

Privacy Rights, Internet Mug Shots, and a Right to Be Forgotten

Amy Gajda

9.1 INTRODUCTION

In the spring of 2022, visitors to the Smoking Gun website would find a challenging “game, where [one’s] wasted time [was] well spent.”¹

“For today’s ‘Friday Photo Fun,’” the website explained, “readers must examine five mug shots and match up the respective defendants with the crime for which they were arrested.” There appeared five photos of sorry-looking individuals arrested for crimes both serious and not so much. A tattooed white man nabbed by police for narcotics possession; a black woman arrested for speeding; three other individuals arrested for driving while intoxicated, assault and battery, and grand theft, respectively. The match-the-mug-shot-to-the-crime game appeared every Friday.

The Smoking Gun gathered those police booking photos through freedom-of-information laws, statutes designed to give the public access to important governmental information. For a long time in the United States, mug shots have been a part of such governmental openness: The thought was that the public should know who’d been arrested and on what grounds, and how they’d looked at the time of arrest in order to ensure that police had not battered them. Mug shots also helped to avoid mistaken identity, access proponents said. In the past, it was mainly journalists who were those proponents, who would receive the images from police and later assess them for newsworthiness, publishing only those they thought relevant for public view.

Today, it’s not only journalists who are interested in mug shots. As the Smoking Gun matching game shows, other types of websites publish the images for reasons beyond news value; some have no focus on news value at all.

This chapter considers mug shots and other once-public information about those arrested by police. It finds that, in direct response to worries about internet-based

¹ SMOKING GUN, <https://perma.cc/38FV-zB8B>.

abuse and online longevity, legislatures and courts have taken action to shield such information from public view. It notes that journalism has shifted to include mug shots in reporting less often and, in some cases, to remove from public databases those mug shots published as a part of older news stories. Given such shifts, this chapter predicts that, soon, most mug shots will no longer be made available through public-records requests and those whose mug shots are published could one day bring a valid publication invasion-of-privacy claim. Finally, given such shifts and potential shifts, it predicts one's *entire* criminal past, including one's older mug shot, could one day be even more strongly protected on privacy grounds.

9.2 TWO SHIFTS IN LAW REGARDING MUG-SHOT PRIVACY

As ubiquitous as mug shots may seem today online and otherwise, at the turn of the twentieth century, courts routinely protected mug shots on privacy grounds. In short, there is support in early case law for a right to privacy in booking photos.

Consider *Joyce v. York*,² an 1899 case from New York in which the court suggested even a habitual criminal could have an action against police for including his photograph in a so-called rogue's gallery published for others to view. The court wrote that the "wrong [was] in the nature of a libel,"³ which back then meant at times that anything either true or false that harmed reputation could lead to liability if published. How one looked at the time of arrest, that court suggested, impacted the way others perceived the person, even if the photograph and the information regarding the arrest were accurate.

In *Itzkovitch v. Whitaker*, too, a decision from 1905, the Louisiana Supreme Court forbade police from circulating an arrestee's booking photograph even though the man was notorious for running a pawn shop and had been arrested several times. "Everyone who does not violate the law can insist upon being let alone (the right of privacy)," the court wrote, and indicated that an individual not yet convicted would be protected from having his booking photograph published to others too.⁴ By 1906, the Louisiana court ordered police to return to the not-yet-convicted arrestee all photographic negatives of his mug shot and "to erase and cancel all record entries of the photographs and of the measurement made of the plaintiff" too.⁵

Judges in other states agreed; most courts that had decided lawsuits involving booking photos back then found privacy rights in them,⁶ especially – but not

² *People ex rel. Joyce v. York*, 27 Misc. 658 (N.Y. Sup. Ct. 1899).

³ *Id.* at 659.

⁴ *Itzkovitch v. Whitaker*, 115 La. 479, 481 (La. 1905).

⁵ *Itzkovitch v. Whitaker*, 117 La. 708, 709–10 (La. 1905).

