

February 2015

Extortion Through the Public Record: Has the Internet Made Florida's Sunshine Law Too Bright?

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Michael Polatsek, *Extortion Through the Public Record: Has the Internet Made Florida's Sunshine Law Too Bright?*, 66 Fla. L. Rev. 913 (2015).

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EXTORTION THROUGH THE PUBLIC RECORD: HAS THE
INTERNET MADE FLORIDA'S SUNSHINE LAW TOO BRIGHT?

*Michael Polatsek**

Abstract

In recent years, privately owned websites around the country have begun to gather arrest records directly from law enforcement websites and republish them on their own sites. Often, the images are displayed without regard to the ultimate disposition of the arrestee's case. Images and arrest records of individuals who were eventually convicted or acquitted are stored on these websites indefinitely, and specifically designed search algorithms ensure that potentially damaging information is just a click away on commonly used search engines such as Google. Some websites categorize images under derogatory headings based solely on the individual's appearance and allow users to leave comments. Most provide links to social media outlets such as Facebook and Twitter, which allow users to further disseminate this information. Although this information is in the public record, these new privately owned websites have dramatically increased the visibility of mugshots and arrest records. The information can severely damage a person's reputation and greatly limit employment opportunities. It can also cause embarrassment and psychological trauma. Understandably, many individuals who are displayed on such websites want the information taken down. In response to these wishes, additional websites have emerged offering to have the images removed for a fee. The amount charged for this service is often quite high, which forecloses many individuals' opportunities to have them removed. The website owners currently use liberal public records laws in many states to justify their actions and claim that they provide a public service by facilitating access to information in the public record. This scheme is known as the Mugshot Racket.

Using Florida as a case study, this Note examines many issues in connection with the Mugshot Racket. The threshold issue is whether this activity is illegal or simply immoral. In attempting to answer this question, this Note explores the evolving relationship between public records laws and privacy rights in the Internet age. It asks whether an individual has a right to privacy in his mugshot and explores potential causes of action against the perpetrators of the Mugshot Racket under Florida's extortion law and the Racketeer Influenced and Corrupt Organizations Act. Finally, this Note argues that legislatures should

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INTRODUCTION

A few years ago in South Florida, a young graduate student met some old college acquaintances for a night on the town. He had not seen

these friends for some time, and the evening was supposed to be one of remembrance and good times. Unfortunately, as sometimes happens at such reunions, the student got carried away and had a little too much to drink. While walking from one bar to the next, the student was arrested for disorderly conduct. He spent the night in the Broward County jail and was released the next day.

Two years later, the student had long since complied with his court-ordered punishment and put this single indiscretion behind him. That was until a simple Google¹ search of his name brought the incident rushing back. On the first page of search results was a link to a website that displayed not only his mugshot² taken that night but also details regarding the charges filed against him.

Understandably, this may seem surprising. Nevertheless, it is now common for state and federal organizations to publish matters of public record electronically, often in response to legislation requiring them to make official records more accessible.³ Mugshots and booking information are part of the public record, and in most states members of the public who wish to look them up may freely do so.⁴ This information has traditionally been available from the county clerk or local law enforcement agencies around the country.⁵ Historically, those interested in reviewing the public record had to make requests for what they

1. GOOGLE, <http://www.google.com> (last visited Apr. 17, 2014). Google is an American-run website that offers a variety of services such as Internet searches, cloud computing, and software and advertising technologies. Individuals make use of the site's services all across the globe. In the United States and globally, Google has achieved a first place ranking when considering Internet traffic relative to other sites. *See Site Info: Google*, ALEXA, <http://www.alexa.com/siteinfo/google.com> (last visited Apr. 8, 2014).

2. Law enforcement organizations have used mugshots to identify and document criminal suspects since the nineteenth century. *See* HENRY T.F. RHODES, ALPHONSE BERTILLON: FATHER OF SCIENTIFIC DETECTION 74 (1956). Alphonse Bertillon, a French investigator and innovator in the field of criminal investigation, has been credited as one of the first to compile and utilize mugshots for the identification of criminals. *See id.* at 83 (“[A] ‘speaking likeness’ was precisely what Alphonse Bertillon was aiming at. . . . Photography, as Bertillon devised it, was standardized and accurate. He planned to photograph every accused person in full face and profile, which was in itself an important innovation.”). Bertillon’s goal was to supply a method whereby law enforcement could identify repeat offenders. *See* Joseph Peterson, *Preface to ALPHONSE BERTILLON’S INSTRUCTIONS FOR TAKING DESCRIPTIONS FOR THE IDENTIFICATION OF CRIMINALS AND OTHERS* (Gallus Muller trans., AMS Press 1977) (1889).

3. For example, Florida Statutes § 119.01(2)(a) states that “[a]utomation of public records must not erode the right of access to those records. As each agency increases its use of and dependence on electronic recordkeeping, each agency must provide reasonable public access to records electronically maintained.” FLA. STAT. ANN. § 119.01(2)(a) (West, Westlaw through ch. 272 of 2013 Reg. Sess. of the 23rd Legis.).

4. *See* DANIEL J. SOLOVE, *THE DIGITAL PERSON: TECHNOLOGY AND PRIVACY IN THE INFORMATION AGE* 128–29 (2004).

5. *See id.*

wanted directly from these agencies.⁶ While the information was generally freely accessible, individuals whose arrest records were in the possession of law enforcement agencies benefitted from the “practical obscurity” associated with the extra effort an interested party would have to make to obtain the records.⁷

Today, the Internet has largely eroded the protection afforded by this “practical obscurity.”⁸ Also, a growing number of states have passed laws that increase the public’s access to criminal records.⁹ As Internet use has become more prevalent, many law enforcement organizations and county clerks have chosen to make arrest records and court records available on their respective websites.¹⁰ Thus, the Internet has greatly increased the circulation and availability of the public record.¹¹

Recently, privately owned websites around the country have begun to gather these arrest records directly from law enforcement websites and republish them on their own sites.¹² Often, the images are displayed

6. See Justin Silverman, *The ‘Mugshot Racket’: Paying to Keep Public Records Less Public*, DIGITAL MEDIA LAW PROJECT (Oct. 11, 2011, 9:15PM), <http://www.dmlp.org/blog/2011/mugshot-racket-paying-keep-public-records-less-public>.

7. See U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 762, 764 (1989); Jennifer Greene, *Competing Interests Regarding Electronic Court Records: Privacy Versus Open Access in Arizona*, JUDGES’ J., Summer 2001, at 26 (noting the process typically associated with requesting public records prior to the advent of the Internet).

8. See Nancy S. Marder, *From “Practical Obscurity” to Web Disclosure: A New Understanding of Public Information*, 59 SYRACUSE L. REV. 441, 456–57 (2009) (“The Web, with its unlimited reach across time and place, can bring information to people’s fingertips, which they can use for good or ill . . . Information that was public but practically obscure will no longer be practically obscure on the Web, and the question with each new issue is whether this matters.”).

9. See James Jacobs & Tamara Crepet, *The Expanding Scope, Use, and Availability of Criminal Records*, 11 N.Y.U. J. LEGIS. & PUB. POL’Y 177, 207 (2008). The authors note:

An increasing number of states are making it easier for any person, for any purpose, to obtain anyone’s criminal record. A 2006 . . . survey found that twenty-five of thirty-four responding states made name-only searches of criminal history records available to the public. Fifteen states allowed searches by means of telephone, mail, or website queries, and ten states provided for searches of court records. Twenty-five of the thirty-four responding states also allowed members of the public to initiate fingerprint-based record searches of state criminal records.

Id. (footnotes omitted).

10. See Greene, *supra* note 7, at 26 (noting the privacy concerns associated with making court records accessible online to the public).

11. Even though law enforcement websites themselves increase the visibility of mugshots and booking information in many states, they still arguably retain a higher degree of anonymity than commercial mugshot websites.

12. Stephanie Francis Ward, *Hoist Your Mug: Websites Will Post Your Name and Photo; Others Will Charge You to Remove Them*, A.B.A. J. (Aug. 1, 2012, 2:59 AM),

without regard to the ultimate disposition of the defendant's case.¹³ Images and arrest records of defendants who are eventually convicted or acquitted are stored on these websites indefinitely, and specifically designed search algorithms ensure that potentially damaging information is just a click away on commonly used search engines such as Google.¹⁴ Even if defendants' cases are dismissed or otherwise dropped, their mugshots and arrest records are fair game if they appear on a law enforcement website.¹⁵

Perhaps worst of all, individuals who (understandably) wish to have their records removed from these sites are often charged for the service.¹⁶ Many sister websites, purporting to be defenders of personal privacy, have sprung up in response to the proliferation of the mugshot sites; in reality, however, these sites are often loosely affiliated with the offending websites.¹⁷ They offer to remove potentially damaging

http://www.abajournal.com/magazine/article/hoist_your_mug_websites_will_post_your_name_and_photo_others_will_charge_you. Through a process known as "screen scraping," these websites automatically and continuously sift through numerous law enforcement and county court websites around the country and compile already publicized arrest information for later republication. See Josh Green, *Mugshots Inc: 'Legalized Extortion' or Constitutional Privilege?*, GWINNETT DAILY POST (July 22, 2012), <http://www.gwinnettdailypost.com/news/2012/jul/21/mugshots-inc-legalized-extortion-or>; Silverman, *supra* note 6. The number of photographs lifted from law enforcement websites can be quite high: <http://florida.arrests.org> reportedly searches through at least thirty-seven counties in Florida, compiling 1,500 mugshots each day. David Kravets, *Mug-Shot Industry Will Dig Up Your Past, Charge You to Bury It Again*, WIRED (Aug. 2, 2011, 1:52 PM), <http://www.wired.com/threatlevel/2011/08/mugshots>.

13. See Green, *supra* note 12; Jon Silman, *Dropped Arrests Leave Marks on Citizens*, GAINESVILLE SUN (Dec. 16, 2012, 5:19 PM), <http://www.gainesville.com/article/20121216/ARTICLES/121219704>.

14. Adam Tanner, *Mug Shot Sites Reward a Few and Rankle Many*, SUN SENTINEL, Sept. 21, 2012, at D3. News media organizations also publicize mugshots on television and on their respective websites. This practice differs significantly, however, from what privately owned mugshot sites do. The mugshots that are posted on news media websites such as the Sun Sentinel's "are part of more complete coverage of alleged crimes and automatically expire after a predetermined length of time." *Id.*

15. See Martin A. Holland, Note, *Identity, Privacy and Crime: Privacy and Public Records in Florida*, 23 U. FLA. J.L. & PUB. POL'Y 235, 240 (2012) ("There is no difference whether the person in the mugshot is later found guilty, not guilty, declared innocent, or has the charges dropped entirely."); Silman, *supra* note 13. It is worth pointing out that not every website that reposts mugshots is engaged in the same morally questionable (and likely illegal) practices as privately owned websites that repost mugshots taken from law enforcement websites. For example, www.jailbase.com, which claims to provide an informational service for "the public, family, friends, and victims" of arrested and booked individuals, does not charge a fee for removal, but instead takes photos down voluntarily after six months. JAILBASE, <http://www.jailbase.com/en/about> (last visited May 19, 2014). The site also removes the webpage displaying the information from "major [Internet] search engine results (like [G]oogle)." *Id.*

16. Tanner, *supra* note 14.

17. See Kravets, *supra* note 12 ("On the surface, the mugshot sites and the reputation firms are mortal enemies. But behind the scenes, they have a symbiotic relationship that wrings

information in exchange for a fee, but they do not guarantee to keep the records from appearing on similar websites.¹⁸ The fee is often very high.¹⁹ For many people, this can foreclose the opportunity to have the information removed.²⁰ This practice has become commonly known as the Mugshot Racket.²¹

Owners of these new mugshot websites claim that they provide a public service by facilitating the dissemination of publicly available information of interest to law-abiding members of society.²² This argument makes little sense. As should be obvious, this function is already served by law enforcement and county court websites that publish the same material.²³ Additionally, many of these private websites provide links to social media outlets such as Facebook,²⁴ Twitter,²⁵ and others that allow visitors to “share” or “like” individual

cash out of the people exposed.”); Silverman, *supra* note 6 (stating that “photos are uploaded to the web on tens, maybe even hundreds, of police and sherriff [sic] websites, giving rise to two new online businesses: the mugshot aggregation website and its opposite number, the mugshot removal website”).

18. See Silverman, *supra* note 6. Some people have sought professional legal help to have their photos removed from mugshot websites; however, the cost of hiring an attorney to address the problem can far exceed the fees charged by the identity-protecting websites. Kravets, *supra* note 12. Some attorneys even participate in the racket themselves by using client fees to pay for the mugshot removal. Green, *supra* note 12.

19. For example, some websites charge fees as high as \$399 to remove mugshots from www.florida.arrests.com, one of the largest privately run mugshot websites in Florida. Kravets, *supra* note 12; see also Holland, *supra* note 15, at 240.

20. See Silverman, *supra* note 6. Due to this system, the mugshot websites don’t have the “faces of all those who have the financial means and desire to pay for their mugshot’s removal [O]nly the wealthy and informed get to limit their indiscretions to the relative obscurity of a single county website. When it comes to open records, these varying degrees of publicness are bothersome.” *Id.*

21. *Id.* (“mugshot racket”); Kravets, *supra* note 12 (“mug-shot racket”).

22. See Tanner, *supra* note 14.

23. The publication of booking photos on private mugshot websites simply makes the already public images even more accessible. See Ward, *supra* note 12.

24. Facebook is a social networking website that allows users to connect and remain in contact with one another. As stated on the website’s homepage, the site’s goal is “to give people the power to share and make the world more open and connected.” FACEBOOK, <http://www.facebook.com/facebook> (last visited May 19, 2014). Facebook’s dedication to openness, and the implication this holds for those who are depicted on mugshot websites that provide these features, should not be taken lightly. Facebook users are required to use their real identities when creating profiles, and those caught with phony accounts usually have their memberships either suspended or terminated. See REBECCA MACKINNON, *CONSENT OF THE NETWORKED: THE WORLDWIDE STRUGGLE FOR INTERNET FREEDOM* 150 (2012). Mark Zuckerberg, Facebook’s creator, is dedicated to what he has termed “radical transparency”: the idea that humanity would be better off if everybody were more transparent about who they are and what they do.” *Id.*

25. “Twitter instantly connects people everywhere to what’s most meaningful to them. Any registered user can send a Tweet, which is a message of 140 characters or less that is public by default and can include other content like photos, videos, and links to other websites.”

mugshots, greatly increasing their potential audience.²⁶ Some websites even allow users to upload mugshots or leave derogatory captions under the images.²⁷ Many websites group mugshots into categories with offensive and disparaging titles based solely on the nature of the image, rather than the underlying offense.²⁸ It is difficult to imagine how the public is served by providing a conduit through which people may ridicule members of society who have been judged or are awaiting judgment by the criminal justice system. The consequences of having one's arrest record displayed on such websites can be quite serious.²⁹ It can limit employment opportunities and can be damaging in a host of other ways.³⁰ In addition to embarrassment, such negative publicity can also cause substantial injury to one's reputation.³¹

The websites themselves are covered in advertisements from various organizations that pay the owners for the right to market their

Twitter Privacy Policy, TWITTER, <https://twitter.com/privacy> (last visited May 19, 2014).

