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MY LIFE IS NOT MY OWN: DO CRIMINAL ARRESTEES' PRIVACY INTERESTS IN MUG SHOTS OUTWEIGH PUBLIC'S DESIRE FOR DISCLOSURE?

JOCELYN WATKINS*

I. INTRODUCTION

While attending a party on a summer night, imagine that you are arrested and charged with failure to disperse.¹ Not only do you think the accusation is absurd, you find that your pending mug shot is comedic. Therefore, you cock your head to the side at a goofy angle and squint when the mug shot is taken by the police officer.² Months later, you would like to forget that night. Since the charges were dropped, that might be possible, except for that accursed, easy-to-Google mug shot.³ Potential viewers include not only your friends and family, but also prospective employers and clients, unless you pay the website a substantial fee to remove the photo.⁴

Similarly, imagine that you are arrested while shopping in a local store and charged with theft. You are subsequently arraigned, booked, and your mug shot is taken. Months later, the charges are dismissed and your record is sealed—effectively removing the theft charge from your public record.⁵ Six months after the charge is removed from the public record, you win a civil judgment against the man who accused

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1. Michael McLaughlin, *Mug Shot Websites Face Lawsuit Alleging Violations of Arrestee Publicity Rights*, HUFFINGTON POST (Jan. 14, 2013), http://www.huffingtonpost.com/2013/01/14/mug-shot-websites-lawsuit-publicity-rights_n_2472607.html.

2. *Id.*

3. *Id.*

4. *Id.*

5. Christopher Connelly, *Mug Shot Websites Charge When You're Charged, For Now*, NPR (Dec. 23, 2012), <http://m.npr.org/news/U.S./167916738>.

you of theft. The court declares that the charges are erroneous and awards to you thousands of dollars in damages.⁶ Nevertheless, you find your mug shot is still online, posted on a handful of websites like Bustedmugshots.com⁷ and Justmugshots.com.⁸ To get your photo stripped from the websites and search engines, such as Google, you must pay between \$100 and \$500 per website.⁹

Stop imagining. This is the reality for Philip Kaplan and Debbie Jo Lashaway.¹⁰ Fortunately, they have each decided to fight back by filing lawsuits for infringement on publicity rights; however, their information privacy rights remain in jeopardy.

Being arrested for a crime, or suspected of committing one, is an indisputable truth about an arrestee or suspect. It is also true that most people will find this personal information embarrassing and unflattering; and that the public disclosure of which can seriously interfere with one's life and work.¹¹ Personal ties can be strained, family members shunned, current employment lost, future job prospects threatened, and social status damaged—and that's just the beginning.¹² Furthermore, the possibility that the individual is innocent of the crime, or may be found not guilty at trial, or may never be prosecuted at all, makes the damage of public access to mug shots all the more unjustifiable.¹³

There is good reason to be concerned about the routine public posting of mug shots of arrestees and suspects. Public disclosure of mug shots can damage a person's reputation and social standing in his

6. *Id.*

7. BUSTED! MUGSHOTS, <http://www.bustedmugshots.com> (last visited Mar. 11, 2014).

8. JUST MUGSHOTS, <http://www.bustedmugshots.com> (last viewed Mar. 7, 2014).

9. *Id.*

10. McLaughlin, *supra* note 1; Connelly, *supra* note 5.

11. Sadiqu Reza, *Privacy and the Criminal Arrestee or Suspect: In Search of a Right, In Need of a Rule*, 64 MD. L. REV. 755, 771 (2005).

12. *Id.*

13. *Id.* Statistics show that the percentage of state felony cases dismissed after arrest in major urban centers ranges from ten percent for driving-related offenses to forty percent for assault cases. In federal court, prosecutors decline to prosecute some thirty-five percent of suspects they investigate for violent offenses, forty-two percent of those they investigate for property offenses, and seventeen percent and thirty-four percent of those they investigate for drug and weapons offenses, respectively. Among those suspects federal prosecutors do prosecute, nearly eight percent of defendants charged with felonies and over twenty-three percent of those charged with misdemeanors find their cases dismissed at some point in the process. Statistics compiled by the F.B.I., meanwhile, have for years put the average rate of "unfounded or false" complaints of serious crimes at two percent. With some 119,000 federal suspects in a year, yielding approximately 66,000 felony defendants and 11,000 misdemeanor defendants, on top of the staggering number of over one million annual arrests just for serious felonies in state courts, the numbers involved are far from trivial. *Id.*

community. Because of this potential for harm, an individual should have some control over the public dissemination of his mug shots.¹⁴ The damage caused to a person can long outlast the relevance of his mug shot. The issue that presents itself today is whether the Freedom of Information Act (“FOIA”) Exemption 7(C) applies to mug shots. Currently, there is a split within the federal circuits as to whether criminal arrestees’ privacy interests in their mug shots outweigh the public’s interest in viewing the mug shots.

This Comment compares arrestees’ privacy interests in mug shots with the public’s interest in the dissemination of the information based on the FOIA Exemption 7(C). Part II of this Comment will shape the context of the analysis through the lenses of information privacy and criminal arrestees’ rights. Specifically, Part II will establish the evolution of the right to privacy from its inception in the Bill of Rights to the current statutory language of FOIA Exemption 7(C). Additionally, Part II will proffer that there should be a privacy right for criminal arrestees based upon similarly-existing rights for others in the criminal process, while admitting that no express right currently exists for criminal arrestees. Part II concludes with the acknowledgment of the circuit split at the appellate level regulating whether mug shots qualify for protection based on FOIA Exemption 7(C).

Further, Part III will analyze the nuanced reasonings among the different circuits; specifically, the *Detroit Free Press, Inc. v. U.S. Department of Justice*,¹⁵ *Karantalis v. U.S. Department of Justice*,¹⁶ and *World Publishing Company v. U.S. Department of Justice*.¹⁷ Each case will be analyzed in accordance with that circuit’s respective method of application of the three-part test for use of the FOIA Exemption 7(C). Additionally, this Comment argues why criminal arrestees should retain privacy interests in their mug shots. Finally, this Comment

14. *Id.* (“It is a truth about a person, the public disclosure of which can damage the person; because of this damage, it is a truth over the public dissemination of which an individual should have some control.”).

15. *Detroit Free Press, Inc. v. U.S. Dep’t of Justice*, 73 F.3d 93 (6th Cir. 1996) (holding that disclosure of mug shots of subjects of federal grand jury indictments could not be reasonably expected to constitute an unwarranted invasion of personal privacy where the individuals were already indicted, who had already made court appearances after their arrests, and whose names had already been made public in connection with an ongoing criminal prosecution).

16. *Karantalis v. U.S. Dep’t of Justice*, 635 F.3d 497 (11th Cir. 2011) (holding that the mug shots were properly withheld because they were gathered for law enforcement purposes and disclosing them would constitute and unwarranted invasion of personal privacy).

17. *World Publ’g Co. v. U.S. Dep’t of Justice*, 672 F.3d 825 (10th Cir. 2012) (holding that detainees had a privacy interest in their mug shots, and the privacy interest in those mug shots outweighed public interest in disclosure).

proposes a standard analysis for courts to apply in determining under what circumstances the public interest in the dissemination of mug shots and transparency of executive agencies outweigh the privacy interests of criminal arrestees.

II. BACKGROUND

A. ESTABLISHING A RIGHT TO PRIVACY

The United States Constitution contains no express right to privacy. The Bill of Rights, however, reflects the concern for protecting specific aspects of privacy, such as the privacy of beliefs,¹⁸ privacy of the home,¹⁹ privacy of the person and possessions,²⁰ privilege against self-incrimination,²¹ and a more general protection for privacy.²²

The question of whether the Constitution protects privacy in ways not expressly provided in the Bill of Rights is controversial. Beginning in 1923 and continuing through recent decisions,²³ the United States

18. U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances.”).

19. U.S. CONST. amend. III (“No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.”).

20. The Fourth Amendment of the U.S. Constitution states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be search, and the persons or things to be seized.

U.S. CONST. amend. IV.

21. The Fifth Amendment of the U.S. Constitution states:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V.

22. U.S. CONST. amend. IX (“The enumeration of the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”).

23. *Meyer v. Nebraska*, 262 U.S. 309 (1923) (allowing for the right of parental control to extend to the type of education that their children receive); *see Griswold v. Connecticut*, 381 U.S. 479 (1965) (extending the right to privacy to include a person’s interest in using birth control); *see also Stanley v. Georgia*, 394 U.S. 557 (1969) (deciding that the mere private possession of obscene material did not constitute a crime); *see also, Moore v.*

Supreme Court has broadly read the “liberty” guarantee of the Fourteenth Amendment²⁴ to guarantee a broad right to privacy.²⁵

While there is no exact definition of privacy, a law school treatise from Israel proposed a working definition for a “right to privacy:”

The right to privacy is our right to keep a domain around us, which includes all those things that are part of us, such as our body, home, property, thoughts, feelings, secrets and identity. The right to privacy gives the ability to choose which parts in this domain can be accessed by others, and to control the extent, manner and timing of the use of those parts we choose to disclose.²⁶

Regardless of the precise definition, the United States Constitution has protected individuals’ “right to privacy.” Throughout time, the right to privacy has expanded to cover a broader array of topics while the scope of the permissible infringements on this right has narrowed.

B. WHAT IS INFORMATION PRIVACY?

Information privacy is a person’s control over the dissemination of information about himself to others.²⁷ Warren and Brandeis’ plea for a “right to be let alone”²⁸ has generated a vast body of federal and state statutes that protect individuals from the public disclosure of personal information by government officials or fellow citizens.²⁹

East Cleveland, 431 U.S. 494 (1977) (protecting the right of individuals to live together as a family unit); *see also* Lawrence v. Texas, 539 U.S. 559 (2003) (protecting the right to intimate sexual conduct between consenting adults).

24. U.S. CONST. amend. XIV (“No State shall . . . deprive any person of life, liberty or property without due process of law.”).

