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Innocent Until Proven Posted: Regulating Online Mugshot Publication with Intellectual Property Law

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Cover Page Footnote

J.D. Candidate, 2023, University of Georgia School of Law. Sincere thanks to Professor Jean Mangan for guidance and encouragement.

INNOCENT UNTIL PROVEN POSTED: REGULATING ONLINE MUGSHOT PUBLICATION WITH INTELLECTUAL PROPERTY LAW

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I. INTRODUCTION

The maturity of the internet has created a highly interconnected culture. Developments in social platforms allow for communication and discourse among geographically dispersed loved ones, casual acquaintances, and the anonymous.[1] The online space is also information rich. An amateur researcher can uncover various features of a person's life simply by knowing their name.[2] When seeking to keep private information related to intimate details of which the public has little concern, such as an individual's medical records, it is logical that the information should remain private. A grey area, however, emerges when the interests of public safety or public disclosure are implicated in the information. Mugshots taken during the booking process of a criminal arrest inhabit this grey area. The interests of the public appear at first glance to be strong: the public has an interest in being informed of perpetrators of crime. Even so, the publication of mugshots online encompasses far more than data on crime commission, but rather comprises an essential element of one's physical being: a photograph of their face. This photograph is not the posed and edited selfie which headlines their social media page. It is a head-on, brightly lit image taken either following or preceding a search of their bodies, taking their fingerprints, and confiscating their personal belongings. It is an image that predates this individual's day in court or the determination of guilt. Mugshots do not disappear when the charge is dropped or when the individual is found innocent. These mugshots, once taken, exist in the world of open records.[3] They are available upon request, frequently along with information about the arrest, including "the person's name, arrest date, and birth date."[4]

The internet created a new home for mugshots, and not just those of widely known criminals, but of your high school soccer coach, your mother, your partner, or yourself. This new home is in the form of privately controlled

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[1] *How Has Social Media Emerged as a Powerful Communication Medium?*, UNIV. OF CAN. W., https://www.ucanwest.ca/blog/media-communication/how-has-social-media-emerged-as-a-powerful-communication-medium/ (last visited Nov. 1, 2022).

[2] Andrea Bartz & Brenna Ehrlich, *The dos and don'ts of Googling people*, CNN: BUS. (Dec. 7, 2011, 5:17 PM), https://www.cnn.com/2011/12/07/tech/social-media/netiquette-google-stalking.

[3] *Are Mugshots on Public Record?*, NET NEWS LEDGER (May 7, 2021), https://www.netnewsledger.com/2021/05/07/are-mugshots-on-public-record/.

[4] *Mugshot Websites*, GA. DEP'T OF L.'S CONSUMER PROT. DIV., https://consumer.georgia.gov/consumer-topics/mugshot-websites (last visited Nov. 1, 2022).

websites, such as arrests.org,[5] mugshots.com,[6] or BustedNewspaper.com.[7] These websites, however, are not maintained by public discourse heroes who relish in the opportunity to keep the community informed on crime. Instead, these websites commercialize the social shame of the individual depicted in the mugshot by requiring a fee to remove the record.[8] Not every person depicted in a mugshot, however, has discretionary money to pay the often-hefty fees for removal.[9]

By following popular investigative journalism reports on the commercial mugshot publication, analogizing the practices to extortion, the mugshot industry garnered skeptical attention.[10] As a result, states began combatting mugshot publication by banning removal fees, limiting the parties to which law enforcement can provide mugshots, and requiring removal upon request.[11] These legislative strategies have questionable constitutional implications under First Amendment jurisprudence and require a significant showing from an aggrieved arrestee.[12] A subset of intellectual property doctrines may be apt to remedy what state legislation cannot. Right of publicity, right to privacy, and copyright claims all have the same goals as those who seek to maintain control over an image of themselves: all seek to protect an individual's interest in disseminating materials that implicate some uniqueness in the owner. In section II, this Note explores these intellectual property doctrines generally. In section III, the Note determines the applicability of those doctrines to regulating online mugshot publication and identifies the most advantageous subset for this goal. This Note concludes by proposing that any administrative benefit of a mugshot is outweighed by several policy factors, including that mugshots implicate many critical privacy interests.

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[5] ARRESTS.ORG, https://arrests.org (last visited Nov. 1, 2022).
[6] MUGSHOTS.COM NEWS, https://mugshots.com (last visited Nov. 1, 2022).
[7] BUSTED NEWSPAPER, https://bustednewspaper.com (last visited Nov. 1, 2022).
[8] Adam Tanner, *Shakedown or public service? Mug shot websites spread*, REUTERS (Sept. 20, 2012, 10:30 AM), https://www.reuters.com/article/us-usa-internet-mugshots/shakedown-or-public-service-mug-shot-websites-spread-idUKBRE88J0R020120920.
[9] Samantha Schmidt, *Owners of Mugshots.com accused of extortion: They attempted 'to profit off of someone else's humiliation*,*'* CHI. TRIB., https://www.chicagotribune.com/business/ct-biz-mugshot-website-owners-extortion-20180518-story.html ("Those who can't afford to pay into this scheme to have their information removed pay the price when they look for a job, housing, or try to build relationships with others. This is exploitation, plain and simple.").
[10] Eumi K. Lee, *Monetizing Shame: Mugshots, Privacy, and the Right to Access*, 70 RUTGERS U. L. REV. 557, 567 (2018).
[11] *Id.* at 610-11.
[12] *Id.* at 613 (noting that the statutes "still place an onerous burden on individuals to find the mugshot companies, which are often sham entities and challenging to track down[] and petition them").

II. BACKGROUND

A. A HISTORY OF MUGSHOTS: LABELING IMAGES "CRIMINAL"

A modern "booking photograph," or a mugshot, is taken upon the arrest of an individual, typically for identification purposes.[13] Images of this kind predate the booking context. Photographing "racial and religious minorities of a dominant society" was a common attempt to discern physical characteristics correlated with a disposition for committing crimes,[14] a practice now completely discredited as junk science.[15] The practice of taking or disseminating images of individuals suspected of or known to be involved with crime in the United States began in the mid-nineteenth century, virtually as soon as methods of photography became widely available.[16] Before the standardized version of mugshots, law enforcement relied on collections of images of individuals known as "rogue galleries," purportedly to familiarize themselves with those suspected of committing crimes.[17] It did not take long for images of those suspected of crime to seep outside police precincts. It became common practice to display the galleries to the public, often in frames and with the depicted individual's cheeks tinted pink, as entertainment for the public.[18] In 1886, people in New York City could read '*Professional Criminals of America*,' a book containing over 200 mugshots to educate the public on repeat offenders.[19]

The modern mugshot form was developed by French anthropologist Alphonse Bertillon, who developed a photography style to aid law enforcement's

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[13] *See, e.g.,* GA. CODE ANN. § 35-1-19(a) (West 2022) (describing the booking process to include the taking of a booking photograph).
[14] Nicole R. Fleetwood, *Racist police practices like mug shots normalize the criminalization of Black Americans*, NBC NEWS: THINK (Aug. 6, 2020, 8:32 PM), https://www.nbcnews.com/think/opinion/racist-police-practices-mug-shots-normalize-criminalization-black-americans-ncna1235694.
[15] Ramin Skibba, *The Disturbing Resilience of Scientific Racism*, SMITHSONIAN MAG., (May 20, 2019), https://www.smithsonianmag.com/science-nature/disturbing-resilience-scientific-racism-180972243/.
[16] Pete Brook, *America's oldest mugshots show the naked faces of the downtrodden, criminal, and marginalized*, TIMELINE (Aug. 5, 2017), https://timeline.com/americas-oldest-mugshots-show-the-naked-faces-of-the-downtrodden-criminal-and-marginalized-1100045af179.
[17] *Id.*
[18] Livia Gershon, *The Origins of the Mug Shot*, JSTOR: DAILY (May 7, 2021), https://daily.jstor.org/the-origins-of-the-mug-shot/.
[19] *Id.*; THOMAS F. BYRNES, PROFESSIONAL CRIMINALS OF AMERICA (1886).

