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Protecting Privacy on the Front Page: Why Restrictions on Commercial Use of Law Enforcement Records Violate the First Amendment

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NOTES

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I. INTRODUCTION

An individual is involved in an automobile accident and is arrested for driving under the influence. A few days after being released, he receives several letters in the mail. One is from a chiropractor offering services to treat his injuries. Another is from an alcohol abuse treatment center. Yet another is from an attorney who defends traffic offenses. Each of the solicitors obtained the individual's name and address from publicly available records concerning the incident. The letters are truthful and not misleading, but utilize publicly available information for purely commercial purposes at the expense of the individual's privacy.

Several states have passed laws¹ prohibiting the commercial use of public information in law enforcement records.² State govern-

1. See, e.g., CAL. GOV'T CODE § 6254(f) (West 1998); COLO. REV. STAT. § 24-72-305.5 (1994); FLA. STAT. ANN. § 316.650(11) (West 1996); GA. CODE ANN. § 33-24-53(c) (1997); GA. CODE ANN. § 35-1-9 (1994); KY. REV. STAT. ANN. § 189.635 (Banks-Baldwin 1996); TEX. BUS. & COM. CODE ANN. § 35.54 (West 1993); TEX. REV. CIV. STAT. ANN. art. 4512b (West 1993).

2. For the purposes of this Note, "law enforcement records" include police arrestee reports, accident reports and incident reports. See *Speer v. Miller* (Speer I), 15 F.3d 1007, 1009 n.3 (11th Cir. 1994) (describing types of law enforcement records that the government is required to disclose under GA. CODE ANN. § 50-18-72(a)(4)). "Public information" refers to any data found in law enforcement records, particularly information used for solicitation purposes, including the arrestee or accident victim's name, mailing address, and the details of the incident reported. At common law, any member of the public had a right of access to public records. See

ments have offered a number of reasons for such laws. The primary reasons given include protecting the privacy interests of individuals and improving public confidence in the legal system by discouraging solicitation abuse.³ These statutes, however, simultaneously create exceptions for the media and the general public.⁴

To illustrate this tension, imagine that the individual mentioned above opened the morning paper to find all of the details of the accident and arrest on the front page.⁵ The statutes do nothing to prevent other, potentially greater invasions of individual privacy.⁶ In addition, the statutes restrict the non-deceptive commercial speech of businesses that wish to provide legitimate services to recent arrestees and accident victims.⁷ Thus, restrictions on commercial use of public information in law enforcement records implicate the tension between privacy concerns, solicitors' commercial speech rights, and public perceptions of solicitation abuse.

Nixon v. Warner Communications, Inc., 435 U.S. 589, 597-98 (1978) (stating that the right of access fulfills concerns of preserving integrity of law enforcement and judicial process). This right of access included situations where the public or the press sought access to criminal justice records. See *Lanphere & Urbaniak v. Colorado*, 21 F.3d 1508, 1511-12 (10th Cir. 1994) (citing *Warner Communications*, 435 U.S. at 609). Over time, however, some state legislatures replaced the common law with statutes that limit access to certain public records. See, e.g., *United Reporting Publ'g Corp. v. Lungren*, 946 F. Supp. 822, 825 (1996), *aff'd sub nom.*, *United Reporting Publ'g Corp. v. California Highway Patrol (United Reporting II)*, 146 F.3d 1133 (9th Cir. 1998), *cert. granted sub nom.*, *Los Angeles Police Dep't v. United Reporting Publ'g Corp.*, 119 S.Ct. 901 (1999). See *infra* notes 112-13 and accompanying text.

3. See, e.g., *Babkes v. Satz*, 944 F. Supp. 909, 912 (S.D. Fla. 1996) (explaining the reasons behind restricting commercial use of information in traffic citations as "preserving the privacy of [Florida] citizens, in not aiding in the dissemination of information for commercial purposes, in lessening the dangers of solicitation abuse, and in maintaining public support of the legal profession . . .").

4. See *United Reporting II*, 146 F.3d at 1135 (state may release information for any "scholarly, journalistic, political, or government purpose"); *Speer I*, 15 F.3d at 1009 (information may be used by the news media or for "lawful data collection or analysis purpose"); *Babkes*, 944 F. Supp. at 911 (allowing driver safety training programs to use information).

5. See, e.g., *Amelkin v. Commissioner, Dep't of State Police*, 936 F. Supp. 427, 429 (W.D. Ky. 1996) (allowing information to be used in any "news-gathering organization's publication"), *aff'd sub nom.*, *Amelkin v. McClure*, 168 F.3d 893 (6th Cir. 1999).

6. See *Speer I*, 15 F.3d at 1011 n.7 (finding privacy arguments disingenuous in light of statutory language allowing "the media to place any information they obtain on the front page of any newspaper in Georgia").

7. See *United Reporting II*, 146 F.3d at 1140 (noting that having personal information printed in a newspaper is a much "greater affront to privacy than receiving a letter from an attorney, substance abuse counselor, or driving school eager to help one overcome present difficulties," even if for a fee).

While commercial speech,⁸ including solicitation, is entitled to First Amendment protection,⁹ it is afforded less protection than other forms of protected speech.¹⁰ In *Central Hudson Gas & Electric Corp. v. Public Service Commission*, the Supreme Court created a test to determine whether restrictions on lawful, non-misleading commercial speech are permissible.¹¹ Provided that the government asserts a substantial interest,¹² a court must determine whether the restriction directly advances the government's asserted interest and is not more extensive than necessary to serve the asserted interest.¹³ Under this framework, the Supreme Court has upheld several regulations on the commercial speech of attorneys, including bans on in-person solicitation and rules requiring waiting periods for direct mail advertising.¹⁴ The Court has also held that a state may not completely ban professional advertising,¹⁵ advertisements in newspapers,¹⁶ or direct mail advertising.¹⁷

Several circuit courts, however, have split over whether restrictions on commercial use of information in law enforcement records are constitutional under the commercial speech doctrine.¹⁸ In *Lanphere & Urbaniak v. Colorado*, the Tenth Circuit upheld a statute requiring any person accessing public arrestee records to sign a statement that the records would not be used for commercial purposes.¹⁹ The Ninth Circuit took the opposite position in *United Re-*

8. Commercial speech has been defined as "speech that proposes a commercial transaction," *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 762 (1976), or as any speech made in the speaker's economic interest. *See Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 562-563 (1980). However, not all speech generating commercial profit falls under the lower protection afforded commercial speech. *See, e.g., New York Times v. Sullivan*, 376 U.S. 254, 266 (1964) (holding that newspapers are not commercial speech despite any revenue generated through their production and sale). *See infra* Part IV.A.

9. *See, e.g., Virginia Board*, 425 U.S. at 762.

10. *See Central Hudson*, 447 U.S. at 562-563.

11. *See id.* at 566.

12. *See id.*

13. *See id.*

14. *See, e.g., Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978) (banning in-person solicitation); *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995) (imposing waiting periods).

15. *See, e.g., Bates v. State Bar*, 433 U.S. 350 (1977).

16. *See Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985).

17. *See Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988).

18. *Compare, e.g., Lanphere & Urbaniak v. Colorado*, 21 F.3d 1508, 1514 (10th Cir. 1994), with *Amelkin v. McClure*, 168 F.3d 893, 902 (6th Cir. 1999); *United Reporting Publ'g Corp. v. California Highway Patrol (United Reporting II)*, 146 F.3d 1133, 1140 (9th Cir. 1998); *Speer v. Miller (Speer I)*, 15 F.3d 1007, 1010-11 (11th Cir. 1994); *Innovative Database Syss. v. Morales*, 990 F.2d 217 (5th Cir. 1993).

19. *See Lanphere*, 21 F.3d at 1508.

porting *Publishing Corp. v. California Highway Patrol*.²⁰ It held that prohibiting commercial use of information in publicly available arrest records was unconstitutional under *Central Hudson*.²¹ Similar issues have arisen over the commercial use of public information in accident reports.²² The Fifth and Sixth Circuits have invalidated complete prohibitions on commercial use of accident reports,²³ while the state supreme courts of Louisiana and South Carolina have upheld similar restrictions.²⁴

This Note examines whether restrictions on commercial use of law enforcement records directly advance the states' interests in privacy and promoting professional standards of ethics and whether the restrictions are more extensive than necessary to advance these interests. Part II traces the development of the commercial speech doctrine, analyzing Supreme Court case law up to *Central Hudson*, and subsequent cases refining the *Central Hudson* framework. Part III examines recent decisions on the constitutionality of such laws under the First Amendment. In particular, it contrasts the Tenth Circuit's decision in *Lanphere* with the Ninth Circuit's decision in *United Reporting*. Part IV analyzes three issues: whether laws restricting the use of law enforcement records fall under the commercial speech doctrine; whether they are constitutional under *Central Hudson*; and, in the alternative, whether these laws are constitutional under a traditional time, place, and manner analysis. Finally, Part V

20. 146 F.3d 1133. See also *Speer v. Miller* (*Speer II*), 864 F. Supp. 1294, 1302 (N.D. Ga. 1994) (granting permanent injunction against restriction on commercial use of law enforcement records).

