

Your Right to Look Like an Ugly Criminal: Resolving the Circuit Split over Mug Shots and the Freedom of Information Act

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I. INTRODUCTION

Mug shots occupy a seemingly indelible place in American popular culture. Embarrassing booking photos of celebrities like Lindsay Lohan,¹ Mel Gibson,² and Robert Downey, Jr.³ are plastered on televisions and tabloids across the country. Local newspapers feature the most recent mug shots from the nearby jail,⁴ and mug shot websites are increasingly common.⁵ Perhaps our fascination with these images stems from the same impulse driving the popularity of reality television: seeing real people in bad situations makes us feel better about our own lives.⁶



1. *Lindsay Lohan's Many Mug Shots: July 24, 2007*, E! ONLINE, <http://www.eonline.com/photos/6947/lindsay-lohan-s-many-mug-shots> (last visited Feb. 25, 2013).

2. *Busted! Hollywood's Most Memorable Mug Shots: Mel Gibson - July 28, 2006*, ET ONLINE, http://www.etonline.com/gallery/featured/90403_Busted_Hollywood_s_Most_Memorable_Mug_Shots/index.html?photo=4 (last visited Feb. 25, 2013).

3. *Busted! Hollywood's Most Memorable Mug Shots: Robert Downey Jr. - April 24, 2001*, ET ONLINE, http://www.etonline.com/gallery/featured/90403_Busted_Hollywood_s_Most_Memorable_Mug_Shots/index.html?photo=13 (last visited Feb. 25, 2013).

4. BRIAN WESLEY BAUGH, *THE INDISCRIMINATE RELEASE OF PUBLIC RECORDS TO THE PUBLIC DURING THE INFORMATION AGE 6* (2010), *available at* http://brianbaugh.com/files/baugh_100609_Ethical-Criticism_Mug-Shots.pdf.

5. *See, e.g.*, BUSTED! MUGSHOTS, <http://www.bustedmugshots.com/> (last visited Feb. 25, 2013); MUGSHOTS.COM, www.mugshots.com (last visited Feb. 25, 2013); *Mug Shots*, SMOKING GUN, <http://www.thesmokinggun.com/mugshots> (last visited Feb. 25, 2013).

6. *See* Steven Reiss & James Wiltz, *Why People Watch Reality TV*, 6 *MEDIA PSYCHOL.* 363, 373-74 (2004) (discussing the results of a survey of why people watch reality television).

Regardless of why we find them appealing, mug shots play a major role in how the media report crime. Just last year, several news outlets covering the death of Trayvon Martin stirred up controversy by featuring an outdated mug shot of a younger, heavysset George Zimmerman in an orange jumpsuit, which some alleged was a calculated attempt to make him look more menacing.⁷

Given the prevalence of these images, it is perhaps surprising that the federal government generally does not disseminate the mug shots in its possession.⁸ The Freedom of Information Act (“FOIA”)⁹ requires federal agencies to disclose certain records to the public. However, FOIA Exemption 7(C) permits agencies to deny requests for law enforcement records when releasing them might violate someone’s personal privacy.¹⁰

When federal agencies refuse to disclose mug shots, members of the news media occasionally challenge them in court. Three federal appellate courts have considered whether mug shots qualify for nondisclosure under Exemption 7(C). The Sixth Circuit concluded that mug shots must be disclosed, but the Eleventh and Tenth Circuits recently disagreed, creating a circuit split.¹¹ In late 2012, the U.S. Department of Justice (“DOJ”) decided to ignore the Sixth Circuit’s decision and now refuses to disclose federal mug shots.¹² However, the legal terrain remains unsettled: the circuit split is still unresolved, and the DOJ’s mug shot policy may again be challenged. The goals of this Note are (1) to review both sides of the circuit split on mug shot

7. Alicia Shepard, *The Iconic Photos of Trayvon Martin & George Zimmerman & Why You May Not See the Others*, POYNTER INST. (Mar. 30, 2012, 6:15 AM), <http://www.poynter.org/latest-news/top-stories/168391/the-iconic-photos-of-trayvon-martin-george-zimmerman-why-you-may-not-see-the-others/>.

8. Mug shots are still ubiquitous, though, because most states and localities voluntarily disclose them or allow citizens to access them under their own open-records laws. Justin Silverman, *The ‘Mugshot Racket’: Paying to Keep Public Records Less Public*, DIGITAL MEDIA L. PROJECT (Oct. 11, 2011), <http://www.dmlp.org/blog/2011/mugshot-racket-paying-keep-public-records-less-public>. For a list of state transparency laws, see *Open Government Guide*, REPS. COMM., <http://www.rcfp.org/open-government-guide> (last visited Feb. 19, 2013).

9. 5 U.S.C. § 552 (2012).

10. *Id.* § 552(b)(7)(C).

11. *World Publ’g Co. v. U.S. Dep’t of Justice*, 672 F.3d 825, 831–32 (10th Cir. 2012); *Karantalis v. U.S. Dep’t of Justice*, 635 F.3d 497, 504 (11th Cir. 2011); *Detroit Free Press, Inc. v. U.S. Dep’t of Justice*, 73 F.3d 93, 99 (6th Cir. 1996); see also Nicholas J. Wagoner, *Are Mugshots Subject to Public Disclosure?*, CIR. SPLITS (Feb. 24, 2012, 5:31 AM), <http://www.circuitsplits.com/2012/02/are-mugshots-subject-to-public-disclosure.html>.

12. Memorandum from Gerald M. Auerbach, Gen. Counsel, U.S. Dep’t of Justice, for all U.S. Marshals, Assoc. Dirs., and Assistant Dirs., U.S. Dep’t of Justice (Dec. 12, 2012), available at http://www.usmarshals.gov/foia/policy/booking_photos.pdf.

disclosure and (2) to suggest how courts should analyze this issue by placing it in a broader legal, empirical, and historical context.

This Note proceeds in four parts. Part II gives a brief overview of FOIA and Exemption 7(C). Part III highlights the federal circuits' disagreements about how to apply FOIA to mug shots and then critically analyzes their reasoning. Part IV explains the consequences of the ongoing circuit split and suggests how the federal courts should resolve it. Part V briefly concludes. This Note contends that the Sixth Circuit erred in deciding that mug shots must be disclosed under FOIA; instead, Exemption 7(C) should generally shield law enforcement agencies from these requests.

II. BACKGROUND

Before discussing the circuit split over mug shots, a brief summary of the general framework of FOIA and Exemption 7(C) is appropriate. Section A of this Part traces the history of FOIA and explores its basic provisions. Section B focuses on Exemption 7(C) and the two U.S. Supreme Court cases that have interpreted it.

A. The Freedom of Information Act: A Primer

Congress passed FOIA in 1966 to promote transparency in government. Not long after the New Deal, Congress perceived a “mushrooming growth in Government secrecy.”¹³ This concern was not hypothetical; federal agencies at the time denied public requests for information almost as a matter of course.¹⁴ Accordingly, FOIA is an early manifestation of Americans' long-standing unease with the modern regulatory state, whereby important decisions are made by unaccountable, unelected bureaucrats.¹⁵ Beyond these instrumental fears, proponents of FOIA also heralded transparency as a core democratic value. When President Lyndon Johnson signed FOIA into law, he proclaimed, “A democracy works best when the people have all the information”¹⁶ President Obama recently echoed this view,

13. H.R. REP. NO. 89-1497, at 2 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2418, 2419.

14. See Martin E. Halstuk & Bill F. Chamberlain, *The Freedom of Information Act 1966-2006: A Retrospective on the Rise of Privacy Protection over the Public Interest in Knowing What the Government's Up To*, 11 COMM'N L. & POL'Y 511, 517-25 (2006) (detailing the historical background preceding passage of FOIA).

15. See generally Jodi L. Short, *The Paranoid Style in Regulatory Reform*, 63 HASTINGS L.J. 633 (2012) (showing how the critique that agencies are undemocratic has been a persuasive one throughout American history).

16. Presidential Statement on Signing Pub. L. 89-487 (July 4, 1966), *reprinted in* Halstuk & Chamberlain, *supra* note 14, at 531.

promising an “unprecedented level of openness” in his administration.¹⁷

FOIA attempts to promote transparency primarily by giving the public a judicially enforceable right to access the records kept by federal agencies.¹⁸ “Records” include “readable materials” and anything else that can be stored on a computer.¹⁹ “[A]ny person,” including businesses and other organizations,²⁰ may submit a FOIA request.²¹ Generally, such persons do not have to state why they want particular records, and the agency’s disclosure decision cannot be based on the identity of the requestor.²² Once a FOIA request is made, the agency must promptly produce the information or state its reasons for not disclosing it.²³ If the agency opts for nondisclosure, the requesting party can challenge that decision in federal court, where the agency has the burden of proving why the information should be withheld.²⁴

B. Exemption 7(C)

Despite FOIA’s general policy of transparency, nine statutory exemptions permit nondisclosure in certain instances.²⁵ Two of the exemptions—Exemptions 6 and 7(C)—deal with personal privacy.²⁶ While Exemption 6 was included in the original 1966 FOIA

17. Transparency and Open Government, 74 Fed. Reg. 4685, 4685 (Jan. 21, 2009).

18. FOIA also requires agencies to make certain proactive disclosures. 5 U.S.C. § 552(a)(2) (2012). Moreover, an agency can usually voluntarily disclose records as well. *Chrysler Corp. v. Brown*, 441 U.S. 281, 293 (1979). Mug shots, however, are covered by the Privacy Act, 5 U.S.C. § 552a, so agencies cannot disclose them unless someone makes a valid FOIA request. *World Publ’g Co. v. U.S. Dep’t of Justice*, No. 09-CV-574-TCK-TLW, 2011 WL 1238383, at *1 (N.D. Okla. Mar. 28, 2011).

19. See *N.Y. Times Co. v. NASA*, 920 F.2d 1002, 1005 (D.C. Cir. 1990) (holding that an audiotape of Space Shuttle Challenger astronauts is a “record” because “FOIA makes no distinction between information in lexical and . . . non-lexical form”); *DiViaio v. Kelley*, 571 F.2d 538, 542 (10th Cir. 1978) (“[R]eliance may be placed on a dictionary meaning . . . as that which is written or transcribed to perpetuate knowledge”); *Save the Dolphins v. U.S. Dep’t of Commerce*, 404 F. Supp. 407, 410–11 (N.D. Cal. 1975) (finding that a movie is a “record” for purposes of FOIA).

20. Administrative Procedure Act (“APA”), 5 U.S.C. § 551(2) (defining “person” as an “individual, partnership, corporation, association, or public or private organization other than an agency”). The federal courts apply the APA definition of “person” to FOIA. See, e.g., *SAE Prods., Inc. v. FBI*, 589 F. Supp. 2d 76, 80 (D.D.C. 2008).

21. 5 U.S.C. § 552(a)(3).

22. *Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004).

23. 5 U.S.C. § 552(a)(3), (6).

