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Reining in Internet-Age Expansion of Exemption 7(C): Towards a Tort Law Approach for Ferreting Out Legitimate Privacy Concerns and Unwarranted Intrusions Under FOIA

Clay Calvert, Austin Vining,** and Sebastian Zarate****

ABSTRACT

Using the July 2016 federal appellate court decision in Detroit Free Press, Inc. v. U.S. Department of Justice *as an analytical springboard, this article explores the expansion of Freedom of Information Act (FOIA) Exemption 7(C) in the Internet era. In* Detroit Free Press*, the Sixth Circuit recognized a privacy interest in mug shots under Exemption 7(C). The practical impact of the decision is to uphold the general policy of the U.S. Marshals Service not to release mug shots. This article illustrates the yawning gap between tort law, which this article argues would deny recovery for the Internet posting of the mug shots at issue in* Detroit Free Press*, and Exemption 7(C) when it comes to privacy concerns. Furthermore, this article critiques three key reasons why the Sixth Circuit in 2016 reversed its ruling from twenty years ago in which it held there was no privacy interest in mug shots. Troublingly for access advocates, courts are justifying expansion of the meaning of "personal privacy" within Exemption 7(C) as a mechanism for counteracting the ease and permanence of accessibility to information on the Internet.*

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INTRODUCTION

WHEN former Stanford University swimmer Brock Turner was sentenced in June 2016 to six months in jail for sexual assault, it sparked outrage.[1] The paltry punishment, however, was not the only aspect of Turner's case causing considerable consternation.

In particular, the delayed release of his booking photo—more commonly, a mug shot[2]—"became an issue in the debate over how the story of the sexual assault he committed was told."[3] Due to belated access to Turner's mug shot, news outlets instead published "yearbook-style smiling photographs of him with a tie and jacket."[4]

To critics, this seemed like "preferential treatment symptomatic of a culture of white male privilege."[5] As Fred Ritchin, Dean of New York City's International Center of Photography School, explained in *Time*, "[m]any wanted to have had a mug shot released that demonstrated that a white student from an elite university held on sexual assault charges would be treated, at the very least, like everyone else."[6] NBC News reported that "[t]he resentment sparked a very active hashtag on Twitter and Instagram: #NoMugShot."[7]

Those upset by the protracted battle over Turner's mug shot, which was held by two Northern California law enforcement agencies,[8] surely would be stunned to discover that it is even harder to obtain a mug shot held by a federal agency—in particular, the U.S. Marshals Service (USMS).[9] In-

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1. Liam Stack, *Outrage Over Sentencing in Rape Case at Stanford*, N.Y. Times, June 7, 2016, at A15; *see* Jennifer Calfas, *Stanford Student in Assault Case Freed*, Wall St. J., Sept. 3, 2016, at A3 (reporting that Turner was released after serving three months of his six-month sentence and noting that his "sentence drew national outrage and launched an effort to unseat the judge who imposed it").

2. *See* State v. Haynes, 6 P.3d 1026, 1029 (N.M. Ct. App. 2000) (observing that a booking photo is "more colloquially" known as "a mugshot").

3. Elahe Izadi & Abby Ohlheiser, *Why You Are Only Now Seeing the Stanford Sex Offender's Mugshot*, Wash. Post (June 6, 2016), https://www.washingtonpost.com/news/the-intersect/wp/2016/06/06/where-is-stanford-sex-offender-brock-turners-mugshot-here [https://perma.cc/P5NY-9KBR].

4. Fred Ritchin, *The Ambiguous Role of Photography in Presenting Innocence and Guilt*, Time: LightBox (June 20, 2016), http://time.com/4374225/photography-innocence-guilt [https://perma.cc/TP7N-FNP3].

5. *Id.*

6. *Id.*

7. Alex Johnson, *After Months of Requests, Mugshots of Stanford Rapist Brock Turner Finally Emerge*, NBC News (June 7, 2016), http://www.nbcnews.com/news/us-news/after-months-requests-mugshots-stanford-rapist-brock-turner-finally-emerge-n586936 [https://perma.cc/PSS5-FLBB].

8. Turner was arrested and booked by the Stanford Department of Public Safety but later was turned over to the Santa Clara Sheriff's Department. Dayna Evans, *Brock Turner Mug Shot Finally Released [Updated]*, N.Y. Mag.: The Cut (June 6, 2016, 4:12 PM), http://nymag.com/thecut/2016/06/no-brock-turner-mug-shot.html [https://perma.cc/4DYV-X54N]. The two agencies "seemed to be volleying the responsibility for releasing the mug shot back and forth." *Id.*

9. When it comes to accessing mug shots in California, where Brock Turner was arrested and convicted, "there is no California case that discusses whether the Public Records Act requires release of booking photographs, or whether such records are ex-

deed, on the fiftieth anniversary of the federal Freedom of Information Act[10] (FOIA) in 2016,[11] the U.S. Court of Appeals for the Sixth Circuit dealt a blow to journalists, news consumers, and access advocates in *Detroit Free Press, Inc. v. U.S. Department of Justice*[12] (hereinafter *Detroit Free Press II*).

There, the appellate court held, in a sharply divided nine-to-seven en banc ruling, that FOIA Exemption 7(C)[13] protects a defendant's[14] "nontrivial privacy interest in booking photos."[15] The Sixth Circuit, in turn, concluded that the statutory privacy interest in mug shots requires courts to consider, on a case-by-case basis, whether that privacy interest is outweighed by "the public's interest in disclosure"[16] before such images can be publicly released after an FOIA request. It remanded the case to the district court to make that determination.[17]

If releasing Brock Turner's mug shot was important because people wanted to see that he—stereotyped as a privileged white male[18]—"would be treated, at the very least, like everyone else,"[19] then the same rationale for disclosure certainly holds true for the individuals depicted in the mug shots at the heart of *Detroit Free Press II*. Those images are of four police officers charged "with bribery and drug conspiracy."[20] Seeing their mug shots helps to ensure the public that police officers are treated like

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empt." *A&A: Trouble Obtaining Arrest Records*, First Amendment Coalition (Oct. 28, 2011), https://firstamendmentcoalition.org/2011/10/aatrouble-obtaining-arrest-records-and-mugshots [https://perma.cc/HG8W-MBZY]. A 2003 opinion issued by Bill Lockyer, then California's Attorney General, provides that:

> A sheriff has discretion to furnish copies of photographs of arrested persons, commonly known as "mug shots," in response to a request from a member of the general public, including the news media; however, once a copy is furnished to one member of the general public, a copy must be made available to all who make a request.

Op. of Lockyer, No. 03-205, 86 Ops. Cal. Att'y Gen. 152, 152 (2003), 2003 WL 21672840.

10. 5 U.S.C. § 552 (2012).

11. *See* Erin C. Carroll, *Protecting the Watchdog: Using the Freedom of Information Act to Preference the Press*, 2016 Utah L. Rev. 193, 207 (2016) (observing that, in the year the article was published, "FOIA celebrates its fiftieth anniversary," and noting that "[i]n 1966, when it was passed, FOIA was groundbreaking").

12. Detroit Free Press, Inc. v. U.S. Dep't of Justice, 829 F.3d 478 (6th Cir. 2016), *cert. denied*, 2017 U.S. LEXIS 3246 (May 22, 2017).

13. *See* 5 U.S.C. § 552(b)(7)(C) (2012) (exempting from disclosure "records or information compiled for law enforcement purposes" that "could reasonably be expected to constitute an unwarranted invasion of personal privacy").

14. *See Detroit Free Press II*, 829 F.3d at 485 ("The privacy interest in a booking photo is the defendant's").

15. *Id.* at 482.

16. *Id.* at 484.

17. *Id.* at 485.

18. *See* Naeemah Clark, *Why Brock Turner Should Talk to Campus Men About Sexual Assault*, Chron. Higher Educ. (June 9, 2016), http://www.chronicle.com/article/Why-Brock-Turner-Should-Talk/236747 [https://perma.cc/XZ8R-ENKR] ("White privilege, a societal phenomenon where the majority benefits simply by being in the majority, means the white men on campus have been born with systemic advantages that give them access to opportunities that I, as an African-American woman, cannot fathom.").

19. Ritchin, *supra* note 4.

20. Detroit Free Press, Inc. v. U.S. Dep't of Justice, 16 F. Supp. 3d 798, 806 (E.D. Mich. 2014), *rev'd*, 829 F.3d 478 (6th Cir. 2016).

everyone else entering the criminal justice system, rather than being handled with kid gloves. The officers' privacy interests, in turn, are non-existent, as the Department of Justice (DOJ) publicly revealed their names in a press release trumpeting their arrests—a document still readily available on the DOJ's website.[21]

Photographs, of course, are essential in journalism storytelling, helping not just to pull readers into an article but also to enhance factual recall.[22] Indeed, communication scholars assert that mug shots are "an important element of newspaper content."[23] In fact, mug shots have "a long tradition in newspaper photojournalism,"[24] serving a key—if somewhat primitive—function because readers desire to see what people in the news look like.[25] Furthermore, mug shots provide an "intertextual link"[26] that suggests a person's state of mind by his or her appearance. Additionally, publishing mug shots promotes desirable social norms. As scholars Mark Grabowski and Sokthan Yeng argue, "[i]f posting a mug shot of an alleged drunk driver helps to enforce the idea that drunk driving is bad, this would help create a positive norm or standard of behavior."[27]

The July 2016 ruling in *Detroit Free Press II*, however, brings the Sixth Circuit in line with decisions during the prior five years by the Tenth Circuit in *World Publishing Co. v. U.S. Department of Justice*[28] and the Eleventh Circuit in *Karantsalis v. U.S. Department of Justice*.[29] Those appellate courts also recognized a defendant's privacy interest in booking photos protected by Exemption 7(C).[30] *Detroit Free Press II* means, in

21. Press Release, U.S. Dep't of Justice, Four Highland Park Police Officers Arrested and Charged With Taking Bribes and Conspiring to Protect and Deliver Six Kilograms of Cocaine (Jan. 25, 2013) [hereinafter Arrest Press Release], https://www.justice.gov/usao-edmi/pr/four-highland-park-police-officers-arrested-and-charged-taking-bribes-and-conspiring [https://perma.cc/H9L6-WD4T].

22. Laurence B. Lain & Philip J. Harwood, *Mug Shots and Reader Attitudes Toward People in the News*, 69 Journalism Q. 293, 294 (1992).

23. *Id.*

24. Paul Martin Lester, *Front Page Mug Shots: A Content Analysis of Five U.S. Newspapers in 1986*, 9 Newspaper Res. J. 1, 1 (1988).

25. *Id.*

26. John H. Coverdale et al., *"Behind the Gun Shot Grin": Uses of Madness-Talk in Reports of Loughner's Mass Killing*, 37 J. Comm. Inquiry 200, 208 (2013).

27. Mark Grabowski & Sokthan Yeng, *To Post or Not to Post: Philosophical and Ethical Considerations for Mug Shot Websites*, *in* Digital Ethics: Research & Practice 99, 113 (Don Heider & Adrienne L. Massanari eds., 2012).

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

29. Karantsalis v. U.S. Dep't of Justice, 635 F.3d 497 (11th Cir. 2011).

30. The Tenth Circuit in *World Publishing Co.* found that "[p]ersons arrested on federal charges outside of the Sixth Circuit maintain some expectation of privacy in their booking photos." *World Publ'g Co.*, 672 F.3d at 829.
The prior year, the Eleventh Circuit in *Karantsalis* issued a one-paragraph per curiam opinion affirming a district court ruling recognizing such a privacy interest. *Karantsalis*, 635 F.3d at 499. Specifically, U.S. District Judge Paul Huck found that booking photos implicate a "personal privacy interest." Karantsalis v. U.S. Dep't of Justice, No. 09-CV-22910 2009, U.S. Dist. LEXIS 126576, at *11 (S.D. Fla. Dec. 14, 2009), *aff'd*, 635 F.3d 497 (11th Cir. 2011). In reaching this pro-privacy conclusion, Huck wrote that he agreed:

> with the Marshals Service that a booking photograph is a unique and powerful type of photograph that raises personal privacy interests distinct from normal photographs. A booking photograph is a vivid symbol of criminal

turn, that a conflict or split of authority among the federal appellate circuits[31] no longer exists regarding privacy in mug shots under FOIA. This, unfortunately for free press advocates, reduces the odds of the U.S. Supreme Court reviewing the Sixth Circuit's decision.[32] Indeed, in May 2017 the Court denied a petition for writ of certiorari in the case.

The practical impact of *Detroit Free Press II* is to uphold the USMS's policy *not* "to honor FOIA requests for booking photos."[33] That decree, set forth in a 2012 DOJ memorandum, provides that:

> the USMS will not disclose booking photographs under the FOIA, regardless of where the FOIA request originated, unless USMS OGC [Office of General Counsel] determines either that the requester has made the requisite showing that the public interest in the requested booking photograph outweighs the privacy interest at stake or that other factors specific to the particular FOIA request warrant processing that request consistent with *existing Sixth Circuit precedent*.[34]

The emphasized portion of that policy, which today is irrelevant after *Detroit Free Press II*, references the now-overruled 1996 Sixth Circuit decision in *Detroit Free Press, Inc. v. U.S. Department of Justice*[35] (hereinafter *Detroit Free Press I*). There, the Sixth Circuit declared that releasing mug shots of federally indicted defendants, whose names were already

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> accusation, which, when released to the public, intimates, and is often equated with, guilt. Further, a booking photograph captures the subject in the vulnerable and embarrassing moments immediately after being accused, taken into custody, and deprived of most liberties.