⁶ *State ex rel. Mavity v. Tyndall*, 66 N.E.2d 755, 762 (Ind. 1956) ("Is the placing of appellant's picture in the 'rogues' gallery' described in the complaint so serious a violation of appellant's right to privacy as to justify judicial protection? Most of the cases so hold and we are constrained to follow them.").

exclusively – before the arrestee’s conviction. Those states included Indiana,⁷ Maryland,⁸ Missouri,⁹ and New Jersey.¹⁰ Courts were especially concerned about the lasting harm that such images would have on a person’s reputation no matter the outcomes of the underlying criminal case. “Upon [an arrestee’s] vindication,” the New Jersey court wrote in explanation, “the circulation of such information [] could not be undone.”¹¹

Then, there came a shift in that sort of privacy-protective awareness regarding mug shots. In the 1960s and 1970s, as federal and state governments opened more of their files to the public view as a measure of support for the public’s right to know about government matters, mug shots and other arrest information became more accessible, and privacy protections in such information seemed less of a concern. Newspapers back then *wanted* such information so that they might publish news about certain arrests and include, as part of that reporting, the visual images of those charged with particularly noteworthy crimes. They argued it would be best for the public: Community members’ minds would be eased if they saw the person who had been placed in custody for a heinous crime, for one. Moreover, as the use of illustrations and thereafter photographs grew more commonplace in newspapers, readers began expecting to see such things. Legislatures and courts came to trust that such ethics-abiding publishers would not make criminal information public unless nearly everyone would agree that it was something the public should know; the personal privacy concerns of those arrested for murder, for example, seemed far less important than the press’s freedom to report on such a crime. In short, back then, at a time when the word “publisher” was nearly synonymous with ethics-abiding journalism, the public’s right of access trumped any individual’s right to privacy.

A good example of that sensibility is the 1996 Sixth Circuit’s decision in *Detroit Free Press v. Department of Justice*.¹² There, the *Detroit Free Press* had asked for the mug shots of individuals arrested on federal charges – they were accused of having ties to organized crime – and the appellate court agreed that such access would be appropriate. The judges of the Sixth Circuit, however, first explicitly rejected the argument that the release of such images would be harmful to those arrested even though they had not yet been convicted.¹³ Instead, such release could at times be *helpful* to the individuals, the court reasoned, suggesting that published booking images could help reveal mistaken identity or police use of excessive force.¹⁴

⁷ *State ex rel. Mavity v. Tyndall*, 66 N.E.2d 755 (Ind. 1956).

⁸ *Downs v. Swann*, 73 A. 653 (Md. 1909).

⁹ *State ex rel. Reed v. Harris*, 153 S.W.2d 834 (Mo. 1941).

¹⁰ *McGovern v. Van Riper*, 43 A.2d 514 (N.J. Ch. Ct. 1945).

¹¹ *Id.* at 525.

¹² 73 F.3d 93 (6th Cir. 1996).

¹³ *Id.* at 97.

¹⁴ *Id.* at 98.

Second, the court decided, the privacy concerns of the arrestees were of absolutely no concern. They had “already [been] indicted,” the court wrote, and “had already made court appearances after their arrests” and, during that process, their names had been made public. Therefore, the court reasoned, the additional release of their mug shots implicated no privacy interests whatsoever because some in the public knew them or knew of them from such coverage already, and at least family and friends knew what they looked like; any release “could not reasonably be expected to constitute an unwarranted invasion of personal privacy” on such facts.¹⁵

By that point, the Supreme Court had suggested in *Paul v. Davis*¹⁶ that an individual whose mug shot had been included as part of a list of shoplifters had no valid constitutional claim against the police for its release even though he had not been convicted of that or of any crime. It wasn’t the perfect parallel because the justices had also suggested that a defamation claim at the state level might be possible, but the rejection of the constitutional claim was noteworthy nonetheless.

The World Wide Web was already hitting the mainstream when the Sixth Circuit’s opinion came down. Suddenly, the word “publisher” meant not only an ethics-abiding newspaper, like the *Detroit Free Press*, but anyone with a computer who could publish anything to the world with the click of a mouse.

Those newfangled sorts of publishers eventually recognized that the public had a real interest not only in the more-newsworthy mug shots but in *all* mug shots. Websites appeared that published photos of all arrested; some of those websites suggested that those who wanted the images taken down could pay to make that happen.