26. A visit to many mugshot websites currently active on the Internet will demonstrate these features. A simple Google search will reveal many of them. *See, e.g.*, LOOKWHOGOTBUSTED: YOUR SITE FOR CONSTANTLY UPDATED MUGSHOTS, <http://www.lookwhogotbusted.com> (last visited May 19, 2014) (hover cursor over the green rectangular box titled "Share" to view these links) (providing links to, *inter alia*, Facebook, Twitter, Pinterest, LinkedIn, Google+, Digg, StumbleUpon, Reddit, and Tumblr).

27. *See, e.g.*, MUGSHOT ROW, <http://mugshotrow.com> (last visited May 19, 2014) (providing a link to upload mugshots to the website and allowing users to leave comments under each picture).

28. Kravets, *supra* note 12 ("Visitors to [www.florida.arrests.org] can comment on the photos, or browse them by tags like 'Celebrity,' 'Hotties,' 'Trannies,' 'Tatted Up' and 'WTF.' Most of the photos are of adults, but children as young as 11 are also on display if they're accused of adult crimes.").

29. Jacobs & Crepet, *supra* note 9, at 177 ("[Criminal records] are also rapidly becoming a negative curriculum vitae (negative c.v.) used to determine eligibility for occupational licenses, social welfare benefits, employment, and housing." (footnote omitted)); *see also* Skyler McDonald, Note, *Defamation in the Internet Age: Why Roommates.com Isn't Enough to Change the Rules for Anonymous Gossip Websites*, 62 FLA. L. REV. 259, 276 (2010) ("The Internet, and especially its interactive websites and blogs, allows Everyday Joes equal access to give their opinions and engage in discourse that is unprecedented in history—unprecedented because on the Internet, there is no gatekeeper and virtually no limit on the audience." (footnote omitted)).

30. Jacobs & Crepet, *supra* note 9, at 177–79 (noting that the increasing availability of criminal records may restrict persons with criminal records from obtaining housing, employment, occupational licenses, and social welfare benefits).

31. *See* Michael Zimmer & Anthony Hoffman, *Privacy, Context, and Oversharing: Reputational Challenges in a Web 2.0 World*, in *THE REPUTATION SOCIETY: HOW ONLINE OPINIONS ARE RESHAPING THE OFFLINE WORLD* 175, 175 (Hassan Masum & Mark Tovey eds., 2011) ("Powerful and innovative Web 2.0 tools and services have made our personal information—previously scattered and hard to locate—increasingly discoverable, visible, and linkable. Various Web 2.0 platforms have emerged that make visible personal information that was previously disclosed, but that until now has remained obscure.").

products,³² and the owners make money every time visitors to the websites view or click these links.³³ Moreover, owners often receive a percentage of the fee charged by their sister websites that purport to protect individuals' identities by removing potentially damaging information.³⁴ Regardless of which activity generates the most income for the mugshot websites, the removal fees certainly add to their coffers.³⁵

There are many issues that come to mind when considering this new practice. This Note addresses whether this type of activity is illegal and whether it should be regulated through the legislative process.³⁶ Website owners currently hide behind liberal public records laws in many states to justify their actions, effectively using them as a shield.³⁷ This Note also addresses whether one can have a legitimate privacy right in one's mugshot and, if so, how state governments can reconcile this right with the right of access to public records. Finally this Note addresses whether charging a fee to remove the information from the websites is a form of extortion by use of the public record.

While these issues are not limited to a single state or jurisdiction, this Note limits its focus to Florida, a state with some of the most expansive open public records laws in the country.³⁸ Part I explores

32. See Kravets, *supra* note 12 (noting that the bulk of income for one mugshot website comes from advertising). Courts around the country have mentioned the potentially harmful effect that the dissemination of a mugshot can have upon a person's reputation. See, e.g., *Times Picayune Publ'g Corp. v. U.S. Dep't of Justice*, 37 F. Supp. 2d 472, 477 (E.D. La. 1999) ("As in the clich[é], a picture is worth a thousand words. For that reason, a mug shot's stigmatizing effect can last well beyond the actual criminal proceedings. Furthermore, just because somebody has conceded guilt does not negate that person's interest in nondisclosure of the mug shot."). But see *State v. Adler*, 558 P.2d 817, 820 (Wash. Ct. App. 1976) (stating that "the constitutional right of privacy does not include the interest an individual possesses in his arrest record including his photograph and fingerprints").

33. Kravets, *supra* note 12.

34. *Id.*

35. See *id.*

36. Silverman, *supra* note 6 ("The best access to records—be them [sic] town board meeting minutes or mugshots—shouldn't be through a site that is paid for protecting the privacy of one individual over another. It should come from a government body that prohibits the patronage in favor of accuracy and context.").

37. *Id.* ("These companies are now emerging in Florida due to the state's broad public record laws that allow individual mugshots to be easily obtained. When it comes to these photos, most states consider your face—be it beat-up, distraught, or half-shaven—to be a public record."); see also Kravets, *supra* note 12 ("Exploiting Florida's liberal public-records laws and Google's search algorithms, a handful of entrepreneurs are making real money by publicly shaming people who've run afoul of Florida law. Florida.arrests.org, the biggest player, now hosts more than 4 million mugs.").

38. See FLA. STAT. ANN. § 119.01(1) (West, Westlaw through Ch. 272 of the 2013 1st Reg. Sess. of the 23rd Legis.) ("It is the policy of this state that all state, county, and municipal records are open for personal inspection and copying by any person."); Nat'l Collegiate Athletic

whether one has a privacy right in their mugshot. To answer this question, this Note surveys federal appellate cases under the Freedom of Information Act³⁹ (FOIA). Part II presents a history of the Florida Sunshine Law, outlines the evolution of Florida's constitutional right to privacy, and discusses the potential conflict between Florida's dual commitment to open government and the protection of personal privacy. Part III explores whether mugshot websites' actions are a form of extortion, how the images can be highly prejudicial when displayed under these circumstances, and how there is often no alternative to paying the fee to have the records removed. Part IV presents a cause of action that may be available against mugshot websites under Florida's Racketeer Influenced and Corrupt Organization Act⁴⁰ (Florida RICO Act), discusses legislation designed to prevent the exploitation of one's past for personal profit, and explores other methods to curb the Mugshot Racket.

I. PRIVACY RIGHTS AND THE PUBLIC RECORD

History, culture, and varying legal systems also influence the extent of privacy protection [P]rivacy protection in the United States is complex and decentralized. The laws and regulations governing the use of personal information are many and varied, usually pertaining to a specific industry or issue. This sectoral approach results in a patchwork of uneven, inconsistent,

Ass'n v. Associated Press, 18 So. 3d 1201, 1206 (Fla. Dist. Ct. App. 2009) ("Florida courts construe the public records law liberally in favor of the state's policy of open government."); Kravets, *supra* note 12 (noting the breadth of Florida's "liberal" public records laws). In addition, Florida Statutes § 119.011(12) defines a public record as "all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency." The Florida Supreme Court has decided that this "definition limits public information to those materials which constitute *records*—that is, materials that have been prepared with the intent of perpetuating or formalizing knowledge." *Shevin v. Byron, Harless, Schaffer, Reid & Assocs., Inc.*, 379 So. 2d 633, 640 (Fla. 1980). This includes criminal records.

39. Freedom of Information Act, 5 U.S.C. § 552 (2012).

40. FLA. STAT. ANN. §§ 895.01–.06. While this Note limits its scope to exploring whether the mugshot websites are engaged in a form of extortion pursuant to the Florida RICO Act, this is not the only theory of illegality being pursued in this matter. For example, an Ohio lawyer is currently suing mugshot websites under Ohio's right of publicity law. *See Taylor Dungjen, Web Sites Profiting from Mug Shots Sued*, TOLEDO BLADE (Dec. 5, 2012), <http://www.toledoblade.com/Courts/2012/12/05/Web-sites-profiting-from-mug-shots-sued-fees-charged-to-remove-online-images.html>; David Kravets, *Shamed by Mugshot Sites, Arrestees Try Novel Lawsuit*, WIRED (Dec. 12, 2012, 6:30 AM), <http://www.wired.com/threatlevel/2012/12/mugshot-industry-legal-attack/>.

and often irrational privacy protection.⁴¹

The Internet has done much to erode individual privacy.⁴² In the age of smart phones, instantaneous uploading, and social media outlets such as Facebook and Twitter, it is much more difficult to keep certain aspects of one's life from the public eye.⁴³ Moreover, the rapid development of the Internet and technology in general has in many instances greatly outpaced the legislative process.⁴⁴ The result is that much of what happens in the digital world is either entirely unregulated or regulated by outdated legislation that is difficult to apply in new technological contexts.⁴⁵ The Mugshot Racket provides a fitting example.

A. *A Brief History of the Freedom of Information Act 5 U.S.C. § 552*

The recent rise of the Mugshot Racket is arguably an unintended consequence of liberal public record legislation enacted in the latter half of the twentieth century. The movement toward a more open government began with the creation of the Special Subcommittee on Government Information in 1955.⁴⁶ Headed by Congressman John E. Moss, the Subcommittee's goal was to reverse the growing trend in Washington to withhold information.⁴⁷ Throughout the ten years

41. Michael H. Armacost, *Foreword* to FRED H. CATE, *PRIVACY IN THE INFORMATION AGE*, at vii, vii (1997).

42. See FREDERICK S. LANE, *AMERICAN PRIVACY: THE 400-YEAR HISTORY OF OUR MOST CONTESTED RIGHT* 234 (2009). The author states:

Any individual can make what seems to be a rational decision to post personal information to a Web site The reality is that most people don't realize how little control they retain over the information they post on the Web, whether on a social networking site or their personal Web site. As many, many people have discovered, it is far too easy for information to be copied from one location on the Web to another or to be spread around the globe in a seemingly endless string of forwarded e-mails.

Id.

43. See *id.* ("Not only is it essentially impossible for someone to control the information that he or she posts to the Web, it is increasingly difficult to track, let alone control, the information that others post.").

44. Recent Cases, *Doe v. Myspace, Inc.*, 474 F. Supp. 2d 843 (W.D. Tex. 2007), 121 HARV. L. REV. 930, 936 (2008) (noting that "the speed of the Internet's development outpaces that of congressional legislation").

45. See *id.*

46. See MICHAEL R. LEMOV, *PEOPLE'S WARRIOR: JOHN MOSS AND THE FIGHT FOR FREEDOM OF INFORMATION AND CONSUMER RIGHTS* 53–54, 56–57 (2011).

47. See *id.* at 57. "[Moss] targeted what his staff called 'silly secrecy,' the refusal to disclose such vital data, as modern uses of the bow and arrow and the amount of peanut butter consumed by U.S. soldiers." *Id.* at 54.

between the establishment of the Subcommittee and the 1966 enactment of FOIA, Moss and his Subcommittee faced significant opposition to the proposed legislation.⁴⁸ When Congress finally passed FOIA, the stated purpose was to provide private citizens with greater access to “the government’s inner-workings.”⁴⁹ Specifically, FOIA obligates “agencies of the federal government [to] make available to the public all written information in their files unless the withholding of the information can be authorized under one of the Act’s nine exemptions.”⁵⁰

Today, FOIA has been incorporated into the Administrative Procedure Act (APA).⁵¹ Congress drafted FOIA “to revise Section Three of the APA [which] was regarded as a withholding statute rather than a disclosure statute.”⁵² Much of § 3 contained ambiguous language. Significantly, § 3 did not contain a “remedy for wrongful withholding of information” by the government.⁵³ In contrast, FOIA clearly stipulates that “official information shall be made available ‘to the public,’ ‘for public inspection.’”⁵⁴ The nine exemptions presented in § 522(b) of FOIA “set up concrete, workable standards for determining whether particular material may be withheld or must be disclosed,” and FOIA provides aggrieved citizens “a speedy remedy in district courts, where ‘the court shall determine the matter de novo and the burden is on the agency to sustain its action.’”⁵⁵

These exceptions were included in FOIA to ensure that information requested by members of the public served a legitimate public

48. In 1955, the issue had not yet attracted much public attention, although the press had long since complained of the government’s refusal to provide access to documents. *See id.* at 56. Also playing heavily into the government’s reluctance to grant greater access to documents were national security concerns in light of the Cold War and the desire of the Department of Defense to restrict the public availability of information reflecting negatively on the war effort. *See id.* at 57. Lastly, Moss had to contend with the administration of President Lyndon Johnson, which greatly opposed the proposed legislation. *Id.* at 53.

49. Lauren Bemis, *Balancing a Citizen’s Right to Know with the Privacy of an Innocent Family: The Expansion of the Scope of Exemption 7(C) of the Freedom of Information Act Under National Archives & Records Administration v. Favish*, 25 J. NAT’L ASS’N ADMIN. L. JUDGES 507, 509 (2005).

50. GARY R. COOPER & ROBERT R. BELAIR, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRIVACY AND SECURITY OF CRIMINAL HISTORY INFORMATION: PRIVACY AND THE MEDIA 14 (1979). The exemptions are codified in 5 U.S.C. § 552(b) (2012).

51. *See* U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 754 (1989).

52. Bemis, *supra* note 49, at 509.

53. EPA v. Mink, 410 U.S. 73, 79 (1973), *superseded in part by statute*, Act of November 21, 1974, Pub. L. No. 93-502, 88 Stat. 1561, *as recognized in* NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 226 (1978).

54. *Id.*

55. *Id.* (quoting 5 U.S.C. § 552(a)(3)).

purpose.⁵⁶ Once a request is made, the government agency in possession of the records can decide whether to make them available or invoke one of the exceptions.⁵⁷ If the agency refuses to disclose the information, it must prove that the reason for retention satisfies one of the exceptions.⁵⁸ The party denied access may then pursue disclosure of the documents in court, where the matter would be reviewed *de novo*.⁵⁹

B. *Splitting the Circuits—The Scope of Exemption 7(C) and Privacy Rights in a Mugshot*

The nine exemptions codified in § 552(b) of FOIA protect both government agencies otherwise obligated to turn over records and the private individuals whose information is contained within those materials.⁶⁰ If the requested information fits within criteria of an exemption, then the records do not have to be disclosed.⁶¹ Exemption 7(C) relieves the government of its duty to disclose “records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy.”⁶²

The United States Supreme Court has established a three-part test to determine what constitutes an unwarranted invasion of personal privacy based upon the wording of Exemption 7(C).⁶³ The Court held that “an invasion is unwarranted where (1) the information sought implicates

56. Bemis, *supra* note 49, at 510.

57. *Id.*; see *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 121 (1980) (“Federal agencies . . . are granted discretion to refuse FOIA requests when the requested material falls within one of the nine statutory exemptions set forth in 5 U.S.C. § 552(b).”).

58. Bemis, *supra* note 49, at 510; accord *Milner v. Dep’t of Navy*, 131 S. Ct. 1259, 1262 (2011) (“FOIA thus mandates that an agency disclose records on request, unless they fall within one of nine exemptions.”); *Nat’l Ass’n of Gov’t Emps. v. Campbell*, 593 F.2d 1023, 1025–26 (D.C. Cir. 1978) (“The Freedom of Information Act requires subject federal agencies to release properly-requested information save to the extent that it is specifically exempted. The statutory exemptions are to be narrowly construed, and an agency opposing divulgence bears the burden of demonstrating that the material in issue falls with an exempted category.” (footnotes omitted)).