Id. at *11–12.

31. *See* Karen M. Gebbia, *Circuit Splits and Empiricism in the Supreme Court*, 36 Pace L. Rev. 477, 504 (2016) ("The Supreme Court typically reviews federal circuit court of appeals' decisions on certiorari to resolve either *a split among the lower federal courts*, an important question of federal law, or a constitutional or quasi-constitutional question.") (footnote omitted) (emphasis added); Heather Meeker, *Stalking the Golden Topic: A Guide to Locating and Selecting Topics for Legal Research Papers*, 1996 Utah L. Rev. 917, 925 (1996) ("One of the explicit grounds for granting certiorari in the United States Supreme Court is to resolve conflicts between the circuit courts of appeals.").

32. Shortly after the Sixth Circuit issued its opinion in *Detroit Free Press II*, the newspaper's attorney, Herschel Fink, said the paper was considering asking the Supreme Court to hear the case. Sophie Murguia, *Sixth Circuit Limits Access to Federal Mug Shots*, Reporters Committee for Freedom of the Press (July 15, 2016), https://www.rcfp.org/browse-media-law-resources/news/sixth-circuit-limits-access-federal-mug-shots [https://perma.cc/5HST-SB4V].

In November 2016, the newspaper filed its petition for a writ of certiorari with the Supreme Court. Petition for Writ of Certiorari, Detroit Free Press, Inc. v. U.S. Dep't of Justice, 829 F.3d 478 (6th Cir. 2016) (No. 16-706). The brief is available at http://www.scotusblog.com/wp-content/uploads/2017/01/16-706-cert-amicus-ReportersCommittee.pdf [https://perma.cc/9BBS-ESPG]. The Court denied the petition in May 2017. Detroit Free Press, Inc. v. U.S. Dep't of Justice, 2017 U.S. LEXIS 3246 (May 22, 2017).

33. Detroit Free Press, Inc. v. U.S. Dep't of Justice, 829 F.3d 478, 481 (6th Cir. 2016).

34. Memorandum to All United States Marshals et al., Office of the General Counsel, U.S. Dep't of Justice (Dec. 12, 2012), at 2–3 [hereinafter Marshals Memorandum], https://www.usmarshals.gov/foia/policy/booking_photos.pdf [https://perma.cc/27VF-QPX4] (emphasis added).

35. Detroit Free Press, Inc. v. U.S. Dep't of Justice, 73 F.3d 93 (6th Cir. 1996), *overruled by* Detroit Free Press, Inc. v. U.S. Dep't of Justice, 829 F.3d 478 (6th Cir. 2016).

public and who had previously appeared in open court, "could *not* reasonably be expected to constitute an invasion of personal privacy."[36]

The question thus is: Why did the Sixth Circuit in 2016 reverse its ruling from two decades earlier, thereby changing its interpretation of a federal statute and conflicting with the principle of stare decisis?[37] After all, as the U.S. Supreme Court observed, "[s]tare decisis is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."[38]

The answer is that, in addition to considering rulings by other circuits in *World Publishing Co.* and *Karantsalis*, which recognized a privacy interest in booking photos, three factors were critical to the majority's change of heart in *Detroit Free Press II*. Those variables are:

(1) *The Internet*—specifically, proliferation of mug shot-oriented websites that allow booking photos to be accessed both in perpetuity and with minimal effort, time, and expense;[39]

(2) *Public Ignorance*—in particular, alleged misperception by some individuals who see booking photos and wrongly believe the people depicted therein already have been adjudicated guilty;[40] and

(3) *Embarrassment*—specifically, that booking photos constitute "embarrassing and humiliating information"[41] regarding the individuals they depict.

This article critiques this trio of variables, including some implicit judicial assumptions lurking beneath them that played a pivotal role in *Detroit Free Press II*. In the process, the article argues that traditional tort principles—namely, those pertaining to causes of action for public disclosure of private facts and intentional infliction of emotional distress (IIED)—would likely prevent a person from recovering damages under those theories based upon the Internet-posting of his or her booking photograph. In other words, there is a gaping disconnect between FOIA Exemption 7(C) that, per *Detroit Free Press II*, stops the dissemination of booking photos in the name of privacy, and tort principles that generally would allow the dissemination of booking photos and leave remediless those depicted therein.

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36. *Id.* at 97 (emphasis added).

37. *See* Richard M. Garner, *Flexible Predictability: Stare Decisis in Ohio*, 48 Akron L. Rev. 15, 15 (2015) (observing that the doctrine of stare decisis "holds that similar cases should be decided by similar legal principles rather than by the personal views of an ever-changing judiciary"); Larry J. Pittman, *The Federal Arbitration Act: The Supreme Court's Erroneous Statutory Interpretation, Stare Decisis, and a Proposal for Change*, 53 Ala. L. Rev. 789, 811 (2002) (noting that "for opinions involving statutory interpretation, the Court employs a presumption against the overruling of precedent, as an essential feature of its stare decisis doctrine").

38. Payne v. Tennessee, 501 U.S. 808, 827 (1991) (emphasis omitted).

39. Detroit Free Press, Inc. v. U.S. Dep't of Justice, 829 F.3d 478, 482–83 (6th Cir. 2016).

40. *Id.* at 482.

41. *Id.*

Additionally, this article contends that the *Detroit Free Press II* majority's concern with mug-shot websites is better addressed through legislation directly targeting those sites rather than by a judicial decision. In particular, *Detroit Free Press II* amounts to a preemptive strike against all mug shot publicity and hinders everyone—including mainstream journalists and news organizations—from easily obtaining those images based on the fear that they later will be exploited downstream by a few businesses. Furthermore, this article asserts that public misunderstanding about the nature of booking photos—the supposed misperception that individuals depicted therein are guilty—does not justify judicial intervention targeting public access to them. To paraphrase a well-worn cliché, public ignorance of the law is no excuse for restricting access to truthful information;[42] the remedy, if anything, is education—not censorship in the name of privacy.

Ultimately, this article concludes that the majority erred in *Detroit Free Press II*. Tort principles from public disclosure and IIED can serve as useful heuristics in future cases, both for identifying privacy interests under Exemption 7(C) and for determining when, per that exemption, a disclosure causes an "unwarranted invasion of personal privacy."[43]

Detroit Free Press II, however, opens the door for using Exemption 7(C) as a tool promoting FOIA's version of the "right to be forgotten"[44]—or, perhaps more accurately, for expanding the "practical obscurity" rationale for rap sheets embraced in *U.S. Department of Justice v. Reporters Committee for Freedom of the Press*.[45] The premise for opening this door rests on little more than shielding a person from the kind of embarrassment and humiliation spawned by a single, accurate (and often newsworthy) image that is non-compensable in tort law. Put slightly differently, non-disclosure of mug shots under Exemption 7(C) serves the same purpose as the right to be forgotten but does so by impeding—at the outset—their public dissemination in order to shield a person from potential embarrassment wrought by truthful information in the future.

Part I of the article reviews Exemption 7(C).[46] It also discusses the Supreme Court's 1989 ruling in *U.S. Department of Justice v. Reporters Committee for Freedom of the Press*,[47] which affects the scope of this exemption, and the Court's clear concern fifteen years later with the nexus between privacy and the Internet in *National Archives and Records Ad-*

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42. *See* Elonis v. United States, 135 S. Ct. 2001, 2009 (2015) ("The familiar maxim 'ignorance of the law is no excuse' typically holds true.")

43. 5 U.S.C. § 552(b)(7)(C) (2012).

44. *See generally* Patricia Sánchez Abril & Jacqueline D. Lipton, *The Right to be Forgotten: Who Decides What the World Forgets?*, 103 Ky. L.J. 363 (2015) (providing an excellent overview of the right to be forgotten concept, stretching from its history through the ruling by the Court of Justice of the European Union in *Google Spain SL v. Agencia Española de Protección de Datos*).

45. U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 762 (1989).

46. *See* Part I, *infra* notes 54–154 and accompanying text.

47. 489 U.S. 749 (1989).

ministration v. Favish.[48] Additionally, Part I touches briefly and more generally on other opinions addressing the connection between privacy and the Internet when it comes to releasing images.

Next, Part II provides a primer on the elements of the torts of public disclosure of private facts and IIED.[49] It also argues that neither theory would allow the individuals depicted in their mug shots at issue in *Detroit Free Press II* to recover damages for their publication.

With background from Parts I and II in mind, the article shifts in Part III to critiquing the three factors identified above[50] from the majority's ruling in *Detroit Free Press II* that purportedly favor a privacy interest in booking photos.[51] In the process, Part III also examines the dissent's logic in *Detroit Free Press II* as it relates to these three variables. Finally, Part IV concludes that *Detroit Free Press II* was wrongly decided, and it avers that courts in the future would benefit from considering tort law principles in Exemption 7(C) analyses in which proposed privacy interests are at stake alongside the public's unenumerated First Amendment[52] right to know.[53]

I. FOIA EXEMPTION 7(C): ITS MEANING AND EXPANSION IN THE INTERNET AGE

The federal Freedom of Information Act, Professor Martin Halstuk observes, was passed by Congress in "1966 to make public the activities and processes of the federal government's approximately one hundred federal agencies and departments."[54] Although signed into law by "a reluctant President Lyndon Johnson"[55] and exempting from its reach records held by "Congress, the courts, and the president,"[56] FOIA nonetheless was, as professor and MacArthur Fellow Michael Schudson recently wrote, "a landmark development of a more open society."[57]

FOIA applies to government agency[58] records.[59] The Supreme Court emphasized forty years ago that "disclosure, not secrecy, is the dominant

48. 541 U.S. 157 (2004).
49. *See* Part II, *infra* notes 155–217 and accompanying text.
50. Detroit Free Press, Inc. v. U.S. Dep't of Justice, 829 F.3d 478, 482–83 (6th Cir. 2016).
51. *See* Part III, *infra* notes 218–268 and accompanying text.
52. The First Amendment to the U.S. Constitution provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. Const. amend. I. The Free Speech and Free Press Clauses were incorporated more than ninety years ago through the Fourteenth Amendment Due Process Clause as fundamental liberties to apply to state and local government entities and officials. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925).
53. *See* Part IV, *infra* notes 269–282 and accompanying text.
54. Martin E. Halstuk, *When Secrecy Trumps Transparency: Why the Open Government Act of 2007 Falls Short*, 16 CommLaw Conspectus 427, 429 (2008).
55. Michael Schudson, The Rise of the Right to Know 34 (2015).
56. *Id.* at 35.
57. *Id.* at 30.
58. *See* 5 U.S.C. § 552(f)(1) (2012) (defining the term "agency").
59. *See* 5 U.S.C. § 552(f)(2) (2012) (defining the term "record").

objective"[60] of FOIA. There are, however, nine exemptions carved out by the FOIA statute that may apply when a person requests a record.[61] These exemptions, Professor Mark Grunewald writes, remove a "record from the mandatory disclosure requirement."[62]

Critical for this article is Exemption 7(C). It shields from disclosure "records or information compiled for law enforcement purposes" by a government agency that "could reasonably be expected to constitute an unwarranted invasion of personal privacy" were they to be released.[63] The applicability of the exemption thus involves a two-part determination, with both parts required to prevent disclosure: (1) the record in question was compiled for law enforcement purposes, and (2) its release might reasonably amount to an unwarranted invasion of personal privacy.[64] It is the meaning of the second part of this test that is contested in *Detroit Free Press II*, as the parties agreed that the booking photos at issue of four Michigan police officers charged with bribery and drug conspiracy[65] were compiled for law enforcement purposes.[66] How, then, does this analysis proceed?

Initially, the U.S. Supreme Court made it clear in 2011 in *Federal Communications Commission v. AT&T, Inc*. that only humans, not corporations, can assert a privacy interest under Exemption 7(C).[67] There, AT&T claimed a personal privacy interest in certain documents it submitted to the Federal Communications Commission's Enforcement Bureau as part of an investigation into whether the phone company overcharged the government for services it provided to the government's education-rate program.[68] In rejecting AT&T's contention, Chief Justice John Roberts wrote for a unanimous Court that "[t]he protection in FOIA against disclosure of law enforcement information on the ground that it would constitute an unwarranted invasion of personal privacy does not extend to corporations."[69]

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

61. *See* Margaret B. Kwoka, *The Freedom of Information Act Trial*, 61 Am. U. L. Rev. 217, 222 (2011) ("This statute gives anyone the right to request federal agency records and requires agencies to release them *unless they fall within one of the nine exempt categories*.") (emphasis added).

62. Mark H. Grunewald, *Freedom of Information and Confidentiality Under the Administrative Dispute Resolution Act*, 9 Admin. L.J. 985, 994 (1996).

63. 5 U.S.C. § 552(b)(7)(C) (2012).

