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Mugshots in Oklahoma: Stigmatizing Native American Individuals and Communities

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MUGSHOTS IN OKLAHOMA: STIGMATIZING NATIVE AMERICAN INDIVIDUALS AND COMMUNITIES

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I. INTRODUCTION

Imagine walking into your local gas station and seeing your mugshot on the front cover of a newspaper. To make matters worse, would you want to be labeled a “Jailbird?” *Jailbirds*, known as “Oklahoma’s #1 Mugshot Tabloid,” is a monthly newspaper that publishes mugshots of everyone arrested in rural Oklahoma counties.¹ Law enforcement agencies primarily use mugshots as an administrative tool to capture physical characteristics.² Now, however, mugshots are readily reproduced on websites and in newspapers, causing public humiliation, racial profiling, and discrimination to those whose faces appear in them.³ Although this practice is troublesome for many Oklahomans due to the predatory nature of mugshots, the publication and its wide distribution of mugshots enhances discrimination against Native Americans, which is particularly problematic in Oklahoma due to its large Native American population.⁴ Citizens of Oklahoma, especially minorities and Native Americans, would be well-served if the Oklahoma Legislature regulated the indiscriminate publication of mugshots to reduce any actual or potential prejudicial effect it may have on arrestees.

Part II of this Comment will discuss how mugshots contribute to racial profiling among Native Americans. Many states have taken legislative action against publishing mugshots because publications such as *Jailbirds* promote racial biases and serve little to no value to society or the government.⁵ This part also discusses Oklahoma laws regulating mugshots and the relationship between mugshots and Oklahoma’s incarceration rate, which is higher than any other state.⁶

Part III discusses the historical and current tension between Oklahoma and the various tribes located in Oklahoma. The Supreme Court decision in *McGirt v. Oklahoma* confirmed tribal reservations exist in Oklahoma, halting the state’s unlawful exercise of law enforcement power over Native Americans in certain circumstances.⁷ Oklahoma Governor Kevin Stitt’s recent comments opposing tribal sovereignty fueled tension between state

1. See generally VICE, *Inside Oklahoma’s #1 Mugshot Tabloid*, YOUTUBE (Mar. 24, 2017), <https://www.youtube.com/watch?v=aNEbHbsJ8Pw>.

2. Hansi Lo Wang, *Meet Alphonse Bertillon, The Man Behind the Modern Mug Shot*, NPR (Mar. 8, 2016, 6:21 PM EST), <https://www.npr.org/2016/03/08/469174753/meet-alphonse-bertillon-the-man-behind-the-modern-mug-shot>.

3. *Mug Shots and Booking Photo Websites*, NAT’L CONF. STATE LEG., <https://www.ncsl.org/technology-and-communication/mug-shots-and-booking-photo-websites> (Aug. 8, 2022); VICE, *supra* note 1.

4. See Joe Neel, *Poll: Native Americans See Far More Discrimination in Areas Where They Are a Majority*, NPR (Nov. 14, 2017, 12:01 AM EST), <https://www.npr.org/2017/11/14/563306555/poll-native-americans-see-far-more-discrimination-in-areas-where-they-are-a-majo>; *The Sunshine Blog: The Department of Law Says Goodbye to Those Unflattering Mugshots*, HONOLULU CIVIL BEAT (July 8, 2024), <https://www.civilbeat.org/2024/07/the-sunshine-blog-the-department-of-law-says-goodbye-to-those-unflattering-mugshots/> (“There’s . . . been a concern the past few years that mugshots reinforce racial biases.”).

5. NAT’L CONF. STATE LEG., *supra* note 3; e.g., Maria Cramer, *The Mug Shot, a Crime Story Staple, Is Dropped by Some Newsrooms and Police*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/2020/07/03/us/mugshot-san-francisco-police.html>.

6. Roxanne Daniel, *Since You Asked: What Data Exists About Native American People in the Criminal Justice System?*, PRISON POL’Y INITIATIVE (Apr. 22, 2020), <https://www.prisonpolicy.org/blog/2020/04/22/native>.

7. See generally *McGirt v. Oklahoma*, 591 U.S. 894 (2020). This change in police power may not stop state and local authorities from booking Native Americans before transferring them to tribal court jurisdiction. See Defendants’ Joint Motion to Dismiss & Brief in Support at 8, 13–14, *Creek Nation v. City of Tulsa et al.* (2023) (No. 23-CV-490-CVE-SH), ECF No. 28.

officials and Native Americans.⁸ Ultimately, Native Americans in Oklahoma suffer from the resulting tension between the state and tribal sovereignty.

Part IV argues that the Oklahoma Legislature should prohibit fees to remove mugshots and consider the ethical lines that mugshot companies, websites, and publications cross. Oklahoma can better protect Native Americans, who comprise sixteen percent of the state's population, by prohibiting fees to remove mugshots and restricting editorial freedom.⁹

II. MUGSHOTS CONTRIBUTE TO RACIAL PROFILING

One of the first steps in the post-arrest booking process is the extraction of the arrestee's identifying information along with a photograph, also known as a mugshot.¹⁰ The word mugshot traces back to the Scandinavian term for a drinking vessel, a "mugg."¹¹ Muggs were often decorated with cartoons that resemble human faces, which "led to the use of 'mug' as a synonym for an ugly face."¹² In the early 1930s, police and popular crime movies began using the word mugshot.¹³ In the United Kingdom, the word "mug" was used to describe someone as being a "bloke" or of a low social class.¹⁴ In modern times, society commonly uses "mug" to describe criminals or someone with a criminal record.¹⁵

Alphonse Bertillon, a French criminologist, set the standard for criminal identification that many police departments use today.¹⁶ Bertillon's method included taking a photograph of an arrestee's face and side profile to better capture their "physical features and certain measurements," which were then described in a written attachment.¹⁷ However, this method of obtaining an arrestee's physical description may now contribute to racial profiling through the modern use of facial and tattoo recognition technology.¹⁸ Facial recognition technology scans an image of an individual's face and computes data based on

8. Chad Hunter, *Chief Says Stitt Continues Campaign Against Tribal Sovereignty*, CHEROKEE PHOENIX, (May 19, 2022), https://www.cherokeephoenix.org/council/chief-says-stitt-continues-campaign-against-tribal-sovereignty/article_50f6385e-d789-11ec-8851-078eba2b0324.html.

9. America Counts Staff, *Oklahoma Population Up 5.5% Last Decade*, U.S. CENSUS BUREAU (Aug. 25, 2021), <https://www.census.gov/library/stories/state-by-state/oklahoma-population-change-between-census-decade.html>.

10. *Why Are Police Photos Called Mugshots*, ERASE MUGSHOTS (July 5, 2022), <https://erasemugshots.com/why-are-police-photos-called-mugshots>.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. ERASE MUGSHOTS, *supra* note 10.

16. *See generally* Wang, *supra* note 2.

17. Ellen Wexler, *A Brief History of the Mug Shot*, SMITHSONIAN MAG. (Aug. 25, 2023), <https://www.smithsonianmag.com/smart-news/mug-shot-history-180981922>.

18. Samuel D. Hodge, Jr. & John Meehan, *Tattoo Recognition Technology Is Gaining Acceptance as Crime-Solving Technique*, 42 N. ILL. U. L. REV. 125, 146 (2021) (citing Alex Najibi, *Racial Discrimination in Face Recognition Technology*, HARV. UNIV. SCH. ARTS & SCI. (Oct. 24, 2020), <https://sitn.hms.harvard.edu/flash/2020/racial-discrimination-in-face-recognition-technology> (discussing the use of how facial recognition technology may contribute to racial profiling)); DEBORAH RAMIREZ ET AL., U.S. DEP'T JUST., RESOURCE GUIDE ON RACIAL PROFILING DATA COLLECTION SYSTEMS: PROMISING PRACTICES AND LESSONS LEARNED 3 (2000), <https://www.ojp.gov/pdffiles1/bja/184768.pdf> ("[I]f police use a person's race, ethnicity, or national origin in determining whether a specific individual is a member of a criminal organization, they have engaged in racial profiling.").

their physical characteristics.¹⁹ Similarly, tattoo recognition technology scans a photo of a tattoo and generates data based on the tattoo's characteristics, like its size or color.²⁰ The data generated in both facial and tattoo recognition technology is then stored in a database and compared to other faces or tattoos.²¹ This process is concerning because many Native Americans share common physical characteristics like high cheekbones, darker complexions, heavy earlobes, and almond-shaped eyes.²² Thus, there is a risk of racial profiling because Native Americans are identifiable by their physical characteristics, as shown through mugshots.

Similarly, racial profiling may occur through mugshots by tattoo recognition technology. It is common for Native Americans to have tattoos to represent "symbols of their families and tribes."²³ However, if tattoos do not appear in traditional mugshots, police may take photographs of the tattoos and upload them to a database.²⁴ Although tattoo recognition technology may help police identify possible gang affiliations, this method draws concern for linking a person to criminal activity simply based on their culture.²⁵ Thus, a tattoo linking an individual to their Native American culture also conveys a connection between Native Americans and crime.

State legislatures across the country are working to modernize mugshot laws to combat the negative effects of mugshot publication.²⁶ Several pieces of legislation relate to payoffs for mugshot removal and restricting law enforcement from releasing mugshots.²⁷ Additionally, several news and media outlets stopped releasing mugshots after recognizing that mugshots contribute to racial profiling.²⁸ However, Oklahoma state officials continue to rely on a 2012 Opinion by Oklahoma Attorney General Scott Pruitt, which states that mugshots are open records and the public has a right to access them.²⁹

Oklahoma should prohibit the wide publication of mugshots by newspaper outlets such as Jailbirds because it increases the risk of racial profiling. Jailbirds is a monthly newspaper that specializes in printing mugshots of arrested individuals in fifty-five rural Oklahoma counties.³⁰ The newspaper is available in over 600 Oklahoma stores and is expanding into Kansas and Missouri.³¹ Jailbirds thrives in Oklahoma, printing about 80,000 newspapers a month.³² The newspaper may attribute its success to citizens of rural

19. Hodge & Meehan, *supra* note 18, at 138.

20. *Id.*

21. *Id.*

22. *My Cherokee Heritage and General Cherokee History*, HUB PAGES, <https://discover.hubpages.com/family/Cherokee-Heritage> (Feb. 6, 2019).

23. *Understanding the Native American Tattoo*, FAUST GALLERY (July 22, 2019), <https://www.faustgallery.com/understanding-the-native-american-tattoo>.

24. *See* Hodge & Meehan, *supra* note 18, at 125.

25. *Id.* at 145.

26. NAT'L CONF. STATE LEG., *supra* note 3.

27. *Id.*

28. Cramer, *supra* note 5.

29. 2012 OK AG 22, ¶ 13; Wayne Greene, *Oklahoma Attorney General: Police Mug Shots Are Public Records*, TULSA WORLD (Aug. 31, 2020), https://tulsa-world.com/news/local/govt-and-politics/oklahoma-attorney-general-police-mug-shots-are-public-records/article_1efb56a7-7553-5b2a-9a7a-8714e21221c7.html.

30. VICE, *supra* note 1.

31. *About Us*, JAILBIRDS, <https://jailbirds.com/about-us> (last visited Nov. 22, 2024); *Frequently Asked Questions*, <https://jailbirds.com> (last visited Nov. 22, 2014).

