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# THE MUGSHOT INDUSTRY: FREEDOM OF SPEECH, RIGHTS OF PUBLICITY, AND THE CONTROVERSY SPARKED BY AN UNUSUAL NEW TYPE OF BUSINESS

ALLEN ROSTRON\*

Matthew Creed, a young entrepreneur in suburban Kansas City, decided to start a business.<sup>1</sup> He created a website called *BlabberMouth* featuring the names, addresses, and mugshot photographs of local people recently arrested. He then mailed letters to the arrestees, informing them about the website and offering to delete the information upon payment of a \$199.99 fee.<sup>2</sup> “We have already started blabbing to the world about your release from jail,” the letter declared, “[a]nd we want to make you aware of our services, as we kind of have a big mouth.”<sup>3</sup> The letters added that those who failed to pay the fee might see their neighborhoods flooded with fliers further publicizing the arrests. “We will canvas the neighborhood of someone just released from jail with flyers on every residence,” the letter warned, “even if they have not gone to trial or been convicted of the crimes brought against them.”<sup>4</sup>

The public outcry against Creed’s business venture was intense. Local law enforcement promised to investigate whether it violated any laws.<sup>5</sup> Creed received death threats.<sup>6</sup> People angry about *BlabberMouth*’s business tactics soon discovered that Creed had once been arrested for drunk driving and that several of his relatives also had arrest records; they began posting mugshots and information about those arrests on the Internet.<sup>7</sup> Just a week after the first news reports about his business appeared, Creed apologized and announced that he had decided to shut down the *BlabberMouth* business.<sup>8</sup>

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1. Christine Vendel, *Website Offers to Delete Its Information About Your Arrest—If You Pay About \$200*, K.C. STAR, June 29, 2012 (on file with author).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. Christine Vendel, *Owner Shuts down Blabbermouthkc.com, Citing Huge Backlash*, K.C. STAR (July 5, 2012), <http://www.kansascity.com/2012/07/05/3692483/owner-shuts-down-blabbermouthkc.com.html>.

7. *Id.*

8. *Id.*

While *BlabberMouth* was a short-lived enterprise, the mugshot industry remains alive and well, with many companies around the nation profiting from the dissemination of mugshot photos. This new type of business arouses strong feelings on both sides, with critics charging that it amounts to a form of blackmail, while the mugshot companies contend that they provide a beneficial public service protected by freedom of speech.

The mugshot industry raises intriguing legal questions, and yet these issues have received remarkably little attention from courts or legal scholars to date. Indeed, the controversy surrounding the mugshot industry's practices has yet to be the subject of any court decisions or analysis in law journals. In this article, I begin the process of exploring the difficult questions surrounding mugshot businesses. In my view, people targeted by businesses like *BlabberMouth* have a viable theory under which to seek legal relief, but a line must be carefully drawn between businesses that merely profit by reproducing mugshot photos and those that take the further step of agreeing not to publicize a mugshot or other arrest information in exchange for payment of a fee.

### I. THE RISE OF THE MUGSHOT INDUSTRY

Several varieties of mugshot businesses have proliferated in recent years. In some cities, particularly in the South, tabloid-style newspapers with titles like *Jailbirds* or *Just Busted* can be found for sale at gas stations and convenience stores.<sup>9</sup> Typically published weekly and selling for a dollar a copy,<sup>10</sup> the mugshot tabloids contain “page after page of local mug shots, interspersed with a few short crime articles from around the country.”<sup>11</sup> The mugshots are often accompanied by commentary mocking the arrestees or may be “grouped under kitschy headlines,” like the “wrinkly rascals section” (for elderly arrestees) or the “hairdo’s and don’ts” section.<sup>12</sup> The tabloids also contain advertisements, “mostly for cash advance outlets, bail bondsmen, and defense attorneys.”<sup>13</sup>

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9. Debbie Elliott, *The Newest Magazine Fad: The Mug Shot Tabloid*, NAT'L PUB. RADIO (Nov. 23, 2011), <http://www.npr.org/2011/11/23/142701001/the-newest-magazine-fad-the-mug-shot-tabloid>; see also Nat'l Pub. Radio, *The Slammer: Mug-Shot Tabloids Spread Across the South*, YOUTUBE (Nov. 23, 2011), [http://youtu.be/y\\_s7thF7OCg](http://youtu.be/y_s7thF7OCg). National Public Radio and *Oxford American* magazine jointly produced this short documentary film about the mugshot tabloid phenomenon.