detection of recidivists.[20] Bertillon would photograph subjects twice, once head-on and once in profile.[21] Bertillon termed the set of images as a "portrait parlé," or a "speaking image," because the image included a description of the subject as well as information on the subject's physical description, family, and occupation.[22] As the practice of rogue galleries diminished, a shift away from mugshots began in the mid-twentieth century, and they were only featured occasionally in newspapers or true crime magazines.[23]

The rise of the digital age and the invention of the internet drastically transformed mugshot use.[24] The images, once temporarily displayed in a gallery or newspaper that would soon be discarded, can now live indefinitely online.[25] Websites with mugshots as their sole content began to emerge around 2011.[26] By 2013, the practice was ubiquitous:

> [T]here were over eighty mugshot websites such as Mugshots.com, MugshotsUSA.com, BustedMugshots.com, and more local versions like Florida.Arrest.org. One of the largest sites, Mugshots.com, has between fifteen and twenty million mugshots available for viewing on its site. These companies use automated software that scrapes mugshot images from local law enforcement websites and seamlessly transfers them to an online mugshot gallery[] without human assistance.[27]

Removing a mugshot from these websites costs hundreds of dollars, and payment does not guarantee the image's complete removal from the website's competitors or the rest of the internet.[28] In between the time of posting and removal, the image could be taken from a mugshot website and transported to other platforms, including Facebook groups or sub-Reddits.[29]

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[20] Gershon, *supra* note 18; *Biographies*, NLM, https://www.nlm.nih.gov/exhibition/visibleproofs/galleries/biographies/bertillon.html (last updated June 5, 2014).
[21] Gershon, *supra* note 18.
[22] *Id.*
[23] Lee, *supra* note 10, at 565.
[24] *Id.*
[25] *Id.*
[26] *Id.* at 566.
[27] *Id.*
[28] *Id.* at 567.
[29] *See, e.g.*, Arrest Mugshots, FACEBOOK, https://www.facebook.com/ArrestMugshots/ (last visited Nov. 29, 2021) (representing an example of a webpage dedicated to posting

B. MUGSHOTS AS A DEVICE OF PUBLIC SHAMING

The public attaches a highly stigmatized label of criminality to individuals associated with or convicted of crimes.[30] This stigma creates a high barrier to involvement in necessary realms of social life, including "employment opportunities, voting rights, access to public housing, student financial aid, and social service benefits . . . ."[31] The attachment of the criminal label is therefore objectively undesirable for most people. It follows that the publication of mugshots, either by for-profit websites or news media, contributes to the attachment of this label.

Once the label is attached, a shaming process can begin. A surprising source of this shaming is law enforcement. Take, for instance, the Dodge County, Wisconsin sheriff's office. In August 2019, the Dodge County sheriff's office announced it would begin posting the mugshots of individuals detained for possibly Driving Under the Influence on Facebook.[32] The post was not made for administrative documentation. Instead, it was an express attempt to publicly shame the depicted individuals as punishment for a crime for which they had not yet been convicted. The office said, "[i]t is always our hope that we can gain voluntary compliance with the law, but if this choice is made, it will become a public choice."[33] This practice is not unique to Dodge County. The police in Flint, Michigan conducted a similar publicity scheme for individuals arraigned in connection with prostitution, and other jurisdictions vowed to do the same.[34]

The public also partakes in publicly shaming individuals arrested for a crime. Take, for example, the Facebook Group entitled "*United Reporting – Local Crime*

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mugshots); Hot Mugshots, REDDIT, https://www.reddit.com/r/hotmugshots/ (last visited Nov. 29, 2021) (representing an example of a webpage dedicated to posting mugshots).

[30] Kelly A. Moore et al., *Self-stigma among Criminal Offenders: Risk and Protective Factors,* STIGMA HEALTH (Aug. 2018), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6157751/pdf/nihms864803.pdf.

[31] Simone Ispa-Landa & Charles E. Loeffler*, Indefinite Punishment and the Criminal Record: Stigma Reports Among Expungement-Seekers in Illinois*, 54 CRIMINOLOGY 387, 389 (2016) (citations omitted), https://onlinelibrary.wiley.com/doi/epdf/10.1111/1745-9125.12108.

[32] Simon Chandler, *Increasing Police Use Of Social Media Shaming Carries Grave Privacy Risks*, FORBES (Aug. 18, 2019, 12:01 PM), https://www.forbes.com/sites/simonchandler/2019/08/18/increasing-police-use-of-social-media-shaming-carries-grave-privacy-risks/?sh=4bf79f817beb.

[33] *Id.*

[34] *Id.*

News."[35] This group is dedicated to providing California arrest information to its followers "as a courtesy resource for the general public."[36] The group administrators make daily posts, including mugshots and corresponding arrest information, such as the name and age of those arrested in the region.[37] Group members are permitted to comment on these posts; for instance, there is a posting where a commenter remarked, "too bad we [do not] use the death penalty anymore," regarding a man on trial for murder or another post where a commenter utilized an animated image known as a ".gif" to mock an arrestee's appearance.[38]

Publicly shaming individuals associated with crime is not necessarily standard across arrestee demographics. When associated with crime, white individuals are often permitted to retain their presumption of innocence in a way that arrestees of other races are often not. White arrestees are often depicted in media by their university headshot or yearbook photo, while arrestees of color, arrested for the same crime, are shown by their mugshot.[39]

C. RIGHT TO PRIVACY

1. Historical Basis for Right to Privacy

The idea that all American citizens have a right to privacy is a general proposition with authority from various sources.[40] Although the Constitution makes no explicit mention of "privacy," the United States Supreme Court has acknowledged this implicit right in several forms, including in Fourth and

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[35] United Reporting – Local Crime News, FACEBOOK https://www.facebook.com/United-Reporting-Local-Crime-News-430791916971524/ (last visited Nov. 29, 2021).
[36] *Id.*
[37] *Id.*
[38] Juan S. Hernandez, Comment to *United Reporting – Local Crime News*, FACEBOOK (Sept. 25, 2021), https://www.facebook.com/United-Reporting-Local-Crime-News-430791916971524/; Gwen Wolverton, Comment to *United Reporting - Local Crime News,* FACEBOOK (Sept. 23, 2021), https://www.facebook.com/United-Reporting-Local-Crime-News-430791916971524/.
[39] Jenée Desmond-Harris, *These 2 sets of pictures are everything you need to know about race, crime, and media bias*, VOX (Apr. 1, 2015, 3:40 PM), https://www.vox.com/2015/4/1/8326315/media-bias-black-mughsots; Caroline Sieda, *Arrested for same crime, in newspaper white suspects get yearbook photos, black suspects get mugshots*, BOING BOING (Mar. 31, 2015, 7:20 AM), https://boingboing.net/2015/03/31/arrested-for-same-crime-in-ne.html.
[40] *See* Jeffrey M. Shaman, *The Right of Privacy in State Constitutional Law*, 37 RUTGERS L.J. 971, 972 (2006) ("The right of privacy is a broad concept, used in diverse contexts to refer to a variety of claims or entitlements.").