59. Bemis, *supra* note 49, at 510–11; accord *Cent. Platte Natural Res. Dist. v. U.S. Dep’t of Agric.*, 643 F.3d 1142, 1147 (8th Cir. 2011) (noting that district courts generally review FOIA complaints *de novo*).

60. Bemis, *supra* note 49, at 511.

61. See 5 U.S.C. § 552(b) (2012); *FTC v. Owens-Corning Fiberglas Corp.*, 626 F.2d 966, 971 (D.C. Cir. 1980) (noting that agencies who receive a FOIA request must release the material sought “unless it falls within an exemption found in the statute”).

62. *Id.* § 552(b)(7)(c) (emphasis added).

63. *Karantalis v. U.S. Dep’t of Justice*, 635 F.3d 497, 502 (11th Cir. 2011) (per curiam) (citing *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989)).

someone's personal privacy, (2) no legitimate public interest outweighs infringing the individual's personal privacy interest, and (3) disclosing the information 'could reasonably be expected to constitute an unwarranted invasion of personal privacy.'"⁶⁴ Part three of the test is essentially a balancing of the interests identified in parts one and two.⁶⁵

1. *United States Department of Justice v. Reporters Committee for Freedom of the Press*

While the Supreme Court has not yet had the opportunity to decide whether one has a privacy right in their mugshot, the Court has addressed the related issue of inherent privacy rights in other components of criminal records.⁶⁶ In *United States Department of Justice v. Reporters Committee for Freedom of the Press*, the Court decided whether a defendant had an inherent right to privacy in his FBI rap sheet.⁶⁷ Specifically, the Court addressed whether "the disclosure of the contents of such a file to a third party 'could reasonably be expected to constitute an unwarranted invasion of personal privacy' within the meaning of the Freedom of Information Act" Exemption 7(C).⁶⁸ Writing for the Court, Justice Stevens held that a defendant does have an inherent right to privacy in his FBI rap sheet.⁶⁹

Reporters Committee involved a CBS journalist and the Reporters Committee for Freedom of the Press's requesting the criminal records of members of a family suspected of executing illegal business contracts with a crooked Pennsylvania congressman.⁷⁰ The FBI denied the request, citing Exemption 7(C).⁷¹ The Court adopted a broad interpretation of the exemption, stating that it "encompasses any disclosure that 'could reasonably be expected to constitute' such an invasion."⁷² Employing this analysis, the Court stated that in

64. *Id.* (quoting *Reporters Comm. for Freedom of the Press*, 489 U.S. at 756).

65. *See id.* at 504.

66. *See Reporters Comm. for Freedom of the Press*, 489 U.S. at 751.

67. *Id.*

68. *Id.*

69. *Id.* at 780. Justice Stevens wrote:

Finally: The privacy interest in maintaining the practical obscurity of rap-sheet information will always be high. When the subject of such a rap sheet is a private citizen and when the information is in the Government's control as a compilation, rather than as a record of "what the Government is up to," the privacy interest protected by Exemption 7(C) is in fact at its apex while the FOIA-based public interest in disclosure is at its nadir.

Id.

70. *Id.* at 757.

71. *Id.* at 751, 757.

72. *Id.* at 756.

determining the exemption's applicability, courts must compare the privacy interests of keeping one's rap sheet confidential against the asserted public interest in disclosure.⁷³

In other words, although there is undoubtedly some public interest in anyone's criminal history, especially if the history is in some way related to the person's dealing with a public official or agency, FOIA's central purpose is to ensure that the *government's* activities be open to the sharp eye of public scrutiny, not that information about a *private citizen* locked away in a government warehouse be disclosed.⁷⁴ This decision was also based in part upon the Court's unwillingness to expand the scope of FOIA beyond what Congress intended.⁷⁵ That intention, as the Court has previously stated, is "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny."⁷⁶

If there is a right to privacy in one aspect of a person's arrest record, it stands to reason that there are privacy interests in others. At the federal level, the Tenth and Eleventh Circuit Courts of Appeal have interpreted *Reporters Committee* to find an inherent privacy right in mugshots.⁷⁷ Meanwhile, the Sixth Circuit has taken the opposite approach.⁷⁸

73. *Id.* at 762. In weighing these interests, Justice Stevens suggested that privacy rights are more likely to be violated when criminal records are archived in an easy-to-search database, due to a loss of obscurity. *Id.* at 764 ("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 throughout the country and a computerized summary located in a single clearinghouse of information.")

74. *Id.* at 774.

75. *See id.* at 775. Regarding Congress's intent, Justice Stevens further explained:

If respondents are entitled to have the FBI tell them what it knows about [the defendant's] criminal history, any other member of the public is entitled to the same disclosure There is, unquestionably, *some* public interest in providing interested citizens with answers to their questions But that interest falls outside the ambit of the public interest that the FOIA was enacted to serve.

Id.

76. *Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976) (quoting *Rose v. Dep't of the Air Force*, 495 F.2d 261, 263 (2d Cir. 1973)) (internal quotation marks omitted).

77. *See World Publ'g Co. v. U.S. Dep't of Justice*, 672 F.3d 825, 832 (10th Cir. 2012) (holding that "when the public interest is balanced against the privacy interest in a booking photo, [the appellant's] request would not further the purpose of the FOIA"); *Karantsalis v. U.S. Dep't of Justice*, 635 F.3d 497, 504 (11th Cir. 2011) (per curiam) (holding that "booking photographs . . . fall under Exemption 7(C) to the FOIA because they were gathered for law enforcement purposes and disclosing them would constitute an unwarranted invasion of . . . personal privacy").

78. *See Detroit Free Press, Inc. v. Dep't of Justice*, 73 F.3d 93, 98 (6th Cir. 1996) (holding that because the respondent's "FOIA request involved only mug shots of individuals who were

2. *Detroit Free Press, Inc. v. United States Department of Justice*

In 1996, the Detroit Free Press brought suit against the U.S. Marshals Service (USMS) of the Department of Justice (DOJ) after the DOJ denied the Detroit Free Press's FOIA request for the mugshots of eight federal prisoners.⁷⁹ The DOJ invoked Exemption 7(C) in defense of its decision not to disclose the photos.⁸⁰

On appeal, the Sixth Circuit listed three requirements for an agency to properly deny a request under Exemption 7(C).⁸¹ First, the requested records must be "compiled for law enforcement purposes."⁸² Next, "the release of the information by the federal agency must *reasonably* be expected to constitute an invasion of personal privacy."⁸³ Lastly, the "intrusion into private matters must be deemed 'unwarranted' after balancing the need for protection of private information against the benefit to be obtained by disclosure of information concerning the workings of components of our federal government."⁸⁴

While the Sixth Circuit found that mugshots fulfilled the first requirement, the court held they did not satisfy the remaining requirements.⁸⁵ The fact that the inmates had already been identified publicly by the USMS and had been seen in the courtroom factored heavily in the court's decision.⁸⁶ "[T]he indictees in this matter had already been identified by name by the federal government and their visages had already been revealed during prior judicial appearances. No *new* information that the indictees would not wish to divulge would, therefore, be publicized by release of the mug shots"⁸⁷ Moreover, the court noted that the publication of mugshots is desirable in some instances because publication can "serve to subject the government to public oversight."⁸⁸

already indicted, who had already made court appearances after their arrests, and whose names had already been made public in connection with an ongoing criminal prosecution . . . [the photos] could not reasonably be expected to constitute an unwarranted invasion of personal privacy").

79. *Id.* at 95.

80. *Id.* (noting that the DOJ "appropriately focused on two statutory exemptions" under FOIA, one of which was Exemption 7(C)).

81. *Id.* at 96.

82. *Id.* (quoting 5 U.S.C. § 552(b)(7)(C) (2012)) (internal quotation marks omitted).

83. *Id.*

84. *Id.*

85. *Id.* at 96–98.

86. *Id.* at 97.

87. *Id.*

88. *Id.* at 98. As an example, the court mentioned how a publicly disclosed mugshot of Rodney King could have notified the public of the conduct of Los Angeles police officers, had the infamous video not existed. *Id.*

The Sixth Circuit stands alone among the U.S. Circuit Courts in deciding that defendants have no inherent privacy interest in their mugshots.⁸⁹ Significantly, the court considered only the privacy rights that may be affected by the release of mugshots in an “ongoing criminal proceeding.”⁹⁰ Notably absent is any acknowledgment by the court that mugshots are created as a preliminary step in criminal investigations. The photo is taken after a suspect has been arrested but before any of the allegations leading to the arrest have been proven in court. In short, the Sixth Circuit failed to address the effect a mugshot can have on a defendant’s presumption of innocence, let alone its effect in the court of public opinion.⁹¹ Arguably by narrowing the scope of its decision, the Sixth Circuit implied that there are elevated privacy concerns if a person’s booking photo is made public before trial, after trial, or when an individual has been exonerated.⁹²

3. *Karantsalis v. United States Department of Justice*

Karantsalis v. United States Department of Justice also involved a request for mugshots from the USMS.⁹³ Just as it had in *Detroit Free Press*, the USMS invoked Exemption 7(C) and denied the request.⁹⁴ After determining that the agency conducted an adequate search for the requested records, the Eleventh Circuit held that the request satisfied the Supreme Court’s three-part test for determining whether an invasion of privacy had occurred and that the USMS properly withheld the mugshots under the exemption.⁹⁵

In applying the first part of the test, the Eleventh Circuit emphasized the assumption of guilt that the public generally associates with a booking photo:⁹⁶

89. *World Publ’g Co. v. U.S. Dep’t of Justice*, 672 F.3d 825, 828 (10th Cir. 2012).

90. *Detroit Free Press*, 635 F.3d at 97.

91. *See Karantsalis v. U.S. Dep’t of Justice*, 635 F.3d 497, 499, 503 (11th Cir. 2011) (per curiam).

92. *See Detroit Free Press*, 635 F.3d at 97 (“We need not decide today whether the release of a mug shot by a government agency would constitute an invasion of privacy in situations involving dismissed charges, acquittals, or completed criminal proceedings. Instead, we need resolve only the single issue of whether such disclosure in an ongoing criminal proceeding, in which the names of the defendants have already been divulged and in which the defendants themselves have already appeared in open court ‘could reasonably be expected to constitute an . . . invasion of personal privacy.’” (alteration in original) (quoting 5 U.S.C. § 552(b)(7)(C) (2012))).

93. *Karantsalis*, 635 F.3d at 499.

94. *Id.*

95. *Id.* at 502–04.

96. *Id.* at 503. While the court acknowledged that it had not yet considered the privacy interest in a mugshot, the court noted that it had previously mentioned that “mug shots carry a clear implication of criminal activity.” *Id.* at 503 (quoting *United States v. Hines*, 955 F.2d 1449, 1455 (11th Cir. 1992)) (internal quotation marks omitted).

[A] booking photograph is a unique and powerful type of photograph that raises personal privacy interests distinct from normal photographs. A booking photograph is a vivid symbol of criminal accusation, which, when released to the public, intimates, and is often equated with, guilt. Further, a booking photograph captures the subject in the vulnerable and embarrassing moments immediately after being accused, taken into custody, and deprived of most liberties.⁹⁷

The court also pointed out that, unlike criminal records in many states, USMS photos are not usually made available to the public.⁹⁸ Importantly, it deviated from the Sixth Circuit's analysis by asserting that an individual still has "a continuing personal privacy interest in preventing public dissemination of his booking photographs" that endures after one has been convicted in a criminal proceeding.⁹⁹

The court concluded that fulfilling the request would not serve a public interest protected by FOIA, stating that "the general curiosity of the public in [a defendant's] facial expression during his booking photographs is not a cognizable interest that would 'contribute significantly to public understanding of the operations or activities of government.'"¹⁰⁰ In light of this analysis, the court held that the defendants' privacy interests outweighed the public's interest and upheld the DOJ's refusal to hand over the photos.¹⁰¹

4. *World Publishing Co. v. United States Department of Justice*

The Tenth Circuit most recently considered the question of privacy rights in mugshots. Again, the case involved a demand for booking photos from the DOJ.¹⁰² Tulsa World, a newspaper owned by World Publishing Company, made a FOIA request to the USMS for pictures of six federal defendants who were awaiting trial.¹⁰³ Applying the Supreme Court's three-part test for Exemption 7(C), the court rejected the Sixth Circuit's interpretation and followed the Eleventh Circuit in

97. *Id.*

98. *Id.* The fact that the DOJ does not make these photos available implies that there are inherent privacy concerns associated with mugshots that the USMS takes into account. *See id.* at 499 (noting that the DOJ denied the request for mugshots because "they were gathered for law enforcement purposes and releasing them *would constitute an unwarranted invasion of . . . personal privacy*" (emphasis added)).

99. *Id.* at 503.

100. *Id.* at 504 (quoting *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 775 (1989)).

101. *Id.* at 504–05.

102. *World Publ'g Co. v. U.S. Dep't of Justice*, 672 F.3d 825, 826 (10th Cir. 2012).

103. *Id.*

finding that the defendants had important privacy interests in the photos.¹⁰⁴

The first part of the test was not in dispute.¹⁰⁵ In considering the second and third prongs of the test, the court identified the “stigmatizing effect” a mugshot can have on an individual.¹⁰⁶ In support of its decision, the Tenth Circuit also cited the negative connotations often associated with the pictures and reiterated that the USMS does not have a history of making mugshots available to the public.¹⁰⁷ Finally, the court rejected Tulsa World’s proffered public interest in disclosure and held that the proffered interest did not outweigh the individuals’ privacy interests in keeping the images from the public eye.¹⁰⁸

C. Circuit Decisions and the Mugshot Racket

Based upon the forgoing decisions, it would seem that the mugshot websites violate a privacy right. It is important to keep in mind that the Circuit Courts dealt only with the issue of a legitimate possessor of mugshots disclosing them to the media. Mugshot sites lift booking photos from law enforcement websites without the permission of federal or state agencies.¹⁰⁹ But worse, they take advantage of the general public’s curiosity and seek to profit from the past indiscretions of arrestees. In many cases, these arrestees have served or are serving their court-ordered punishment. In other instances the arrestees have been acquitted. In any event, they have already been judged by the criminal justice system. As these individuals attempt to move on with their lives, Mugshot Racket websites do nothing more than throw up roadblocks of embarrassment, ridicule, and, arguably, extortion.¹¹⁰

The privacy concerns cited by the Tenth and Eleventh Circuits when booking photos are made available to the media are magnified by the rise of mugshot websites. The visibility of a mugshot that appears on the first page of a Google search can understandably have a much greater “stigmatizing effect” on that individual than a mugshot given to a

104. *See id.* at 831–32.

105. *Id.* at 827.

106. *Id.* at 828 (quoting *Times Picayune Publ’g Corp. v. U.S. Dep’t of Justice*, 37 F. Supp. 2d 472, 477 (E.D. La. 1999)) (internal quotation marks omitted).

107. *Id.* at 828–29.