10. Elliott, *supra* note 9.

11. *Id.*

12. *Id.*

13. *Id.*

These publications are popular. For example, the central Arkansas edition of *The Slammer* sells about 7,000 copies a week.<sup>14</sup> As that newspaper's publisher explained, "[m]ost people look at this because they're curious and they want to gawk and gossip a little bit."<sup>15</sup> Each issue of *The Slammer* includes a disclaimer advising readers that "[n]ot every arrest leads to a conviction" and "[a]ll suspects are innocent until proven guilty in a court of law."<sup>16</sup>

Mugshot businesses also thrive on the Internet. Websites like *mugshots.com* and *bustedmugshots.com* feature searchable databases of photos accompanied by information such as the person's name, offense, and date and place of arrest.<sup>17</sup> Other websites, like *The Smoking Gun*, *The Hollywood Gossip*, and *TMZ* focus on celebrity mugshots.<sup>18</sup> And even mainstream newspapers, like the *Chicago Tribune* and *Washington Post*, maintain online galleries of mugshots.<sup>19</sup>

The mugshots are available because many states have laws requiring open access to public records.<sup>20</sup> Indeed, many cities and counties make the photos available online, such as by posting them on police or sheriff's department websites.<sup>21</sup> The companies that operate mugshot businesses "can use screen-scraping programs to expeditiously snag every new and old mug shot from a department's system, and then post them to their own sites."<sup>22</sup> The mugshot businesses also benefit from the fact that "search engine optimization" techniques allow them to tag photos so that they turn

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14. *Id.*

15. *Id.*

16. *Id.*

17. See BUSTED! MUGSHOTS, <http://www.bustedmugshots.com/> (last visited Apr. 6, 2013); MUGSHOTS.COM, <http://mugshots.com/> (last visited Apr. 6, 2013).

18. *Celebrity Mug Shots Photos*, THE HOLLYWOOD GOSSIP, <http://www.thehollywoodgossip.com/gallery/categories/celebrity-mug-shots/> (last visited Apr. 6, 2013); *Celebrity Mug Shots*, TMZ, <http://www.tMZ.com/photos/2007/05/09/39-celebrity-mug-shots#!/images/2012/09/19/1019-lilo-mug-sot-jpg> (last visited Apr. 6, 2013); *Mug Shots: All Celebs*, THE SMOKING GUN, <http://www.thesmokinggun.com/mugshots/celebrities> (last visited Apr. 6, 2013).

19. *D.C. Region Mug Shots*, WASH. POST, [http://www.washingtonpost.com/local/crime/2012/08/27/9869432e-c08e-11e1-95b8-18a2903941ea\\_gallery.html#photo=1](http://www.washingtonpost.com/local/crime/2012/08/27/9869432e-c08e-11e1-95b8-18a2903941ea_gallery.html#photo=1) (last visited Apr. 6, 2013); *Mugs in the News*, CHI. TRIB., <http://www.chicagotribune.com/news/local/chi-mug-photogallery,0,5488047.photogallery> (last visited Apr. 6, 2013).

20. Cord Jefferson, *How People Profit from Your Online Mug Shot and Ruin Your Life Forever*, GIZMODO (Oct. 8, 2012), <http://gizmodo.com/5949333/how-people-profit-from-your-online-mug-shot-and-ruin-your-life-forever>.

21. *Id.*

22. *Id.*

up at the top of the results when someone enters a person's name into an Internet search engine like Google.<sup>23</sup>

Some of the mugshot businesses make money from hosting advertising on their websites,<sup>24</sup> and some charge users a fee to search for mugshots in their databases.<sup>25</sup> But the most controversial source of revenue for mugshot websites is removal fees. People embarrassed to learn that their mugshots are on the websites can essentially pay to make them go away.

