates an association of guilt and depicts the individual in a "vulnerable and embarrassing" state.[45] Thus, it found that there is a substantial personal privacy interest at stake and that disclosing booking photos does not serve any public interest that FOIA was designed to protect.[46] The court rejected the argument that general curiosity was sufficient to justify disclosure because it "is not a cognizable interest that would contribute significantly to public understanding of the operations or activities of the government."[47] In 2012, the Tenth Circuit reached the same conclusion, citing the Eleventh Circuit's decision with approval.[48] Therefore, all three circuit courts concluded that individuals enjoy a substantial privacy interest in their booking photos that is not outweighed by any public interest.

Furthermore, all three circuits relied on the Supreme Court's decision in *United States Department of Justice v. Reporters Committee for Freedom*

38. *Free Press II*, 829 F.3d at 485 ("Today, an idle internet search reveals the same booking photo that once would have required a trip to the local library's microfiche section.").
39. *Id.* at 482 (citing Nat'l Archives & Recs. Admin. v. Favish, 541 U.S. 157 (2004)).
40. *Id.* (citing Am. Civ. Liberties Union v. U.S. Dep't of Justice, 655 F.3d 1, 7 (D.C. Cir. 2011)).
41. *Id.* at 482–83.
42. *Id.* at 486.
43. *Id.* at 485.
44. *See id.*
45. *Karantsalis*, 635 F.3d at 503.
46. *See id*. at 503–04.
47. *Id.* (citing U.S. Dep't of Justice v. Reps. Comm. for Freedom of Press, 489 U.S. 749 (1989)).
48. *World Publ'g Co*., 672 F.3d at 829 (concluding that disclosure of booking photos would not contribute to public understanding of federal law enforcement).

of Press, which held that the disclosure of rap sheets compiled by the Federal Bureau of Investigation (FBI) constitutes an unwarranted invasion of privacy, therefore falling under exemption 7(C) of FOIA.[49] Rap sheets include "descriptive information, such as date of birth and physical characteristics, as well as a history of arrests, charges, convictions, and incarcerations of the subject."[50] The Court began its analysis by balancing the privacy interest at stake against public interest in disclosure.[51] It rejected the "cramped" argument that there is no privacy interest in rap sheets because they only contain information already available to the public.[52] Instead, it defined privacy as an individual's ability to control information "concerning his or her person."[53] The FBI spends resources to compile and maintain rap sheets, which demonstrates that the information is not freely available to the public or to the officials who have access to them.[54] The Court found a "vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information."[55]

Additionally, the Court found support in its conclusion from FOIA and the Privacy Act of 1974.[56] The legislative intent behind FOIA was not to disclose personal details about private citizens, but to allow the public access to activities of the government.[57] The Privacy Act was intended to mitigate "the impact of computer data banks on individual privacy."[58]

Further, the Court found significance in states' decisions to prohibit access to non-conviction data in criminal records.[59] Given the level of concern Congress and the states had expressed at the time, it concluded that "individual subjects have a significant privacy interest in their criminal histories."[60] That interest is compounded by the reality that a computer can "store information that would otherwise surely been forgotten long before a person attains age 80, when the FBI's rap sheets are discarded."[61] The Court concluded that when the subject of a rap sheet is a private citizen, the privacy interest is "at its apex while the FOIA-based public interest in disclosure is at its nadir."[62]

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49. 489 U.S. 749 (1989).
50. *Id.* at 752.
51. *See id.* at 762.
52. *See id.* at 762–63.
53. *Id.* at 763.
54. *See id.* at 764.
55. *Id.*
56. *Id.* at 765–66.
57. *See id.*
58. *Id.* at 766 (citing H.R. REP. NO. 93-1416, at 7 (1974)).
59. *Id.* at 767.
60. *Id.*
61. *Id.* at 771.
62. *Id.* at 780.

Although the Court accepts that there is no FOIA-based public interest in the disclosure of rap sheets, it has not recognized due process protection for mugshot distribution.[63] In *Paul v. Davis*, a 1976 case, the Court seemed to suggest that distribution of the plaintiff's mugshot before his conviction would better support a claim for defamation than it would for a procedural due process violation.[64] Justice William Brennan issued a strong dissent to this opinion:

> The Court today holds that police officials, acting in their official capacities as law enforcers, may on their own initiative and without trial constitutionally condemn innocent individuals as criminals and thereby brand them with one of the most stigmatizing and debilitating labels in our society. If there are no constitutional restraints on such oppressive behavior, the safeguards constitutionally accorded an accused in a criminal trial are rendered a sham . . . The Court accomplishes this result by excluding a person's interest in his good name and reputation from all constitutional protection, regardless of the character or necessity for the government's actions. The result, which is demonstrably inconsistent with prior case law and unduly restrictive in its construction of our precious Bill of Rights, is one in which I cannot concur.[65]

Justice Brennan recognized the "debilitating" effect a mugshot can have on an individual, even though this case was decided long before a person's mugshot became the top search result after an Internet search of their name.[66] The notion that one is innocent before proven guilty is a legal fiction if the government can distribute a person's mugshot before conviction.[67]

In summary, federal courts have no difficulty finding a substantial privacy interest in booking photos and criminal histories in general when weighed against the FOIA-based public interest in disclosure. Further, the increased accessibility and longevity of these records due to the Internet seems to weigh heavily on the courts as well as Congress. Although Congress and the courts have recognized an important privacy interest in booking photos, existing protections are insufficient because they give the government too much discretion to voluntarily release booking photos even when release is not mandated.