32. VICE, *supra* note 1.

Oklahoma counties because “in a small town where everybody knows everybody, the information about who was arrested in the last thirty days is more interesting news.”³³

Jailbirds groups Oklahoma’s fifty-five counties based on geographical location and prints twelve separate newspapers:

1. Tulsa;
2. Canadian, Blaine, Custer, Washita, and Beckham;
3. Cherokee, Adair, Sequoyah, Muskogee, and Wagoner;
4. Comanche, Caddo, Cotton, Kiowa, Tillman, Jackson, Stephens, and Grady;
5. Garfield, Kingfisher, Noble, and Major;
6. Garvin, McClain, Carter, Marshall, Murray, and Love;
7. Kay, Washington, Osage, and Pawnee;
8. LeFlore, Latimer, Pittsburg, McIntosh, and Haskell;
9. McCurtain, Choctaw, Bryan, Atoka, Pushmataha, and Coal;
10. Payne, Creek, Lincoln, and Logan;
11. Pottawatomie, Pontotoc, Seminole, Hughes, and Johnston;
12. Rogers, Nowata, Craig, Mayes, Delaware, and Ottawa.³⁴

Jailbirds then provides stores with newspapers based on the store’s geographic location.³⁵ However, all twelve publications are available on the *Jailbirds* website for purchase.³⁶

Jailbirds refuses to remove mugshots regardless of the reason, whereas many other mugshot publications provide an arrestee the option to remove their mugshot for a fee.³⁷ Because owners of mugshot websites do not have an incentive to keep individual mugshots published, several Oklahoma legislators call removal fees extortion.³⁸ Essentially, by soliciting money to remove an individual’s mugshot, these websites act in a manner that resembles the crime of extortion.³⁹ The Oklahoma Legislature tried to address this extortion issue through two bills, but both failed.⁴⁰

Furthermore, *Jailbirds* likely violates an arrestee’s privacy due to its reckless use of catchy titles, like “Mistakes Were Made,” which imply the guilt of an arrestee.⁴¹ Under the 2012 Attorney General Opinion, a violation of privacy occurs when a mugshot is

33. *Id.*

34. *Browse e-Editions*, JAILBIRDS, <https://jailbirds.com/product-category/digital-downloads> (last visited Sept. 27, 2023) [hereinafter *e-Editions*].

35. VICE, *supra* note 1.

36. *e-Editions*, *supra* note 34.

37. *Compare* VICE, *supra* note 1, with Lucia Walinchus, *Paying to Save Face: Some Mugshot Sites May Operate in Legal Gray Area*, J. REC. (Sep. 27, 2017), <https://journalrecord.com/2017/09/27/paying-to-save-face-some-mugshot-sites-may-operate-in-legal-gray-area>.

38. Dale Denwalt, *Bill to End Payments to Get Off Booking Photo Sites Gets Locked Up*, J. REC. (Mar. 23, 2016), <https://journalrecord.com/2016/03/23/bill-to-end-payments-to-get-off-booking-photo-sites-gets-locked-up-capitol>.

39. Walinchus, *supra* note 37.

40. S.B. 1530, 55th Leg., 2d Sess. (Okla. 2016); S.B. 407, 59th Leg., 1st Sess. (Okla. 2023).

41. *See* 2012 OK AG 2022, ¶ 13 (stating that an invasion of privacy may occur if “the law enforcement agency knowingly or recklessly places an arrestee in a false light in public.”); Editorial, *Garvin, Carter, McClain, Marshall, Murray, & Love*, 12 JAILBIRDS 1 (Jan. 2023) [hereinafter Jan. 2023 Editorial].

accompanied by misinformation or implies a conviction.⁴² However, *Jailbirds*' editorial judgment seems to fly under the radar of this legal guardrail since it is not held to the same strict standards imposed on law enforcement agencies, as the publication continues to use questionable titles for seemingly comedic entertainment.⁴³ The fact that mugshots are open records gives *Jailbirds* the opportunity to place arrestees in a false light even though police cannot; this is even more reason why mugshots should not be open records.

Another issue arising from *Jailbirds* concerns the negative impact the newspaper has on the Native American incarceration rate in Oklahoma. The likelihood of arrest for Native Americans is high, especially within reservations and other areas with a large Native American population.⁴⁴ The high Native American incarceration rate in Oklahoma suggests that the Oklahoma criminal justice system disproportionately harms Native Americans.⁴⁵ Accordingly, Oklahoma's large Native American population and the wide circulation of *Jailbirds*, contributes to racial profiling of Native Americans and, ultimately, their high incarceration rate.⁴⁶

A. Nationwide Approach to Public Mugshots and Legislation

It is no surprise that, with the rapid advancement of technology, mugshots of famous individuals circulate on the internet.⁴⁷ For example, Rosa Parks, Martin Luther King Jr., and former President Donald Trump all have mugshots that appear online.⁴⁸ However, most online mugshots are not of famous people.⁴⁹ Instead, they depict ordinary people, "and sometimes even people who haven't committed crimes."⁵⁰ Many state legislatures have recognized the various issues that published mugshots cause, resulting in mugshot legislation.⁵¹ However, Oklahoma lacks modern mugshot legislation and instead relies on the Oklahoma Open Records Act and a 2012 Attorney General Opinion to support the public's right to access those mugshots.⁵²

42. 2012 OK AG 2022, ¶ 8.

43. VICE, *supra* note 1; Olivia Solon, *Haunted by a Mugshot: How Predatory Websites Exploit the Shame of Arrest*, GUARDIAN (June 12, 2018, 3:01 EST), <https://www.theguardian.com/technology/2018/jun/12/mugshot-exploitation-websites-arrests-shame> ("[T]he internet transformed mugshots . . . into 'commodities posted for entertainment and commercial gain.'").

44. Jessica G. Finkeldey & Stephen Demuth, *Race/Ethnicity, Perceived Skin Color, and the Likelihood of Adult Arrest*, 11 RACE & JUST. 4, 584–85 (2021).

45. Jen Deerinwater, *Paper Genocide: The Barriers to an Accurate Count of Native People in 2020*, REWIRE NEWS GRP. (Dec. 10, 2019, 10:19 AM), <https://rewirenewsgroup.com/2019/12/10/paper-genocide-the-barriers-to-an-accurate-count-of-native-people-in-2020>; Daniel, *supra* note 6.

46. Cramer, *supra* note 5.

47. Wexler, *supra* note 17.

48. *Id.*

49. *Id.*

50. *Id.*; Sandy Rozek, *Mugshots Are Not a Good Look for Anyone*, NAT'L ASS'N RATIONAL SEXUAL OFFENSE L. (Aug. 27, 2023), <https://www.narsol.org/2023/08/mugshots-are-not-a-good-look-for-anyone>. The effect of publishing mugshots "lingers long after the false accusation is recanted, the mistaken identity is corrected, or the innocent person is vindicated." Rozek, *supra* note 50.

51. NAT'L CONF. STATE LEG., *supra* note 3 (explaining that mugshot issues range from ruining an individual's reputation, mugshot removal payoff schemes, and mugshots remaining online even when the arrestee no longer faces charges).

52. Greene, *supra* note 29.

i. Public Access to Mugshots Should Come to an End

Supporters of publishing mugshots allege that mugshots convey “who” someone is in a way that the arrestee’s name alone cannot.⁵³ However, Native American last names are highly diverse, unique, and recognizable.⁵⁴ Overall, mugshot supporters believe that the public has an unfettered right to mugshots.⁵⁵ Despite these arguments, the U.S. Department of Justice prohibits the release of federal arrestee mugshots on privacy grounds.⁵⁶ The public’s opinion on mugshot publication has recently begun to sour, with opposition to the practice growing, especially when done before conviction.⁵⁷ Approximately four in ten Americans believe they should have the right to remove potentially harmful or embarrassing media from the internet, including criminal records and mugshots.⁵⁸ This is because mugshots publicize “an unflattering close-up of a person’s face and profile, taken at one of the worst possible moments” of their lives.⁵⁹ Police departments and news organizations then work together to distribute mugshots.⁶⁰ This relationship between police departments and newsrooms has lasted for over a century, but recent shifts from media outlets suggest that it may end soon.⁶¹

In July 2020, the San Francisco police chief announced that their department “will limit the release of booking photos” to instances where it is necessary to warn the public of danger or ask for its assistance in locating an individual.⁶² Limiting the release of mugshots “can help prevent bias in policing and the potentially negative outcome for justice-involved persons who are subsequently not charged or convicted of committing a crime.”⁶³ Jennifer Eberhart, a psychology professor who “studied the correlation between the public’s perception of crime and images of Black people,” consulted San Francisco’s police chief before the change.⁶⁴ Professor Eberhart found that “[i]f the only faces you’re seeing are of Black and Latino people, it can create this illusion that most Black and Latino people are committing the crimes.”⁶⁵

Grouping people based on their mugshots causes fear of the group and not the individual who was arrested.⁶⁶ For example, racial profiling may occur when mugshots are

53. Tresa Baldas, *Media to Feds: Give Us the Mug Shots—They’re Public*, DET. FREE PRESS (Mar. 10, 2016, 9:31 AM EST), <https://www.freep.com/story/news/nation/2016/03/09/media-feds-give-us-mug-shots-theyre-public/81541576>.

54. See Native American Career Center, *Some Info on Native Last Names*, YOUTUBE (June 8, 2022), <https://www.youtube.com/watch?v=g0awsszCd7k>.

55. Baldas, *supra* note 53.

56. *Id.*

57. Wexler, *supra* note 17.

58. Brooke Auxier, *Most Americans Support Right to Have Some Personal Info Removed from Online Searches*, PEW RSCH. CTR. (Jan. 27, 2020), <https://www.pewresearch.org/short-reads/2020/01/27/most-americans-support-right-to-have-some-personal-info-removed-from-online-searches>.

59. Cramer, *supra* note 5.

60. *Id.*

61. *Id.*

62. Press Release, William Scott, Chief of Police, S.F. Police Dep’t, Department Media Relations & Social Media—Booking Photos & Arrestee Information 1 (July 1, 2020), <https://www.sanfranciscopolice.org/sites/default/files/2020-07/SFPDDN20.112.20200701.pdf>.

63. *Id.*

64. Cramer, *supra* note 5.

65. *Id.*

66. *Id.*

grouped by county, resulting in a perception that Native Americans commit more crimes than others.

Many newsrooms followed the San Francisco police chief's decision and decided to remove mugshot galleries for the same reason.⁶⁷ Gannett, the largest newspaper publisher in the United States,⁶⁸ discontinued mugshot galleries, stating that mugshots "without context may feed into negative stereotypes and, in our editorial judgment, are of limited news value."⁶⁹ Not long after, the Orlando Sentinel in Florida and WRCB-TV in Tennessee, both local news outlets, announced similar changes.⁷⁰ WRCB-TV specifically stated that it would only use mugshots to help police find a dangerous person, to differentiate individuals with common names, or to encourage victim reporting.⁷¹ Additionally, the Houston Chronicle announced in 2020 that it would stop using galleries, which the local sheriff's office praised due to mugshots publicly embarrassing people before they are convicted.⁷²

Newsrooms and media outlets are not alone in enacting mugshot policy changes. Louisiana, Arkansas, Illinois, and Texas are some of the many states that have enacted policies to address mugshot concerns.⁷³ Louisiana prohibits law enforcement from releasing mugshots, requires websites to remove mugshots upon request, and prohibits charging fees for the removal of mugshots.⁷⁴ Arkansas prohibits websites from charging a fee to remove a mugshot and requires these websites to take down the mugshot within five business days of a request.⁷⁵ Illinois prohibits law enforcement agencies from posting mugshots on their social media for specific types of offenses.⁷⁶ Texas enacted legislation requiring mugshot companies to ensure their publication of an individual's criminal record is accurate.⁷⁷ If inaccuracies exist, the State of Texas or the Texas Attorney General may seek civil penalties.⁷⁸

Between 2014 and 2022, at least ninety-one pieces of various states' legislation addressed the publication of mugshots.⁷⁹ A common theme among that legislation were the ethical concerns surrounding mugshot publication. Most proposed legislation addressed the public use of mugshots, law enforcement's right to distribute mugshots, and removal of mugshots from websites.⁸⁰

Finally, even private companies have taken a stance against profiting off of mugshots.⁸¹ MasterCard, American Express, and Discover no longer work with companies

67. *Id.*

68. See generally *Gannett Company, Inc.*, LIBR. CONG., <https://www.loc.gov/item/lcwaN0016970> (last visited Jan. 7, 2024).