Some mugshot websites directly offer and provide the removal service.<sup>26</sup> In other instances, the removal service is provided by what appears to be a business separate from the website displaying the mugshots. For example, the *mugshots.com* site provides a link to *unpublisharrest.com*, an "Exclusive Authorized Unpublishing Vendor[]"<sup>27</sup> that charges \$399 and purports to have a "good working relationship" with *mugshots.com* that enables it to arrange removal from the *mugshots.com* site.<sup>28</sup>

The mugshot websites and removal services may have a symbiotic relationship even when owned and operated independently. An investigation by *Wired* magazine provided a revealing example.<sup>29</sup> The *RemoveSlander.com* website promised that for a \$399 fee, its team of legal experts would fight to get a mugshot removed from the *florida.arrests.org* website.<sup>30</sup> According to the owner of *RemoveSlander.com*, "There is a tremendous amount of work to get the photos down."<sup>31</sup> In fact, *florida.arrests.org* had set up an automated mechanism so that

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23. Lisa Loving, *New Movement Emerges to Beat Down Mugshot 'Racket'*, SKANNER (July 12, 2012), <http://www.theskanner.com/article/New-Movement-Emerges-to-Beat-Down-Mugshot-Racket-2012-07-12>.

24. Jefferson, *supra* note 20.

25. *See, e.g.*, BUSTED! MUGSHOTS, *supra* note 17 (offering one month of unlimited searching, monitoring, and alerts for \$19.95 per month).

26. *See, e.g.*, MUGSHOTSWORLD.COM, <http://www.mugshotsworld.com/> (click on an image and then click on "Remove this picture" link above image to view removal options) (last visited Apr. 6, 2013) (charging \$200 for removal); *Removal Process*, BUSTED! MUGSHOTS, <https://www.bustedmugshots.com/removal/search> (search "John Doe" and then click on an image for removal options) (last visited Apr. 6, 2013) (charging \$98 for removal within twenty business days or \$178 for rush removal).

27. *See* MUGSHOTS.COM, <http://mugshots.com/> (clicking on "UNPUBLISH MUGSHOT" on the top right of the website will bring up the link to the *UnpublishArrest.com* website) (last visited Apr. 6, 2013).

28. *FAQ*, UNPUBLISHARREST.COM, <http://unpublisharrest.com/faq/> (last visited Apr. 6, 2013) (containing the removal request form after the "FAQ").

29. David Kravets, *Mug-Shot Industry Will Dig Up Your Past, Charge You to Bury It Again*, WIRED (Aug. 2, 2011), <http://www.wired.com/threatlevel/2011/08/mugshots/>.

30. *Id.*

31. *Id.*

*RemoveSlander.com* could remove any mugshot from *florida.arrests.org* at any time.<sup>32</sup> In return for this, *RemoveSlander.com* paid to *florida.arrests.org* a small slice (\$9.95, or \$19.90 for an expedited removal) of each \$399 removal fee that it collected.<sup>33</sup> The mugshot websites thus profit when people pay to get their mugshots taken down, even when separate companies market the removal services.

## II. UNCERTAINTIES UNDER CRIMINAL AND TORT LAW

Critics denounce the mugshot industry as a racket and a scam.<sup>34</sup> At first glance, it might be easy to assume that the business, or at least some variants of it, must be illegal. For example, when a company like *BlabberMouth* sends letters soliciting payment of \$199.99 to refrain from publicizing the recipients' arrests, that sounds like a form of extortion.<sup>35</sup> Indeed, blackmail is a felony in Kansas, and the statutes define it to include "intentionally gaining or attempting to gain anything of value" by threatening to "[c]ommunicate accusations or statements about any person that would subject such person or any other person to public ridicule, contempt or degradation."<sup>36</sup> Essentially telling someone "pay me or I will embarrass you by spreading the word about your arrest" certainly could be a crime under that statute.

The picture is clouded, however, by the fact that so much confusion surrounds the crime of blackmail. Legal scholars continue to disagree about the fundamental underlying question of why blackmail is even illegal.<sup>37</sup> The offense remains notoriously difficult to define, with "[m]ost statutes broadly prohibit[ing] behavior that no one really believes is criminal and then rely[ing] on the good judgment of prosecutors not to enforce the statute as written."<sup>38</sup> Given the muddled character of this area of criminal law, it is difficult for anyone to know with certainty what practices by a mugshot company would cross the line into blackmail. The

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32. *Id.*

33. *Id.*

34. *See, e.g.,* Loving, *supra* note 23; Justin Silverman, *The 'Mugshot Racket': Paying to Keep Public Records Less Public*, DIGITAL MEDIA LAW PROJECT (Oct. 11, 2011), <http://www.citmedialaw.org/blog/2011/mugshot-racket-paying-keep-public-records-less-public>.