63. *See* Paul v. Davis, 424 U.S. 693, 697–98 (1976) (rejecting plaintiff's procedural due process claim because damage to reputation is insufficient).

64. *See id.*

65. *Id*. at 714 (Brennan, J., dissenting).

66. *See id.*

67. *See id.*

B. States' Treatment of Booking Photos

The previous section discussed federal treatment of booking photos, but criminal law primarily comes from decisions of state and local governments. Federal recognition of a privacy interest in booking photos is encouraging, but it is state treatment that likely has a greater impact on our population. This section will begin by examining the early state case law regarding booking photos, then it will discuss the case law following the passage of FOIA and the states' FOIA equivalents. Finally, it will assess states' reactions to the emergence of websites such as Mugshots.com.

State courts began grappling with booking photos as early as 1899, when cameras were relatively new.[68] In New York, a court held that the police have the right to photograph habitual criminals and to distribute those photos in certain ways.[69] However, the opinion suggested that if a person had been incorrectly labeled a criminal and had his photo distributed, he would have a claim for libel against the police.[70]

In 1905, a man brought a right of privacy claim against the police for distributing his mugshot after his arrest.[71] The Louisiana court decided that sharing his mugshot was improper because he was not a "hardened criminal."[72] Even though he was arrested a number of times before this incident, the court stated that "before conviction his picture should not be posted, for then it would be a permanent proof of [his] dishonesty."[73]

Subsequently, several other state courts followed suit; each recognized a privacy interest that exists in mugshots, especially in light of the lasting reputational harm a mugshot can have.[74] This recognition quickly ceased when FOIA and the states' FOIA equivalents passed into law in the 1960s.[75] State laws were broadly interpreted as allowing public access to a wide range of government information, including mugshots.[76] Thus, whether mugshots are a matter of public record largely depends on the state's statute and whether mugshots fall within any statutory exemption.[77]

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68. *See* Amy Gajda, *Mugshots and the Press-Privacy Dilemma*, 93 TUL. L. REV. 1199, 1206–07 (2019).

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

70. *See id.*

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

72. *See id.*

73. *Id.*

74. *See* Gajda, *supra* note 68, at 1209 (citing McGovern v. Van Riper, 43 A.2d 514, 525 (N.J. Ch. 1945) ("[U]nless an accused becomes a fugitive from justice there exists no right to publish or disseminate his . . . photographs . . . in advance of conviction"); State ex rel. Mavity v. Tyndall, 66 N.E. 2d 755, 761–63 (Ind. 1946) (warning there may be exceptional cases that warrant destruction of mugshots; those cases should be decided by balancing right of privacy against public interest); *see also* Bingham v. Gaynor, 126 N.Y.S. 353, 357 (N.Y. App. Div. 1910) (stating a person could be "ruined for life" and "he and his parents have lived in daily dread of the day his employer would learn that his picture is in the 'Rogues' Gallery")).

75. Gajda, *supra* note 68, at 1209–10.

76. *Id.*

77. Lee, *supra* note 31, at 591–92.

A majority of states—approximately thirty—consider mugshots to be a matter of public record.[78] Some of these states explicitly provide for the release of mugshots, such as Virginia, North Dakota, Minnesota, and Nebraska.[79] In other states, courts or agencies interpret the statutes as allowing the distribution of mugshots.[80]

Georgia, Kansas, Montana, New Jersey, and Washington consider mugshots exempt from public disclosure.[81] In Montana, mugshots are considered confidential, and public disclosure is only allowed "upon a written finding that the demands of individual privacy do not clearly exceed the merits of public disclosure."[82] Further, if an arrest does not result in a conviction, all photographs and fingerprints taken must be returned to the individual.[83]

The remaining states do not have a "clear authority from the judicial or executive branch" which would determine if mugshots fall within the state's public records statute.[84] Some states have a balancing approach that weighs the invasion of privacy against public interest in disclosure.[85] In California, former Attorney General Bill Lockyer gave discretion to law enforcement agencies to decide whether or not to release mugshots, which resulted in varying practices across the state.[86]

Most recently, states contend with the problem of the exploitative nature of the mugshot industry emerging online. For instance, New York Governor Andrew Cuomo proposed a ban on the release of mugshots in 2019.[87] A spokesman for Cuomo stated the proposal is designed "to help curtail an unethical practice that amounts to extortion of formerly incarcerated individuals."[88] He also highlighted that fifteen other states "passed legislation that prohibits websites from charging fees for removing photos" and that it "is not working—mugshots keep popping up online."[89]

78. *Id.* at 593.

79. *Id.* (Virginia has exception where release would jeopardize an ongoing investigation).

80. *Id.* at 593–94 (Attorneys General from Alabama, Florida, Maryland, and Oklahoma interpreted public records statutes as allowing disclosure of mugshots; a Wisconsin court of appeals held that a mugshot was a "record" for the purpose of the state's public records law).