108. *Id.* at 832 (“[W]hen the public interest is balanced against the privacy interest in a booking photo, Tulsa World’s request would not further the purpose of the FOIA.”).

109. *See* Allen Rostron, *The Mugshot Industry: Freedom of Speech, Rights of Publicity, and the Controversy Sparked by an Unusual Type of Business*, 90 WASH. U. L. REV. 1321, 1323 (2013) (noting that Internet mugshot businesses use “screen-scraping programs” to copy mugshots from police department websites and post the copied mugshots on the businesses’ own websites).

110. *See id.* at 1324 (noting that mugshot businesses make money from those persons who are embarrassed enough of their mugshot that they “essentially pay to make them go away”).

member of the media for one-time publication.¹¹¹ Arguably, the Sixth Circuit's narrow holding does not apply to this context. *Detroit Free Press* only considered the privacy interests in booking photos during an ongoing criminal trial that had already been publicized.¹¹² The court was careful to note that its analysis would likely be different in situations involving the publication of mugshots before or after trial or if a defendant was acquitted.¹¹³ All of these scenarios are in some form present in the mugshot website context and thus support recognizing a privacy right in a mugshot.

II. PRIVACY AND THE PUBLIC RECORD IN FLORIDA

All states have followed FOIA's lead and passed laws ensuring varying degrees of openness in matters relating to public business and records.¹¹⁴ These laws require that the states and state agencies make this information available to the public.¹¹⁵ Laws pertaining to the accessibility of state public records are determined by each state.¹¹⁶ Florida provides a unique example.¹¹⁷

A. Florida's Very Public Record

Florida's longstanding tradition of guaranteeing free access to public records can be traced to 1909, when the Florida Legislature enacted Chapter 119 of the Florida Statutes.¹¹⁸ The current version of this statute defines public records as "all documents, papers, letters,

111. *World Publ'g Co.*, 673 F.3d at 828 (quoting *Times Picayune*, 37 F. Supp. 2d at 477) (internal quotation marks omitted).

112. *Detroit Free Press, Inc. v. Dep't of Justice*, 73 F.3d 93, 97 (6th Cir. 1996).

113. *See id.*

114. Daniel J. Solove, *Access and Aggregation: Public Records, Privacy and the Constitution*, 86 MINN. L. REV. 1137, 1161 (2002) ("Today, all fifty states have open records statutes, a majority of which are modeled after the FOIA."); *see State Sunshine Laws*, BALLOTEDIA, http://ballotpedia.org/State_sunshine_laws (last visited May 19, 2014) (supplying comparisons and descriptions of each state's public records laws).

115. *State Sunshine Laws*, *supra* note 114; *see* Michele Estrin Gilman, "Charitable Choice" and the Accountability Challenge: Reconciling the Need for Regulation with the First Amendment Religion Clauses, 55 VAND. L. REV. 797, 819–20 (2002) (noting that "freedom of information acts" and sunshine laws make government files and agency meetings available to the public).

116. *See* Public Records: Availability of Arrest Records, 1977 Fla. Op. Att'y Gen. 269, 270, available at 1977 WL 26639, at *2.

117. The legislation differs from state to state in identifying who may request public records. Florida Statutes § 119.01(1) provides that "all state, county, and municipal records are open for personal inspection and copying by any person." FLA. STAT. ANN. § 119.01(1) (West, Westlaw through ch. 272 of 2013 Reg. Sess. of the 23rd Legis.).

118. *See Open Government – The "Sunshine" Law*, OFF. OF THE ATTORNEY GEN. OF FLA. PAM BONDI, <http://myfloridalegal.com/pages.nsf/Main/DC0B20B7DC22B7418525791B006A54E4> (last visited May 19, 2014).

maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.”¹¹⁹ Today, Florida’s Sunshine Law is codified in Chapter 286 of the Florida Statutes.¹²⁰

Any interested party can obtain these records.¹²¹ According to the Florida Constitution, anyone can “inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution.”¹²² This section also states that “[t]he legislature . . . may provide by general law passed by a two-thirds vote of each house for the exemption of records from the requirements of subsection (a).”¹²³ Thus, while disclosure is usually granted pursuant to a public records request, the Constitution permits exemptions by subsequent legislation.¹²⁴

The Florida Legislature has chosen to exempt certain law enforcement records from disclosure if the information is considered “active.”¹²⁵ Specifically, Florida law enforcement records that the

119. FLA. STAT. ANN. § 119.011(12).

120. *Id.* § 286.011(1). The statute reads in pertinent part:

All meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision, except as otherwise provided in the Constitution, including meetings with or attended by any person elected to such board or commission, but who has not yet taken office, at which official acts are to be taken are declared to be public meetings open to the public at all times, and no resolution, rule, or formal action shall be considered binding except as taken or made at such meeting. The board or commission must provide reasonable notice of all such meetings.

Id.

121. Cheryl Cooper, *Sending the Wrong Message: Technology, Sunshine Law, and the Public Record in Florida*, 39 STETSON L. REV. 411, 420 (2010); see also FLA. STAT. ANN. § 119.01(1) (“It is the policy of this state that all state, county, and municipal records are open for personal inspection and copying by any person. Providing access to public records is a duty of each agency.”).

122. FLA. CONST. art. I, § 24(a).

123. *Id.* art. I, § 24(c).

124. See *Rios v. Direct Mail Express, Inc.*, 435 F. Supp. 2d 1199, 1203 (S.D. Fla. 2006) (emphasizing that “the Florida Constitution creates a right of access to public records unless the records in question have been specifically exempted or made confidential”).

125. See FLA. STAT. ANN. § 119.071(2)(c)(1) (stating that “[a]ctive criminal intelligence information and active criminal investigative information are exempt from . . . s. 24(a), Art. I of the State Constitution”).

statute defines as “criminal intelligence information”¹²⁶ or “criminal investigative information”¹²⁷ are exempt from public disclosure if the records are “active.”¹²⁸

Certain information included in arrest reports is statutorily excluded from the definition of criminal intelligence and investigative information, including the time, date, location, and nature of the reported crime and arrest; the specific crime charged; and the “name, sex, age, and address of a person arrested.”¹²⁹ This information is considered part of the public record in Florida and is generally accessible.¹³⁰ The Attorney General of Florida has stated that the state does not consider arrest reports to be exempt from public disclosure.¹³¹ These records can be obtained without identifying any specific or legitimate purpose.¹³² Accordingly, it is quite easy to obtain criminal records in Florida.

To acquire criminal history reports in Florida, the Florida Department of Law Enforcement (FDLE) charges the general public a fee of \$24.¹³³ In many cases, however, local Florida law enforcement agencies do not charge a fee to obtain records for recently arrested

126. *Id.* § 119.011(3)(a) (defining “criminal intelligence information” as “information with respect to an identifiable person or group of persons collected by a criminal justice agency in an effort to anticipate, prevent, or monitor possible criminal activity”).

127. *Id.* § 119.011(3)(b) (defining “criminal investigative information” as “information with respect to an identifiable person or group of persons compiled by a criminal justice agency in the course of conducting a criminal investigation of a specific act or omission”).

128. *Id.* § 119.071(2)(c)(1); *see State v. Kokal*, 562 So. 2d 324, 326 (Fla. 1990) (holding that criminal investigative information is deemed active until conviction); *Kight v. Dugger*, 574 So. 2d 1066, 1068 (Fla. 1990) (reiterating the position stated in *State v. Kokal* that “criminal investigative information and litigation do not remain active after a conviction and sentence becomes final on direct appeal”).

129. FLA. STAT. ANN. § 119.011(3)(c)(1)–(4).

130. Public Records Law: Applicability to Crime and Arrest Records, 1980 Fla. Op. Att’y Gen. 241, 243, *available at* 1980 WL 350652, at *3 (“[E]ven under the common law, crime and arrest reports generally were held to be public records subject to public inspection . . . [N]either criminal intelligence information nor criminal investigative information includes crime and arrest reports.”).

131. *Id.* (“The Public Records Law nowhere expressly exempts or refers to police crime and arrest reports . . . [C]riminal intelligence information . . . relates to intelligence information collected generally in an effort to anticipate criminal activity. . . . [B]ecause [arrest reports] clearly relate to *specific* criminal acts or omissions, [they] could not be considered criminal intelligence information.” (internal quotation marks omitted)).

132. Public Records: Availability of Arrest Records, *supra* note 116, at 271, 1977 WL 26639, at *3 (“It has been consistently held that Ch. 119, F.S., does not require a citizen to demonstrate a particular or special interest in a record as a condition to obtaining access to public documents . . . [M]ere curiosity or commercial purposes do not vest in either the courts or the custodian discretion to deny inspection.”).

133. *See Obtaining Criminal History Information*, FLA. DEP’T L. ENFORCEMENT, <http://www.fdle.state.fl.us/content/getdoc/2952da22-ba08-4dfc-9e45-2d7932a803ea/Obtaining-Criminal-History-Information.aspx> (last visited May 19, 2014).

individuals.¹³⁴ Under Florida's broad public access laws, these agencies publish booking photos and arrest records on their websites and provide access to the records free of charge.¹³⁵ Some counties purport to require personal information such as a name or date of arrest to locate a specific inmate.¹³⁶ Leaving the search field blank or entering simple information such as a date of arrest, however, often produces a list of arrests complete with identification information, charge, and booking photo.¹³⁷ Other county law enforcement websites skip this formality and simply provide access to a list of recent arrestees without requiring a preliminary search.¹³⁸ These practices make it very easy for mugshot websites to copy arrest records and mugshots from law enforcement websites and to repost the mugshots on their own sites.¹³⁹ The unanswered question is whether this new use of public records intrudes upon the right to privacy in Florida.

B. Privacy in Florida

Analysis of Florida's right to privacy must begin with a brief look at federal privacy protection. Interestingly, there is no specifically defined right to privacy in the United States Constitution.¹⁴⁰ Rather, at the federal level, the U.S. Supreme Court has stated that this right can be found within certain "penumbras" of the Bill of Rights that "create zones of privacy."¹⁴¹ Beyond the protection afforded by these "penumbras," the Supreme Court has also stated that "the protection of a person's *general* right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left

134. See, e.g., *Arrest Search*, BROWARD SHERIFF'S OFF., <http://sheriff.org/apps/arrest> (last visited May 19, 2014) (allowing visitors to search for inmates currently incarcerated in the Broward Sheriff's Office jail by name and for no charge); see also John Dorschner, *Mugshots: The Hot New Internet Business*, MIAMI HERALD (Nov. 3, 2012), <http://www.miamiherald.com/2012/11/03/3081517/mugshots-the-hot-new-internet.html>.

135. See Dorschner, *supra* notes 114–20.

136. See, e.g., *Arrest Search*, *supra* note 134; *Arrest Inquiry*, HILLSBOROUGH COUNTY SHERIFF'S OFF., <http://www.hcso.tampa.fl.us/PublicInquiry/ArrestInquiry> (last visited May 19, 2014) (allowing visitors to search for arrests in Hillsborough County by date alone).

137. See *supra* note 136 and accompanying text.

138. Alachua County posts a list of recent arrest records on its website without requiring an interested party to search for a specific inmate. See *Alachua County Jail Inmate Lookup*, EIGHTH JUD. CIRCUIT, <http://oldweb.circuit8.org/inmate.html> (last visited May 19, 2014) (click "List of All Inmates"). Brevard County also follows this practice. See *Inmate Population*, BREVARD COUNTY SHERIFF'S OFF., <http://www.brevardsheriff.com/dar/inmatephotos> (last visited May 19, 2014).

139. See *supra* notes 12–15 and accompanying text.

140. Ben F. Overton & Katherine E. Giddings, *The Right of Privacy in Florida in the Age of Technology and the Twenty-First Century: A Need for Protection from Private and Commercial Intrusion*, 25 FLA. ST. U. L. REV. 25, 32 (1997).

141. See *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

largely to the law of the individual States.”¹⁴² Thus, the states may freely provide more substantial and comprehensive privacy rights than federal law affords.¹⁴³ Florida has chosen to establish a right to privacy that “embraces more privacy interests, and extends more protection to the individual in those interests, than does the federal Constitution.”¹⁴⁴

Florida first recognized a constitutionally protected right to privacy in November 1980 when citizens throughout the state voted to approve a privacy amendment proposed that year by the Constitution Revision Commission.¹⁴⁵ Before the provision was ratified, claims that the state had invaded a citizen’s right of privacy were based upon theories such as infringement upon the claimant’s “right to be let alone.”¹⁴⁶ This right was first articulated in an article written by Samuel D. Warren and Louis Brandeis in 1890¹⁴⁷ and was later argued by then-Justice Brandeis in his famous dissenting opinion in *Olmstead v. United States*.¹⁴⁸

The provision incorporated this “right to be let alone” into the

142. *Katz v. United States*, 389 U.S. 347, 350–51 (1967).

143. *See In re T.W.*, 551 So. 2d 1186, 1191 (Fla. 1989) (“While the federal Constitution traditionally shields enumerated and implied individual liberties from encroachment by state or federal government, the federal Court has long held that state constitutions may provide even greater protection.”).

144. *Id.* at 1192.

145. *Overton & Giddings, supra* note 140, at 26, 34–35; *see also Winfield v. Div. of Pari-Mutuel Wagering*, 477 So. 2d 544, 547 (Fla. 1985).

146. *See, e.g., State v. Eitel*, 227 So. 2d 489, 491 (Fla. 1969) (upholding a Florida statute requiring motocyclists to wear protective head gear when the claimants argued that it “unconstitutionally infringed [their] right to be let alone”).

147. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 205 (1890). As articulated by Professor Warren and Justice Brandeis:

[T]he protection afforded to thoughts, sentiments, and emotions, expressed through the medium of writing or of the arts, so far as it consists in preventing publication, is merely an instance of the enforcement of the more general right of the individual to be let alone. It is like the right not to be assaulted or beaten, the right not to be imprisoned, the right not to be maliciously prosecuted, the right not to be defamed.

Id.

148. 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). Justice Brandeis wrote:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man’s spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.

Id.

Florida Constitution as an amendment codified in article I, section 23.¹⁴⁹ The amendment states that “[e]very natural person has the right to be let alone and free from governmental intrusion into the person’s private life except as otherwise provided herein. This section shall not be construed to limit the public’s right of access to public records and meetings as provided by law.”¹⁵⁰

1. The Florida Supreme Court’s Interpretation of Article I, Section 23

The Florida Supreme Court has had many opportunities to define the scope of Florida’s “right to be let alone” since 1980. For example, in *Florida Board of Bar Examiners Re: Applicant*,¹⁵¹ the Florida Supreme Court addressed whether a requirement that a Florida Bar applicant disclose certain medical information “relevant to [his] good moral character and fitness to perform the responsibilities of an attorney” constituted a violation of the applicant’s right of privacy under the Florida Constitution.¹⁵² In answering this question, the court stated that when considering an alleged violation of Florida’s right to privacy, the “privacy right . . . must be considered in the context in which it is asserted and may not be considered wholly independent of those circumstances.”¹⁵³ Although the Florida Supreme Court had not yet established a standard of review for intrusions upon Florida’s right to privacy when this case was decided, it found the state’s interest in requiring the disclosures to be compelling “since mental fitness and emotional stability are essential to the ability to practice law in a manner not injurious to the public.”¹⁵⁴ Thus, whether an alleged intrusion upon a citizen’s privacy actually constitutes a violation of the Florida Constitution depends in large part on the circumstances.