24. *Id.* § 552(a)(4)(B); see *Dep’t of the Air Force v. Rose*, 425 U.S. 352, 360–61 (1976) (“[D]isclosure, not secrecy, is the dominant objective of [FOIA].”).

25. 5 U.S.C. § 552(b)(1)–(9).

26. *Id.* § 552(b)(6)–(7).

legislation,²⁷ Exemption 7(C) was added pursuant to a series of amendments in 1974.²⁸ Exemption 6 protects “personnel and medical files” when disclosure “would constitute a clearly unwarranted invasion of personal privacy.”²⁹ Exemption 7(C) covers “law enforcement records” and permits nondisclosure when production of such records “could reasonably be expected to constitute an unwarranted invasion of personal privacy.”³⁰

This Note focuses on Exemption 7(C), not Exemption 6, because only the former is relevant in the context of mug shots. Mug shots do not qualify under any reasonable interpretation of “personnel” or “medical” records.³¹ Moreover, even if mug shots did qualify under Exemption 6, litigants would still focus on Exemption 7(C) because, as explained below, its requirements are much easier to satisfy.³² Indeed, every federal court presented with a FOIA request for mug shots has analyzed the case under Exemption 7(C), not Exemption 6.³³

Nevertheless, both privacy-based exemptions, along with the other statutory limitations on disclosure,³⁴ demonstrate that FOIA is not a full-throated endorsement of government transparency. Although transparency is a laudable ideal, Congress recognized that a policy of disclosure-at-all-costs would conflict with other important democratic values.³⁵ One such value is individual privacy—what Justice Brandeis called “the most comprehensive of rights and the

27. Pub. L. No. 89-487, § 3(e)(6), 80 Stat. 250, 251 (1966).

28. Pub. L. No. 93-502, § 2(A), 88 Stat. 1561 (1974).

29. 5 U.S.C. § 552(b)(6).

30. *Id.* § 552(b)(7).

31. *Id.* § 552(b)(6); see *Providence Journal Co. v. U.S. Dep’t of Army*, 781 F. Supp. 878, 883 (D.R.I. 1991) (analyzing an investigative report of criminal charges under Exemption 7(C) instead of Exemption 6 because it was not a “regularly compiled administrative record” or a “personal file matter[]”).

32. See *infra* Part II.B.i.

33. See *World Publ’g Co. v. U.S. Dep’t of Justice*, 672 F.3d 825, 827 (10th Cir. 2012); *Karantsalis v. U.S. Dep’t of Justice*, 635 F.3d 497, 501 (11th Cir. 2011); *Detroit Free Press, Inc. v. U.S. Dep’t of Justice*, 73 F.3d 93, 96 (6th Cir. 1996); *Times Picayune Publ’g Corp. v. U.S. Dep’t of Justice*, 37 F. Supp. 2d 472, 477 (E.D. La. 1999).

34. The other exemptions in FOIA cover the following types of records: confidential financial information (Exemption 4); regulatory reports of financial institutions (Exemption 8); geologic data about wells (Exemption 9); classified national security information (Exemption 1); law enforcement records that could deprive someone of a fair trial, disclose the identity of a confidential informant, disclose secret police techniques, or endanger someone’s life (Exemption 7(A)–(B), (D)–(F)); internal agency personnel records (Exemption 2); inter-agency memoranda (Exemption 5); and information explicitly exempted by other statutes (Exemption 3). 5 U.S.C. § 552(b)(1)–(7).

35. See *Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004) (“When disclosure touches upon certain areas defined in the exemptions, however, the statute recognizes limitations that compete with the general interest in disclosure, and that, in appropriate cases, can overcome it.”).

right most valued by civilized men.”³⁶ Today, federal agencies are vast repositories of sensitive information such as credit card transactions, social security numbers, and medical histories.³⁷ Freely disseminating such information would jeopardize the financial and emotional well-being of countless people. The overall scheme of FOIA—a “general policy of disclosure”³⁸ with several “narrow”³⁹ statutory exemptions—reflects the need to balance these competing concerns.

1. The Basic Framework

If an agency wants to justify nondisclosure under Exemption 7(C), the plain text of the statute specifies three requirements. First, the requested records must have been “compiled for law enforcement purposes.”⁴⁰ In other words, there must be some nexus between the records and an investigation into potentially illegal conduct.⁴¹ This requirement is not particularly significant for the purposes of this Note because mug shots easily satisfy it.⁴²

Second, disclosure of the law enforcement records must “reasonably be expected” to violate personal privacy.⁴³ This “reasonably be expected” language in Exemption 7(C) departs noticeably from Exemption 6, which requires that disclosure “would” constitute an invasion of privacy.⁴⁴ In fact, this change in terminology

36. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

37. Herb Weisbaum, *Federal Agencies Don't Do Enough to Protect Your Data*, NBC NEWS (Oct. 19, 2012), <http://www.nbcnews.com/business/federal-agencies-dont-do-enough-protect-your-data-1C6563242>; see also *U.S. Agencies Collect, Examine Personal Data on Americans*, WASH. TIMES (May 28, 2004), <http://www.washingtontimes.com/news/2004/may/28/20040528-122605-9267r/?page=all>.

38. *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 754 (1989) (internal citation omitted).

39. *Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976).

40. 5 U.S.C. § 552(b)(7) (2012).

41. *Pratt v. Webster*, 673 F.2d 408, 420–21 (D.C. Cir. 1982) (reviewing the various tests applied by the federal courts and finding that each Circuit utilized this “nexus” requirement).

42. See *Karantalis v. U.S. Dep't of Justice*, 635 F.3d 497, 502 (11th Cir. 2011) (“[I]t is clear the booking photographs were compiled for law enforcement purposes because the Marshals Service is a law enforcement agency tasked with the ‘receipt, processing and transportation of prisoners held in the custody of a marshal or transported by the U.S. Marshals Service.’ ” (quoting 28 C.F.R. § 0.1111(j) (2013))).

43. 5 U.S.C. § 552(b)(7)(C).

44. Compare *id.* § 552(b)(7)(C), with *id.* § 552(b)(6).

was intentional⁴⁵ and suggests that Congress wanted agencies to have an easier time justifying nondisclosure of law enforcement records.⁴⁶

Third, Exemption 7(C) requires an “unwarranted” invasion of personal privacy.⁴⁷ Again, comparing the language of Exemption 7(C) with Exemption 6 is instructive. Exemption 6 requires a “*clearly* unwarranted” violation of privacy.⁴⁸ The original draft of Exemption 7(C) adopted this same language, but the word “clearly” was dropped in the final bill after President Ford threatened to veto it.⁴⁹ Like the change from “would” to “reasonably be expected,” Congress dropped the word “clearly” to ensure that agencies would face a lower burden in justifying nondisclosure under Exemption 7(C) than under Exemption 6.⁵⁰

Congress’s insertion of the word “unwarranted” indicates that Exemption 7(C) is not satisfied by just *any* violation of personal privacy; rather, the costs of the invasion must outweigh the benefits. Indeed, federal courts employ a balancing test to determine if nondisclosure under Exemption 7(C) is proper, weighing the public interest in disclosure against the privacy rights of the affected individual.⁵¹

According to the Court, there is only one cognizable public interest under FOIA: citizens’ right to know “what their government is up to.”⁵² Stated differently, disclosure only furthers a public interest if it directly serves the “central purpose” of FOIA by “shed[ding] light on an agency’s performance of its statutory duties.”⁵³ Assessing any other public interest—like a general interest in disclosure for its own sake—goes beyond the legislative purpose of FOIA.⁵⁴ Thus, the balance will generally tilt in favor of nondisclosure if the requestor merely wants information about a private citizen, rather than a government agency.⁵⁵

45. See *Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157, 166 (2004) (“We know Congress gave special consideration to the language in Exemption 7(C) because it was the result of specific amendments to an existing statute.”).

46. See *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 756 (1988) (“[T]he standard for evaluating a threatened invasion of privacy interests [under Exemption 7(C)] is somewhat broader than the standard applicable to [Exemption 6].”).

47. 5 U.S.C. § 552(b)(7)(C).

48. *Id.* § 552(b)(6) (emphasis added).

49. James T. O’Reilly, *The 1974 Amendments*, 1 *FED. INFO. DISCL.* § 3:8 (2013).

50. *Reporters Comm.*, 489 U.S. at 756.

51. *Id.* at 762.

52. *Id.* at 773.

53. *Id.* at 773–74.

54. *Id.* at 772.

55. *Id.* at 773.

Finally, it is important to note that Exemption 7(C) typically applies to *categories* of records. In other words, agencies do not have to make an individual 7(C) determination each time a record is requested.⁵⁶ According to the Supreme Court's interpretation of Exemption 7(C), "[I]ndividual circumstances [may be] disregarded when a case fits into a genus in which the balance [between the public interest and personal privacy] characteristically tips in one direction."⁵⁷ Thus, in a typical 7(C) case, federal courts must decide whether a "class of cases" qualifies for exemption.⁵⁸ This categorical approach reflects agencies' need for "workable rules" that allow them to quickly respond to requests without spending time and resources on case-by-case evaluations.⁵⁹

2. U.S. Supreme Court Cases

The Supreme Court has interpreted Exemption 7(C) in two cases: *U.S. Department of Justice v. Reporters Committee*⁶⁰ and *National Archives & Records Administration v. Favish*.⁶¹ Both times, the Court unanimously ruled in favor of nondisclosure and personal privacy.⁶² Even Chief Justice Rehnquist, who has been described as one of the least friendly Justices toward privacy rights,⁶³ sided with the majority in each case.

The *Reporters Committee* litigation arose after the FBI denied a FOIA request from a group of reporters for Charles Medico's "rap

56. *Id.* at 777, 779 (citing *FTC v. Grolier Inc.*, 462 U.S. 19 (1983), and *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978)).

57. *Id.* at 776.

58. *Id.* at 780. For example, in *Reporters Committee*, the Court asked whether rap sheets *in general* qualify for nondisclosure under Exemption 7(C), not whether the agency was justified in withholding a *particular* rap sheet. *Id.* at 776–80. Rap sheets qualified for categorical treatment because the Court concluded that the privacy interest in these documents will always be high enough to trump the public interests. *Id.* at 780.

59. *Id.* at 779. See generally Charles J. Wichmann III, *Ridding FOIA of Those "Unanticipated Consequences": Repaving a Necessary Road to Freedom*, 47 DUKE L.J. 1213 (1998) (explaining agencies' difficulties under FOIA due to the volume of requests and persistent underfunding and understaffing).

60. 489 U.S. 749 (1989).

61. 541 U.S. 157 (2004).

62. *Favish* was a 9-0 decision in favor of nondisclosure. *Id.* at 159, 175. In *Reporters Committee*, all nine Justices likewise agreed that nondisclosure was proper. 489 U.S. at 750, 780. Justice Blackmun authored a concurring opinion, joined by Justice Brennan, agreeing with the majority's analysis of the balancing test but disagreeing about whether the Court ought to take a categorical or case-by-case approach. *Id.* at 780–81 (Blackmun, J., concurring).