21. See *United Reporting II*, 146 F.3d at 1140.

22. Compare *Innovative Database Sys. v. Morales*, 990 F.2d 217 (5th Cir. 1993), and *Amelkin*, 168 F.3d at 902, (6th Cir.) with *Walker v. South Carolina Dep't of Highways & Pub. Transp.*, 466 S.E.2d 346 (S.C. 1995) and *DeSalvo v. Louisiana*, 624 So.2d 897 (La. 1993)). The Sixth Circuit had previously discussed the issue without resolution. See *Northern Ky. Chiropractic v. Ramey*, 106 F.3d 401 (6th Cir. 1997) (vacating preliminary injunction against enforcement of a Kentucky regulation on commercial use of accident reports on abuse of discretion grounds) (unpublished opinion). Several concurring judges disagreed on the possible constitutionality of the regulation. Compare *id.* at *3-*4 (Nelson, J., concurring) (agreeing with the Tenth Circuit in *Lanphere* that such regulations are constitutional), with *id.* at *5 (Guy, J., concurring) (expressing "serious reservations" about the constitutionality of the regulation).

23. See *Innovative Database Sys.*, 990 F.2d at 217; *Amelkin*, 168 F.3d at 902. The Fifth Circuit subsequently upheld a law that prohibited the release of accident reports for 180 days from the date of an accident, along with a thirty day ban on professional solicitation. See *Moore v. Morales*, 63 F.3d 358, 363 (5th Cir. 1995) (citing *Florida Bar v. Went for It, Inc.*, 515 U.S. 618 (1995)). The case, however, did not address the constitutionality of a permanent ban on certain types of commercial use.

24. See *DeSalvo*, 624 So.2d at 901; *Walker*, 466 S.E.2d at 348.

suggests that the problem could be solved by either eliminating public access to sensitive information through temporary limits on commercial access, or by restricting the undesirable activities themselves, rather than indirectly regulating such activities by restricting commercial use of information in public law enforcement records.

II. THE COMMERCIAL SPEECH DOCTRINE

Initially, the Supreme Court treated government regulation of commercial speech as a valid exercise of the states' power to regulate economic activity.²⁵ However, the Court later reversed its position in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council* by placing commercial speech under the protection of the First Amendment.²⁶ In that case, the Court found that the state's interest in upholding the professionalism of licensed pharmacists was outweighed by consumers' interest in the "free flow of commercial information."²⁷ The Court noted that consumers used the dissemination of information in advertising to make intelligent and informed economic decisions.²⁸ The Court indicated, however, that commercial speech would be afforded less protection than other types of speech in order "to insure that the flow of truthful and legitimate commercial information is unimpaired."²⁹ To justify the lower level of protection, the Court differentiated commercial speech from other protected speech in several ways.³⁰ First, commercial speech was normally more "objective" than other types of speech, meaning that its speaker was able to verify its truth more easily.³¹ Second, commercial speech

25. Several early cases discussed whether commercial speech warranted First Amendment protection. In *Valentine v. Chrestensen*, 316 U.S. 52 (1942), the Court held that commercial speech was not protected under the First Amendment. Subsequent cases gradually eroded this approach. See, e.g., *Bigelow v. Virginia*, 421 U.S. 809 (1975) (weighing the commercial nature of speech as one factor in evaluating the validity of a government restriction); *New York Times v. Sullivan*, 376 U.S. 254 (1964) (holding that sale of newspapers did not necessarily turn an advertisement soliciting financial support for a political cause into commercial speech).

26. *Virginia State Bd. Of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976). In holding that commercial speech was entitled to First Amendment protection, the Court in *Virginia Board* rejected the reasoning in *Valentine*. *Id.* at 765. See also *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 481 (1995) (noting that *Virginia Board* repudiated *Valentine's* holding that the First Amendment did not protect commercial speech).

27. *Virginia Board*, 425 U.S. at 763.

28. See *id.* at 765.

29. *Id.* at 772 n.24.

30. See *id.*

31. See *id.* The Court has explained that commercial speakers are well-situated to evaluate the accuracy and lawfulness of their messages because they generally have extensive

was less likely to be "chilled" by restrictions because the speaker normally had substantial economic incentives to enter the speech into the marketplace of ideas.³²

In *Central Hudson Gas & Electric Corp. v. Public Service Commission*, the Court articulated a four-part test to determine whether government restrictions on commercial speech violated the First Amendment.³³ As a threshold question, to qualify for protection the speech must concern lawful activity and not be misleading.³⁴ Next, the interests asserted by the government must be substantial.³⁵ If both conditions are satisfied, then the court must determine whether the regulation directly advances the asserted interests.³⁶ Finally, the restriction must not be more extensive than necessary to serve the interests.³⁷ In a later case, the Court clarified *Central Hudson's* last requirement, noting that it did not require legislatures to adopt the least restrictive means of achieving its goals, but rather a "reasonable fit" between the means chosen and the interests served.³⁸

The *Central Hudson* analysis has been used in a number of cases involving professional solicitation. For example, while profes-

knowledge of both the market and their products. See *Bates v. State Bar*, 433 U.S. 350, 381 (1977).

32. See *Virginia Board*, 425 U.S. at 772 n.24. Courts have also argued that commercial speakers are motivated by economic self-interest, making their expression not "particularly susceptible to being crushed by over-broad regulation." *Id.* For a critique of this reasoning, see David F. McGowan, *A Critical Analysis of Commercial Speech*, 78 CAL. L. REV. 359, 405-11 (1990).

33. See *id.*

34. See *id.*

35. See *id.*

36. See *id.*

37. See *id.*

38. See *Board of Trustees v. Fox*, 492 U.S. 469, 479-80 (1989). The proper level of protection for commercial speech has been the subject of vigorous debate. Some commentators have argued that commercial speech should receive the same protection as any other speech. See, e.g., Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?* 76 VA. L. REV. 627, 631-38 (1990); Martin H. Redish, *Product Health Claims and the First Amendment: Scientific Expression and the Twilight Zone of Commercial Speech*, 43 VAND. L. REV. 1433, 1445-46 (1990); Rodney A. Smolla, *Information, Imagery, and the First Amendment: A Case for Expansive Protection of Commercial Speech*, 71 TEX. L. REV. 777, 780 (1993). At least one Supreme Court Justice has expressed agreement with this position. See 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 518-28 (1996) (Thomas, J., concurring) (questioning the distinction between commercial and noncommercial speech). Other commentators have claimed that commercial speech deserves no protection at all. See, e.g., Ronald K. Collins & David M. Skover, *Commerce & Communication*, 71 TEX. L. REV. 697, 729-33 (1993); Thomas H. Jackson & John C. Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 14 (1979). A discussion of the proper amount of protection to grant commercial speech is beyond the scope of this Note.

sional advertising may not be completely banned,³⁹ the Supreme Court has allowed regulation of solicitation depending on the risk of solicitors overreaching the bounds of ethical conduct and professional responsibility. In *Ohralik v. Ohio State Bar Ass'n*, the Court upheld a complete ban on in-person solicitation by attorneys, an activity with a high risk of overreaching.⁴⁰ The Court overturned a similar ban on targeted direct mail solicitation by attorneys in *Shapiro v. Kentucky Bar Ass'n*,⁴¹ distinguishing the case from *Ohralik* because the increased potential for overreaching was absent from direct mailings. In *Edenfield v. Fane*, the Court overturned a ban on in-person solicitation by certified public accountants, noting that the potential for overreaching was significantly lower in nonlegal professions.⁴² In the most recent case regarding attorney solicitation, *Florida Bar v. Went For It, Inc.*, the Court upheld a thirty day ban on direct solicitation of accident victims, reasoning that the scope of the restriction was reasonably well tailored to the state's asserted interests.⁴³ The Court noted that the restriction was not an absolute ban on solicitation,⁴⁴ and left open several other ways for attorneys to convey their message to potential clients during the thirty-day waiting period.⁴⁵

III. RECENT CASE DEVELOPMENTS REGARDING THE CONSTITUTIONALITY OF LIMITATIONS ON COMMERCIAL USE OF LAW ENFORCEMENT RECORDS

A. Cases Upholding Restrictions on Commercial Use of Law Enforcement Records

In *Lanphere & Urbaniak v. Colorado*, the Tenth Circuit held that states could prohibit the commercial use of law enforcement records.⁴⁶ In that case, a Colorado statute required any person seeking access to criminal justice records to sign an affidavit that the records would not be used "for the direct solicitation of business for

39. See, e.g., *Bates v. State Bar*, 433 U.S. 350 (1977) (invalidating a complete ban on attorney advertising).

40. *Ohralik v. Ohio St. Bar Ass'n*, 436 U.S. 447, 468 (1978).

