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# Picture Imperfect: Mug Shot Disclosures and the Freedom of Information Act

Lisa Chinai

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# Picture Imperfect: Mug Shot Disclosures and the Freedom of Information Act

Lisa Chinai<sup>†</sup>

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## I. INTRODUCTION

“Look at the picture of this guy. Do you really [sic] need to do a background [sic] check? One look and the answer should [sic] have been ‘no, you can’t have a gun,’”<sup>1</sup> wrote one commenter in the comments section following *The Huffington Post* article, “Jared Lee Loughner’s Mug Shot (PHOTO).” The commenter’s reaction to Jared Lee Loughner’s photograph illustrates the prejudicial effect of releasing mug shot photographs to the press. In the photograph, a bald Loughner smirks directly into the camera. As one publication described, “[h]e grabs the viewer with his eyes, looking straight ahead and not backing down or showing any sign of shame or remorse.”<sup>2</sup> In 2012, Loughner plead guilty for shooting Congresswoman Gabrielle Giffords, killing six people, and wounding thirteen others in 2011 at a political rally in Tucson, Arizona.<sup>3</sup>

United States courts have long recognized the prejudicial nature of submitting a defendant’s mug shot into evidence during trial.<sup>4</sup> In *Barnes v. United States*, the court stated that the “double-shot” (front and profile) feature of a mug shot photograph “is so familiar, from ‘wanted’ posters in the post office, motion pictures and television, that the inference that the person involved has a criminal record, or has at least been in trouble with the police, is natural,

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<sup>1</sup> El Saltine, COMMENT to *Jared Lee Loughner’s Mug Shot (PHOTO)*, THE HUFFINGTON POST (last updated May 25, 2011, 7:25 PM), [http://www.huffingtonpost.com/2011/01/10/jared-lee-loughner-mug-shot-photo\\_n\\_807042.html](http://www.huffingtonpost.com/2011/01/10/jared-lee-loughner-mug-shot-photo_n_807042.html).

<sup>2</sup> *Jared Lee Loughner mugshot disturbs viewers (PHOTO)*, GLOBALPOST (last updated Jan. 14, 2011, 3:21 AM), <http://www.globalpost.com/dispatch/america-and-the-world/110110/jared-lee-loughner-mugshot-disturbs-viewers-photos>.

<sup>3</sup> Josh Gerstein, *Media wins on Loughner mugshots, loses for now on search warrants*, POLITICO (Feb. 18, 2011, 10:09 PM), [http://www.politico.com/blogs/joshgerstein/0211/Media\\_wins\\_on\\_Loughner\\_mugshots\\_loses\\_for\\_now\\_on\\_search\\_warrants.html](http://www.politico.com/blogs/joshgerstein/0211/Media_wins_on_Loughner_mugshots_loses_for_now_on_search_warrants.html); Michael Martinez & Kyung Lah, *Loughner pleads guilty to 19 counts in Tucson Arizona, mass shooting*, CNN (last updated Aug. 8, 2012, 5:30 AM), <http://www.cnn.com/2012/08/07/us/arizona-loughner-plea>.

<sup>4</sup> See *Barnes v. U.S.*, 365 F.2d 509, 510–11 (D.C. Cir. 1966); see also *U.S. v. Harman*, 349 F.2d 316, 319–20 (4th Cir. 1965) (holding that the admission of photographs, which were taken of defendant while he was an inmate at a federal prison, and which showed his prison number and other information, was prejudicial error and deprived defendant of fair trial where defendant’s character was not an issue); cf. *U.S. v. Reed*, 376 F.2d 226, 227–28 (7th Cir. 1967) (holding that witness testimony that merely characterized a defendant’s photograph as a “mug shot” violated the presumption of innocent until proven guilty and was prejudicial error).

perhaps automatic.”<sup>5</sup> Some courts have guidelines that regulate the submission of mug shot photographs into evidence.<sup>6</sup> For instance, the United States Court of Appeals for the First Circuit and the United States Court of Appeals for the Second Circuit require prosecutors to prove a demonstrable need to introduce the mug shot photograph and do not permit photographs that imply a defendant’s prior criminal record and suggest the source setting of the photograph.<sup>7</sup>

While these guidelines discuss the admittance of mug shot photos to *courtrooms* during trials, they do not discuss the impact of releasing mug shot photographs to the *media* during an ongoing trial. This Comment does not concentrate on the evidentiary function of mug shot photographs in courtroom proceedings. Instead, this Comment focuses on how the release of a defendant’s mug shot photograph to the media affects a defendant’s privacy rights.