35. *See supra* notes 1–8 and accompanying text.

36. KAN. STAT. ANN. § 21-5428(a) (2012). Kansas law is not unique in criminalizing such conduct. For example, the Model Penal Code provides that "theft by extortion" occurs when a person intentionally obtains another's property by threatening to "expose any secret tending to subject any person to hatred, contempt or ridicule." MODEL PENAL CODE § 223.4 (1985).

37. *See, e.g.,* Ken Levy, *The Solution to the Real Blackmail Paradox: The Common Link Between Blackmail and Other Criminal Threats*, 39 CONN. L. REV. 1051, 1053–64 (2007).

38. James Lindgren, *Unraveling the Paradox of Blackmail*, 84 COLUM. L. REV. 670, 671 (1984).

creator of *BlabberMouth*, for example, apparently realized that he was treading close to that line and took precautionary steps intended to keep him on the right side of it. Figuring that it should be legal to publicize information that was not a secret, he “printed mugshots on the outside of the envelopes he sent by mail not only to grab the intended recipient’s attention, but so the mail carrier and others see it.”<sup>39</sup> Likewise, he vowed to publicize an arrest by distributing fliers only if an outside third party asked him to do so, allowing him to deny that his letters to arrestees constituted threats.<sup>40</sup> Otherwise, he conceded, his letters would be “straight-up blackmail.”<sup>41</sup>

The First Amendment further complicates the situation. Mugshot businesses claim to be exercising their constitutional rights to freedom of speech and press, and they have a solid argument to the extent that they merely republish photos and information available in public records. In *Cox Broadcasting Corp. v. Cohn*,<sup>42</sup> the Supreme Court struck down a Georgia law that prohibited publishing or broadcasting the name of a rape victim.<sup>43</sup> The case concerned a television news broadcast that revealed a rape victim’s name after a reporter saw the name in documents made available for inspection by a courtroom clerk.<sup>44</sup> The Court concluded that crimes, arrests, and prosecutions are “without question events of legitimate concern to the public” and the interest in allowing the press to report freely on such matters outweighs the rape victim’s privacy interests “when the information involved already appears on the public record.”<sup>45</sup> The Court added that if states want to protect the privacy of rape victims, they must do so by keeping victims’ names out of public records rather than releasing the information and then trying to prohibit the press from repeating it.<sup>46</sup> In *Florida Star v. B.J.F.*,<sup>47</sup> the Court extended the same protection to a newspaper that published the name of a rape victim obtained from a report made available in a police department’s pressroom.<sup>48</sup> If the First Amendment protects republication of information about crime victims obtained from publicly-accessible sources, it surely

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39. Vendel, *supra* note 1.

40. *Id.*

41. *Id.*

42. 420 U.S. 469 (1975).

43. *Id.* at 495–97.

44. *Id.* at 472–74, 472 n.3, 474 n.5.

45. *Id.* at 492, 495.

46. *Id.* at 496.

47. 491 U.S. 524 (1989).

48. *Id.* at 527, 540–41.

gives companies a right to print tabloids or create websites featuring mugshots and arrest information made available to the public by police or sheriff's departments.

To the extent that people who are unhappy about displays of their mugshots might look for relief under tort law, the situation is equally complicated. Many would consider the mugshot industry's activities to be extreme, outrageous, and intended to inflict severe emotional distress.<sup>49</sup> But in cases like *Snyder v. Phelps*,<sup>50</sup> the Supreme Court has held that the First Amendment protects even the most vile and hurtful personal attacks when they relate to matters of public concern.<sup>51</sup> Just as the protests at soldiers' funerals at issue in *Snyder* purported to be expressions about important issues like homosexuality, religion, and America's future,<sup>52</sup> the mugshot industry can plausibly contend that crimes and arrests are matters of great public concern. While mugshot businesses obviously seek to profit financially from what they do, the same can be said for mainstream news sources, such as the *New York Times* or *CNN*. The mugshot companies cannot lose their constitutional right to report on criminal arrests simply by virtue of being for-profit purveyors of information.