41. *Shapiro v. Kentucky*, 486 U.S. 466, 475-76 (1988).

42. *Edenfield v. Fane*, 507 U.S. 761, 777 (1993).

43. *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 635 (1995).

44. See *id.* at 629.

45. See *id.* at 633. The Court suggested, for example, advertising in print and broadcast media, utilizing billboards, sending untargeted mailings, or placing advertisements in telephone directories. See *id.*

46. *Lanphere & Urbaniak v. Colorado*, 21 F.3d 1508, 1516 (10th Cir. 1994).

pecuniary gain.⁴⁷ The records were otherwise available to any member of the public.⁴⁸ The plaintiffs, a law firm serving misdemeanor DUI clients and a drug and alcohol treatment center, desired to use the addresses in the public records to engage in direct mail solicitation and advertising.⁴⁹

The court rejected Colorado's arguments that the case involved a simple access-to-information issue and thus did not implicate the First Amendment.⁵⁰ The court explained that, while public records themselves do not constitute speech, the Colorado statute drew a regulatory line based on the speech use of such information.⁵¹ By not allowing release of the records to those wishing to use the records for a commercial purpose, while allowing release to noncommercial users, the statute created a content-based restriction on commercial speech,⁵² subject to First Amendment review.⁵³

Applying the *Central Hudson* test, the *Lanphere* court found that the commercial speech in question concerned lawful activity and was not misleading.⁵⁴ The court also found that the state had a substantial interest in protecting the privacy of those charged with misdemeanor traffic offenses, in lessening the danger of solicitation abuse, and in maintaining public confidence in the justice system.⁵⁵

47. *Id.* at 1511 (quoting COLO. REV. STAT. ANN. § 24-72-305.5 (West 1998)).

48. *See* § 24-72-304 ("[A]ll criminal justice records . . . may be open for inspection by any person at reasonable times, except as otherwise provided by law.").

49. *See Lanphere*, 21 F.3d at 1510.

50. *See id.* at 1511-13.

51. *See id.* at 1513.

52. Unlike many other types of speech, courts have allowed commercial speech to be regulated on the basis of its content for several reasons. *See Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 564 n.6 (1980). *See also supra* notes 30-32 and accompanying text. First, commercial speakers are well-situated to evaluate the accuracy and lawfulness of their messages because they generally have extensive knowledge of both the market and their products. *See Bates v. State Bar*, 433 U.S. 350, 381. Courts have also argued that commercial speakers are motivated by economic self-interest, making their expression not "particularly susceptible to being crushed by over-broad regulation." *Id.* For a critique of this reasoning, see David F. McGowan, *A Critical Analysis of Commercial Speech*, 78 CAL. L. REV. 359, 405-11 (1990).

53. *See Lanphere*, 21 F.3d at 1513.

54. *See id.* at 1514 (noting that the regulation restricted all commercial solicitations, not merely misleading ones, and thus was subject to First Amendment analysis).

55. *See id.* In an earlier case, the Supreme Court had found no sufficient privacy interest in a ban on targeted direct mail solicitation, reasoning that the invasion of privacy occurred when the attorney discovered the accused's legal affairs rather than when the attorney confronted the accused with the discovery. *See Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 476 (1988). The *Lanphere* court held that the Colorado statute prevented such an invasion. *See Lanphere*, 21 F.3d at 1514.

After determining that the restrictions met the two threshold requirements of the *Central Hudson* test, the court found that the Colorado statute advanced the asserted interests in a "reasonably direct" way.⁵⁶ Finally, the court discussed whether the regulation was more extensive than necessary to serve the state's interests.⁵⁷ The court found that the regulation constituted a "reasonable fit" in light of the asserted state interests.⁵⁸ The *Lanphere* court distinguished the Colorado regulation from the complete ban on direct mail solicitation invalidated in *Shapero* in several ways.⁵⁹ The court observed that the Colorado regulation protected privacy by preventing solicitors from obtaining information, unlike in *Shapero*, where solicitors had already obtained the information.⁶⁰ In addition, the Colorado regulation did not completely ban direct mail solicitation, but merely established an indirect barrier by not making certain records available for that purpose.⁶¹ Finally, the court noted that the state was not required to provide access to law enforcement records at all.⁶² The *Lanphere* court thus found that the Colorado statute, though a content-based restriction on commercial speech, was valid under the *Central Hudson* framework.⁶³

Several other courts have upheld similar restrictions on commercial use of law enforcement records, though not under the com-

56. See *Lanphere*, 21 F.3d at 1515. The *Lanphere* court, however, provided little analysis in support of this conclusion. The court noted that the state's asserted privacy interest was served despite availability of the information through other sources, such as local newspapers, because the plaintiffs would not be involved in the litigation if the information sought was so widely available that privacy was no longer at issue. See *id.* at 1514. However, this assertion fails to address whether or not the privacy interest is directly advanced by the restrictions. The plaintiffs brought the action not because the information was completely unavailable, but because the statute greatly increased the economic cost of obtaining the information. Privacy may be violated without economic cost. For example, when a party accesses the law enforcement records for noncommercial purposes, the statute may still fail to directly advance the accused's privacy interests. See discussion *infra* Part IV.B.3.

57. See *Lanphere*, 21 F.3d at 1515.

58. *Id.* The court noted that the "reasonable fit" requirement did not mandate that government select the least restrictive means necessary to accomplish the interests. *Id.* (quoting *Board of Trustees v. Fox*, 492 U.S. 469, 476-81 (1989)).

59. See *id.* But see discussion *infra* Part IV.B.3-4.

60. See *Lanphere*, 21 F.3d at 1515.

61. See *id.* The Supreme Court has noted that complete bans on commercial speech should be scrutinized more carefully than partial bans. See *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 n.9 (1980).

62. See *Lanphere*, 21 F.3d at 1516. The court observed that while the state's discretion did not render the First Amendment inapplicable, the discretion was relevant to a reasonable fit analysis. *Id.* (citing *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 (1984) (stating that because access to information in the discovery process is "a matter of legislative grace," some continued control over that information by the court "does not raise the same specter of government censorship that such control might [otherwise] suggest")).

63. See *id.*

mercial speech analysis utilized in *Lanphere*. In *DeSalvo v. Louisiana*, the Louisiana Supreme Court found that a statute denying commercial access to accident reports did not infringe upon the plaintiffs' commercial speech rights, but rather was valid as a reasonable time, place or manner regulation.⁶⁴ The South Carolina Supreme Court took a different approach, holding that a restriction on disclosure of accident reports did not implicate the First Amendment at all.⁶⁵ The South Carolina Supreme Court then upheld the restrictions under a due process analysis.⁶⁶

B. Cases Invalidating Restrictions on Commercial Use of Law Enforcement Records

Several courts have disagreed with the Tenth Circuit's conclusions in *Lanphere*. The Ninth Circuit invalidated a similar restriction on commercial use of law enforcement records in *United Reporting Publishing Corp. v. California Highway Patrol*.⁶⁷ The California statute at issue prohibited the use of arrestee addresses obtained from public law enforcement records "to sell a product or service to any individual or group of individuals."⁶⁸ After determining that the sale of arrestee addresses to potential solicitors was commercial speech,⁶⁹ the court applied the *Central Hudson* analysis to the restrictions.⁷⁰ The Ninth Circuit agreed with the district court that the state's interest in protecting the privacy of arrestees was substan-

64. *DeSalvo v. Louisiana*, 624 So.2d 897, 898-99 (La. 1993). The *DeSalvo* court's reasoning was questionable in light of the Supreme Court's decision regarding time, place or manner restrictions on commercial speech in *Discovery Network* earlier that year. The *Discovery Network* Court rejected an argument that a restriction based solely on the commercial nature of the speech was a content-neutral time, place, or manner restriction. See *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993) (overturning law banning newsracks containing commercial handbills but allowing newsracks containing newspapers); see also *infra* notes 165-71 and accompanying text.

65. See *Walker v. South Carolina Dep't of Highways & Pub. Transp.*, 466 S.E.2d 346, 347 (S.C. 1995). The *Walker* court claimed that the statute only regulated access to information. See *id.* at 348. But see discussion *infra* Part IV.A.

66. See *Walker*, 466 S.E.2d at 348.

67. *United Reporting Publ'g Corp. v. California Highway Patrol (United Reporting II)*, 146 F.3d 1133 (9th Cir. 1998), cert. granted sub nom., *Los Angeles Police Dep't v. United Reporting Publ'g Corp.*, 119 S.Ct. 901 (1999).

68. *Id.* at 1135 (quoting CAL. GOV'T CODE § 6254(f)(3) (West 1998)).