81. *Id.* at 594.

82. *Id.* at 595.

83. *Id.*

84. *Id.* at 596.

85. *Id.*

86. *Id.* at 597.

87. Brendan J. Lyons, *Cuomo Proposes Ban on Release of Mugshots, Arrest Info*, TIMESUNION (Jan. 20, 2019, 6:38 PM EDT), https://www.timesunion.com/news/article/Cuomo-proposes-ban-on-release-of-mugshots-arrest-13545073.php [https://perma.cc/93HL-FZ5Q].

88. *Id.*

89. *Id.*

In addition, a handful of states passed legislation allowing for the automatic sealing of eligible criminal records.[90] In 2018, Pennsylvania became the first state to pass "clean slate" legislation, followed by Utah.[91] Further, Arkansas and California are considering passing their own clean slate statutes.[92] Pennsylvania's clean slate law allows 30 million criminal cases to be sealed "so that they cannot affect people's chances for employment, education and housing."[93] Although well-intended, if mugshots are still released to the public and uploaded to the Internet, employers, landlords, and educational institutions will still likely judge a person based on their mugshot.[94]

Overall, state courts have recognized the privacy interest at stake in mugshots since the beginning of the 20th century. Courts seem to struggle with the lasting reputational harm caused by the distribution of a mugshot before a person is convicted. Further, recent legislation enacted by states demonstrates an increased intolerance of the exploitation of people with criminal records. It is also an acknowledgement that there is no societal benefit to websites that simply post mugshots with no follow-up on the final disposition of those cases. New York in particular has recognized that as long as mugshots are available to the public, this problem will always exist. If an employer or landlord can still access a person's mugshot online, record sealing will not be of much use.

III. ANALYSIS

A. Congress Should Enact a Law Prohibiting the Distribution of Booking Photos Until After a Person is Convicted

As long as mugshots remain easily accessible by the public, the exploitative mugshot industry will continue to exist. As previously discussed, the consequences of classifying mugshots as public record, which has devastating and lasting implications for those depicted, far outweigh any public interest in disclosure. Whether a person will be haunted by their mugshot arbitrarily varies based on the policy choices of each state. Because employers, landlords, and educational institutions frequently Google their applicants, a mugshot can significantly diminish a person's potential to earn income.[95] This reality is equally true for both convicted persons and for

90. Hannah Knowles, *Criminal Records Can Be a 'Life Sentence to Poverty.' This State is Automatically Sealing Some*, WASH. POST (July 1, 2019), https://www.washingtonpost.com/nation/2019/07/01/criminal-records-can-be-life-sentence-poverty-this-state-is-automatically-sealing-some/ [https://perma.cc/S3GW-9T26].

91. *Id.*

92. *Id.*

93. *Id.*

94. Quandt, *supra* note 12 (quoting Daryoush Taha).

95. Knowles, *supra* note 90 ("even a minor offense can be 'a life sentence to poverty," and University of Michigan researchers stated individuals who expunged their records "saw their wages go up by more than 20 percent within a year").

persons acquitted or even wrongly accused. If there are no restraints on the release of mugshots, as Justice Brennan wrote, the safeguards of the Constitution "in a criminal trial are rendered a sham."[96] Thus, Congress should enact a statute that prohibits the distribution of mugshots until a person is convicted of a crime. This statute would protect the innocent from the hot iron branding of "one of the most stigmatizing and debilitating labels in our society."[97] This section will first examine the public interest in the publication of mugshots. It will then argue that distribution of mugshots into interstate commerce provides the hook necessary to support federal regulation.[98]

There is little societal benefit to publishing millions of mugshots online beyond morbid curiosity. Proponents of disclosure argue that it provides insight into the criminal justice system and that it allows for greater accountability. However, the Sixth, Tenth, and Eleventh Circuits rejected that exact argument: mugshots do not contribute to "public understanding of the operations" of the government and "the public obtains no discernable interest from viewing the booking photographs, except perhaps the negligible value of satisfying voyeuristic curiosities."[99]

Mugshot galleries display the depicted individual's name, age, and suspected offense, but there is hardly ever any follow-up coverage.[100] The intent behind these galleries is not to inform; it is to ridicule.[101] As the Sixth Circuit noted, these galleries target "the most vulnerable among us."[102] Indeed, the most viral mugshots tend to display people who are clearly suffering from mental illness or addiction issues.[103] Further, some local media outlets recognize that all they need is "goofy mugshots" in order to get more clicks.[104] The notoriety of "Florida man" also demonstrates "the runaway racism and classism [that are] baked into the cake of the mugshot industry."[105] "Florida man" has become so popular that in 2019, the "Florida man challenge" emerged.[106] This "challenge" entailed googling a person's birthday, followed by the phrase "Florida man," to find a Florida arrest story that happened on that person's birthday.[107] A survey of "Florida man" headlines includes "Florida Man Killed Ex-Girlfriend While Trying to 'Get