69. Cramer, *supra* note 5.

70. *Id.*

71. *Id.*

72. *Id.*

73. See NAT'L CONF. STATE LEG., *supra* note 3.

74. H.B. 729, 2022 Leg., Reg. Sess. (La. 2022).

75. H.B. 1437, 93rd Gen. Assemb., Reg. Sess. (Ark. 2021).

76. S.B. 1699, 101st Gen. Assemb., Reg. Sess. (Ill. 2019).

77. S.B. 1289, 83rd Leg., Reg. Sess. (Tex. 2013).

78. *Id.*

79. NAT'L CONF. STATE LEG., *supra* note 3.

80. *Id.*

81. *Id.*

who charge a fee to remove mugshots.⁸² Additionally, Google altered its algorithm so that mugshot websites were no longer presented at the top of its search results.⁸³ While many states and companies have addressed mugshot concerns, Oklahoma companies and the Oklahoma State Legislature has yet to do the same.

ii. Oklahoma's Outdated Response to Public Mugshots

Instead of considering effective mugshot legislation, defenders of mugshots continue to support the public's right to open records.⁸⁴ The Oklahoma Open Records Act ("OORA") aims to "ensure and facilitate the public's right of access to and review of government records so they may efficiently and intelligently exercise their inherent political power."⁸⁵ The OORA further states that there are exceptions included to protect individuals' privacy interests.⁸⁶ However, an individual lacks the right to keep information private and cannot expect information to be kept from the public when they submit information to a public entity, including law enforcement.⁸⁷

Over ten years ago, E. Scott Pruitt, the former Oklahoma Attorney General, released an Opinion regarding the OORA's relationship with mugshots.⁸⁸ Attorney General Pruitt answered four questions on the matter,⁸⁹ ultimately concluding that mugshots are open records.⁹⁰

The first question asked whether an arrestee's mug shot is considered an open record under the OORA.⁹¹ The Oklahoma Legislature did not specifically define mugshots as a public record.⁹² Attorney General Pruitt used the OORA's language to conclude that photographs are defined as a record.⁹³ Thus, mugshots obtained by law enforcement are public records.⁹⁴ Another section of the OORA states that an arrestee's description is a public record.⁹⁵ Because the OORA does not define the term "description," Attorney General Pruitt looked to the word's plain meaning, stating that a "description includes pictures."⁹⁶ He then answered the first question affirmatively, stating that mugshots are the "best" and "most accurate" description of an individual's appearance.⁹⁷

The second question asked: "If the mugshot is an open record, is that record subject

82. *Id.*

83. *Id.*

84. Derrick James, *Oklahoma Lawmakers Hold Interim Study Over Profiting from Mugshots*, MCALESTER NEWS-CAP. (Sept. 30, 2023), https://www.mcalesternews.com/news/oklahoma-lawmakers-hold-interim-study-over-profiting-from-mugshots/article_7d09c9ce-5e3d-11ee-a9a7-efe4b920e547.html.

85. OKLA. STAT. tit. 51, § 24A.2 (2024).

86. *Id.*

87. *Id.* ("Except where specific state or federal statutes create a confidential privilege, persons who submit information to public bodies have no right to keep this information from public access nor reasonable expectation that this information will be kept from public access.").

88. *See generally* 2012 OK AG 22.

89. *Id.* ¶ 0.

90. *Id.* ¶ 13.

91. *Id.* ¶ 0.

92. *Id.* ¶ 2.

93. 2012 OK AG 22, ¶ 3–4.

94. *Id.*

95. *Id.* ¶ 2.

96. *Id.* ¶ 3 (internal quotations omitted).

97. *Id.* ¶ 4.

to disclosure to the media or any citizen upon request?”⁹⁸ Attorney General Pruitt said that law enforcement agencies must disclose mugshots to any person upon request because they are a physical description of an arrestee.⁹⁹ He explained further that the purpose of the Act is to ensure that the public has access to government records.¹⁰⁰ The Legislature advanced this purpose by requiring that “[a]ll records of public bodies and public officials be open to any person.”¹⁰¹ Although the Legislature created exceptions for records that do not require disclosure, mugshots do not fall within any of the exceptions.¹⁰²

The third question posed asked whether the disclosures of mugshots by law enforcement agencies “constitute an invasion of privacy of the arrestee regardless of whether a determination of guilt was made?”¹⁰³ Attorney General Pruitt explained that mugshots generally do not constitute an invasion of privacy.¹⁰⁴ However, if a mugshot misrepresents someone’s image, then it could be an invasion of privacy.¹⁰⁵ So, when the information in the public record is true, an arrestee cannot claim an invasion of privacy.¹⁰⁶ Alternatively, when mugshot disclosure “is accompanied by a knowing or reckless false communication that the person in the mugshot has been convicted of a crime,” an invasion of privacy could occur.¹⁰⁷ Attorney General Pruitt concluded that he could not answer whether releasing a mugshot is an invasion of privacy because it is a question of fact.¹⁰⁸

Finally, the fourth question addressed whether a mugshot is an open record subject to disclosure, asking “is a law enforcement agency required to provide a copy of the record electronically or is allowing access to the hard copy of the record for . . . reproduction . . . in compliance with the law?”¹⁰⁹ Since mugshots are an open record, individuals, media outlets, and private companies may be the requestor.¹¹⁰ Attorney General Pruitt stated that, if a law enforcement agency does not keep a mugshot in an electronic format or a mugshot is requested in a different form, law enforcement agencies may, but are not required to, convert it to electronic format.¹¹¹ Additionally, a law enforcement agency may charge a fee if the request is “solely for commercial purposes or if it would clearly cause excessive disruption of the essential function of the public body.”¹¹² However, if the request is for news purposes, news media will not be charged a fee.¹¹³

David Reid, publisher of the *Jailbirds* newspaper, was a driving force behind Attorney General Pruitt’s opinion, as he experienced “trouble getting mugshots from

98. 2012 OK AG 22, ¶ 0.

99. *Id.* ¶ 5–6.

100. *Id.* ¶ 5.

101. *Id.* (quoting OKLA. STAT. tit. 51, § 24A.5 (2024)).

102. *Id.* ¶ 6.

103. 2012 OK AG 22, ¶ 0.

104. *Id.* ¶ 7.

105. *Id.* ¶ 8.

106. *Id.* ¶ 7.

107. *Id.* ¶ 8.

108. 2012 OK AG 22, ¶ 9.

109. *Id.* ¶ 0.

110. *Id.* ¶ 12.

111. *Id.* ¶ 11.

112. *Id.* at n.4 (internal quotations omitted).

113. 2012 OK AG 22 n.4.

sheriffs.”¹¹⁴ Likely due to the rapid advancement of technology, *Jailbirds Digital* was created in 2020, providing mugshot publications online.¹¹⁵ The Opinion does not address whether mugshots disseminated by “private individuals or organizations constitutes an invasion of privacy.”¹¹⁶ The Office of the Oklahoma Attorney General has not addressed mugshots related to open records since the 2012 Opinion, leaving room for a reexamination of mugshots under the Oklahoma Open Records Act.

iii. The Oklahoma Legislature Had Multiple Opportunities to Enact Mugshot Legislation

Since 2022, the Oklahoma Legislature considered and enacted five bills that limit the application of the OORA.¹¹⁷ However, none of these bills addressed mugshot concerns regarding an invasion of privacy.¹¹⁸ Instead, the Legislature focused on protecting the privacy and efficiency of government authorities.¹¹⁹ Although the Legislature shows a willingness to limit the Act in these circumstances, the Legislature has not enacted any bills to address mugshot concerns.¹²⁰

In the 2023 Legislative Session, the Oklahoma Legislature discussed Senate Bill 89, which requires government officials to respond to an open-records request within ten days.¹²¹ Although this bill benefits individuals requesting records, it also places a burden on city staff.¹²² For example, a former municipal employee for the City of McAlester submitted intensive open records requests as revenge after being sentenced to four years in federal prison for embezzling money from the city.¹²³ McAlester’s mayor and other city staff struggled with compiling thousands of document pages and described the former employee’s requests as “solely a harassment tool.”¹²⁴ The local hospital had to assist the McAlester city clerk in compiling the records because the clerk spent half of her week working to fulfill those requests.¹²⁵ Thus, House Representative Jim Grego authored House Bill 3475 to address the City of McAlester’s concerns.¹²⁶ The bill sought to limit “excessive disruption” due to constant record requests.¹²⁷ This bill ultimately would have given government officials the authority to decline requests.¹²⁸ However, Representative

114. VICE, *supra* note 1; Greene, *supra* note 29.

115. See generally *Jailbirds Digital, LLC*, OKLA. SEC’Y STATE, <https://www.sos.ok.gov/corp/corpInformation.aspx?id=3512834266> (last visited Mar. 17, 2024).

116. 2012 OK AG 22 n.2.

117. See, e.g., S.B. 89, 59th Leg., 1st Sess. (Okla. 2023); H.B. 3475, 58th Leg., 2d Sess. (Okla. 2022); S.B. 1272, 58th Leg., 2d Sess. (Okla. 2022); S.B. 1159, 58th Leg., 2d Sess. (Okla. 2022); S.B. 1733, 58th Leg., 2d Sess. (Okla. 2022); S.B. 1356, 58th Leg., 2d Sess. (Okla. 2022); H.B. 3569, 58th Leg., 2d Sess. (Okla. 2022).

118. See generally *supra* note 117.

119. See, e.g., H.B. 3475, 58th Leg., 2d Sess. (Okla. 2022); S.B. 1159, 58th Leg., 2d Sess. (Okla. 2022).

120. S.B. 1530, 55th Leg., 2d Sess. (Okla. 2016); S.B. 407, 59th Leg., 1st Sess. (Okla. 2023).

121. S.B. 89, 59th Leg., 1st Sess. (Okla. 2023).

122. See, e.g., Kayla Branch, *Cities and State Agencies Push Back Against Oklahoma Open Records Law*, OKLA. CITY FREE PRESS (Aug. 6, 2023, 9:20 PM), <https://freepressokc.com/cities-and-state-agencies-push-back-against-oklahoma-open-records-law>.

123. *Id.*

124. *Id.*

125. *Id.*

126. H.B. 3475, 58th Leg., 2d Sess. (Okla. 2022); Branch, *supra* note 122.

127. H.B. 3475, 58th Leg., 2d Sess. (Okla. 2022).

128. Branch, *supra* note 122.

Grego withdrew the bill after advocates and journalists voiced concerns regarding the bill's effect on public transparency.¹²⁹

Although the OORA aims to protect some information from the public by including more than twenty exemptions, more protections are needed.¹³⁰ City and state agencies resist the OORA because large record requests “disrupt their core functions and impact economic development.”¹³¹ House Bill 3475 is one bill among many filed during the 2022 regular session that addressed open records.¹³² Senator Tom Dugger filed Senate Bill 1272 to increase record request costs.¹³³ Senator Dugger later withdrew the bill after “journalists and Freedom of Information advocates created backlash.”¹³⁴ These critics “warned that increased fees would be prohibitive” to open record requestors.¹³⁵ Senate Bill 1159, also later pulled, sought to exempt the Commissioners of the Land Office from complying with open records requests.¹³⁶ The Land Office desired to “financially invest in business in the state, but if private companies share their information, it would be public record.”¹³⁷ Senator Julie Daniels said “lawmakers struggle with the line between privacy and security and the public’s right to know.”¹³⁸ Finding a balance between privacy and transparency may be difficult, but many states have still found a way forward.¹³⁹

Senate Bill 1733 and House Bill 1356 demonstrate the Oklahoma Legislature’s willingness to enact legislation restricting the Oklahoma Open Records Act.¹⁴⁰ Under Senate Bill 1733, university foundations are exempt from all open record requests.¹⁴¹ This bill intends to “combat frivolous lawsuits against university foundations for records.”¹⁴² Additionally, Senate Bill 1356 grants the Grand River Dam Authority open record exemptions.¹⁴³ The Grand River Dam authority received an overwhelming amount of record requests after two of its employees died in an explosion.¹⁴⁴ In response to these record requests, the Authority asked for an exemption to the Oklahoma Open Records Act after realizing that their records would expose important infrastructure information.¹⁴⁵

Although not yet enacted, House Bill 3569 would grant the state’s public power utility open records exemptions.¹⁴⁶ One of the exemptions under this bill would prevent

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. S.B. 1272, 58th Leg., 2nd Sess. (Okla. 2022); Branch, *supra* note 122.

134. Ashlynd Huffman, *Oklahoma Senator Scrapping Bills Related to Open Records Act*, HUNTSVILLE ITEM (Jan. 20, 2022), https://www.itemonline.com/cnhi_network/oklahoma-senator-scrapping-bills-related-to-open-records-act/article_05c31635-638e-5d83-97ba-fca94af8d607.html.

135. Branch, *supra* note 122.

136. *Id.*; S.B. 1159, 58th Leg., 2d Sess. (Okla. 2022).

137. Branch, *supra* note 122.

138. *Id.*

139. *See supra* notes 73–80 and accompanying text.