69. See *id.* at 1136-37.

70. See *id.*

tial.⁷¹ The court held, however, that the statute failed to advance the privacy interest in a "direct and material way"⁷² because noncommercial users could still access the information without restriction.⁷³ While the statute hindered solicitation practices, the court observed that several other courts had found no invasion of privacy in direct mail solicitation.⁷⁴ The court argued that publication of an arrestee's information in a newspaper, which the statute allowed, was a greater affront to privacy than receiving letters from professionals offering their services.⁷⁵ As the statute did not directly advance the state's interests, the court of appeals affirmed the district court's decision to strike down the statute as an unconstitutional infringement of First Amendment rights.⁷⁶ The court did not reach the fourth part of the *Central Hudson* test, which asks whether the restrictions were not more extensive than necessary to serve the asserted interests.⁷⁷

The Ninth Circuit's analysis in *United Reporting II* drew upon the reasoning in several previous decisions from other circuits. In *Innovative Database Systems, Inc. v. Morales*, the Fifth Circuit affirmed a lower court decision that a statute prohibiting use of information from publicly available law enforcement records to contact crime victims or people involved in motor vehicle accidents was an unconstitutional restriction on commercial speech.⁷⁸ The court found that the restriction was too extensive to pass the fourth prong of *Central Hudson*.⁷⁹ The court likewise invalidated a statute prohibiting any solicitation of accident victims by chiropractors.⁸⁰ The court was unconvinced that a complete ban on solicitation using law enforcement information was a sufficiently tailored means to promote professional ethical standards, to prevent fraud and misrepresenta-

71. *See id.* The parties agreed that the speech at issue was neither illegal nor misleading under *Central Hudson's* first prong. *See id.*

72. *Id.* at 1138 (quoting *Edenfield v. Fane*, 507 U.S. 761, 767 (1993)).

73. *See id.* at 1139.

74. *See id.* (citing *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 72 (1983); *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 476 (1988)).

75. *See id.* at 1140.

76. *Id.* Recently, another court came to the same conclusion regarding a Rhode Island law prohibiting commercial use of any public record kept by the state government. *See Rhode Island Ass'n of Realtors, Inc. v. Whitehouse*, 51 F. Supp. 2d 107, 113-14 (D.R.I. 1999). At least one court has reached a similar result under a state constitutional provision. *See Zackheim v. Forbes*, 895 P.2d 793, 796-97 (Or. Ct. App. 1995)

77. *See United Reporting II*, 146 F.3d at 1140 n.5.

78. *See Innovative Database Sys. v. Morales*, 990 F.2d 217, 218 (5th Cir. 1993) *aff'g* Order Granting Plaintiff's Motion for Summary Judgment, No.3:91-CV-1663-T (N.D. Tex. 1992). The Fifth Circuit opinion adopted the district court's reasoning in its entirety, adding no additional reasoning of its own.

79. *See id.*

80. *See id.* at 222.

tion, or to protect the public from inflated interest rates to pass scrutiny under the fourth part of *Central Hudson*.⁸¹

In *Speer v. Miller*, the Eleventh Circuit held that a Georgia statute prohibiting inspection of law enforcement records for commercial solicitation violated First Amendment commercial speech rights.⁸² Observing that the statute "probably impinges upon . . . commercial speech," the court of appeals reversed a lower court decision denying a preliminary injunction against enforcement of the statute.⁸³

On remand, the district court considered whether the statute restricted speech, or was merely a denial of access to a government commodity.⁸⁴ The district court rejected an interpretation of the statute as merely denying access to a government commodity or withdrawal of a government benefit.⁸⁵ Rather, it noted that enforcement of the statute was triggered only by speech using the records rather than the act of accessing the information.⁸⁶ This imposition of a criminal punishment for certain speech implicated First Amendment protection.⁸⁷

Having determined that the Georgia statute restricted commercial speech, the district court applied the *Central Hudson* test.⁸⁸ The court found that the plaintiff's proposed use of the records was neither false, deceptive, nor misleading.⁸⁹ Also, the court held that the asserted government interests in protecting the privacy of the accused, protecting against unnecessary insurance abuses, and minimizing opportunities for fraud and misrepresentation were substantial enough to warrant further analysis under *Central Hudson*.⁹⁰

81. See *id.* at 221.

82. *Speer v. Miller* (Speer I), 15 F.3d 1007, 1010-11 (11th Cir. 1994).

83. *Id.* The court of appeals provided only limited analysis of its conclusions. However, the district court on remand provided a substantial discussion of the commercial speech issues in the case. See *Speer v. Miller* (Speer II), 864 F. Supp. 1294, 1296-1302 (N.D. Ga. 1994).

84. See *Speer II*, 864 F. Supp. at 1297-99. The district court noted that, while the court of appeals cited several cases involving statutes and professional regulations that limited dissemination of information, none of those cases had discussed restrictions on access to information. See *id.* Also, the courts in professional regulation cases had conceded that speech was being regulated. Thus, the *Speer II* court felt it necessary to analyze whether First Amendment values were implicated. *Id.*

85. See *id.* at 1297-98.

86. See *id.* at 1298-99 (citing *Lanphere & Urbaniak v. Colorado*, 21 F.3d 1508, 1516 (10th Cir. 1994)).

87. See *id.* at 1298-99.

88. See *id.* at 1299.

89. See *id.* at 1299-1300.

90. See *id.*

Nevertheless, the district court found that the restriction on commercial use of law enforcement records did not directly advance the asserted government interests in preventing insurance abuses, fraud, and misrepresentation.⁹¹ Disagreeing with *Lanphere*, the court also held that the statute did not directly advance the government's interest in protecting arrestee privacy.⁹² The court observed that previous decisions had found that statutes restricting use of government information did not protect privacy interests, because the invasion of privacy had already occurred with the initial access to the information.⁹³ Finding that the statute prevented only solicitation rather than solicitors' actual discovery of information, the court held that the statute failed to advance the asserted interests significantly enough to pass muster under *Central Hudson*.⁹⁴

More recently, the Sixth Circuit invalidated several restrictions on access to accident reports for commercial purposes in *Amelkin v. McClure*.⁹⁵ One statute prohibited access to accident reports to anyone except parties involved in the accident, the parties' insurers, and the parties' attorneys.⁹⁶ The statute, however, allowed an exception for any "news-gathering organization" to publish or broadcast accident report information in the news.⁹⁷ The news-gathering organization was prohibited from using or allowing use of the information for commercial purposes.⁹⁸ The court held that the exceptions for media use of the accident report information prevented the statute from directly and materially advancing the government's interests in

91. *See id.* at 1300-01. The court noted that the government provided three affidavits from individuals "familiar with insurance fraud in the state of Georgia" and offered only "conclusory claims" that the statute directly advanced these interests. *Id.*

92. *See id.* While the reasoning on this point was furnished by the district court on remand, the court of appeals made the initial determination in its earlier opinion. *See Speer v. Miller* (Speer I), 15 F.3d 1007, 1011 n.7 (11th Cir. 1994) ("We note that any privacy arguments the state asserts are disingenuous in light of the fact that the statute carves out an exception for the media to place any information they can obtain on the front page of any newspaper in Georgia.").

93. *See Speer II*, 864 F. Supp. at 1301 (citing *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 476 (1988)); *McHenry v. Florida Bar*, 21 F.3d 1038, 1044 (11th Cir. 1994), *rev'd sub nom.*, *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995)).

94. *See Speer II*, 864 F. Supp. at 1302. The court stated its belief that *Central Hudson's* "direct advancement" requirement did not include statutes that were "so riddled with exceptions" as to provide only ineffective or remote support for the government's purpose. *Id.* (quoting *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 564 (1980) ("[T]he regulation may not be sustained if it provides only ineffective or remote support for the government's purpose.")).

95. *Amelkin v. McClure*, 168 F.3d 893 (6th Cir. 1999).

96. *See id.* at 896-97 (quoting KY. REV. STAT. ANN. § 189.635 (Banks-Baldwin 1995)).

97. *Id.*

98. *See id.* The law specifically allows the news media to broadcast or publish accident report information since it is outside of the statutory definition of "commercial purposes." *Id.*

protecting the privacy of accident victims from unwanted intrusions.⁹⁹ Agreeing with the Ninth Circuit's analysis in *United Reporting II*, the *Amelkin* court found that the exception for media use tended to "directly undermine and counteract" any attempts to protect privacy.¹⁰⁰ Thus, the exception prevented the statute from achieving a reasonable fit between its ends and the means it used to reach them, making the statute an unconstitutional restriction of commercial speech.¹⁰¹

IV. LIMITATIONS ON COMMERCIAL USE OF LAW ENFORCEMENT RECORDS ARE UNCONSTITUTIONAL UNDER THE FIRST AMENDMENT

A. Laws that Restrict Access to Public Law Enforcement Records for Commercial Use Implicate Commercial Speech Rights

For bans on commercial use of public information in law enforcement records¹⁰² to implicate the First Amendment, the regulations must restrict the expression of protected speech in some way. Unlike the direct restrictions on solicitation at issue in cases like *Shapero*¹⁰³ and *Florida Bar*,¹⁰⁴ restrictions on potential solicitors' access to law enforcement information seek to indirectly regulate solicitation. In fact, some courts have held that these restrictions do not constrain commercial speech at all,¹⁰⁵ or that they are reasonable time, place and manner restrictions on commercial speech.¹⁰⁶ Unfor-

99. *See id.* at 899-900. The court stated that "[t]here is no rational basis for a statute which purports to advance the government interest in protecting the privacy of accident victims to allow their names and addresses to be published or broadcast to the general public." *Id.* at 900.