64. Martin E. Halstuk & Bill F. Chamberlin, *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. L. & Pol'y 511, 541 (2006); *see* Jeffrey R. Boles, *Documenting Death: Public Access to Government Death Records and Attendant Privacy Concerns*, 22 Cornell J. L. & Pub. Pol'y 237, 250–51 (2012) (observing that "[w]hen faced with an Exemption 7(C) withholding dispute, courts first decide whether the information or records withheld were in fact 'compiled for law enforcement purposes,'" and that if this requirement is satisfied, then courts "employ a balancing test . . . which weighs the privacy right against the public's right to be informed").

65. Detroit Free Press, Inc. v. U.S. Dep't of Justice, 829 F.3d 478, 481 (6th Cir. 2016).

66. *See id.* ("Neither party disputes that booking photos meet the first requirement.").

67. FCC v. AT&T, Inc., 562 U.S. 397, 409–10 (2011).

68. *Id.* at 400.

69. *Id.* at 409–410.

Sections A and B below describe two Supreme Court opinions that are crucial for better understanding the meaning of Exemption 7(C)'s phrase "could reasonably be expected to constitute an unwarranted invasion of personal privacy."[70]

A. U.S. Department of Justice v. Reporters Committee for Freedom of the Press[71]

In *Reporters Committee*, the Court held that criminal identification records—better known as rap sheets[72]—possessed by the Federal Bureau of Investigation (FBI) are, "as a categorical matter," immune from disclosure under Exemption 7(C) as an unwarranted invasion of the personal privacy of the individuals to whom they pertain.[73] In reaching this pro-secrecy conclusion, the Court, in an opinion by John Paul Stevens, focused on two significant points.

The first is the nature of an FBI rap sheet as "compiled computerized information"[74] and an aggregate summary "of otherwise hard-to-obtain information"[75] scattered in "courthouse files, county archives, and local police stations throughout the country."[76] In brief, a rap sheet makes available, "in a single clearinghouse of information," multiple data points that otherwise are difficult to track down and collate and thus, were it not for a rap sheet, would likely linger and languish in what the Court called "practical obscurity."[77] As Professors Woodrow Hartzog and Frederic Stutzman encapsulate, "[t]he information was considered practically obscure because of the extremely high cost and low likelihood of the information being compiled by the public."[78]

Thus, a key part of Justice Stevens' opinion pivoted on what he called "the basic difference between scattered bits of criminal history and a federal compilation."[79] The decision in *Reporters Committee* therefore turned, in part, "on the nature of the requested document."[80]

The second point Stevens emphasized is the supposed central purpose of record disclosure under FOIA. He wrote that FOIA "focuses on the

70. 5 U.S.C. § 552(b)(7)(C) (2012).
71. U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989).
72. *Id.* at 751.
73. *Id.* at 780; *see* Jane Kirtley, *"Misguided in Principle and Unworkable in Practice": It Is Time to Discard the* Reporters Committee *Doctrine of Practical Obscurity (and its Evil Twin, the Right to be Forgotten)*, 20 Comm. L. & Pol'y 91, 94 (2015) (observing that the Court concluded rap sheets are "categorically exempt from disclosure because their release would invariably constitute an unwarranted invasion of privacy").
74. *Reporters Comm.*, 489 U.S. at 766.
75. *Id.* at 764.
76. *Id.*
77. *Id.* at 780.
78. Woodrow Hartzog & Frederic Stutzman, *The Case for Online Obscurity*, 101 Calif. L. Rev. 1, 21 (2013).
79. *Reporters Comm.*, 489 U.S. at 767.
80. *Id.* at 772.

citizens' right to be informed about 'what their government is up to.'"[81] Critically, however, the Court added that this purpose "is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct."[82] As Professor Benjamin Cramer sums up the constricting impact of this holding, "the only public interest in disclosing private information is to inform citizens about the workings of government."[83]

In other words, the *Reporters Committee* Court drew a dichotomy between, on the one hand, requests made to learn about a private citizen and, on the other hand, requests made to learn about the conduct of a government agency. As Stevens wrote, "FOIA's central purpose is to ensure that the *Government's* activities be opened to the sharp eye of public scrutiny, not that information about *private citizens* that happens to be in the warehouse of the Government be so disclosed."[84]

This distinction regarding FOIA's purpose proved pivotal in finding that Exemption 7(C) shielded from disclosure the FBI rap sheet of Charles Medico, a member of an alleged organized crime syndicate known as the Medico Family.[85] Justice Stevens explained that:

> [i]n this case—and presumably in the typical case in which one private citizen is seeking information about another—the requester does not intend to discover anything about the conduct of the agency that has possession of the requested records. Indeed, response to this request would not shed any light on the conduct of any Government agency or official.[86]

The *Reporters Committee* decision is criticized on grounds related both to the Court's central-purpose logic and its focus on the nature of rap sheets/practical obscurity. For instance, Professor Martin Halstuk and Dean Charles Davis assert that the Court's articulation of FOIA's central purpose—learning about the conduct of government agencies—"sharply limited the ambit of information that can be released."[87] Blasting this interpretation of FOIA's central purpose as "an alarming instance of judicial activism,"[88] they contend that it "raises serious questions about the future of public access to vast stores of government-held information that does not necessarily reveal government operations but that still holds

81. *Id.* at 773.
82. *Id.*
83. Benjamin W. Cramer, *Privacy Exceptionalism and Confidentiality Versus the Public Interest in Uncovering Universal Service Fraud*, 20 Comm. L. & Pol'y 149, 181 (2015).
84. *Reporters Comm.*, 489 U.S. at 774 (emphasis in original).
85. *See id.* at 757 (noting that the FBI released the rap sheets of three other members of the Medico family after their deaths in response to "requests made by a CBS news correspondent and the Reporters Committee for Freedom of the Press").
86. *Id.* at 773.
87. Martin E. Halstuk & Charles N. Davis, *The Public Interest be Damned: Lower Court Treatment of the Reporters Committee "Central Purpose" Reformulation*, 54 Admin. L. Rev. 983, 987 (2002).
88. *Id.* at 995.

great public interest."[89] The duo demonstrate that the legislative intent behind access under FOIA was, in fact, far broader[90] than *Reporters Committee's* narrow focus on accessing only "official information that reflects an agency's performance and conduct."[91]

The practical impact of the decision, in turn, is to force FOIA record requesters to demonstrate, when a government agency claims an exemption, that their need for a record fits within the slender scope of this central-purpose formulation—a hurdle that Professor Cramer notes "can be excessively difficult for the requester,"[92] and one that Professor Halstuk and Dean Davis point out did not exist before *Reporters Committee*.[93] As Halstuk and Davis observe, "[p]re-*Reporters Committee* courts routinely held that the FOIA can be used for any private or public purpose, without the need for a requester be required to justify a request."[94]

Indeed, Justice Ruth Bader Ginsburg stresses both that "[t]he *Reporters Committee* 'core purpose' limitation is not found in FOIA's language"[95] and that "no such limitation appears in the text of any FOIA exemption."[96] Yet by adding the core-purpose requirement, *Reporters Committee* "changed the FOIA calculus."[97]

Professor Jane Kirtley, who was the Executive Director of the Reporters Committee for Freedom of the Press when the Court issued its decision,[98] notes that when the Electronic Freedom of Information Act was adopted in 1996, Congress clarified "that the public has a right to access agency records 'for any public or private purpose.'"[99] This language, Kirtley asserts from her current perch as Silha Professor of Media Ethics and Law at the University of Minnesota, reinforces the broad idea—one contradicting *Reporters Committee*—"that important interests are also served when members of the public are allowed to tap into the vast storehouses of information collected by government employees at taxpayers' expense, regardless of whether they reveal details about how the government functions."[100]

Criticizing the Court's other focus in *Reporters Committee*—namely, the collated nature of rap sheets—Halstuk and Davis aver "that nowhere

89. *Id.* at 990.
90. *Id.* at 991.
91. *Id.*
92. Cramer, *supra* note 83, at 183.
93. Halstuk & Davis, *supra* note 87, at 992.
94. *Id.* at 1021.
95. U.S. Dep't of Defense v. Fed. Labor Relations Auth., 510 U.S. 487, 507 (1994) (Ginsburg, J., concurring).
96. *Id.* at 508.
97. *Id.* at 505.
98. *See* Kirtley, *supra* note 73, at 92 ("In the interest of full disclosure, I must note that I was the Executive Director of the Reporters Committee for Freedom of the Press for fourteen years, and it was on my watch that we argued, and lost, this case. I regard it as the proverbial albatross around my neck.").
99. *Id.* at 95 (quoting the findings section of the Electronic Freedom of Information Act, Pub. L. 104-231, § 2(a)(1), 110 Stat. 3048–49 (1996)).
100. *Id.*

in the FOIA is there any mention that the form or format of a record should be considered when an agency determines whether to disclose requested information."[101] Similarly, Kirtley contends that the aggregated format of rap sheets should make no difference because:

> the fundamental nature of the records remains the same: They are public documents, reflecting an individual's involvement with the criminal justice system. If the records are public—and presumptively a matter of public interest—at their source, that interest does not fade away simply because the records have been consolidated in one place.[102]

Kirtley adds that "by disclosing details about individuals who have had a brush with the criminal justice system, these records provide insights into how government functions."[103]

Kirtley's sentiment here is important because it concisely makes the case why mug shots should be disclosed in cases like *Detroit Free Press II*. Mug shots, for example, might reveal the skin color—perhaps indicating race or ethnicity—of those targeted for arrest, thereby shining a spotlight on allegations of racial or ethnic profiling. They may also shed light on the apparent physical condition of an individual—perhaps a face bloodied and bruised during the police apprehension process.[104] As attorney Adam Marshall of the Reporters Committee for Freedom of the Press explains, "[a]ccess to mug shots could help the public understand if there was potential abuse of someone when they were arrested . . . If they have cuts on their face or a black eye, that would allow the public to say, 'Hey, what happened here?' "[105] Ultimately, if the U.S. Supreme Court in *Richmond Newspapers, Inc. v. Virginia*[106] was correct that "the appearance of justice can best be provided by allowing people to observe it,"[107] then mug shots should be disclosed under FOIA because they provide a chance to observe a person's entry into the criminal justice system.

Importantly, *Detroit Free Press II* is readily distinguished from *Reporters Committee* by the simple fact that a mug shot lacks the collated, aggregate nature of a rap sheet. While the Court in *Reporters Committee*

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101. Halstuk & Davis, *supra* note 87, at 994.

102. Kirtley, *supra* note 73, at 94.

103. *Id.*

104. *See* Gregory Nathaniel Wolfe, Note, *Smile for the Camera, The World Is Going to See That Mug: The Dilemma of Privacy Interests in Mug Shots*, 113 Colum. L. Rev. 2227, 2242 (2013) (noting that journalists "purport to use mug shots to monitor government misconduct, including police mistreatment of arrestees").

105. Jessica Priest, *Victoria Sheriff Stops Releasing Jail Mug Shots*, Victoria Advocate (Tex.), Aug. 14, 2016, https://www.victoriaadvocate.com/news/2016/aug/13/victoria-sheriff-stops-releasing-jail-mug-shots/ [https://perma.cc/7SPY-6HTB].

106. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980). In *Richmond Newspapers*, the Court found "that a presumption of openness inheres in the very nature of a criminal trial under our system of justice." *Id.* at 573. The Court added that when it comes to criminal trials, "the First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time that Amendment was adopted." *Id.* at 576.

107. *Id.* at 572.

focused on "the power of compilations to affect personal privacy,"[108] that concern does not exist when it comes to revealing a mug shot, which constitutes a single data point. An access-friendly court would draw this pivotal factual distinction to evade the strictures of *Reporters Committee*, and the seven-judge dissent in *Detroit Free Press II*, in fact, stressed this discrepancy with *Reporters Committee*.[109]

B. National Archives & Records Administration v. Favish[110]

In *Favish*, the Court extended "personal privacy" under Exemption 7(C) to include "surviving family members' right to personal privacy with respect to their close relative's death-scene images."[111] The deceased in *Favish* was Vincent Foster, Jr., deputy counsel to President Bill Clinton.[112] His family members objected to a request by Allan Favish for color photographs showing Foster's body at the scene of death.[113]

Foster's death, attorney Joseph Romero writes, "generated a number of conspiracy theories."[114] Indeed, Favish skeptically viewed the conclusion reached by several investigations that Foster committed suicide.[115] Favish contended that death-scene photos "could show discrepancies between official reports and the path of the gunshot that killed him."[116]

In addition to extending the "personal privacy" right beyond the individual named or depicted in an agency record—in *Favish*, Vincent Foster—to more broadly encompass the individual's family members, the Court addressed the "unwarranted invasion" aspect of the exemption and, in turn, the burden imposed on the record requester. Here, Justice Anthony Kennedy wrote for a unanimous Court that:

> Where the privacy concerns addressed by Exemption 7(C) are present, the exemption requires the person requesting the information to establish a sufficient reason for the disclosure. First, the citizen must show that the *public interest sought to be advanced is a significant one*, an interest more specific than having the information for its own sake. Second, the citizen must show the *information is likely to advance that interest*. Otherwise, the invasion of privacy is unwarranted.[117]

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108. U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press, 489 U.S. 749, 765 (1989).

109. *See* Detroit Free Press, Inc. v. U.S. Dep't of Justice, 829 F.3d 478, 491 (6th Cir. 2016) (Boggs, J., dissenting) ("The booking photographs at issue here, by contrast, do not compile any information that is difficult to find.").