96. 424 U.S. at 714 (Brennan, J., dissenting).
97. *Id.*
98. *See generally* Lee, *supra* note 31.
99. *Karantsalis*, 635 F.3d at 504; *see* 672 F.3d 825; *see also* 829 F.3d 478.
100. 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 [https://perma.cc/82ZP-QZXV].
101. Adam Johnson, *The Media's Profitable, Indefensible Addiction to Mugshots*, FAIR (Jan. 23, 2019), https://fair.org/home/the-medias-profitable-indefensible-addiction-to-mugshots/ [https://perma.cc/RXS7-VBLJ].
102. *Detroit Free Press*, 829 F.3d at 486.
103. Johnson, *supra* note 101.
104. *Id.*
105. *Id.*
106. Ashley Hoffman, *The Florida Man Challenge Is a Bizarre News Bonanza*, TIME (Mar. 21, 2019), https://time.com/5555893/florida-man/ [https://perma.cc/9KRU-LWGS].
107. *Id.*

Rid of the Devil;' " "Florida Man Chews Up Police Car Seat After Cocaine Arrest;" "Florida Man Doesn't Get Straw, Attacks McDonald's Employee;" and "Florida Man Denies Syringes Found in Rectum Are His."[108] It is easy to tie these headlines to disturbed individuals who are likely suffering from mental illness, drug addiction, and poverty.

One journalist describes mugshot galleries as "preying on human suffering" and feels that they are "the wrong way to get traffic."[109] Unfortunately, this practice will continue as long as it remains profitable.[110] According to an editor at North Carolina's *Salisbury Post*, the "Mugshot Monday" feature "is the most popular thing on the website for that particular day."[111]

On the other hand, attitudes are shifting "away from a belief that the best way to keep the public safe is to 'lock people up for as long as we could' and toward a recognition that criminal justice should be proactive about setting people up for success when they leave incarceration."[112] As Daniel Solove, privacy law professor at the George Washington University Law School, states in *The Virtues of Knowing Less*, "the benefits of rehabilitation are difficult to reject, especially in a criminal justice system from which most criminals are released back into society."[113] Solove also highlights that the possibility of rehabilitation has long been a part of American tradition.[114]

One in three Americans have some sort of criminal record, including arrests that do not result in a conviction.[115] This fact may explain the bipartisan support for initiatives such as automatic record-sealing.[116] In addition, 70% of voters support automatic record-sealing and shrinking prison

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108. Justin Kirkland, *The 90 Wildest Florida Man Headlines of 2019 (So Far)*, ESQUIRE (Apr. 1, 2019), https://www.esquire.com/news-politics/a26899191/florida-man-headlines-2019/ [https://perma.cc/2MWC-XZ7F].

109. Hutchins, *supra* note 100.

110. *Id.* ("In 2016, Fusion looked at 74 newspapers, mostly owned by the McClatchy and Tribune Publishing chains, and found 40 percent of them published mugshot galleries online"); *see also* Ingrid Rojas & Natasha Del Toro, *Should Newspapers Make Money Off of Mugshot Galleries?*, FUSION TV (Mar. 9, 2016), https://fusion.tv/story/278341/naked-truth-newspapers-mugshot-galleries/ [https://perma.cc/PBT8-CAHK] ("[I]t appears that newspapers are monetizing police photos and public humiliation in a manner that's strikingly similar to exploitive private sites like mugshots.com").

111. Hutchins, *supra* note 100.

112. Knowles, *supra* note 90.

113. Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 DUKE L.J. 967, 1057 (2003).

114. *Id.* (quoting Lawrence Fiedman) ("American society is and has been a society of extreme mobility, in every sense of the word: social, economic, geographical. Mobility has meant freedom; mobility has been an American value. People often moved from place to place; they shed an old life like a snake molting its skin. They took on new lives and new identities. They went from rags to riches, from log cabins to the White House. American culture and law put enormous emphasis on second chances.").

115. Clark, *supra* note 25.

116. Knowles, *supra* note 90 (stating Pennsylvania's Clean Slate Act was "a relatively easy sell" because it received support from "both Democrats and Republicans and garnered support well beyond defendant advocates").

populations.[117] Thus, the time is ripe for Congress to pass legislation that recognizes the public's interest in rehabilitation.

Congress previously passed privacy legislation that directly affected states' activities on multiple occasions. For instance, the Driver's Privacy Protection Act of 1994 (DPPA), codified at 18 U.S.C. §§ 2721–25, "establishes a regulatory scheme that restricts the States' ability to disclose a driver's personal information without the driver's consent."[118] Specifically, it prohibits states' departments of motor vehicles (DMVs) from "knowingly disclos[ing] or otherwise mak[ing] available to any person or entity personal information . . . about any individual obtained by the department in connection with a motor vehicle record. . . ."[119] Further, DPPA regulates "the resale and redisclosure of drivers' personal information by private persons who have obtained that information from a state DMV."[120] If a person knowingly violates DPPA, they may be subject to a criminal fine and to liability in a civil action brought by the driver.[121] If a state agency does not comply with DPPA, the United States Attorney General may impose a civil penalty of not more than $5,000 per day of substantial noncompliance.[122] Congress passed DPPA in part because "a deranged fan murdered actress Rebecca Shaeffer outside her home after acquiring [her] address from the [DMV]."[123]

In *Reno v. Condon*, the Supreme Court upheld DPPA after South Carolina challenged its constitutionality.[124] The Court ruled that DPPA is a valid exercise of Congress's authority to regulate interstate commerce under the Commerce Clause.[125] It also concluded DPPA does not violate the Tenth Amendment.[126] The Court stated that motor vehicle information "is used by insurers, manufacturers, direct marketers, and others engaged in interstate commerce."[127] The information is used by public and private entities for the purpose of interstate motoring as well.[128] The Court concluded that in this context, motor vehicle information is an article of commerce, so "its sale or release into the interstate stream of business is sufficient to support congressional regulation."[129]

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117. *Clean Slates, Rich States – Why States Are Rushing to Seal Tens of Millions of Old Criminal Records*, ECONOMIST (Nov. 14, 2019), https://www.economist.com/united-states/2019/11/14/why-states-are-rushing-to-seal-tens-of-millions-of-old-criminal-records [https://perma.cc/UQ92-PMTS].