100. *Id.* at 900 (citing *Coors Brewing*, 514 U.S. at 476; *Valley Broad. Co. v. United States*, 107 F.3d 1328, 1334 (9th Cir. 1994)).

101. The court also considered the constitutionality of a statute allowing a state agency to set a "reasonable fee" for making copies of public accident reports. *Id.* at 897 (quoting KY. REV. STAT. ANN. § 61.874 (Banks-Baldwin 1997)). The plaintiffs claimed that the agency set the fees to make them prohibitively expensive for commercial users. *See id.* at 901. The plaintiffs' brief alleged that costs rose from \$0.10 per page to \$40 per report for non-injury accidents, \$90 per report for injury accidents, and \$230 per report for fatal accident reports. *See id.* For one of the plaintiffs this raised the cost of two weeks worth of reports from \$68 to approximately \$17,650. *See id.* The court remanded the issue to the district court for findings of fact on whether the state agency had applied these fees in a discriminatory manner. *See id.* at 902.

102. *See supra* note 1.

103. *See Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 469-70 (1988).

104. *See Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 620-21 (1994).

105. *See, e.g., Walker v. South Carolina Dep't of Highways & Pub. Transp.*, 466 S.E.2d 346 (S.C. 1995).

106. *See, e.g., DeSalvo v. Louisiana*, 624 So.2d 897 (La. 1993).

tunately, such holdings fail to recognize that the triggering provisions of the laws are *de facto* limitations on protected commercial speech.¹⁰⁷

Where the right of access to law enforcement records has been statutorily limited, individuals may only gain access to the records if some constitutional right overrides the state law.¹⁰⁸ Accordingly, statutes restricting commercial use of law enforcement records will prevent would-be solicitors from examining the information unless the statutes infringe upon the First Amendment.¹⁰⁹ There is, however, no general First Amendment right for individuals to access public records.¹¹⁰ Constitutionally, the public is not entitled to government-held information, except that the government may not restrain the public or the press from communicating information that they have already acquired.¹¹¹

In the restrictions at issue, state legislatures have granted public access to the information in law enforcement records.¹¹² Though the states may withdraw public access to law enforcement

107. See *infra* Part IV.C.

108. See *United Reporting Publ'g Corp. v. Lungren*, 946 F. Supp. 822, 825 (S.D. Cal. 1996), *aff'd sub nom.*, *United Reporting Publ'g Corp. v. California Highway Patrol (United Reporting II)*, 146 F.3d 1133 (9th Cir. 1998), *cert. granted sub nom.*, *Los Angeles Police Dep't v. United Reporting Publ'g Corp.*, 119 S. Ct. 901 (1999).

109. Some solicitors have argued that the restrictions are invalid under the First Amendment as it relates to the Sixth Amendment. See, e.g., *Lanphere & Urbaniak v. Colorado*, 21 F.3d 1508, 1512 (10th Cir. 1994). Though in certain circumstances a First Amendment right of access is implicated in relation to the Sixth Amendment right to a fair and public trial, the right of access inheres only in situations where the criminal records have traditionally been accessible. See *id.* (citing *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986)). As the court in *Lanphere* points out, the law enforcement records discussed in this Note have not been traditionally accessible to the public. See *id.* ("To hold that [Sixth Amendment] principles provide for access to any criminal justice record . . . would stretch them well beyond their current bounds.").

110. See *Houchins v. KQED, Inc.*, 438 U.S. 1, 9 (1978). Two exceptions to this rule exist. First, courts have defined a constitutional right to public access to criminal trials and court proceedings. See, e.g., *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575-78 (1980) ("In guaranteeing freedoms such as those of speech and press, the First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to those guarantees."). Second, courts have found a First Amendment right of access to judicial records. See *United Reporting II*, 946 F. Supp. at 825 n.1 (citing *United States v. Hickey*, 767 F.2d 705, 708 (10th Cir. 1985) (finding a common law right to inspect and copy judicial records)). Nevertheless, courts have generally rejected these arguments in the context of commercial use of law enforcement records. See, e.g., *Lanphere*, 21 F.3d at 1512; *United Reporting II*, 946 F. Supp. at 825 n.1. *But see Walker v. South Carolina Dep't of Highways and Pub. Transp.*, 466 S.E.2d 346, 348 (S.C. 1995) (holding that the statute merely restricts access and does not implicate commercial speech rights).

111. See *Houchins*, 438 U.S. at 10. The reasoning behind the rule was that "[t]he Constitution . . . establishes the contest, not its resolution. [State legislatures] may provide a resolution . . . through carefully drawn legislation." *Id.* at 14-15 (quoting Hon. Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 636 (1975)). See also *United Reporting II*, 946 F. Supp. at 825.

112. See *Lanphere*, 21 F.3d at 1513.

records at any time, the restrictions should be subject to constitutional scrutiny.¹¹³

Although the law enforcement records themselves do not constitute protected commercial speech, the restrictions on access draw a regulatory line based on the intended speech use of the records which implicates the First Amendment.¹¹⁴ As the district court noted in *Speer II*, "the operative act of accessing the information does not give rise to culpability until the actor utilizes . . . the information in certain speech activities (i.e. soliciting business.)"¹¹⁵ Thus, the restrictions do not penalize individuals who seek access to the law enforcement records until the individuals act in a certain manner, by utilizing the information in the records to facilitate commercial solicitation. Because solicitation falls within the commercial speech activities protected by the First Amendment,¹¹⁶ the limitations on access to public law enforcement records create restrictions on protected speech.¹¹⁷

113. See *id.* at 1512 (citing *Sherbert v. Verner*, 374 U.S. 398 (1963)). States may not disregard free speech protections simply because the practice in question is a privilege rather than an absolute right. See, e.g., *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993) (holding that, even presuming the city could completely prohibit the use of newsracks on public property, any content-based regulation of newsracks is still subject to First Amendment scrutiny). But see *Lyng v. International Union, United Auto. Workers*, 485 U.S. 360 (1988) (holding that law excluding any household of which a member is on strike from participation in the food stamp program does not violate the First Amendment guarantees of freedom of speech or association). The Court found that this denial of access to a desired government commodity did not "significantly" interfere with the exercise of freedom of association, though the denial of food stamps to striking workers could "exert[] pressure on them to abandon their union." *Id.* at 368. One court has rejected this argument in the context of restrictions on commercial use of law enforcement records because the laws impose a criminal punishment rather than merely withdrawing a government benefit. See *Speer v. Miller (Speer II)*, 864 F. Supp. 1294, 1298 (N.D. Ga. 1994); see also *Lyng*, 485 U.S. at 367 n.5 (noting that exposure to civil or criminal penalties based on membership in an organization is more dangerous to the exercise of First Amendment freedoms than the temporary withdrawal of government benefits for the duration of one of the organization's activities).

114. See *Lanphere*, 21 F.3d at 1513.

115. *Speer II*, 864 F. Supp. at 1298.

116. See, e.g., *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 476 (1988).

117. See *Lanphere*, 21 F.3d at 1513; accord *Speer v. Miller (Speer I)*, 15 F.3d 1007, 1010 (11th Cir. 1994) (noting, without analysis, that the restriction "probably impinges upon [the plaintiffs] commercial speech"); *United Reporting Publ'g Corp. v. Lungren*, 946 F. Supp. 822, 825 (S.D. Cal. 1996) (finding that the restrictions limit access in order to allow the government to limit speech on the basis of its content).

B. As Restrictions on Commercial Speech, Prohibitions on Commercial Use of Information in Law Enforcement Records Are Unconstitutional Under Central Hudson

1. Truthful Direct Mail Solicitation Using Information from Public Law Enforcement Records is Lawful and Not Misleading

The regulations at issue prohibit the acquisition of addresses from public records by a variety of professionals for commercial use in direct mail solicitation. As noted above, advertising for the services of attorneys and other professionals, particularly in the form of direct mail solicitation,¹¹⁸ is commercial speech protected under the First Amendment.¹¹⁹ No court that has considered the constitutionality of regulations on commercial use of law enforcement records under *Central Hudson* has disputed that the commercial activities in question were lawful and not misleading.¹²⁰

118. See *Edenfield v. Fane*, 507 U.S. 761, 777 (1993) (invalidating ban on in-person solicitation by certified public accountants); *Shapero*, 486 U.S. at 476 (invalidating complete ban on direct mail solicitation by attorneys on First Amendment grounds); *Silverman v. Walkup*, 21 F. Supp. 2d 775 (E.D. Tenn. 1998) (invalidating ban on solicitation by licensed chiropractors); *Gregory v. Louisiana Bd. of Chiropractic Exam'rs*, 608 So.2d 987 (La. 1992) (invalidating ban on chiropractor solicitation).