Other potential tort claims against mugshot businesses seem equally problematic. Defamation or false light claims would require proof that the publication was false.<sup>53</sup> Barring some kind of unusual error, the information in mugshot tabloids and on mugshot websites is true. The people whose mugshots are shown really were arrested. Of course, not all of them wind up being convicted, but the mugshot businesses are careful not to say that anyone shown is guilty of anything. They simply depict who was arrested. Moreover, while one can incur tort liability for wrongfully publicizing true but private facts about a person, the mugshot businesses republish information that is already a matter of public record.<sup>54</sup>

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49. See RESTATEMENT (SECOND) OF TORTS § 46 (1965) ("One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress . . .").

50. 131 S. Ct. 1207 (2011).

51. *Id.* at 1215–20.

52. *Id.* at 1216–17.

53. See *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986) (holding that even a plaintiff who is not a public figure must prove falsity where defendant's allegedly libelous publications addressed matters of public concern); *Machleder v. Diaz*, 801 F.2d 46, 53 (2d Cir. 1986) (recognizing that "commentators agree that falsity must be shown to state a false light cause of action").

54. See RESTATEMENT (SECOND) OF TORTS § 652D (1965) ("One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.").

By relying entirely on photos and other information from public records of arrests, mugshot businesses have a formidable shield against legal attacks.

### III. THE OPENING SALVO IN THE LEGAL BATTLE OVER MUGSHOTS

Scott Ciolek may have found a crucial gap in the mugshot industry's defenses. Ciolek is an attorney practicing in Toledo, Ohio.<sup>55</sup> He recently filed a lawsuit against four companies that operate mugshot websites and one that operates a mugshot removal service.<sup>56</sup> Ciolek brought the suit on behalf of two plaintiffs who had their mugshots displayed on the websites, and he seeks to have the case certified as a class action.<sup>57</sup> The lawsuit is based on Ohio's right of publicity statute,<sup>58</sup> which provides that "a person shall not use any aspect of an individual's persona for a commercial purpose."<sup>59</sup> Persona is broadly defined to include "an individual's name, voice, signature, photograph, image, likeness, or distinctive appearance, if any of these aspects have commercial value."<sup>60</sup> Violation of the Ohio statute is a misdemeanor criminal offense,<sup>61</sup> and the statute creates a private civil right of action, with the remedies including statutory damages of \$2,500 to \$10,000 per violation in lieu of of any actual damages that can be proven.<sup>62</sup>

A similar tort exists under the law of most states.<sup>63</sup> The central idea underlying the tort is "the interest of the individual in the exclusive use of his own identity, in so far as it is represented by his name or likeness, and in so far as the use may be of benefit to him or to others."<sup>64</sup> In short, a business should not be able to profit by exploiting the commercial value of someone's name or image. For example, companies obviously would not continue to pay enormous sums for celebrity endorsements if they could simply put images of famous athletes or entertainers in advertisements without paying. If a business wants to run an ad featuring LeBron James or Lady Gaga, it must pay for the right to do so.

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55. See Complaint, *Lashaway v. JustMugshots.com*, No. CI0201206547, 2012 WL 6015894 (Ohio Ct. C.P. Dec. 3, 2012).

56. *Id.*

57. *Id.*

58. *Id.*

59. OHIO REV. CODE ANN. § 2741.02(A) (West 2012).

60. *Id.* § 2741.01(A).

61. *Id.* § 2741.99.

62. *Id.* § 2741.07.

63. *Statutes*, RIGHT OF PUBLICITY, <http://rightofpublicity.com/statutes> (last visited Apr. 7, 2013) (asserting that nineteen states currently recognize the right of publicity by statute and twenty-eight others do so under common law).

64. RESTATEMENT (SECOND) OF TORTS § 652C cmt. a (1965).

The mugshot businesses will surely argue that their practices do not fit within the scope of this tort, particularly to the extent that they are disseminating the names and photos of people who are not the least bit famous.<sup>65</sup> The *Restatement (Second) of Torts*, for example, suggests that the tort should be limited to situations where the defendant is taking advantage of the plaintiff's reputation or prestige for purposes of publicity.<sup>66</sup> Incidental uses of a person's name or likeness should not create liability, otherwise a newspaper would need to pay for permission every time it mentioned any person's name in a story.<sup>67</sup>

While the tort may have been originally and primarily intended to protect against uncompensated commercial exploitation of famous names and faces, the tort may not necessarily be so limited in its reach. Suppose that rather than hiring a famous model or actress, a company obtained photographs of a person who is not famous, but happens to be exceptionally beautiful, and used those photos in a massive advertising campaign. Would any court really hold that the right of publicity tort was inapplicable because the company appropriated images of a person who was not a celebrity? The person, famous or not, had an interest in control of her image that was appropriated by the company for commercial gain. Or, to put it in terms of the Ohio right of publicity statute, Scott Ciolek can persuasively argue that mugshot companies have improperly wrung commercial value from the use of his clients' personas.<sup>68</sup> Indeed, the rapid growth of the mugshot industry demonstrates that images of arrestees, famous or not, have substantial commercial value.