The Florida Supreme Court promulgated a standard of review for constitutional challenges to the privacy amendment in 1985 in *Winfield v. Division of Pari-Mutuel Wagering*.¹⁵⁵ In *Winfield*, the Department of Business Regulation subpoenaed certain banking records and requested that the banks providing the information not notify the petitioners that their records had been disclosed.¹⁵⁶ Noting that the drafters of article I, section 23 had intentionally omitted certain limiting words from the final version of the amendment, the court determined that the

149. FLA. CONST. art I, § 23.

150. *Id.*

151. 443 So. 2d 71 (Fla. 1983).

152. *Id.* at 72–73.

153. *Id.* at 74.

154. *See id.* at 74–75.

155. *See* 477 So. 2d 544, 547 (Fla. 1985).

156. *Id.* at 546.

amendment was intended to be “much broader in scope than that of the Federal Constitution.”¹⁵⁷ Accordingly, the court stated that the state could infringe a citizen’s right to privacy by “demonstrating that the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means.”¹⁵⁸ In other words, the Florida Supreme Court applies a strict scrutiny-like test to invasions upon the right to privacy.¹⁵⁹

Employing this standard, the Florida Supreme Court has declared many state intrusions upon Florida’s right to privacy to be constitutional. While many of the following cases do not deal directly with privacy rights associated with criminal records or mugshots, they are instructive to understanding the contours of Florida’s right to privacy. For example, the Florida Supreme Court has held that the state has a compelling interest justifying otherwise impermissible intrusions in criminal investigations if the state “demonstrates a clear connection between the illegal activity and the person whose privacy would be invaded.”¹⁶⁰ The court has further held that the state has a compelling interest in preventing the distribution of “obscene” materials even though one can legally possess these materials in their home¹⁶¹ and that defendants cannot claim a violation of their privacy right when they are prosecuted for such actions.¹⁶² The court has also held that government entities can pass regulations requiring the disclosure of private aspects of an individual’s life when the entity has demonstrated a significant financial interest in obtaining the disclosure.¹⁶³ Finally, the Florida Supreme Court has declared that Florida’s right to privacy protects an incompetent, terminally ill patient’s right to provide in a testamentary

157. *Id.* at 548.

158. *Id.* at 547.

159. *See* N. Fla. Women’s Health & Counseling Servs., Inc. v. State, 886 So. 2d 612, 626 (Fla. 2002) (noting that Florida’s right of privacy warrants strict scrutiny review because it is a fundamental right).

160. *See* Shaktman v. State, 553 So. 2d 148, 152 (Fla. 1989) (upholding the placement of pen registers on certain telephone lines when the state can “show a reasonable founded suspicion that the targeted telephone line was being used for a criminal purpose” (footnote omitted)).

161. *See* Stall v. State, 570 So. 2d 257, 262 (Fla. 1990) (“The right to possess privately does not equate to the right to sell publicly There is no indication that the drafters of article I, section 23 meant to broaden the right of privacy as it relates to obscene materials”).

162. *Id.* at 262–63.

163. *See* City of N. Miami v. Kurtz, 653 So. 2d 1025, 1027–29 (Fla. 1995) (holding that the City of North Miami could require job applicants to disclose their smoking habits for the twelve months immediately preceding applying to work for the city because the city demonstrated that those who abstain from smoking for one year are much less likely to resume smoking, and medical expenses incurred by nonsmoking employees was significantly lower than those for employees that smoked).

document for the termination of artificial life-sustaining treatment.¹⁶⁴

Interpreting the supreme court's ruling on an individual's right to end life-sustaining treatment, Florida's Second District Court of Appeal held that this right existed even when not stated in a testamentary document.¹⁶⁵ Additionally, the court found that in situations where surviving family members cannot agree on whether treatment should be terminated for an incompetent loved one who has not articulated her wishes, it is not a violation of the patient's right to privacy for Florida courts to decide the matter.¹⁶⁶

On the other hand, the Florida Supreme Court has also found certain intrusions upon Florida's right to privacy to be unconstitutional. For example, in *Rasmussen v. South Florida Blood Service, Inc.*,¹⁶⁷ the court found that the privacy interests of blood donors outweighed a plaintiff's subpoena *duces tecum* requesting documents in the possession of the blood service that contained information identifying its blood donors.¹⁶⁸ The plaintiff's estate requested the documents in an attempt to determine whether any of the donors from whom the plaintiff received a blood transfusion had been infected with autoimmune deficiency virus (AIDS), which had caused the plaintiff's death.¹⁶⁹ The court denied the request because the subpoena *duces tecum* did not limit the use of the information once it had been disclosed and because the "[d]isclosure of donor identities in any context involving AIDS could be extremely disruptive and even devastating to the individual donor," which could result in fewer people deciding to donate blood.¹⁷⁰ Thus, the supreme court recognized that article I, section 23 "was intended to protect the right to determine whether or not sensitive information about oneself will be disclosed to others."¹⁷¹

Furthermore, in *In re T.W.*,¹⁷² the Florida Supreme Court concluded that Florida's privacy amendment protected a woman's right to terminate her pregnancy¹⁷³ and that this right also applied to unwed

164. See *John F. Kennedy Mem'l Hosp., Inc. v. Bludworth*, 452 So. 2d 921, 923–24, 926 (Fla. 1984).

165. See *Corbett v. D'Alessandro*, 487 So. 2d 368, 370–72 (Fla. Dist. Ct. App. 1986).

166. See *In re Guardianship of Schiavo*, 916 So. 2d 814, 818 (Fla. Dist. Ct. App. 2005) (holding that "[i]n circumstances such as these, when families cannot agree, the law has opened the doors of the circuit courts to permit trial judges to serve as surrogates or proxies to make decisions about life prolonging procedures").

167. 500 So. 2d 533 (Fla. 1987).

168. *Id.* at 534.

169. *Id.*

170. *Id.* at 537–38.

171. *Id.* at 536.

172. 551 So. 2d 1186 (Fla. 1989).

173. *Id.* at 1192 ("We can conceive of few more personal or private decisions concerning one's body that one can make in the course of a lifetime . . .").

minors.¹⁷⁴ Specifically, the court stated that Florida's interest in restricting a woman's right to choose is not a compelling state interest until the fetus becomes viable, or "when the fetus becomes capable of meaningful life outside the womb through standard medical measures."¹⁷⁵

2. Article I, Section 23 and Access to Public Records

Despite the strict scrutiny standard,¹⁷⁶ the importance of determining the context in which the alleged intrusion has occurred,¹⁷⁷ and the fact that the amendment provides a safeguard against unwanted public disclosures of sensitive information,¹⁷⁸ it might appear that republishing mugshots on private websites in the manner previously described does not violate article I, section 23 of the Florida Constitution.¹⁷⁹ The second sentence of article I, section 23 explicitly states that it "shall not be construed to limit the public's right of access to public records and meetings as provided by law."¹⁸⁰ To those perpetrating the Mugshot Racket, an individual's privacy rights are not infringed when their arrest records are republished on the Internet, as this information is freely available under the state's public records laws concerning criminal records.¹⁸¹ In short, one could argue that the protection that the Florida Constitution provides to a "person's private life" does not extend to information available to the public under state law. Although the Florida Supreme Court has not yet had the opportunity to weigh in on the merits of this argument, it has in the past resolved conflicts arising from Florida's dual commitment to open government and the right to privacy. The following cases can be instructive in predicting how the supreme court would rule if presented with the issue. These conflicts arose in cases dealing with the sealing of court records, private information contained in discoverable materials, and the release of crime scene and autopsy photos and videos.

In *Barron v. Florida Freedom Newspapers, Inc.*,¹⁸² which considered whether to seal the record in a divorce proceeding, the Florida Supreme Court established a six-part test for sealing "court

174. *Id.* at 1193 ("The next question to be addressed is whether this freedom of choice concerning abortion extends to minors. We conclude that it does, based on the unambiguous language of the amendment: The right of privacy extends to '[e]very natural person.'" (alteration in original)).

175. *Id.* at 1193–94.

176. *See supra* notes 155–59 and accompanying text.

177. *See supra* notes 151–54 and accompanying text.

178. *See supra* notes 167–71 and accompanying text.

179. *See supra* notes 12–15 and accompanying text.

180. FLA. CONST. art I, § 23.

181. *See supra* notes 119–32 and accompanying text.

182. 531 So. 2d 113 (Fla. 1988).

proceedings and records.”¹⁸³ After noting that “[p]ublic trials are essential to the judicial system’s credibility in a free society,”¹⁸⁴ the court found that in certain situations, Florida’s privacy amendment provided a “constitutional basis for closure.”¹⁸⁵ Closure is appropriate when motions to seal a record are “necessary . . . (e) to avoid substantial injury to innocent third parties . . . or (f) to avoid substantial injury to a party by disclosure of matters protected by a common law or privacy right not generally inherent in the specific type of civil proceeding sought to be closed.”¹⁸⁶ The court also held that, before sealing a record, a court must conclude that there are no reasonable alternatives to closure and that the court must use “the least restrictive closure necessary to accomplish its purpose.”¹⁸⁷ The supreme court ultimately held that the petitioner’s request for sealing the records in this case did not satisfy this standard.¹⁸⁸

Using the *Barron* test, the Florida Supreme Court later declined to extend Florida’s right to privacy “to protect the names and addresses contained in public records”¹⁸⁹ which had become part of the public record according to state discovery procedures.¹⁹⁰ In *Post-Newsweek Stations, Florida Inc. v. Doe*, many “John Does” filed a motion to prevent discovery materials from being released to the public.¹⁹¹ The materials at issue were seized during the search of a home involved in a prostitution ring and contained the “names and addresses, and other lists stating the names, amounts paid, and sexual notations regarding [the defendant’s] customers.”¹⁹² The customers identified in these items were the “John Does” who challenged release of the records.¹⁹³ The court limited its ruling to the names and addresses of the individuals listed in the seized materials and stopped short of holding that the right to privacy could not be invoked if the materials contained more sensitive information.¹⁹⁴ The decision to allow the release was also

183. *Id.* at 118.

184. *Id.* at 116.

185. *Id.* at 118. The court also noted that “it is generally the content of the subject matter rather than the status of the party that determines whether a privacy interest exists and closure should be permitted.” *Id.*

186. *Id.*

187. *Id.*

188. *Id.* at 119.

189. *See Post-Newsweek Stations, Fla. Inc. v. Doe*, 612 So. 2d 549, 552 (Fla. 1992).

190. Under Florida law, pretrial discovery material becomes a public record once the prosecutor hands it over to the defendant in a criminal case. *See Fla. Freedom Newspapers, Inc. v. McCrary*, 520 So. 2d 32, 34 (Fla. 1988).

191. *Post-Newsweek Stations*, 612 So. 2d at 550.

192. *Id.*

193. *Id.*

194. *See id.* at 552; *id.* at 552 n.3 (“Because the trial court has not conducted an in-camera review of any information other than the names and addresses and because the trial court has not

based in part upon the fact that the “John Does” had willingly participated in the prostitution ring.¹⁹⁵

Perhaps the most intriguing clashes between the right to privacy and the right to access public records in Florida have involved the public’s desire to view highly sensitive crime scene and autopsy photographs or videos. Interestingly, Florida courts have consistently applied Florida’s privacy right to block public release of these types of records.

Florida’s Eighth Judicial Circuit Court in Alachua County addressed this issue in one of the state’s most famous murder cases, *State v. Rolling*.¹⁹⁶ In *Rolling*, the State Attorney, acting on behalf of the families of victims murdered by serial killer Danny Rolling, petitioned the court to prevent the public disclosure of crime scene and autopsy pictures and videotapes that had been created during the course of the investigation.¹⁹⁷ These materials were public records because they had been “taken by officers of the State in the course of the investigation,” and because they were made available to the defense during pretrial discovery.¹⁹⁸ The pictures and videotapes were highly disturbing and depicted the “nude and mutilated bodies of [Rolling’s] victims.”¹⁹⁹ The families argued that public release of these documents would cause them future distress and injury in violation of their right to privacy.²⁰⁰

Citing *Post-Newsweek Stations* and utilizing the *Barron* test, the court concluded that the relatives of the deceased victims had a constitutionally protected privacy right that would be violated if the photos were released, although this right was less weighty than that which the victims would possess if they had survived.²⁰¹ The court balanced “the public’s right to know against the residual privacy interest of the victim’s relatives,”²⁰² and came up with a unique solution to

ruled on the disclosure of any other information, we do not address whether that information should be released. However, we note that the details of an individual’s life dealing with noncriminal intimate associations fall within a protected zone of privacy.”)

195. *Id.* at 552–53 (“Because the Does’ privacy rights are not implicated when they participate in a crime, we find that closure is not justified under *Barron*.”).

196. No. 91-3832 CF A, 1994 WL 722891 (Fla. Cir. Ct. July 27, 1994).

197. *Id.* at *1.

198. *Id.* at *2.

199. *See id.* at *3.

200. *Id.* at *1.

201. *See id.* at *5 (“The right is less weighty, however, than would be the right to privacy held by the victims themselves, and is further attenuated by the distance of the relatives from the victims and from the event itself.”).

202. *Id.* The court noted that the public’s right to access the information must be balanced against the intrusion on the families’ fundamental right to privacy. *Id.* Specifically, the court balanced four factors:

- a. The relevance of disclosure of the material to furthering public evaluation of governmental accountability;

further both interests. The court permitted members of the public to view the photos and videos in the office of the records custodian but prohibited the public from copying or removing them.²⁰³

In *Earnhardt v. Volusia County*,²⁰⁴ the Florida Circuit Court for the Seventh Judicial Circuit addressed a similar issue concerning the release of autopsy photos of famous racecar driver Dale Earnhardt.²⁰⁵ On February 22, 2001, three days after her husband died in a crash at the Daytona International Speedway, Teresa Earnhardt obtained a temporary injunction preventing the release of autopsy photos taken by the Volusia County Medical Examiner during the investigation of Mr. Earnhardt's death.²⁰⁶ On February 23, the Orlando Sentinel requested the autopsy records, and the medical examiner who prepared the autopsy records denied the request.²⁰⁷ Thereafter, members of the media, including the Orlando Sentinel and a website owner that had published autopsy photos of other deceased racecar drivers, challenged the injunction.²⁰⁸ Considering the graphic nature of the photographs and the fact that they would be disseminated worldwide over the Internet if released, the court upheld the injunction and stated that “[a]utopsy photographs are different in character than other documents retained by the government and, in spite of the sophisticated arguments in favor of their open release, they are the ‘business’ of very few people.”²⁰⁹ In support of its ruling, the court noted that the photographs did not provide any information that was not already available in the publicly available autopsy report.²¹⁰ Florida's Fifth District Court of Appeal upheld the circuit court's holding in *Campus Communications, Inc. v.*

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- b. The seriousness of the intrusion into the close relatives' right to privacy by disclosure of the material;
 - c. The availability, from other sources . . . of material which is equally relevant to the evaluation of the same governmental action but is less intrusive on the right to privacy;
 - d. The availability of alternatives other than full disclosure which might serve to protect both the interests of the public and the interest of the victims.