25. The rights governed by the Due Process clause are those related to privacy. It is really the right people have to make decisions about highly personal matters. These rights derive indirectly from several Bill of Rights guarantees, which collectively create a “penumbra” or “zone” of privacy. *See* Griswold v. Connecticut, 381 U.S. 479, 484 (1965); *see also* Roe v. Wade, 410 U.S. 113, 152 (1973).

26. Yael Onn, et al., *Privacy in the Digital Environment*, in 7 THE HAIFA CENTER OF LAW AND TECHNOLOGY PUBLICATION SERIES, 1-12 (Niva Elkin-Koren & Michael Birnhack, eds. 2005).

27. *See, e.g.*, U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 763 (1989) (“[B]oth the common law and the literal understandings of privacy encompass the individual’s control of information concerning his or her person.”); Daniel J. Solove, *Conceptualizing Privacy*, 90 CAL. L. REV. 1088, 1109-15 (2002) (defining information privacy).

28. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890).

29. *See* DANIEL J. SOLOVE & MARC ROTENBERG, INFORMATION PRIVACY LAW 22-25 (2003) (listing various federal privacy statutes); Jonathan B. Mintz, *The Remains of Privacy’s Disclosure Tort: An Exploration of the Private Domain*, 55 MD. L. REV. 425, 432-35 (1996) (citing various state privacy statutes); William L. Prosser, *Privacy*, 48 CAL. L. REV.

Justifications for these protections vary, and include, but are not limited to the maintenance of an individual's identity, maintenance of a community, continual development of intimacy, and preservation of individual autonomy.³⁰ Within these justifications is the notion that information privacy is about one's ability to protect his reputation.³¹ An individual is able to do so by maintaining control over information about his actions, habits, character, and other personal matters.³² Disclosing such information might prove embarrassing or unflattering to him and might thus interfere with his personal relationships or his professional standing.³³ However, flattering information is nevertheless subject to privacy protection as well.³⁴ Whatever the content of information, privacy means the individual's control over how, when, and to whom information is divulged. Moreover, information about a person need not be false or misleading in order to invoke privacy protection. While the common law privacy doctrine does encompass this possibility, its overwhelming focus is on truthful or accurate information about a person.³⁵ In other words, the land of information privacy is a land of truths about a person that the person has a right to keep others from knowing.³⁶

383, 392-98 (1960) (reviewing state court decisions finding invasions of privacy actionable).

30. See, e.g., JEFFREY ROSEN, *THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA* 215 (2000). Jeffrey Rosen states, "privacy is important not only . . . to protect individual autonomy but also to allow individuals to form intimate relationships . . . Friendship and romantic love can't be achieved without intimacy, and intimacy, in turn, depends upon the selective and voluntary disclosure of personal information that we don't share with everyone else." *Id.* ("The ideal of privacy . . . insists that individuals should be allowed to define themselves, and to decide how much of themselves to reveal or conceal in different situations.")

31. *Time, Inc. v. Hill*, 385 U.S. 374, 384 (1967).

32. *Id.*

33. *Id.* ("In the 'right of privacy' cases the primary damage is the mental distress from having been exposed to public view, although injury to reputation may be an element bearing upon such damage.")

34. *Id.* ("[T]he published matter need not be defamatory . . . and might even be laudatory and still warrant recovery.")

35. The "false light" tort deals expressly with the dissemination of false or misleading information about a person, providing an action for statements that unreasonably place a person in a false light before the public. RESTATEMENT (SECOND) OF TORTS § 652E (1977). Liability under that tort is generally deemed subject to the rule and progeny of *New York Times v. Sullivan*, which held that the First Amendment forbids recovery in defamation suits brought by public figure plaintiffs absent proof that the defendant published the falsehood knowingly or with reckless disregard for the truth. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-80; see also RESTATEMENT (SECOND) OF TORTS § 652E cmt. d (discussing the *Sullivan* Court's holding).

36. See generally SOLOVE & ROTENBERG, *supra* note 29, at 1-33.

C. INFORMATION PRIVACY BEFORE FREEDOM OF INFORMATION LAWS

At common law, English courts rarely encountered cases involving an individual seeking to gain access to government documents.³⁷ In certain limited circumstances, English courts recognized that the public could inspect certain government records.³⁸ As such, early American courts followed the English practice.³⁹ Conversely, many jurisdictions established that an individual seeking to inspect non-court records for the general public interest (to expose graft or corruption or to bring government activities into the sunlight) could not bring suit in her own name; rather, only the Attorney General could bring an action on her behalf.⁴⁰ However, if the person had a “special interest” in examining the records (i.e., to provide evidence in a legal proceeding), the individual could bring a petition for mandamus on her own.⁴¹ Accordingly, one court articulated the rule in 1882 as follows:

The individual demanding access to, and inspection of public writings must not only have an interest in the matters to which they relate, a direct, tangible interest, but the inspection must be sought for some specific and legitimate purpose.⁴²

Under more modern common law rule in many jurisdictions, a person can inspect public records when the purpose is not improper and access is not harmful to others.⁴³ One of the most commonly mentioned improper purposes for accessing public records was “to satisfy idle curiosity or for the purpose of creating a public scandal.”⁴⁴

37. See HAROLD L. CROSS, *THE PEOPLE’S RIGHT TO KNOW* 25 (1953).

38. Daniel J. Solove, *Access and Aggregation: Public Records, Privacy and the Constitution*, 86 MINN. L. REV. 1138, 1153 (2002). In certain limited circumstances, English courts recognized that the public could inspect certain government records. If an individual were denied the ability to inspect, she could seek enforcement of her right through mandamus; however, there were several restrictions on the ability to use mandamus to obtain access to records. Individuals could not bring mandamus on their own and had no right to access government documents for their own personal purposes. There was a narrow exception to this rule, however, when the seeker of a record needed to obtain it for use in litigation. Courts would generally “not issue extraordinary writ of mandamus to enforce a private right of inspection, unless the purpose was to use it in some pending or prospective suit. *Id.* (quoting *Nowack v. Fuller*, 219 N.W. 749, 750-51 (Mich. 1928)).

39. See CROSS, *supra* note 37.

40. *Norwack*, 219 N.W. at 751.

41. *Id.*

42. *Brewer v. Watson*, 71 Ala. 299, 305 (1882).

43. See CROSS, *supra* note 37. “We cannot find any valid basis in our society for the imposition of the requirement of the interest stated in the common-law rule as a prerequisite to the right to inspect public records.” *City of St. Matthews v. Voice of St. Matthews, Inc.*, 519 S.W.2d 811, 815 (KY. Ct. App. 1974).

44. *Voice of St. Matthews, Inc.*, 519 S.W.2d at 815; *Husband, C. v. Wife, C.*, 320 A.2d 717, 723 (Del. 1974) (characterizing the common law approach as permitting ac-

Therefore, government officials could deny access to information based on the person's reason for seeking the information. Currently, however, this discretion has been significantly reduced by state and federal freedom of information laws.

D. INFORMATION PRIVACY AND THE CRIMINAL ARRESTEE

The common law species of information privacy—protecting individuals against embarrassment or other harm from the disclosure of personal information about them to the public—is no stranger to criminal proceedings.⁴⁵ This privacy concern underlies the combination of statutory protection and media self-restraint that keeps the names of sexual assault victims and complainants from the public.⁴⁶ Similar information privacy concerns explain the routine exclusion of the public from juvenile delinquency proceedings, the sealing of juvenile records, and media policies forbidding the naming of juvenile offenders and accusees.⁴⁷ The Supreme Court has endorsed the notion that a person's privacy interest in "avoiding disclosure of personal matters" extends to his criminal record,⁴⁸ and on this basis the Court has repeatedly and unequivocally upheld restrictions on public access to arrest records.⁴⁹ The Court also recognizes a person's interest in preventing disclosure of the fact of mere criminal suspicion of him. Reason No. 5 in the Court's classic justification of grand jury secrecy is "to protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt."⁵⁰

All of these parties to the criminal process have a recognized right to keep information about their involvement in criminal proceedings from the public.⁵¹ For these parties, this right sounds in privacy doctrine, specifically information privacy of common law origin.

cess to judicial records if a person "has an interest therein for some useful purpose and not for mere curiosity").

45. Reza, *supra* note 11.

46. *Id.* (discussing Michelle Johnson, *Protecting Child Sex-Crime Victims: How Public Opinion and Political Expediency Threaten Civil Liberties*, 20 SEATTLE U. L. REV. 401 (1997)).

47. Reza, *supra* note 11 (almost every state permits or requires judges to exclude the public from juvenile delinquency proceedings and prohibits public disclosure of those proceedings' records).

48. U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 762 (1989) (quoting *Whalen v. Roe*, 429 U.S. 589, 599 (1977)).

49. Reza, *supra* note 11.

50. *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958) (quoting *United States v. Rose*, 215 F.2d 617, 628-29 (3d Cir. 1954)).

51. Reza, *supra* note 11.

The information protected by this privacy right pertains to an individual's identity, i.e., the very fact of one's involvement in the criminal process.⁵² It would seem to follow that a person who is arrested for a crime or suspected of committing a crime has a similar right to prevent public access to his mug shots.

An arrestee's privacy interest in non-disclosure of his identity is not entirely unrecognized.⁵³ Indeed, every so often, a government official invokes this interest in not naming an accusee of some kind, but the interest apparently arises only when officials decide it should.⁵⁴ The government's assertion of a privacy interest to justify withholding the names of arrestees and other accusees when it so chooses only confirms the absence of an *established* right.⁵⁵ Discretionary withholding of decisions by the government do not confer a right of anonymity for arrestees and suspects any more than they create a rule that governs when and how that right is invoked.