119. Even if restrictions on commercial use of law enforcement records do not violate solicitors' commercial speech rights under the federal Constitution, the statutes, as they pertain to attorney conduct, still could violate separation of powers between the legislature and the judiciary under state constitutions. If the implicit purpose of the restrictions is to limit attorney solicitation, then the statutes are a legislative attempt to regulate the practice of law. See *DeSalvo v. Louisiana*, 624 So.2d 897, 903 (La. 1993) (Kimbell, J., dissenting). In many states, the state constitution grants the judiciary an exclusive inherent power to regulate the practice of law within the state. For example, the Louisiana Constitution gives the state judiciary the inherent power to regulate the practice of law. See LA. CONST. art. V, § 5(B); see also *O'Rourke v. Cairns*, 683 So.2d 697, 700 (La. 1996); *Singer Hutuer Levine Seeman & Stuart v. Louisiana State Bar Ass'n*, 378 So.2d 423, 425-26 (La. 1979). This is also the case in each state in which a federal court has decided the constitutionality of restrictions on commercial access to law enforcement records. See, e.g., *Texans Against Censorship, Inc. v. State Bar*, 888 F. Supp. 1328, 1334 (E.D. Tex. 1995), *aff'd*, 100 F.3d 953 (5th Cir. 1996); *In re Attorney Discipline Sys.*, 967 P.2d 49, 60 (Ca. 1998) (noting that although the legislature created the state bar, "the State Bar is a constitutional entity subject to [the state judiciary's] expressly reserved power over admission and discipline"); *Colorado v. Coria*, 937 P.2d 386, 390 (Colo. 1997); *Wallace v. State Bar*, 486 S.E.2d 165, 166 (Ga. 1997); *Horn v. Kentucky*, 916 S.W. 2d 173, 176 (Ky. 1995); Thus, any legislative attempt to regulate the practice of law, including indirect restrictions on attorney solicitation, would encroach upon the powers expressly reserved to the state judiciary. The issue of separation of powers between the legislature and the judiciary would vary from state to state, and would only invalidate the restrictions insofar as they seek to regulate solicitation by attorneys rather than other professions.

120. See, e.g., *Amelkin v. McClure*, 168 F.3d 893 (6th Cir. 1999); *United Reporting Publ'g Corp. v. California Highway Patrol*, 146 F.3d 1133, 1137 (9th Cir. 1998); *Lanphere*, 21 F.3d at 1514 (noting that the regulation restricted all commercial use, not just unlawful or misleading use); *Speer II*, 864 F. Supp. at 1299-1300.

2. The States' Interests in Preserving the Privacy of Citizens and Reducing the Possibility of Solicitation Abuse are Substantial

Similarly, most courts have found that the asserted governmental interests in restricting the commercial use of law enforcement records are substantial.¹²¹ The most common interest asserted has been in preserving the privacy of citizens by not aiding in the dissemination of information for commercial purposes.¹²² States have also explained that the restrictions on the commercial use of law enforcement records serve as a way to lessen the dangers of solicitation abuse, including fraud and misrepresentation.¹²³ Reducing this abuse, states have argued, helps to maintain and promote standards of ethical conduct¹²⁴ and encourages public confidence in the justice system.¹²⁵ Finally, at least one state has asserted an interest in minimizing the costs of producing arrestee information.¹²⁶

121. See, e.g., *Amelkin*, 168 F.3d at XXX; *United Reporting*, 146 F.3d at 1137; *Lanphere*, 21 F.3d at 1514-15; *Speer II*, 864 F. Supp. at 1300.

122. At least one court has noted that the state's interest in protecting citizens' privacy by not aiding the dissemination of information for commercial purposes remains despite the availability of other sources of information.

[E]ven if the information is available to some degree from other sources, the state's interest in not aiding the dissemination of the information . . . remains. We presume that plaintiffs would not be involved in this litigation if the information . . . is so widely available that the privacy of the accused is no longer at issue.

Lanphere, 21 F.3d at 1514.

123. See *Speer II*, 864 F. Supp. at 1300.

124. See *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 625 (1995) (quoting *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975) (noting the state's broad power to regulate the practice of professionals)); *Edenfield v. Fane*, 507 U.S. 761, 770 (1993) (finding that maintaining professional ethical standards is a substantial state interest).

125. See *Lanphere*, 21 F.3d at 1514 n.4. The court noted that this interest applies whether the information is used by attorneys or non-attorneys because the source of the information rather than the user of the information reflects on the integrity of the justice system in maintaining the confidentiality of private citizens.

126. See *United Reporting Publ'g Corp. v. Lungren*, 946 F. Supp. 822, 826 (S.D. Cal. 1996). Some courts have held that this interest may be satisfied without restricting speech if the commercial users pay the costs of producing the information. See, e.g., *Transportation Info. Servs., Inc. v. Oklahoma Dep't of Corrections*, 970 P.2d 166 (Okla. 1998) (holding that a private corporation is entitled to public offender records where corporation is prepared to pay reasonable costs incurred in assembling the information) cf. *Amelkin*, 168 F.3d at 902 (implying that a statute requiring commercial users to pay reasonable costs of assembling data is an acceptable restriction of commercial speech).

3. Restrictions on Commercial Use of Public Law Enforcement Records Do Not Directly Advance the States' Asserted Interests

The government bears the burden of showing not only that the recited harms are real, but also that the regulation will alleviate them "to a material degree."¹²⁷ "[M]ere speculation and conjecture" will not satisfy this burden.¹²⁸ However, the numerous exceptions in the laws for public, noncommercial access to public records prevent the laws from directly advancing the asserted state interests. A commercial speech regulation "may not be sustained if it provides only ineffective or remote support for the government's purpose."¹²⁹

In passing the restrictions on commercial use of information in public law enforcement records, the states' main asserted interest is to preserve individuals' privacy.¹³⁰ The states do not wish to aid in the dissemination of information for commercial purposes in part because they do not wish to facilitate direct mail solicitation.¹³¹ According to the states, such solicitation constitutes a "direct intrusion into the private lives and homes of arrestees and victims."¹³²

Nevertheless, the Supreme Court has recognized that direct mail solicitation is an insufficient invasion of privacy to exempt such speech from First Amendment protection.¹³³ In addition, the Supreme Court has rejected privacy arguments justifying complete bans on direct mail solicitation.¹³⁴ It observed that the invasion of privacy

127. 44 *Liquormart v. Rhode Island*, 517 U.S. 484, 505 (1996) (quoting *Edenfield*, 507 U.S. at 771).

128. *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (1995).

129. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 564 (1980).

130. See, e.g., *Amelkin*, 168 F.3d at 898; *United Reporting Publ'g Corp. v. California Highway Patrol*, 146 F.3d 1133, 1138 (9th Cir. 1998); *Lanphere*, 21 F.3d at 1514; *Speer v. Miller* (Speer II), 864 F. Supp. 1294, 1300 (N.D. Ga. 1994).

131. See *Amelkin*, 168 F.3d at 901 (observing that restrictions on commercial access to accident reports are aimed at reducing direct mail solicitation practices); *Babkes v. Satz*, 944 F. Supp. 909, 913 (S.D. Fla. 1996) (analyzing the government's asserted interest in not aiding the commercial dissemination of law enforcement record information); *Speer II*, 864 F. Supp. at 1302 (concluding that the narrow scope of the restriction reveals its purpose to prevent solicitous practices rather than to protect privacy).

132. *United Reporting*, 146 F.3d at 1138-39.

133. See *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 72 (1983) (invalidating ban on unsolicited commercial mailings concerning contraceptives). The *Bolger* Court rejected the government's argument that recipients of direct mailings were "captive audiences" that could not avoid objectionable speech. *Id.* Suggesting that individuals could avoid material that they found offensive by "averting their eyes," the Court stated that the "short, though regular, journey from mail box to trash can . . . is an acceptable burden, at least so far as the Constitution is concerned." *Id.* (citations omitted). See also *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 475-76 (1988) ("A letter, like a printed advertisement (but unlike a lawyer), can readily be put in a drawer to be considered later, ignored, or discarded.")