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

111. *Id.* at 157.

112. *Id.* at 160.

113. *Id.* at 160–62.

114. Joseph Romero, National Archives & Record Administration v. Favish*: Protecting Against the Prying Eye, the Disbelievers, and the Curious*, 50 Naval L. Rev. 70, 71 (2004).

115. *Favish*, 541 U.S. at 161.

116. Richard Willing, *Court Skeptical About Need for Foster Photos*, USA Today, Dec. 4, 2003, at 6A.

117. *Favish*, 541 U.S. at 172 (emphasis added).

Kennedy added that in cases like *Favish*, where the alleged public interest is demonstrating that government officials "acted negligently or otherwise improperly in the performance of their duties, the requester must establish more than a bare suspicion in order to obtain disclosure. Rather, the requester must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred."[118] The Court concluded that Allan Favish failed to meet this burden,[119] and thus, it ruled that the four death-scene images in question were shielded from disclosure.[120]

Favish, as Professors Halstuk and Chamberlin write, marked the first time the Supreme Court "recognized that FOIA-related privacy interests apply to surviving family members of deceased subjects of an FOIA request."[121] Of particular importance for this article, however, is the role the Internet played in the Court's decision. Justice Kennedy, for example, quoted the concern of Sheila Foster Anthony—Vincent Foster's sister—about the Internet: "I fear that the release of [additional] photographs certainly would set off another round of intense scrutiny by the media. Undoubtedly, the photographs would be placed on the Internet for world consumption. Once again my family would be the focus of conceivably unsavory and distasteful media coverage."[122]

Kennedy linked the Foster family's concern about Internet postings with a neighboring paragraph describing "a sensation-seeking culture."[123] He later pointed out that after images are released under FOIA, they are available to anyone and everyone. Kennedy explained that "[i]t must be remembered that once there is disclosure, the information belongs to the general public. There is no mechanism under FOIA for a protective order allowing only the requester to see whether the information bears out his theory, or for proscribing its general dissemination."[124] Connecting these strands, Kennedy's fear is palpable—once an image is released under FOIA, it will migrate to the Internet where, in turn, it will feed the appetite of "a sensation-seeking culture."[125]

Favish's concern regarding the Internet as a privacy-destructive force laid the foundation for the Sixth Circuit's 2016 decision in *Detroit Free Press II*. Indeed, the Sixth Circuit cited *Favish* to support its conclusion that "modern technology only heightens the consequences of disclosure"[126] under FOIA.[127]

Yet the concerns about Internet-caused harms that animate *Favish* are quite distinct from those that seem to drive the Sixth Circuit in *Detroit*

118. *Id.* at 174.
119. *Id.* at 175.
120. *Id.*
121. Halstuk & Chamberlin, *supra* note 64, at 546.
122. *Favish*, 541 U.S. at 167.
123. *Id.* at 166.
124. *Id.* at 174.
125. *Id.* at 166.
126. Detroit Free Press, Inc. v. U.S. Dep't of Justice, 829 F.3d 478, 482 (6th Cir. 2016).
127. *See id.* (citing *Favish*).

Free Press II.[128] In *Favish*, the harm is not to the person depicted in the images but to his relatives, and it stems from gory death-scene images of suicide becoming fodder for both the morbidly curious and a sensation-seeking press. The harm, in turn, is the mental anguish caused by what Justice Kennedy called such "unwarranted public exploitation."[129]

In contrast, the harm in *Detroit Free Press II* is to those depicted in the images, and it stems from two basic facts—identification and knowledge. In particular, people who come across a mug shot on the Internet will be able to identify the person therein—connecting a face to a name—and, in turn, to know the person was once arrested. The harm of embarrassment to the person in the mug shot that may flow from others knowing about an arrest is not tantamount to unwarranted public exploitation of what Justice Kennedy in *Favish* called "graphic details"[130] of death. And to the extent that commercial websites may exploit mug shots for profit, such exploitation is better dealt with—as Section A of Part III argues—by direct legislation.[131]

Additionally, the *Favish* Court drew support for its recognition of a privacy interest in death-scene images under Exemption 7(C) from the common law. As Justice Kennedy observed, a family's privacy interest in "death images of the deceased has long been recognized at common law. Indeed, this right to privacy has much deeper roots in the common law than the rap sheets held to be protected from disclosure in *Reporters Committee*."[132] The Supreme Court in *Favish* cited a decision that was then more than 100 years old to buttress this proposition.[133] In contrast, as the dissent in *Detroit Free Press II* points out, "the common law did not, and does not now, recognize an indicted defendant's interest in preventing the disclosure of his booking photograph during ongoing criminal proceedings,"[134] and that today "[b]ooking photographs are either available, or presumptively available, to the public under the law of most states."[135]

In brief, while concerns regarding the Internet animated both *Favish* and *Detroit Free Press II*, the cases are readily distinguishable.

C. The Internet as Game Changer for Access to Images

Although this article concentrates on FOIA Exemption 7(C) and, in part, the Sixth Circuit's fears regarding the Internet dissemination of mug shots in *Detroit Free Press II*, it is important to contextualize such issues

128. *See Favish*, 541 U.S. at 167 (quoting Sheila Foster Anthony's worries about the Internet in *Favish*).
129. *Id.* at 168.
130. *Id.* at 171.
131. *See* Part III, Section A, *infra* notes 218–234 and accompanying text.
132. *Favish*, 541 U.S. at 168.
133. *Id.* at 168–69 (quoting and citing Schuyler v. Curtis, 42 N.E. 22 (N.Y. 1895)).
134. Detroit Free Press, Inc. v. U.S. Dep't of Justice, 829 F.3d 478, 490 (6th Cir. 2016) (Boggs, J., dissenting).
135. *Id.*

within broader judicial concerns for the tension between privacy and Internet-posted images. For instance, the U.S. Court of Appeals for the Ninth Circuit in *Marsh v. County of San Diego*[136] in 2012 held that the U.S. Constitution, within the substantive due process privacy right, "protects a parent's right to control the physical remains, memory and *images* of a deceased child against unwarranted public exploitation by the government."[137] The case involved Brenda Marsh's efforts to punish San Diego County officials for releasing an autopsy image of her deceased two-year-old son who had died of severe head injuries.[138]

In penning this pro-privacy decision for a unanimous three-judge panel, Alex Kozinski favorably cited the Supreme Court's decision in *Favish* for support.[139] The former chief judge of the Ninth Circuit also focused on the Internet as a key factor, writing that Brenda Marsh claimed:

> that when she learned that Coulter sent her son's autopsy photograph to the press, she was "horrified; and suffered severe emotional distress, fearing the day that she would go on the Internet and find her son's hideous autopsy photos displayed there." *Marsh's fear is not unreasonable given the viral nature of the Internet*, where she might easily stumble upon photographs of her dead son on news websites, blogs or social media websites.[140]

Marsh thus extends concerns about the Internet over images of death beyond the Exemption 7(C) context of *Favish* to the realm of constitutional law. Yet, the very gruesomeness of the underlying images in both *Marsh* and *Favish*—an autopsy image of a child with a smashed skull and four death-scene photos showing gunshots that killed a person—seems far more disquieting and disturbing than anything depicted in a mug shot. Put differently, the privacy concerns of immediate family members in seeing gruesome images of their loved ones—images that will reside on the Internet where others can pruriently and voyeuristically feast on them[141]—appear far more substantial than those of arrested individuals who have routinized headshots taken by law enforcement as part of the booking process.[142]

A 2016 decision by a federal district court in Arkansas in *Whitney v. Morse*[143] involving mug shots that are publicly available indicates that the

136. Marsh v. Cty. of San Diego, 680 F.3d 1148 (9th Cir. 2012).

137. *Id.* at 1154 (emphasis added).

138. *Id.* at 1152.

139. *Id.* at 1153.

140. *Id.* at 1155 (emphasis added and omitting from the quote a footnote citing *Favish*).

141. *See generally* Clay Calvert, *The Privacy of Death: An Emergent Jurisprudence and Legal Rebuke to Media Exploitation and a Voyeuristic Culture*, 26 Loy. L.A. Ent. L. Rev. 133 (2005) (addressing, in a now somewhat dated article, the intersection of privacy, death, and voyeurism, as well as an emerging privacy-of-death jurisprudence).

142. For a thorough review of why the First Amendment should generally protect the display of gruesome images, see Eugene Volokh, *Gruesome Speech*, 100 Cornell L. Rev. 901 (2015).

143. Whitney v. Morse, No. 14-5028, 2016 U.S. Dist. LEXIS 29472 (W.D. Ark. Feb. 4, 2016), *adopted*, No. 5:14-CV-05028, 2016 U.S. Dist. LEXIS 29465 (W.D. Ark. Mar. 8., 2016).

Internet does not need to play a game-changing role in the privacy equation. Specifically, James Whitney claimed that posting his mug shot and the charges against him on a public website operated by the Washington County Detention Center in Arkansas violated his federal constitutional right to privacy and gave the appearance that he was guilty.[144] He argued—much as the Sixth Circuit in *Detroit Free-Press II* also assumed[145]— "that individuals visiting the website presume you are arrested because you are guilty."[146] While Whitney conceded that charges and mug shots are matters of public record in Arkansas,[147] he focused on the fact that "the Defendants have made this publicly available information *more* accessible by putting it on the Internet."[148]

In ruling against Whitney's privacy claim, however, U.S. Magistrate Erin Setser found "that 'it is now common for state and federal organizations to publish matters of public record electronically . . . Mugshots and booking information are part of the public record, and in most states members of the public who wish to look them up may freely do so.'"[149] She added that "[c]learly there is no genuine issue of material fact as to whether the act of putting publicly available information on a web page constitutes a shocking degradation or an egregious humiliation or a flagrant breach of a pledge of confidentiality."[150]

Significantly, Magistrate Setser was not swayed either by Whitney's argument that posting his mug shot on the Internet invaded his privacy by making it "more accessible"[151] or his contention "that individuals visiting the website presume you are arrested because you are guilty."[152] In other words, downstream harms supposedly wrought by the Internet-posting of mug shots were rendered nugatory by Setser.

Key differences between *Whitney* and *Detroit Free Press II*, of course, are that mug shots are part of the public record in Arkansas[153] and that the plaintiff in *Whitney* asserted a violation of a constitutional privacy

144. *Id.* at *4, *41–42.

145. *See* Detroit Free Press Inc. v. U.S. Dep't of Justice, 829 F.3d 478, 482 (6th Cir. 2016) (asserting that "booking photos convey *guilt* to the viewer" and adding that "viewers so uniformly associate booking photos with guilt and criminality that we strongly disfavor showing such photos to criminal juries") (emphasis in original).

146. *Whitney*, 2016 U.S. Dist. LEXIS 29472, at *41.

147. *See* Ark. Code Ann. § 25-19-103(7)(A) (2016) (defining public records in Arkansas); *see also* Andaluz-Prado v. Helder, No. 5:16-CV-05123, 2016 U.S. Dist. LEXIS 109588, at *4 (W.D. Ark. Aug. 17, 2016) ("Arrest records, including any booking photographs, are public records and are not protected from disclosure").

148. *Whitney*, 2016 U.S. Dist. LEXIS 29472, at *44 (emphasis added).

149. *Id.* at *44–45 (quoting Michael Polastek, *Extortion Through the Public Record: Has the Internet Made Florida's Sunshine Law Too Bright?*, 66 Fla. L. Rev. 913, 915–16 (2014)).

150. *Id.* at *45.

151. *Id.* at *44.

152. *Id.* at *41.

153. *See* Ark. Code Ann. § 25-19-103(7)(A) (2016) (defining public records in Arkansas); *see also* Andaluz-Prado v. Helder, No. 5:16-CV-05123, 2016 U.S. Dist. LEXIS 109588, at *4 (W.D. Ark. Aug. 17, 2016) (describing how mug shots are part of the public record in Arkansas).

right. Yet, in *Detroit Free Press II*, the only barrier prohibiting mug shots from becoming publicly available is a USMS policy[154] that, in turn, depends on judicial interpretation for its enforcement of an exemption from a statute (FOIA) generally *favoring* access. *Whitney* simply illustrates that once mug shots are made public (as they are in Arkansas), the fact that they may migrate to the Internet does not necessarily tilt the access equation in favor of privacy.

With this in mind, the article next examines how tort law might treat the publication of the mug shots at issue in *Detroit Free Press II*.