63. Christopher Slobogin, *Rehnquist & Panvasive Searches*, 82 MISS. L.J. 307, 314–16 (2013).

sheet,” a compilation of his entire criminal history.⁶⁴ The requestors wanted the information for a story on the Medico family, who allegedly obtained federal defense contracts pursuant to an arrangement with a corrupt congressman.⁶⁵ Nevertheless, the Court upheld the FBI’s decision to keep the information confidential under Exemption 7(C) because Medico’s privacy interest in his rap sheet outweighed the public’s purported interest in disclosure.⁶⁶

The Court first concluded that individuals have a significant privacy interest in keeping their rap sheets confidential.⁶⁷ According to the Court, its prior cases recognized individuals’ privacy interest in “avoiding disclosure of personal matters.”⁶⁸ Individuals have a “significant privacy interest in their criminal histories”⁶⁹ because this information can be “embarrassing or harmful” if disclosed.⁷⁰ The reporters argued that Medico had very little privacy interest in his rap sheet because all of the information therein—his prior arrests, indictments, acquittals, convictions, and sentences⁷¹—had already been disclosed to the public.⁷² The Court, however, rejected this contention, calling it an overly “cramped” notion of personal privacy.⁷³ First, rap sheets are not “freely available” because several federal and state laws prohibit their release; without the rap sheet, a curious party could only find someone’s complete criminal history after a “diligent search” through various archives.⁷⁴ Second, the fact that “an event is not wholly ‘private’ does not mean that an individual has no interest in limiting disclosure” of that information.⁷⁵ Disclosure can expose more people to the information or simply stir up “aspects of [someone’s] criminal history that may have been wholly forgotten.”⁷⁶

64. *Reporters Comm.*, 489 U.S. at 757.

65. *Id.* The FBI, on the other hand, claimed that it had no records suggesting Medico had committed any financial crimes. *Id.*

66. *Id.* at 780.

67. *Id.* at 762–63.

68. *Id.* at 762 (quoting *Whalen v. Roe*, 429 U.S. 589, 598–600 (1977)).

69. *Id.* at 767.

70. *Id.* at 770.

71. *Id.* at 757.

72. *Id.* at 762–63.

73. *Id.* at 763.

74. *Id.* at 764.

75. *Id.* at 770 (quoting a lecture by Justice Rehnquist at Kansas Law School in 1974).

76. *Id.* at 769.

Next, the Court weighed Medico's privacy interest against the supposed public interest in disclosing his rap sheet.⁷⁷ The reporter-petitioners argued that, since the Medico family allegedly obtained defense contracts through an improper relationship with a congressman, disclosing the rap sheet would shed light on malfeasance by government officials.⁷⁸ However, the Court held that this supposed interest was not cognizable under FOIA because the information in a rap sheet says nothing about the conduct of the *government*, only the conduct of a *private citizen*.⁷⁹ Congress did not enact FOIA to give the public access to "information about private citizens that happens to be in the warehouse of the Government."⁸⁰ If the reporters wanted information about the alleged corruption, they could have requested information about how the Department of Defense decides to award defense contracts or the details surrounding the contracts with the Medicos.⁸¹ Obtaining the rap sheet to "provide details to include in a news story" was not a legitimate public interest under Exemption 7(C).⁸²

More than twenty years after *Reporters Committee*, the Court further elaborated how Exemption 7(C) should be applied in *Favish*. There, a media watchdog group requested crime scene photographs taken by the U.S. Park Police while investigating the death of Vincent Foster, Jr., a deputy counsel for President Clinton.⁸³ After numerous investigations, the government concluded that Foster had committed suicide,⁸⁴ but the watchdog group suspected a cover-up and wanted to see pictures of the body.⁸⁵ The government refused to disclose the photos because releasing them would violate the Foster family's privacy.⁸⁶ The Court unanimously agreed, upholding the government's use of Exemption 7(C) to justify nondisclosure.⁸⁷

77. *Id.* at 775. In fact, the Court suggested that *no* cognizable public interest was served by disclosing rap sheets. *See id.* (concluding that any public interest in disclosing Medico's rap sheet "falls outside the ambit of the public interest that the FOIA was enacted to serve").

78. *Id.* at 774.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 160–61 (2004).

84. *Id.* at 161.

85. *See* Miquel Rodriguez, *Death of Vince Foster (Part 1)*, ACCURACY IN MEDIA (Oct. 16, 2004), <http://www.aim.org/special-report/death-of-vince-foster-part-1/> (alleging that the federal government and national media ignored evidence that pointed to murder rather than suicide).

86. *Favish*, 541 U.S. at 161–62.

87. *Id.* at 174.

The Court first determined that Foster's family had a cognizable privacy interest under Exemption 7(C). It consulted the "background of law, scholarship, and history" that preceded the statute, as well as the policy consequences of disclosing this type of record.⁸⁸ According to the Court, the privacy interest protected by Exemption 7(C) "goes beyond the common law and the Constitution,"⁸⁹ though these legal traditions are still highly instructive.⁹⁰ Under the common law, families have a considerable privacy interest in controlling the images of their deceased loved ones.⁹¹ Furthermore, the Court noted that the statutory privacy right of Exemption 7(C) "must be understood . . . in light of the consequences that would follow" from disclosure.⁹² Child molesters and murderers often request crime-scene photos of their victims as a kind of sick trophy, a consequence that would violate the purpose of Exemption 7(C).⁹³ Thus, Foster's family had a substantial privacy interest in preventing disclosure of the photos.

The Court then turned to the potential public interest in disclosure and, in so doing, fleshed out in greater detail how to apply the balancing test of Exemption 7(C). Although FOIA requestors generally do not need to state the reasons they want certain information, this presumption no longer applies once the agency cites Exemption 7(C).⁹⁴ If a requestor wants law enforcement records that implicate personal privacy, she must (1) identify a "significant" public interest beyond just disclosure for its own sake and (2) show that the information is "likely to advance" that interest.⁹⁵ If the requester believes that government officials acted improperly in performing their duties, she must produce "clear evidence" that would lead a "reasonable person" to believe that the alleged government malfeasance might have occurred.⁹⁶ Courts afford a presumption of legitimacy to the government's official conduct⁹⁷ and require a "meaningful evidentiary showing" because allegations of government

88. *Id.* at 169–70.

89. *Id.* at 170.

90. *See id.* (relying on common-law doctrines to determine the proper scope of Exemption 7(C)).

91. *Id.* at 168–69.

92. *Id.* at 170.

93. *Id.*

94. *Id.* at 172.

95. *Id.* The Court specifically declined to define the reasons that would constitute a "significant" public interest or the nexus required between the requested information and purported public interest. *Id.* at 172–73.

96. *Id.* at 174.

97. *Id.* (citing *Dep't of State v. Ray*, 502 U.S. 164, 178–79 (1991)).

misconduct are “easy to allege and hard to disprove.”⁹⁸ In *Favish*, the requesters made no such showing.⁹⁹ Thus, the Court directed that summary judgment be entered in favor of the government.¹⁰⁰

III. ANALYSIS

Several years before the Court’s decision in *Favish*, the Sixth Circuit considered whether mug shots must be disclosed under FOIA. Almost a decade later, the Eleventh and Tenth Circuits also confronted this issue. Both the Eleventh and Tenth Circuits explicitly rejected the Sixth Circuit’s approach. Section A analyzes this circuit split. Section B identifies problems with the Sixth Circuit’s reasoning by placing the issue of mug shot disclosure in a broader context.

A. *The Circuit Split over Mug Shots*

The split among the federal circuits over mug shots and Exemption 7(C) pits the Sixth Circuit against the Tenth and Eleventh Circuits. The Sixth Circuit weighed in first in *Detroit Free Press, Inc. v. U.S. Department of Justice*,¹⁰¹ concluding that Exemption 7(C) did not cover mug shots. This decision stood alone among the federal appellate courts until only very recently. In the last three years, two additional circuit courts confronted the issue: the Eleventh Circuit in *Karantsalis v. U.S. Department of Justice*¹⁰² and the Tenth Circuit in *World Publishing Co. v. U.S. Department of Justice*.¹⁰³ Both cases involved facts very similar to *Detroit Free Press*, but both circuits declined to follow that decision,¹⁰⁴ creating a circuit split. The remainder of Section A summarizes the key holdings of each case.

1. The Sixth Circuit Mandates Disclosure

The Sixth Circuit considered whether mug shots were excused from disclosure under Exemption 7(C) in *Detroit Free Press*.¹⁰⁵ There,

98. *Id.* at 175 (internal quotations omitted) (citing *Crawford-El v. Britton*, 523 U.S. 574, 585 (1998)).

99. *Id.*

100. *Id.*

101. 73 F.3d 93 (6th Cir. 1996).

102. 635 F.3d 497 (11th Cir. 2011).

103. 672 F.3d 825 (10th Cir. 2012).

104. *World Publ’g Co.*, 672 F.2d at 829 (“[T]his court is not bound by the Sixth Circuit’s decision in *Detroit Free Press*”); *Karantsalis*, 635 F.3d at 497 (“We take note of the opinion in *Detroit Free Press* . . . and respectfully reject its holding.”).

105. 73 F.3d at 95–96.

a newspaper requested mug shots from the U.S. Marshals Service (“USMS”)¹⁰⁶ of eight individuals who were indicted and awaiting trial on federal charges.¹⁰⁷ The USMS denied the newspaper’s request.¹⁰⁸ The agency’s policy was to withhold mug shots unless releasing them would help find a fugitive.¹⁰⁹ A divided Sixth Circuit rejected the USMS’s invocation of Exemption 7(C) and required the agency to disclose the mug shots.¹¹⁰

In assessing the relevant public and private interests, the Sixth Circuit held that the suspects had *no* privacy interest in their mug shots.¹¹¹ The DOJ argued that releasing mug shots violates personal privacy because these pictures convey an extremely unflattering view of the suspect and strongly suggest criminal guilt.¹¹² Yet, according to the court, “ridicule or embarrassment” is not sufficient to constitute an invasion of personal privacy.¹¹³ Moreover, the suspects no longer had an expectation of privacy in their mug shots because their names had already been released in connection with the criminal proceedings and their visage was already made public when they appeared in court.¹¹⁴ In short, no *new* information would be publicized if their mug shots were released. The court distinguished *Reporters Committee* based on the fact that rap sheets, unlike mug shots, are compilations of information from various sources and often contain old information that was lost or forgotten.¹¹⁵ Recognizing that an old mug shot also implicates this latter concern, the Sixth Circuit limited its holding to disclosures of mug shots during *ongoing* criminal prosecutions where

106. The USMS is part of the DOJ and serves as the law-enforcement arm of the federal government. The duties of U.S. Marshals include apprehending federal fugitives. *See generally* FACT SHEET, U.S. MARSHALS SERVICE (2013), *available at* <http://www.usmarshals.gov/duties/factsheets/general-2013.pdf>.

107. *Detroit Free Press*, 73 F.3d at 95.