140. S.B. 1733, 58th Leg., 2d Sess. (Okla. 2022); S.B. 1356, 58th Leg., 2d Sess. (Okla. 2022).

141. S.B. 1733, 58th Leg., 2d Sess. (Okla. 2022).

142. Branch, *supra* note 122 (internal quotations omitted).

143. S.B. 1356, 58th Leg., 2d Sess. (Okla. 2022).

144. Branch, *supra* note 122.

145. *Id.*

146. H.B. 3569, 58th Leg., 2d Sess. (Okla. 2022).

open records requests for confidentiality agreements.¹⁴⁷ State agencies frequently use confidentiality agreements when contracting with private entities.¹⁴⁸ For example, the Department of Commerce “pledged a package of incentives to the electric vehicle company Canoo valued at \$300 million,” but the public cannot view the details due to a confidentiality agreement.¹⁴⁹ Clearly, the Legislature is willing to enact, or at least consider, policies that provide economic opportunities or protect the privacy of state agencies.¹⁵⁰ Similar to state agencies, arrestees have an interest in protecting their economic opportunities and, ultimately, their privacy.¹⁵¹

Along with other measures proposed, the Oklahoma Legislature has previously considered two bills that address mugshot removal fees.¹⁵² In 2016, State Representative Ken Walker co-authored Senate Bill 1530, which would have prohibited for-profit mugshot websites from charging a fee to remove a mugshot.¹⁵³ Senator Walker explained that removal fees are “like extortion” because website owners have every right to post mugshots since they are open records.¹⁵⁴ Thus, prohibiting removal fees, would take the incentive away for keeping a mugshot online.¹⁵⁵ However, the bill failed to pass a senate committee vote.¹⁵⁶

In January 2023, State Senator Jo Anna Dossett proposed Senate Bill 407, addressing the same concerns as Senate Bill 1530.¹⁵⁷ The bill states that, if an arrestee’s mugshot is published, the arrestee may request the business or individual to remove their mugshot.¹⁵⁸ Within ten days of receiving the request, the bill would require the business or individual to remove the mugshot.¹⁵⁹ The arrestee may seek civil action and impose a \$1,000 daily fine on the business or individual for not complying with the request.¹⁶⁰ Senator Dossett believes that for-profit mugshot companies charging removal fees participate in a “predatory act.”¹⁶¹ The bill applies to a business or individual who “solicits or accepts payments for the removal of photographs” or if their primary business model is to publish mugshots for a “commercial purpose or pecuniary gain.”¹⁶² Senator Dossett said “charging exorbitant fees to take down mugshots” is like extortion.¹⁶³ Unfortunately, Senate Bill 407 failed in the last session, but Senator Dossett expects lawmakers to reconsider similar

147. *Id.*

148. Branch, *supra* note 122.

149. *Id.*

150. *See, e.g.*, S.B. 1733, 58th Leg., 2d Sess. (Okla. 2022); S.B. 1356, 58th Leg., 2d Sess. (Okla. 2022).

151. *See* Brendan Lynch, *Never Convicted, but Held Back by a Criminal Record*, TALK POVERTY (Dec. 9, 2014), <https://talkpoverty.org/2014/12/09/held-back-by-a-criminal-record/index.html>.

152. S.B. 1530, 55th Leg., 2d Sess. (Okla. 2016); S.B. 407, 59th Leg., 1st Sess. (Okla. 2023).

153. S.B. 1530, 55th Leg., 2d Sess. (Okla. 2016); Denwalt, *supra* note 38.

154. Denwalt, *supra* note 38.

155. *Id.*

156. *Id.*

157. S.B. 407, 59th Leg., 1st Sess. (Okla. 2023).

158. *Id.*

159. *Id.*

160. *Id.*

161. John Asebes, *Oklahoma Lawmaker Fights For-Profit Mugshot Publications*, FOX 23 NEWS (Sept. 25, 2023), https://www.fox23.com/news/oklahoma-lawmaker-fights-for-profit-mugshot-publications/article_c89e288e-5c1d-11ee-ac0c-f7c31aa53223.html.

162. S.B. 407, 59th Leg., 1st Sess. (Okla. 2023).

163. Asebes, *supra* note 161.

provisions.¹⁶⁴ In the meantime, Senator Dossett plans to review mugshot legislation from other states and seek advice from the National Conference of State Legislators.¹⁶⁵ While there has been some progress to restrict public mugshots, more recent discussions seem to address the biggest issue plaguing Oklahoma's arrestees: *Jailbirds*.

B. Oklahoma's Mugshot Tabloid: Jailbirds

In September 2023, several lawmakers met at the Oklahoma Capitol for a State Senate Public Safety Committee meeting to discuss for-profit mugshot companies.¹⁶⁶ Senator Dossett presented an interim study analyzing “the predatory practice of for-profit mugshot websites.”¹⁶⁷ Senator Dossett recognized that mugshots benefit law enforcement agencies, news media, and the public's safety.¹⁶⁸ However, the study helped Senator Dossett understand how for-profit mugshot websites exploit citizens.¹⁶⁹ Mugshot websites can exploit citizens because, even if the state dismisses an arrestee's charge or if the arrestee is found not guilty, those sites still demand “large amounts of money” to remove a mugshot.¹⁷⁰ Despite the potential benefit to those who want access to mugshots, publishing mugshots for financial gain should be against public policy.

A concerned mother, Jill McCormick, shared the story of her son's arrest after suffering a mental health episode.¹⁷¹ Although the state dismissed his case, his mugshot appeared on various for-profit websites.¹⁷² The family resorted to hiring a “reputation defender,” who assists with online reputation issues, but the defender was unsuccessful in removing the son's mugshot from every website on which it was published.¹⁷³ Jill McCormick explained that many families cannot afford professional help, so she hopes to help others become aware of the costs that removing a mugshot requires.¹⁷⁴

Critics also weighed in on the study, stating mugshots assist law enforcement agencies, and the 2012 Opinion deems mugshots an open record.¹⁷⁵ A journalist said, “images can be helpful when a suspect has a common name shared by multiple individuals and can allow the public to truthfully address who is being arrested.”¹⁷⁶ Even though mugshots might help differentiate individuals, the purpose of *Jailbirds* is not to differentiate common names.¹⁷⁷ Out of the approximately 501 arrestees in the August 2023 edition for Kay, Washington, Osage, and Pawnee counties, twenty arrestees do not have a mugshot.¹⁷⁸

164. *Id.*

165. *Id.*

166. *Id.*

167. *Interim Study Examines For-Profit Mugshots*, OKLA. SENATE (Sept. 25, 2023, 4:53 PM), <https://oksenate.gov/press-releases/interim-study-examines-profit-mugshots>.

168. *Id.*

169. *Id.*

170. *Id.*; see also Walinchus, *supra* note 37.

171. OKLA. SENATE, *supra* note 167.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. OKLA. SENATE, *supra* note 167.

177. VICE, *supra* note 1.

178. Editorial, *Kay, Washington, Osage, Pawnee*, 13 JAILBIRDS (Aug. 2023) [hereinafter Aug. 2023 Editorial].

Thus, *Jailbirds* fails to properly inform the public of the physical description of all arrestees to differentiate between common names. Instead, *Jailbirds* earns the title of “Oklahoma’s #1 Mugshot Tabloid” by providing comedic entertainment to its customers.¹⁷⁹

i. First Comes Arrest, Next Comes Your Face on the Front Page of *Jailbirds*

The front page of *Jailbirds* displays a few mugshots significantly bigger than the others, with an eye-catching title and a short description of the arrestee’s charge and the events leading up to the arrest.¹⁸⁰ These front-page mugshots are concerning for two reasons. First, they provide comedic entertainment. For example, in an interview with VICE, David Reid pointed to an individual’s mugshot on the front page and said, “look at this funny expression this guy’s got.”¹⁸¹ Second, *Jailbirds* pushes the boundaries of “Presumed Innocent Until Proven Guilty”—the mantra printed on the top of every page of their newspaper.¹⁸² Contrary to this contention, Reid said that, once you are handcuffed, police take your mugshot, and you end up behind bars, “you’ve probably been up to no good.”¹⁸³

Although Attorney General Pruitt did not specifically address *Jailbirds* in his opinion, *Jailbirds*’ refusal to remove mugshots may violate an arrestee’s right to privacy. *Jailbirds* would violate an arrestee’s privacy if they published untrue information or accompanied a mugshot with “a knowing or reckless false communication” that infers a conviction.¹⁸⁴ Some titles accompanying mugshots draw the inference that an arrestee is guilty, such as “Back Where You Belong,”¹⁸⁵ “Overwhelming Evidence,”¹⁸⁶ “Big Mistake,”¹⁸⁷ “Mistakes Were Made,”¹⁸⁸ and “Bad Example.”¹⁸⁹ Furthermore, *Jailbirds* is flying under the radar and potentially violating an arrestee’s privacy for portraying them in a “false light” by titling mugshots with implications of guilt because *Jailbirds* is not subject to the same strict standards as law enforcement.¹⁹⁰ Nevertheless, *Jailbirds* refuses to remove mugshots from its newspapers for any reason.¹⁹¹ Additionally, since an arrestee cannot claim an invasion of privacy if the information is true, *Jailbirds* should not publish mugshots until an arrestee’s conviction. The Oklahoma Legislature should regulate this legal gray area in which mugshot websites and *Jailbirds* operate.

Although the state may drop an arrestee’s charge, mugshots already published by outlets like *Jailbirds* still have long-lasting effects.¹⁹² One Oklahoma woman charged with possession of a dangerous substance in 2016 found herself on the front page of

179. VICE, *supra* note 1.

180. *See, e.g.*, Aug. 2023 Editorial, *supra* note 178.

181. VICE, *supra* note 1.

182. *Id.*

183. *Id.*

184. *See supra* note 107 and accompanying text.

185. Editorial, *Leflore, McIntosh, Latimer, Pittsburg, Haskell*, 10 JAILBIRDS 1 (Apr. 2022).

186. Editorial, *Rogers, Delaware, Mayes, Craig, Nowata, Ottawa*, 11 JAILBIRDS 1 (Jan. 2022).

187. Editorial, *Garfield, Woodward, Woods, Kingfisher, Major, Noble*, 12 JAILBIRDS 1 (June 2022).

188. Jan. 2023 Editorial, *supra* note 41, at 1.

189. Editorial, *Canadian, Blaine, Custer, Washita, Beckham*, 11 JAILBIRDS 1 (June 2022).

190. 2012 OK AG 2022, ¶ 13; *see supra* notes 41–43 and accompanying text.

191. *See sources cited supra* note 37 and accompanying text.

192. VICE, *supra* note 1.

Jailbirds.¹⁹³ No one told her that she would be on the front page of *Jailbirds*, which is “sold at every gas station in the town [where] you get in trouble.”¹⁹⁴ Even though the woman’s charge was later dropped and will not be on her record, her mugshot will forever be online and could negatively impact her outcome, for instance, in terms of job opportunities that she may pursue.¹⁹⁵

ii. Payoffs: If You Cannot Pay, Your Face Stays

Many mugshot websites charge a removal fee to take down an individual’s mugshot, and these fees can range from \$100 to \$2000.¹⁹⁶ Mugshot websites can charge these excessive fees likely due to their pricing power.¹⁹⁷ Pricing power allows a business to raise their prices without impacting demand.¹⁹⁸ An arrestee who seeks to remove their mugshot from all mugshot websites are subject to that website’s fee.¹⁹⁹ For example, a Florida woman paid over \$800 to remove her mugshot from three websites.²⁰⁰ Therefore, an arrestee is at the mercy of not just one mugshot website, but any website that accepts payment to remove a mugshot.²⁰¹

David Reid claims that *Jailbirds* has never taken money to leave a mugshot out, but there is no oversight to ensure he is telling the truth.²⁰² Even Reid believes that the practice of charging removal fees “should be illegal” because payoffs are like “extortion.”²⁰³ *Jailbirds’* no payment policy may seem like an ethical choice, but it may actually be for *Jailbirds’* financial benefit.²⁰⁴ For example, after a young woman’s mugshot appeared in *Jailbirds*, she bought every *Jailbirds* newspaper in her town and then disposed of them.²⁰⁵ Once Reid found out that the woman had bought all the newspapers, he located the dumpster she threw them in, pulled them out, and put them back on the shelves.²⁰⁶

Oklahoma City defense attorney Adam Banner believes the mugshot payoff scheme is “a shady method to make money.”²⁰⁷ Banner recognizes the public has a right to access records, but believes that soliciting people to remove their mugshots for money is “more

193. *Id.*

194. *Id.*

195. *Id.*

196. Denwalt, *supra* note 38; Walinchus, *supra* note 37.

197. See generally Daniel Casali, *Power to the Corporates*, EVELYN PARTNERS (May 24, 2023), <https://www.evelyn.com/insights-and-events/insights/power-to-the-corporates>.