Soon, in response to such publications and the clicks that they generated, ethics-abiding newspapers, no doubt feeling they had to keep up, similarly began to publish pages of the images of those arrested with little regard to the news value. Mug shots had become a “game changer,” some newspapers reported, “the most popular thing on the website” and therefore a driver of internet traffic to what might otherwise be a news site in economic trouble.¹⁷ Eventually, 40 percent of newspapers that moved online would publish mug-shot galleries.¹⁸

And so, in 1999, just three years after the Sixth Circuit in *Detroit Free Press* found no privacy interests in mug shots because many already knew what arrestees looked like, a federal court in Louisiana switched gears and suggested that even a public figure – a man who had owned a National Football League team and was known widely for his work in the NFL, a man arrested in conjunction with an investigation into government corruption – would have privacy protections for his mug shot. In its

¹⁵ *Id.*

¹⁶ 424 U.S. 693 (1976).

¹⁷ Corey Hutchins, *Mugshot Galleries Might Be a Web-Traffic Magnet. Does that Justify Publishing Them?*, COLUM. JOURNALISM REV. (Oct. 24, 2018).

¹⁸ Keri Blakinger, *Newsrooms Rethink a Crime Reporting Staple: The Mugshot*, MARSHALL PROJECT (Feb. 11, 2020), <https://perma.cc/47J6-NTU6>.

decision in *Times Picayune Publishing Group v. United States Department of Justice*,¹⁹ the court wrote that mug shots were more than just photographs, and for a few reasons: They were linked with the “notorious”; they recorded “unflattering facial expressions”; and “arguably most humiliating of all, a sign under the accused face” with a criminal identification number.²⁰ “A mug shot preserves in its unique and visually powerful way, the subject individual’s brush with the law for posterity,” the judge wrote, and its “stigmatizing effect can last well beyond the actual criminal proceedings.”²¹ Current dissemination could trigger future misuse by rivals, the court reasoned, specifically worrying what might become of the mug shot in future years, “including the reappearance of [a] mug shot in the media,” leading to renewed personal embarrassment and discomfort for the depicted individual.²²

In line with that, in 2016, twenty years after its rejection of privacy in mug shots, the Sixth Circuit sitting en banc changed its mind and overruled its earlier suggestion that there were no privacy rights in booking photos.²³ The court’s opinion reflected those same concerns about internet publishers that had been hinted at in the *Times Picayune* decision. These mug shots, these “[e]mbarrassing and humiliating facts,” the court wrote, that “connect[ed] individual[s] to criminality,” decidedly implicated those individuals’ privacy interests.²⁴ Now, in an internet age, “[a] booking photo cast a long, damaging shadow over the depicted individual.”²⁵ Now, the forever internet meant that arrested individuals might never escape their criminal pasts – meaning that the modern world was far different, the judges wrote, from what existed two decades before:

In 1996 . . . booking photos appeared on television or in the newspaper and then, for all practical purposes, disappeared. Today, an idle internet search reveals the same booking photo that once would have required a trip to the local library’s microfiche collection. In fact, mug-shot websites collect and display booking photos from decades-old arrests [and] [p]otential employers and other acquaintances may easily access booking photos on these websites, hampering the depicted individual’s professional and personal prospects.²⁶

“In 1996,” the Sixth Circuit judges continued, “this court could not have known or expected that a booking photo could haunt the depicted individual for decades.”²⁷ And so, even though the images at issue in 2016 involved police officers who had been arrested for drug crimes and police brutality – a decidedly newsworthy story –

¹⁹ 37 F. Supp. 2d 472 (E.D. La. 1999).

²⁰ *Id.* at 476.

²¹ *Id.*

²² *Id.* at 479.

²³ *Detroit Free Press v. U.S. DOJ*, 829 F.3d 478 (6th Cir. 2016).

²⁴ *Id.* at 481.

²⁵ *Id.* at 482.

²⁶ *Id.* at 482–83.

²⁷ *Id.* at 485.

the court overruled its earlier decision. “The internet and social media,” the court wrote, had by then “worked unpredictable changes in the way photographs [were] stored and shared.” Mug shots suddenly “no longer ha[d] a shelf life” and the “humiliating, embarrassing [and] painful”²⁸ images would remain forever accessible even though the individual had changed their ways. The judges decided that those depicted had privacy interests in them after all.

By that point, following the lead of the *Times Picayune* court, two federal appellate courts had similarly ruled in favor of some level of privacy in mug shots.²⁹ There was also strong language in three key cases from the Supreme Court that reflected those same privacy concerns, language made ever more relevant in an internet age, and some courts deciding mug-shot cases shifted to rely in part on these three cases and not on the breezy mention of mug shots in *Paul v. Davis*.