134. See *Shapero*, 486 U.S. at 476; see also *Ficker v. Curran*, 119 F.3d 1150, 1154 (4th Cir. 1997) (invalidating thirty-day ban on direct mailings to recent arrestees).

occurs when the solicitor originally discovers the recipient's private legal affairs, not when the unsolicited letter is received.¹³⁵ Bans on commercial use of law enforcement information fail to protect privacy effectively because anyone, including solicitors, may still access the information for noncommercial purposes.¹³⁶ In addition, the laws do not restrict noncommercial dissemination of the information in any way, including publishing the details of individuals' "private legal affairs" in the local press.¹³⁷ Mass publication of "private information" in the media is a far greater affront to privacy than a discreet letter sent to an individual's home.¹³⁸ Therefore, by exposing individuals to more egregious invasions of privacy, the restrictions fail to directly or materially advance the states' asserted interests in protecting individuals' privacy.¹³⁹

To justify restrictions on commercial use of law enforcement records, states have also advanced interests in maintaining and promoting standards of ethical conduct and encouraging public confidence in the justice system. The states argue that prohibiting commercial use of public information restricts solicitation and its abuse.¹⁴⁰ Restricting access to law enforcement records forces solicitors to spend more time and resources locating potential clients. This lessens the danger of overreaching by solicitors when recipients may be particularly vulnerable from the mental and/or physical stress of the

135. See *Shapero*, 486 U.S. at 476.

136. See *United Reporting*, 146 F.3d at 1139 ("The fact that . . . noncommercial users may peruse and report on arrestee records . . . belies the [government's] claim that the statute is actually intended to protect the privacy interests of arrestees."). But see *Lanphere*, 21 F.3d at 1515 (asserting, without analysis, that the restrictions protect privacy through prohibition of commercial access).

137. See, e.g., CAL. GOV'T CODE § 6254(f)(3) (West 1998) (exception for requests made for a "scholarly, journalistic, political, or governmental purpose"); KY. REV. STAT. ANN. § 189.635(b) (Banks-Baldwin 1996) (stating that media publications are specifically exempted from definition of "commercial purpose" prohibited in statute).

138. See *Speer v. Miller*, 15 F.3d 1007, 1011 n.7 (11th Cir. 1994) (noting that privacy arguments were disingenuous in light of the statutory exception allowing "the media to place any information they obtain on the front page of any newspaper in Georgia").

139. See *Amelkin v. McClure*, 168 F.3d 893, 900 (6th Cir. 1999); *United Reporting*, 146 F.3d at 1140; *Innovative Database Sys. v. Morales*, 990 F.2d 217, 221 (5th Cir. 1993) (holding that the statute "goes too far in attempting to achieve its stated goal"); *Speer v. Miller*, 864 F. Supp. 1294, 1301 (N.D. Ga. 1994). But see *Lanphere*, 21 F.3d at 1515.

140. See *Lanphere*, 21 F.3d at 1515.

incident.¹⁴¹ Courts have accepted that the regulations directly advance this asserted interest.¹⁴²

In addition, several states have asserted an interest in minimizing the additional costs incurred from assembling law enforcement information for commercial use.¹⁴³ While courts have deemed saving public funds a substantial interest,¹⁴⁴ a ban on the commercial use of law enforcement records does not directly advance this goal.¹⁴⁵ First, the costs incurred are generally minimal, since the government has already compiled the information for public use.¹⁴⁶ Second, the state could require commercial users to pay for any additional charges that the duplication or further processing of the information generates.¹⁴⁷ In any event, these charges should reflect the actual cost of generating the information,¹⁴⁸ and they may not be used as a *de facto* barrier to commercial access.¹⁴⁹

4. Exceptions for Public and Media Access to Law Enforcement Records Prevent Restrictions on Commercial Use from Achieving a Reasonable Fit Between Means and Goals

Numerous alternatives would more effectively serve the states' asserted interests while reducing burdens on commercial speech.¹⁵⁰ Although states are not required to select the least restrictive alterna-

141. *See id.*

142. *See id.* Even disregarding the argument that these regulations hinder honest solicitors as much as their overreaching counterparts, the interest in discouraging overreaching does not justify the restrictions under *Central Hudson* because the restrictions do not achieve a reasonable fit between the means chosen and the interests served. *See infra* Part IV.4.

143. *See, e.g.,* *United Reporting Publ'g Corp. v. Lungren* (United Reporting II), 946 F. Supp. 822, 826 (S.D. Cal. 1996). *Cf.* *Transportation Info. Servs. v. Oklahoma Dep't of Corrections*, 970 P.2d 166 (Okla. 1998) (addressing whether additional costs of generating public offender records for commercial use justified denial of commercial access); *Cummings & Assoc. v. Oklahoma City*, 849 P.2d 1087 (Okla. 1993) (considering whether additional resources necessary to generate traffic collision reports for commercial users warranted denial of commercial access).

144. *See, e.g.,* *United Reporting II*, 946 F. Supp. at 826.

145. *See id.* at 827.

146. *See id.* (noting that the cost savings to the state would be minimal because the state would have to compile identical data for non-commercial users).

147. *See id.* (stating that the state could charge any additional costs of duplication to commercial users).

148. State statutes allowing public agencies to prescribe a fee for gathering public information generally require that such fees be reasonable. *See, e.g.,* KY. REV. STAT. ANN. § 61.874(3) (Banks-Baldwin 1995). Reasonable fees reflect only the costs for the compilation, storage, and upkeep of the records. *See Amelkin v. McClure*, 168 F.3d 893, 902 (6th Cir. 1999).

149. *See Amelkin*, 168 F.3d at 902 (remanding the issue of whether a state agency had set fees for producing accident reports in order to recoup the state's cost in investigating the accident rather than only assessing the average cost of compiling the information).

150. For additional solutions, see Part V, *infra*.

tive,¹⁵¹ states must demonstrate "a fit between the restriction and the government interest that is not necessarily perfect, but reasonable."¹⁵² The alternatives available to prohibitions on commercial use of law enforcement records demonstrate that the restrictions are unreasonably extensive.¹⁵³ In particular, the states could achieve their goal of discouraging unethical conduct in solicitation without imposing as substantial a burden on solicitors' commercial speech rights.

To justify restrictions on commercial use of law enforcement records, states have asserted an interest in maintaining and promoting standards of ethical conduct in commercial solicitation.¹⁵⁴ In *Florida Bar*, the Court upheld a *temporary* ban on direct mail solicitation to accomplish the same goal.¹⁵⁵ The Florida Bar Association demonstrated that accident victims were more likely to suffer emotional harm from overreaching in the thirty days following an incident than in later periods.¹⁵⁶ In contrast, prohibitions on commercial use of law enforcement records *permanently* deprive commercial users of an inexpensive and reliable source of essential information. Though the restrictions do not prohibit solicitation, they impose a heavy burden on professionals' ability to engage in commercial speech.¹⁵⁷ In addition, such restrictions do not differentiate effectively between honest solicitation practices and dishonest ones.¹⁵⁸ Limiting the time period for solicitation would help balance the restrictions' effectiveness in preventing dishonest solicitation against honest solicitors' commercial speech rights. Therefore, direct, but temporary, regulations of solicitation would place a significantly lower burden on commercial speech, and would more efficiently encourage ethical behavior in professional solicitation.

151. See *Board of Trustees v. Fox*, 492 U.S. 469, 480 (1989).

152. *United States v. Edge Broad. Co.*, 509 U.S. 418, 429 (1993).

153. See *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 n.13 (1993) ("[I]f there are numerous and obvious less-burdensome alternatives to the restriction on commercial speech, that is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable.").

154. See *supra* notes 140-42 and accompanying text. The Supreme Court addressed this issue in *Bates v. State Bar*, 433 U.S. 450 (1977) See *supra* notes 39-45 and accompanying text.

155. See *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 635 (1992).

156. See *Florida Bar*, 515 U.S. at 626-27.

157. See *Lanphere & Urbaniak v. Colorado*, 21 F.3d 1508, 1514 (10th Cir. 1994).

158. See *Speer v. Miller (Speer II)*, 864 F. Supp. 1294, 1301 (N.D. Ga. 1994).

*C. Limitations on Use of Information in Law Enforcement Records
Are Unconstitutional under a Time, Place and Manner Analysis*

In *DeSalvo v. Louisiana*, the Louisiana Supreme Court upheld a statute denying commercial users access to accident reports as a reasonable time, place or manner restriction.¹⁵⁹ The court's reasoning was flawed for several reasons. The decision rested upon the court's incorrect conclusion that the restriction was content-neutral.¹⁶⁰ Although not addressed in *DeSalvo*, the restrictions also could not be justified as regulations of the "secondary effects" of direct solicitation.¹⁶¹ Finally, the only specifically commercial harm that may have allowed a time, place or manner regulation to distinguish legitimately between commercial and noncommercial speech, the risk of overreaching by solicitors, could be more effectively addressed in the *Central Hudson* analysis.¹⁶²

The *DeSalvo* court found that the restriction on commercial access to accident reports was content-neutral in that it did not regulate the type of messages that solicitors wished to disseminate to persons identified in the reports.¹⁶³ Rather, it restricted all commercial use of the accident report information.¹⁶⁴ Such analysis, however, is questionable in light of the Supreme Court's decision in *Discovery Network* earlier that year.¹⁶⁵ In *Discovery Network*, the Court invalidated a restriction that discriminated between publications based solely on whether commercial or noncommercial speech was contained within.¹⁶⁶ The Court found that the city's asserted reason for the restriction¹⁶⁷ was content-neutral, but that the regulation did not address a distinctively commercial harm to justify the discrimination between commercial and noncommercial publications.¹⁶⁸ The news-

159. See *DeSalvo v. Louisiana*, 624 So.2d 897, 901 (La. 1993).

160. See *id.* at 900; see *infra* notes 164-74 and accompanying text.

161. *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 49 (1986) (upholding city zoning of adult businesses based on the "secondary effects" rather than the actual content of the speech); see also *infra* notes 175-78 and accompanying text.