#### IV. NEWSWORTHINESS

Ciolek's lawsuit is just making its way out of the starting gates, so no judge has had an opportunity yet to rule on the intriguing questions it presents.<sup>69</sup> The likelihood that this lawsuit or similar actions brought in the

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65. See Defendant's Motion to Dismiss for Failure to State a Claim upon Which Relief Can Be Granted and Memorandum in Support at 3–4, *Lashaway v. JustMugshots.com*, No. 3:13-cv-00043-JZ (N.D. Ohio Jan. 11, 2013) (arguing that plaintiffs' claims fail because their mugshots do not have commercial value). The defendant Justmugshots.com filed this motion after removing the case to federal court. The federal court did not rule on the motion and instead remanded the case to state court because it was not clear that federal jurisdiction existed. See Remand Order, *Lashaway v. JustMugshots.com*, No. 3:13 CV 43 (N.D. Ohio Jan. 15, 2013).

66. RESTATEMENT (SECOND) OF TORTS, *supra* note 64, § 652C cmt. d.

67. *Id.*

68. See *supra* notes 59–60 and accompanying text.

69. See *supra* note 65.

future will find success ultimately turns on what courts will decide about one crucial issue: newsworthiness.

Courts have struggled to come up with a clear test for determining the extent to which free speech concerns should override tort law's protection against appropriation of publicity rights. The basic principle they have uniformly embraced, however, is that "the First Amendment bars appropriation liability for the use of a name or likeness in a publication that concerns matters that are newsworthy or of legitimate public concern."<sup>70</sup> The "newsworthiness" of information has become the "essential balance point" between individuals' privacy and dignitary interests and society's interests in freedom of speech and the press.<sup>71</sup> Reflecting the constitutional concerns, this concept has been incorporated directly into the definition or elements of the tort. Ohio's right of publicity statute, for example, provides exemptions for "[m]aterial that has political or newsworthy value" and for "broadcast or reporting of an event or topic of general or public interest."<sup>72</sup>

Unfortunately, determining what constitutes a newsworthy matter remains a difficult task, with courts failing to produce solid standards or consistent decisions.<sup>73</sup> The mugshot issue illustrates the difficulty of the inquiry. Are the contents of a mugshot tabloid or website sufficiently newsworthy to deserve protection? It depends on how one looks at it. At a general level, crime and law enforcement are obviously issues of great importance and public interest. Some arrests are obviously newsworthy, and the extensive coverage they receive in conventional news media often includes use of mugshot photos.<sup>74</sup> On the other hand, mugshot businesses typically exercise no selectivity or editorial discretion as to which arrests are really "news" in which the public has an interest. Many instead indiscriminately pull together all mugshots and arrest information made

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70. *Battaglieri v. Mackinac Ctr. for Pub. Policy*, 680 N.W.2d 915, 919 (Mich. Ct. App. 2004).

71. Amy Gajda, *Judging Journalism: The Turn Toward Privacy and Judicial Regulation of the Press*, 97 CALIF. L. REV. 1039, 1061 (2009).

72. OHIO REV. CODE ANN. §§ 2741.09(A)(1)(b), (A)(3) (West 2012).

73. See Clay Calvert, *Every Picture Tells a Story, Don't It? Wrestling with the Complex Relationship Among Photographs, Words and Newsworthiness in Journalistic Storytelling*, 33 COLUM. J.L. & ARTS 349, 355 (2010).