II. TORT LAW PRINCIPLES OF PRIVACY AND IIED: ESTABLISHING GROUNDS FOR COMPARISON WITH EXEMPTION 7(C) AND REVEALING WHY TORT RECOVERY WOULD BE PRECLUDED

Why is it helpful to compare the Sixth Circuit's 2016 decision in *Detroit Free Press II* involving FOIA Exemption 7(C) with tort law principles? Professor Lior Jacob Strahilevitz of the University of Chicago Law School explains, "[i]t is natural to analogize between the common law invasion of privacy and the statutory 'unwarranted invasion of personal privacy'"[155] terminology found in FOIA Exemption 7(C). Strahilevitz asserts that:

> [i]f the disclosure of information would constitute a tortious invasion of privacy had a private party engaged in it, then the disclosure of the same information by the government would be inappropriate under FOIA. Many state courts have construed the privacy exemptions in their own states' versions of FOIA in precisely that way.[156]

Importantly, Strahilevitz points out that although "there is nothing in the legislative history to suggest that FOIA privacy should track tort privacy,"[157] there also "is nothing in the legislative history to suggest that FOIA privacy should not track the common law."[158] Citing both *Reporters Committee* and *Favish* and arguing that the results in those cases likely would have been different had the Court applied tort principles, Strahilevitz concludes that "the Supreme Court has made errors in both of its landmark FOIA privacy precedents and those are mistakes that would have been averted had FOIA privacy doctrine simply followed well-established privacy tort principles."[159]

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154. *See* Detroit Free Press, Inc. v. U.S. Dep't of Justice, 829 F.3d 478, 481 (6th Cir. 2016); *see also* Memorandum to All United States Marshals et al., Office of the General Counsel, U.S. Dep't of Justice (Dec. 12, 2012), at 2–3, https://www.usmarshals.gov/foia/policy/booking_photos.pdf [https://perma.cc/27VF-QPX4] (describing the USMS policy).

155. Lior Jacob Strahilevitz, *Reunifying Privacy Law*, 98 Calif. L. Rev. 2007, 2020 (2010).

156. *Id.*

157. *Id.* at 2021.

158. *Id.*

159. *Id.* at 2024.

In brief, then, tort law can help guide FOIA disputes involving privacy and reconcile these bodies of law in coherent fashion. Sections A and B below thus consider, respectively, the elements of the torts of public disclosure of private facts and IIED. These sections also illustrate that a person suing under these theories based upon the public posting of a mug shot, under applicable Michigan law in *Detroit Free Press II*, is highly unlikely to recover damages.

Consider this hypothetical: Journalists at the *Detroit Free Press* newspaper obtain, from a source at the USMS, mug shots of the four officers that the newspaper now seeks.[160] The newspaper then posts those mug shots on its website, accompanying a story regarding the officers' arrests. Keeping in mind that the Justice Department did, in fact, publicly reveal the officers' names more than three years ago in a still-available, Internet-posted press release touting their arrests,[161] the question is this: Would the officers be able to successfully sue the *Detroit Free Press* for either public disclosure of private facts or IIED in their home state of Michigan? Those are the key tort issues examined below, rather than what might be considered the separate *Bartnicki* issue regarding publishing lawfully obtained truthful information about a matter of public concern.[162]

A. Public Disclosure of Private Facts

In 1960, Dean William Prosser famously catalogued four privacy torts.[163] One was public disclosure of embarrassing private facts.[164] Under the public disclosure tort, as encapsulated in the *Restatement (Second) of Torts*, a person:

> who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.[165]

Summarized recently by Tulane Professor Amy Gajda, this means that "a plaintiff who wishes to sue a publication for publishing private facts

160. *See* Detroit Free Press, Inc. v. U.S. Dep't of Justice, 16 F. Supp. 3d 798, 806 (E.D. Mich. 2014), *rev'd*, 829 F.3d 478 (6th Cir. 2016) (describing the underlying facts regarding the mug shots at issue in *Detroit Free Press II*).

161. *Supra* note 21.

162. *See* Bartnicki v. Vopper, 532 U.S. 514, 527–28 (2001) (observing that publication of lawfully obtained truthful information about a matter of public significance is protected by the First Amendment unless the government demonstrates an interest of the highest order justifying its punishment).

163. William L. Prosser, *Privacy*, 48 Calif. L. Rev. 382, 389 (1960); *see* Neil M. Richards & Daniel J. Solove, *Prosser's Privacy Law: A Mixed Legacy*, 98 Calif. L. Rev. 1887, 1890 (2010) (noting that "[c]ourts readily embraced Prosser's formulation of privacy tort law" and adding that Prosser's "influence encouraged courts and commentators to adopt his division of tort privacy into the four causes of action of intrusion, disclosure, false light, and appropriation").

164. Prosser, *supra* note 163, at 389.

165. Restatement (Second) of Torts § 652D (1977).

about her must show both that the revelation would be offensive to a reasonable person and that the revelation itself was not newsworthy."[166] Simply put by Yale Law School Dean Robert Post, the tort "attempts to regulate the publicizing of private life."[167]

The Supreme Court of Michigan (the ultimate legal authority in the hypothetical here) recognizes Prosser's four privacy torts, including public disclosure of private facts.[168] Consistent with the *Restatement's* definition, Michigan's high court observed in 1991 that "public disclosure of embarrassing private facts 'requires that the disclosed information be highly offensive to a reasonable person and of no legitimate concern to the public.' "[169] A Michigan appellate court notes that "[i]nformation of a legitimate concern to the public includes matters regarded as 'news.' "[170] Indeed, what is a matter of public concern and what constitutes news overlap in the public disclosure tort.[171]

Regarding the hypothetical lawsuit above involving the website-posting of the officers' mug shots, the newspaper must concede the publicity element. It is satisfied under Michigan law when a message is communicated to the "public in general."[172] This comports with the typical understanding of the tort in which, as Professors Kent Middleton and William Lee ably explain, a "plaintiff must usually show that a wide audience was exposed to the publication."[173] Posting mug shots on the newspaper's website plainly meets this criterion.

As to the remaining three elements of the public disclosure tort, however, the officers' case significantly weakens. In fact, at the tort's macro level, the Michigan Supreme Court has quoted favorably a comment from the *Restatement* that "[a]uthorized publicity includes *publications concerning* homicide and other crimes, *arrests*, police raids, suicides, marriages and divorces."[174] Mug shots, of course, are a requisite part of the intake process following an arrest, which is a matter of legitimate public concern.[175] Thus, while the officers can prove publicity, such publicity

166. Amy Gajda, The First Amendment Bubble: How Privacy and Paparazzi Threaten a Free Press 31 (2015).

167. Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 Calif. L. Rev. 957, 978 (1989).

168. Beaumont v. Brown, 257 N.W.2d 522, 527–29 (Mich. 1977).

169. Swickard v. Wayne Cty. Med. Exam'r, 475 N.W.2d 304, 310 (Mich. 1991) (quoting Fry v. Ionia Sentinel-Standard, 300 N.W.2d 687, 689 (Mich. Ct. App. 1980)).

170. *Fry*, 300 N.W.2d at 690.

171. *See* Danielle Keats Citron, *Mainstreaming Privacy Torts*, 98 CALIF. L. REV. 1805, 1829 (2010) ("Courts dismiss public disclosure claims where information addresses a newsworthy matter, in other words, one of public concern."); Mary-Rose Papandrea, *Citizen Journalism and the Reporter's Privilege*, 91 MINN. L. REV. 515, 580 (2007) (noting that a newsworthiness standard "involves essentially the same inquiry as a 'public concern' test").

172. *Beaumont*, 257 N.W.2d at 530.

173. Kent R. Middleton & William E. Lee, The Law of Public Communication 175 (9th ed. 2014).

174. *Swickard*, 475 N.W.2d at 310 (emphasis added) (quoting Restatement (Second) of Torts § 652D cmt. g (1977)).

175. *See* O'Brien v. Perry, No. CV 9805845035, 1999 Conn. Super. LEXIS 439, at *6 (Conn. Super. Ct. 1999) ("Arrests are matters of legitimate public interests.").

concerning arrests is authorized and thus is non-actionable.[176] The lawsuit likely dies there.

Drilling deeper, however, for the sake of argument, into the remaining elements, mug shots are not private facts because people have no reasonable privacy expectations in them. Why? Because mug shots are used by police "for eyewitness identification."[177]

For example, mug shots might "be shown to the victim of a robbery in the hope that the victim will be able to identify the perpetrator or to exclude innocent suspects."[178] In other words, a key purpose for the existence of mug shots pivots on the very fact that other people—perhaps several dozens of others—will, indeed, see them in the process of a criminal investigation. The images thus are never intended to remain private, and today, along with fingerprint impressions, they are "benchmarks of social acceptance for at least some identification purposes."[179]

Additionally, there is nothing private or intimate about the image captured in a mug shot. It is, in brief, an impression of a person's face—something often visibly displayed to the public every day of a person's life. It is well established that "[o]ne cannot base liability upon something that is open to the public eye"[180] and that "a person's image in and of itself is not a 'private fact.'"[181]

The newspaper thus would argue that one's face simply is not a private fact, even if the suspect finds a photograph of it unflattering. This stands in stark contrast to a Michigan case recognizing the generally "private nature of . . . genitalia"[182] in the context of a public disclosure cause of action. Indeed, as First Amendment scholar Rodney Smolla explains, the public disclosure tort involves only "truly intimate or private matters . . . such as one's private sexual affairs or intimate details about the health of one's self or family."[183]

In addition to needing to prove the existence of a private fact, a plaintiff suing for public disclosure must demonstrate that the publicity given to it is highly offensive to a reasonable person.[184] As Dean Prosser wrote, "[t]he law of privacy is not intended for the protection of any shrinking

176. Michigan is not the only court to conclude that arrests are newsworthy. As the Supreme Court of California notes, "[n]ewspapers have traditionally reported arrests or other incidents involving suspected criminal activity, and courts have universally concluded that such events are newsworthy matters of which the public has the right to be informed." Kapellas v. Kofman, 459 P.2d 912, 924 (Cal. 1969).

177. Whitney T. Martin, Note, *From the Police Precinct to Your Neighbor's Coffee Table: Limiting Public Dissemination of Mug Shots During an Ongoing Criminal Proceeding Under the Freedom of Information Act*, 99 Iowa L. Rev. 1431, 1445 (2014).

178. D. H. Kaye, *The Constitutionality of DNA Sampling on Arrest*, 10 Cornell J. L. & Pub. Pol'y 455, 487 (2001).

179. Eric T. Juengst, *I-DNA-Fication, Personal Privacy, and Social Justice*, 75 Chi.-Kent L. Rev. 61, 63 (1999).

180. Jones v. City of Philadelphia, 893 A.2d 837, 845 (Pa. Commw. Ct. 2006).

181. Alvarado v. KOB-TV, LLC, 493 F.3d 1210, 1219 (10th Cir. 2007).

182. Granger v. Klein, 197 F. Supp. 2d 851, 868 (E.D. Mich. 2002).

183. Rodney A. Smolla, Law of Defamation § 10:39 (2d ed. 2016 rel.).

184. *Supra* notes 165–166 and accompanying text.

soul who is abnormally sensitive about such publicity."[185] In a case noted above, the publicity afforded to a person's genitals in a yearbook photo may well be highly offensive to a reasonable person,[186] but that is far different from the posting of a mug shot on a newspaper website accompanying a story about the arrest of the individual depicted in therein.

In fact, Professor J. Thomas McCarthy cites multiple cases suggesting that the public disclosure of facts and images that typically are highly offensive relate to: nudity and sexual matters; medical, health and disease conditions and procedures; and the disclosure of past facts such as being the victim of child molestation.[187] Thus, it is extremely doubtful a court would consider "highly offensive" a newspaper posting a perfunctorily taken mug shot on the Internet.

The final element of the public disclosure tort requires plaintiffs to prove the information is not of legitimate public concern.[188] The question becomes whether the publication of mug shots of police officers accused of criminal wrongdoing—and that accompany a story about said alleged wrongdoing—is newsworthy.

Cases involving charges of misconduct against on-duty police officers have been considered matters of public concern for decades.[189] Police officers are government employees, accountable to the public. The mug shots provide visual information to the public regarding the police officers accused of wrongdoing and, in turn, "[i]nformation concerning the possible guilt or innocence of a person charged with a crime is a classic example of a matter of legitimate public concern."[190]

Courts generally consider the opposite of newsworthiness to be a "morbid and sensational prying into private lives for its own sake."[191] This language flows from a comment in the *Restatement (Second) of Torts* on the public disclosure cause of action. The comment provides that in determining what separates a matter of public concern from one of private interest, "[t]he line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake."[192] This

185. Prosser, *supra* note 163, at 397.

186. *Granger*, 197 F. Supp. 2d at 868.

187. J. Thomas McCarthy, The Rights of Publicity and Privacy 552–56 (2015 ed. 2015).

188. *See* Fry v. Ionia Sentinel Standard, 300 N.W.2d 687, 689 (Mich. Ct. App. 1980) (observing that a successful claim for public disclosure of private facts requires that the information published be "of no legitimate concern to the public").

189. Rawlins v. Hutchinson Pub. Co., 543 P.2d 988, 996 (Kan. 1975) (observing, in a case involving a police-officer plaintiff, that "official misconduct is newsworthy when it occurs, and remains so for so long as anyone thinks it worth retelling").

190. Anderson v. Suiters, 499 F.3d 1228, 1236 (10th Cir. 2007).

191. *See* Wilkins v. Nat'l Broad. Co., Inc., 84 Cal. Rptr. 2d. 329, 340–41 (Cal. Ct. App. 1999) (using this phrase twice to describe material that is not newsworthy in the context of a public disclosure of private facts cause of action).

192. Restatement (Second) of Torts § 652D, cmt. h (1977).

language has been embraced by numerous courts over the years.[193]

It seems tremendously doubtful that the vast majority of images in mug shots are morbid and sensational because the photo is simply of a person's head and shoulders. Furthermore, even if a person depicted in a mug shot may have what some consider to be a sensational-looking appearance, such as the mug shot of Arizona mass-killer Jared Loughner,[194] publishing such a mug shot, at least within the context of a news story, is not a morbid and sensational prying into one's life *for its own sake*. The mug shot, instead, is published for the purpose of showing the public what the person looks like.