Id.

203. *Id.* at *6 (“This remedy permits the public and media to independently evaluate what the jurors saw, close-up as they saw it, and to reach whatever independent conclusion they deem proper. It permits interested members of the public and the media access to the material sufficient to enable them to carry out the oversight function envisioned by Florida's Public Records Act.”).

204. No. 2001-30373-CICI, 2001 WL 992068 (Fla. Cir. Ct. July 10, 2001).

205. *Id.* at *3.

206. *Id.* at *1–2.

207. *Id.* at *2.

208. *Id.*

209. *Id.* at *2–5.

210. *Id.* at *4.

Earnhardt.²¹¹ The Fifth District Court of Appeal also upheld the constitutionality of a statute passed during the litigation, which, pursuant to article I, section 24, specifically and retroactively barred the release of autopsy photographs, videos, and audio to the general public without a court order.²¹²

Most recently, Florida's Ninth Judicial Circuit Court in Orange County considered whether to release photos and video footage of SeaWorld trainer Dawn Brancheau's death.²¹³ Mrs. Brancheau was killed after being pulled into the water by an orca during a live performance on February 24, 2010.²¹⁴ SeaWorld's cameras captured videos of the events occurring after the victim was pulled into the pool, and SeaWorld made the footage available to the Orange County Sheriff's Office.²¹⁵ Members of Mrs. Brancheau's family successfully obtained an injunction preventing the release of this video and other death scene photos and videos generated during the investigation.²¹⁶ Disclosure of materials created during the autopsy was not at issue in the case.²¹⁷

Citing *Post-Newsweek*, *Barron*, *Earnhardt*, and *Rolling*, and noting that there was no ongoing criminal investigation in the case, the court held that the privacy concerns of the Brancheau family outweighed any interest the public might have in viewing the materials.²¹⁸ The court took special note of the disturbing and graphic content of the photos and videos, that they would be widely dispersed over the Internet, and that both the medical examiner and the sheriff's office had produced reports that provided "less intrusive means to evaluate government performance

211. See 821 So. 2d 388, 391, 402 (Fla. Dist. Ct. App. 2002) ("[W]hile our constitution does not catalogue every matter that one can hold as private, autopsy photographs which display the remains of a deceased human being is certainly one of them."). The court utilized the same four-part balancing test first articulated by the circuit court in *State v. Rolling*. Compare *id.* at 401, with *supra* note 202. The Florida Legislature later codified this test. See FLA. STAT. ANN. § 406.135(4)(b) (West, Westlaw through Ch. 272 of the 2013 Reg. Sess. of the 23rd Legis.).

212. See *Campus Commc'ns*, 821 So. 2d at 392, 401, 402–03 (upholding FLA. STAT. ANN. § 406.135(3), which gives permission to obtain records of photographs, video, and audio of autopsies only to the agent of a relative and a local government agency and disallows the custodian of record from permitting any other person from obtaining autopsy records without permission from the decedent's relative). See generally *supra* notes 123–24 and accompanying text (discussing how the legislature may create such exceptions).

213. *Brancheau v. Demings*, No. 2010-CA-6673, 2010 WL 7971871, at 2–3, 10 (Fla. Cir. Ct. Dec. 15, 2010) (order granting permanent injunction).

214. *Id.* at 5.

215. *Id.* at 6.

216. *Id.* at 2–3.

217. See *id.* at 2, 6 (noting that SeaWorld's videos depicting Mrs. Brancheau's death and the subsequent attempts to rescue and recover her body were at issue).

218. *Id.* at 10, 13, 14.

in this case.”²¹⁹

These decisions clearly demonstrate Florida’s recognition that there are privacy interests inherent in certain sensitive public records that may outweigh the public’s right to view them. The open question is whether this newly acknowledged privacy interest in autopsy and graphic crime scene photographs extends to other public records such as mugshots.

3. How Florida Courts Might Apply Article I, Section 23 to Mugshots

As the United States Courts of Appeals for the Sixth, Tenth, and Eleventh Circuits have made clear, one has a strong privacy interest in their mugshot.²²⁰ Florida courts have not yet addressed this issue directly, but their decisions in cases involving public records other than autopsy and crime scene photos suggest that a Florida court is unlikely to extend Florida’s right to privacy to mugshots.

For example, in *Woodard v. Sunbeam Television Corp.*,²²¹ a school bus driver in Dade County, Florida sued a reporter for publishing a story detailing the bus driver’s past criminal history.²²² The report was based on information received from the Florida Attorney General’s Office and the Florida Department of Law Enforcement (FDLE). The report erroneously stated that the driver had been incarcerated for four years after being convicted for murder under a different name.²²³ In truth, the driver had been convicted of attempted murder and served two years of a four-year sentence.²²⁴ Even though the report was incorrect, the court noted that the press had a right to print “information they receive from government officials.”²²⁵ Additionally, the court stated that the reporter “had no duty to determine the accuracy of the information contained in the FDLE records before broadcasting it in his report.”²²⁶ The Third District Court of Appeal (DCA) upheld a summary judgment motion granted by the lower court in favor of Sunbeam.²²⁷

219. *Id.* at 14 (“[A]pplying the standards pronounced in *Barron* and *Doe*, and since used in *Rolling*, this Court finds as a matter of law that Plaintiff’s privacy interests outweigh any legitimate interest of the public in access to the Death Scene Photographs and Death Scene Videos at issue in this case.”).

220. *See supra* Section I.C.

221. 616 So. 2d 501 (Fla. Dist. Ct. App. 1993).

222. *Id.* at 502.

223. *Id.*

224. *Id.*

225. *Id.* (quoting *Ortega v. Post-Newsweek Stations, Fla., Inc.*, 510 So. 2d 972, 976 (Fla. Dist. Ct. App. 1987)) (internal quotation marks omitted) (noting that this right is honored even if the information gleaned from the government reports is incorrect as long as the reporting is “reasonable, accurate and fair”).

226. *Id.* at 503.

227. *Id.*

Additionally, in *Walker v. Florida Department of Law Enforcement*,²²⁸ the Third DCA affirmed the lower court's dismissal of a much stronger claim for invasion of privacy in favor of Florida's public records laws.²²⁹ There, a teacher sued FDLE for releasing records containing information about the teacher's prior criminal history.²³⁰ These documents had been previously sealed and expunged by court order.²³¹ The court held that the teacher "could not state a cause of action for invasion of privacy, as a matter of law, because the information allegedly disseminated by FDLE constituted a matter of legitimate public interest or concern."²³²

The treatment of these cases by Florida courts suggests that as public records made available by government officials, mugshots can fairly be republished even if the mugshots contain inaccurate information. *Walker* also clearly states that the right to privacy protected in article I, section 23 does not extend to public records that are of "legitimate public interest or concern,"²³³ which may well include mugshots.

In short, these cases demonstrate the state's strong commitment to maintaining openness and transparency in government dealings and matters of public interest. These sentiments are eagerly echoed by those operating the Mugshot Racket, who also claim they are honoring the state's dedication to openness by reposting booking photos and arrest information.²³⁴ In *Woodard* and *Walker*, however, the agencies disseminating the information had a legitimate interest for disclosure, an interest that furthered Florida's commitment to open records.²³⁵ In contrast, despite their claims, the actions and motives of those perpetrating the Mugshot Racket do not appear to be so altruistic.²³⁶ Whether this fact resonates with Florida courts such that they would consider the republication of mugshots on private websites to be an invasion of privacy remains to be seen.

228. 845 So. 2d 339 (Fla. Dist. Ct. App. 2003).

229. *See id.* at 340.

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.* (citing *Cape Publ'ns, Inc. v. Hitchner*, 549 So. 2d 1374, 1377 (Fla. 1989)).

234. *See Silverman, supra* note 6.

235. *See Walker*, 845 So. 2d at 340; *Woodard v. Sunbeam Television Corp.*, 616 So. 2d 501, 502–03 (Fla. Dist. Ct. App. 1993); *Ortega v. Post-Newsweek Stations, Fla., Inc.*, 510 So. 2d 972, 976 (Fla. Dist. Ct. App. 1987); *supra* notes 115–20 and accompanying text.

236. *See supra* notes 22–35 and accompanying text; *cf. Holland, supra* note 15, at 240 ("However well-intentioned the Florida legislature was in making mugshots part of the public record, the extortion [by mugshot websites] of those arrested is clearly not a desired outcome.").

III. EXTORTION THROUGH THE PUBLIC RECORD

The most important question surrounding the Mugshot Racket is whether republishing legally obtained arrest information on privately owned websites and charging for its removal is illegal. As the name implies, some consider the mugshot websites' actions to be a form of extortion.²³⁷ They certainly seem to be at first glance. Bringing a successful extortion action against the owners of mugshot websites may be difficult, however, given Florida courts' conflicting interpretations of Florida's extortion statute.

A strong negative reaction to the Mugshot Racket business is hardly surprising among those whose records have been re-posted on these websites, given the nature of the practice and the stigma generally associated with mugshots.²³⁸ The circumstances under which many of the images are depicted are highly prejudicial, regardless of the nature of the crime.²³⁹ Mugshots often remain accessible on the websites even after the defendant has been acquitted or the authorities have reduced the underlying charge.²⁴⁰ Moreover, there is often no way to remove the images other than by paying a fee to collusive websites, and even this does not guarantee that the information will not be republished on a similar website in the future.²⁴¹ Indeed, "[t]he business model seems to be to generate embarrassment and then remove the source of the embarrassment for a fee . . . the whole practice is designed to exploit human weakness."²⁴²

According to Florida's extortion statute:

Whoever either verbally or by written or printed communication . . . maliciously threatens an injury to the . . . reputation of another, or maliciously threatens to expose another to disgrace . . . with intent thereby to extort money or any pecuniary advantage whatsoever, or with intent to compel the person so threatened, or any other person, to do any act . . . shall be guilty of a felony of the

237. See Dorschner, *supra* note 134; Holland, *supra* note 15, at 240.

238. See Karantsalis v. U.S. Dep't of Justice, 635 F.3d 497, 503 (11th Cir. 2011) ("[A] booking photograph is a vivid symbol of criminal accusation, which, when released to the public, intimates, and is often equated with, guilt.").

239. See *supra* notes 22–31 and accompanying text; *cf.* United States v. George, 160 F. App'x 450, 456 (6th Cir. 2005) (noting that mugshots can be unfairly prejudicial because of their tendency to evoke negative associations, i.e., "make people believe the [person pictured in the mugshot] is 'bad'").

240. See Green, *supra* note 12.

241. See *supra* notes 16–21 and accompanying text.

242. See Kravets, *supra* note 12 (quoting Steven Aftergood, the director of the Project on Government Secrecy for the Federation of American Scientists) (internal quotation marks omitted).

second degree²⁴³

The party bringing the extortion action must prove that the threat was undertaken with malice.²⁴⁴ Moreover, “[t]here is no requirement . . . that the extortionist intend (or even have the ability) to carry out his threat.”²⁴⁵

The language of this statute seems to confirm that the Mugshot Racket is aptly named. Disseminating arrest information much more broadly (and much less ethically) than law enforcement websites and subsequently charging for removal appears to constitute a malicious threat to damage the reputation of those depicted. Such dissemination could also be considered a malicious threat to hinder employment opportunities and to cause psychological trauma and embarrassment.²⁴⁶ Additionally, the Florida Supreme Court has held that one cannot threaten to perform even a lawful act to gain a monetary advantage.²⁴⁷ Given the Florida Supreme Court’s refusal to “sanction the use of

243. FLA. STAT. ANN. § 836.05 (West, Westlaw through Ch. 272 of the 2013 Reg. Sess. of the 23rd Legis.).

244. See *Carricarte v. State*, 384 So. 2d 1261, 1263 (Fla. 1980) (noting that the extortion statute prohibits utterances or communications that “constitute malicious threats to do injury to another’s person, reputation, or property” and that the defendant’s argument failed to “recognize the additional elements of malice and intent required to convict under the [extortion] statute”). Two different definitions of malice exist. Each represents a separate standard that must be met to satisfy the elements of an extortion charge, and there is disagreement among the Florida District Courts of Appeal as to which standard applies in an extortion case. In *Dudley v. State*, the court used the definition for “legal malice,” and stated that “[a] threat is malicious if it is made intentionally and without any lawful justification.” 634 So. 2d 1093, 1094 (Fla. Dist. Ct. App. 1994) (citing *Alonso v. State*, 447 So. 2d 1029, 1030 (Fla. Dist. Ct. App. 1984)); see also *Calamia v. State*, 125 So. 3d 1007, 1009–10 (Fla. Dist. Ct. App. 2013); *Chestnut v. State*, 516 So. 2d 1144, 1144 (Fla. Dist. Ct. App. 1987) (holding that a malicious threat must be shown for a charge of extortion under Florida’s extortion statute). The second definition, “actual malice,” is defined as “ill will, hatred, spite, an evil intent.” *Id.* at 1010 (quoting *State v. Gaylord*, 356 So. 2d 313, 314 (Fla. 1978)) (internal quotation marks omitted). In *Calamia*, Florida’s Fifth DCA held that “actual malice” was the proper definition to utilize in an extortion proceeding. *Id.* The conflict between the Second and Fifth DCAs has been certified to the Florida Supreme Court for resolution. *Id.* at 1012.

245. *Alonso*, 447 So. 2d at 1030.

246. See *supra* notes 29–30 and accompanying text; see also *Duan v. State*, 970 So. 2d 903, 906–08 (Fla. Dist. Ct. App. 2007) (holding that Florida’s extortion statute “does encompass injuries . . . where the [extorter] threatened the victim and caused her emotional distress”). The court in *Duan* noted that whether the Florida extortion statute extends to mental or emotional injury was an issue of first impression in Florida. *Id.* at 907. The court specifically referenced Florida’s extortion statute and noted that the statute’s express prohibition of “threats to divulge information which would damage the victim’s reputation, or which would expose the victim to disgrace” evidences legislative intent to include mental or emotional well-being as the types of harms recognized under the Florida extortion statute. *Id.*

247. *Carricarte*, 384 So. 2d at 1263 (stating that “we cannot sanction the use of threats to take legal action where those threats are made maliciously and with the intent to acquire pecuniary gain”); accord *Duan*, 970 So. 2d at 906.

threats to take *legal action* where those threats are made maliciously and with the intent to acquire pecuniary gain,”²⁴⁸ the argument that the mugshot websites simply republish information in the public record is less persuasive.²⁴⁹

As reprehensible as their actions appear, the mugshot websites may not actually be guilty of extortion under Florida law.²⁵⁰ Moreover, Florida’s extortion law is a criminal statute,²⁵¹ and whether and to what extent it provides for a private right of action has been treated differently by various courts in Florida.²⁵² For example, in *Bass v. Morgan, Lewis & Bockius*, the Third DCA held that there is no civil cause of action under Florida Statutes § 836.05.²⁵³ The court cited an earlier decision holding that under Florida law, a “mere violation of the penal statutes does not give rise to liability per se” when the section was not intended by the legislature to protect a particular class.²⁵⁴ The United States District Court for the Southern District of Florida has similarly held that “there is no private right of action under § 836.05.”²⁵⁵

Moreover, if a party were to bring a private cause of action for extortion, that party must prove that the photos were republished with malice.²⁵⁶ While there is a decent argument that this activity constitutes a malicious threat, it may still not convince a court.²⁵⁷ For example, the Florida Supreme Court has held that “in order for a demand and threat to be actionable under our extortion statute, it must be calculated to coerce the victim’s acquiescence ‘in order to prevent the threat from being carried out.’”²⁵⁸ Here, reposting mugshot photos is arguably itself

248. *Carricarte*, 384 So. 2d at 1263 (emphasis added).