118. Reno v. Condon, 528 U.S. 141, 144 (2000).

119. 18 U.S.C. § 2721(a)(1) (2018).

120. 528 U.S. at 146.

121. *Id.* at 146–47 (citing 18 U.S.C. §§ 2723(a), 2724, 2725(2)).

122. *Id.* at 147 (citing 18 U.S.C. § 2723(b)).

123. Solove, *supra* note 113, at 1012.

124. 528 U.S. at 151.

125. *Id.*

126. *Id.*

127. *Id.* at 148.

128. *Id.* at 149.

129. *Id.*

Turning to the question of whether DPPA violated the Tenth Amendment, the Court stated that it treats the states as owners of databases and that it does not require states to enact any laws or "to assist in the enforcement of federal statutes regulating private individuals."[130] For purposes of congressional regulation, the parallel between motor vehicle information and mugshots is patent. Webpages such as mugshot websites inherently implicate interstate commerce because they involve the Internet.[131] Similar to how motor vehicle information enters the interstate stream of business, mugshots are used by mugshot websites, reputation management firms, local newspapers, and even search engines for profit.[132] Thus, mugshots are a proper subject of congressional regulation.

Although *Condon* involved South Carolina's sale of motor vehicle information, that fact alone is not dispositive.[133] The Court specifically stated the "sale or release" of the information into the interstate stream of commerce was sufficient to support congressional regulation.[134] Further, other Commerce Clause cases upholding statutes have not required the direct participation of states in the market.[135] As the Court stated in *United States v. Lopez*, Congress can regulate "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities."[136] One could also argue that distribution of mugshots has a substantial effect on interstate commerce because a significant portion of those who have their mugshots available online have a difficult time seeking employment, housing, and educational opportunities, thus hurting the economy.[137]

Because regulating mugshots would likely pass the same Commerce Clause tests as other information privacy regulations upheld by the Supreme

130. *Id.* at 151.

131. United States v. MacEwan, 445 F.3d 237, 245–46 (3d Cir. 2006) (holding that the Internet is a "channel and instrumentality of interstate commerce" and that child pornography downloaded over the Internet is a proper subject of congressional regulation even without the proof that the image crossed state lines).

132. Solon, *supra* note 6.

133. 528 U.S. at 149.

134. *Id.* at 148.

135. *See* Shreveport Rate Cases, 234 U.S. 342 (1914); Southern Ry. Co. v. United States, 222 U.S. 20 (1911).

136. United States v. Lopez, 514 U.S. 549, 558 (1995).

137. *See Reno*, 528 U.S. at 148–89.

Court, Congress can regulate mugshots.[138] Though privacy rights are still developing, the Internet era is shifting attitudes towards protecting records from public access. Following the spirit of this attitude shift, the appropriate balance to strike for mugshots is prohibiting their release until after conviction. This way, innocent people will not be permanently harmed by mugshots revealed in a simple Google search of their name. Further, the public will still be able to access the mugshots of those who actually pose some degree of danger to society. Proposed legislation should include an exception that would allow mugshot disclosure to aid in law enforcements' attempts to locate a fugitive.

B. Congress Should Carve Out an Exception to Section 230 of the Communications Act That Would Allow Courts to Require Search Engines to Remove Links to Websites with Exploitative Removal Practices

This section proposes an effective mechanism for enforcing the prohibition of pre-conviction mugshot release discussed in Section III, particularly for those who already have their mugshots posted online. As previously noted, one in three Americans eligible for employment have some sort of criminal record, including arrests not resulting in a conviction.[139] Because mugshots are a standard part of booking procedures and states allow them to be freely accessible, millions of Americans have their mugshots posted online. The availability of mugshots online deeply impacts a person's personal and family life, as well as employment and educational opportunities.[140] People should be able to request that search engines remove links to websites that require fees to remove mugshots due to the severe consequences involved.