Fourteenth Amendment jurisprudence.[41] State constitutions and courts also provide authority for the recognition of the right to privacy.[42]

Additionally, one piece of scholarship is hugely influential in developing privacy law. Louis Brandeis and Samuel Warren's *'The Right to Privacy'* is considered the seminal plea for privacy recognition in tort law at a time when injunctive relief was unavailable unless there was an injury to physical property.[43] Brandeis and Warren channeled their contempt for the nineteenth-century media publishing private affairs in newspapers, including the "unauthorized circulation of portraits," into a demand for legal protection for one's privacy.[44] The authors asked and received. Following the article's publication, several states took notice and began applying Brandeis and Warren's privacy principles by way of legislation and court opinions, thereby creating the first instances of a cause of action in tort for a violation of the right of privacy.[45]

2. Modern Privacy Rights.

Modern privacy rights protect against four forms of invasion: unreasonable intrusion into the seclusion of another, appropriation of another's likeness, unreasonable publicity given to another's private life, and publicity that unreasonably places another in a false light before the public.[46] These four wrongs collectively protect against "interference with the interest of the individual in leading, to some reasonable extent, a secluded and private life, free from the prying eyes, ears and publications of others." [47]

The first form of privacy invasion involves the intentional and objectively unreasonable intrusion "upon the solitude or seclusion of another or [their] private affairs or concerns."[48] This intrusion neither needs to be physical nor result in any publicity given to the affairs or concerns, but it does require that the

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[41] *See, e.g.,* Katz v. United States, 389 U.S. 347, 350 (1967) (holding that the Fourth Amendment "protects individual privacy against certain kinds of governmental intrusion"); Lawrence v. Texas, 539 U.S. 558, 578 (2003) (relying on the Fourteenth Amendment and notions of privacy in striking down a state law which criminalized two people of the same sex engaging in sexual conduct).

[42] Shaman, *supra* note 40, at 974 ("State constitutions, after all, are an important source of protection for individual rights and liberties, including the right of privacy.").

[43] Benjamin E. Bratman, *Brandeis and Warren's 'The Right to Privacy and The Birth of Right to Privacy',* 69 TENN. L. REV. 623, 624, 633 (2002).

[44] Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890).

[45] Bratman, *supra* note 43, at 643.

[46] RESTATEMENT (SECOND) OF TORTS § 652A (AM. L. INST. 1977).

[47] *Id.* cmt. b.

[48] RESTATEMENT (SECOND) OF TORTS § 652B (AM. L. INST. 1977).

intrusion be into a private place or affair.[49] For instance, the examination of the public record in search of an individual is not protected when the records are open to the public.[50]

The second form of privacy intrusion involves appropriating another's name or likeness for the user's use or benefit.[51] The benefit need not be for commercial gain, but the pecuniary benefit is frequently required to state a claim under many state statutes.[52] It is important to note that this claim only operates to serve the interest it protects: private affairs. Thus, merely presenting an individual's name or likeness to the public is unactionable without appropriating the value associated with the name or likeness for the defendant's benefit.[53] For this reason, the quintessential application of this tort is the use of a celebrity's name or likeness for the defendant's commercial gain.[54] Even so, many states allow the claim in equal force where there has been a non-pecuniary benefit and where the plaintiff does not have celebrity status.[55] Nevertheless, requiring commercial gain by the defendant essentially transforms the appropriation privacy tort into the distinct tort of the violation of the right of publicity,[56] discussed in section II.D below.[57]

The third form, publicizing an aspect of the private life of another, is actionable if the publicity is objectively offensive and the content is not of legitimate concern to the public.[58] These conditions—offensiveness and legitimate concern—are not self-defining. The Second Restatement of Torts describes "highly offensive" publicity as requiring a reasonable person be

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[49] *Id.* cmt. c.

[50] *Id.*; *Compare* Jones v. U.S. Child Support Recovery, 961 F. Supp. 1518, 1522 (D. Utah 1997) ("A public record defense to a claim of intrusion upon seclusion is limited to records open to the general public, not just to any public record."), *with* Benitez v. KFC Nat'l Mgmt. Co., 714 N.E.2d 1002, 1009 (Ill. App. Ct. 1999) (finding a cause of action based on intrusion upon seclusion exists where employer spied on female employees through hole in ceiling of women's bathroom).

[51] RESTATEMENT (SECOND) OF TORTS § 652C (AM. L. INST. 1977).

[52] *Id.* cmt. b.

[53] *Id.* cmt. d.

[54] *Id.* cmt. b., illus. 1; *see, e.g.,* Butler v. Enter. Integration Corp., 459 F. Supp. 3d 78, 104 (D.D.C. 2020) ("[T]he typical case involves 'using a celebrity's . . . name or picture in advertising without his consent' . . . ." (quoting Haynes v. Alfred A. Knopf, Inc.*,* 8 F.3d 1222, 1229 (7th Cir. 1993))).

[55] *See*, *e.g.*, Minnifield v. Ashcraft, 903 So. 2d 818, 827 (Ala. Civ. App. 2004) (upholding a claim for appropriation where tattoo artist submitted image of non-celebrity plaintiff's body to magazine for publication); *Butler*, 459 F. Supp. 3d at 104 (finding that a misappropriation claim does not necessarily require commercial benefit).

[56] *Minnifield*, 903 So. 2d at 826.

[57] *Infra* note 74.

[58] RESTATEMENT (SECOND) OF TORTS § 652D (AM. L. INST. 1977).

"justified in feeling seriously aggrieved by it . . . ."[59] Matters of legitimate concern to the public include "truthful information contained in official court records open to public inspection."[60]

The fourth and final form of privacy intrusion is publicity about a person, which places that person in a false light.[61] Liability exists where the information being made public is untrue.[62] One is liable when the publicized information is *objectively* highly offensive, and the alleged tortfeasor "had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed."[63]

While these four torts differ in their elements, they all serve as a form of redress for an individual whose privacy has unjustifiably been infringed upon. In the context of mugshots, arrestees commonly feel a sense of privacy in their mugshot, which is violated upon publication.[64]

D. THE RIGHT OF PUBLICITY

In some jurisdictions, the privacy right against appropriation exists as a distinct right, also known as the right of publicity.[65] The right of publicity is "the inherent right of every human being to control the commercial use of [their] identity."[66] While the privacy right against appropriation is based on privacy principles,[67] the right of publicity is rooted in preventing unfair competition.[68] Because the right of publicity is largely defined by state law,[69] the elements to establish a cause of action may vary.[70] There are two general theories on the necessary elements to prove a cause of action for an infringement on the right of publicity.[71] The first approach requires that the defendant use the plaintiff's persona for the defendant's advantage without the plaintiff's consent and in such

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[59] *Id.* cmt. c.
[60] *Id.* cmt. d.
[61] RESTATEMENT (SECOND) OF TORTS § 652E (AM. L. INST. 1977).
[62] *Id.* cmt. a.
[63] RESTATEMENT (SECOND) OF TORTS § 652E (AM. L. INST. 1977).
[64] Lee, *supra* note 10, at 560-61.
[65] 31 THOMAS P. BOGGESS, V, CAUSES OF ACTION 121 § 1 (2d ed. 2006) (discussing the "the interrelated nature of the right of publicity and the appropriation tort of the right of privacy").
[66] *Id.* § 2 (citations omitted).
[67] *Supra* text accompanying notes 41-45.
[68] 31 THOMAS P. BOGGESS, V, CAUSES OF ACTION 121 § 2 (2d ed. 2006) (citations omitted).
[69] *Id.*
[70] *Id.* § 5.
[71] *Id.*

a way that is likely to cause injury to the plaintiff.[72] The second, the Restatement approach, is slightly different. First, it requires that the "defendant, without permission, [use] some aspect of identity or persona in such a way that plaintiff is identifiable from defendant's use."[73] It also requires that the defendant's use be likely to "cause damage to the commercial value of that persona" rather than requiring any injury.[74] Many states have enacted legislation protecting the right of publicity, with some providing civil remedies[75] and others threatening criminal liability.[76]