162. See *infra* notes 176-81 and accompanying text.

163. See *Renton*, 475 U.S. at 52-53.

164. See *id.*

165. See *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993) (invalidating ordinance prohibiting newsracks containing commercial handbills but allowing the same newsracks to carry newspapers, where city wished to reduce the number of newsracks for aesthetic purposes).

166. See *id.* at 429 ("The [content-neutrality] argument is unpersuasive because the very basis for the regulation is the difference in content between ordinary newspapers and commercial speech.").

167. The city wished to reduce the number of newsracks in order to ensure that sidewalks were safe and more aesthetically pleasing. See *id.* at 415 n.8.

168. See *id.* at 429.

racks containing commercial handbills were no less aesthetically pleasing than newsracks containing noncommercial newspapers.¹⁶⁹ The city's actual basis for the distinction was its assertion of the "low value" of commercial speech as compared with noncommercial speech.¹⁷⁰ Since the city's discrimination between commercial and noncommercial speech was not content-neutral, the court would not allow the restriction to be considered a time, place or manner restriction.¹⁷¹

Similarly, restrictions on commercial use of law enforcement records are not content-neutral because the restrictions distinguish between commercial and noncommercial use of the information without addressing a specifically commercial harm. Although the states assert an interest in protecting individuals' privacy, allowing noncommercial use of the information, particularly by the news media, violates individuals' privacy.¹⁷² Also, the asserted interest in reducing the cost of producing these records is not a specifically commercial harm as the same costs will be incurred in producing the information for noncommercial users.¹⁷³

This argument is similar to the Court's reasoning in *Discovery Network*, where it rejected the city's argument that the ordinance was motivated by concerns about the "secondary effects" of newsracks containing commercial handbills.¹⁷⁴ The Court stated that any "secondary effects" of the newsracks containing handbills would be identical to the effects of newsracks containing newspapers.¹⁷⁵ As restrictions on commercial use of law enforcement records do not advance the states' interests in preserving privacy and preventing unnecessary costs any more than noncommercial use of the information,¹⁷⁶ the restrictions are not justified under a secondary effects argument.¹⁷⁷

169. *See id.* at 425.

170. *Id.* at 429.

171. *See id.* ("[W]hether any particular newsrack falls within the ban is determined by the content of the publication resting inside that newsrack. Thus . . . the ban in this case is content based.") (internal quotation marks omitted).

172. *See supra* notes 136-39 and accompanying text.

173. *See supra* notes 130-39 and accompanying text.

174. *Discovery Network*, 507 U.S. at 430 (citing *Renton*, 475 U.S. at 50-53).

175. *Id.*

176. *See supra* notes 136-39, 143-49 and accompanying text.

177. *See Discovery Network*, 507 U.S. at 430 (citing *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986)).

Finally, the states' interest in discouraging solicitors from overreaching could present a harm specific to commercial users.¹⁷⁸ This raises the issue of whether regulations on commercial speech should ever be analyzed as time, place or manner restrictions that impermissibly discriminate based on content. In *Discovery Network*, the Court did not address whether time, place or manner restrictions on commercial speech were permissible if they addressed a harm that noncommercial speech did not implicate.¹⁷⁹ Any time, place or manner restriction addressing a specific commercial harm, however, must discriminate between the contents of various commercial speakers.¹⁸⁰ While such content-based restrictions are impermissible under a time, place or manner analysis, legislatures have been permitted to enact content-based restrictions on commercial speech.¹⁸¹ The *Central Hudson* test then determines whether such restrictions are acceptable.¹⁸² This may explain why *Central Hudson* looks so similar to a time, place or manner analysis,¹⁸³ and why time, place or manner arguments have not been addressed in recent cases addressing the problem of overreaching by solicitors.¹⁸⁴

V. LAWS LIMITING THE COMMERCIAL USE OF PUBLIC INFORMATION
SHOULD BE APPLIED TO SOLICITATION ITSELF, NOT TO THE
AVAILABILITY OF INFORMATION

Legislators could solve the problems presented by restrictions on commercial use of law enforcement records in several ways. First, states could completely eliminate public access to certain types of law enforcement records, without exceptions for the media or other non-commercial public users. State legislators probably would not wish to accept this solution, since it would confound the legislators' interest in allowing the media to communicate newsworthy incidents to the general public.

178. This argument could still fail under a state separation of powers analysis insofar as it relates to attorney solicitation. See discussion *infra* Part V.

179. See *Discovery Network*, 507 U.S. at 428-430.

180. For example, regulations prohibiting certain solicitation practices discriminate between speech that contains the disfavored solicitation and speech that does not.

181. See *supra* notes 30-32 and accompanying text.

182. See *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980).

183. See Elisabeth Alden Longworthy, Note, *Time, Place, or Manner Restrictions on Commercial Speech*, 52 GEO. WASH. L. REV. 127, 137-38 (1983) (discussing the similarities between *Central Hudson* and the traditional time, place or manner analysis).

184. See, e.g., *Florida Bar v. Went for It, Inc.*, 515 U.S. 618 (1995); *Edenfield v. Fane*, 507 U.S. 761 (1993).

In the alternative, states could restrict commercial use of law enforcement records for definite periods rather than on a permanent basis.¹⁸⁵ Similar to the waiting period in *Florida Bar*,¹⁸⁶ denying commercial access for a specified period would encourage professionals to wait until arrestees and accident victims had recovered sufficiently from the incidents before soliciting their business. This solution, though, is less effective because the restriction would not prevent all solicitation within the waiting period.¹⁸⁷

Finally, state governments could regulate solicitous behavior directly, rather than through violating professionals' commercial speech rights in an indirect attempt to make solicitation more difficult.¹⁸⁸ One approach would be to require professionals to wait to solicit business until a specified period after an incident.¹⁸⁹ This approach would address privacy concerns and help to improve public confidence in the legal system, while avoiding unnecessary interference with commercial speech.

VI. CONCLUSION

The Supreme Court recently granted *certiorari* in *United Reporting*. Hopefully, the Court will resolve the issue of whether restrictions on commercial use of law enforcement records violate solicitors' commercial speech rights. As an intersection of commercial speech rights, personal privacy concerns, and appropriate limitations on professional solicitation, the complexity of the issue forecasts that courts will continue to struggle regardless of the outcome in *United Reporting*.

States have used restrictions on commercial use of law enforcement records as a way to impose indirect and substantial bur-

185. See, e.g., *Moore v. Morales*, 63 F.3d 358, 360 (5th Cir. 1995) (describing Texas' 180-day waiting period for commercial access to law enforcement records).

186. See *Florida Bar*, 515 U.S. at 620.

187. Presumably, solicitors could find other sources of information about potential clients, albeit not as reliable or inexpensive.

188. "Virginia is free to require whatever professional standards it wishes of its pharmacists. . . . But it may not do so by keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 770 (1975). Many states, however, will require restrictions on attorney solicitation to be promulgated through the state judiciary rather than the legislature. See *supra* note 119.

189. See, e.g., *Florida Bar*, 515 U.S. at 620; *Moore*, 63 F.3d at 358.

dens on solicitation. While the states' interests in protecting their citizens' privacy and in maintaining ethical standards of professional conduct are substantial, the numerous exceptions to the restrictions undermine the states' effectiveness in promoting these goals, and illustrate the states' true objective of regulating solicitation. These restrictions are constitutionally invalid because they do not directly and materially advance the states' interests, nor do they establish the reasonable fit between ends and means that *Central Hudson* requires.

The best solution to the problem is for states to regulate solicitation directly. States could achieve their goals by placing restrictions on solicitations rather than limiting the information available to solicitors. This method would be more effective than restricting commercial use of law enforcement records. It would allow states to advance privacy interests and discourage overreaching with-out interfering with solicitors' free speech rights under the First Amendment.

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