249. *See supra* notes 22–23 and accompanying text; *see also Duan*, 970 So. 2d at 906 (“[G]enerally[,] a claim of extortion cannot be predicated on a threat to do an act which a person has a lawful right to do, one may not *threaten* to undertake an otherwise legal act to his *own pecuniary advantage*.” (emphasis added)).

250. *See Miami Herald Publ’g Co. v. Ferre*, 636 F. Supp. 970, 976 (S.D. Fla. 1985) (stating that there “is persuasive authority for the proposition that in enacting § 836.05 the Florida Legislature did not intend to create a private civil cause of action”).

251. *See* FLA. STAT. ANN. § 836.05 (West, Westlaw through Ch. 272 of the 2013 Reg. Sess. of the 23rd Legis.); *accord Kamau v. Slate*, No. 4:11cv522-RH/CAS, 2012 WL 5390001, at *10 (N.D. Fla. Oct. 1, 2012) (“As correctly noted by Defendants, § 836.05 is a criminal statute . . .”).

252. *See, e.g., Bass v. Morgan, Lewis & Bockius*, 516 So. 2d 1011, 1011 (Fla. Dist. Ct. App. 1987); *Miami Herald Publ’g Co.*, 636 F. Supp. at 976.

253. *Bass*, 516 So. 2d at 1011; *accord Kamau*, 2012 WL 5390001, at *10.

254. *Bass*, 516 So. 2d at 1011 (quoting *Lavis Plumbing Servs., Inc. v. Johnson*, 515 So. 2d 296, 298 (Fla. Dist. Ct. App. 1987)).

255. *Miami Herald Publ’g Co.*, 636 F. Supp. at 977.

256. *See supra* notes 243–47 and accompanying text.

257. *See Green, supra* note 12; *see also Tanner, supra* note 14.

258. *Matthews v. State*, 363 So. 2d 1066, 1069 (Fla. 1978) (quoting *State v. McInnes*, 153 So. 2d 854, 858 (Fla. Dist. Ct. App. 1963)).

an action and not a malicious threat to perform an action in the future. In other words, the mugshot websites are not really making a malicious threat to anyone before they repost the photos—they are simply posting them. It remains unclear whether a court would conclude that the act of reposting a mugshot itself constitutes a malicious threat.

Absent clear precedent, potential plaintiffs must weigh the competing arguments based on the facts. There is a strong, fact-based argument that reposting mugshot photos satisfies the “malicious threat” element of the Florida extortion statute.

Black’s Law Dictionary defines malice as: “1. The intent, without justification or excuse, to commit a wrongful act. 2. Reckless disregard of the law or of a person’s legal rights. 3. Ill will; wickedness of heart.”²⁵⁹ The stark contrast between the manner in which law enforcement websites post booking photos and the way the photos are often depicted on the mugshot websites suggests that there is a malicious intent behind the photos’ reposting.²⁶⁰ If the true motivating factor behind the Mugshot Racket was to provide a public service and further disseminate arrest records found in the public record, as the website owners argue, these websites would not need to depict the information in highly pejorative and slanderous ways.²⁶¹ The websites would simply repost the photos in a professional, nonderogatory manner, similar to the way they are featured on law enforcement websites.²⁶²

The “threat” portion of the malicious threat element can be found in the potential negative impact upon the reputation and employment opportunities of an arrestee as well as the emotional harm that can result from finding one’s booking photo on a mugshot website.²⁶³ This information is only a click away on a variety of search engines and is available to peers, friends, and employers, with no explanation of the circumstances leading to the arrest or the ultimate disposition of the case.²⁶⁴ In this regard, these actions may indeed constitute a threat.²⁶⁵ This argument is consistent with the Florida Supreme Court’s interpretation of Florida’s extortion law: “The extortion statute prohibits only those utterances or communications which constitute malicious

259. BLACK’S LAW DICTIONARY 1042 (9th ed. 2009).

260. *See supra* notes 12–35 and accompanying text.

261. *See supra* notes 22–31 and accompanying text.

262. *See supra* notes 3–11 and accompanying text.

263. *See supra* notes 243–49 and accompanying text.

264. *See supra* notes 12–15 and accompanying text.

265. *See* WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 2382 (Philip Babcock Gove et al. eds., 1993) [hereinafter WEBSTER’S] (defining a threat as an “expression of an intention to inflict loss or harm on another by illegal means and esp[ecially] by means involving coercion or duress of the person threatened” or “something that by its very nature or relation to another threatens the welfare of the latter”).

threats to do injury to another's person, reputation, or property. Furthermore, the threats must be made with the intent to extort money or the intent to compel another to act or refrain from acting against his will.²⁶⁶

While the malicious threat requirement may be the greatest obstacle that opponents of the Mugshot Racket face, it may not be the only hurdle. Even if it is determined that the websites are committing extortion by charging for removal, that may be the only illegal act in which they are engaged. The fact that arrest records are part of the public record and are freely accessible under Florida law²⁶⁷ suggests that the mugshot websites are not breaking any laws by copying and republishing the records.²⁶⁸ If courts accept the website owners' argument that they simply disseminate publicly accessible information, then the manner in which they depict these pictures, while unethical, may be perfectly legal.²⁶⁹ Therefore, much depends on if the mugshot website's practices are determined to be illegal or simply immoral. In the meantime, it is unclear whether mugshot websites engage in an actionable form of extortion under Florida law. An alternate method of prosecution is worth exploring.

IV. SOLUTIONS

Another promising approach to deterring perpetrators of the Mugshot Racket that seems promising can be found in the Florida RICO Act. It bears mentioning that while this approach avoids some of the issues presented when pursuing a direct extortion claim, a plaintiff still must prove the malicious threat element under Florida's extortion statute to succeed with a Florida RICO cause of action.²⁷⁰

A. *Florida's Racketeer Influenced and Corrupt Organizations Act*

The Florida RICO Act is a very broad law, encompassing many crimes and prescribing serious punishments for infractions.²⁷¹ The law was passed in 1977 amid "a political atmosphere that forced lawmakers

266. *Carricarte v. State*, 384 So. 2d 1261, 1263 (Fla. 1980).

267. See FLA. STAT. ANN. § 119.011(12) (West, Westlaw through Ch. 272 of the 2013 Reg. Sess. of the 23rd Legis.); SOLOVE, *supra* note 4, at 129–30.

268. See Green, *supra* note 12 (implying that the mugshot removal business model is wrong but not criminal); Kravets, *supra* note 12 (same); Silverman, *supra* note 6 (same).

269. See Green, *supra* note 12; see also Tanner, *supra* note 14.

270. See *Nicor Int'l Corp. v. El Paso Corp.*, 318 F. Supp. 1160, 1170 (S.D. Fla. 2004) (noting that crimes covered by the Florida RICO Act include "extortion under Section 836.05 of the Florida Statutes"); *supra* notes 243–45 and accompanying text.

271. Jacqueline Dowd, *Interpreting RICO: In Florida, the Rules Are Different*, 40 FLA. L. REV. 127, 128 (1988) ("While the federal statute is sweeping, Florida's version is even broader, incorporating far more crimes and providing more severe penalties." (footnote omitted)).

to promise to be tough on crime.”²⁷² As a consequence, the statutory definition of “‘racketeering activity’ . . . includes far more crimes than the Florida Legislature intended.”²⁷³ Florida’s RICO Act even includes crimes defined as “racketeering activity” under federal law.²⁷⁴

The appeal of attempting to establish a cause of action against mugshot websites under the Florida RICO Act is that a Florida RICO action avoids some of the pitfalls of Florida’s extortion statute; namely, unlike Florida’s extortion law,²⁷⁵ there is a recognized civil cause of action under the Florida RICO Act.²⁷⁶ Section 895.05(6) of the Florida RICO Act states, in pertinent part, that:

Any aggrieved person may institute a proceeding under subsection (1). In such proceeding, relief shall be granted in conformity with the principles that govern the granting of injunctive relief from threatened loss or damage in other civil cases, except that no showing of special or irreparable damage to the person shall have to be made.²⁷⁷

Section 895.05(1) of the statute provides that “[a]ny circuit court may . . . enjoin violations of the provisions of s. 895.03 by issuing appropriate orders and judgments,”²⁷⁸ which include “[i]mposing reasonable restrictions upon the future activities or investments of any defendant, including, but not limited to, prohibiting any defendant from engaging in the same type of endeavor as the enterprise in which the

272. *Id.* at 130.

273. *Id.* at 132; *see* FLA. STAT. ANN. § 895.02(1)(a) (West, Westlaw through Ch. 272 of the 2013 Reg. Sess. of the 23rd Legis.) (listing fifty separate crimes under Florida law that are included in the definition of “racketeering activity”).

274. *See* FLA. STAT. ANN. § 895.02(1)(b) (extending Florida’s definition of “racketeering activity” under § 895.02(1)(a) to include “[a]ny conduct defined as ‘racketeering activity’ under 18 U.S.C. s. 1961(1)”). *See generally* BRYAN A. GARNER, GARNER’S MODERN AMERICAN USAGE 691 (3d ed. 2009) (stating that, in common usage, “*racketeering* refers to the business of racketeers—a system of organized crime traditionally involving the extortion of money from business firms by intimidation, violence, or other illegal methods. . . . Today *racketeering* often has the broad sense ‘the practice of engaging in a fraudulent scheme or enterprise.’”); WEBSTER’S, *supra* note 265, at 1871 (defining a “racket” as both an “illegitimate enterprise or activity that is made workable by coercion, bribery, or intimidation,” and “a system of obtaining money or other advantage illegally, fraudulently, or undeservedly [usually] with the outward consent of the victims”); *id.* (defining “racketeer” as “one who extorts money or advantages . . . by threatened or unlawful interference with business or employment: one who engages in a racket”).

275. *See supra* notes 250–55 and accompanying text.

276. FLA. STAT. ANN. § 895.05; *see also* 16C FLA. JUR. 2D *Criminal Law* § 1983 (“The Florida RICO Act provides for civil remedies which includes injunctive relief and forfeiture of property.” (footnotes omitted)).

277. FLA. STAT. ANN. § 895.05(6).

278. *Id.* § 895.05(1).

defendant was engaged in violation of the provisions of s. 895.03.²⁷⁹
In § 895.03(1), the Florida RICO Act provides:

It is unlawful for any person who has with criminal intent received any proceeds derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest, whether directly or indirectly, any part of such proceeds . . . in the establishment or operation of any enterprise.²⁸⁰

The statute defines “racketeering activity” broadly.²⁸¹ “Racketeering activity” is defined in § 895.02(a)(1)(40) to include “[s]ection 836.05, relating to extortion.”²⁸² “Racketeering activity” is also defined in section 895.02(b) to include conduct defined as “racketeering activity” under federal law.²⁸³

The relevant portions of Florida’s extortion statute have already been described.²⁸⁴ Under federal law, conduct defined as “racketeering activity” includes “any act or threat involving . . . extortion . . . which is chargeable under State law and punishable by imprisonment for more than one year.”²⁸⁵ Under Florida’s extortion statute, guilty parties are charged with a second-degree felony,²⁸⁶ which is punishable by a maximum prison sentence of fifteen years.²⁸⁷ Whereas the Florida extortion statute does not provide aggrieved parties a civil remedy for extortion,²⁸⁸ the Florida RICO Act may provide aggrieved parties a civil remedy for extortion repackaged as “racketeering activity.”²⁸⁹ Thus, the Florida RICO Act cause of action circumvents the argument that there is no civil remedy for extortion in Florida.

While the Florida RICO Act approach permits a civil remedy, the party pursuing this cause of action will still need to establish that reposting booking photos constitutes a malicious threat under section 836.05.²⁹⁰ As stated above, a strong, fact-based argument supports this

279. *Id.* § 895.05(1)(b).

280. *Id.* § 895.03(1).

281. *Bee Line Entm’t Partners v. State*, 791 So. 2d 1197, 1202 (Fla. Dist. Ct. App. 2001) (“‘Racketeering activity’ is defined broadly by Florida’s RICO law.”); *see supra* notes 271–74 and accompanying text.

282. FLA. STAT. ANN. § 895.02(1)(a)(40).

283. *Id.* § 895.02(1)(b).

284. *See supra* notes 243–45 and accompanying text.

285. 18 U.S.C. § 1961(1) (2012).

286. FLA. STAT. ANN. § 836.05.

287. *Id.* § 775.082(4)(c).

288. *Bass v. Morgan, Lewis & Bockius*, 516 So. 2d 1011, 1011 (Fla. Dist. Ct. App. 1987).

289. *See* FLA. STAT. ANN. § 895.02(1)(a) (providing that extortion under Florida Statutes § 836.05 constitutes “racketeering activity” under the Florida RICO Act); *id.* § 895.05 (providing a civil remedy for violations of the Florida RICO Act).

290. *See supra* notes 243–45 and accompanying text.

position.²⁹¹

B. *Statutory Reform*

Most people get their information via a Google search, not from requesting the records of an individual police department

The best access to records—be them [sic] town board meeting minutes or mugshots—shouldn't be through a site that is paid for protecting the privacy of one individual over another. It should come from a government body that prohibits that patronage in favor of accuracy and context. There should be a central hub for all public records and not their current scattered online state. Without such a repository, the public is left with private enterprises like [those in the Mugshot Racket]. It's a reality that is likely to remain, as state offices are quite fond of collecting FOIA fees.²⁹²

Although the Florida RICO Act may provide a successful cause of action, a more lasting and realistic solution to the problem posed by the Mugshot Racket would be to criminalize the reposting of mugshots and arrest information on private websites. As noted above, mugshot website owners claim to provide the public service of disseminating arrest records, but this purpose is already served by law enforcement websites in Florida that post the material in the first place.²⁹³ If mugshot website owners were sincere in their claim, they would simply post the photos without all of the deprecating trappings that adorn their websites.²⁹⁴ They would also not charge a fee for removal.²⁹⁵

Legislation making such activity illegal would go a long way to solving this problem because it would remove the protection afforded by Florida's public records laws.²⁹⁶ Florida's commitment to open and accessible public records could be preserved by laws establishing a central, state-operated repository where each county could log its arrests.²⁹⁷ Public access to arrest information could be regulated

291. *See supra* notes 256–266 and accompanying text.

292. Silverman, *supra* note 6.

293. *See supra* notes 22–23 and accompanying text.

294. *See supra* notes 22–35 and accompanying text.

295. *See supra* notes 16–21 and accompanying text.

296. *See supra* note 37 and accompanying text.