E. COPYRIGHT INFRINGEMENT

A copyright infringement claim requires two key elements: the ownership of a valid copyright and unauthorized use of the original components of the copyrighted work.[77] While copyright protection begins the moment a work of original authorship is created,[78] a copyright owner must register the copyright with the U.S. Copyright Office to bring an action for copyright infringement.[79] Although copyright law initially served to protect written works, pictorial works are copyrightable per 17 U.S.C. § 102(a)(5), which includes "pictorial, graphic, and sculptural works" in works of authorship.[80] This expression includes "not only works of art in the traditional sense but also . . . photographs and reproductions of them . . . ."[81]

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[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] *See, e.g.,* CAL. CIV. CODE § 3344(a) (West 2022) ("Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent . . . shall be liable for any damages sustained by the person or persons injured as a result thereof.").
[76] *See, e.g.,* N.Y. CIV. RIGHTS LAW § 50 (McKinney 2022) ("A person . . . that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person . . . is guilty of a misdemeanor.").
[77] Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991).
[78] 60 ELIZBETH WILLIAMS, CAUSES OF ACTION 553 § 5 (2d ed. 2013).
[79] Rogers v. Better Bus. Bureau of Metro. Houston, Inc., 887 F. Supp. 2d 722, 727 (S.D. Tex. 2012).
[80] 60 ELIZBETH WILLIAMS, CAUSES OF ACTION 553 § 2 (2d ed. 2013) (citing 17 U.S.C. § 102(a)(5)).
[81] *Id.* § 5.

There are several requirements to prove ownership of a valid copyright, including originality by the author and copyrightability of the content.[82] The author of a photographic work is, by default, the photographer, as they are the one who fixes an intangible expression into a tangible medium.[83] If the photograph, however, is taken in furtherance of one's employment, the employer is the owner of the copyright.[84]

For a work to be considered original to the author, it "must have been independently created by the author and possess at least some minimal degree of creativity."[85] Even so, the threshold for creativity is low, and even the slightest creativity will suffice.[86] A visual depiction of a person by photograph qualifies if it represents the photographer's creative work.[87] Creative decisions regarding "lighting, shading, angle, background, and so forth have been recognized as sufficient to convey copyright protection."[88]

In the context of photographs taken by law enforcement during the booking process, the author of the mugshot photograph is the law enforcement agency.[89] Thus, two avenues exist for copyright protection of mugshots. First, law enforcement agencies could commit to protecting mugshot images by enforcing the copyright against online publishers themselves,[90] discussed more in Section III(c) below.[91] Or, second, by transferring the copyright to the arrestee through the copyright transfer mechanism provided by 17 U.S.C. § 201(d) for individual enforcement. Transferring copyright ownership does not require compliance

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[82] *Id.* (referencing other requirements such as compliance with statutory requirements, point of attachment of the work in the United States, and transfer rights, if applicable).
[83] *Id.*
[84] *Id.* § 7 ("The employer or other person for whom the work was prepared is considered the author of a work made for hire." (citing 17 U.S.C. § 201)); *see also* Jason Tashea, *Use copyright law to battle mugshot extortion*, A.B.A J. (Mar. 27, 2018, 9:23 AM), https://www.abajournal.com/lawscribbler/article/use_copyright_law_to_battle_against_mugshot_extortion ("In the U.S., the default copyright holder of a photo is the person or organization that took the photo, not the person in the image. In the case of mugshots, this is most likely the law enforcement agency.").
[85] 60 ELIZBETH WILLIAMS, CAUSES OF ACTION 553 § 8 (2d ed. 2013).
[86] *Id.*
[87] *Id.*
[88] Ets-Hokin v. Skyy Spirits, Inc., 225 F.3d 1068, 1077 (9th Cir. 2000); Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 55 (1884).
[89] Tashea, *supra* note 84.
[90] *Id.* ("Police departments around the country are in the unique position to serve and protect . . . by using existing copyright law to support their community and fight back against the mugshot racket.").
[91] *Infra* note 177.

with extensive formalities but requires a signed instrument of conveyance showing the intent to transfer the copyright to another party.[92]

III. ANALYSIS

A. PUBLIC MUGSHOT ACCESS THREATENS THE PRIVACY RIGHTS OF ARRESTEES

Mugshots implicate serious privacy concerns because the photos contain a private depiction of one's person, irreparably associating the arrestee with stigmatized criminality.

1. Privacy Interests in One's Image.

While photographs taken in public places do not violate the right to privacy even where no consent is given[93], photographs taken in more intimate contexts are subject to privacy constraints.[94] Protecting images of an individual taken while that individual is in their home is supported by the idea that one's reasonable expectation of privacy is at its highest in the sanctity of their home.[95] Arguably, the guiding principle in determining whether a photograph violates one's expectation of privacy is the level of privacy associated with the location and act being photographed.[96] Mugshots depict an inherently private thing: a person's face. Courts have long noted the inherent privacy of some depictions of the human body. In a case where law enforcement disseminated images of an assault victim's body, the court remarked on the associated privacy concerns:

> We cannot conceive of a more basic subject of privacy than the naked body. The desire to shield one's unclothed figure from view of strangers . . . is impelled by elementary self-respect and personal dignity. . . . We do not see how it can be argued that the searching of one's home deprives him of

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[92] 20A1 BRENT A. OLSON, MINNESOTA PRACTICE SERIES TM § 15.19 (2021).
[93] Phillip E. Hassman, Annotation, *Taking Unauthorized Photographs as Invasion of Privacy*, 86 A.L.R.3d 374 § 4 (1978).
[94] *See id.* § 3(a) (identifying a home and hospital room as places where a reasonable expectation of privacy has been upheld).
[95] Katz v. United States, 389 U.S. 347 (1967).
[96] *See Photographers' Guide to Privacy*, REPS. COMM. FOR FREEDOM OF THE PRESS 2 (2007), https://www.rcfp.org/wp-content/uploads/imported/PHOTOG.pdf ("[C]ourts constantly redefine what is private based upon interpretations of the elusive legal standard of a 'reasonable expectation of privacy.'").

> privacy, but the photographing of one's nude body, and the distribution of such photographs to strangers does not.[97]

Similarly, in a case where a published article included an image of an injured child lying on the ground following a car accident, the Third Circuit Court of Appeals found that the "publication was an actionable invasion of plaintiff's right of privacy" even though the photo was taken for news purposes.[98] Therefore, there are indeed scenarios where photographing a person's body implicates privacy interests. The question becomes whether protection could be extended to photographs taken of a person's face during the criminal booking process.

Protecting the privacy of a person's face is not a revolutionary concept. For instance, the Illinois legislature has recognized privacy interests in one's face through the Illinois Biometric Information Privacy Act ("BIPA").[99] BIPA seeks to prevent the undisclosed retention of certain biometric identifiers, including a "scan of hand or face geometry."[100] Further, several Circuit Courts of Appeal have expressly found that booking photos implicate privacy interests.[101] The Tenth Circuit did so in *World Publishing Co. v. U.S. Department of Justice*, where World Publishing sought six booking photos from the U.S. Marshals Service ("UMS").[102] UMS denied the request, citing an exception to the Freedom of Information Act, which prevents disclosure of law enforcement materials that could "constitute an unwarranted invasion of personal privacy . . . ."[103] In finding UMS's denial of the request lawful, the court remarked that "a mug shot's stigmatizing effect can last well beyond the actual criminal proceedings . . . . A mug shot preserves, in its unique and visually powerful way, the subject individual's brush with the law *for posterity*."[104]

2. Privacy Interests in Criminal Record.

Whether criminal records should be subject to privacy protections is beyond the scope of this Note. Even so, examining the reasoning for protecting criminal records is helpful to determine if that same reasoning applies to mugshots.