First, *Doe v. McMillan*,³⁰ not a mug-shot case but one involving concerns about the long-lasting effects of minors’ criminal histories. There, the Supreme Court suggested in 1973 that seventh-grade students named in a congressional report investigating a “troubled school” had privacy interests in their specific instances of “deviant conduct” and their “criminal violations.”³¹ The justices worried in *McMillan* specifically about potential future harm for those students who would in a few years become adults: With the publication of such material, the justices wrote, the students’ “future careers” would be implicated. Therefore, while the Speech and Debate Clause would protect Congress’s own publication of the material, the justices reasoned, it would *not* protect “a private republication of documents” containing such information even though the information had been “introduced and made public at a committee hearing” and even though “the hearing was unquestionably part of the legislative process.”³² Such material, though made public, “would . . . invite gratuitous injury to citizens for little if any public purpose.”³³

Concurring Justices Douglas, Brennan, and Marshall even more explicitly worried what the public revelation of such information would do to the children in later years. “We all should be painfully aware of the potentially devastating effects” of such government-collected data, they wrote. “Arrests . . . [and a]cts of juvenile delinquency are permanently recorded and they and other alleged misdeeds or indiscretions may be devastating to a person in later years when he has outgrown

²⁸ *Id.* (Cole, J., concurring).

²⁹ See *Karantalis v. U.S. Dep’t of Justice*, 635 F.3d 497 (11th Cir. 2011); *World Publ’g Co. v. U.S. Dep’t of Justice*, 672 F.3d 825 (10th Cir. 2012).

³⁰ 412 U.S. 306 (1973).

³¹ *Id.* at 308–09 n.1.

³² *Id.* at 313–14.

³³ *Id.* at 317.

youthful indiscretions and is trying to launch a professional career or move into a position where steadfastness is required.”³⁴

Second, *Department of the Air Force v. Rose*.³⁵ There, in 1975, the Court similarly worried that information that had once been released at the Air Force Academy – the names of those convicted of violating Honor Code provisions not to steal, among other things³⁶ – would lead to harm to the individuals and therefore held that that information should be redacted from any reports turned over to the public. Those who once knew that information “may have wholly forgotten” it, the Court wrote in explanation, and the “risk to the privacy interests” of such an individual, especially one who remained in the military “cannot be rejected as trivial.”³⁷ Such “privacy values” included not only “practical disabilities, such as the loss of employment or friends,” but “lifelong embarrassment, perhaps disgrace” as well.³⁸

And, finally, *United States Department of Justice v. Reporters Committee for Freedom of the Press*.³⁹ So-called “rap sheets” containing an individual’s “history of arrests, charges, convictions and incarcerations”⁴⁰ could be protected on privacy grounds, the Justices decided in 1989, even though the information had once been made public by police and was therefore in effect part of the public record. “The privacy interest in a rap sheet is substantial,” the Court wrote, and especially so given the powerful memories in computers that could include information “that would otherwise have surely been forgotten” by people.⁴¹ “Plainly there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations,” the Justices wrote, the more easily accessed “computerized summary located in a single clearinghouse of information.”⁴² “If a cadet has a privacy interest in past discipline that was once public but may have been ‘wholly forgotten,’” the Court wrote, referring to *Rose*, “the ordinary citizen surely has a similar interest in the aspects of his or her criminal history that may have been wholly forgotten.”

It’s true that all five of those cases – *Detroit Free Press*, *Times Picayune*, *McMillan*, *Rose*, and *Reporters Committee* – mainly focused on access and on the information about past and present crimes that would be released to the public. But, given such powerfully protective language, a potential right to privacy in mug shots and other arrest information is arguably broader than access. Today, there’s also a suggestion that stretches beyond *McMillan*: that the right to privacy in such information could extend to the *publication* of such information as well.

³⁴ *Id.* at 329–30.

³⁵ 425 U.S. 352 (1975).

³⁶ *Id.* at 358–59.

³⁷ *Id.* at 381.

³⁸ *Id.* at 376–77 (citing in part the Second Circuit decision in the case, 495 F.2d at 267).

³⁹ 489 U.S. 749 (1989).

⁴⁰ *Id.* at 752.

⁴¹ *Id.* at 771.

⁴² *Id.* at 764.