74. For example, countless news stories about James Holmes, accused of a July 2012 mass shooting in a Colorado movie theater, have been accompanied by his mugshot photo. See, e.g., Erica Goode et al., *Before Gunfire, Hints of 'Bad News'*, N.Y. TIMES, Aug. 27, 2012, at A1, available at <http://www.nytimes.com/2012/08/27/us/before-gunfire-in-colorado-theater-hints-of-bad-news-about-james-holmes.html?smid=pl-share>; see also Jo Becker et al., *Looking Behind the Mug-Shot Grin*, N.Y. TIMES, Jan. 16, 2011, at A1, available at <http://www.nytimes.com/2011/01/16/us/16loughner.html> (discussing reactions to the "spellbinding mug shot" of Jared Loughner, who shot nineteen people including a federal judge and a member of Congress at a Tucson grocery store).

available to them. And even when a mugshot business does something beyond just dumping all available photos into a database, such as by organizing the photos into categories based on the arrestees' appearances or adding some sort of commentary to accompany the photos, the result hardly becomes what one would customarily think of as legitimate news coverage.

To be sure, some people read the mugshot tabloids or peruse the websites, so they obviously have an interest in seeing the material. But sexually explicit images also have widespread appeal in print and online, and no one could reasonably insist that pornography is newsworthy simply because it has a large audience. Likewise, mugshot businesses do not exist to serve the function of conveying newsworthy information. They instead owe their audiences to a less noble but undeniably common desire to gawk at the less fortunate and draw some sort of satisfaction from imagining their embarrassment.

Torn between conflicting interests, courts can strike a fair balance by drawing a line between mugshot businesses that profit merely by assembling and displaying arrest photos and information and those that profit by their willingness to remove content for a fee. For example, a tabloid newspaper full of mugshot photos would be protected, as would a website that never accepts compensation for taking down mugshots. These companies can credibly contend that they are in the business of transmitting information to the public. The success and continuation of their ventures will be determined by the proverbial marketplace of ideas. A mugshot tabloid will go out of business if few people care to read it. Likewise, the online equivalent will survive only if it can attract a sufficient number of visitors willing to pay for access or advertisers willing to pay to reach those visitors.

Mugshot businesses that get paid to delete content are a different story. Whether they collect compensation directly from arrestees or through affiliated or even completely independent mugshot removal services, they are not really in the business of conveying information. They get paid to suppress information; they profit by agreeing to curtail their speech. Giving legal shelter to their activities thus would turn all the justifications for protecting freedom of expression on their heads.

The Supreme Court's decisions in the *Cox Broadcasting* and *Florida Star* cases provide a compelling parallel.<sup>75</sup> Again, the Supreme Court ruled in those cases that the news media cannot be punished for disclosing the

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75. See *supra* notes 42–48 and accompanying text.

names of rape victims obtained from publicly available records. Those decisions provide strong support for finding that mugshot businesses have a right to reproduce photos and other information about arrests obtained from government websites or other public records. But imagine that the *Cox Broadcasting* and *Florida Star* cases instead involved companies that combed through publicly available records to find information about rape victims, created a print publication or website devoted to displaying the victims' names and photographs, and then offered to remove the information concerning any victim who paid a substantial fee. The Supreme Court surely would have concluded that such businesses were not constitutionally protected means of distributing newsworthy information about matters of legitimate public concern.<sup>76</sup>

Drawing this distinction, between businesses that merely display mugshots and those that accept compensation for not displaying mugshots, also provides a bright-line rule that avoids the need for courts to make more subjective and debatable distinctions among media companies. Again, virtually all news sources sometimes use mugshots or convey other information about arrests, and some well-respected newspapers maintain galleries of mugshots.<sup>77</sup> Even without any sort of objective standard or bright-line rule to apply, judges reasonably could conclude that the *Washington Post's* use of mugshots is legitimately newsworthy and *The Slammer* tabloid's contents are not. But to some extent, that sort of subjective determination would open the door to bias in favor of more familiar and conventional media forms and styles. The *Washington Post's* approach to displaying mugshots is more serious and less sensationalistic than that of *The Slammer*, but legal analysis of press and speech rights should boil down to something more objective and determinate than judges' determinations about what is in good or bad taste. By making the newsworthiness inquiry focus on whether a business plays the pay-to-make-it-go-away game, courts can have a clear and consistent rule that does not involve any sort of discrimination based on the character, viewpoint, or tone of the speaker.

Distinguishing between mugshot businesses based on whether they profit from removals also has the simple virtue of reflecting the public's gut feelings about what is most troubling and distasteful about the mugshot industry. While taking down a mugshot for a fee may not legally

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76. Cf. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 489 (1975) (noting that "we should recognize that we do not have at issue here an action for the invasion of privacy involving the appropriation of one's name or photograph").