In summary, it is exceedingly improbable that a police officer in the hypothetical would prevail on a cause of action for public disclosure of private facts.

B. Intentional Infliction of Emotional Distress

A cause of action for IIED, which all states today recognize,[195] generally "consists of four elements: (1) the defendant's conduct must be intentional or reckless, (2) the conduct must be outrageous and intolerable, (3) the defendant's conduct must cause the plaintiff emotional distress and (4) the distress must be severe."[196] Parsed more concisely, a successful IIED claim requires "severe emotional distress caused by outrageous conduct that exceeds the bounds that ought to be tolerated by civilized society."[197]

Although the Supreme Court of Michigan "has not dispositively addressed the establishment, and the contours, of the tort of intentional infliction of emotional distress,"[198] intermediate appellate courts in the Great Lakes State recognize IIED. In 1995, for example, a Michigan appellate court wrote that the elements of IIED "are: (1) extreme and outrageous conduct; (2) intent or recklessness; (3) causation; and (4) severe emotional distress."[199] The appellate court elaborated that liability for

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193. *See*, *e.g.*, Toffoloni v. LFP Publ'g Grp., LLP, 572 F.3d 1201, 1211 (11th Cir. 2009); Alvarado v. KOB-TV, 493 F.3d 1210, 1219 (10th Cir. 2007); Virgil v. Time, Inc., 527 F.2d 1122, 1129 (9th Cir. 1975).

194. Colby Hall, *This Is Unsettling*, Mediaite.com (July 10, 2011), http://www.mediaite.com/online/this-is-unsettling-jared-loughners-mug-shot-released [https://perma.cc/F8JA-XYBC].

195. Elizabeth M. Jaffee, *Sticks and Stones May Break My Bones but Extreme and Outrageous Conduct Will Never Hurt Me: The Demise of Intentional Infliction of Emotional Distress Claims in the Aftermath of Snyder v. Phelps*, 57 Wayne L. Rev. 473, 479 (2011) ("IIED is recognized as a recoverable cause of action in all U.S. jurisdictions."); John J. Kircher, *The Four Faces of Tort Law: Liability for Emotional Harm*, 90 Marq. L. Rev. 789, 806 (2007) ("All states have recognized intentional infliction of emotional distress as an independent tort and have adopted *Restatement (Second) of Torts* section 46 in some form.") (emphasis added).

196. Karen Markin, *The Truth Hurts: Intentional Infliction of Emotional Distress as a Cause of Action Against the Media*, 5 Comm. L. & Pol'y 469, 476 (2000).

197. William R. Corbitt, *An Outrageous Response to "You're Fired!"*, 92 N.C. L. Rev. Addendum 17, 43–44 (2013).

198. Melson v. Botas, 863 N.W.2d 674, 674 (Mich. 2015) (Markman, J., dissenting).

199. Johnson v. Wayne Cty., 540 N.W.2d 66, 74 (Mich. Ct. App. 1995).

IIED exists "only where the conduct complained of has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community."[200] Mere annoyances and indignities do not rise to this level in Michigan.[201]

In the hypothetical above, the officers very likely lose an IIED claim for multiple reasons. First, posting truthful, headshot images of people taken by the government upon their official intake to the criminal justice system—a system presumptively open[202]—seems like anything but extreme and outrageous conduct falling outside the bounds of decency in a civilized society. The *Detroit Free Press* should argue here that a civilized, democratic society publishes truthful information regarding its alleged criminal activity and those accused of it. More directly put, newsworthiness negates outrageousness.

Publishing mug shots is a far cry, for instance, from posting hidden-camera video of a person engaged in sexual activity in a bedroom without his consent.[203] Although IIED may pave a road to recovery for victims of so-called revenge porn[204] who find images of their sexual activity posted on the Internet without consent,[205] a mug shot is extremely different, revealing only a person's shoulders and head, devoid of sexual activity, intimate or otherwise.

Furthermore, publishing mug shots is extremely different from disseminating close-up images of a young girl's skull—images a Florida court called "gruesome and macabre"[206] —that may well constitute extreme

200. *Id.*

201. Shaya v. Belcastro, No. 14-11112, 2016 U.S. Dist. LEXIS 76218, at *77 (E.D. Mich. June 10, 2016).

202. *See* Kirtley, *supra* note 73, at 98–99 (noting "the long tradition in the United States of allowing public access to executive branch records, such as arrest records, that are related to the criminal justice system" and pointing out that the U.S. Supreme Court "has ruled that criminal judicial proceedings and transcripts are presumptively open to the public"). *But see* Los Angeles Police Dep't v. United Reporting Publ'g Corp., 528 U.S. 32, 40 (1999) ("California could decide not to give out arrestee information at all without violating the First Amendment.").

203. Terry Gene Bollea, better known by his wrestling name of Hulk Hogan, prevailed on a cause of action for IIED—along with several other legal theories—in early 2016 before a Florida jury based upon the Internet-posting of a sex tape depicting him that he claimed was made without his knowledge or permission. *See* Verdict at 5–6, Bollea v. Gawker Media, LLC, No. 12012447-CI-011 (Fla. Cir. Ct. Mar. 18, 2016); *see also* Erwin Chemerinsky, *Privacy Versus Speech in the Hulk Hogan Sex Tape Trial*, L.A. Times, Mar. 14, 2016, at A15 (writing that the case "revolves around a videotape showing the wrestler Hulk Hogan, whose real name is Terry G. Bollea, having sex with the wife of a friend. Apparently, the friend, radio host Bubba 'the Love Sponge' Clem, took the video without Bollea's consent or knowledge.").

204. *See* Mary Anne Franks, *Unwilling Avatars: Idealism And Discrimination In Cyberspace*, 20 Colum. J. Gender & L. 224, 227 (2011) (asserting, in gender-specific fashion, that revenge porn is "a practice where ex-boyfriends and husbands post to the web sexually explicit photographs and videos of them without their consent").

205. *See* Paul J. Larkin, Jr., *Revenge Porn, State Law, and Free Speech*, 48 Loy. L.A. L. Rev. 57, 80 (2014) (asserting that "the online posting of revenge porn would seem to be an eminently suitable example of outrageous conduct" for which IIED should provide relief).

206. Armstrong v. H & C Commc'ns, Inc., 575 So.2d 280, 281 (Fla. Dist. Ct. App. 1991).

and outrageous behavior by a news organization. As the Florida appellate court in *Armstrong v. H & C Communications* wrote, "[w]e have no difficulty in concluding that reasonable persons in the community could find that the alleged conduct . . . was outrageous in character and exceeded the bounds of decency so as to be intolerable in a civilized community."[207] In that case, the news organization even admitted that the staged, closed-up images of the skull were not newsworthy.[208]

Second, the intent of the *Detroit Free Press* in publishing mug shots of the four police officers is completely unrelated to trying to cause them emotional distress. Instead, the newspaper's purpose is to educate readers about alleged wrongdoings of government officials by putting faces to names. People recognizing the officers by their images and thus discovering they were also detained or arrested by them may, in turn, have grounds to question the validity of their interactions with them.

A claim for IIED, however, can exist in the absence of intent to cause emotional distress if the defendant acted with recklessness in causing such distress. Recklessness in Michigan entails that a reasonable person would know from his or her actions that emotional distress would result.[209] On this point, the *Detroit Free Press* would be wise to argue that emotional distress stemming from worries about potential non-employability due to the publication of a mug shot simply is too speculative to be reasonably foreseeable. In other words, the worries (the emotional distress, as it were) are caused by possibilities—not necessarily realities—of the downstream actions that might be taken by others regarding how they *could*, but not necessarily *will*, react to a mug shot. The publisher of a mug shot cannot, in brief, prognosticate how others will ultimately understand or interpret it.

Furthermore, the *Detroit Free Press* should contest causation. In particular, is it the publishing of a mug shot that causes emotional distress or, far more likely, is it the fact that the person's name and identity (*regardless of pictorial image*) become publicly known as part of the arrest record that causes the purported emotional distress? In other words, if a plaintiff truly suffers emotional distress after being arrested, is it because people will identify him by his name or, instead, that people will recognize his face? Or—a third possibility—is the sense of shame purely from an internal feeling of guilt or remorse about one's own actions, *regardless* of how others feel? Put more simply, is it other people knowing the *name* or knowing the *face* that causes emotional harm? And if any harm, in fact, exists, it may be due to speculative, downstream fears of being unemployable because prospective employers later discover the fact the person was once arrested. These issues disrupt the requisite causal connection of emotional distress stemming from publication of a photograph.

207. *Id.* at 282.
208. *Id.* at 281.
209. Haverbush v. Powelson, 551 N.W.2d 206, 210 (Mich. Ct. App. 1996).

By way of comparison, what happens if a newspaper lists the names of individuals arrested for driving under the influence (DUI) of alcohol, but does *not* also publish their mug shots? Those arrested individuals might likely be embarrassed (and suffer emotional distress, be it the IIED-mandated severe level or otherwise) simply because other people learn they were arrested for DUI, *regardless* of whether a mug shot is published alongside their name. In brief, is the harm caused by name or facial recognition? That question—between the power of words versus the power of images—clouds, complicates, and convolutes the causation inquiry, and it never was addressed in *Detroit Free Press II*.

Finally, and certainly not least, is the veneer of First Amendment protection the Supreme Court grants defendants in speech-based IIED cases. As the Court wrote in 2011 in *Snyder v. Phelps*,[210] "[t]he Free Speech Clause of the First Amendment— 'Congress shall make no law . . . abridging the freedom of speech'—can serve as a defense in state tort suits, including suits for intentional infliction of emotional distress."[211] In particular, if speech affects a matter of public concern, then this likely results in a ruling against an IIED plaintiff.[212]

Writing for the *Snyder* majority, Chief Justice John Roberts explained that speech addresses "matters of public concern when it can 'be fairly considered as relating to any matter of political, social, or other concern to the community,'" or when it "'is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.'"[213] Alleged criminal activity—the reason mug shots exist—certainly is of social concern to people in the community affected by that activity. As a California appellate court wrote in 2003, "[n]ews reports concerning current criminal activity serve important public interests."[214] Additionally, the U.S. Court of Appeals for the Tenth Circuit in 2007 concluded that "[i]nformation concerning the *possible* guilt or innocence of a person charged with a crime is a classic example of a matter of legitimate public concern."[215] In brief, to be accused—even if not convicted—is newsworthy.

Moreover, alleged criminal activity is of general value to community members who might identify an individual from a mug shot and, in turn, connect him or her with other possible wrongdoings. In the specific case involving the *Detroit Free Press*, the charges pertain to allegations of bribery and drug conspiracy against government officials—namely, four po-

210. Snyder v. Phelps, 562 U.S. 443 (2011).

211. *Id.* at 451.

212. *See id.* (observing that the outcome of the case "turns largely on whether that speech is of public or private concern, as determined by all the circumstances of the case").

213. *Id.* at 453 (internal citations omitted) (quoting, respectively, Connick v. Myers, 461 U.S. 138, 146 (1983) and City of San Diego v. Roe, 543 U.S. 77, 83–84 (2004)). Additionally, Roberts pinpointed three factors—content, form, and context of the speech—for courts to use in deciding whether speech involves a matter of public or private concern. *Id.*

214. Lieberman v. KCOP Television, Inc., 1 Cal. Rptr. 3d 536, 541 (Cal. Ct. App. 2003).

215. Anderson v. Suiters, 499 F.3d 1228, 1236 (10th Cir. 2007) (emphasis added).

lice officers[216]—thereby heightening the newsworthiness of their images. The U.S. Court of Appeals for the Third Circuit, for instance, has held that "[t]he content of the speech may involve a matter of public concern if it attempts "'to bring to light actual or *potential wrongdoing or breach of public trust on the part of government officials*.'"[217]

In summary, it is extremely doubtful the officers involved in *Detroit Free Press II* would recover damages if they sued for either public disclosure of private facts or IIED based on the newspaper's publication of their mug shots. There is, then, a decided disconnect between tort law and FOIA when it comes to safeguarding supposed privacy interests in mug shots. With this in mind, the next Part critiques three key aspects of the Sixth Circuit's logic in *Detroit Free Press II*.

III. THE MAJORITY'S LOGIC IN *DETROIT FREE PRESS II*: CRITIQUING A TRIO OF CRUCIAL FACTORS

This Part has three sections, each of which analyzes a different facet of the Sixth Circuit's reasoning in recognizing a privacy interest in mug shots under FOIA Exemption 7(C).