Currently, under Section 230 of the Communications Act, search engines like Google receive immunity from being treated as publishers of third party content.[141] This section will focus on why Congress should carve out an exception to Section 230 that would allow plaintiffs to seek equitable relief in court to remove search engine links to websites with exploitative mugshot removal practices. This section will first examine Section 230,

138. DANIEL J. SOLOVE & PAUL M. SCHWARTZ, INFORMATION PRIVACY LAW 37–38 (6th ed. 2018) ("Fair Credit Reporting Act of 1970, Pub. L. No. 90-32, 15 U.S.C. §§ 1681 et seq. – provides citizens with rights regarding the use and disclosure of their personal information by credit reporting agencies; Privacy Act of 1974, Pub. L. No. 93-579, 5 U.S.C. § 552a – provides individuals with a number of rights concerning their personal information maintained in government record systems . . . Family Educational Rights and Privacy Act of 1974, Pub. L. No. 93-380, 20 U.S.C. §§ 1221 n.1232g – protects the privacy of school records; Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 47 U.S.C. § 551 – mandates privacy protection for records maintained by cable companies; Children's Online Privacy Protection Act of 1998, Pub. L. No. 106-170, 15 U.S.C. §§ 6501-6506 – restricts the use of information gathered from children under age 13 by Internet websites").

139. Clark, *supra* note 25.

140. *Legislative Memo*, *supra* note 15.

141. 47 U.S.C. § 230(c)(1) [hereinafter Section 230].

including its legislative history and purpose. It will then discuss the circuit split regarding its interpretation. Finally, this section will argue why the Digital Millennium Copyright Act's notice system should be incorporated into Section 230, requiring search engines to remove links to websites with exploitative removal practices.

To begin, it is necessary to understand the distinction between publishers and distributors. Publishers, such as newspapers, are responsible for content appearing on their platforms because they exert editorial control over the content.[142] In other words, publishers decide what information appears on their platforms. To hold a publisher liable for a privacy tort, one merely must show that the tortious statements in question appeared on the publisher's platform.[143] Distributors, on the other hand, solely sell or distribute third party content.[144] Examples of distributors include bookstores and newsstands.[145] A distributor is only liable for a third party's statement if it knew or should have known the statement was tortious.[146]

Two cases from the 1990s led to the enactment of Section 230.[147] In 1991, the Southern District of New York held that Internet service providers (ISPs) are distributors rather than publishers because the ISP in question had "no more editorial control over such a publication than does a public library," and it would not be feasible to require an ISP "to examine every publication it carries for potentially defamatory statements."[148] The court concluded that the ISP in question was not liable because it had no reason to know of the defamatory statements.[149] In 1995, a New York trial court drew the opposite conclusion. The computer network in question, Prodigy Services, actively screened postings for offensive material.[150] Because of Prodigy's content moderation policy, the court held that it acted as a publisher, making it liable for defamation.[151] These two conflicting cases drew the attention of then-Congressmen Christopher Cox and Ron Wyden, who believed the holding in *Stratton Oakmont* disincentivized good faith content moderation by ISPs.[152] They argued ISPs are in the best position to monitor content and that they should not be penalized for "help[ing] us control" the Internet.[153] This is the pretext to Section 230's enactment in 1996.[154]

142. Solove & Schwartz, *supra* note 138, at 176.
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.* at 177.
148. Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135, 140 (S.D.N.Y. 1991).
149. *Id.* at 141.
150. Stratton Oakmont, Inc. v. Prodigy Servs. Co., Trial IAS Part 34.,1995 WL 323710, at *4 (N.Y. Sup. May 24, 1995).
151. *Id.* at *4–5.
152. Andrew P. Bolson, *Flawed but Fixable: Section 230 of the Communications Decency Act at 20*, 42 RUTGERS COMPUT. & TECH. L.J. 1, 5–6 (2016).
153. 141 CONG. REC. H8468 (daily ed. Aug. 4, 1995) (statement of Rep. Christopher Cox).
154. *See* Bolson, *supra* note 152, at 5–6.

Section 230 sets out protection for "Good Samaritan" blocking of offensive material: "no provider or user of an interactive computer service shall be treated as the publisher" if a third party provides the content.[155] An interactive computer service is defined as "any information service" provider that "enables computer access by multiple users to a computer server."[156] While Section 230 immunizes interactive computer services, information content providers are not entitled to any immunity.[157] Information content providers are defined as any entity which "is responsible, in whole or in part, for the creation" of content on the Internet.[158] Thus, interactive computer services are treated similarly to distributors and information content providers are similar to publishers.

The legislative history demonstrates that Section 230 primarily intends "to balance the need to protect the safety of children with the need to allow Internet companies to grow without the fear of crippling regulation."[159] It also shows the mistaken belief held at the time that content on the Internet could be controlled with the help of companies "like the new Microsoft network."[160] Congressman Cox stated that Congress should encourage companies "to do everything possible for us, the customer, to help us control, at the portals of our computer, at the front door of our house, what comes in and what our children see. This technology is very quickly becoming available, and in fact everyone one [sic] of us will be able to tailor what we see to our own tastes."[161] That is not the case in today's Internet Age. The legislative history shows that Congress did not intend Section 230 to enable content that no one would be willing to control.[162]

To further complicate matters, the Fourth Circuit held in *Zeran v. America Online* that "publishers" and "distributors" are the same for the purpose of Section 230, despite the fact that Congress only used the word "publisher."[163] In this case, the plaintiff argued under a distributor theory of liability that Section 230 allowed liability for interactive computer services that received notice of defamatory material posted through their services and then subsequently refused to act.[164] The court rejected this argument because Section 230 "plainly immunizes computer service providers like AOL from