198. *Id.*

199. *Businesses Charge Hundreds to Remove Mug Shots Online*, ABC NEWS (Apr. 23, 2012, 7:10 AM), <https://abcnews.go.com/Business/businesses-make-profit-copying-mug-shots-online-critics/story?id=16157378>.

200. *Id.*

201. *Id.*

202. Denwalt, *supra* note 38.

203. Walinchus, *supra* note 37.

204. *Id.* (explaining that if an individual wants their mugshot removed from *Jailbirds*, then they will have to buy the company).

205. VICE, *supra* note 1.

206. *Id.*

207. Walinchus, *supra* note 37.

or less extorting them” by holding their mugshot over their head.²⁰⁸ To emphasize his point, Banner compared mugshot solicitation to holding someone’s child for ransom.²⁰⁹

Jeff McAlpin, an instructor in sociology and behavioral science at Northwestern Oklahoma State University, identified another issue underlying mugshot payoffs.²¹⁰ McAlpin said that individuals “who have been through the justice system are often the targets of scam artists” because they “can be more susceptible” to paying websites to remove their mugshot.²¹¹ When faced with the fear of public humiliation or the desire to keep an arrest private, paying removal fees is a “quick fix.”²¹²

Put simply, mugshot removal fees are outright extortion. The concept of exploitation includes extortion and blackmail.²¹³ Under Oklahoma law, extortion is defined as the “obtaining of property from another with his consent, induced by a wrongful use of force or fear, or under color of official right.”²¹⁴ Fear constitutes extortion when someone threatens to accuse an arrestee or their family of a crime by exposing or imputing them of “any deformity or disgrace.”²¹⁵ Similarly, blackmail is the “intent to extort or gain value from another” by print, verbal, or written communication.²¹⁶ Blackmail is threatening to expose information about an individual that would subject them to “ridicule or contempt of society.”²¹⁷ Thus, mugshot companies who solicit removal fees threaten to expose an arrestee’s mugshot and, therefore, practice extortion and blackmail as a form of conducting business, which many arrestees pay out of fear of society’s negative response.²¹⁸

Arrestees not only suffer financial hardships due to removal fees, but also public humiliation, especially when their face is on the front page of *Jailbirds*. *Jailbirds*, and all other mugshot websites and companies, profit from creating a powerful visual association of guilt.²¹⁹ These companies profit because mugshots create an inference “between the subject and the criminal activity,” even when the arrestee is not guilty.²²⁰ Although “courts try to avoid showing mugshots to juries to avoid prejudice,”²²¹ prejudice can reach inside Oklahoma courtrooms because *Jailbirds* is sold in every Oklahoma county.

The payoff scheme boils down to the arrestee’s ability to pay. Those who can afford to have their mugshots removed are usually White defendants.²²² Those who cannot pay are “disproportionately Black and Brown,” and their mugshots are published or remain online.²²³ Taken together, you will see more Black and Brown faces than White, simply

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. Walinchus, *supra* note 37.

213. Solon, *supra* note 43.

214. OKLA. STAT. tit. 21, § 1481 (2024).

215. OKLA. STAT. tit. 21, § 1482 (2024).

216. OKLA. STAT. tit. 21, § 1488 (2024).

217. *Id.*

218. Solon, *supra* note 43.

219. *Id.*

220. *Id.*

221. *Id.*

222. Amy F. Kimpel, *Paying for a Clean Record*, 112 J. CRIM. L. & CRIMINOLOGY 439, 439 (2022).

223. *Id.*

because of the arrestee's inability to pay.²²⁴ As a result, the publisher contributes to racial profiling because viewers are mostly seeing Black and Brown mugshots.²²⁵

C. *Mugshots Contribute to the High Incarceration Rate for Native Americans in Oklahoma*

If one of the “most important cornerstone[s] of the U.S. justice system is the presumption of innocence until proven guilty,” then why do we unconsciously allow mugshots to create an association of guilt?²²⁶ Public booking photographs have this effect because “we live in a very judgmental society.”²²⁷ Thus, once “people see your mugshot, they won’t care what you have done.”²²⁸ Rather, society assumes an arrestee is a criminal.²²⁹ Newspapers like *Jailbirds*, and other similar mugshot websites, largely contribute to mugshots spreading online and in the community before a trial starts.²³⁰ The combination of Oklahoma’s large Native American population,²³¹ the high likelihood of Native Americans facing arrest,²³² and *Jailbirds* being Oklahoma’s most popular mugshot tabloid²³³ has the consequential effect of racial profiling and ultimately incarcerating more Native Americans than any other state.

Many states recognize the negative impact that mugshots have on racial profiling, yet the Oklahoma Legislature ignores the fact that its large Native American population could be suffering from that issue.²³⁴ With eye-catching titles, *Jailbirds* is not a regular newspaper²³⁵—it is a tabloid that profits from an individual’s arrest. An individual’s mugshot widely circulated in rural communities could lead to loss of employment, lack of economic opportunities, and public embarrassment.²³⁶ Ultimately, racial profiling occurs when grouping people together based on skin color, and not considering the individual.²³⁷ While looking at the arrestees in Osage County, named after the Osage Nation,²³⁸ the risk of racial profiling exists, and therefore, is likely one of the reasons why Native Americans are incarcerated at a significantly high rate.²³⁹

224. *Id.*

225. Cramer, *supra* note 5.

226. Luke Worli, *Can Mugshots Portrait Innocent People as Guilty?*, N.Y. STATE BAR ASS’N (Apr. 25, 2021, 4:07 PM), <https://communities.nysba.org/blogs/luke-worli1/2021/04/25/can-mugshots-portrait-innocent-people-as-guilty>.

227. *Id.*

228. *Id.*

229. *Id.*

230. *See id.*; *see supra* note 33 and accompanying text (noting that *Jailbirds* offers a look into arrests made in the preceding thirty days before publication—a timeframe long before a trial can occur)

231. America Counts Staff, *supra* note 9; *see infra* Section II.C.i.

232. *See infra* Section II.C.ii.

233. VICE, *supra* note 1.

234. *See supra* Section II.A.i., iii.

235. *See supra* notes 185–89 and accompanying text.

236. *See, e.g., supra* notes 192–95 and accompanying text

237. *See supra* notes 64–66 and accompanying text.

238. Jon D. May, *Osage County*, OKLA. HIST. SOC’Y (Feb. 9, 2024), <https://www.okhistory.org/publications/enc/entry?entry=OS004>.

239. Daniel, *supra* note 6.

i. Oklahoma's Large Native American Population

Native Americans make up sixteen percent of Oklahoma's population, making Oklahoma the state with the second largest Native American population in the country.²⁴⁰ Out of the seventy-seven Oklahoma counties, Native Americans make up to 49.9 percent of the population in fifty-nine counties, and in Adair County, Native Americans make up more than fifty percent of the population.²⁴¹ It is no surprise that Oklahoma is home to a significant number of Native Americans because Oklahoma was part of Indian Territory prior to statehood.²⁴²

Today, Oklahoma is known for its rich Native American history, which is accredited to the tribes in Oklahoma.²⁴³ There are thirty-nine federally recognized tribes in Oklahoma.²⁴⁴ Among them are the Cherokee, Chickasaw, Choctaw, Creek, and Seminole nations.²⁴⁵ These tribes have reservations in the eastern part of Oklahoma, accounting for nearly half of the state.²⁴⁶ Despite the large Native American presence and population in Oklahoma, the question still remains as to why Native Americans are overrepresented in the criminal justice system.²⁴⁷ One reason could be due to the likelihood of arrest.

ii. Likelihood of Arrest for Native American Individuals

Native Americans are among the minority groups that more frequently face arrest "due to racial profiling and discrimination by police."²⁴⁸ Many Americans hold stereotypes that categorize Native Americans as "unpleasant, violent, dangerous, and criminal."²⁴⁹ The likelihood of arrest for Native Americans with darker skin is six times higher than those with lighter skin.²⁵⁰ Thus, the degree of skin color among Native Americans influences their likelihood of arrest.²⁵¹ Furthermore, the likelihood of arrest for darker skin is prominent due to the "more extreme conditions of disadvantage[s]" many Native Americans face.²⁵² The location of Native Americans also contributes to their likelihood of arrest.²⁵³ Off-reservation Native Americans with lighter skin do not suffer the same disadvantages that darker skin Native Americans face when living on reservations.²⁵⁴ Although

240. America Counts Staff, *supra* note 9.

241. *American Indian and Alaska Native (AIAN) Heritage Month*, U.S. CENSUS BUREAU (Oct. 25, 2022), <https://www.census.gov/library/visualizations/2022/comm/aian-month.html>.

242. Conor P. Cleary, *The Rediscovery of Indian Country in Eastern Oklahoma*, 94 OKLA. BAR J. 18, 19 (May 2023).

243. Jessica Shaw, *What Is Oklahoma Known For?*, TRAVEL2NEXT (Feb. 22, 2024), <https://travel2next.com/what-is-oklahoma-known-famous-for>.

244. Mac Bentley, *39 Tribes Call State Home*, OKLAHOMAN (Feb. 16, 2003, 12:00 AM CST), <https://www.oklahoman.com/story/news/2003/02/16/39-tribes-call-state-home/62057840007>.

245. Andrew K. Frank, *Five Civilized Tribes*, OKLA. HIST. SOC'Y (Jan. 15, 2010), <https://www.okhistory.org/publications/enc/entry.php?entry=FI011>.

246. Cleary, *supra* note 242, at 19.

247. *See* Daniel, *supra* note 6.

248. Finkeldey & Demuth, *supra* note 44, at 569.

249. *Id.*

250. *Id.* at 581.

251. *Id.*

252. *Id.* at 584.

253. Finkeldey & Demuth, *supra* note 44, at 584–85.

254. *Id.*

the study of how skin color affects Native Americans is “an extremely underdeveloped area,”²⁵⁵ the research that is available provides insight as to how law enforcement views Native Americans even without a mugshot. Given these statistics, it follows that Native Americans living in Oklahoma, especially those within a reservation, face a higher likelihood of arrest.

Economic and social disparities among Native American communities also contribute to the likelihood of arrest.²⁵⁶ Many Native American communities experience “overcrowding more often than other races,” which likely contributes to the homelessness population.²⁵⁷ Additionally, the opioid crisis and domestic violence “can be linked to historical community traumas,” which include children forced to attend boarding schools.²⁵⁸ Ultimately, “twenty percent of [law enforcement] stops of Native Americans result in an arrest—over twice as much as any other race.”²⁵⁹ If these factors contribute to the overrepresentation of Native Americans in the criminal justice system, then one could assume that public mugshots of Native individuals also contribute to racial profiling and ultimately a higher incarceration rate. This result is likely due to Oklahoma’s large Native American population and the way *Jailbirds* categorizes their publications by county.

iii. Categorizing Publications by County Presents Misconceptions about Native American Individuals and Communities

Jailbirds is unique in that it organizes its twelve monthly publications by geographical area.²⁶⁰ For example, because *Jailbirds* covers local arrests, the publication available in stores in Ponca City is the Kay, Washington, Osage, and Pawnee edition. This method of organization appeals to locals who often see people they know in the latest edition.²⁶¹ However, all twelve editions are available for purchase on the *Jailbirds* website, so anyone can access them no matter where they live.²⁶² Nevertheless, it is important to understand the significance of only showing local arrests in a rural county and how that process contributes to racial profiling. According to *Jailbirds*, their newspaper allows people to gain access to information about crime within their community.²⁶³ However, in a rural town, a mugshot can spread quickly throughout a small community, which is exactly how *Jailbirds* contributes to racial profiling.

While many of Oklahoma’s seventy-seven counties are named in connection with “local and national statesmen,” several others have ties to Native American history.²⁶⁴

255. *Id.* at 586.

256. Marina M. Gorsuch & Deborah Rho, *Police Stops and Searches of Indigenous People in Minneapolis: The Roles of Race, Place, and Gender*, 10 INT’L INDIGENOUS POL’Y J. 1, 1 (2019). While this study focused on Minneapolis, researchers can apply it to cities in Oklahoma that have similarly high Native American populations.