A. The Internet and Mug Shot Websites

A key part of the Sixth Circuit's reasoning in *Detroit Free Press II* to reverse its decision from two decades ago focused on the possibility that mug shots exist in perpetuity on the Internet and thus may haunt a person later in life. As the appellate court wrote, "[i]n 1996, when we decided *Free Press I*, booking photos appeared on television or in the newspaper and then, for all practical purposes, disappeared. Today, an idle Internet search reveals the same booking photo that once would have required a trip to the local library's microfiche collection."[218]

The Sixth Circuit majority drilled deeper into the Internet issue, expressing specific concern about commercial websites that post mug shots. It asserted that BustedMugshots and JustMugshots "collect and display booking photos from decades-old arrests."[219] The danger, the Sixth Circuit explained, is that "[p]otential employers and other acquaintances may easily access booking photos on these websites, hampering the depicted individual's professional and personal prospects."[220]

Individuals depicted in mug shots who want to avoid such deleterious consequences, the Sixth Circuit pointed out, must expend both time and money. Specifically, they need to "pay such sites to remove their pictures. Indeed, an online-reputation-management industry now exists, promising

216. Detroit Free Press, Inc. v. U.S. Dep't of Justice, 16 F. Supp. 3d 798, 806 (E.D. Mich. 2014), *rev'd*, 829 F.3d 478 (6th Cir. 2016); *see* Arrest Press Release, *supra* note 21.
217. Baldassare v. New Jersey, 250 F.3d 188, 195 (3d Cir. 2001) (emphasis added) (quoting Holder v. City of Allentown, 987 F.2d 188, 195 (3d Cir. 1993)).
218. Detroit Free Press Inc. v. U.S. Dep't of Justice, 829 F.3d 478, 482 (6th Cir. 2016).
219. *Id.*
220. *Id.* at 483.

to banish unsavory information—a booking photo, a viral tweet—to the third or fourth page of Internet search results, where few persist in clicking."[221] The court concluded that such "steps many take to squelch publicity of booking photos *reinforce a statutory privacy interest*."[222] In fact, the *New York Times* notes that "for-profit Web sites, with names like Mugshots, BustedMugshots and JustMugshots"[223] prosper "by charging a fee to remove the image. That fee can be anywhere from $30 to $400, or even higher. Pay up, in other words, and the picture is deleted, at least from the site that was paid."[224]

Stretching the interpretation of Exemption 7(C) to include a privacy interest in mug shots due to such an Internet-based parade of horrors, however, is misguided. First, problems wrought by mug-shot websites are better addressed by legislation directly targeting them, rather than by an expansive judicial interpretation of a statute adopted long before such sites even existed. Indeed, the National Conference of State Legislatures (NCSL) notes that multiple states already had taken legislative action aimed at such sites by early 2016.[225] The NCSL reports that:

> Georgia, Illinois, Oregon, Texas and Utah in 2013 enacted legislation to address these concerns by prohibiting commercial sites from charging fees for removing inaccurate mug shots upon request or by prohibiting sheriffs from releasing mug shots to sites that charge a fee, among other provisions. California, Colorado, Georgia, Missouri and Wyoming passed laws in 2014; in Maryland and Virginia in 2015; Kentucky and South Carolina in 2016.[226]

For example, consider Oregon Revised Statute § 646A.806.[227] It applies to websites that charge a fee for removing mug shots.[228] The statute requires such sites to remove—free of charge and upon written request—mug shots and related personal information of anyone who can prove that "all charges stemming from the arrest for which the photograph was made: (A) Were resolved through acquittal or otherwise without a conviction; (B) Were reduced to violations; or (C) Following conviction, were expunged or set aside pursuant to court order."[229]

If the problem that must be addressed pertains to mug-shot websites, then the solution is to target them directly and specifically with legislation. The judicial response in *Detroit Free Press II*, instead, creates a privacy interest that broadly affects *everyone's* access to mug shots held by U.S. Marshals. In an effort to push back against mug-shot websites, the

221. *Id.*
222. *Id.* (emphasis added).
223. David Segal, *Mugged by a Mug Shot*, N.Y. Times, Oct. 6, 2013, at BU1.
224. *Id.*
225. *Mug Shots and Booking Photos Websites*, Nat'l Conference of State Legislatures, Apr. 13, 2016, http://www.ncsl.org/research/telecommunications-and-information-technology/mug-shots-and-booking-photo-websites.aspx [https://perma.cc/JRQ5-SJ44].
226. *Id.*
227. OR. REV. STAT. § 646A.806 (2016).
228. *Id.*
229. *Id.*

Sixth Circuit's decision is vastly overbroad because it applies to any and all media outlets—mainstream news organizations like the *Detroit Free Press* included—that seek access to mug shots.

The sweep of the Sixth Circuit's ruling unnecessarily carpet bombs all media organizations. A more surgically precise strike to mitigate the problem would be both more appropriate and proportionate. As attorney Gregg Leslie of the Reporters Committee for Freedom of the Press states, "[t]he appropriate remedy is to stop them [mug-shot websites] from doing that . . . rather than to deny everyone access to mug shots."[230]

Second, the Sixth Circuit's focus on the fact "a booking photo could haunt the depicted individual for decades"[231] in the Internet age seems, albeit *sub silentio*, to be concerned with protecting individuals who are either acquitted or against whom all charges are dropped. Colloquially put, the worry appears to be with protecting the innocent. But what about individuals who are, in fact, later convicted or who plead guilty to criminal charges? Should a court be similarly acutely concerned about shielding them from being haunted by their proven guilt or admitted past criminal wrongdoings? The Sixth Circuit failed to consider this important distinction in any way. Instead, it adopted a far-reaching ruling that *everyone* depicted in a mug shot has a privacy interest, even if they later are convicted of the gravest and most heinous of criminal offenses.

Finally, responses from private entities to the Sixth Circuit's concern about mug-shot websites already are proving potent in dramatically weakening those interests. Specifically, Google has "allowed de-ranking of search results containing mug shots of people."[232] Indeed, the mammoth search engine company "altered its search algorithms to reduce such sites' salience."[233] Additionally, as the *New York Times* reported, major credit card companies such as MasterCard and American Express, along with online pay service PayPal, are cutting off their services for commercial mug-shot websites.[234]

In summary, if the problem is commercial mug-shot websites, there are multiple ways of addressing it—from state legislation to the actions of private entities such as search engine and credit card companies—other than a judicial decision negatively affecting all media organizations.

B. Public Ignorance of the Meaning of Mug Shots

A second vital factor for the Sixth Circuit in recognizing a privacy interest in mug shots pertains directly to how, supposedly, many members

230. Laura C. Morel, *Arrest Photos That Won't Die*, Tampa Bay Times, Nov. 11, 2013, at 1B.
231. Detroit Free Press Inc. v. U.S. Dep't of Justice, 829 F.3d 478, 485 (6th Cir. 2016).
232. Edward Lee, *The Right to be Forgotten v. Free Speech*, 12 I/S: J. L. & Pol'y for Info. Soc'y 85, 107 (2015).
233. Frank Pasquale, *Reforming the Law of Reputation*, 47 Loy. U. Chi. L.J. 515, 537 (2015).
234. David Segal, *Mug-Shot Websites, Retreating or Adapting*, N.Y. Times, Nov. 10, 2013, at BU3.

of the public wrongly interpret what the images signal about those depicted in them. Writing for the *Detroit Free Press II* majority, Judge Deborah Cook asserted that "booking photos convey *guilt* to the viewer."[235] She added that "viewers so uniformly associate booking photos with guilt and criminality that we strongly disfavor showing such photos to criminal juries . . . This alone establishes a non-trivial privacy interest in booking photos."[236]

There is a vast difference, however, between jurors who misunderstand the nature of a mug shot in a criminal trial and people who may misperceive their meaning when coming upon them on the Internet. Precisely, the misunderstanding of a mug shot's meaning in a criminal prosecution jeopardizes a person's Sixth Amendment[237] right to a fair trial and, in turn, could wrongly result in his or her incarceration.[238] In brief, the consequences of a juror misunderstanding the meaning of a mug shot in a criminal trial are enormous. A person's very liberty and freedom may be sacrificed because of the alleged prejudicial nature of a mug shot that is introduced into evidence.

The consequence of incarceration stemming from possible misunderstanding of a mug shot in a criminal case simply is absent in other contexts where a person stumbling upon an Internet-posted mug shot. In a nutshell, the emotional harms of embarrassment and humiliation that the Sixth Circuit majority suggests a person feels when someone else discovers he or she has been arrested[239] are nowhere near the magnitude or severity of the harm of being locked up in prison or jail. And even the possible economic harm of being denied a job because a potential employer learns of a person's arrest through a mug shot is not tantamount to being deprived of the physical liberty of freedom of movement resulting from incarceration.[240] Put differently, concerns about the Sixth Amendment and the right to a fair trial that may justify prohibiting the use of

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235. Detroit Free Press, Inc. v. U.S. Dep't of Justice, 829 F.3d 478, 482 (6th Cir. 2016) (emphasis in original).

236. *Id.* (internal citations omitted).

237. The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. Const. amend. VI.

238. *See* 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.").

239. *See Detroit Free Press II*, 829 F.3d at 482 (asserting that booking photos "fit squarely within this realm of embarrassing and humiliating information").

240. *See id.* at 483 ("Potential employers and other acquaintances may easily access booking photos on these websites, hampering the depicted individual's professional and personal prospects.").

mug shots in criminal prosecutions do not justify stopping their dissemination outside of the courtroom context.

Furthermore, it smacks of judicial paternalism to prevent the release of mug shots due to the perceived ignorance of some members of the American public who may not understand them. Essentially, the Sixth Circuit's decision rests largely on protecting those depicted in mug shots from the lack of legal literacy of potential audience members—namely, Internet users—who may view them. Erroneous perception of some unwitting people, in other words, justifies judicial recognition of a non-explicit statutory privacy interest in mug shots, in the Sixth Circuit's view.

This is simply wrong. It illustrates Professor Wat Hopkins' point that the "FOIA is not doing the job that was intended, and that a major overhaul of the act is needed to ensure requisite access to government documents and activities."[241] The cure for a lack of legal literacy about the meaning of mug shots is education, not censorship.

C. Embarrassment and Humiliation

In recognizing a privacy interest in mug shots, the Sixth Circuit majority argued that a mug shot constitutes "embarrassing and humiliating information."[242] Such mental anguish, along with the possibility of being denied a job because a potential employer stumbles upon a mug shot,[243] constitutes the supposed harms justifying a privacy interest in mug shots that, via Exemption 7(C), impedes public access to the truthful information they reveal.

Initially, it must be pointed out that embarrassment—a central concern of the Sixth Circuit[244]—in the Internet era simply is a reality of modern life. According to a *Washington Post* poll conducted in November 2013, "[o]ne in four Americans ages 18 to 29 reported being embarrassed or upset by something that appeared online about them."[245] Similarly, having an arrest record is a reality of life for many in the United States. As legal scholar Brian Murray wrote in 2016, "[i]t is estimated that between twenty-five and thirty-five percent of the adult population of the United States has a criminal record,"[246] while a whopping "[r]oughly one-third of adults have been arrested by age twenty-three."[247] One might reasonably wonder whether the embarrassment or humiliation of an arrest is somewhat diminished today when so many people, in fact, have been arrested.

241. W. Wat Hopkins, *Special Issue: The U.S. Freedom of Information Act At 50: Editor's Note*, 21 Comm. L & Pol'y 431, 432 (2016).

242. *Detroit Free Press II*, 829 F.3d at 482.

243. *See id.* at 483 ("Potential employers and other acquaintances may easily access booking photos on these websites, hampering the depicted individual's professional and personal prospects.").

244. *See Detroit Free Press II*, 829 F.3d at 482.

245. Craig Timberg & Sarah Halzack, *Google Case Pits Right to be Forgotten vs. Free Speech*, Wash. Post, May 15, 2014, at A10.

246. Brian M. Murray, *A New Era for Expungement Law Reform? Recent Developments at the State and Federal Levels*, 10 Harv. L. & Pol'y Rev. 361, 363 (2016).

247. *Id.*

Similarly, one might query whether it is the proper role of the judiciary to pushback, in the name of privacy, against what amounts to a mass-arrest criminal justice system.

More importantly, an implicit assumption underlying the *Detroit Free Press II* majority's concern with embarrassment and humiliation purportedly caused by mug shots is the belief that *visual images* are somehow more embarrassing or humiliating than are *written facts*. What, in other words, is the real cause of any embarrassment and humiliation stemming from an arrest—that others know the fact that a person has been arrested or that others know how the person looked shortly after they were arrested? Should courts, as the Sixth Circuit majority did, create an artificial dichotomy between words and images when it comes to information—written versus pictorial—about an arrest?

The *Detroit Free Press II* dissent, for instance, pointed out that much factual information about a person's brushes with the law is now easily available online, not simply mug shots. Writing for the dissent, Judge Danny Julian Boggs called attention to "the now-digitized information that was once hidden away in the dusty basements of courthouses and libraries."[248] He questioningly wrote:

> Surely the majority would not agree that an individual has a cognizable privacy interest in his court filings or public statements simply because they too may turn up in an "idle internet search." If anything, the ease with which a third party today can find an individual's indictment and arrest would seem to cut against finding a cognizable privacy interest in booking photographs.[249]

For example, one can easily find in multiple places on the Internet the names of the four officers who were arrested and whose mug shots are at the heart of *Detroit Free Press II*. They are, for example, identified in a post-arrest press release on the Department of Justice's website.[250] They are named in a press release posted by the Federal Bureau of Investigation on its website describing the outcome of the criminal cases against all four officers.[251] They are also identified in several newspaper stories on the Internet.[252]

248. *Detroit Free Press II*, 829 F.3d at 491 (Boggs, J., dissenting).