77. See *supra* notes 19 and 74 and accompanying text.

qualify as blackmail, people's common sense tells them it is essentially a form of extortion, and if there is not a law against it, there should be.<sup>78</sup>

### CONCLUSION

The mugshot industry has been booming for several years now, but a backlash is underway. The class action case filed in Ohio is likely to be just the first of many lawsuits that will begin to pop up around the nation.<sup>79</sup> A grassroots movement of opposition to mugshot businesses also has sprung up, with activists pushing for legislation and boycotts of companies that advertise on mugshot websites.<sup>80</sup> Police and sheriff's departments, unhappy about commercial exploitation of mugshots, have begun to rethink whether they should provide public access to such photos.<sup>81</sup> A few legislators around the country have also started taking note of the issue.<sup>82</sup>

Even the most ardent advocates for open access to public records worry that the mugshot industry may ultimately wind up driving governments to severely restrict access to information about arrests. Steven Aftergood, head of the Federation of American Scientists' Project on Government Secrecy, explained that "[p]osting mugshots and then charging a fee to remove them highlights the fact that not all users of official information have the public interest in mind" and may eventually lead to legislation

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78. See, e.g., Justin Silverman, *The 'Mugshot Racket' II: A Commercial Purpose Exemption?*, DIGITAL MEDIA LAW PROJECT (May 14, 2012), <http://www.citmedialaw.org/blog/2012/mugshot-racket-ii-commercial-purpose-exemption> ("What bothered [an arrested person] wasn't the publication of his mugshot *per se*, but instead the companies working together to solicit payment for its removal."):

79. See Travis Crum, *Mug Shot Websites Suit Filed*, CHARLESTON GAZETTE (W. Va.), Jan. 6, 2013, at 1A, available at <http://www.wvgazette.com/News/201301050124> (reporting that Ohio lawyer Scott Ciolek's next lawsuit against mugshot businesses will be brought in West Virginia).

80. See CLASS ACTION AGAINST MUG SHOT WEBSITES, <http://classactionagainstmugshotwebsites.com/index.html> (last visited Apr. 7, 2013).

81. See, e.g., Crum, *supra* note 79 (reporting that West Virginia's Office of Technology changed its database settings to prevent auto-downloading of mugshot photos but the changes had little effect); Patrick Orr, *Mug Shot Websites Make Money on 'Embarrassment'*, IDAHO STATESMAN, Feb. 27, 2012 (on file with author) (reporting that a sheriff in Ada County, Idaho, was considering whether to stop posting mugshots online or to encrypt the photos to stop them from being automatically downloaded); Pat Reavy, *Sheriff Pulls Mug Shots Offline to Stop 'Extortion' Websites*, DESERET NEWS (Salt Lake City) (Jan. 10, 2013), <http://www.deseretnews.com/article/865570390/Sheriff-pulls-mug-shots-offline-to-stop-extortion-websites.html?pg=all> (reporting that a sheriff in Salt Lake County, Utah, stopped posting mugshots online).

82. See, e.g., Josh Green, *Mugshots Inc.: 'Legalized Extortion' or Constitutional Privilege?*, GWINNETT DAILY POST (Lawrenceville, Ga.) (July 22, 2012), <http://www.gwinnettdaily.com/news/2012/jul/21/mugshots-inc-legalized-extortion-or/#> (reporting that Roger Bruce, a member of Georgia's House of Representatives, planned to introduce legislation aimed at mugshot businesses).

diminishing access to public records.<sup>83</sup> ““That would be a pity,”” Aftergood said, ““because there are cases where mugshots may be newsworthy and should be available to the press.””<sup>84</sup>

The mugshot industry provides a stark illustration of the vexing dilemmas that can arise when information rights clash with other important values. When courts get the opportunity to weigh in on these issues, they should strike a sound balance of the competing interests at stake by finding that the mere publication of mugshots obtained from public records is a legitimate means of disseminating newsworthy information, but directly or indirectly profiting from a willingness to take down such information for a fee goes beyond the bounds of constitutionally protected conduct and exposes the business to liability. We can maintain ample protection for freedom of speech and the press without tolerating business practices that unduly prey on shame.

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83. *Id.*

84. *Id.*