That privacy interest is reflected in the privacy sections of the Second Restatement of Torts, published in 1977. In “Publicity Given to Private Life,”⁴³ the Restatement authors specifically suggest that one’s criminal past may well be protected on privacy grounds, that “a lapse of time” is “a factor to be considered” in such a privacy claim.⁴⁴ “Jean Valjean,” an example reads, “an ex-convict who was convicted and served a sentence for robbery, has changed his name, concealed his identity, and for twenty years has led an obscure, respectable and useful life in another city far removed.”⁴⁵ Any newspaper that would ferret out his criminal history and publish it, the Restatement says, could well be liable for invading Valjean’s privacy.⁴⁶

Moreover, the Restatement authors suggested that there would also be privacy in some of “a man’s . . . past history that he would rather forget.”⁴⁷

Such interests – a right to privacy in truth that includes past information about an arrest; what some might consider in a colloquial sense a right to be forgotten – did not come out of the blue. As early as 1884, a court wrote that it would be a “barbarous doctrine” should newspapers be allowed to report anything truthful that they wanted, including “crimes long since forgotten and perhaps expiated by years of remorse and sincere reform.”⁴⁸ Well more than a century later, the Eleventh Circuit wrote in a related sense that “timeliness . . . boundaries . . . circumscribe the breadth of public scrutiny to [an] incident of public interest” and that, therefore, the nude photographs of a murder victim taken more than twenty years before the crime had no relation to news coverage of it; those photos were not related in time, the court held,⁴⁹ and any other holding would “debase[] the very concept of a right to privacy.”

This concept made headlines when the European Court of Justice ordered an accurate but ten-year-old newspaper article about a man’s debt proceedings de-indexed so that it would be much more difficult to find during an internet search.⁵⁰ The court was especially worried about protecting the man’s attempt to turn his life around more fully. Besides, it reasoned, the news article was “inadequate,” “no longer relevant,” and “excessive” in relation to “the light of the time that has elapsed.”

Somewhat in line with that, a number of recent court decisions in the United States contain similar concerns about older *criminal* information. In 2021, a federal judge in Pennsylvania ordered the website Mugshots.com to pay \$150,000 to a

⁴³ RESTATEMENT (SECOND) OF TORTS § 652D (1977).

⁴⁴ *Id.* at cmt. k.

⁴⁵ *Id.* at cmt. k, illus. 26.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *State v. Bienvenu*, 36 La. Ann. 378, 382 (La. 1884).

⁴⁹ *Toffoloni v. LFB Publ’g Grp.*, 572 F.3d 1201 (11th Cir. 2009).

⁵⁰ *Case C-131/12, Google Spain SL v. Agencia Española de Protección de Datos, ECLI:EU:C:2014:317* (May 13, 2014).

former arrestee whose criminal record had been expunged.⁵¹ The website's world-wide use of the man's mug shot from two decades before had significantly harmed his reputation among family and friends, the judge wrote, and instructed that the mug shot be removed.⁵² "[I]n an age when it is a widespread practice for employers to conduct an online search on the background of prospective employees," the court reasoned, "any job application by [the man] would most likely entail revelation of the information posted about him online."⁵³

In another case from six years before, a state court similarly ordered older criminal information be taken down.⁵⁴ Details about the man's criminal past, the court wrote, "are likely not newsworthy twenty-five years after the fact."⁵⁵

Other modern courts have suggested that the release of private individuals' criminal records would be especially forbidden because "there might be little to offset the risk of adverse collateral consequences arising some such disclosure";⁵⁶ that police photo arrays should not be made public because "a significant privacy interest warrants protecting the identities of third parties included in the photo lineups" because the images convey the individuals' guilt;⁵⁷ that people featured on a website that charged money to have the mug shots removed had valid claims for misappropriation;⁵⁸ and that a person arrested on a misdemeanor charge whose booking photo appeared on the internet had a potential privacy claim against the sheriff for making the image public.⁵⁹

And then, in 2018, the Eleventh Circuit found police liable for allowing cameras from the reality show *The First 48* to record images of an arrestee without his consent. The filming and broadcast constituted a seizure of the man's image, the court held, and violated his right to privacy; showing him walking down a police hallway and later being interrogated by police served no legitimate purpose. Thus, the authorities had violated the arrestee's constitutional rights and the court upheld his Section 1983 claim.⁶⁰

In the case involving the sheriff's release of a mug shot, one decided in 2020, the plaintiff had relied in part on what the court said were "several recent federal cases analyzing the issue and determining that arrestees generally have rights to privacy with respect to their booking photos."⁶¹ Those cases helped support the plaintiff's

⁵¹ *Taha v. Bucks Cnty.*, 2021 U.S. Dist. Lexis 26961 (E.D. Pa. 2021).