E. FOIA

State legislatures have gradually replaced or supplemented the court-created rights of the nineteenth and early twentieth centuries with open records statutes, which generally mandate open access.⁵⁶ These statutes are often titled, or referred to as "freedom of

52. *Id.*

53. *Id.* One of the arguments the U.S. Department of Justice put forward to justify withholding the names of hundreds of individuals arrested and detained on immigration charges following the attacks of September 11, 2001 was the privacy interest in not naming the accused. *Id.*

54. *Compare, e.g.,* Douglas Jehl & Eric Schmitt, *Dogs and Other Harsh Tactics Linked to Military Intelligence*, N.Y. TIMES, May 22, 2004, at A1 (reporting that an Army spokesman, "citing privacy concerns," declined to identify military intelligence soldiers fined and demoted for incidents of abuse at Iraq's Abu Ghraib prison), *with* David Johnston, *Threats and Responses: The Inquiry; U.S. Questions Saudi Friend of Hijackers*, N.Y. TIMES, Aug. 5, 2003, at A8 (noting that "government officials" disclosed an F.B.I. interview of a named but not arrested Saudi Arabian citizen "identified by Congressional investigators" as "a likely intelligence operative for Riyadh who befriended two of the 9/11 hijackers in California" before the 9/11 attacks).

55. Note that the government quickly issued a regulation to justify withholding the names of the post-September 11 immigration arrestees. *See* 8 C.F.R. § 236.6 (2004) (barring the disclosure of names of all immigration arrestees, and any other information about them, on grounds of detainee privacy and national security).

56. *See* Roger A. Nowadzky, *A Comparative Analysis of Public Records Statutes*, 28 URB. LAW. 65, 69-70 (1996) (acknowledging that while some states' FOIAs replaced the common law, courts in some states have held that the state's FOIA operates as an additional right of access to the common law); Jason Lawrence Cagle, Note, *Protecting Privacy on the Front Page: Why Restrictions on Commercial Use of Law Enforcement Records Violate the First Amendment*, 52 VAND. L. REV. 1421, 1422 n.2 (1999).

information,” “open access,” “right to know,” or “sunshine” laws.⁵⁷ States were initially slow in enacting statutory public access rights; by 1940, only twelve states had open records statutes.⁵⁸

In 1946, the Federal Administrative Procedures Act (“APA”) contained a limited provision for disclosure of government records.⁵⁹ However, under section 3 of the APA, information could be withheld if it involved “any function of the United States requiring secrecy in the public interest” or was “required for good cause to be held confidential.”⁶⁰ The FOIA replaced section 3 of the APA of 1946,⁶¹ which ostensibly served as a public information provision to permit the public to gain access to federal records.⁶²

In 1966, Congress passed the FOIA, dramatically reforming public access to government records.⁶³ According to the Senate Report for the FOIA, the APA was “full of loopholes which allowed agencies to deny legitimate information to the public” and that information was often “withheld only to cover up embarrassing mistakes or irregularities.”⁶⁴ Upon signing the FOIA into law, President Lyndon Johnson declared:

This legislation springs from one of our most essential principles: A democracy works best when the people have all the information that the security of the Nation permits. No one should be able to pull curtains of secrecy around decisions which can be revealed without injury to the public interest.⁶⁵

As Fred Cate observes, the FOIA serves the following three purposes: “(1) ensure public access to the information necessary to evaluate the conduct of government officials; (2) ensure public access to information concerning public policy; and (3) protect against secret laws,

57. Nowadzky, *supra* note 56, at 91; *see also* Wilson v. McNeal, 575 S.W.2d 802, 804 (Mo. App. 1978) (citing “Missouri’s Sunshine Law, Chapter 610, RSMo Cum.Supp.1975”).

58. William Randolph Henrick, Comment, *Public Inspection of State and Municipal Documents: “Everybody, Practically Everything, Anytime, Except . . .”*, 45 FORDHAM L. REV. 1105, 1108 (1977).

59. 5 U.S.C. § 1002 (1946).

60. *Id.* superseded by the FOIA, 5 U.S.C. § 552 (2000).

61. *Id.*

62. S. REP. NO. 89-813, at 3 (1965).

63. Solove, *supra* note 38, at 1158.

64. S. REP. NO. 89-813, at 3. The House Report likewise noted that under § 3 of the APA, “[g]overnment agencies whose mistakes cannot bear public scrutiny have found ‘good cause’ for secrecy.” H.R. REP. NO. 89-1497 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2418, 2423.

65. 2 Public Papers of the Presidents of the United States: Lyndon B. Johnson 699 (1967), *quoted in* H.R. REP. NO. 104-795, at 8 (1996), *reprinted in* 1996 U.S.C.C.A.N. 3448, 3451.

rules and decision making.”⁶⁶ The FOIA embodies a strong presumption “of full agency disclosure” based on the principle that the “public as a whole has a right to know what its Government is doing.”⁶⁷ However, such a liberal presumption in favor of disclosure is not without its costs. Justice Antonin Scalia, then a Professor of Law at the University of Chicago, referred to the FOIA as “the Taj Mahal of the Doctrine of Unanticipated Consequences, and the Sistine Chapel of Cost Benefit Analysis Ignored.”⁶⁸

Under FOIA, “any person” (including associations, organizations, and foreign citizens) may request “records” maintained by an executive agency.⁶⁹ FOIA, however, does not apply to records kept by Congress or the Judiciary.⁷⁰ Accordingly, requesting parties of records do not need to state a reason for requesting such records.⁷¹ Currently, all fifty states have open records statutes, a majority of which are modeled after the FOIA. Similar to the federal FOIA, state FOIAs are justified by a strong commitment to openness and transparency.⁷²

Nevertheless, open access laws never mandate absolute disclosure.⁷³ The federal FOIA contains nine enumerated exemptions to disclosure, two of which pertain to privacy.⁷⁴ Referring to these privacy concerns in particular, the Senate report that accompanied the original FOIA legislation declared, “success lies in providing a workable formula which encompasses, balances, and protects all interests, yet places

66. Fred H. Cate, D. Annette Fields, & James K. McBain, *The Right to Privacy and the Public's Right to Know: The "Central Purpose" of the FOIA*, 46 ADMIN. L. REV. 41, 65 (1994).

67. S. REP. NO. 89-813, at 5 (1965).

68. Antonin Scalia, *The FOIA Has No Clothes*, REGULATION, March/April 1982, at 14, 15.

69. 5 U.S.C. § 552(a)(3)(A) (2000).

70. *Id.* at § 552(f).

71. *See, e.g.*, U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 771 (1989).

72. *See generally* Solove, *supra* note 38, at 1159. “Many states, following FOIA, eliminated the common law requirement of [requesting parties] establishing an interest in obtaining the records. Indeed, the federal FOIA and many state FOIAs allow information to be obtained by anybody for any reason. Most state FOIAs contain a presumption in favor of disclosure.” *Id.* at 1161-62.

73. Martin E. Halstuk, *When is an Invasion of Privacy Unwarranted Under the FOIA?*, 16 U. FLA. J.L. & PUB. POL'Y 361, 369, (2005). Martin Halstuk states:

Although the FOIA carries a clear presumption of openness, the public's interest in government-held information is not all-encompassing. While Congress recognized that citizens in a participatory democracy must have access to government information in order to make informed and meaningful decisions, lawmakers also acknowledged that confidentiality is sometimes necessary for the effective functioning of the government and the protection of individuals and businesses.

Id.

74. *See* 5 U.S.C. § 552(b)(1)-(9) (2000).

emphasis on the fullest responsible disclosure.”⁷⁵ Of the nine exemptions to disclosure, Exemptions 6 and 7(C) focus on “unwarranted” invasions of privacy and reflect congressional efforts to balance the individual’s interest in privacy against the public’s interest in disclosure.⁷⁶ Exemption 6 exempts from disclosure “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.”⁷⁷ Unlike Exemption 6, Exemption 7(C) was not included in the original FOIA statute but was added in the 1874 amendments.⁷⁸ Exemption 7(C) pertains to the disclosure of “records or information compiled for law enforcement purposes . . . [which] could reasonably be expected to constitute an unwarranted invasion of personal privacy.”⁷⁹

In resolving an Exemption 7(C) dispute, the courts use a two-prong approach to decide whether a record can be disclosed. First, the document must have been compiled for law enforcement purposes. Second, the government must prove that the disclosure “could reasonably be expected to constitute an unwarranted invasion of privacy.”⁸⁰

Apart from failure to disclose the requested documents, the government can take other measures to effectively remedy the invasion of privacy. If possible, private information can be deleted from records and the redacted records disclosed to the requesting party.⁸¹ The federal FOIA does not require that a person be given notice that his personal information is encompassed within a FOIA request.⁸² Even if an individual finds out about the request, he has no right under FOIA to prevent or second-guess an agency’s decision to disclose the records. Moreover, FOIA does not require that the government withhold information.⁸³

75. S. REP. NO. 89-813, at 3 (1965).

76. Halstuk, *supra* note 73, at 371.

77. 5 U.S.C. § 552(b)(6) (2000).

78. Halstuk, *supra* note 73, at 371.

79. 5 U.S.C. § 552(b)(7)(C) (2000).

80. See *F.B.I. v. Abramson*, 456 U.S. 615, 622 (1982) (discussing that this analysis is a “two-part” inquiry).

81. See 5 U.S.C. § 552(b) (2000).

82. Heather Harrison, Note, *Protecting Personal Information from Unauthorized Government Disclosures*, 22 MEMPHIS ST. U. L. REV. 775, 787 (1992).

83. Cate, Fields, & McBain, *supra* note 66, at 49; Paul M. Schwartz, *Privacy and Participation: Personal Information and Public Sector Regulation in the United States*, 80 IOWA L. REV. 553, 593 (1995).

F. CIRCUIT SPLIT

The standing issue has thus developed into whether a criminal arrestee's privacy right in his mug shot outweighs the public's right to view it. Over the past sixteen years, the Sixth, Tenth and Eleventh Circuits have rendered one decision each that adds to a circuit split. The Tenth and Eleventh circuits are aligned in that both recognize a privacy right in mug shots. Conversely, the Sixth Circuit has concluded that no such right exists.⁸⁴ The following cases comprise the circuit split: *Detroit Free Press, Inc. v. U.S. Department of Justice*,⁸⁵ *Karantalis v. U.S. Department of Justice*,⁸⁶ and *World Publishing Company v. U.S. Department of Justice*.⁸⁷ In each of these cases, a newspaper or freelance reporter sought to compel the release of mug shots of arrestees from the U.S. Marshall Service pursuant to FOIA. The Marshall Service declined to release the photos because the requests fell within one of the enumerated exceptions to FOIA.