108. *Id.*

109. *Karantalis*, 635 F.3d at 501 (explaining the USMS policy regarding mug shot disclosure before and after *Detroit Free Press*).

110. The *Detroit Free Press* decision was a 2–1 split, with Judges Daughtery and Jones in the majority. Judge Norris wrote an insightful dissent criticizing the majority for misapplying the Supreme Court’s analysis in *Reporters Committee*. 73 F.3d at 99–100 (Norris, J., dissenting). This Note agrees in large part with Judge Norris’s legal analysis.

111. *See id.* at 97 (“[R]elease of mug shots . . . could not reasonably be expected to constitute an invasion of personal privacy, [so] there is, of course, no need then to determine whether such an invasion would be *warranted*.”).

112. *Id.*

113. *Id.* (citing *Schell v. U.S. Dep’t of Health & Human Servs.*, 843 F.2d 933, 938–39 (6th Cir. 1988)).

114. *Id.*

115. *Id.*

the defendants' names have already been divulged and they have already appeared in open court.¹¹⁶

Once the Sixth Circuit determined that the suspects had no privacy interest in their mug shots, the court did not need to assess the public interest in disclosure or apply the balancing test under Exemption 7(C).¹¹⁷ Nevertheless, the court, in dicta, identified two potential public interests that could have justified disclosure.¹¹⁸ Disclosing mug shots could facilitate public oversight over federal agencies because they (1) “more clearly reveal the government’s glaring error in detaining the wrong person than can any reprint of only the name” and (2) “startlingly reveal the circumstances surrounding an arrest and initial incarceration.”¹¹⁹ As an example, the Sixth Circuit contemplated what would have happened if the videotape of the LAPD’s beating of Rodney King was never recorded; according to the court, “[A] mug shot of Mr. King released to the media would have alerted the world that the arrestee had been subjected to much more than a routine traffic stop.”¹²⁰ The court also suggested—without any further elaboration—that “additional examples” of public benefits from disclosing mug shots could be identified.¹²¹

After *Detroit Free Press*, the USMS amended its policy regarding FOIA requests for mug shots. The agency would release a mug shot if the request was made from within the Sixth Circuit, the suspect was publicly named and had appeared in open court, and there was an ongoing criminal prosecution.¹²² If the request came from outside the Sixth Circuit, the USMS would apply its traditional policy of denying the request unless disclosure would help apprehend a fugitive.¹²³ However, once a mug shot was disclosed to a requestor in the Sixth Circuit, the USMS would disclose the photo to anyone else in the country who asked for it.¹²⁴ The USMS maintained this Sixth Circuit exception until only very recently.¹²⁵

116. *Id.*

117. *Id.*

118. *Id.* at 97–98.

119. *Id.* at 98.

120. *Id.*

121. *Id.*

122. *Karantsalis v. U.S. Dep’t of Justice*, 635 F.3d 497, 501 (11th Cir. 2011).

123. *Id.*

124. Brief of Plaintiff-Appellant at 3–4, *Karantsalis*, 635 F.3d 497 (No. 10-10229-B) (explaining the USMS policy and citing several examples).

125. *See infra* Part IV.

2. The Eleventh Circuit Disagrees

In *Karantsalis*, the Eleventh Circuit explicitly rejected *Detroit Free Press* and instead upheld the USMS's decision to not disclose a mug shot, though its discussion of the issue was somewhat cursory. In fact, the Eleventh Circuit's decision consisted of a lone introductory paragraph that simply adopted the opinion of the district court below.¹²⁶ The case involved a FOIA request by a reporter for the mug shot of Luis Giro, a businessman who was arrested by the USMS for securities fraud.¹²⁷

The Eleventh Circuit recognized that a suspect had a significant privacy interest in keeping his mug shot confidential. First, mug shots are a "unique and powerful type of photograph" that is a "vivid symbol of criminal accusation" which the public often equates with guilt.¹²⁸ Second, unlike merely appearing in court or having your name released in connection with crime, a mug shot is uniquely sensitive because it captures the suspect in the "vulnerable and embarrassing moments" immediately after the deprivation of most of his liberties.¹²⁹ Finally, like the rap sheets in *Reporters Committee*, mug shots are not freely available to the public because the federal government generally does not disclose them.¹³⁰

The court then applied the balancing test required under Exemption 7(C) and concluded that the suspect's significant privacy interest outweighed the very small public interest in disclosing the mug shot.¹³¹ The reporter in *Karantsalis* argued that disclosure would provide insight into USMS operations by revealing whether or not a suspect was receiving preferential treatment, which could be seen in his "smirks and smiles."¹³² The court rejected this argument because the mug shot alone is not a "sufficient proxy" to evaluate whether a prisoner is receiving preferential treatment.¹³³ According to the court, "[c]ommon sense" suggests that a prisoner would not smirk or smile during the mug shot photo because then he would risk losing his preferential treatment.¹³⁴ Instead, the court chalked up the reporter's request to an attempt to "satisfy[] voyeuristic curiosities," a

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

127. *Id.*

128. *Id.* at 503.

129. *Id.*

130. *Id.*

131. *Id.* at 504.

132. *Id.*

133. *Id.*

134. *Id.*

“negligible” public interest that is not cognizable under FOIA.¹³⁵ Thus, because the suspect’s substantial privacy interest outweighed the negligible public interest, the Eleventh Circuit held that mug shots satisfy the criteria for nondisclosure under Exemption 7(C).

3. The Tenth Circuit Follows Suit

One year later, the Tenth Circuit came down the same way in *World Publishing Co.*, but the court fleshed out its analysis in greater detail. There, a newspaper requested the mug shots of six federal detainees awaiting trial, which the USMS denied since the request came from outside the Sixth Circuit.¹³⁶ The Tenth Circuit concluded that mug shots are exempt under Exemption 7(C), reemphasizing the embarrassing and incriminating nature of these images.¹³⁷ The newspaper, like the requestors in other Exemption 7(C) cases, tried to minimize the suspects’ privacy interest by pointing out that such information is already generally available; indeed, most nonfederal law enforcement agencies freely disclose mug shots to the public.¹³⁸ The Court rejected this argument, however, because even if *state and local* mug shots are generally available, *USMS* mug shots are not.¹³⁹ Thus, people accused of federal charges maintain an expectation of privacy in their mug shots, and the federal government has its own reasons for wanting to keep these records confidential, even if state and local governments do not.¹⁴⁰

On the other side of the scale, the Tenth Circuit rejected a long list of potential public interests. The newspaper in *World Publishing Co.* asserted nine public interests in disclosing mug shots under FOIA:

1. Determining the arrest of the correct detainee
2. Detecting favorable, unfavorable, or abusive treatment
3. Detecting fair versus disparate treatment
4. Uncovering racial, sexual, or ethnic profiling in arrests
5. Revealing the outward appearance of the detainee to determine whether they may be competent, incompetent, or impaired
6. Comparing a detainee’s appearance at arrest and at the time of trial

135. *Id.*

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

137. *Id.* at 829 (comparing the “sensitive nature of the subject matter in a rap sheet, and the vivid and personal portrayal of a person’s likeness in a booking photograph”).

138. *Id.*

139. *Id.*

140. *Id.*

7. Allowing witnesses to come forward and assist in other arrests and solving crimes
8. Capturing a fugitive
9. Showing whether the indictree took the charges seriously.¹⁴¹

The court rejected Interests 1 and 7–9 because FOIA is meant to promote public *supervision*, not assistance, of federal law enforcement.¹⁴² Furthermore, although Interests 2–6 are cognizable, the newspaper provided no evidence that such government misconduct was occurring, and releasing mug shots would not meaningfully aid in detecting it.¹⁴³ Therefore, like the Eleventh Circuit, the Tenth Circuit endorsed the USMS policy of not disclosing mug shots unless it serves a law enforcement purpose.

B. Applying the Balancing Test: Why the Sixth Circuit Got It Wrong

After *Karantsalis* and *World Publishing Co.*, the federal circuits are now split over whether USMS mug shots should be exempt from disclosure under FOIA.¹⁴⁴ The remainder of this Note seeks to resolve this split by adding empirical, historical, and legal depth to the debate. Part III.B follows the tripartite framework commonly applied by courts to resolve Exemption 7(C) problems: (1) identify the nature and extent of the privacy rights affected by disclosure, (2) identify the nature and extent of the public interests in disclosure, and (3) weigh the competing interests against each other to determine if disclosure would cause an “unwarranted” invasion of privacy.¹⁴⁵ Ultimately, this Note contends that the Sixth Circuit’s decision in *Detroit Free Press* was improper; mug shots should qualify for 7(C) exemption.

1. The Personal Privacy Interest in a Mug Shot

The Sixth Circuit, when it applied the 7(C) balancing test, held that individuals have *no* privacy interest in their mug shots.¹⁴⁶ This conclusion surely overreaches. Yet, even if the court had ruled more narrowly—by deciding that an individual has *some* privacy interest in

141. *Id.* at 831.

142. *Id.*

143. *Id.*

144. The Eastern District of Louisiana also weighed in on this issue. The district court shared the view of the Tenth and Eleventh Circuits that mug shots should qualify for 7(C) exemption. *Times Picayune Publ’g Corp. v. U.S. Dep’t of Justice*, 37 F. Supp. 2d 472, 477 (E.D. La. 1999).

145. *See supra* Part II.B.

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

his mug shot but that his interest is outweighed by countervailing public interests—its holding still could not withstand scrutiny. The Sixth Circuit came to its conclusion for two reasons: (1) “ridicule or embarrassment” is not sufficient to constitute a violation of privacy, and (2) the information conveyed by a mug shot is already freely available once a suspect appears in open court to answer for the criminal charges against her (i.e., the “cat is out of the bag”).¹⁴⁷ Both of these arguments will be addressed in turn.

a. Mug Shots Attach a Stigma of Criminality to Their Subjects

When the Sixth Circuit evaluated the personal privacy interests in a mug shot, the court did not consider the extent to which these images strongly implicate criminal guilt—something both the Tenth and Eleventh Circuits recognized.¹⁴⁸ Of course, whether mug shots actually implicate guilt is an *empirical* question that calls for evidentiary support. Nevertheless, this contention seems well-supported by scholarly literature and federal case law.

The remarkably consistent characteristics of mug shots, coupled with the secondary meaning society has ascribed to them, attach a stigma of criminality to the suspect featured in the picture. The basic format of the mug shot has not changed since the mid-nineteenth century: a frontal shot of the head and shoulders of an expressionless suspect, against a monochromatic background.¹⁴⁹ Today, no one views such an image without immediately identifying it as a mug shot and assuming that the subject was arrested for some crime. As J.M. Finn puts it, “The police mug shot has become an icon in contemporary visual culture. The pose, framing, and formal conventions of the image are easily recognized throughout the general public. It is an image that is taken to indicate criminality.”¹⁵⁰ Of course, the suspects in mug shots may in fact be innocent, and most Americans have now heard the classic warning before every episode of *Cops*: “All suspects are innocent until proven guilty in a court of law.”¹⁵¹ Yet, the mug shot itself explains none of the surrounding

147. *Id.*

148. *World Publ'g Co. v. U.S. Dep't of Justice*, 672 F.3d 825, 827–28 (10th Cir. 2012); *Karantalis v. U.S. Dep't of Justice*, 635 F.3d 497, 503 (11th Cir. 2011).