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[97] York v. Story, 324 F.2d 450, 455 (9th Cir. 1963).
[98] Leverton v. Curtis Pub. Co., 192 F.2d 974, 977 (3d Cir. 1951).
[99] 740 ILL. COMP. STAT. ANN. 14 (West 2022).
[100] 740 ILL. COMP. STAT. ANN. 14/10 (West 2022).
[101] Karantsalis v. U.S. Dep't of Just., 635 F.3d 497 (11th Cir. 2011) (noting that booking photographs implicate privacy rights).
[102] World Pub. Co. v. U.S. Dep't of Just., 672 F.3d 825, 830, 832 (10th Cir. 2012).
[103] *Id.* at 827 (quoting 5 U.S.C. § 552b(c)(7)).
[104] *Id.* at 828 (citations omitted).

Just as a person should have a recognized privacy interest in a photograph of their face, they should have a recognized privacy interest in their criminal record, which is implied by the existence of a mugshot. To illustrate why this proposition is true, it is helpful to look at other types of records that receive privacy protections and examine whether there are functional differences between these other records and criminal records.

For instance, medical records receive extensive privacy protection. The Health Insurance Portability and Accountability Act of 1996 ("HIPAA") was enacted to "protect sensitive patient health information from being disclosed without the patient's consent or knowledge."[105] HIPAA intends to protect "the privacy of people who seek care and healing" and ease "worries that sensitive health information that could embarrass patients or leave them vulnerable to discrimination would be too freely accessible."[106] Criminal records similarly contain information that could embarrass a person or leave them vulnerable to discrimination: their involvement with the criminal legal system. This embarrassment, or potential for discrimination, is due to the process of criminal labeling and stigmatization.[107]

Despite the potential for embarrassment and discrimination created by access to criminal records, courts have not recognized a privacy interest against disclosing criminal records,[108] even in cases where the record was expunged and then disclosed.[109] For instance, the Tenth Circuit, who remarked in *World Publishing Co.* on the stigmatizing effect of being associated with crime,[110] did not recognize an expectation of privacy in expunged criminal records in a case which post-dates *World Publishing Co.*[111] There, the court remarked that:

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[105] *Health Insurance Portability and Accountability Act of 1996 (HIPAA)*, CDC, https://www.cdc.gov/phlp/publications/topic/hipaa.html (last updated June 27, 2022); Health Insurance Portability and Accountability Act, Pub. L. No. 104-191, § 264, 110 Stat. 1936 (1996).

[106] Elizabeth Rosenthal, *Medical Records: Top Secret*, N.Y. TIMES (Nov. 8, 2014), https://www.nytimes.com/2014/11/09/sunday-review/medical-records-top-secret.html; *Summary of the HIPAA Privacy Rule*, HHS.GOV, https://www.hhs.gov/hipaa/for-professionals/privacy/laws-regulations/index.html (last visited Oct. 24, 2022).

[107] Katerina Hadjimatheou, *Criminal Labelling, Publicity, and Punishment*, 35 L. & PHIL. 567, 567 (2016), https://link.springer.com/content/pdf/10.1007/s10982-016-9274-0.pdf.

[108] *See, e.g.*, Cline v. Rogers, 87 F.3d 176 (6th Cir. 1996) ("[T]here is no constitutional right to privacy in one's criminal record. Nondisclosure of one's criminal record is not one of those personal rights that is 'fundamental' or 'implicit in the concept of ordered liberty.'" (quoting Whalen v. Roe, 429 U.S. 589 (1977))).

[109] Nunez v. Pachman, 578 F.3d 228, 233 (3d Cir. 2009) (rejecting the "contention that New Jersey law itself creates a constitutional right of privacy in an expunged criminal record").

[110] World Pub. Co. v. U.S. Dep't of Just., 672 F.3d 825, 827 (10th Cir. 2012).

[111] Nilson v. Layton City, 45 F.3d 369, 372 (10th Cir. 1995).

> Expectations of privacy are legitimate if the information which the state possesses is highly personal or intimate. Information readily available to the public is not protected by the constitutional right to privacy. Consequently, government disclosures of arrest records . . . do not implicate the right to privacy. Furthermore, a validly enacted law places citizens on notice that violations thereof do not fall within the realm of privacy. Criminal activity is thus not protected by the right to privacy.[112]

This reasoning, however, is circular: information available to the public cannot be protected by the right to privacy, yet the information is available to the public in the first place because the information lacks privacy protection. Moreover, at least in the Tenth Circuit, the reasoning behind denying FOIA requests for mugshots is that the mugshot irreparably connects the depicted person to crime,[113] while access to criminal records is upheld because the information is not of "such a personal nature that it demands constitutional protection . . . ."[114] In sum, mugshots involve private information because (1) they depict an inherently private feature, a face, and (2) because they associate a person with a stigmatized criminal label.

B. THE VIABILITY OF LITIGATION FOR AGGRIEVED ARRESTEES: STATE PRIVACY TORTS

Because mugshot photos implicate the privacy interests of arrestees, it is worth determining whether any of the invasion of privacy causes of action currently available are apt to address mugshot publication. All states recognize at least one of the four Restatement right to privacy claims[115]—intrusion into seclusion, misappropriation, publicity of private facts, and false light.[116] Several states recognize all four of these privacy claims.[117] The following evaluation of

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[112] *Id.* (citing Mangels v. Pena, 789 F.2d 836, 839 (10th Cir. 1986)).
[113] *World Pub. Co.*, 672 F.3d at 829 (citing United States v. Romero-Rojo, 67 F. App'x 570, 572 (10th Cir. 2003)).
[114] *Nilson,* 45 F.3d at 371 (finding no legitimate expectation of privacy in criminal records).
[115] *Photographers' Guide to Privacy*, *supra* note 96.
[116] *See* RESTATEMENT (SECOND) OF TORTS § 652A (AM. L. INST. 1977) (identifying and describing the four right to privacy claims).
[117] *See Photographers' Guide to Privacy*, *supra* note 96, at 2 (noting that, as of 2007, Alabama, Georgia, California, and Connecticut, among other states, recognize all four privacy claims).

these four causes of actions and their applicability to a case where an arrestee seeks to obtain redress against the publisher of their mugshot may leave that arrestee with much to be desired from state privacy protection. First, identifying a defendant may prove challenging since the people publicizing the mugshots are "often sham entities and challenging to track down . . . ."[118] Further, these actions require significant financial resources, and those seeking redress are often "the most disenfranchised in our society."[119]

1. Intrusion Upon Seclusion

While state law claims of invasion of privacy based on intrusion upon seclusion may include varying elements, the claims generally ascribe to the requirements outlined by the Restatement (Second) of Torts § 652(B).[120] Thus, for argument's sake, the elements of invasion of privacy based on an intrusion upon seclusion can be assumed to follow Restatement § 652(B). These elements include intentional intrusion, which would be "highly offensive to a reasonable person[,]" "physical or otherwise, upon the solitude or seclusion of another or [their] private affairs or concerns."[121]

One example illustration in the Restatement of intrusion upon seclusion is a hypothetical scenario where a woman is sick in the hospital, and a newspaper reporter enters her hospital room and, over the woman's objection, photographs her.[122] While the illustration includes a newspaper reporter as the invader of privacy, invasion by intrusion upon seclusion does not require any publicity of the private information.[123] Further, while this illustration includes a physical intrusion into a woman's hospital room, a physical intrusion is not necessary to claim intrusion upon seclusion per the Restatement approach.[124] Courts, however, generally interpret the intrusion upon seclusion as "an extension of the