In determining whether a record is exempt from FOIA disclosure under Exemption 7(C),⁸⁸ a court must consider the following: (1) if the information was gathered for a law enforcement purpose; (2) whether there is a personal privacy interest at stake; and (3) if there is a balance between the privacy interest versus the interest in disclosure.⁸⁹ *Detroit Free Press, Inc.*⁹⁰ is the only federal circuit case that holds criminal arrestees do not have a privacy interest in their mug shots. To the contrary, *Karantalis*⁹¹ and *World Publishing Company*⁹² found that criminal arrestees do have a privacy interest and affirmed decisions not to

84. Prisoners' Privacy Interest in Mug Shots Outweighs Public's Desire to View Them, 80 U.S.L.W 1143 (2012) [hereinafter Prisoners' Privacy].

85. *Detroit Free Press, Inc. v. U.S. Dep't of Justice*, 73 F.3d 93, 99 (6th Cir. 1996) (holding that disclosure of mug shots of subjects of federal grand jury indictments could not be reasonably expected to constitute an unwarranted invasion of personal privacy where the individuals were already indicted, who had already made court appearances after their arrests, and whose names had already been made public in connection with an ongoing criminal prosecution).

86. *Karantalis v. U.S. Dep't of Justice*, 635 F.3d 497, 504 (11th Cir. 2011) (holding that the mug shots were properly withheld because they were gathered for law enforcement purposes and disclosing them would constitute an unwarranted invasion of personal privacy).

87. See generally *World Publ'g Co. v. U.S. Dep't of Justice*, 672 F.3d 825 (10th Cir. 2012) (holding that detainees had a privacy interest in their mug shots, and the privacy interest in those mug shots outweighed public interest in disclosure).

88. 5 U.S.C. § 552(b)(7)(C) (2000).

89. *World Publ'g Co.*, 672 F.3d at 825.

90. *Detroit Free Press, Inc.*, 73 F.3d at 93.

91. *Karantalis*, 635 F.3d at 497.

92. *World Publ'g Co.*, 672 F.3d at 825.

release detainees' booking photos.⁹³

This circuit split is the current state of the law regarding whether FOIA Exemption 7(C) applies to mug shots. As a result, we are left with the lingering question of whether criminal arrestees have privacy interests in mug shots; and if so, whether that interest outweighs the public's interest in disclosure.

III. ANALYSIS

The FOIA Exemption 7(C) applies to mug shots of criminal arrestees. In coming to this conclusion, one must recognize that criminal arrestees have a privacy interest in their mug shots. Once arrestees' privacy interests are given proper acknowledgement, the court can properly balance the privacy interest against the public interest in disclosure. *Detroit Free Press, Inc.*,⁹⁴ *Karantsalis*,⁹⁵ and *World Publishing Company*⁹⁶ exhibit a chronological development of appellate court analysis of criminal arrestees' privacy interests in mug shots. While the Sixth Circuit originally held that criminal arrestees did not have a privacy interest in their mug shots, the Tenth and Eleventh Circuit later strayed from that line of reasoning and held in favor of privacy interests for criminal arrestees in their mug shots. This Comment will analogize the aforementioned cases to show that criminal arrestees have privacy interests that outweigh public interests in disclosure when assessing the language of the FOIA Exemption 7(C) and the relevant policy arguments.

A. FURTHER UNDERSTANDING FOIA EXEMPTION 7(C)

Privacy, in the context of Exemption 7(C), is related not only to intimate personal facts but also to the individual's interest in being free from the adverse consequences of public knowledge that he or she is involved with a government law enforcement agency.⁹⁷ The FOIA Exemption 7(C) applies to prevent great embarrassment or stigmatization of persons on inherently private activities.⁹⁸

Exemption 7(C) provides an exemption when the release of documents "could reasonably be expected to constitute an unwarranted invasion of personal privacy."⁹⁹ Prior to 1986, Exemption 7(C) applied to

93. *Prisoners' Privacy*, *supra* note 84.

94. *Detroit Free Press, Inc.*, 73 F.3d at 93.

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

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

97. *Wash. Post Co. v. U.S. Dep't of Justice*, 863 F.2d 96, 100 (D.C. Cir. 1988).

98. *Coulter v. Reno*, 163 F.3d 605, 605 (9th Cir. 1998).

99. 5 U.S.C. § 552(b)(7)(C) (2000).

disclosures that “would constitute” an invasion of privacy.¹⁰⁰ In 1986, Congress amended Exemption 7(C), substituting “could reasonably be expected to constitute” for the phrase “would constitute.”¹⁰¹ In the Supreme Court’s view, the amendment represented a congressional effort:

to ease considerably a Federal law enforcement agency’s burden in invoking [Exemption 7]. In determining the impact on personal privacy from disclosure of law enforcement records or information, the stricter standard of whether such disclosure “would” constitute an unwarranted invasion of such privacy gives way to the more flexible standard of whether such disclosure “could reasonably be expected to” constitute such an invasion.¹⁰²

The Supreme Court in *U.S. Department of Justice v. Reporters Committee for Freedom of the Press*¹⁰³ enunciated three principles to govern application of the 7(C) Exemption. First, the documents must have been compiled for law enforcement purposes, and the government must prove that disclosure “could reasonably be expected to constitute an unwarranted invasion of privacy.”¹⁰⁴ “Unwarranted” means an invasion that is unjustifiable in the view of the court.¹⁰⁵ Disclosure is “warranted” for purposes of the public oversight of agency actions.¹⁰⁶ The statutory term, “unwarranted” requires courts to balance the asserted privacy interests against the potential public interest in disclosure.¹⁰⁷ In *Reporters Committee*, the Supreme Court ruled unanimously, “whether disclosure of a private document under Exemption 7(C) is warranted must turn on the nature of the requested document and its relationship to the basic purpose of the FOIA to open agency action to the light of public scrutiny.”¹⁰⁸ “[The Act] indeed focuses on the citizens’ right to be informed about ‘what their government is up to’” and “the 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.”¹⁰⁹

100. Cate, Fields, & McBain, *supra* note 66, at 52.

101. *Id.*

102. *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 756 n.9 (1989).

103. *Id.* at 749.

104. Halstuk, *supra* note 73, at 372.

105. *Providence Journal Co. v. U.S. Dep’t of Army*, 981 F.2d 552, 568 (1st Cir. 1992).

106. *Church of Scientology of Tex. v. I.R.S.*, 816 F. Supp. 1138, 1158 (W.D. Tex. 1993).

107. *Martin v. U.S. Dep’t of Justice*, 488 F.3d 446, 457 (D.C. Cir. 2007).

108. *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 772 (1989) (quoting *Dep’t of Air Force v. Rose*, 425 U.S. 352, 372 (1976)).

109. Cate, Fields, & McBain, *supra* note 66, at 52.

The second question to ask in determining whether disclosure is unwarranted is whether there is any privacy interest in the information sought. Only where a privacy interest is implicated does the public interest for which the information will serve become relevant and require a balancing of the competing interests. The Supreme Court has explained that such privacy interests include the individual interest in avoiding disclosure of personal matters. Information such as names, addresses, and other personal information falls within the ambit of privacy concerns under FOIA.¹¹⁰

The third question to ask in determining whether disclosure is unwarranted is whether the privacy interest outweighs the public interest in disclosure. The privacy interest of a person is lessened if the information is or has been on the public record, but the interest is not defeated.¹¹¹ Privacy interests must be considered under an analysis consistent with *Reporters Committee*. The analysis must be flexible and measured in light of particular circumstances in each case.¹¹² A court must balance the public interest in disclosure against the interest Congress intended the Exemption to protect. Disclosure is in the public interest when it is “likely to contribute significantly to public understanding of the operations or activities of the government.”¹¹³ The only public interest relevant for purposes of Exemption 7(C) is one that focuses on the citizens’ right to be informed about what their government is up to.¹¹⁴ If the public interest is government wrongdoing, then the requesting party must produce evidence that would warrant a belief by a reasonable person that alleged government impropriety might have occurred.¹¹⁵

110. *Associated Press v. U.S. Dep’t of Defense*, 554 F.3d 274, 285 (2d Cir. 2009); see *Rose*, 425 U.S. at 380-81 (recognizing privacy interest in identifying information about cadets redacted from case summaries arising out of ethics hearings at the Air Force Academy); *U.S. Dep’t of State v. Ray*, 502 U.S. 164, 175-77 (1991) (reasoning privacy interest in names of interviewees is significant where their names could then be linked to other personal information in the interviews).

111. *Reporters Comm. for Freedom of Press*, 489 U.S. at 762-63.

112. *Id.* at 749.

113. *Id.* at 775.

114. *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989).

115. *Lasko v. U.S. Dep’t of Justice*, 684 F. Supp. 2d 120, 132 (D.D.C. 2010); *Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157, 174 (2004) (requiring that the requesting party produce evidence that would warrant a belief by a reasonable person that government impropriety had occurred).

B. FOIA EXEMPTION 7(C) ANALYSIS

Detroit Free Press, Inc., Karantsalis, and World Publishing Company are the trilogy of appellate decisions discerning whether criminal arrestees' mug shots are exempt from disclosure as an unwarranted invasion of privacy based on FOIA Exemption 7(C). Contrary to the holding in *Detroit Free Press*, the application of Exemption 7(C) to mug shots changed direction when the Eleventh Circuit decided that criminal arrestees do have a privacy interest in their mug shots that is not outweighed by the public's interest in dissemination of the photos in *Karantsalis*. That holding was solidified when the Tenth Circuit decided *World Publishing Company* just one year later. A step-by-step analysis of the FOIA Exemption 7(C) test will lay the building blocks to assert privacy rights for the criminal arrestee.