155. Section 230.
156. 47 U.S.C. § 230(f)(3).
157. 47 U.S.C. § 230(c).
158. 47 U.S.C. § 230(c).
159. Bolson, *supra* note 152, at 8.
160. *Id.* at 7 (citing 141 CONG. REC. H8468 (daily ed. Aug. 4, 1995) (statement of Rep. Christopher Cox)).
161. *Id.*
162. *Id.* at 8–9.
163. Zeran v. Am. Online, Inc., 129 F.3d 327, 332 (4th Cir. 1997) ("once a computer service provider receives notice of a potentially defamatory posting, it is thrust into the role of a traditional publisher. The computer service provider must decide whether to publish, edit, or withdraw the posting.").
164. *Id.* at 328.

liability for information that originates with third parties."[165] This view has support in four other federal appellate courts.[166]

The Seventh Circuit, however, does not interpret Section 230(c) "as a general prohibition of civil liability" for online content hosts:[167]

> The district court held that subsection (c)(1), though phrased as a definition rather than as an immunity, also blocks civil liability when web hosts and other Internet service providers (ISPs) refrain from filtering or censoring the information of their sites . . . If this reading is sound, then § 230(c) as a whole makes ISPs indifferent to the content of information they host or transmit: whether they do (subsection (c)(2)) or do not (subsection (c)(1)) take precautions, there is no liability under either state or federal law. As precautions are costly . . . ISPs may be expected to take the do-nothing option and enjoy immunity under § 230(c)(1). Yet § 230(c)—which is, recall, part of the 'Communications Decency Act'—bears the title 'Protection for 'Good Samaritan' blocking and screening of offensive material', hardly an apt description if its principal effect is to induce ISPs to do nothing about the distribution of indecent and offensive materials via their services.[168]

The court elaborated that another possible interpretation of Section 230 is that it "forecloses any liability that depends on deeming the ISP a 'publisher'—defamation law would be a good example of such liability—while permitting the states to regulate ISPs in their capacity as [distributors]."[169] A plain language reading of Section 230 better supports this interpretation because Congress explicitly stated that interactive computer service providers will not be treated as *publishers* if the content originates from a third party.[170] It says nothing about *distributors*.[171]

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165. *Id.*

166. Ben Ezra, Weinstein & Co. v. Am. Online, Inc., 206 F.3d 980, 986 (10th Cir. 2000); Green v. Am. Online, Inc., 318 F.3d 465, 471 (3d Cir. 2003); Batzel v. Smith, 333 F.3d 1018, 1027 (9th Cir. 2003) (though the court had no need to decide whether § 230(c)(1) encompasses both publishers and distributors in the specific case. It did note that, "so far, every court to reach the issue has decided that Congress intended to immunize both distributors and publishers."); Universal Commc'n Sys., Inc. v. Lycos, Inc., 478 F.3d 413, 420 (1st Cir. 2007) ("[i]t is, by now, well established that notice of the unlawful nature of the information provided is not enough to make it the service provider's own speech").

167. Chi. Lawyers' Comm. for Civ. Rts. Under L., Inc. v. Craigslist, Inc., 519 F.3d 666, 669 (7th Cir. 2008).

168. *Id.* at 670 (citing Doe v. GTE Corp., 347 F.3d 655 (7th Cir. 2003)).

169. *Id.*

170. Section 230.

171. *See id.*

The distinction matters because search engines, like Google, are interactive computer service providers under Section 230.[172] Because courts supporting the *Zeran* interpretation grant immunity for both publisher and distributor liability, plaintiffs seeking removal of their mugshots have few legal options. Therefore, Congress should, at minimum, craft an exception to Section 230 that treats search engines as distributors for the purpose of removing links to websites with exploitative removal practices. This policy fix should allow plaintiffs to seek injunctive relief from courts if, after notifying the search engine, the search engine refuses to remove the links. This notice system would be modeled after the Digital Millennium Copyright Act (DMCA), codified at 17 U.S.C. § 512.

DMCA requires service providers to remove content after receiving notice of their copyright-infringing character.[173] For search engines, the relevant provision is Section 512(d), which pertains to "information location tools."[174] It states that "information location tools" are not liable for "linking users to an online location containing infringing material" if they do not have "actual knowledge" of the material.[175] If they do not have actual knowledge, they can still be liable if they are "aware of facts or circumstances from which infringing activity is apparent."[176] Further, even after becoming aware of the infringing material, if search engines act "expeditiously" to remove the material, then they will not be liable.[177] This provision is referred to as DMCA's notice and takedown system.[178]

This notice system will also work for content that has exploitative removal practices. In fact, Google is already willing and capable of removing links to websites with exploitative removal practices in some instances.[179] For example, on a Google support webpage, it states that "upon request, under some circumstances, we may remove links to [websites that require a fee to remove content] from Google search results."[180] As Google highlights, other

172. Bennett v. Google, LLC, 882 F.3d 1163, 1167 (D.C. Cir. 2018); Parker v. Google, Inc., 422 F. Supp. 2d 492, 501 (E.D. Pa. 2006), *aff'd* 242 F. App'x 833, 838 (3d Cir. 2007).

173. 17 U.S.C. § 512 (2018).