⁵² *Id.* at *10.

⁵³ *Id.*

⁵⁴ *Hartzell v. Cummings*, No. 150103764, 2015 WL 7301962 (Pa. Ct. Com. Pl., Nov. 4, 2015).

⁵⁵ *Id.* at *11.

⁵⁶ *Boston Globe Media Partners v. Dep't of Crim. Just. Info. Servs.*, 140 N.E.3d 923, 934 (Mass. 2019).

⁵⁷ *White v. City of Cleveland*, 2020 U.S. Dist. Lexis 93919 (N.D. Ohio May 29, 2020).

⁵⁸ *Rogers v. JustMugshots.com*, No. BC530194, 2015 WL 5838403 (Cal. Ct. App., Oct. 7, 2015).

⁵⁹ *City of Austin v. Doe*, 2020 Tex. App. Lexis 10257 (Dec. 29, 2020).

⁶⁰ *Smart v. City of Miami*, 740 Fed. App'x 952 (11th Cir. 2018).

⁶¹ *Id.* at *22.

argument that Texas state law prevented the release of mug shots as government information “considered to be confidential by law.”⁶²

A small number of states today limit access to booking photographs even more clearly. In Illinois, for example, one of the statutory exemptions to the freedom-of-information law says this:

[A] law enforcement agency may not publish booking photographs, commonly known as “mugshots,” on its social networking website in connection with civil offenses, petty offenses, business offenses, Class C misdemeanors, and Class B misdemeanors unless the booking photograph is posted to the social networking website to assist in the 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.⁶³

If certain mug shots are no longer published online or otherwise, those legislators have reasoned, mocking websites will no longer be able to access them. Other states have passed laws that criminalize the practice of forcing individuals to pay for the removal of their mug shots from websites.⁶⁴

9.3 A SHIFT IN JOURNALISM TOO

In the 2010s, the *Chicago Tribune* would routinely run a feature on its website. It was called “Mugs in the News” and it highlighted 100 people arrested by police throughout the Chicagoland area the day before. The crimes included the sensational, like rape and murder, but also the more mundane, like theft and burglary.⁶⁵

Then, in 2021, the *Tribune* announced a major change, a shift to what it called “compassionate coverage.” Not only had it decided not to publish its “Mugs in the News” feature anymore, it had decided to cut back significantly on the use of mug shots in its reporting, period. “Part of this is just plain fairness,” editors wrote. “A lot of people” featured in such mug shots “will end up not being convicted,” will be found not guilty, or will plead to lesser charges. Moreover, the use of such images “might reinforce racial stereotypes and amount to punitive coverage of people who enter the criminal justice system.”⁶⁶

Even more relevant to what might be considered a right for one’s criminal past to be forgotten, *Tribune* editors suggested they were working to remove most of the mug shots from old news stories that are now accessible through archival databases. “[W]e have been removing some mug shots from older stories for months now,” they

⁶² *Id.* at *14.

⁶³ 5 ILL. COMP. STAT. ANN. 140/2.15.

⁶⁴ CAL. CIV. CODE § 1798.91.1(b).

⁶⁵ This information is from Amy Gajda, *Mugshots and the Press-Privacy Dilemma*, 93 TUL. L. REV. 1199 (2019).

⁶⁶ The information in this paragraph is from Colin McMahon, *How the Chicago Tribune Handles Police Booking Photos*, CHI. TRIB. (Feb. 10, 2021).

wrote, and would continue to “remove many of them as we come upon them.” Decisions to publish versus not to publish, to take down or leave up, would be based on “high news value,” the editors explained, including high-profile crimes, those involving a public figure, and those with some public-safety purpose.⁶⁷

“The default,” editors explained in 2021, was “not to use a mug shot.”⁶⁸

The *Chicago Tribune* is not the only newspaper to decide to do such a thing. The Marshall Project, a nonprofit news organization with the criminal justice system as its beat, suggested in 2020 that “faced with questions about the lasting impact of putting these photos on the internet, where they live forever, media outlets are increasingly doing away with the galleries of people on the worse days of their lives.”⁶⁹

“Legally, it’s public record,” one reporter explained, “but legal is not always right.”⁷⁰

9.4 THE FUTURE OF MUG SHOTS AND OTHER ONLINE CRIMINAL ARREST INFORMATION

That reporter who suggested in 2020 that mug shots were public records and that, therefore, publishers could publish them without concern for *legal* liability was mostly correct. Today, despite a growing number of court decisions and legislative enactments that hold otherwise in certain cases, in many places and in many situations, a mug shot is indeed a public record, and a news publisher need not worry about the legality of publishing it, especially in a decidedly newsworthy case.