1. Criminal Arrestees' Mug Shots were Compiled for Law Enforcement Purpose

In *Detroit Free Press*, pursuant to the FOIA,¹¹⁶ the Free Press sought the release of mug shots of eight named individuals who were under indictment and awaiting trial on federal charges.¹¹⁷ The court provided little analysis on whether the information was "compiled for law enforcement purposes." Instead, the court relied on a *per se* rule created in *Jones v. F.B.I.*, "under which records compiled by a law enforcement agency qualify as 'records compiled for law enforcement purposes' under FOIA."¹¹⁸ The court's use of the *per se* rule is proper because close inspection reveals that the *per se* rule closely comports with the policies Congress enacted in FOIA and the goal of "opening agency action to the light of public scrutiny."¹¹⁹ Rejecting the *per se* rule in lieu of a more stringent test would protect government action from public

116. 5 U.S.C. § 552 (2000).

117. *Detroit Free Press, Inc. v. U.S. Dep't of Justice*, 73 F.3d 93, 95 (6th Cir. 1996).

118. *Jones v. F.B.I.*, 41 F.3d 238, 245-46 (6th Cir. 1994). The First, Second and Eighth Circuits have adopted the *per se* rule that records compiled by law enforcement agencies qualify as records compiled for law enforcement purposes. See *Irons v. Bell*, 596 F.2d 468, 473-75 (1st Cir. 1979); *Curran v. U.S. Dep't of Justice*, 813 F.2d 473, 475 (1st Cir. 1987); *Williams v. F.B.I.*, 730 F.2d 882, 884-85 (2d Cir. 1984); *Ferguson v. F.B.I.*, 957 F.2d 1059, 1070 (2d Cir. 1992); *Kuehnert v. F.B.I.*, 620 F.2d 662, 666 (8th Cir. 1980). However, the D.C. Circuit has rejected this analysis and has adopted a "rational nexus" rule: in order for documents stemming from an investigation to be withheld under any of the (b)(7) exemptions, the agency must demonstrate that there is a "nexus between the investigation and one of the agency's law enforcement duties [that is] based on information sufficient to support at least 'a colorable claim' of its rationality." *Pratt v. Webster*, 673 F.2d 408, 421 (D.C. Cir. 1982). The Ninth Circuit appears to have adopted this rational as well. *Wiener v. F.B.I.*, 943 F.2d 972, 985 (9th Cir. 1991).

119. *Jones*, 41 F.3d at 245-46.

scrutiny in all cases, not just where there is an infringement on personal privacy.¹²⁰ Therefore, the threshold requirement is satisfied.

Similarly, in *World Publishing Company* and *Karantsalis*, the appellate courts exerted little or no analysis to whether the mug shots were compiled for law enforcement purposes. Even without using the *per se* rule established in *Jones*, the Tenth and Eleventh Circuits satisfied the threshold requirement for Exemption 7(C) analysis because it was undisputed that the photos were in fact taken for a “law enforcement purpose.”¹²¹ In *World Publishing Company*, on August 26, 2008, Tulsa World sent a FOIA request to the U.S. Marshals Service requesting mug shots of six pretrial detainees.¹²² The Tenth Circuit did not analyze whether the mug shots were compiled for law enforcement purposes because, in the court’s opinion, it was undisputed that the photos were in fact taken for a “law enforcement purpose.”¹²³ In *Karantsalis*, on July 11, 2009, Karantsalis¹²⁴ sent an email to the U.S. Marshals Service requesting copies of the mug shot photos of Luis Giro pursuant to the FOIA.¹²⁵ Karantsalis acknowledged that the photographs were compiled for law enforcement purposes.¹²⁶ As such, the Eleventh Circuit agreed that the photographs were compiled for law enforcement purposes.

Despite employing a *per se* rule analysis in *Detroit Free Press*, no analysis in *World Publishing Company* and minimal analysis in *Karantsalis*, each court plainly proclaimed that criminal arrestees’ mug shots are documents compiled for law enforcement purposes; therefore, these photos meet the minimum threshold for Exemption 7(C) analysis.

120. *Id.*

121. *World Publ’g Co. v. U.S. Dep’t of Justice*, 672 F.3d 825, 827 (10th Cir. 2012); *Karantsalis v. U.S. Dep’t of Justice*, 635 F.3d 497, 502 (11th Cir. 2011).

122. *World Publ’g Co.*, 672 F.3d at 826.

123. *Id.* at 827.

124. Karantsalis is a self-described freelance reporter who posted on www.linkin.com that his interests include obtaining information pursuant to the FOIA.

125. *Karantsalis*, 635 F.3d at 499. Giro was the former president of Giro Investments Group, Inc. He plead guilty to securities fraud in 2009. The Marshals Service took booking photographs (“mug shots”) of Giro on May 27, 2009 after taking him into custody. *Id.* at 499-500.

126. *Id.* at 502. In the complaint, Karantsalis ceded that the mug shots may constitute records of information compiled for law enforcement purposes. The court notes that even absent the admission by Karantsalis, it is clear that the mug shots were compiled for law enforcement purposes. The Marshals Service is a law enforcement agency tasked with receiving, processing, and transporting prisoners held in custody. The photos of Giro were taken in accord with this duty. *Id.*

2. Disclosure of Mug Shots Could Reasonably be Expected to Constitute an “Unwarranted” Invasion of Privacy

Having satisfied the threshold requirement for Exemption 7(C) analysis, the courts subsequently devoted the bulk of their analysis to whether the release of information could reasonably be expected to constitute an invasion of personal privacy.

a. Criminal Arrestees have a Privacy Interest in Their Mug Shots

The Courts’ principle focus is whether criminal arrestees have a legitimate expectation of privacy in their mug shots. In *Detroit Free Press*, the Department of Justice was correct in proffering that the range of privacy interests protected by the exemptions for FOIA disclosure was expansive and included the disclosure of mug shots of individuals already arrested, indicted, and awaiting federal trial.¹²⁷ The Department of Justice’s argument is supported by Supreme Court cases ruling that certain information in the possession of federal agencies cannot be released to the public without infringing upon personal privacy interests.¹²⁸

In *U.S. Department of Defense v. Federal Labor Relations Authority*, the Supreme Court refused to order dissemination of the home addresses of federal agency employees, despite the availability of the information in public telephone directories because release of home addresses would shed no light on the workings of the government.¹²⁹ The majority reasoned that releasing the mug shots of individuals under indictment in federal court provides documentary evidence of the designated responsibilities of an agency of the federal government and thus provides a factual scenario distinguishable from the controversy in *Federal Labor Relations Authority*.¹³⁰

127. *Detroit Free Press, Inc. v. U.S. Dep’t of Justice*, 73 F.3d 93, 96 (6th Cir. 1996).

128. *Id.* The Department of Justice cited to the following Supreme Court cases: *U.S. Dep’t of Defense v. Fed. Labor Relations Auth.*, 510 U.S. 487 (1994) (refusing to order dissemination of the home addresses of federal agency employees, despite the fact that many of those addresses could be obtained from public telephone directories); *U.S. Dep’t of State v. Ray*, 502 U.S. 164 (1991), and *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989) (holding that disclosure of contents of FBI rap sheets to third parties could reasonably be expected to constitute an unwarranted invasion of personal privacy within the meaning of law enforcement exemption of the FOIA).

129. *Id.* at 501. The Supreme Court recognized the clear objective of the FOIA is “to pierce the veil of administrative secrecy and to open agency to the light of public scrutiny.” *Id.* (quoting *Dep’t of Air Force v. Rose*, 425 U.S. 352, 361, 96 S.Ct. 1592 (1975)).

130. *Detroit Free Press*, 73 F.3d at 96.

Next, the Supreme Court considered *U.S. Department of State v. Ray*.¹³¹ The majority concluded that the mug shots should not be exempted from disclosure because the indictees in this matter had already been identified by name by the federal government and their identities had already been revealed during prior judicial appearances.¹³² Therefore, no new information that the indictees would wish to keep private would be publicized by releasing their mug shots.¹³³ However, the majority erred in its analysis and this line of reasoning should be disregarded. In fact, Judge Norris' dissent called into question the majority's rational.¹³⁴ The dissent relied on the Supreme Court's holding in *U.S. Department of Justice v. Reporters Committee for Freedom of the Press*, which rejected the notion that just because information was available to the public, it could no longer contain a privacy interest.¹³⁵ The majority's espousal of that belief demonstrates a "cramped notion of personal privacy."¹³⁶

Lastly, the majority in the *Ray* case unequivocally denied the Supreme Court's ruling in *Reporters Committee* that rap sheets possess a privacy interest, as not dispositive of the dispute regarding disclosure of mug shots.¹³⁷ The *Ray* Court refused to analogize mug shots with constitutionally protected rap sheets.¹³⁸ Instead, the *Ray* Court categorized rap sheets as more than single pieces of information, but rather, compilations of many facts.¹³⁹ Rap sheets were therefore distinct from mug shots, which are mere photos.¹⁴⁰ Again, the majority erred in its decision, as noted in the dissent. While a photograph may not reveal any

131. *Ray*, 502 U.S. at 164 (ruling that only illegal Haitian immigrants had a statutory privacy interest in preventing the *initial* release of their names to the public).

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

133. *Id.* at 97 (discussing that the indictees had already been identified by name by the federal government and their identities had already been revealed during prior court appearances prior to the requested release of their mug shots).

134. *Id.* at 99 (Norris, J., dissenting) (quoting *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 770 (1989) ("The fact that the matter was not wholly private does not mean that an individual has no interest in limiting disclosure or dissemination of the information.")).

135. *Reporters Comm. for Freedom of the Press*, 489 U.S. at 749.

136. *Detroit Free Press*, 73 F.3d at 99 (quoting *U.S. Department of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 763 (1989)).