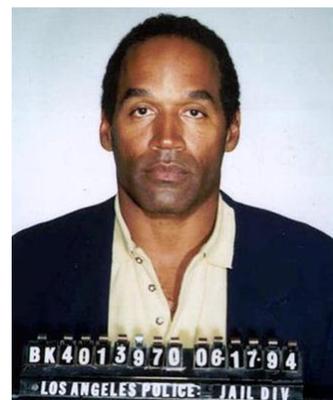
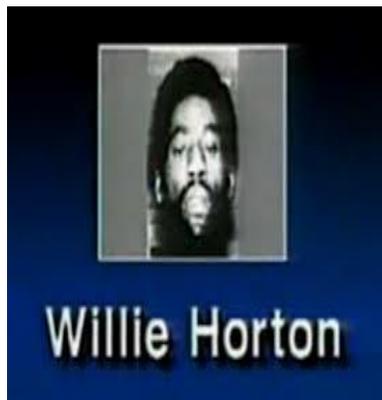
149. Phil Carney, *Crime, Punishment and the Force of Photographic Spectacle*, in *FRAMING CRIME* 22–23 (Keith J. Hayward & Mike Presdee eds., 2010); JONATHAN MATHEW FINN, *CAPTURING THE CRIMINAL IMAGE 2* (2009).

150. FINN, *supra* note 149, at 1.

151. *Cops (1989–)*: *Quotes*, IMDB, <http://www.imdb.com/title/tt0096563/quotes> (last visited Feb. 21, 2013).

circumstances of the arrest, and most people assume that the arrestee was doing something illegal.¹⁵²

Well-known anecdotal examples of this phenomenon have been documented. For instance, the 1992 presidential election featured the Bush campaign's now-infamous "Willie Horton" ad, which flashed a mug shot of a middle-aged black man while criticizing Michael Dukakis for being soft on crime.¹⁵³ Many political scientists attribute George H.W. Bush's turnaround in the polls to this ad, which was successful in part because Horton's menacing mug shot played on the fears of white, suburban voters.¹⁵⁴ As another example, O.J. Simpson was a beloved football star prior to his murder trial. When the covers of *Newsweek* and *Time* featured an unshaven, dreary-eyed mug shot of Simpson, scholars believe this contributed to Simpson's public metamorphosis from sports icon to cold-blooded killer.¹⁵⁵



Of course, the Willie Horton and O.J. Simpson mug shots are usually remembered for triggering feelings of racial animus, rather than perceptions of criminality. Nevertheless, the decision to use mug shots of these men—rather than some other image—played an

152. See, e.g., Andrew D. Leipold, *The Problem of the Innocent, Acquitted Defendant*, 94 NW. U. L. REV. 1297, 1299–300 (2000):

[T]he presumption of innocence is a legal requirement, not a social norm . . . [Society] strongly suspect[s] that many defendants who are acquitted were in fact guilty but were not convicted because of the prosecutor's high burden of proof, because of guileless jurors, or because of some other social values that conflict with the truth-seeking function

153. *The :30 Second Candidate – 1988*, PBS ONLINE, <http://www.pbs.org/30secondcandidate/timeline/years/1988.html#movie> (last visited Feb. 25, 2013).

154. Darrell West, *Independent Ads: The National Security Political Action Committee – “Willie Horton,”* INSIDE POLITICS, <http://www.insidepolitics.org/ps111/independentads.html> (last visited Feb. 23, 2013).

155. Billy Hawkins, *The Dominant Images of Black Men in America: The Representation of O.J. Simpson*, in *AFRICAN AMERICANS IN SPORTS* 48 (Gary A. Sailes ed., 1998).

essential role in creating the fear and stigma that so penetrated the public consciousness.¹⁵⁶ A picture of Willie Horton at a family reunion or a football card starring O.J. Simpson would not have struck the same chord, even if coupled with details about their criminal charges.

Social science research sheds additional light on the stigmatizing, criminalizing effect of mug shots. Psychologists from four universities conducted an experiment in which participants assessed the trustworthiness of different people based only on their headshots.¹⁵⁷ Viewers saw either regular photographs or mug shots of a group of Caucasian men, but the mug shots were cropped to make them look as much like normal photos as possible.¹⁵⁸ Nevertheless, the viewers rated the men in the mug shots twenty percent more untrustworthy than the exact same men in the normal pictures—a statistically significant deviation.¹⁵⁹ These perceptions of untrustworthiness, in turn, tend to develop into perceptions of criminality.¹⁶⁰ The results of this experiment suggest that mug shots not only make the subject look like a criminal to the viewer, but that they do so in ways that may even be unconscious. In short, there seems to be significant historical and empirical support for the notion that mug shots attach a criminalizing stigma to the people portrayed in them.

Finally, the Sixth Circuit's own case law demonstrates a judicial concern with the tendency of mug shots to associate someone with criminality. For instance, the Sixth Circuit acknowledges that mug shots are generally not admissible under the Federal Rules of Evidence:

Even if relevant, a mug shot tends to make people believe that the person is “bad,” and therefore can be unfairly prejudicial. Moreover, the visual impact of a mug shot, apart from mere references to a prior conviction, can leave a lasting, although illegitimate, impact on the jury. Accordingly, the use of mug shots at trial is highly disfavored.¹⁶¹

156. And, these phenomena are likely mutually reinforcing. Studies show that news outlets show mug shots of black suspects as much as eight times more than those of white suspects. *See, e.g.*, ROBERT M. ENTMAN & ANDREW ROJECKI, *THE BLACK IMAGE IN THE WHITE MIND* 78–106 (2000) (examining local Chicago news broadcasts for a ten-week period in the 1990s).

157. Nicholas O. Rule et al., *Accuracy and Consensus in Judgments of Trustworthiness from Faces: Behavioral and Neural Correlates*, 104 *J. PERSONALITY & SOC. PSYCHOL.* 411–12 (2013).

158. *Id.* at 3.

159. *Id.* at 4.

160. *Id.*; *see* Heather D. Flowe, *Do Characteristics of Faces that Convey Trustworthiness and Dominance Underlie Perceptions of Criminality?*, 7 *PLOS ONE* (2012), available at <http://www.plosone.org/article/info%3Adoi%2F10.1371%2Fjournal.pone.0037253> (conducting a social science experiment using face evaluation models and concluding that perceptions of criminality are tied to how trustworthy people appear).

161. *United States v. George*, 160 F. App'x 450, 456 (6th Cir. Dec. 20, 2005) (internal citation omitted).

In other words, the Sixth Circuit considers mug shots to be too prejudicial for the eyes of the *jury* in a criminal trial where the defendant must be convicted beyond a reasonable doubt.¹⁶² This effect is only magnified when a mug shot is disseminated under FOIA to the *public*, who commonly assume someone is guilty until proven innocent.¹⁶³

b. Mug Shots Are Embarrassing

Apart from their implications of criminal guilt, mug shots are quite humiliating. For most people, a mug shot is taken at the worst moment in their entire lives.¹⁶⁴ In the words of the Eleventh Circuit, the mug shot captures the subject in the “vulnerable and embarrassing moments immediately after being accused, taken into custody, and deprived of most liberties.”¹⁶⁵ Mug shots even manage to make Hollywood superstars look horrendous.¹⁶⁶

The humiliating nature of mug shots is important because *embarrassment*—despite the Sixth Circuit’s argument to the contrary—is a cognizable privacy interest. In *Reporters Committee*, the Supreme Court specifically cited the “embarrassing” nature of law enforcement records as a reason to bar the disclosure of rap sheets under FOIA.¹⁶⁷

The Court’s Fourth Amendment jurisprudence is also instructive. For example, the Fourth Amendment requires police to knock and announce their presence before entering a home to “protect individuals against the fear, humiliation, and *embarrassment* of being aroused from their beds in states of partial or complete undress.”¹⁶⁸ Likewise, the Court found that a school violated a student’s Fourth Amendment rights by strip-searching her for drugs because she found

162. *Eberhardt v. Bordenkircher*, 605 F.2d 275, 280 (6th Cir. 1979) (“The use of mug shots has been strongly condemned in federal trials, as effectively eliminating the presumption of innocence and replacing it with an unmistakable badge of criminality.”); *see also Barnes v. United States*, 365 F.2d 509 (D.C. Cir. 1966) (cited by the 6th Circuit in *Eberhardt*); *United States v. Reed*, 376 F.2d 226 (7th Cir. 1967) (same).

163. Leipold, *supra* note 152, at 1299–300.

164. Joe Guastaferrro, *It Isn’t About (Just) the Glasses*, Comment to *Eyeglasses and Mock Juror Decisions*, JURY EXPERT (Mar. 30, 2011), <http://www.thejuryexpert.com/2011/03/eyeglasses-and-mock-juror-decisions/>.

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

166. *See, e.g., supra* notes 1–3.

167. *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 770 (1988).

168. *Payton v. New York*, 445 U.S. 573, 617 (1980) (emphasis added).

it “*embarrassing*, frightening, and humiliating.”¹⁶⁹ The Court also cited embarrassment as a reason why a police checkpoint at the U.S.-Mexico border was unconstitutional.¹⁷⁰

If embarrassment is a cognizable privacy concern under the Fourth Amendment, it qualifies with even more force under Exemption 7(C). According to the *Favish* Court, “[T]he statutory privacy right protected by Exemption 7(C) goes *beyond* the common law and the Constitution. . . . It would be anomalous to hold . . . that the statute provides even less protection”¹⁷¹

Of course, embarrassment alone should not trump FOIA’s general preference for disclosure in every context. When government agents engage in wrongdoing, FOIA requests can be instrumental in bringing this information to light. Then, public shaming seems not only acceptable, but desirable.

However, requests for mug shots target *private citizens*, and it is these individuals—not government bureaucrats—who experience the embarrassment of having their run-in with the law released to the world. This suggests that courts should be much more sensitive to the potential for embarrassment and ridicule when evaluating mug shots under Exemption 7(C), as opposed to other run-of-the-mill FOIA requests.

Furthermore, the Sixth Circuit’s contention that ridicule and embarrassment are insufficient grounds for nondisclosure lacks precedential support. The case that the court relied on to make this point arose under Exemption 6, not Exemption 7(C).¹⁷² As explained in Part II, Exemption 6 requires that disclosure “would” constitute a “*clearly* unwarranted” invasion of personal privacy,¹⁷³ a higher standard than the one Congress chose for Exemption 7(C).¹⁷⁴ While Exemption 6 deals with personnel and medical records, Exemption 7(C) is concerned with law enforcement records and requires only that disclosure “could reasonably be expected” to cause an “unwarranted” privacy intrusion.¹⁷⁵ Given this lower bar, embarrassment or ridicule could very well constitute a sufficient privacy interest under Exemption 7(C) even though it may not under Exemption 6.