297. *See* Justin Silverman, *The 'Mugshot Racket' II: A Commercial Purpose Exemption?*, DIGITAL MEDIA L. PROJECT (May 14, 2012), <http://www.dmlp.org/blog/2012/mugshot-racket-ii-commercial-purpose-exemption> (“Because there is no central repository for public records, mugshot websites can exploit state FOI laws and profit from what seems like a shady practice.

according to a standardized policy in conformity with the state's public records laws. This central repository would likely bring continuity to a system in which access currently differs from county to county throughout Florida. The central repository would also likely preclude mugshot website owners from acting as "gatekeeper[s] to embarrassing information."²⁹⁸ Moreover, such a policy would be more consistent with the statutory duty to disclose records stated in § 119.01(1) of the state's public records laws: access to government information granted *by the state or state agency* to interested individuals, not secondarily by private entities bent on making a dollar.²⁹⁹ "Until the states get involved in aggregating public records, we're left with private entities like these mugshot websites to fill the gap States need to get better at turning their public records into visible ones."³⁰⁰

The move towards statutory reform addressing the Mugshot Racket has already begun in many states. For example, Utah,³⁰¹ Georgia,³⁰² Oregon,³⁰³ Texas,³⁰⁴ and Illinois³⁰⁵ have all passed legislation restricting, penalizing, or prohibiting the republication of mugshots on privately owned websites. Recently, Florida Representative Carl Zimmermann, a Democrat from Palm Harbor, Florida, proposed a bill in the Florida House of Representatives that would require mugshot websites to remove images within fifteen days of being notified that the

The practice seems shady because there's a degree of unfairness when a private company plays gatekeeper to embarrassing information and then charges a heavy toll to keep it quiet.").

298. *Id.*; see *supra* notes 133–137 and accompanying text.

299. See FLA. STAT. ANN. § 119.01(1) (West, Westlaw through Ch. 272 of the 2013 Reg. Sess. of the 23rd Legis.) ("It is the policy of this state that all state, county, and municipal records are open for personal inspection and copying by any person. Providing access to public records is a *duty of each agency*." (emphasis added)).

300. Silverman, *supra* note 6.

301. UTAH CODE ANN. § 17-22-30(2) (West, Westlaw through 2013 2d Sp. Sess.) (prohibiting sheriffs from providing copies of a booking photograph to persons if the photograph will be placed in publication or on a website and removal of the booking photograph requires payment of a fee); *id.* § 17-22-30(3) (requiring persons who request a copy of booking photographs to submit a signed statement affirming that the photograph will not be placed on a website that charges removal fees).

302. GA. CODE ANN. § 10-1-393.5(b.1) (West, Westlaw through the end of the 2013 Reg. Sess.) (providing a procedure for removing mugshots from websites "without fee or compensation").

303. OR. REV. STAT. ANN. § 646A.806 (West, Westlaw through end of the 2013 Reg. and Sp. Sessions) (requiring websites that disseminate mugshots and charge a removal fee to remove the mugshots upon request and without charge).

304. TEX. BUS. & COM. CODE ANN. §§ 109.001(2)(B), 109.006(a) (West, Westlaw through end of the 2013 3d Called Sess. of the 83rd Legis.).

305. 815 ILL. COMP. STAT. 505 / 2QQQ (2014).

defendant pictured was not convicted of the crime charged.³⁰⁶ The bill did “not differentiate between government-run websites, news websites or those operated by commercial website operators,”³⁰⁷ and established a “\$100 per instance per week” fine for photos not removed during the fifteen-day grace period.³⁰⁸ The bill also provided for “a presumption of defamation of character of the person” after a forty-five day period of noncompliance.³⁰⁹ An identical bill was also introduced in the Florida Senate on March 5, 2013.³¹⁰

Unfortunately, on May 3, 2013, the Florida Legislature allowed both of these proposed pieces of legislation to die in committee.³¹¹ Undaunted, members of both the Florida House of Representatives and the Florida Senate have recently proposed two new bills that target mugshot websites more specifically.³¹² In the Florida House, Representatives Carlos Trujillo, Charles E. Van Zant, and Carl F. “Z” Zimmerman have sponsored House Bill 265.³¹³ Currently up for consideration in the House Judiciary Committee,³¹⁴ the bill states that “[a] county or municipal detention facility may not electronically publish or electronically disseminate an arrest booking photograph of an arrestee who is charged with, but not yet convicted of, a criminal offense.”³¹⁵ By targeting county and municipal law enforcement agencies and preventing them from posting mugshots online before a

306. H.R. 677, 2013 Reg. Sess. (Fla. 2013); *Under Proposed Law Websites Could Be Forced to Delete Some Mugshots*, GAINESVILLE SUN (last modified Feb. 13, 2013, 4:07 PM), <http://www.gainesville.com/article/20130213/WIRE/130219812>.

307. *Under Proposed Law Websites Could Be Forced to Delete Some Mugshots*, *supra* note 306.

308. H.R. 677 (“Failure of the website operator to remove the person’s name or personal information shall result in a civil penalty of \$100 per instance per week . . .”).

309. *Id.*

310. S.B. 1060, 2013 Reg. Sess. (Fla. 2013).

311. *SB 1060: Websites Containing Information Concerning Persons Charged with Crimes*, FLA. SENATE, <http://www.flsenate.gov/Session/Bill/2013/1060> (last visited May 19, 2014) (stating that Senate Bill 1060 was allowed to die in the Communications, Energy, and Public Utilities Committee); *see also HB 677—Websites Containing Information Concerning Persons Charged with Crimes*, FLA. HOUSE REPRESENTATIVES, <http://www.myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=49897> (last visited May 19, 2014) (stating that House Bill 677 was allowed to die in the Civil Justice Subcommittee).

312. *See House Bill 0265*, FLA. SENATE, <http://www.flsenate.gov/Session/Bill/2014/0265> (last visited May 19, 2014); *see also Senate Bill 0298*, FLA. SENATE, <http://www.flsenate.gov/Session/Bill/2014/0298> (last visited May 19, 2014).

313. *See House Bill 0265*, FLA. SENATE, <http://www.flsenate.gov/Session/Bill/2014/0265> (last visited May 19, 2014).

314. *Id.*

315. H.R. 265, 2014 Reg. Sess. (Fla. 2014). The bill does not apply to certain “governmental entities” or “third parties that provide electronic criminal justice services to criminal justice agencies.” *Id.* Also, it does not apply to “any entity if the sheriff or police chief, or a designee thereof, decides such publication is necessary to protect public safety.” *Id.*

defendant has been convicted, the bill would deprive the mugshot websites of a large number of photos they would otherwise have access to shortly after an arrest is made. The bill would also protect innocent-until-proven-guilty arrestees from the shame that would accompany their mugshot being posted all over the Internet.³¹⁶ If enacted, the bill will become effective on October 10, 2014.³¹⁷

In the Florida Senate, Senators Maria Lorts Sachs, Charles S. “Charlie” Dean, Sr., and Darren Soto have proposed Senate Bill 298.³¹⁸ Unlike House Bill 265, this bill targets the mugshot websites directly (rather than law enforcement agencies) by prohibiting any person engaged in the business from “solicit[ing] or accept[ing] a fee or other consideration to remove, correct, or modify an arrest booking photograph of an arrestee.”³¹⁹ The bill also provides that Florida courts may provide a fourteen-day window for mugshot websites to comply with a court order to remove a mugshot, and requires courts to “impose a civil penalty of \$1,000 per day for each day of noncompliance with the order.”³²⁰ By prohibiting the websites from collecting fees for removing mugshots and imposing substantial fines for noncompliance with court orders to take them down, this bill could substantially reduce the profitability of the Mugshot Racket and possibly lead to its demise in Florida. If enacted, this bill will also become effective on October 1, 2014.³²¹

While these newly proposed bills are encouraging, there is no guarantee they will be enacted. If they do not pass, there is another way the Mugshot Racket could be regulated. Under article I, section 24 of the Florida Constitution, the Florida Legislature has the power to create exceptions to the disclosure of public records.³²² An exception could be made delaying or restricting the immediate release of mugshots on law enforcement websites. This exception could at least decrease the likelihood that defendants whose charges have been dropped will later appear on the mugshot websites.

316. It is important to note that House Bill 265 only refers to the electronic posting of booking photographs. *See id.* These images and records would still be accessible to interested members of the public, “but interested parties, like the media and commercial websites devoted to displaying mugshots, would need [to make] an individual public records request for each one and law enforcement could require payment.” Matthew Beaton, *Bills Target Online Mugshots*, NEWS HERALD (Mar. 10, 2014, 8:30 PM), <http://www.newsherald.com/news/government/bills-target-online-mugshots-documents-1.281842>.

317. H.R. 265, 2014 Reg. Sess. (Fla. 2014).

318. S.B. 298, 2014 Reg. Sess. (Fla. 2014).

319. *Id.*

320. *Id.*

321. *Id.*

322. *See supra* notes 122–123 and accompanying text.

C. Shifts in Policy

The downfall of the Mugshot Racket may be brought about not by new legislation or litigation but by the very services that enable the mugshot website businesses to thrive: Google, major credit card companies, and online payment services.

As mentioned above, the mugshot websites depend in large part on search engines such as Google.³²³ Google's search algorithms are specifically designed to display results that "reflect both relevance and popularity," and as a result the algorithms take into account the amount of time a user spends on a website the user found while conducting a Google search.³²⁴ When individuals spend more time on a specific website, that website earns a higher relevancy rating and is therefore more likely to appear in other users' search results.³²⁵ Because many visitors to mugshot websites spend considerable time perusing the material they find, the websites enjoy a very high relevancy rating and consequently are often displayed on the first page of related search results.³²⁶ This increases the likelihood that people will visit the site and perpetuates the cycle.³²⁷

In response to complaints about the mugshot websites, Google recently stated its disapproval of the mugshot website enterprise and changed its search algorithm.³²⁸ As a result, many mugshot websites no longer appear on the first page of results, adding a little more "practical obscurity" to one's booking photo.³²⁹ It is still unclear what effect this change will have on the mugshot website industry, but it is conceivable that individuals will be less likely to pay large sums of money to remove a photo when the photo no longer appears on the first page of the results. It is also possible that a drop in relevancy could lead to fewer visitors to the website, which could in turn reduce the number of companies willing to advertise on these websites.³³⁰

Additionally, many major credit card companies and online payment

323. David Segal, *Mugged by a Mug Shot Online*, N.Y. TIMES (Nov. 29, 2013), <http://www.nytimes.com/2013/10/06/business/mugged-by-a-mug-shot-online.html>.

324. *See id.*

325. *See id.* (noting that Google deems sites more relevant when users click on a given link, "stare in disbelief, and look around a bit" because such users are staying on the page "rather than returning immediately to the search results").

326. *See id.*

327. *See id.*

328. *Id.* (noting that in response to complaints about the mugshot websites, Google introduced an algorithm change that decreased the position of mugshot websites in a basic image search).

329. *Id.* (noting that the algorithm change effectively demoted certain mugshot websites, spelling "very bad news" for the website owners); *see also supra* notes 7–8 and accompanying text.

330. *See supra* notes 32–33 and accompanying text.

services have recently terminated their relationship with mugshot removal businesses.³³¹ As of this writing, MasterCard, American Express, Discover, and PayPal had all discontinued their business relationships with the mugshot websites with which they had been previously affiliated, and Visa was considering the same course.³³²

These developments are encouraging because if the mugshot websites are no longer feasible or profitable to operate, the business could cease to exist entirely without the need for new legislation or lengthy litigation.

CONCLUSION

Arrest records undoubtedly serve an important function in many aspects of society, and the public may have a legitimate interest in them. Given the highly sensitive and personal nature of arrest records and mugshots, however, states should regulate the release of this information before making it available to the general public. Florida's liberal public records laws have allowed law enforcement agencies throughout the state to independently determine how to make arrest records available to the public. While some agencies are somewhat restrictive, others freely post the information on their websites. Mugshot website owners have utilized easy access to this information to create a new industry, which arguably extorts money from arrestees under the threat of advertising their past transgressions much more broadly than done by law enforcement websites. This has resulted in the loss of the notion of "practical obscurity" in Florida.

As evidenced by Florida's laws concerning privacy and the accessibility of public records, the state is steadfastly committed to its current position as a leader in government transparency in the United States. This attitude is also reflected in Florida state court decisions. Given this dedication, and the Florida Legislature's rejection of legislation designed to ameliorate the problem, it is unlikely that Florida will change its position regarding liberal access to public records. Nor is this necessarily a bad thing. As the Supreme Court has stated, the essential purpose behind FOIA laws is "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny."³³³

More than public awareness is at stake, however, when the information being divulged is as sensitive as a mugshot. While Florida courts have yet to address the issue of whether a privacy right exists in a mugshot, the U.S. Supreme Court, as well as the U.S. Courts of Appeal

331. See Segal, *supra* note 323.

332. *Id.*

333. *Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976) (quoting *Rose v. Dep't of the Air Force*, 495 F.2d 261, 263 (2d Cir. 1974)) (internal quotation marks omitted).

for the Sixth, Tenth, and Eleventh Circuits, have ruled on similar matters. With the exception of the Sixth Circuit, which rendered a distinguishable decision,³³⁴ the decisions of the Circuits support recognizing a privacy right in one's mugshot.³³⁵ These decisions, and especially the decision of the Eleventh Circuit,³³⁶ should prove instructive in the likely event that a Florida court considers this issue.

If perpetrators of the Mugshot Racket are prosecuted for their actions, they will likely be charged with extortion.³³⁷ While there is a strong argument that they are in fact extorting people with a checkered past, it is not entirely clear that a private cause of action can proceed under Florida's extortion statute.³³⁸ In light of this, a more successful approach may be to recognize a private cause of action under the Florida RICO Act, which allows a civil cause of action for extortion.³³⁹

Arguably the best way to stop the Mugshot Racket would be to outlaw the republication of arrest information on private websites and to create a central repository for this material that is administered by the state.³⁴⁰ Even though House Bill 265 and Senate Bill 298 are important steps in the right direction, these bills have yet to be enacted, and they do not purport to establish a central repository.³⁴¹ Florida could look to the states that have passed more stringent privacy protections regarding the use of a person's booking photo in order to establish a workable solution that achieves the goals of both the Sunshine Law and article I, section 23 of the Florida Constitution. Additionally, the Florida Legislature could also consider creating an exception to the Sunshine Law that delays or restricts the immediate release of mugshots pursuant to its authority under article I, section 24 of the Florida Constitution.

Because Florida's public records laws are so broad, there is potential for abuse when one considers arrest records and the unregulated use of the Internet to disseminate them. This abuse is underscored by the successful rise of the Mugshot Racket. If neither courts nor the legislature are inclined to provide relief from the actions of organizations involved in this "business," perhaps Google and the major credit card companies can deter the practice. The fact that a defendant may have been guilty of a crime in the past should not further subject the person to these extortive activities. In this regard, Florida's Sunshine Law leaves much to be desired.

334. *See supra* notes 89–91 and accompanying text.

335. *See supra* Section I.B.

336. *Karantalis v. U.S. Dep't of Justice*, 635 F.3d 495 (11th Cir. 2011).

337. *See supra* Part III.

338. *See supra* Part III.

339. *See supra* Section IV.A.

340. *See supra* Section IV.B.

341. *See supra* Section IV.B.