137. *Detroit Free Press*, 73 F.3d at 97. The rap sheets were not germane to any active prosecution and could disclose information beyond a particular, ongoing proceeding to recreate information that, under other circumstance, might be unavailable. *Id.*

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

139. *Id.*

140. *Id.* The *Detroit Free Press* court refuses to say that rap sheets and mug shots are similar even though "both convey an extremely unflattering view of the subject." The court instead states just "because a person suffers ridicule or embarrassment," a "personal privacy interest is not necessarily invaded." *Id.*

“private” information, mug shots are widely viewed by members of the public as signifying that the person in the photo has committed a crime.¹⁴¹ Mug shots carry an unmistakable badge of criminality.¹⁴² This presumption of guilt over innocence is stigmatizing to the criminal arrestee and can affect his relationships with family, friends, and future employers.

Distinguishing the specific facts presented by *Detroit Free Press* from existing Supreme Court precedent, the majority attempted to resolve whether the release of arrestee mug shots could reasonably be expected to constitute an invasion of personal privacy on the narrow factual situation in which there is an ongoing criminal proceeding, the names of the defendants have already been divulged, and the defendants have already appeared in open court.¹⁴³ Based on those narrow facts, the majority found the arrestees had no personal privacy interests in their mug shots.¹⁴⁴ However, this finding does not comport with Supreme Court precedent regarding other FOIA Exemption 7(C) cases. Although not squarely on point, FOIA Exemption 7(C) Supreme Court jurisprudence is analogous to the criminal arrestees’ privacy interests in mug shots. Therefore, the *Detroit Free Press* majority erred in failing to recognize criminal arrestees’ legitimate expectation of privacy in their disclosure of their mug shots.¹⁴⁵

In *Karantsalis*, the Eleventh Circuit correctly concluded that criminal arrestees’ mug shots implicated a personal privacy interest. Although the court did not squarely address the issue, the court relied on precedent that “mug shots carry a clear implication of criminal activity”¹⁴⁶ and that “individuals have a substantial privacy interest in their criminal histories.”¹⁴⁷ The Eleventh Circuit precedent was further supported by the Supreme Court holding in *Reporters Committee*.¹⁴⁸

141. *Id.* at 99 (“Mug shots indicate a number of facts about a person that are not typical of other photographs. Mug shots relay an expression at a humiliating moment and the fact that an individual has been charged.”).

142. *Eberhardt v. Bordenkircher*, 605 F.2d 275, 280 (6th Cir.1979). In the dissent’s view in *Detroit Free Press*, these considerations lead to only one conclusion: that criminal arrestees have cognizable privacy interests in preventing the public dissemination of their mug shots. *Id.*

143. *Detroit Free Press*, 73 F.3d at 97.

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

145. *Id.* at 96. The majority remained unconvinced, noting that the highlighted decisions actually emphasize the public nature of the information sought by *Detroit Free Press*. *Id.*

146. *United States v. Hines*, 955 F.2d 1449, 1455 (11th Cir. 1992).

147. *O’Kane v. U.S. Customs Serv.*, 169 F.3d 1308, 1310 (11th Cir. 1999) (rejecting the notion that federal criminals are entitled to lesser degree of privacy for the purposes of FOIA).

148. *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749,

Additionally, the Court accurately acknowledged that a mug shot was a unique and powerful type of photograph.¹⁴⁹ Furthermore, the fact that mug shots taken by the U.S. Marshals Service are generally not available for public dissemination emphasized an attribute, which suggested the mug shots implicated a personal privacy interest.¹⁵⁰ By analogizing Supreme Court precedent in conjunction with holdings from within the circuit, one can only deduce that criminal arrestees have a privacy interest in keeping their criminal histories private via rap sheets and mug shots.

In addition to providing affirmative case law supporting criminal arrestees' privacy interests in their mug shots, the Court dismissed Karantsalis' unsupported assertions. The first argument—Giro's mug shots did not contain a privacy interest—lacked affirmative evidence that the mug shot was previously published.¹⁵¹ Next, the *Karantsalis* Court was unpersuaded that the privacy interest was moot because Giro appeared in open court and pled guilty.¹⁵² This argument is in direct opposition to the holding in *Reporters Committee* and reflects a cramped notion of privacy. The Court stated, "the fact that an event is not wholly private does not mean that an individual has no interest in limiting disclosure or dissemination of the information."¹⁵³ Accordingly, the court found that despite having been adjudicated as guilty and appearing in open court, there was a continuing personal privacy interest in preventing public dissemination of the mug shots. Finally, the court was unmoved by the fact that the U.S. Marshals Service released photographs of other criminal arrestees stemming from FOIA requests made from

(1989) (holding that disclosure of contents of F.B.I. rap sheets to third parties could reasonably be expected to constitute an unwarranted invasion of personal privacy within the meaning of law enforcement exemption of the FOIA).

149. *Karantsalis v. U.S. Dep't of Justice*, 635 F.3d 497, 503 (11th Cir. 2011) ("Mug shots are vivid symbols of criminal accusation that the public often equates with guilt. Mug shots are taken during vulnerable and embarrassing moments, often immediately after the arrestee has been accused, taken into custody and deprived of most liberties.")

150. *Reporter Comm. for Freedom of the Press*, 489 U.S. at 764 (explaining that if information about an individual is not typically available to the public, it may implicate a personal privacy interest).

151. *Karantsalis*, 635 F.3d at 503. Karantsalis suggested that Giro's no longer had a privacy interest in his mug shots because the Marshals Service publically disseminated the mug shots through INTERPOL while Giro was a fugitive from 2003 to 2009. The court found irreconcilable factual discrepancies between Karantsalis' argument and the Marshals Service contention that it did not take a mug shot of Giro until May 29, 2009. Alternatively, the Marshals Service released a driver's license photo to INTERPOL during the time Giro was a fugitive. Karantsalis offered not affirmative evidence to refute the Marshals Service. *Id.*

152. *Id.*

153. *Reporters Comm. for Freedom of the Press*, 489 U.S. at 770.

within the Sixth Circuit's jurisdiction.¹⁵⁴ The Sixth Circuit erred in its findings in *Detroit Free Press* because it failed to analogize Supreme Court precedent, which recognized privacy interest. Furthermore, the holdings of the Sixth Circuit were not binding on the Eleventh Circuit, and as such, the *Karantsalis* court was at liberty to assert a privacy interest for criminal arrestees.

Like *Karantsalis*, the court in *World Publishing Company* articulated a privacy interest for criminal arrestees in their mug shots. The Court gave due deference to the Supreme Court holding in *Reporters Committee* by analogizing criminal arrestees' privacy interests in mug shots to the protected privacy interests in criminal rap sheets.¹⁵⁵ In *Reporters Committee*, the Court rejected the cramped notion of privacy that because information had been previously disclosed to the public, there was a diminished privacy interest.¹⁵⁶ The Court also recognized that a pattern of authorized disclosure was restricted, further supporting the notion that individuals have a privacy interest in their rap sheets.¹⁵⁷

Subsequently, the court examined *Prison Legal News* in which this court applied Exemption 7(C) to autopsy photographs and a video, despite the fact that these items were shown to a jury in open court and to the public audience present at trial.¹⁵⁸ The court correctly concluded that the privacy interests contained in Exemption 7(C) remained intact, despite being viewed by the public.¹⁵⁹ The photographs in *Prison Legal News* are analogous to criminal arrestees' mug shots.

Likewise, a federal district court held that the subject of a booking photo has a protectable privacy interest under the FOIA.¹⁶⁰ That court

154. *Karantsalis*, 635 F.3d at 503.

155. *World Publ'g Co. v. U.S. Dep't of Justice*, 672 F.3d 825, 828 (10th Cir. 2012).

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

157. *Id.* at 753.

158. *Prison Legal News v. Exec. Office for U.S. Attorneys*, 628 F.3d 1243, 1243 (10th Cir. 2011).

159. *Id.* at 1249. That the video and photographs were, at the time of the trials, displayed publicly, may have impacted the family's expectation of privacy in those materials but it did not negate it. Turning to the Supreme Court's holding in *Reporters Committee*, "the fact that an event is not wholly private does not mean that an individual has no interest in limiting disclosure or dissemination of the information." *Reporters Comm. for Freedom of the Press*, 489 U.S. at 770. *Reporters Committee* thus required an examination whether, as a practical matter, the extent of prior public disclosure has eliminated any expectation in privacy. *Id.*

160. *Times Picayune Publ'g Corp. v. U.S. Dep't of Justice*, 37 F.Supp.2d 472, 477 (E.D.La. 1999). Contrary to the assertion of *Times Picayune*, the court held that mug shots are generally notorious for their visual association of an individual with criminal activities. The court does not try to ascertain whether the unpleasant circumstances or the photography equipment are the cause of unflattering photographs. Rather, the court

emphatically agreed with the cliché, “a picture is worth a thousand words.”¹⁶¹ “For that reason, a mug shot’s stigmatizing effect can last well beyond the actual criminal proceedings . . . A mug shot preserves, in its unique and visually powerful way, the subject individual’s brush with the law for posterity.”¹⁶²

The holdings in *Karantsalis* and *World Publishing Company* accurately align with Supreme Court precedent and appellate court decisions regarding other FOIA Exemption 7(C) cases. Each court uses a different but effective method to analogize criminal arrestees’ privacy interest in mug shots with existing case law. The Eleventh Circuit reached its holding by clinging to its prior decisions in *United States v. Hines*¹⁶³ and *O’Kane v. U.S. Custom Service*.¹⁶⁴ The discernible conclusion being that “mug shots carry a clear implication of criminal activity”¹⁶⁵ and that “individuals have a substantial privacy interest in their criminal histories.”¹⁶⁶ Conversely, the Tenth Circuit analogized criminal arrestees’ mug shots to other photographs compiled for law enforcement purposes. The assertion being that mug shots carry a greater privacy interest than do crime scene and autopsy photographs, which do receive Exemption 7(C) protection, because of their stigmatizing effects, and unique and powerful preservation of an individual’s brush with the law for posterity. By drawing similarities to cases that focus on photographs, the court more easily links existing case law to the newly asserted privacy interest in mug shots. Most importantly, the courts in *Karantsalis* and *World Publishing Company* relied on *Reporters Committee* to link privacy interests in mug shots with constitutionally protected privacy interests in rap sheets. The holdings in *Karantsalis* and *World Publishing Company* illustrate the appropriate arguments to assert criminal arrestees’ privacy interest in their mug shots.

focuses on the information depicted in a mug shot – front and profile shots, lines showing arrestee height, and a sign under the accused’s face with a unique Marshals Service criminal identification number. *Id.*

161. *Id.*

162. *Id.*

163. *United States v. Hines*, 955 F.2d 1449, 1455 (11th Cir. 1992) (holding that it was reversible error for the government to introduce defendants’ mug shots as proof that the complainant had previously identified defendants as her assailants).