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[118] Lee, *supra* note 10, at 613.
[119] *Id.* at 614.
[120] *Compare* Peterson v. Aaron's, Inc., No. 1:14-CV-1919-TWT, 2017 WL 4390260, at *4 (N.D. Ga. Oct. 3, 2017) (citing the Restatement's elements of intrusion upon seclusion), *with* Prather v. Bank of Am., N.A., No. CV 15-163-M-DLC, 2017 WL 1929474, at *3 (D. Mont. May 9, 2017) (citing Montana's common law elements of intrusion upon seclusion including subjective expectation of seclusion and objective expectation of seclusion while still following the Restatement approach).
[121] RESTATEMENT (SECOND) OF TORTS § 652B (AM. L. INST. 1977).
[122] *Id.* cmt. b, illus. 1
[123] *See id.* cmt. a ("The form of invasion of privacy covered by this Section does not depend upon any publicity given to the person whose interest is invaded or to [their] affairs.").
[124] *Id.* cmt. b.

tort of trespass."[125] In fact, some jurisdictions require a physical trespass to state such a claim.[126] Thus, intrusion can be characterized as a trespass to a private "safe zone or 'private realm' where individuals can be free from the unwanted intrusions of others."[127]

Under this characterization, it does not appear that intrusion upon seclusion is an appropriate cause of action for an arrestee seeking suit against the publisher of a mugshot photo. Intrusion claims seem to rely heavily on an invasion into a private *space* rather than a private *fact*, such as an association with the criminal legal system.[128] Mugshot photos are not taken in private but rather taken by law enforcement in a public facility. Thus, it would be difficult to argue that they should be protected like photos taken while someone is in their private hospital room should be. Plaintiffs have nonetheless made unsuccessful attempts to frame claims of dissemination of mugshot photos as intrusions upon seclusion.[129] In one such case, a New Jersey District Court rejected that framing:

> [T]he disclosure of a mug shot itself does not reveal any information that was not already public. A mug shot merely provides a visual of someone with pending charges, and Plaintiff does not allege that his pending charges were nonpublic. Second, a mug shot is not based in text. Its disclosure, without anything more, is less likely to facilitate false or inaccurate reporting about the defendant or his pending charges. Third, a mug shot is not the type of "highly personal matter[] representing the most intimate aspects of human affairs" that historically has been protected by the Fourteenth Amendment.[130]

The second of these reasons is generally unobjectionable: it cannot be argued that a mugshot is text. Regarding the first, however, it can be argued that minimizing the dissemination of a mugshot as "merely provid[ing] a visual"

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[125] Eli A. Meltz, Note, *No Harm, No Foul? "Attempted" Invasion of Privacy and the Tort of Intrusion Upon Seclusion*, 83 FORDHAM L. REV. 3431, 3452 (2015).
[126] *See id.* ("[S]ome jurisdictions only recognize a cause of action for intrusion upon seclusion if there has been some physical invasion.").
[127] *Id.* at 3453.
[128] *Id.*
[129] *See* Tramaglini v. Martin, No. CV 19-11915, 2019 WL 4254467, at *6 (D.N.J. Sept. 9, 2019) (finding constitutional privacy interests are not implicated by mugshot dissemination).
[130] *Id.*

neglects the privacy interest in the image itself.[131] Further, regarding the third reason articulated by the district court, association with the criminal legal system could be a "highly personal matter[] representing" an intimate aspect of an arrestee's life.[132] Contrarily, an association with crime cannot be a solely personal matter given a potential legitimate news interest.[133] Indeed, if this were the true motivation of those who publicize mugshots, then such an argument would have merit. This does not appear to be the case.[134] In sum, the only way an aggrieved arrestee could make a colorable claim of intrusion upon seclusion is if a court were to recognize the personal and intimate nature of mugshots while also evaluating the validity of publishers' claims of newsworthiness.

2. Misappropriation and the Right of Publicity

While misappropriation of one's name or likeness, a privacy right, and an invasion of the right of publicity are not the same cause of action,[135] there is significant overlap between elements of the two claims.[136] They differ in that the right of publicity claim requires a "celebrity's commercial interest" while a misappropriation claim can be pled without such celebrity status.[137] Thus, an arrestee seeking mugshot removal who happens to have celebrity status could rely on a right of publicity claim while "common folk" could rely on a misappropriation of one's likeness claim.[138] Beyond that distinction, the claims can be discussed together regarding what is necessary to state a colorable claim.

The Restatement(Second) of Torts § 652C states that, in order to claim misappropriation, a plaintiff must allege that the defendant used or benefited

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131 *Id.* at *6; *supra* note 92 and accompanying text.
132 *Tramaglini*, 2019 WL 4254467, at *6.
133 Lee, *supra* note 10, at 561 ("On the other hand, free speech advocates, media outlets, and victims' rights organizations urge for open access to these records, arguing that the public has the right to know about arrests. They argue that the images are newsworthy.").
134 Olivia Solon, *Haunted by a mugshot: how predatory websites exploit the shame of arrest*, GUARDIAN (June 12, 2018), https://www.theguardian.com/technology/2018/jun/12/mugshot-exploitation-websites-arrests-shame ("[T]his shift to the internet transformed mugshots of ordinary from citizens from 'public records that generally fell into "practical obscurity"' into 'commodities posted for entertainment and commercial gain.'").
135 Kathryn Riley, *Misappropriation of Name or Likeness Versus Invasion of Right of Publicity*, 12 J. CONTEMP. LEGAL ISSUES 587, 587 (2001) ("Although easily confused, the torts 'misappropriation of name or likeness' and 'invasion of right of publicity' are not the same.").
136 *Id.* at 588 ("Both claims require proof of these elements: (1) defendant appropriated plaintiff's name, likeness, or personality; (2) the appropriation was without the plaintiff's consent; and (3) the appropriation was to the defendant's advantage.").
137 *Id.*
138 *Id.* at 589.

from the use of the plaintiff's name or likeness.[139] This seems to be a promising candidate for an arrestee to employ since "[t]he common form of invasion of privacy under the rule here stated is the appropriation and use of the plaintiff's name or likeness . . . for some similar commercial purpose"[140] and much of the objectionable mugshot publication occurs on websites obtaining a commercial gain from the mugshot publication. In the cases where the publication is not for commercial purposes but instead for shaming purposes, a misappropriation action may still be available since "the rule stated is not limited to commercial appropriation."[141] One could argue that posting the mugshot benefits the mugshot poster or publisher, and this benefit could be merely monetary, for news reporting purposes, or entertainment.

Plaintiffs have had more success under this privacy right than with intrusion upon seclusion.[142] In *Gabiola v. Sarid*, the plaintiffs, both previously arrested, alleged that the owner of several mugshot publication websites, including Mugshots.com and Unpublisharrest.com, violated, among other things, their right of publicity.[143] The court remarked that "[a]s pleaded, the factual allegations support an inference that everything, including the articles on the Mugshots.com[,] are click-bait to increase consumers and to embarrass the profiled arrestees and in turn to drive revenue to the removal service."[144] This amounts to a monetary benefit to the owner of the websites, a requirement for misappropriation or right of publicity claims.

3. Publicity of Private Facts

To plead a legitimate claim for invasion of privacy by public disclosure of private facts, one must allege that the public disclosure of a private fact is not of legitimate public concern and is offensive and objectionable to a reasonable person.[145] Thus, an aggrieved arrestee must argue that the fact of their arrest is private, that the fact of the arrest is not of legitimate public concern, and that the publication is offensive and objectionable to a reasonable person.