257. *Id.* at 4.

258. *Id.* at 5.

259. *Id.* at 10.

260. *See supra* note 34 and accompanying text.

261. *See supra* note 33 and accompanying text.

262. *See e-Editions, supra* note 34.

263. VICE, *supra* note 1.

264. Mary Phillips, *The Archivist: How Oklahoma Counties Got Their Names*, OKLAHOMAN (Oct. 14, 2013, 12:00 AM CST), <https://www.oklahoman.com/story/lifestyle/2013/10/14/the-archivist-how-oklahoma-counties-got-their-names/60874789007>.

There are thirteen Oklahoma counties named after tribes, which are Caddo, Cherokee, Choctaw, Comanche, Creek, Delaware, Kiowa, Muskogee, Osage, Ottawa, Pawnee, Pottawatomie, and Seminole counties.²⁶⁵ Eight counties—Adair, Carter, LeFlore, Love, Mayes, McCurtain, McIntosh, and Rogers—received their names from “[p]rominent Indian families.”²⁶⁶ Additionally, Sequoyah, Atoka, Pushmataha, and Johnston counties are all named after honorable Native American leaders.²⁶⁷ Native American words or places also contributed to the names of Pontotoc, Nowata, Okfuskee, Okmulgee, and Tulsa counties.²⁶⁸ While structuring *Jailbirds* by county may simply enhance its organization, it likely also draws a connection between Native Americans and crime.

Many of these counties have significant ties to Native communities and have a large Native American population.²⁶⁹ For example, the town Anadarko, located within Caddo County, has the largest Native American population at thirty-two percent.²⁷⁰ This number is significant because the population is only around 5,700 people.²⁷¹ Additionally, much of the eastern half of Oklahoma has a large Native American population as it is home to the Five Civilized Tribes.²⁷² On the contrary, counties in western Oklahoma have a smaller Native American population.²⁷³ Interestingly enough, *Jailbirds*’ twelve publications focus on the middle and eastern parts of Oklahoma.²⁷⁴

Mugshots harm Native Americans when there are limited employers, landlords, bankers, doctors, and pharmacists in rural Native communities.²⁷⁵ Even publishing names would harm Native individuals because last names like “Ahoka,” “Catawabee,” and “Oowaite” are distinct and recognizable compared to a last name like “Smith.”²⁷⁶ Like David Reid said, *Jailbirds* shows people in power the arrestees that should not be given a loan or a medical prescription.²⁷⁷ Organizing editions by county, Native Americans’ high chance of arrest, and Oklahoma counties that have large Native American populations contribute to misconceptions about Native Americans. This misconception arises from being involved in the criminal justice system, as these individuals “are swiftly identified as criminals.”²⁷⁸ Misconceptions about Native Americans ultimately lead to harmful effects like the inability to obtain employment, housing, or healthcare.²⁷⁹ Overall, *Jailbirds* separating

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.*

269. Chris Kolmar, *The 10 Oklahoma Cities with the Largest Native American Population for 2024*, HOMESNACKS, <https://www.homesnacks.com/most-native-america-cities-in-oklahoma> (Jan. 5, 2024).

270. *Id.*

271. *Id.*

272. Cleary, *supra* note 242, at 19.

273. Kolmar, *supra* note 269.

274. *See supra* note 34 and accompanying text (indicating the grouped counties).

275. Neel, *supra* note 4.

276. L. Elizabeth Forry, *Native American Last Names and Meanings*, FAM. EDUC., <https://www.familyeducation.com/baby-names/surname/origin/native-american> (Feb. 14, 2024).

277. VICE, *supra* note 1.

278. Kelly E. Moore et al., *Self-Stigma Among Criminal Offenders: Risk and Protective Factors*, 3 STIGMA & HEALTH 241, 241 (2018) (internal quotations omitted).

279. *Id.* at 241.

mugshots by county creates unnecessary misconceptions and ultimately drives the racial profiling of Native Americans who already face discrimination in their communities.²⁸⁰

III. OKLAHOMA'S STRAINED RELATIONSHIP WITH NATIVE AMERICANS

The battle over jurisdiction in Oklahoma arguably began in 1907 and continues to this day.²⁸¹ Native Americans have faced oppression in Oklahoma through the loss of land, tradition, culture, and language.²⁸² However, tribal nations contribute “socially, culturally and economically to Oklahoma” and together have donated over “\$130 million to Oklahoma public schools.”²⁸³ Despite these efforts—and many others—to mend relations,²⁸⁴ Oklahoma state officials publicly criticize and dishonor tribal sovereignty.²⁸⁵ Unsurprisingly, law enforcement targets Native Americans as demonstrated by traffic stops.²⁸⁶ The combination of historical oppression in Oklahoma and government officials targeting tribal nations and Native individuals creates a link between Native Americans and crime. As a result, when you open *Jailbirds* you see Native faces, Native names, and Native counties.

A. *History of Growing Tension Between the State of Oklahoma and Native Americans*

Western expansion in the United States was brutal for Native American individuals and communities.²⁸⁷ European and American colonizers went unpunished for “burning Native villages, destroying crops, committing sexual assaults, enslaving people and perpetrating massacres.”²⁸⁸ Using “Manifest Destiny” and the “so-called Doctrine of Discovery,” United States policymakers pressed the federal government to develop the western region of the country.²⁸⁹ The Indian Removal Act of 1830 forcibly removed the Five Civilized Tribes from their homelands in the southeast part of the country and Oklahoma became a place for outcasts of society, otherwise known as “Indian Territory.”²⁹⁰ U.S. policymakers, who were “[r]acist in language and logic,” believed that “Indians” were “inferior to whites” and thus needed a designated territory to live in.²⁹¹ As a result, “Oklahoma was born of this institutionalized racism.”²⁹²

Although Indian Territory was to belong to the tribal nations indefinitely, Congress eventually violated “every one of the 375 treaties” it made with tribal nations in addition

280. See generally Neel, *supra* note 4.

281. See generally Dwanna L. McKay, *Oklahoma Is—and Always Has Been—Native Land*, CONVERSATION (July 16, 2020, 8:12 AM EST), <https://theconversation.com/oklahoma-is-and-always-has-been-native-land-142546>.

282. See *id.*

283. *Id.*

284. *Id.*

285. E.g. Sean Murphy, *Oklahoma Governor's Feud with Native American Tribes Continues over Revenue Agreements*, ASSOCIATED PRESS (July 21, 2023, 11:14pm), <https://apnews.com/article/oklahoma-governor-native-american-revenue-agreements-bf90f0248d17c0ff47e774c6b9b5234d#>.

286. See *infra* Section III.C.

287. McKay, *supra* note 281.

288. *Id.*

289. *Id.* (internal quotations omitted).

290. *Id.*

291. *Id.*

292. McKay, *supra* note 281.

to many statutory acts.²⁹³ Beginning with nearly forty-four million acres, Indian Territory consisted of only twenty-five million acres by 1890.²⁹⁴ In 1889, nearly two million acres in Oklahoma were “redesignated as Unassigned Lands and opened to white settlement.”²⁹⁵ Approximately “28 [percent] of people in Indian Territory were actually Indian” by 1890.²⁹⁶ Oklahoma became a state in 1907 and assumed all jurisdiction over Indian Territory.²⁹⁷

In an effort to “assimilate Native Americans into white culture and to claim tribal land for the country’s westward expansion,” the federal government created Native American boarding schools.²⁹⁸ The schools were opened in the early 1800s and lasted until about 1969.²⁹⁹ The schools were anything but education focused, as “Native students were often abused and forced to do heavy labor and military drills.”³⁰⁰ Additionally, “school leaders changed children’s names, cut their hair, forbid them from practicing any part of their cultures,” and punished children that spoke in their Native language.³⁰¹ Federal officials estimate tens of thousands of children died while attending boarding schools.³⁰²

Seventy-six of these boarding schools were in Oklahoma—primarily in the eastern part of the state, where the tribal nations relocated under the Indian Removal Act.³⁰³ One of the largest boarding schools was the Chilocco Indian School in rural northern Oklahoma.³⁰⁴ Housing children from across the country, the federal government operated the school like a notorious Pennsylvania school that was well-known for having military-like conditions.³⁰⁵ Tribal nations were able to gain ownership of many schools by the early 1900s, but, “as the U.S. government pursued a campaign of breaking up tribal governments and nations,” some of the schools later returned to federal government ownership.³⁰⁶ The schools that still stand are a reminder to Oklahomans that the federal government wanted to eliminate Native Americans.³⁰⁷

293. *Id.*

294. *Id.*

295. *Id.* (internal quotations omitted).

296. *Id.* (internal quotations omitted).

297. McKay, *supra* note 281.

298. Molly Young, *What We Know About the Investigation into Native American Boarding Schools*, OKLAHOMAN (May 18, 2022, 7:00 AM CST), <https://www.oklahoman.com/story/news/2022/05/18/what-know-federal-native-american-boarding-schools-report-oklahoma-indian/9795807002>. Boarding schools are just one example of assimilation, among others like the Dawes Act that allotted land to Native American families, breaking apart their reservation land. *A Brief History of Civil Rights in the United States: The Allotment and Assimilation Era (1887–1934)*, HOWARD UNIV. SCH. L. (Jan. 6, 2023, 12:25 PM), <https://library.law.howard.edu/civil-rights/history/indigenous/allotment>. Additionally, the Indian Citizenship Act furthered the government’s purpose of assimilation. *Id.*

299. Young, *supra* note 298.

300. *Id.*

301. *Id.*

302. *Id.*

303. *Id.*

304. Young, *supra* note 298.

305. *Id.*

306. *Id.*

307. *See id.*

Not only do the schools still haunt living survivors, but also younger generations.³⁰⁸ According to the Department of the Interior, boarding schools created generational trauma that still negatively affects Native American individuals and communities today.³⁰⁹ For example, “high rates of violence, poverty, mental health disorders, and substance abuse” are evidence of direct ties to boarding schools.³¹⁰ Despite the infamous phrase, “kill the Indian, save the man,” Native Americans and tribal nations look to the future.³¹¹

Native American families were torn apart not only by boarding schools, but also state courts.³¹² The federal government passed the Indian Child Welfare Act to protect Native American children enrolled in a tribe.³¹³ The federal government recognized that “nontribal public and private agencies” were breaking up Native American families at an “alarmingly high percentage” by unnecessarily removing children from their homes.³¹⁴ At a comparative pace, these agencies placed children with “non-Indian foster and adoptive homes and institutions.”³¹⁵ Ultimately, the states “failed to recognize the essential tribal relations of Indian people and the cultural and social standards” existing within Native American communities.³¹⁶ As a result of the Act, tribes now have jurisdiction over Native American children.³¹⁷ However, jurisdiction and tribal sovereignty are topics that Oklahoma state officials seem to disagree upon.³¹⁸

Oklahoma history does not begin in 1907, but instead begins with the people who first settled in the state.³¹⁹ The Indian Removal Act, boarding schools, and the creation of the Indian Child Welfare Act demonstrate how Native Americans were brought to Oklahoma, treated in Oklahoma, and what the federal government had to do to protect Native American children in state courts.³²⁰ This history lays the foundation of the generational trauma that comes with being a Native American living in Oklahoma.³²¹ Due to the trauma, Native communities face more difficulties like violence and mental health issues, which leads to more interactions with law enforcement and, ultimately, the taking and distribution of mugshots.³²²

308. See Sierra Alvarez, *No More Silence: Boarding School Survivor Anita Yellowhair Shares Her Story, Over 60 Years Later*, CRONKITE NEWS (May 8, 2023), <https://cronkitenews.azpbs.org/2023/05/08/indian-boarding-school-survivor-anita-yellowhair>.

309. Young, *supra* note 298.

310. *Id.*

311. *Id.*; Alvarez, *supra* note 308.

312. See Indian Child Welfare Act of 1978, 25 U.S.C. § 1901.

313. *Id.*

314. *Id.*

315. *Id.*

316. *Id.*

317. Kendra Germany-Wall, *Supreme Court Upholds Indian Child Welfare Act*, BISKINIK (July 5, 2023), <https://www.choctawnation.com/biskinik/news/supreme-court-upholds-indian-child-welfare-act>.