174. H.R. REP. NO. 105-551(II), at 58 (1998); S. REP. NO. 105-190, at 49 (1998); *see also* Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1172 (9th Cir. 2007) ("Google could be held contributorily liable if it had knowledge that infringing Perfect 10 images were available using its search engine, could take simple measures to prevent further damage to Perfect 10's copyrighted works, and failed such steps.").

175. 17 U.S.C. § 512(d) (2018).

176. 17 U.S.C. § 512(d)(1)(B) (2018).

177. *Id.*

178. Edward Lee, *Decoding the DMCA Safe Harbors*, 32 COLUM. J.L. & ARTS 233, 235 (2009).

179. *Remove Content about Me on Sites with Exploitative Removal Practices from Google*, GOOGLE HELP CENTER, https://support.google.com/websearch/answer/9172218 (last visited Jan. 26, 2020) [https://perma.cc/FKH2-V8AU].

180. *Id.* ("We recognize that it can be distressing when content about you is posted by others on websites. There is additional angst in discovering that you have to pay money directly to the sites or to other agencies to get the content removed").

search engine operators can still host the information, so Google's policy alone is not a true removal of the post from the Internet.[181]

A shortcoming to this approach is that it only applies to websites with exploitative removal practices and not to newspapers' mugshot galleries. Although local newspapers that publish mugshot galleries can barely be distinguished from mugshot websites, local newspapers are generally better at responding to requests for removals.[182] Some newspapers even take down mugshots after a certain period of time and prevent Google from indexing the page, thus stopping the mugshot from appearing at the top of a search result.[183] According to the Marshall Project, in February 2020, the Houston Chronicle announced that it will no longer publish mugshot galleries, joining an increasing number of media outlets that no longer tolerate this practice.[184] In response to the Houston Chronicle's decision, a spokesman for the Harris County Sheriff's Office tweeted, "I'm hopeful that other media outlets and law enforcement agencies will follow your lead and rethink the practice of publicly shaming arrested people who haven't been convicted of a crime."[185]

In sum, Congress should amend Section 230 so that search engines are required to remove links to websites with exploitative removal practices after being notified of their existence.[186] DMCA supplies an example of how that notice system should work. This proposed legislation would give practical effect to the notion of rehabilitation, as one of the worst moments in a person's life will no longer be used to exploit them.

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181. *Id.*

182. Johnson, *supra* note 101 ("Those who attempt a qualified defense of using mugshots may distinguish between local media using mugshots in the context of a story, and overtly sleazy galleries… But it's important to recognize that the former very often hosts the latter… The gap between high- and low-brow mugshot tabloidism is not a great as many in the respectable media would like to believe, and a focus on the more exploitative end of the spectrum deflects responsibility from those relatively upscale outlets who do a slightly watered-down version of it"); Hutchins, *supra* note 100 (Salisbury Post editor states the paper will follow-up if suspect presents documentation that they were acquitted); Laura Hazard Owen, *Fewer Mugshots, Less Naming and Shaming: How Editors in Cleveland Are Trying to Build a More Compassionate Newsroom*, NIEMANLAB (Oct. 18, 2018), https://www.niemanlab.org/2018/10/fewer-mugshots-less-naming-and-shaming-how-editors-in-cleveland-are-trying-to-build-a-more-compassionate-newsroom/ [https://perma.cc/H8MH-3XZ5].

183. Keri Blakinger, *Newsrooms Rethink a Crime Reporting Staple: The Mugshot*, MARSHALL PROJECT (Feb. 11, 2020), https://www.themarshallproject.org/2020/02/11/newsrooms-rethink-a-crime-reporting-staple-the-mugshot [https://perma.cc/4BU4-HQ73].

184. *Id.*

185. *Id.*

186. This proposal will also likely be attacked on First Amendment grounds, as some in the legal community believe that mugshot publication itself is speech and therefore entitled to First Amendment protection. It is, however, a largely unsettled area of the law and it is not the subject of this Note.

IV. CONCLUSION

The best way forward is for Congress to limit the disclosure of mugshots until after a person has been convicted. This proposed legislation strikes the appropriate balance between privacy and the need for public disclosure. It is already a stretch to say that any public benefit is served from the distribution of mugshots; it is simply absurd to say there is one iota of necessity for the distribution of mugshots before a person is convicted unless the mugshot would help locate a fugitive. Further, mugshots have entered into the stream of interstate commerce because they are uploaded to mugshot websites, which in turn profits mugshot removal services and reputation management firms, as well as raises significant advertising revenue for local newspapers. Mugshots, therefore, are a proper subject of congressional regulation.

Another workable possibility is a modification of Section 230 to incorporate a notice system similar to the one outlined in the DMCA. This system would require search engines to remove links to websites with exploitative removal policies. No one should be able to profit off the suffering of others for simply voyeuristic purposes, particularly those who need assistance reintegrating into society.

This proposed legislation would protect millions of potentially innocent Americans from being branded "with one of the most stigmatizing and debilitating labels in our society."[187] Because of the Internet, these mugshots could haunt those who are depicted for the remainder of their lives. That is a significant price to pay for a person who has not been convicted of a crime or who has had their records sealed. Given America's love of redemption, and the public's support for criminal justice reform, the time is ripe to reconsider the existing laws surrounding mugshots.

187. *Paul*, 424 U.S. at 714 (Brennan, J., dissenting).