169. *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 374–75 (2009) (emphasis added).

170. *United States v. Ortiz*, 422 U.S. 891, 895 (1975).

171. *Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157, 170 (2004) (emphasis added).

172. *Schell v. U.S. Dep’t of Health & Human Servs.*, 843 F.2d 933, 936 (6th Cir. 1988).

173. 5 U.S.C. § 552(b)(6) (2012).

174. *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 756 (1989).

175. *Compare* 5 U.S.C. § 552(b)(6), *with id.* § 552(b)(7)(C).

Indeed, Congress had good reason to require less of an agency under Exemption 7(C) compared to Exemption 6. Exemption 7(C) applies to law enforcement records and hence will usually involve criminal investigatory agencies like the USMS. Law enforcement agencies are very interested in reducing their exposure under FOIA because responding to these requests drains the agency's scarce resources.¹⁷⁶ Every government official operating under a freedom-of-information law knows all too well that such requests can be quite frivolous. Recent examples include requests for President Obama's homebrewed beer recipes,¹⁷⁷ inquiries into a local government's plans for a zombie attack,¹⁷⁸ and one inmate's strategy of overwhelming agencies with requests in order to collect the statutory late fees.¹⁷⁹ Though this concern affects all agencies, the problem is more acute with federal law enforcement agencies because repeatedly digging up mug shots may trade off with apprehending dangerous suspects and solving crimes.¹⁸⁰

Moreover, compared to medical and personnel records under Exemption 6, the law enforcement records protected by Exemption 7(C) generally implicate greater privacy concerns precisely because of their connection to criminal activity. As explained above, a criminal arrest can have a powerful stigmatizing effect. Even if a suspect is ultimately acquitted, her neighbors, coworkers, and acquaintances may forever be wary of her once they find out about her previous brush with the law.¹⁸¹ As the Court noted in *Reporters Committee*, having a criminal history—or even a mere arrest record—may prevent someone from getting a job, renting a house, or obtaining credit from a

176. Wichmann, *supra* note 59.

177. *White House Beer Recipe: Freedom of Information Act Request Filed for Obama's Brew*, HUFFINGTON POST (Aug. 21, 2012), http://www.huffingtonpost.com/2012/08/21/white-house-beer-recipe-obama_n_1818531.html.

178. *FOI: Top 10 Strangest Requests Council Have Answered, from Father Christmas to Zombies and Aliens*, HUFFINGTON POST (UK) (Dec. 23, 2011), http://www.huffingtonpost.co.uk/2011/12/23/foi-top-10-strangest-requests_n_1166901.html.

179. Gene Johnson, *Wash. Lawmakers May Limit Inmate Access to Public Records to Curb Stalking, Harrassment*, STAR TRIB. (Feb. 22, 2009), http://www.startribune.com/templates/Print_This_Story?sid=40055257.

180. See Keith Anderson, *Is There Still a "Sound Legal Basis?": The Freedom of Information Act in the Post-9/11 World*, 64 OHIO ST. L.J. 1605, 1606 (2003) (advocating greater deference to law enforcement agencies and their decisions to deny FOIA requests when homeland security is implicated); see also *Pratt v. Webster*, 673 F.2d 408, 418 (D.C. Cir. 1982) ("[A]n agency whose principal mission is criminal law enforcement will more often than not satisfy the Exemption 7 threshold criterion. Thus, a court can accept less exacting proof from such an agency that the purpose underlying disputed documents is law enforcement." (internal footnotes omitted)).

181. Leipold, *supra* note 152, at 1305.

bank.¹⁸² Indeed, federal courts commonly recognize the uniquely sensitive privacy concerns involved when someone is suspected of criminal wrongdoing.¹⁸³

Finally, there is an additional compelling policy rationale for not disclosing federal mug shots under FOIA which no court has yet discussed: the risk of extortion. Many Internet entrepreneurs have figured out an innovative—albeit cruel—way to use mug shots to make money. A proliferating number of websites exploit lax freedom-of-information laws to collect mug shots from law enforcement agencies, post them online, and then wait for the people featured in the mug shots to discover them.¹⁸⁴ Once they do, the websites often charge them exorbitant amounts to take the photos down.¹⁸⁵ Paying this premium is typically well worth the cost to the person in the mug shot, since these photos could be discovered by friends, family, and prospective employers with a simple Google search. Worse still, these websites generally do not keep track of whether the charges were dropped or the suspect was acquitted.¹⁸⁶ Therefore, even if posting mug shots online could serve some sort of public-shaming function, it also exploits many *innocent* people.

Extortion websites demonstrate the serious privacy implications that can occur once the government decides to disclose mug shots. Former criminal suspects may pay several hundred dollars to have their mug shots taken off the Internet, yet these people are often among society's most financially vulnerable.¹⁸⁷ The Supreme Court in *Favish* recognized the importance of taking into account such negative consequences when it refused to force disclosure of death-

182. U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 775 (1989).

183. *Neely v. FBI*, 208 F.3d 461,464–66 (4th Cir. 2000) (finding that third-party suspects have a “substantial interest in the nondisclosure of their identities and their connection with particular investigations . . .”); *Fitzgibbon v. CIA*, 911 F.2d 755, 767 (D.C. Cir. 1990) (“It is surely beyond dispute that ‘the mention of an individual's name in a law enforcement file will engender comment and speculation and carries a stigmatizing connotation.’ ”); *Buros v. U.S. Dep't of Health & Human Servs.*, No. 93-571, slip op. at 10 (W.D. Wis. Oct. 26, 1994) (“[C]onfirming . . . federal criminal investigation brushes the subject with an independent and indelible taint of wrongdoing.”).

184. *Shakedown or Public Service? Mug Shot Websites Spread*, REUTERS (Sept. 20, 2012), <http://www.reuters.com/article/2012/09/20/net-us-usa-internet-mugshots-idUSBRE88J0R020120920>. See generally CLASS ACTION AGAINST MUGSHOT WEBSITES.COM, <http://classactionagainstmugshotwebsites.com/wp/> (last visited July 22, 2013).

185. *Shakedown or Public Service?*, *supra* note 184. These fees could escalate quickly for someone captured in the mug shot, since her image could have been obtained by multiple websites.

186. *Mugshots: The Hot New Internet Business*, MIAMI HERALD (Mar. 11, 2012), <http://www.miamiherald.com/2012/11/03/3081517/mugshots-the-hot-new-internet.html>.

187. *Id.*

scene photographs because criminals might obtain them as trophies.¹⁸⁸ In the same way, federal courts should consider online extortion when assessing whether mug shots must be disclosed under FOIA.

c. The Cat is Not Already out of the Bag

The Sixth Circuit's second major argument—that a suspect's previous appearances in open court vitiate his privacy interest in the mug shot—also does not withstand scrutiny. Releasing a mug shot causes an *additional* invasion of privacy to the suspect beyond mere criminal accusations and court appearances.

First, disclosure increases the duration of the privacy invasion. A mug shot immortalizes the suspect's run-in with the law by capturing it in a single image. Once an image goes up on the Internet, it hardly ever comes down.¹⁸⁹ Or, as explained above, the image only comes down after some website extorts large sums of money from the former suspect (which is still no guarantee that the image will truly disappear).¹⁹⁰

Second, disclosing a mug shot increases the size of the audience who learn about the suspect's legal troubles. Of course, a few people may see the suspect in open court, but the number of people in federal court on a given day is infinitesimal compared to the number of people who may read a news article or peruse the Internet. Such widespread exposure simply does not occur during a typical criminal prosecution, particularly since cameras have long been prohibited in the federal courts.¹⁹¹

Finally, a mug shot is a much more powerful, vivid symbol of criminality than a mere written indictment or imageless news story. The Sixth Circuit itself recognized the power of such images when it claimed that disclosing mug shots could “more clearly reveal” a government error “than can any reprint of only the name of an arrestee” and can “startlingly reveal” circumstances “in a way that written information cannot.”¹⁹² Likewise, the Sixth Circuit speculated that a mug shot of Rodney King would be essential in moving public

188. Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 170 (2004).

189. BAUGH, *supra* note 4, at 7:

[W]hen you put something online, it goes out of your control and out in to the world forever. No matter what length of time it's there or if you decide to take it down later, search engines and web crawlers could archive it and allow it to be found again indefinitely.

190. *See id.*; *supra* Part III.B.i.2.

191. *History of Cameras in the Federal Courts*, U.S. COURTS, <http://www.uscourts.gov/Multimedia/Cameras/history.aspx> (last visited Jan. 13, 2013).

192. *Detroit Free Press, Inc. v. U.S. Dep't of Justice*, 73 F.3d 93, 98 (6th Cir. 1996).

opinion if there had been no videotape of his beating, implicitly conceding that mug shots leave a much deeper impression on their viewers.¹⁹³

Furthermore, the Sixth Circuit's cat-out-of-the-bag argument gives insufficient consideration to key aspects of *Reporters Committee*. There, the Court rejected the requestors' contention that the suspect had no privacy interest in his rap sheet because the information was already publicly available.¹⁹⁴ In *Detroit Free Press*, the Sixth Circuit attempted to distinguish *Reporters Committee* by emphasizing the fact that rap sheets are *compilations* of multiple criminal proceedings, unlike a lone mug shot in an ongoing prosecution.¹⁹⁵ However, the Sixth Circuit's myopic focus on this detail disregards other key passages in the Court's opinion. Specifically, the Court stated that the fact that "an event is not wholly private" does not eliminate the individual's interest in nondisclosure.¹⁹⁶ The Court denounced the cat-out-of-the-bag argument as an overly "cramped" conception of privacy rights because "[i]n an organized society, there are few facts that are not at one time or another divulged."¹⁹⁷ Instead, the Court found a sufficient privacy interest in the fact that the data was itself "embarrassing or harmful" and that disclosure would allow additional people to view it.¹⁹⁸ The Sixth Circuit did not afford proper consideration to these aspects of *Reporters Committee*, a decision that was favorably cited by a unanimous Court in *Favish*.¹⁹⁹

Similarly, the plaintiff-appellants in *World Publishing Co.* made a different cat-out-of-the-bag argument by pointing out that most states already freely distribute mug shots under their open records laws.²⁰⁰ At first, this objection seems fairly persuasive; as society grows increasingly accustomed to seeing mug shots everywhere, a person's expectation that such an image will remain private decreases. However, in the context of FOIA, such an argument cannot be determinative. Courts applying FOIA Exemption 7(C) are

193. *Id.*

194. U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 763–71 (1989).

195. 73 F.3d at 97.

196. *Reporters Comm.*, 489 U.S. at 770 (internal quotation marks omitted).

197. *See id.* at 762–63 ("Because [the] events . . . have been previously disclosed to the public, respondents contend that Medico's privacy interest in avoiding disclosure . . . approaches zero. We reject respondents' cramped notion of personal privacy.")

198. *Id.* at 769–70.