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[139] *See* RESTATEMENT (SECOND) OF TORTS § 652C (AM. L. INST. 1977) ("One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy.").
[140] *Id.* cmt. b.
[141] *Id.*
[142] *See, e.g.*, Bilotta v. Citizens Info. Assocs., LLC, No. 8:13-CV-2811-T-30TGW, 2014 WL 105177, at *2 (M.D. Fla. Jan. 10, 2014) (finding that the plaintiff adequately stated a claim under Fla. Stat. § 540.08 for misappropriation against mugshot website).
[143] Gabiola v. Sarid, No. 16-CV-02076, 2017 WL 4264000, at *1 (N.D. Ill. Sept. 26, 2017).
[144] *Id.* at *6.
[145] 103 AM. JUR. 3D *Proof of Facts* § 2 (2008).

All jurisdictions that recognize this form of invasion of privacy agree that publicity given to already public facts is not an invasion of privacy.[146] Thus, the success of establishing that a mugshot is private depends upon whether or not the arrestee's jurisdiction permits public access to mugshots. For instance, Georgia passed a law in 2014 which limits the public disclosure of booking photographs to narrow circumstances,[147] thereby limiting the public's access to the images. Similarly, in 2019, New York prohibited the public disclosure of mugshots unless the disclosure serves a valid law enforcement purpose.[148] Even so, "most nonfederal law enforcement agencies freely disclose mug shots to the public."[149] Therefore, in many jurisdictions, public access to the mugshot would be preclusive of a suit for invasion of privacy via public disclosure of private facts.[150]

Advocates of open disclosure of records, like mugshots, "stress the importance of government transparency, open access to public records, and the oversight function of the press in monitoring the police and the government."[151] Mugshot publication websites themselves urge that their sites advance public safety.[152] The banner on Mugshots.com boasts that it is a "news organization" informing the public on crime.[153] Courts generally treat "matters of public concern" as a broad category,[154] but there are few bright-line state rules on whether or not mugshots are a matter of legitimate public concern.[155]

Finally, if a plaintiff were to succeed in establishing that the fact of their mugshot is private and that their mugshot does not involve a legitimate public concern, the plaintiff would have to establish that the publication was offensive to a reasonable person. Again, little exists by way of bright-line rules in this aspect of state privacy law. Plaintiffs have had success pleading this element where the

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146 123 AM. JUR. *Trials* § 17 (2012).
147 GA. CODE ANN. § 50-18-72(a)(4) (West 2022).
148 *Mug Shots and Booking Photo Websites*, NCSL (Aug. 8, 2022), https://www.ncsl.org/research/telecommunications-and-information-technology/mug-shots-and-booking-photo-websites.aspx.
149 Cameron T. Norris, Note, *Your Right to Look Like an Ugly Criminal: Resolving the Circuit Split over Mug Shots and the Freedom of Information Act*, 66 VAND. L. REV. 1573, 1589 (2013).
150 *Id.*
151 Lee, *supra* note 10, at 576.
152 *Id.* at 575.
153 MUGSHOTS.COM, https://mugshots.com/ (last visited Nov. 28, 2021).
154 123 AM. JUR. *Trials* § 20 (2012).
155 *Publication of Private Facts*, DIGIT. MEDIA L. PROJECT (Sept. 10, 2022), https://www.dmlp.org/legal-guide/publication-private-facts (last visited Nov. 28, 2021).

content published involved an intimate act, however.[156] Although, plaintiffs have failed in pleading this element where the content published contained a photo of a couple kissing or a private wedding.[157] While mugshots arguably depict private content, one could find that a booking photo is analogous to a photo of a private wedding or couple kissing rather than that of a woman nursing a child or posing nude.

4. False Light

The final invasion of privacy right to evaluate for its applicability to an aggrieved arrestee is the false light invasion of privacy. This requires that a defendant, with malicious intent, publicize a highly offensive, inaccurate representation with knowledge of the representation's falsity.[158]

Although case law where an arrestee pleads false light invasion of privacy against a mugshot publisher is minimal, the available court opinions suggest the claim is viable.[159] In *Taha v. Bucks County*, for example, an arrestee sought redress after his mugshot was posted on the county's website and subsequently posted on other online mugshot websites along with his arrest information.[160] The defendant-mugshot website moved to dismiss the claims of false light invasion of privacy because the plaintiff's arrest was not false.[161] In fact, the plaintiff pleaded guilty to the charges associated with the mugshot.[162] Nevertheless, the court agreed with the plaintiff, noting "[i]t is plausible that [the website's] design creates the impression that [the plaintiff] is a 'criminal'—at the very least, that he is guilty, that he has done something wrong, [and] that his conduct warrants monitoring in future."[163] This decision represents recognition by a court that it can be true that an individual is arrested and still be false to portray them as a criminal or worthy of monitoring.

C. THE VIABILITY OF LITIGATION FOR AGGRIEVED ARRESTEES: COPYRIGHT INFRINGEMENT

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[156] *Id.* (noting that "publishing a photograph of a woman nursing a child or posing nude in a bathtub" has been found to be offensive to a reasonable person).
[157] *Id.*
[158] 33 RICHARD E. KAYE, CAUSES OF ACTION 1 § 4 (2d ed. 2007).
[159] Taha v. Bucks Cty., 9 F. Supp. 3d 490 (E.D. Pa. 2014).
[160] *Id.* at 494.
[161] *Id.*
[162] *Id.*
[163] *Id.*

In the absence of a perfectly suited state law invasion of privacy claim and fully effective state legislation, an arrestee seeking redress for mugshot publication may seek other avenues of protection. Copyright law, designed to promote progress in arts and sciences[164], has been suggested as a potential remedy.[165] Copyright law is in the exclusive jurisdiction of federal courts,[166] so this body of law offers a more universally applicable remedy to arrestees in the United States seeking redress than, for instance, state privacy law, which varies significantly among states.[167]

For a plaintiff to allege copyright infringement of a mugshot, for example, there must be valid copyright ownership over the image.[168] The initial owner of a mugshot is not the person depicted in the image but the law enforcement agency who took the photo.[169] Ownership of a mugshot depends on whether the mugshot was taken by a federal law enforcement agency or a state law enforcement agency because the federal government cannot own copyrights.[170] Further, a state's ability to own copyrights is murky: the Supreme Court recently held that a state's statute annotations are ineligible for copyright protection,[171] but the U.S. Copyright Office only prohibits copyrights of "a government edict that has been issued by any state, local, or territorial government, including legislative enactments, judicial decision, administrative rulings, public ordinances, or similar types of official legal materials."[172] In other words, the Supreme Court and Copyright Office prohibit a state from copyrighting its laws but do not foreclose state copyright ownership outright. Thus, a state or local law enforcement agency that takes a mugshot photo could validly own the copyright of that photo initially.

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164 U.S. CONST. art. I, § 8, cl. 8; *Purpose of Copyright Law*, S. ILL. UNIV.: CARBONDALE, https://lib.siu.edu/copyright/module-01/purpose-of-copyright-law.php (last updated Sept. 7, 2022).

165 Tashea, *supra* note 84.

166 U.S. Dep't of Just., Crim. Res. Manual § 1844 (2020).

167 *See Photographers' Guide to Privacy*, *supra* note 96, at 5 (identifying differences among states regarding state privacy laws).

168 *Copyright Infringement*, JUSTIA, https://www.justia.com/intellectual-property/copyright/infringement/ (last updated Oct. 2021).

169 *See* Tashea, *supra* note 84 ("In the U.S., the default copyright holder of a photo is the person or organization that took the photo, not the person in the image.").

170 *Id.*; *Are Works By The U.S. Government Protected By Copyright?*, COPYRIGHT ALL., https://copyrightalliance.org/faqs/copyright-us-government-works/ (last visited Nov. 28, 2021).