But, given the shift toward some level of privacy in mug shots in law and in journalism, there is a strong likelihood that privacy protections for arrest information including mug shots will continue to increase.

This is for a couple of reasons. The first is that some legislatures and some courts have already put mug-shot-related privacy protections in place. The second reason is that the *law’s* definition of privacy responds to *society’s* definition of privacy. Consider the language from the Second Restatement of Torts for its “Publicity Given to Private Life,” which identifies those times in which certain information is considered too private to be revealed. There, the Restatement provision reads, the “protection afforded to the plaintiff’s interest in his privacy must be relative to the customs of the time and place” and to “the habits of his neighbors and fellow citizens.”⁷¹ “It is only when the publicity given to him is such that a reasonable

⁶⁷ *Id.*

⁶⁸ *Chicago Tribune Mug Shot Publication Guidelines*, CHI. TRIB. (Feb. 9, 2021), <https://perma.cc/PM5K-XG5M>.

⁶⁹ Blakinger, *supra* note 18.

⁷⁰ *Id.*

⁷¹ RESTATEMENT (SECOND) OF TORTS § 652D (1977).

person would feel justified in feeling seriously aggrieved by it” that such an invasion of privacy claim is valid.

Today, it seems that a growing number of judges and journalists agree that such information about one’s criminal past or present should be protected. Public sentiment is growing too. In 2020, 85 percent of Americans supported some aspect of a “right to be forgotten” and “more than half (56%) [said] all Americans should have the right to have negative media coverage about themselves removed from public search results.” In the meantime, and relatedly, a “smaller share of Americans – though still about four-in-ten (39%) – think the same right should be applied to data collected by law enforcement, such as criminal records or mugshots.”⁷²

This suggests a growing sensibility that seemingly would protect certain criminal histories, and it means that one day, a reporter who suggests that publishers need not worry about publishing such materials because they are public documents could very well be wrong.

It’s true that the Supreme Court’s older jurisprudence, including *Florida Star v. B.J.F.*,⁷³ suggests that it would be unconstitutional to punish the publication of truthful information of public record – but the Justices explained back then that even that jurisprudence has its limits. “We do not hold that truthful publication is automatically constitutionally protected, or that there is no zone of personal privacy within which the State may protect the individual from intrusion by the press, or even that a State may never punish publication of the name of a victim of a sexual offense,” the Court wrote in *Florida Star*, because there is “sensitivity and significance” in privacy interests that are as profound as the interest in a free press.

9.5 CONCLUSION

If journalism continues its trend of avoiding the use of mug shots and pushing for the removal of mug shots from its news databases, the only publications making use of mug shots could well be those that use them mostly to mock. If so, additional courts and additional legislatures – and additional members of the public – will surely continue to demand greater protection for mug shots on privacy grounds. And that means that at some point in the future, probably sooner rather than later, there will be no more public release of booking photographs of anyone, except perhaps in those cases in which an arrestee becomes an escapee or is wanted in some other way.

There is additional support in the Second Restatement. The Restatement authors suggest that “if the record is one not open to public inspection . . . it is not public,

⁷² The polling data is from Brooke Auxier, *Most Americans Support Right to Have Some Personal Info Removed from Online Searches*, PEW RSCH. CTR. (Jan. 27, 2020), <https://perma.cc/Q35Q-7BYB>.

⁷³ *Florida Star v. B.J.F.*, 491 U.S. 524 (1989).

and there is an invasion of privacy when it is made so.” And that means that the society shift toward privacy in mug shots could well expand into liability for *publication* of mug shots too.

All this suggests that those early courts that decided mug-shot cases and protected the privacy of those featured more than the publication had surprisingly modern sensibilities. Today, all the more, as even those early courts suggested, the circulation of mug shots cannot be undone.