164. *O’Kane v. U.S. Customs Serv.*, 169 F.3d 1308, 1310 (11th Cir. 1999).

165. *Hines*, 955 F.2d at 1455.

166. *O’Kane*, 169 F.3d at 1310 (rejecting the notion that federal criminals are entitled to lesser degree of privacy for the purposes of FOIA).

*b. Criminal Arrestees' Privacy Interests in Their Mug Shots
Outweigh the Public's Interest in Disclosure*

The last step in Exemption 7(C) analysis requires a court to balance the criminal arrestees' privacy interests in their mug shots and the public's interest in disclosure. The Exemption 7(C) balancing test provides criminal arrestees with the same degree of personal records' privacy protection as any other person under the FOIA.¹⁶⁷ When weighing privacy interests of persons who had been investigated by the F.B.I., courts have found that "it is better to err on the side of subjects' privacy interests even in cases where they may have held themselves out" for public scrutiny.¹⁶⁸ This reasoning comports with the holding in *Reporters Committee*.¹⁶⁹ Courts acknowledge that mug shots carry a clear implication of criminal activity,¹⁷⁰ and that a mug shot is a unique and powerful type of photograph¹⁷¹ that raises personal privacy interests distinct from normal photographs. A mug shot is a vivid symbol of criminal accusation, which when released to the public insinuates, and is often equated, with guilt.¹⁷² 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."¹⁷³ Exoneration after investigation adds to the privacy interest of the person who had been the target of an investigation.¹⁷⁴

Of the three appellate cases discussing FOIA Exemption 7(C) and criminal arrestees' mug shots, only the *Karantsalis* and *World Publishing Company* courts adequately perform the balancing test. Finding no privacy interest, the court in *Detroit Free Press* gave miniscule attention to balancing the criminal arrestees' privacy interest with the public interest in dissemination of the mug shots stating, "[that] even had an encroachment upon personal privacy been found . . . a significant public interest in the disclosure of the mug shots . . . nevertheless justifi[ed] the release of that information to the public."¹⁷⁵ The *Detroit Free Press* majority correctly acknowledges the "primary purpose of FOIA is to

167. *Id.* (rejecting the notion that federal criminals are entitled to lesser degree of privacy for the purposes of FOIA).

168. *Rosenfeld v. U.S. Dep't of Justice*, 57 F.3d 803, 813 (9th Cir. 1995).

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

170. *United States v. Hines*, 955 F.2d 1449, 1455 (11th Cir. 1992).

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

172. *Id.*

173. *Id.*

174. *McCutchen v. U.S. Dep't of Health & Human Servs.*, 30 F.3d 183, 188 (D.C. Cir. 1994).

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

ensure that the government's activities are 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."¹⁷⁶ However, its application of the balancing test is incorrect. The majority pre-determines that criminal arrestees' privacy interests must be outweighed by the public interest in disclosure without ensuring that the public interest complies with the legislative intent of the FOIA. The majority's only attempt to employ the balancing test was through two hypothetical examples, unsubstantiated by any facts, of how a significant public interest in the disclosure of the mug shots could justify the release of that information to the public.¹⁷⁷ When balancing the public interest against the privacy of an arrested person, an abstract public interest claim cannot be made that the public needs to see mug shots of arrested persons.¹⁷⁸ Rather than focus on hypothetical incidents of government abuse of power to support disclosure of otherwise private information, the dissent focused its attention on the absence of evidence of abuse in the U.S. Marshals Service's arrest and detention practices.¹⁷⁹ The dissent logically concluded that the disclosure of the mug shots to the Detroit Free Press would serve no public interest under the FOIA.¹⁸⁰ As such, the dissent concludes by stating a general rule:

[w]hen the subject of [an agency record] is a private citizen and when the information [is not] a record of "what the Government is up to," the privacy interest protected by Exemption 7(C) is in fact at its apex while the FOIA-based public interest in disclosure is at its nadir.¹⁸¹

In *Karantalis*, the court determined there was no public interest that would be served by releasing the mug shot that justified infringing criminal arrestees' privacy interests in their mugs shots. The court referred back to the core purpose of the FOIA as being able to disclose information that will "contribute significantly to public understanding of the operations or activities of the government."¹⁸² Again, the court was

176. U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press, 489 U.S. 749, 774 (1989).

177. *Detroit Free Press, Inc.*, 73 F.3d at 98. The majority's first claim for public interest in disclosure is to subject the government to public oversight by ensuring the correct individual is arrested. Additionally, the majority believed mug shots can depict the circumstances surrounding an arrest and initial incarceration of an individual in a way that written information cannot. *Id.*

178. *Times Picayune Publ'g Corp. v. U.S. Dep't of Justice*, 37 F.Supp.2d 472, 480-81 (E.D.La. 1999).

179. *Detroit Free Press, Inc.*, 73 F.3d at 99.

180. *Id.* at 100 (Norris, J., dissenting).

181. *Id.* (Norris, J., dissenting) (quoting U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 780 (1989)).

182. *Reporters Comm. for Freedom of Press*, 489 U.S. at 775.

not influenced by the rationale of the Sixth Circuit.¹⁸³ The court was not persuaded that “smirks and smiles” in an arrestee’s mug shot would indicate whether the detainee received preferential treatment by the Department of Justice.¹⁸⁴ The court refused to acknowledge the general curiosity about arrestee’s facial expressions in mug shots as a cognizable interest that would “contribute significantly to public understanding of the operations or activities of the government.”¹⁸⁵ The court is correct in its assertion. Common sense suggests that arrestees who receive preferential treatment would not risk losing that preferential treatment by raising suspicions based on their mug shots. Furthermore, the assumption of impropriety on behalf of the U.S. Marshalls Service must be substantiated by more than a sneaking suspicion. If the public interest is government wrongdoing, then the requesting party must produce evidence that would warrant a belief by a reasonable person that the alleged government impropriety might have occurred.¹⁸⁶ However, there is no evidence of government wrongdoing, and general curiosity does not satisfy the legislative intent for the FOIA.¹⁸⁷

Finally, the *Karantsalis* court balanced the competing privacy interests in mug shots against the public’s interest in disclosure to determine if releasing the information was warranted. Ultimately, the balance weighed heavily against disclosure. The court found that there was a substantial personal privacy interest in preventing public dissemination of the mug shots and no discernible public interest in disseminating the mug shots.¹⁸⁸ Hence, the court reached the only appropriate conclusion—that releasing the mug shots could reasonably be expected to constitute an unwarranted invasion of personal privacy under Exemption 7(C).

183. *Karantsalis v. U.S. Dep’t of Justice*, 635 F.3d 497, 504 (11th Cir. 2011). *Karantsalis* believes Giro’s mug shots may show smiles or smirks that indicate favoritism from the Department of Justice. This reasoning stems from granted FOIA requests in the Sixth Circuit, where the court believed that the facial expressions in Madoff and Nacchio’s mug shots were sufficient proxy to evaluate whether a prisoner received preferential treatment. However, the court’s use of common sense suggested that if a prisoner were receiving preferential treatment, he would not flagrantly display that preferential treatment by smirking or smiling in mug shots. *Id.*

184. *Id.* The court mocked the assertion that an arrestee’s smirk or smile in a mug shot photo would indicate preferential treatment. Common sense suggests that if a prisoner were receiving preferential treatment, he or she would not fragrantly indicate such preferential treatment for risk of losing it. *Id.*

185. *Id.*

186. *Lasko v. U.S. Dep’t of Justice*, 684 F. Supp. 2d 120, 132 (D.D.C. 2010); *Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157, 174 (2004).

187. *See City of St. Matthews v. Voice of St. Matthews, Inc.*, 519 S.W.2d 811, 815 (Ky. Ct. App. 1974); *see also Husband, C. v. Wife, C.*, 320 A.2d 717, 723 (Del. 1974).

188. *Karantsalis*, 635 F.3d at 504.

In *World Publishing Company*, the court again considered the existing Supreme Court, appellate court and district court jurisprudence. The Tenth Circuit relied upon the reasoning presented in *Reporters Committee* and *Times Picayune Publishing Corp. v. U.S. Department of Justice* to support its conclusion that criminal arrestees' interests in their mug shots outweighs the public's interest in disclosure.

In *Reporters Committee*, the Supreme Court stressed the importance of disclosing "[o]fficial information that sheds light on an agency's performance of its statutory duties."¹⁸⁹ The Court was quick to note, however, that the purpose of the FOIA 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*. In this case (and presumably in the typical case in which one private citizen is seeking information about another), the requesting party does not intend to discover anything about the conduct of the agency that has possession of the requested records.¹⁹⁰

The Supreme Court recognized that disclosing rap sheets would provide details to include in a news story, but is not the type of information for which Congress enacted the FOIA.¹⁹¹ Likewise, dissemination of mug shots would create interesting news stories, but does not fall within the legislative intent of the FOIA.

Moreover, the district court in *Times Picayune* noted that a court must measure the public interest in disclosure solely relative to the objective purpose of the FOIA, rather than on the particular purpose for which the document is being requested.¹⁹² The public's interest must be measured in light of alerting citizens as to "what their government is up to."¹⁹³ Disclosure of federal mug shots is not likely to contribute significantly to public understanding of federal law enforcement operations or activities.¹⁹⁴

Lastly, the Tenth Circuit found few prevailing arguments to suggest that disclosing the mug shots to Tulsa World would further the public interest based on the purpose of the FOIA to inform citizens of a

189. *U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773 (1989).

190. *Id.*

191. *Id.* at 831.