249. *Id.*

250. *See* Arrest Press Release, *supra* note 21 ("The four Highland Park police officers charged are: Anthony Bynum, 29, of Highland Park, Michigan; Price Montgomery, 38, of Highland Park, Michigan; Shawn Williams, 33, of Detroit, Michigan; and Craig Clayton, 55, of Highland Park, Michigan.").

251. Press Release, U.S. Attorney's Office, Former Highland Park Police Officer Sentenced to Prison for Taking a $10,000 Bribe (Mar. 7, 2014), https://archives.fbi.gov/archives/detroit/press-releases/2014/former-highland-park-police-officer-sentenced-to-prison-for-taking-a-10-000-bribe [https://perma.cc/96H8-NN2B].

252. *See*, *e.g.*, *Four Highland Park Police Officers Arrested*, Oakland Press News (Mich.) (Jan. 25, 2013), http://www.theoaklandpress.com/article/OP/20130125/NEWS/301259967 [https://perma.cc/3VZ8-57P4]; Steve Neavling, *FBI: Highland Park Cops Beat and Rob Man, Then Deal Cocaine for Him*, Motor City Muckraker (Jan. 25, 2013), http://motorcitymuckraker.com/2013/01/25/fbi-highland-park-cops-beat-and-rob-man-then-deal-cocaine-for-him [https://perma.cc/79V7-LHH4].

By allowing mug shots to be withheld on privacy grounds, the Sixth Circuit essentially contends that the way a person looks or appears in a mug shot is somehow more damning and harmful than the printed fact that the person was arrested. Put differently, the court intimates that making public an individual's image is more embarrassing than the objective fact of the individual's arrest being made public.

The harms of embarrassment and humiliation, however, would seem to be found in the publication of the fact of an arrest, not the arrestee's appearance. It likely is the very unflattering fact that a person has been arrested—not an unflattering appearance in a photo—from which the harm flows. The Sixth Circuit, however, seeks to legally decouple *the fact of an arrest* from *an image taken subsequent to it* and, in turn, to restrict access to the latter in what amounts to protecting the vanity of the arrestee. A mug shot, at bottom, is not a glamour shot, and both arrestees and those who view them should have no reasonable expectation that mug shots capture people at their visual best. Yet the Sixth Circuit seemed to be disturbed by that reality, and it thus chose to recognize a privacy interest because mug shots are "snapped 'in the vulnerable and embarrassing moments immediately after [an individual is] accused, taken into custody, and deprived of most liberties.'"[253]

Critically, the U.S. Supreme Court has made it evident that when the government claims a particular form of content must be censored due to the supposed injury that it produces, the government must proffer evidence of "a direct causal link"[254] between the speech and the harm in question. In *Detroit Free Press II*, the USMS seeks to censor images of mug shots (the particular form of content) because of the harms of embarrassment and humiliation that their publication might produce.[255] Yet the Sixth Circuit considered no evidence demonstrating such a direct causal link, while—compounding the problem of causation—the critical question of whether those harms actually stem from the *fact of arrest*, rather than an *image of the arrestee*, plainly clouds the causal connection and was left unaddressed by the appellate court.

Beyond the alleged mental harms of embarrassment and humiliation springing from mug shots, the Sixth Circuit majority also was concerned about possible fiscal injury. Specifically, the majority reasoned that a mug shot could hamper "the depicted individual's professional"[256] prospects because "potential employers"[257] are able to "easily access booking photos on these [mug-shot] websites."[258]

Although holding superficial appeal, this justification is rendered futile because any employer seriously concerned about the possible criminal

253. *Detroit Free Press II*, 829 F.3d at 482 (quoting Karantsalis v. U.S. Dep't of Justice, 2009 U.S. Dist. LEXIS 126576, at *12 (S.D. Fla. Dec. 14, 2009)).
254. Brown v. Entm't. Merchs. Ass'n, 564 U.S. 786, 799 (2011).
255. *Detroit Free Press II*, 829 F.3d at 482.
256. *Id.* at 483.
257. *Id.*
258. *Id.*

history of a prospective employee does not need to randomly review mug-shot websites but will instead conduct actual criminal-background checks through reputable services accredited by the National Association of Professional Background Screeners.[259] This is perfectly legal. As the U.S. Equal Employment Opportunity Commission provides today on its website:

> some employers might try to find out about the person's work history, education, criminal record, financial history, medical history, or use of social media. Except for certain restrictions related to medical and genetic information (see below), *it's not illegal for an employer to ask questions about an applicant's or employee's background, or to require a background check*.[260]

In brief, any employer genuinely concerned about a potential employee's brushes with the criminal justice system has a clear right to conduct in-depth searches, not just a superficial scouring of mug-shot websites. Shielding mug shots in the name of stopping potential employers from knowing about an arrest thus is futile and the slenderest of reeds against which to lean a justification for privacy and censorship.

One might, however, reasonably wonder about an employer who finds a mug shot on the Internet of an individual who was arrested but never convicted and, in turn, had the matter expunged.[261] Indeed, a recent article notes that "[m]ost states . . . allow for the expungement of arrest and court records relating to cases that did not end in convictions."[262] Another article points out that expungement "commonly removes nonconviction records."[263] The impact of expungement in some states, such as Illinois, is that an employer cannot "use the fact of an arrest or criminal history record information" in a hiring decision.[264]

This argument, however, is rendered largely meaningless in FOIA Exemption 7(C) cases such as *Detroit Free Press II* because "[t]here is no general federal expungement statute."[265] Federal courts may only expunge arrest records, invoking equitable discretion and ancillary jurisdic-

259. *See About NAPBS*, National Association of Professional Background Screeners, https://www.napbs.com/about-us/about-napbs/ [https://perma.cc/UXM9-ZPFV] (describing NAPBS as a non-profit trade association that "was established to represent the interest of companies offering employment and tenant background screening services. Just as importantly, however, the initial members wanted to establish and promote a high level of ethics and performance standards for the screening industry.").

260. *Background Checks: What Employers Need to Know*, U.S. Equal Employment Opportunity Commission (emphasis added), https://www.eeoc.gov/eeoc/publications/background_checks_employers.cfm [https://perma.cc/XA8H-JSVU].

261. Elizabeth E. Joh, Essay, *The Myth of Arrestee DNA Expungement*, 164 U. Pa. L. Rev. Online 51, 53 (2015) (describing expungement as "a legal process that restores an arrested person to the legal status she held prior to arrest").

262. Amy Shlosberg et al., *Expungement and Post-Exoneration Offending*, 104 J. Crim. L. & Criminology 353, 356 (2014).

263. Anna Kessler, Comment, *Excavating Expungement Law: A Comprehensive Approach*, 87 Temp. L. Rev. 403, 409 (2015).

264. 775 Ill. Comp. Stat. 5/2-103 (2016).

265. Erickson v. United States, 757 F. Supp. 2d 1060, 1064 (D. Ore. 2010); *see* Fruqan Mouzon, *Forgive Us Our Trespasses: The Need for Federal Expungement Legislation*, 39 U.

tion, in "extreme circumstances,"[266] such as where "the sole purpose of the arrests was to harass civil rights workers."[267] What is more, as one federal court recently observed, "[d]ifficulty in obtaining or maintaining employment because of a criminal record has been held *insufficient* to warrant expungement."[268] This effectively eviscerates the expungement argument when it comes to protecting federal agency records, including the mug shots at issue in *Detroit Free Press II*.

IV. CONCLUSION

In a 2016 article marking the fiftieth anniversary of the federal Freedom of Information Act, Professors Chip Stewart and Charles Davis assert that, over the course of fifty years, FOIA has "become a tool for preserving secrecy rather than transparency."[269] Specifically, the duo emphasizes that "expansion of exemptions in the name of privacy over transparency has effectively undermined the purpose of FOIA as a disclosure statute."[270]

There is little doubt, as this article illustrates, that the Sixth Circuit's 2016 decision in *Detroit Free Press, Inc. v. U.S. Department of Justice* fits snuggly within this trend and provides a somewhat sorrowful coda to a half-century of anti-access FOIA decisions. Additionally, the opinion comports with what Professor Derigan Silver recently contends is the worry "that privacy concerns are keeping FOIA officials from releasing information to journalists that would be valuable in writing stories."[271] As noted earlier, photographs—including mug shots—serve important functions in journalism storytelling.[272]

Indubitably, the Internet makes massive amounts of information of all varieties—mug shots included—readily, cheaply, and permanently accessible. The Sixth Circuit's decision in *Detroit Free Press II*, however, unfortunately indicates judicial willingness to stretch the interpretation of FOIA Exemption 7(C) to counteract and neutralize, in the name of privacy, such simplicity and ease of access. Must there be, however, such a positive correlation—as the Internet expands access to information, must the scope and reach of FOIA Exemption 7(C) necessarily expand along with it? The answer should be no.

As this article demonstrates, the practical obscurity rationale regarding aggregated information, such as rap sheets, that proved pivotal in the Su-

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Mem. L. Rev. 1, 13 (2008) (observing that "no federal statute expressly authorizes and outlines the boundaries and contours of federal expungement").

266. United States v. Schnitzer, 567 F.2d 536, 540 (2d Cir. 1977).

267. *Id.*

268. Joefield v. United States, No. 13-MC-367, 2013 U.S. Dist. LEXIS 109514, at *9 (E.D.N.Y. 2013) (emphasis added).

269. Daxton R. "Chip" Stewart & Charles N. Davis, *Bringing Back Full Disclosure: A Call for Dismantling FOIA*, 21 Comm. L & Pol'y 515, 517 (2016).

270. *Id.* at 528.

271. Derigan Silver, *The News Media and the FOIA*, 21 Comm. L & Pol'y 493, 510 (2016).

272. *Supra* notes 22–27 and accompanying text.

preme Court's *Reporters Committee* decision simply is absent when it comes to a mug shot.[273] Similarly, as the article explains, the contents of a mug shot are far different from the gruesome qualities of death-scene images that propelled the Court in *Favish*.[274]

This article also argues, by analyzing a realistic hypothetical involving the police officers whose mug shots are at issue in *Detroit Free Press II*, that tort law would not provide a remedy for the public dissemination of mug shots under either the theory of public disclosure of private facts or intentional infliction of emotional distress.[275] There is, then, a gaping chasm between tort law and judicial interpretation of FOIA Exemption 7(C) when it comes to privacy interests. As noted earlier,[276] University of Chicago Professor Lior Jacob Strahilevitz maintains that following "well-established privacy tort principles"[277] provides a smooth path forward for evaluating privacy interests under FOIA.

In the immediate aftermath of the Sixth Circuit's 2016 ruling in *Detroit Free Press II*, journalist James Eli Shiffer observed that while "[t]he mug shot is the star of the voyeur's [I]nternet,"[278] making the images secret "is worse."[279] That is because, as Shiffer wrote, mug shots "have the power to inform and redress injustice, from clearing up mistaken identities to shedding light on racial profiling."[280] And, as this article avers, finding a privacy interest in mug shots that justifies keeping them secret because some members of the public may not understand their meaning reeks of judicial paternalism.[281] Education is the remedy for public ignorance, not censorship.

Furthermore, and assuming simply for the sake of argument that FOIA is to be used to prohibit the dissemination of mug shots held by the USMS and other government agencies, then that authority should come directly from specific Congressional legislation. It should not arise from judicial decisions like *Detroit Free Press II* that depend on the vagaries of phrases such as "personal privacy" and "unwarranted invasion" used in a general exemption and upon which the judges of the Sixth Circuit, sitting en banc, closely divided by a nine-to-seven vote. Legislation, as this article shows, already is starting to address concerns over the mug-shot web-

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273. *See supra* Part I, Section A (addressing the Supreme Court's decision in *Reporters Committee*).

274. *See supra* Part I, Section B (addressing the Supreme Court's decision in *Favish*).

275. *See supra* Part II (addressing hypothetical tort law claims).

276. *See supra* notes 155–159 and accompanying text (reviewing Strahilevitz's arguments).

277. Strahilevitz, *supra* note 155, at 2024.

278. James Eli Shiffer, *Full Disclosure; What to Do with Booking Photos*, Star Trib. (Minneapolis, MN), July 24, 2016, at 2B.

279. *Id.*

280. *Id.*

281. *See supra* Part III, Section B (addressing the Sixth Circuit's reasoning that people do not understand that individuals depicted in mug shots have not been convicted of criminal activity).

sites that so bothered the Sixth Circuit.[282] So too should any concerns regarding the privacy of mug shots under FOIA be resolved by means of pinpoint legislation, not via judicial decisions like *Detroit Free Press II* that broadly affect all news organizations and media outlets.

Ultimately, this article offers multiple reasons why the Sixth Circuit majority got it wrong in 2016 in *Detroit Free Press II*. The Internet should not be used as a rationale—more cynically put, an easy excuse—for expansive judicial interpretations of FOIA Exemption 7(C). Tort law, instead, provides a more logical and less technologically-centric approach for weighing privacy interests in the Internet era. It is therefore regrettable that the U.S. Supreme Court in May 2017 declined to consider the Sixth Circuit's ruling.

282. *See supra* notes 225 and 230 and accompanying text (addressing legislation targeting mug-shot websites, as well as actions by search engines and credit card companies affecting such sites).