171 Georgia v. Public.Resource.Org, Inc., 140 S. Ct. 1498 (2020).

172 Adam Garson, *Can State Governments Own Rights in Copyright?*, LIPTON, WEINBERGER & HUSICK: L. BLOG (May 12, 2017) (citations omitted), https://garson-law.com/can-state-governments-own-rights-in-copyright/.

Mugshots taken by federal law enforcement may enter limbo in terms of copyright ownership because the federal government cannot own copyrights, while mugshots taken by a state or local agency may be owned by law enforcement.[173] Therefore, one might think that individuals arrested by federal agencies are out of luck in protecting their mugshot in the method described below, predicated on initial copyright ownership by the law enforcement who takes the mugshot photo.[174] Federal mugshots, however, are not subject to public disclosure in the same way state mugshots can be,[175] so an individual arrested by federal law enforcement faces virtually no risk of their mugshot being published.

There are two paths to mugshot protection with copyright law. First, the state or local law enforcement agency that initially owns a mugshot photo can register the copyright and file copyright infringement actions against those who publish the mugshot. Second, the state or local law enforcement agency that captures the mugshot photo can register the copyright and then transfer ownership of the copyright to the individual in the mugshot. That individual may then pursue a copyright infringement action against those who publish the photo.[176]

Both paths notably imply that state law enforcement is incentivized or willing to protect the individual from unauthorized mugshot publication. Some state agencies have proven they are willing to take measures against online abuse through mugshot posting.[177] The Department of Public Safety in Newark, New Jersey announced on Facebook that it would no longer "post mugshots or other photos of individuals arrested for minor offenses as part of an effort to safeguard individuals from marginalized communities from abuse."[178] The police department in San Francisco expressed a similar sentiment when it banned the release of mugshots, noting that mugshot release "creates an illusory correlation for viewers that fosters racial bias and vastly overstates the propensity of Black

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[173] Tashea, *supra* note 84.
[174] *See id.* (describing initial copyright ownership for the federal government).
[175] Josh Gerstein, *Court ends routine access to federal mugshots*, POLITICO (July 14, 2016, 2:42 PM), https://www.politico.com/blogs/under-the-radar/2016/07/mugshots-federal-criminal-suspects-225546.
[176] Tashea, *supra* note 84.
[177] *See* Newark NJ Department of Public Safety, FACEBOOK (Oct. 18, 2021), https://www.facebook.com/photo.php?fbid=251899520297515&set=a.238608488293285&type=3 (announcing a new policy for the release of mugshots).
[178] *Id.*

and brown men to engage in criminal behavior . . . ."[179] These two instances may not be indicative of all state agencies' attitudes, but they at least symbolize a sympathy for the plight of individuals associated with the criminal justice system in terms of their relationship with the rest of the community.

D. BALANCING THE NEED FOR MUGSHOTS AGAINST PRIVACY INTERESTS: ARE MUGSHOTS OBSOLETE?

While some of the previous bodies of law may be a promising route for aggrieved arrestees to take to obtain redress for their mugshot publication, many hurdles exist. In the state privacy law context, arrestees are stuck with the set of invasion of privacy causes of action that their state recognizes, some of which do not apply to their claims. Arrestees could rely on state legislation designed to regulate mugshot publication, but in the majority of states, mugshots remain open to disclosure.[180]

In the copyright infringement context, success is highly dependent on the willingness of state and local law enforcement to dedicate resources to registering copyrights and either enforcing or transferring those rights. If it is questionable whether there is an adequate remedy at law for unauthorized mugshot publication, one wonders if this problem could be solved by the elimination of the practice of taking booking photographs entirely. If the purported purpose of taking mugshots is to aid in identifying a person, which it originally was,[181] are there not other available methods of identification that do not threaten an individual's reputation? Fingerprinting, for example, is already a widely practiced method of identification.[182]

Contrary to this position, some urge that mugshots are a "key part of the administrative process for law enforcement agencies and are unlikely to go

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[179] Keri Blakinger, *Mugshots stay online forever. some say the police should stop making them public*, NBC NEWS (Nov. 11, 2021, 10:36 AM), https://www.nbcnews.com/news/us-news/mugshots-police-public-online-rcna4897.

[180] Lee, *supra* note 10, at 593.

[181] Collin Hardee, *Mugshots & the Degradation of the Presumption of Innocence*, CAMPBELL L. OBSERVER (Feb. 26, 2021), http://campbelllawobserver.com/mugshots-the-degradation-of-the-presumption-of-innocence/.

[182] Daniel Engber, *Does the FBI Have Your Fingerprints?,* SLATE (Apr. 22, 2005, 6:38 PM), https://slate.com/news-and-politics/2005/04/does-the-fbi-have-your-fingerprints.html#:~:text=Local%20and%20federal%20law%20enforcement,there%20is%20an%20eventual%20conviction ("Local and federal law enforcement officers typically submit fingerprints to the FBI's criminal file for every person they arrest on a serious charge, whether or not there is an eventual conviction.").

away."[183] They cite how the purpose of mugshots, originally rooted in identification, has transformed to include aiding in crime investigation itself by encouraging other victims to come forward and deter crime generally.[184]

These benefits, apparently minimal by empirical study,[185] must be weighed against the harm that mugshot circulation has on the individuals depicted in the photo. Take Keri Blakinger, for example. She is a journalist with NBC News who was arrested in 2010 on drug charges.[186] She has been sober since but can still find her mugshot online with a Google search of her name.[187] She describes it as the worst picture she had ever seen of herself and representative of a time in her life riddled with addiction.[188] The online presence of her mugshot is the "digital ball and chain linking [her] to a past life."[189] Blakinger counts herself lucky that she was able to turn her life around and obtain employment with major media outlets,[190] but so many others like her are not able to shake the stigma of their past association with the criminal system.[191]

IV. CONCLUSION

Mugshot images are more than an administrative tool for law enforcement. When available to the public, the depicted arrestee is subject to digital shaming and a permanent scar on their reputation. State privacy law, aimed at protecting the privacy interests of constituents, is generally ill-suited to cure the unauthorized posting of mugshots: many privacy torts are inapplicable to this claim, and the ones that may be applicable are not available in all jurisdictions. State legislation aimed at combatting mugshot publication that does not exempt

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183 Hardee, *supra* note 181.
184 Blakinger, *supra* note 179.
185 *See generally* Dara N. Lee, *The Digital Scarlet Letter: The Effect of Online Criminal Records on Crime* 19 (May 2011), https://billslater.com/legal/00_Cyberstalking/2011_TheDigitalScarletLetterTheEffectO_preview.pdf ("[I]f the publishing of criminal background information online impedes ex-felons from finding legitimate employment, or cause them to suffer a wage discount, the benefits of repeat criminal behavior could outweigh the costs.").
186 Blakinger, *supra* note 179.
187 *Id.*
188 *Id.*
189 *Id.*
190 *Id.*
191 Lee, *supra* note 185, at 1 (noting that increased availability of criminal record information can "obstruct ex-convicts from finding legal employment and lead to higher recidivism rates").

mugshots from open record requests, like that of Georgia, are band-aids on bullet wounds.

Copyright law offers a potential, albeit non-traditional, path to a solution. Since this body of law is exclusively federal, aggrieved arrestees everywhere in the country would have access to an infringement claim. Even so, this solution is predicated on either (1) the willingness of state and local law enforcement to engage with mugshot protection by way of enforcing copyrights or transferring them for enforcement by individuals or (2) state legislation requiring law enforcement to enforce or transfer for individual enforcement. While this offers hope for civil redress to arrestees, it begs the question of whether this need for redress should be a reality. If a process like the taking of booking photographs is so harmful to the public, law enforcement should be required to adapt and adopt new, less harmful methods to achieve the goals that mugshots serve.