318. See Murphy, *supra* note 285.

319. McKay, *supra* note 281.

320. *Id.*

321. Young, *supra* note 298.

322. Gorsuch & Rho, *supra* note 256, at 19.

B. *Oklahoma's Relationship with Native Americans Continues to Worsen Due to State Officials Criticizing Tribal Sovereignty*

While Native Americans now have some protection from the federal government, the relationship between tribes and the State of Oklahoma have never been worse. For the first time in modern history, Oklahoma tribes publicly weighed in on the 2022 governor's election.³²³ Oklahoma's five "most powerful tribes" endorsed Joy Hofmeister, opponent to incumbent Kevin Stitt.³²⁴ Governor Stitt's feud with the tribes began during his first term while renegotiating gaming compacts.³²⁵ After an unsuccessful renegotiation, Governor Stitt's administration attempted to overturn *McGirt v. Oklahoma*—a landmark decision that affirmed the Muscogee (Creek) Nation's reservation.³²⁶ Furthermore, Governor Stitt "terminated hunting and fishing compacts between the state and tribes," which seemed to taunt the tribes by disrupting the status quo of a previously agreed upon arrangement.³²⁷ In fact, Governor Stitt said that he "will not go down in history as the governor that gives my state away" when addressing how detrimental tribal sovereignty is to the State of Oklahoma.³²⁸

Governor Stitt's vocal opposition of Native American rights outrages both federal, state, and tribal leaders. Former President Donald Trump questions Governor Stitt's "animosity" regarding tribes.³²⁹ Additionally, David Hill, Muscogee Nation Principal Chief said that "[a]ny governor that postures and attempts dominion of tribes is detrimental to tribes and the state."³³⁰ Recently, Oklahoma Attorney General Gentner Drummond joined a lawsuit against Governor Stitt regarding gaming compacts.³³¹ Attorney General Drummond accused Governor Stitt of failing to follow state law that resulted in costly litigation.³³² Fed up with Governor Stitt's actions, Oklahoma State Legislators considered "taking control of negotiating tribal compacts."³³³ Tribal sovereignty, hunting and fishing compacts, and gaming rights are not the only way Governor Stitt attacks tribes.³³⁴ He seeks to limit Native Americans on all fronts, including law enforcement.³³⁵

323. Sean Murphy, *Feud with Tribes Threatens Oklahoma Governor's Reelection*, USA TODAY, (Oct. 20, 2022, 5:23 PM EST), <https://www.usatoday.com/story/news/politics/2022/10/20/oklahoma-gov-kevin-stitt-faces-opposition-native-american-tribes/10555216002>.

324. *Id.*

325. *Id.*

326. *Id.*; see *McGirt v. Oklahoma*, 591 U.S. 894, 937–38 (2020).

327. Murphy, *supra* note 323.

328. *Id.*

329. Murphy, *supra* note 285.

330. *Id.*

331. Sean Murphy, *Oklahoma Attorney General Joins Lawsuit over Tribal Gambling Agreements, Criticizes GOP Governor*, ASSOCIATED PRESS, <https://apnews.com/article/oklahoma-gambling-compacts-stitt-drummond-tribal-lawsuit-22e2a60425c4d73998aee062a3d91865> (July 25, 2023, 3:01 PM CST).

332. Letter from Gentner Drummond, Att'y Gen., to Kevin Stitt, Gov., State of Okla., (July 25, 2023), https://oklahoma.gov/content/dam/ok/en/oag/documents/news-documents/2023/july/letter_governor_stitt_re_gaming_compact_litigation_072523.pdf.

333. Murphy, *supra* note 331.

334. Murphy, *supra* note 323.

335. See generally Chad Hunter, *Governor Stitt Targets Off Reservation Tribal Vehicle Tags for State Enforcement*, CHEROKEE PHOENIX, (Nov. 17, 2023), https://www.cherokeephoenix.org/news/governor-stitt-targets-off-reservation-tribal-vehicle-tags-for-state-enforcement/article_806d141c-84c2-11ee-b3a8-abe324bb4c9c.html.

Essentially, *McGirt* recognized that tribal law enforcement has more power over Native Americans, which Governor Stitt opposes.³³⁶ He describes *McGirt* as “destructive” and states that it “has hamstrung law enforcement in half of the state.”³³⁷ Unfortunately, “we have a governor that asks the United States to break its promise and treaties to Indian tribes,” said Cherokee Nation Principal Chief Chuck Hoskin.³³⁸ Even more concerning is that Governor Stitt tries to convince the public that *McGirt* causes chaos, even though it has done no such thing.³³⁹ Ultimately, Governor Stitt harms Native Americans by loudly criticizing tribal sovereignty and Native rights.³⁴⁰ As the governor of Oklahoma, he has powerful influence. Criticizing one group of people is concerning, especially when it leads to unlawful targeting.

C. *Oklahoma Law Enforcement Targets Native Americans*

One way Governor Stitt fights *McGirt* is by vetoing public safety legislation, claiming that tribal license plates are illegal.³⁴¹ In Fall 2023, an individual with a tribal tag received a \$249 ticket for not paying state taxes.³⁴² Although nothing in the tribal tag compact changed, state law enforcement claims that tribal tags “are good only within reservations or tribal jurisdictions.”³⁴³ However, the state has never enforced this regulation until recently.³⁴⁴ Chief Hoskin claims that Governor Stitt is “targeting Cherokee Nation at-large citizens in Oklahoma with unlawful state tag law enforcement.”³⁴⁵ The “Oklahoma trooper was simply doing his job when he ticketed the Otoe-Missouria tribal member” claims Governor Stitt.³⁴⁶ Governor Stitt told law enforcement to simply “enforce the law,” so now law enforcement targets vehicles with tribal tags.³⁴⁷ Essentially, the governor is trying to strong-arm tribes into compacts because the state does not have access to tribal plate information.³⁴⁸

Aside from tribal tags, Native Americans worry that the stereotype of “the drunk Indian on the street corner” has a detrimental impact in the way Oklahoma law enforcement interacts with Native communities.³⁴⁹ Native communities “are disproportionately affected by alcoholism,” including drug use and mental health issues.³⁵⁰ In 2012 and 2013,

336. Hunter, *supra* note 8.

337. *Id.*

338. *Id.*

339. *Id.*

340. *Id.*

341. Hunter, *supra* note 335.

342. *Id.*

343. *Id.*

344. *Id.*

345. *Id.*

346. Hunter, *supra* note 335.

347. Carmen Forman, *Oklahoma Voice: Stitt Says Oklahoma Tribal Tags Present Fairness Issue, Urges Tribes to Compact*, TAHLEQUAH DAILY PRESS, (Nov. 27, 2023), https://www.tahlequahdailypress.com/news/oklahoma-voice-stitt-says-oklahoma-tribal-tags-present-fairness-issue-urges-tribes-to-compact/article_902627aa-897b-11ee-a7c2-3b934a4b1536.html.

348. *Id.*

349. Juliana Keeping, *Race and Justice in Oklahoma: Natives Struggle to Overcome Disparity*, AL JAZEERA AM. (Feb. 24, 2016, 5:00 AM EST), <http://america.aljazeera.com/articles/2016/2/24/oklahoma-native-killings-part-3.html>.

350. *Id.*

police officers killed two mentally ill Native Americans in Custer County, Oklahoma—home to the Cheyenne and Arapaho tribes.³⁵¹ Both instances arose from family members contacting law enforcement for help when the deceased was suffering from a mental health episode, only for law enforcement to kill them.³⁵² As a result, the deaths “fed racial tension in the majority-white law enforcement forces and minority Native population.”³⁵³ The families and other Native Americans in the area question “justice and race in Custer County.”³⁵⁴ Custer County law enforcement blame their lack of training on mental health issues on lack of available resources.³⁵⁵ However, the negative stereotypes against Native Americans could have a relationship to law enforcement intentionally targeting Native Americans.³⁵⁶

The relationship between Native Americans and law enforcement likely has not changed in the past ten years.³⁵⁷ An Oklahoma State Bureau of Investigation report provides insight regarding the relationship between Native Americans and law enforcement by examining data gathered throughout 2021.³⁵⁸ This report details nearly sixty different kinds of arrests and offenses along with the reporting agency.³⁵⁹ Among all offenses, the most astounding is justifiable homicide, which is the killing of an individual by law enforcement.³⁶⁰ Twenty-seven percent of victims were American Indian or Alaskan Native, while thirty-six percent were white, eighteen percent were black, and the remaining eighteen percent’s race was unknown.³⁶¹ Law enforcement shootings of Native Americans do not seem to draw much attention from the media.³⁶²

Friction also arises between state law enforcement and tribal law enforcement.³⁶³ Although these agencies should collaborate when working in rural Indian Country, this is often not the case.³⁶⁴ Trent Shores, former United States Attorney for the Northern District of Oklahoma, accredits the frictions “back to historical injustices.”³⁶⁵ On the other hand, the friction may also arise from recent deteriorating relationships.³⁶⁶ Nevertheless, Mr. Shores believes that “it is possible to forge [a] great working relationship” between state

351. *Id.*

352. *Id.*

353. *Id.*

354. Keeping, *supra* note 349.

355. *Id.*

356. *Id.*

357. *See generally* 2021 CRIME IN OKLAHOMA REPORT, OKLA. STATE BUREAU OF INVESTIGATION 1–11 (Feb. 22, 2023), https://oklahoma.gov/content/dam/ok/en/osbi/documents/sac-documents/crime-in-oklahoma/Crime_in_Oklahoma_2021.pdf.

358. *See generally id.*

359. *Id.* at I.

360. *Id.* at 1–11.

361. *Id.*

362. Keeping, *supra* note 349.

363. Press Release, Trent Shores, U.S. Att’y, N. Dist. of Okla., Statement Before the President’s Comm’n on L. Enf’t and the Admin. of J. (May 21, 2020), <https://www.justice.gov/usao-ndok/pr/statement- united-states-attorney-trent-shores-northern-district-oklahoma-president-s> [hereinafter Statement Before the President’s Comm’n].

364. *Id.*

365. *Id.*

366. *Id.*

and tribal law enforcement “where there previously had been none.”³⁶⁷ Unfortunately, when the governor of Oklahoma encourages state law enforcement to target vehicles with tribal tags,³⁶⁸ a collaborative relationship seems impossible.

The relationship between Native Americans, tribes, and Oklahoma has always been tense. Beginning with the Indian Removal Act of 1830, Indian Territory—eventually Oklahoma—became a home to Native American individuals and tribes, though never a friendly one.³⁶⁹ Native Americans and tribes have sought to rebuild their culture and assert their sovereignty in Oklahoma.³⁷⁰ However, this is difficult to accomplish when state officials do not support a working relationship with tribes or tribal members.³⁷¹ For example, when the United States took a census of Native Americans in the early 1900s, many tribal members identified themselves as white and did not enroll with their tribes out of fear of discrimination and prosecution.³⁷² Even today, when a state law enforcement officer pulls a vehicle over simply because they have a tribal tag, the individual faces a higher chance of arrest simply because they are Native.³⁷³ The arrest leads to a mugshot, which then appears on the front page of *Jailbirds*. From there, Native American arrestees are subject to public humiliation. This is why the Oklahoma Legislature should take action to stop newspapers like *Jailbirds* and ultimately end public mugshots.

IV. MUGSHOTS CAUSE HARM TO NATIVE AMERICANS

Mugshots can ruin an individual’s life by causing damage to their reputation, employment, and finances.³⁷⁴ While citizens of the United States debate the best approach to criminal justice reform, the issues regarding mugshots seem unimportant.³⁷⁵ However, this is far from the truth. Published mugshots have a “profoundly negative impact” on individuals that “continues to exacerbate racial stereotypes.”³⁷⁶ When around seventy million people have a criminal record, mugshots have a “devastatingly punitive effect” on the livelihood of these individuals.³⁷⁷ Even just one mugshot can create barriers to employment, housing, or personal relationships regardless whether the individual is convicted.³⁷⁸

Although public mugshots in general are concerning, *Jailbirds* is even more so because it separates publications by area and arrests by county.³⁷⁹ On its face, this may seem

367. *Id.*

368. *See supra* notes 341–48 and accompanying text.

369. *See supra* Section III.A.

370. *See McKay, supra* note 281.

371. *See supra* Section III.B.

372. *Indian Census Rolls, 1885–1940*, NAT’L ARCHIVES (Oct. 9, 2014), <https://www.archives.gov/research/census/native-americans/1885-1940.html>.

373. *See generally supra* notes 341–48 and accompanying text.