192. *Times Picayune Publ'g Corp. v. U.S. Dep't of Justice*, 37 F.Supp.2d 472, 479 (E.D.La. 1999); *see generally*, *Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989) (stating that the public interest must be measured relative to alerting the citizenry about what their government is up to).

193. *Times Picayune*, 37 F.Supp.2d at 479 (citing *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989)).

194. *World Publ'g Co. v. U.S. Dep't of Justice*, 672 F.3d 825, 831 (10th Cir. 2012).

government agency's adequate performance of its function.¹⁹⁵ The court categorized the several arguments made by Tulsa World as relating to the public's ability to assist federal law enforcement, not to the ability of citizens to know how well the government is performing its duties.¹⁹⁶ Still, while other arguments were legitimate public interests under the FOIA, nothing suggested that releasing the mug shots would have more than a miniscule effect on assisting the public in knowing what the government was up to.¹⁹⁷ Therefore, the court found that when balanced against the privacy interest in a mug shot, the public interest in disclosure did not further the purpose of the FOIA.

B. ENACTING A STANDARD ANALYSIS

1. The "Sufficient Reason" Test

Whenever a FOIA Exemption 7(C) dispute occurs, a court will be required to determine if the requested information could reasonably be expected to create an unwarranted invasion of privacy. In doing so, the court must balance the privacy interests in the information sought versus the public's interest in disclosure. Because the balancing test is an essential step in the court's analysis, the court should follow a standard

195. *Id.* Tulsa World argued that several public interests will be furthered by disclosing the photos, namely:

- (1) determining the arrest of the correct detainee
- (2) detecting favorable or unfavorable or abusive treatment
- (3) detecting fair versus disparate treatment
- (4) racial, sexual, or ethnic profiling in arrests
- (5) the outward appearance of the detainee; whether they may be competent or incompetent or impaired
- (6) a comparison in a detainee's appearance at arrest and at the time of trial
- (7) allowing witnesses to come forward and assist in other arrests and solving crime
- (8) capturing a fugitive
- (9) to show whether the indietee took the charges seriously.

Id.

196. *Id.* The court found that interests 1, 7 and 8 relate to the public's ability to assist federal law enforcement—not to the ability of citizens to know how well the government is performing its duties. Interest 9 also says nothing about law enforcement's successful performance of its role. *Id.*

197. *Id.* "While it is true that Interests 2–6 are legitimate public interests under the FOIA, there is little to suggest that releasing mug shot would significantly assist the public in detecting or deterring any underlying government misconduct." *Id.* For example, a mug shot would indicate just as much about the conduct of the detainee prior to arrest as it would indicate the conduct of the police officer post arrest. Additionally, there is little indication that releasing mug shots would indicate racial or ethnic profiling without other information. *Id.*

test to ensure consistency in court rulings and legitimacy of the Judiciary.

The Supreme Court acknowledged that the FOIA makes agency records available to “any person” upon request,¹⁹⁸ places the burden of justifying nondisclosure on the government,¹⁹⁹ and permits requests without requiring a showing of relevancy or an explanation for the request.²⁰⁰ However, the Supreme Court added that under the congressionally prescribed balancing analysis, the usual rules do not apply.²⁰¹ It becomes necessary to define the public interest in order to produce “a counterweight on the FOIA scale” against the privacy interests in the requested records.²⁰² The Court crafted the sufficient reason test to supply such a counterweight. Under this test, when Exemption 7(C) is triggered, the FOIA requesting party must demonstrate a “sufficient reason for the disclosures.”²⁰³ Under this test, the requesting party must show: (i) “the public interest sought to be advanced is a significant one;” and (ii) the information requested “is likely to advance that interest.”²⁰⁴ Otherwise, the invasion of privacy is unwarranted.

The “sufficient reason” test’s first prong recognizes that while there is a potential for an invasion of privacy whenever a FOIA requesting party seeks information about someone, the privacy exemptions do not protect against *all* invasions of privacy, only “unwarranted” invasions of privacy.²⁰⁵ This first prong of the “sufficient reason” test provides for a practical and meaningful balancing analysis while it also comports with both the FOIA’s plain text meaning and Congress’s legislative intent.

However, the second prong of the “sufficient reason” test presents a loophole that can be exploited by federal agencies motivated to withhold information. The second prong requires that the FOIA requesting party must establish that disclosure of the requested materials is likely to advance a significant public interest.²⁰⁶ The difficulty here is that the government can argue that an asserted public interest has been served,

198. 5 U.S.C. § 552(a)(3) (2000).

199. *Id.* at § 552(a)(4)(B)(b); *see also* NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 234, 236 (1977); EPA v. Mink, 410 U.S. 73, 79, 87 (1973).

200. 5 U.S.C. § 552(a) (2000); *see also* Durns v. Bureau of Prisons, 804 F.2d 701, 706 (D.C. Cir. 1986) (“Congress granted the scholar and the scoundrel equal rights of access to agency records.”); Forsham v. Califano, 587 F.2d 1128, 1134 (D.C. Cir. 1978) (reasoning that while factors such as need, interest, or public interest may bear upon an agency’s determination of processing order, these factors have no bearing on a person’s right of access under the FOIA).

201. Nat’l Archives & Records Admin. v. Favish, 541 U.S. 157, 175 (2004).

202. *Id.* at 174.

203. *Id.* at 172.

204. *Id.*

205. Dep’t of the Air Force v. Rose, 425 U.S. 352, 382 (1976).

206. *National Archives*, 541 U.S. at 174.

or diminished, if an agency has already released a large amount of information in response to another request.²⁰⁷ Nevertheless, the “sufficient reason” test provides a structured guideline for courts to follow when determining whether the disclosure of private information is unwarranted.

C. POLICY

The policy of Exemption 7(C) is to protect personal interests in private information from abuse by persons who would receive disclosures from agency files. The purpose of the Exemption is to protect individuals against reprisals, harassment, and the stigma of being associated with criminal investigations.²⁰⁸ Exemption 7(C) benefits the privacy interests of an individual who is named in law enforcement records.²⁰⁹

The cognizable public interest for FOIA is “to open agency action to the light of public scrutiny” and to inform the citizenry “about what their government is up to.”²¹⁰ The privacy interests protected by Exemption 7(C) pertain to interests in “avoiding disclosure of personal matters”²¹¹ and “keeping personal facts away from the public eye.” An individual’s privacy interest is particularly pronounced where disclosure could lead to embarrassment or retaliation.²¹²

The “stigmatizing effect” of disclosure of photos of arrested subjects invades the privacy of the subject and merits exemption.²¹³ The names and identities of individuals of investigatory interest to law enforcement agencies have been consistently protected from disclosure.²¹⁴ “Exemption 7(C) takes particular note of the strong interest of individuals in not being associated unwarrantedly with alleged criminal activity.”²¹⁵ The mere mention of a person’s name in a federal law enforcement file carries a stigma and engenders speculation that is negative toward that

207. Halstuk, *supra* note 73, at 395.

208. McErlean v. U.S. Dep’t of Justice, 1999 WL 791680, at *9 (S.D. N.Y. 1999).

209. Nunez v. U.S. Dep’t of Justice, 497 F. Supp. 209, 212 (S.D. N.Y. 1980).

210. U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 772 (1989).

211. *Id.* at 762.

212. U.S. Dep’t of State v. Ray, 502 U.S. 164, 176-77 (1991).

213. Times Picayune Publ’g Corp. v. U.S. Dep’t of Justice, 37 F.Supp.2d 472, 477 (E.D.La. 1999).

214. Wiggins v. Nat’l Credit Union Admin., 2007 WL 259941 (D.D.C. 2007); Baez v. U.S. Dep’t. of Justice, 647 F.2d 1328, 1338 (D.C. Cir. 1980); Branch v. F.B.I., 658 F. Supp. 204, 209 (D.D.C. 1987).

215. Computer Prof’ls for Soc. Responsibility v. U.S. Secret Serv., 72 F.3d 897, 904 (D.C. Cir. 1996), *amended*, (Feb. 20, 1996) (“records contain[ing] the names of informants, witnesses, and potential suspects who are relevant to its criminal investigation . . . clearly fall within the scope of Exemption 7(C)”).

person.²¹⁶ Exemption (7)(C) protects persons' legitimate privacy interests against this stigma of being associated with a law enforcement investigation.²¹⁷ Disclosure of the identities of individuals who are the subjects of an investigation could subject those individuals to embarrassment or harassment by being associated with a criminal or federal investigation. Such privacy interests cannot be waived through prior public disclosure or through the passage of time.²¹⁸

IV. CONCLUSION

Modern day technological advances further the stigma problem associated with disclosure of certain private information. In the Internet age, pictures and personal information can cascade through networks to millions of people based on a single disclosure. FOIA Exemption 7(C) is designed to protect individuals from the stigmatizing effect of having their names associated with law enforcement records. However, Exemption 7(C) cannot fully benefit criminal arrestees until a privacy interest in their mug shots is recognized, and a standard analysis to balancing that interest against public disclosure is instated.

The chronological development of the FOIA Exemption 7(C) analysis as applied to mug shots shows that courts are beginning to recognize criminal arrestees' privacy interests in their mug shots. The trend further shows that courts recognize that criminal arrestees' privacy interests outweigh the public's interest in disclosure. In order to achieve consistency in this realization, courts must apply the "sufficient reason" test to the balancing analysis. The public's interest in dissemination can only outweigh the privacy interests when the disclosure would "pierce the veil of administrative secrecy and open agency action to the light of public scrutiny."²¹⁹ Under any other circumstances, the court is left to make ad hoc decisions that could infringe on the privacy rights of criminal arrestees.

216. *Lurie v. U.S. Dep't of Army*, 970 F. Supp. 19, 37 (D.D.C. 1997).

217. *Putnam v. U.S. Dep't of Justice*, 873 F. Supp. 705, 715 (D.D.C. 1995).

218. *Halperin v. F.B.I.*, 181 F.3d 279, 297 (2d Cir. 1999).

219. *Rose v. Dept. of Air Force*, 495 F.2d 261, 263 (2d Cir. 1974).