199. *See* Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 165 (2004) (citing *Reporters Committee* and again rejecting "cramped" notions of personal privacy under Exemption 7(C)).

200. *World Publ'g Co. v. U.S. Dep't of Justice*, 672 F.3d 825, 829 (10th Cir. 2012).

interpreting a *federal statute*, not creating common law or discerning the original meaning of the Constitution. As such, FOIA must be interpreted by the traditional tools of statutory construction (e.g., reading the text, defining its terms, applying canons of construction). State practices are irrelevant to this exercise because states release mug shots pursuant to their *own* open records laws, which may be worded differently and may have no analogue to Exemption 7(C).²⁰¹ Allowing states to dictate the meaning of a federal law like FOIA would ignore the federal government's status as a separate sovereign.

Moreover, even if state and local mug shots are generally available, *USMS* mug shots are not.²⁰² Courts should assess whether the USMS makes such records available, rather than whether this type of record is generally available in the United States. Federal and nonfederal law enforcement agencies have different agendas and face different resource constraints.²⁰³ Courts risk placing unrealistic burdens on federal law enforcement—at the expense of catching criminals and protecting American citizens—if they conflate federal and nonfederal standards.

Finally, although nondisclosure under FOIA will not directly prevent state and local governments from disclosing mug shots in their possession, a firm federal stance on the issue could help end the practice at the state level as well. Many state transparency laws mirror FOIA and are influenced by federal disclosure practices.²⁰⁴ Thus, if the federal government takes the lead on this issue, it could spur similar movements at the local level. Indeed, some localities are now taking their mug shots offline after citizens have complained about extortion from mug shot websites.²⁰⁵ The responsiveness of these jurisdictions suggests that bringing awareness to the sensitive privacy concerns involved with mug shots at the federal level could trickle down and affect state and local disclosure policies as well.

For all of these reasons, a person featured in a mug shot has a substantial privacy interest in preventing its disclosure under FOIA.

201. See Roger A. Nowadsky, *A Comparative Analysis of Public Records Statutes*, 28 URB. LAW. 65, 88 (1996) (“Law enforcement records are . . . addressed in nearly every state open records law, but are treated differently from state to state.”).

202. *World Publ'g Co.*, 672 F.3d at 829.

203. See generally Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698, 717–44 (2011) (outlining the various differences between state and federal law enforcement agencies).

204. Nowadsky, *supra* note 201, at 65–66.

205. See, e.g., Matt Long, *Columbia-Area Jail Will No Longer Post Mugshots Online*, S.C. RADIO NETWORK (Oct. 22, 2012), <http://www.southcarolinaradionetwork.com/2012/10/22/columbia-jail-will-no-longer-post-mugshots-online/>; Pat Reavy, *No More Online Mug Shots*, *SL County Sheriff Says*, KSL (Jan. 10, 2013, 4:11 PM), <http://www.ksl.com/?nid=148&sid=23691287>.

At the very least, the individual’s privacy interest is nontrivial, contrary to the Sixth Circuit’s conclusion in *Detroit Free Press*. This latter point is important because—as will be discussed in the remainder of this Part—the public interest in disclosing USMS mug shots is negligible.²⁰⁶ Under the Exemption 7(C) balancing test, a nontrivial privacy interest should always outweigh a miniscule public interest. This is especially true in light of the Supreme Court’s repeated admonitions that courts should place a thumb on the scale in favor of nondisclosure when Exemption 7(C) is involved, in order to protect personal privacy and to give proper deference to law enforcement agencies.²⁰⁷

2. The (Lack of) Public Interest in Disclosing Mug Shots

None of the federal circuits that have considered whether mug shots should be exempt from FOIA have found that the public interest in disclosure actually *outweighs* the intrusion on personal privacy. Indeed, the Sixth Circuit in *Detroit Free Press* did not even apply the 7(C) balancing test because it concluded that individuals have *no* personal privacy interest in their mug shots.²⁰⁸ The court’s speculation about potential public interests was mere dicta.

Nevertheless, the litigants in all three cases still proposed potential public interests, with the plaintiffs in *World Publishing Co.* presenting a near-comprehensive list. These interests can be grouped into two main categories: “crime control” and “agency malfeasance.” The “crime control” interests include those that would assist a law enforcement agency in performing its duties (i.e., Interests 1 and 7–9 asserted by the requestors in *World Publishing Co.*).²⁰⁹ “Agency malfeasance” refers to the ways in which disclosing mug shots could potentially help detect improper agency behavior (i.e., Interests 2–6 in *World Publishing Co.*).²¹⁰ The remainder of this Part will discuss why

206. *See infra* Part III.B.ii.

207. *See generally* Nat’l Archives & Records Admin. v. Favish, 541 U.S. 157 (2004); U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989).

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

209. *World Publ’g Co. v. U.S. Dep’t of Justice*, 672 F.3d 825, 831 (10th Cir. 2012) (“(1) [D]etermining the arrest of the correct detainee . . . (7) allowing witnesses to come forward and assist in other arrests and solving crimes[,] (8) capturing a fugitive[,] (9) to show whether the indictee took the charges seriously . . .”).

210. *Id.*:

(2) [D]etecting favorable or unfavorable or abusive treatment[,] (3) detecting fair versus disparate treatment[,] (4) racial, sexual, or ethnic profiling in arrests[,] (5) the outward appearance of the detainee; whether they may be competent or incompetent or impaired[,] (6) a comparison in a detainee’s appearance at arrest and at the time of trial

these potential public interests are generally insufficient to mandate disclosure under Exemption 7(C).

a. Crime Control Is Not a Cognizable Public Interest

First, the “crime control” interests cannot be used in the Exemption 7(C) balancing test because, as the Tenth Circuit correctly held, they are not cognizable under the Supreme Court’s FOIA precedent. As explained above, Congress did not intend FOIA to promote disclosure for just any reason, but rather only disclosures that further the purpose of FOIA by revealing some sort of agency malfeasance.²¹¹ Nor should such interests be cognizable as a matter of policy. The USMS already releases mug shots if it serves a law enforcement purpose, and no one knows the needs of law enforcement better than the agency itself. Indeed, as explained above, making such information available under FOIA could actually hinder law enforcement efforts by siphoning off scarce agency resources to deal with FOIA compliance.²¹²

b. Disclosing Mug Shots Sheds Little Light on Agency Misbehavior

Second, although the “agency malfeasance” interests are technically cognizable under FOIA, these interests are simply too unlikely to be aided by the release of mug shots to satisfy the balancing test under Exemption 7(C). After *Favish*, a requestor must make a “meaningful evidentiary showing” that the government engaged in improper behavior and that the requested information is “likely to advance” the discovery of that misdeed.²¹³ However, mug shot requestors will very rarely satisfy this standard. For example, if the requestor suspects the USMS is giving a detainee favorable treatment, a mug shot will usually not reveal any relevant information. As the Eleventh Circuit noted, an inmate receiving favorable treatment would not be foolish enough to risk his favored status by smirking or smiling in his mug shot.²¹⁴ Moreover, a picture of a smiling inmate is entirely ambiguous; the expression could signal defiance toward law enforcement, a desire to not look bad in the picture,²¹⁵ or nothing at all.

211. *Reporters Comm.*, 489 U.S. at 773.

212. See generally Wichmann, *supra* note 59.

213. See Nat’l Archives & Records Admin. v. Favish, 541 U.S. 157, 172–74 (2004).

214. *World Publ’g Co.*, 672 F.3d at 830.

215. An increasing number of arrestees smile in their mug shots so that their picture will draw less attention, should it ever surface on the Internet. Bob Ruff, *More People Smiling for*

Furthermore, media groups are only interested in *newsworthy* images, but no accurate conclusions regarding systemic racial or gender discrimination could be drawn with such a limited sample size. Likewise, signs of physical abuse or mistreatment may not even appear in a mug shot, and apparent injuries do not reliably point to official misconduct. A suspect's injuries may have occurred as the result of an accident, a fight with another citizen, a forcible but legal arrest, or some unrelated preexisting condition. In short, mug shot requests do not reveal nearly enough information about key surrounding circumstances to support a reasonable inference of agency misconduct.

This observation should not be overly troubling, even for ardent supporters of government transparency.²¹⁶ If a law enforcement agency did mistreat a detainee, that person would have a strong incentive to bring an individual suit.²¹⁷ Or, to raise public awareness about his mistreatment, such an individual could always obtain a copy of his *own* mug shot if it helped raise awareness about his plight.²¹⁸ Thus, transparency goals can be achieved in large part without the assistance of third-party FOIA requestors.²¹⁹

Lastly, courts evaluating requests from freelance reports and media organizations should keep in mind the actual context of these requests. In all three of the aforementioned cases, the media-plaintiffs had to create hypothetical public interests that could be served by disclosing the mug shots to avoid mentioning their true motives for wanting the photographs: to attract readers to their stories.²²⁰ Of course, generally the requestor's identity and intended use for the information are not relevant under FOIA.²²¹ However, the nature of a

Mug Shots, CNN (May 5, 2009, 10:43 AM), <http://am.blogs.cnn.com/2009/05/05/more-people-smiling-for-mug-shots/>.

216. For examples of such pro-transparency arguments, see Halstuk & Chamberlin, *supra* note 14, at 555–60; Editorial, *Mug Shots Keep System Accountable, Honest*, OKLA. DAILY (June 22, 2012), <http://oudaily.com/news/2012/jun/22/editorial-mug-shots/>.

217. For example, an individual can sue the federal government if a federal law enforcement officer displays excessive force. *See, e.g.*, *Ortiz v. Pearson*, 88 F. Supp. 2d. 151, 153 (S.D.N.Y. 2000). Then, the normal tools of discovery would be available to access the mug shot, although FOIA would probably not be. *Comer v. IRS*, No. 97-CV-76329, 2000 WL 1727711, at *1 (E.D. Mich. Oct. 5, 2000) (“FOIA is not intended to be a substitute for discovery . . .”).

218. The Privacy Act allows individuals to obtain records about themselves. *See* 5 U.S.C. § 552a (2012).

219. Though, as explained below, limited as-applied requests for mug shots may still qualify for disclosure under FOIA in appropriate circumstances. *See infra* Part IV.

220. News organizations are likely aware of research indicating that readers are much more likely to read an article with pictures than one without. *E.g.*, Dolf Zillmann et al., *Effects of Photographs on the Selective Reading of News Reports*, 3 MEDIA PSYCHOL., 301–24 (2001).

221. *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004).

privacy-based statutory exemption changes this default rule, as the Court recognized in *Favish*.²²² Deciding whether disclosure would potentially violate someone's privacy necessarily requires investigating the purpose for which the information will be used.²²³

For instance, extortion websites are mostly using mug shots to make money by humiliating private citizens. One such site, TheSmokingGun.com, breaks down its mug shots into categories such as "Killers," "Funny Faces," "Strippers," and "Weepy."²²⁴ With even less tact, BestMugshotEver.com collects mug shots of females and asks viewers to vote on whether they would have sex with the suspect.²²⁵ Even if websites like these find mug shots that are not entertaining (and thus do not increase website traffic and advertising revenue), they have every incentive to post them anyway, hoping that the people featured in the pictures will pay to take them down.