374. Fares Sabawi & Steven Cavazos, ‘Ruined My Life’: Man Wrongfully Arrested by San Antonio Police Lost Job, Savings, KSTAT (Dec. 22, 2020, 2:45 PM), <https://www.ksat.com/news/local/2020/12/18/ruined-my-life-man-wrongfully-arrested-by-sapd-lost-job-savings>.

375. Julie Levitch, *When Your Criminal Case Is Dropped, but Your Mugshot Lives Forever*, CRIM. LEGAL NEWS (June 2022), <https://www.criminallegalnews.org/news/2022/may/15/when-your-criminal-case-dropped-your-mugshot-lives-forever>.

376. *Id.*

377. *Id.*

378. *Id.*

379. *See supra* Section II.C.iii.

to be an organizational tactic.³⁸⁰ However, it likely contributes to racial profiling because Oklahoma has the second largest Native American population in the country.³⁸¹ As a result, organizing mugshots by county presents misconceptions about Native Americans, especially when counties like Osage County are named after the Osage Nation.³⁸²

Furthermore, *Jailbirds* causes more harm than other public mugshots because, as opposed to mugshots being used as an administrative tool, *Jailbirds* earns the nickname of “Oklahoma’s #1 Tabloid.”³⁸³ David Reid, publisher of *Jailbirds*, prides himself on informing the public about the kind of individuals to avoid.³⁸⁴ However, Reid’s assertion that he is doing the public a favor is misguided, as he completely ignores *Jailbirds*’ own “innocent until proven guilty” presumption.³⁸⁵ As a result, Native Americans likely also suffer from racial profiling resulting from grouping mugshots together.³⁸⁶ So, as long as *Jailbirds* continues to grow in popularity across the state of Oklahoma, a harmful correlation exists between Native Americans and crime.³⁸⁷

While the Oklahoma Legislature has the ability to end *Jailbirds* and the public distribution of mugshots, it has yet to enact any legislation to address these issues.³⁸⁸ Other state legislatures struggle to create laws regarding mugshots, especially without violating first amendment rights and freedom of the press.³⁸⁹ However, many other state legislatures have managed to work around these arguments and enacted legislation.³⁹⁰ So, Oklahoma should do the same.

A. Public Mugshots Cause Loss of Economic and Employment Opportunities

An individual’s reputation is everything when it comes to their employment, finances, housing, and even forming relationships. Thus, a mugshot has the power to ruin an individual’s life.³⁹¹ Employers, landlords, and essentially any person in a position of power, decides whether to deny someone with a criminal record.³⁹² Even the Oklahoma State Bureau of Investigation cannot inform an arrestee of what will happen to their employment or housing opportunities after arrest.³⁹³ Without a clean criminal record, economic and employment opportunities dwindle.³⁹⁴

380. See *supra* Section II.C.iii.

381. America Counts Staff, *supra* note 9.

382. See *supra* Section II.C.iii.

383. VICE, *supra* note 1.

384. *Id.*

385. See *supra* notes 182–83 and accompanying text.

386. See *supra* notes 65–66 and accompanying text.

387. See *supra* Section II.B.i, C.iii.

388. See *supra* Section II.A.iii.

389. Levitch, *supra* note 375; Tim Mandell, *Should Websites That Deal in Mug Shots Get First Amendment Protection? Journalists’ Group Says Yes*, RURAL BLOG (Oct. 7, 2013, 1:45 PM), <https://irjci.blogspot.com/2013/10/should-sites-that-deal-in-mug-shots-get.html>.

390. See *supra* notes 73–80 and accompanying text.

391. See *supra* notes 275–80 and accompanying text.

392. See *supra* notes 275–80 and accompanying text.

393. *Frequently Asked Questions: Criminal History*, OKLA. STATE BUREAU OF INVESTIGATION, <https://oklahoma.gov/osbi/services/information-services-division/criminal-history-reporting-unit/criminal-history-faqs.html> (last visited Sep. 25, 2023).

394. Lynch, *supra* note 151.

Native Americans have difficulty obtaining employment opportunities, which could be attributed to discrimination.³⁹⁵ Around one-third of Native Americans report that “they have experienced discrimination in the workplace when seeking jobs.”³⁹⁶ Furthermore, nearly two-thirds of Native Americans living in majority-native areas, like reservations, report that the availability of local employment opportunities was worse than other places.³⁹⁷ Overall, *Jailbirds* likely contributes to Native individuals losing economic and employment opportunities, especially in rural Oklahoma counties.

David Reid believes that his newspaper is a new form of accountability.³⁹⁸ When Reid hears bankers say, “I like *Jailbirds* because I need to know who the people are that are being arrested when they come in for loan accounts,” he feels “great satisfaction.”³⁹⁹ Additionally, when hearing pharmacists and doctors say, “I like *Jailbirds* because I get to know who [has] been arrested on [controlled dangerous substance] charges, so I know who not to continue prescribing drugs to,” equally gives Reid satisfaction.⁴⁰⁰ This is the kind of criminal justice—or, as Reid would say, accountability—that the Oklahoma Legislature ignores. How can Native individuals receive fair treatment in their communities when *Jailbirds* exists? Native individuals already have difficulty obtaining employment and economic opportunities, so the Oklahoma Legislature must do more to avoid this result.

B. *Mugshots Should Be Used Solely As an Administrative Tool*

When used properly, mugshots have an important role in society. As previously stated, many newsrooms and media outlets discontinued mugshot galleries.⁴⁰¹ Instead, these forums decided to only publish mugshots if they were for an administrative service, like to warn the public or identify a missing person.⁴⁰² Racial profiling was an important factor to these forums when deciding to end mugshot galleries.⁴⁰³ Thus, the Oklahoma Legislature should recognize the correlation between racial profiling and mugshots.⁴⁰⁴

While racial profiling is an issue across all mugshot forums, *Jailbirds* is unique in that it serves more as an embarrassing tabloid than a news forum. *Jailbirds* describes its publication as a way to hold arrestees accountable and a way to discover unique violators of Oklahoma law.⁴⁰⁵ Clearly, *Jailbirds* is in the entertainment business as opposed to providing the public with critical information. For example, on the front page of one edition is a mugshot titled “FIRESTARTER” in large bold font.⁴⁰⁶ In smaller font, the description states that the individual “allegedly started a fire” and that more information is

395. Graham Lee Brewer, *As Native Americans Face Job Discrimination, a Tribe Works to Employ Its Own*, NPR (Nov. 18, 2017, 8:20 AM EST), <https://www.npr.org/2017/11/18/564807229/as-native-americans-face-job-discrimination-a-tribe-works-to-employ-its-own>.

396. *Id.*

397. *Id.*

398. VICE, *supra* note 1.

399. *Id.*

400. *Id.*

401. *See supra* notes 67–72 and accompanying text.

402. *See, e.g., supra* note 62 and accompanying text.

403. *See supra* notes 64–66 and accompanying text.

404. *See supra* Section II.A.i., iii.

405. VICE, *supra* note 1.

406. Editorial, *Canadian, Blaine, Custer, Washita, Beckham*, 12 JAILBIRDS (Aug. 2023).

on another page.⁴⁰⁷ This kind of editorial choice goes beyond what should be allowed under Oklahoma law. Furthermore, there are three other mugshots on the front page with two accompanying descriptions of the arrest.⁴⁰⁸ Thus, *Jailbirds* gets to decide which mugshot goes on the front page, because not every mugshot has a description. Allowing *Jailbirds* to pick and choose which mugshot goes on the front cover, along with a title that alludes to an arrestee's guilt, harms those individuals. Without proper policies in place, *Jailbirds* can target Native Americans.

C. *Counterarguments: An Individual's Right to Privacy Should Be Prioritized Over the Public's Interest in Disclosure*

Although many states have stricter mugshot laws, critics argue that laws restricting the release of mugshots infringe on their First Amendment right.⁴⁰⁹ Furthermore, the Reporters Committee for Freedom of the Press argues that restrictions “impinge[] on editors’ right to determine what is newsworthy.”⁴¹⁰ This is largely because journalists categorize mugshots in the same way they do real estate sales, public education, and health inspections—all records that they want to publish.⁴¹¹ Even seemingly mild restrictions, like removing images of the exonerated, is “a step in the wrong direction,” according to the Reporters Committee.⁴¹² Another popular argument points to extortion as a violation of law.⁴¹³ However, there is no violation because “republishing something that has already been published is not extortion.”⁴¹⁴

Although these arguments have some validity, many states have worked their way around these arguments to enact impactful legislation.⁴¹⁵ Even the Tenth Circuit Court of Appeals held that, under the Freedom of Information Act, the federal government does not have to release mugshots.⁴¹⁶ The Court turned to the exemptions made by Congress to address inappropriate disclosures.⁴¹⁷ One exemption in particular says that nondisclosure is appropriate if disclosure “could reasonably be expected to constitute an unwarranted invasion of personal privacy.”⁴¹⁸ The Court reached its decision after finding that the arrestees in that case had an interest in their mugshot and that their privacy outweighed the public's interest in disclosure.⁴¹⁹ Similarly, the same interest exists for Oklahoma arrestees and the Oklahoma Legislature should recognize that an individual's privacy

407. *Id.*

408. *Id.*

409. Mandell, *supra* note 389.

410. *Id.*

411. *Id.*

412. *Id.*

413. *Id.*

414. Mandell, *supra* note 399.

415. NAT'L CONF. STATE LEG., *supra* note 3.

416. See *World Publ'g Co. v. U.S. Dep't of Just.*, 672 F.3d 825, 832 (10th Cir. 2012); see also Josh Gerstein, *Court Ruling Keeps Federal Mugshots Secret*, POLITICO (Feb. 22, 2012, 12:59 PM), <https://www.politico.com/blogs/under-the-radar/2012/02/court-ruling-keeps-federal-mugshots-secret-115210>.

417. *World Publ'g Co.*, 672 F.3d at 826 (citing 5 U.S.C. § 552(b)).

418. 5 U.S.C. § 552(b)(7)(C).

419. *World Publ'g Co.*, 672 F.3d at 827–30.

outweighs the public's interest. Oklahoma Legislators cannot ignore that many other states and the Tenth Circuit prioritized privacy and found solutions despite valid arguments.⁴²⁰

V. CONCLUSION

Across the country, many state legislatures, newsrooms, and media outlets have recognized the problematic nature and adverse impacts arising from mugshots.⁴²¹ However, Oklahoma has yet to recognize how detrimental mugshots are to its citizens.⁴²² Whether it be racial profiling, removal fees, or extortion, public mugshots cause harm.⁴²³ Yet "Oklahoma's #1 Tabloid," *Jailbirds*, causes even more harm than typical public mugshots. Indeed, these mugshots likely contribute to Oklahoma's high Native American incarceration rate due to racial profiling within Oklahoma's many Native American communities.⁴²⁴ Relations between Native Americans and the state of Oklahoma also contribute to the harm that mugshots cause. When state leaders criticize Native individuals and communities, law enforcement has no choice but to listen.⁴²⁵ Thus, it should not be surprising that state law enforcement officers target vehicles with tribal tags.⁴²⁶ Intentional targeting may lead to other consequences, like arrest, and eventually their mugshot published in *Jailbirds*.⁴²⁷

Jailbirds presents a unique issue within Oklahoma because of its impact on economic and employment opportunities for Native Americans.⁴²⁸ When *Jailbirds* circulates around rural communities, misconceptions about Native Americans and crime are the result.⁴²⁹ Ultimately, to reduce discrimination among Native Americans, it is "essential to inform policies" to limit economic disparities.⁴³⁰ This could come from "stronger discrimination laws" and "efforts that seek to reduce discriminatory attitudes or behaviors."⁴³¹ Thus, the Oklahoma Legislature should address this unique criminal justice issue to protect all citizens, especially its Native American population.

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420. *See supra* Sections II.A.i., ii.

421. *See supra* Section II.A.i.

422. *See supra* Sections II.A.ii., iii.

423. *See supra* notes 203–25 and accompanying text.

424. *See supra* Section II.B.,C.

425. *See supra* Section III.B.

426. *See supra* Section III.C.

427. *See supra* Section III.C.

428. *See supra* Section IV.A.

429. *See supra* Section II.C.iii.

430. Patrick Button & Brigham Walker, *Employment Discrimination Against Indigenous Peoples in the United States: Evidence from a Field Experiment*, 65 LAB. ECON. (Aug. 2020).

431. *Id.*

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