In this context, vague appeals to government transparency ring hollow. Indeed, in a moment of unintentional irony, a blog entry on Mugshots.com trumpets the value of democratic transparency while a scrolling marquee at the top of the page features mug shots of Pep the Dog (an actual dog), Michael Jackson, and a man with an American-flag face tattoo.²²⁶ Courts should recognize this reality. Mandating the disclosure of mug shots will generally only help satisfy the voyeuristic curiosities of the public, rather than serving some noble democratic cause. Ignoring this context opens the judiciary to criticisms of being overly legalistic, pontificating about the law without recognizing how its rules are applied in the real world.

Thus, as a general matter, mug shots should satisfy the requirements for nondisclosure under Exemption 7(C). The privacy interests are significant and the (cognizable) public interests are much too attenuated.

IV. SOLUTION

Part III explained how courts should analyze the disclosure of mug shots under Exemption 7(C). This Part explores the practical implications of the circuit split and what should be done to resolve it.

222. *Id.*

223. *Id.*

224. *Mug Shots*, *supra* note 5.

225. *Id. Tap That Ass*, BESTMUGSHOTEVER.COM, <http://www.bestmugshotever.com/tapthatass.php?page=1&view=1> (last visited Feb. 24, 2013).

226. *Limiting Access to Mugshots Is Never in the Public's Interest*, MUGSHOTS.COM, <http://mugshots.com/Blog/Limiting-Access-to-Mugshots-Is-Never-in-the-Publics-Interest.46626640.html> (last visited Feb. 24, 2013).

Section A outlines the negative impact of decisions like *Detroit Free Press*. Section B considers review by the U.S. Supreme Court as a potential remedy to the circuit split. However, because the Court would probably not grant certiorari to resolve this issue, Section B focuses on how the lower federal courts should approach this issue. This Note proposes a categorical rule with a narrow as-applied exception as the best standard for analyzing the disclosure of mug shots under FOIA.

A. *Why the Circuit Split Matters*

The status quo circuit split is undesirable. If disclosing mug shots truly does violate important privacy rights, then an anomalous decision like *Detroit Free Press* leaves those rights unprotected on a *national* scale.²²⁷ For example, after *Detroit Free Press*, the USMS began honoring FOIA requests for mug shots when they originated from the Sixth Circuit.²²⁸ But, once the USMS disclosed a mug shot to someone in the Sixth Circuit, the agency then freely disclosed it to anyone else in the country. This policy created an easily exploitable loophole for savvy media companies. For instance, the reporter in *Karantsalis* made an additional request for his desired mug shots from a mailbox in the Sixth Circuit just in case he lost in the Eleventh Circuit.²²⁹ Such a loophole-ridden regime subjects the USMS to more FOIA requests, draining law enforcement resources.

In December 2012, the DOJ closed this loophole.²³⁰ Instead of continuing to carve out an exception for FOIA requests from the Sixth Circuit, the DOJ decided to allow the USMS to revert back to its pre-*Detroit Free Press* disclosure policy.²³¹ Now, the USMS will no longer disclose mug shots unless doing so would serve a valid law enforcement purpose, like apprehending fugitives or encouraging witnesses to come forward.²³²

The DOJ's decision to close the loophole was well-warranted because *Detroit Free Press* has been severely undermined by

227. To further emphasize the potential volume of requests, it is important to note that FOIA requestors do not even need to be citizens of the United States. 5 U.S.C. § 552 (2012) (making records available to “any person” who requests them); *see also* Doherty v. U.S. Dep’t of Justice, 596 F. Supp. 423, 428–29 (S.D.N.Y. 1984) (concluding, after an analysis of the legislative history and purpose of FOIA, that an undocumented immigrant had standing to request records).

228. *Karantsalis v. U.S. Dep’t of Justice*, 635 F.3d 497, 501 (11th Cir. 2011).

229. *Id.* at 501 n.1.

230. Memorandum from Gerald M. Auerbach for all U.S. Marshals, Assoc. Dirs., and Assistant Dirs., *supra* note 12.

231. *Id.*

232. *Id.*

subsequent case law. The Supreme Court decided *Favish* after the Sixth Circuit's decision in *Detroit Free Press*. Not only did the *Favish* Court unanimously reaffirm *Reporters Committee*, but it also established a new test for analyzing Exemption 7(C). The newspaper-plaintiff in *Detroit Free Press* could not have satisfied the *Favish* standard because it made no evidentiary showing of wrongdoing that could overcome the presumption that the agency acted in good faith. Thus, *Favish* seriously calls into question the continued validity of *Detroit Free Press*, even within the Sixth Circuit. Furthermore, all other federal courts that have considered whether mug shots are entitled to 7(C) exemption have sided against the Sixth Circuit.²³³ The DOJ sees the contrary decisions by the Eleventh and Tenth Circuits as a harbinger of the end of *Detroit Free Press*.²³⁴

Nevertheless, the unilateral decision by the DOJ to defy the Sixth Circuit does not conclusively settle the matter. *Detroit Free Press* is still on the books and has not been overruled or seriously questioned within the Sixth Circuit.²³⁵ In fact, a newspaper recently filed a complaint in the Sixth Circuit challenging the DOJ's policy reversal.²³⁶ Moreover, only three federal appellate courts have considered the disclosure of mug shots under FOIA; any one of the remaining nine circuits could side against the USMS, creating another loophole. This ongoing uncertainty will require action by one or more federal courts.

B. U.S. Supreme Court Review: An Unlikely Option

The U.S. Supreme Court could grant a petition for writ of certiorari to decide whether mug shots qualify for nondisclosure under Exemption 7(C). However, the Court seems unlikely to get involved. The Court has already taken two opportunities to interpret Exemption 7(C), laying out several fundamental principles in *Reporters Committee* and then spelling out a precise framework in *Favish*.²³⁷

233. *World Publ'g Co. v. U.S. Dep't of Justice*, 672 F.3d 825, 825 (10th Cir. 2012); *Karantalis*, 635 F.3d at 499; *Times Picayune Publ'g Corp. v. U.S. Dep't of Justice*, 37 F. Supp. 2d 472, 472 (E.D. La. 1999).

234. See Memorandum from Gerald M. Auerbach for all U.S. Marshals, Assoc. Dirs., and Assistant Dirs., *supra* note 12, at 2 (describing *Karantalis* and *World Publ'g Co.* as "the weight of legal precedent").

235. District courts in the Sixth Circuit have enforced *Detroit Free Press* years after that case was decided. See, e.g., *Beacon Journal Publ'g Co. v. Gonzalez*, No. 5:05CV1396, 2005 WL 2099787, at *3 (N.D. Ohio Aug. 30, 2005).

236. Complaint, *Detroit Free Press, Inc. v. U.S. Dep't of Justice* (E.D. Mich. July 6, 2013) (No. 2:13CV12939), 2013 WL 3958745.

237. See *supra* Part II.B.ii.

After speaking with near-unanimity in these two cases, the Court is unlikely to hear another case that merely turns on the proper application of the 7(C) framework to one particular factual scenario.²³⁸ Indeed, the Court denied a petition for certiorari after the Eleventh Circuit's decision in *Karantsalis*, despite the obvious circuit split that the decision created.²³⁹ Therefore, policy development will probably occur primarily in the lower federal courts.

C. Lower Federal Courts: A Categorical Approach

Absent definitive action by the Supreme Court, litigants will likely continue challenging agencies' refusals to disclose mug shots under FOIA. Hence, federal courts will be confronted with how to properly decide these cases. Part III.B of this Note illustrates how courts should apply the Exemption 7(C) balancing test to mug shots. Nevertheless, one final question remains: How broadly should courts fashion their rulings? The remainder of this Part proposes a broad categorical rule exempting mug shots from disclosure with a narrow as-applied exception for instances of serious agency misconduct.

As the Supreme Court admonished in *Reporters Committee*, Exemption 7(C) calls for categorical bright-line rules, so mug shots should also be treated in this manner. Part III.B explained why the public's interest in disclosing mug shots almost never outweighs the privacy interest of the person depicted. Thus, like the rap sheets in *Reporters Committee*, the 7(C) balancing test for mug shots "characteristically tips in one direction," and the "individual circumstances" of each particular case should be disregarded.²⁴⁰ In other words, the fact that a requested record is a mug shot should be sufficient to establish as a matter of law that disclosure is not required under FOIA. This bright-line rule would be simple for courts and law enforcement agencies to administer without wasting precious time and resources, and it would also provide ex ante predictability for requestors.

However, a narrow, as-applied exception to this categorical rule is also appropriate. Such an exception should be difficult for a requestor to invoke; otherwise, the value of a bright-line rule will be lost. The Tenth Circuit, in a footnote in *World Publishing Co.*,

238. Arthur D. Hellman, *Error Correction, Lawmaking, and the Supreme Court's Exercise of Discretionary Review*, 44 U. PITT. L. REV. 795, 831-32 (1983) (explaining that the Supreme Court rarely takes cases to simply correct errors in the application of established law).

239. *Karantsalis v. U.S. Dep't of Justice*, 132 S. Ct. 1141, 1142 (2012).

240. *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 776 (1989).

suggested two prerequisites for invoking such an as-applied exception.²⁴¹ First, the requestor must present “compelling evidence” that the agency is engaged in illegal activity.²⁴² Second, the requestor must demonstrate that the requested mug shot is “necessary” to confirm these suspicions.²⁴³ These prerequisites are well-advised. Setting aside a narrow as-applied exception for cases where mug shots could help expose serious agency misconduct conforms with the rationale for Exemption 7(C). After all, FOIA represents a *balance* between promoting government transparency and respecting personal privacy, so the risk of unchecked agency misconduct could, in rare instances, justify the resulting violation of individual privacy.

V. CONCLUSION

The circuit split over the disclosure of mug shots under FOIA illustrates the judiciary’s struggle to balance two core democratic values: individual privacy and government transparency. Nevertheless, this particular disagreement risks creating a patchwork legal terrain that jeopardizes the personal privacy of criminal suspects and needlessly depletes the resources of law enforcement agencies. Thus, unlike most privacy debates, which pit individual-rights advocates against tough-on-crime proponents, both sides can agree that the Sixth Circuit’s decision in *Detroit Free Press* was wrongheaded. This Note attempts to ground the debate over mug shots and FOIA in a broader legal, empirical, and historical context. In this light, the executive branch and lower federal courts should be able to properly resolve this dispute by recognizing the impropriety of using FOIA to force the disclosure of mug shots.

*Cameron T. Norris**

241. *World Publ’g Co. v. U.S. Dep’t of Justice*, 672 F.3d 825, 831 n.1 (10th Cir. 2012) (citing *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1206 (D.C. Cir. 1991)); *Schrecker v. U.S. Dep’t of Justice*, 349 F. 3d 657, 666 (D.C. Cir. 2003)).

242. *Id.*

243. *Id.*

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