The United States Court of Appeals for the Sixth Circuit and the United States Court of Appeals for the Eleventh Circuit disagree over whether releasing a defendant’s mug shot to the media violates a defendant’s right of privacy.<sup>8</sup> The Sixth Circuit, in *Detroit Free Press v. Department of Justice*, held that disclosing mug shots to the media during “ongoing criminal proceedings in which the names of the indicted suspects have already been made public and in which the arrestees have already [revealed their visages in] court appearances” does not

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<sup>5</sup> *Barnes*, 365 F.2d at 510–11.

<sup>6</sup> *See* U.S. v. Foshier, 568 F.2d 207, 214 (1st Cir. 1978); *see also* U.S. v. Harrington, 490 F.2d 487, 494–96 (2d Cir. 1973).

<sup>7</sup> *See Foshier*, 568 F.2d at 214. In this case, the defendant appealed his conviction for armed robbery and assault with a dangerous weapon and argued that the trial court committed reversible error by admitting into evidence his mug shot from “an earlier and unconnected arrest[,]” *id.* at 208. The First Circuit conceded that the Government proved a “demonstrable need” to introduce the defendant’s mug shot into evidence, *id.* at 215, but believed that the photograph clearly conveyed the defendant’s past criminal record, because the prosecution did not “[a]rtful[ly] mask[ ]” the “familiar double–pose format” of a mug shot, *id.* at 215. *See also Harrington*, 490 F.2d at 494–96 (holding that submitting into evidence a defendant’s mug shot photograph associated with a prior conviction constituted prejudicial error when: the prosecution inartfully masked the mug shot; when the prosecution’s witness failed to identify the defendant in court; and when the defendant did not take the witness stand).

<sup>8</sup> During the publishing process of this Comment, a third federal court of appeals, the United States Court of Appeals for the Tenth Circuit, issued an opinion on whether mug shot disclosures to the media violate defendants’ privacy rights in *World Publ’g Co. v. U.S. Dep’t of Justice*, 672 F.3d 825, 827 (10th Cir. 2012) (arguing that defendants have a “privacy interest” in their mug shots).

implicate those defendants' privacy rights.<sup>9</sup> On the other hand, the Eleventh Circuit, in *Karantsalis v. Department of Justice*, held that mug shot disclosures during an ongoing proceeding implicate privacy rights.<sup>10</sup> Both *Detroit Free Press* and *Karantsalis* discussed whether releasing a defendant's mug shot photo to the press violated Exemption 7(C) of the Freedom of Information Act ("FOIA"),<sup>11</sup> which prohibits the government from disclosing records that could "reasonably be expected to constitute an invasion of personal privacy."<sup>12</sup>

Releasing a defendant's mug shot to the press during an ongoing judicial proceeding violates Exemption 7(C) of FOIA. Defendants do not waive their right of privacy simply by appearing in a court proceeding. Disclosing a defendant's mug shot to the press after a defendant has appeared in court poses a *unique* privacy challenge. A mug shot captures one particular moment in a defendant's life and communicates a message wholly distinct from a defendant's courtroom appearance. In turn, releasing this mug shot to the press during an ongoing criminal proceeding negatively impacts the defendant's personal privacy long after the end of the criminal proceeding.<sup>13</sup> Thus, the long lasting effects of the release constitute a violation of a person's reasonable expectation of privacy. Courts must adopt a legal standard, which robustly protects defendants' privacy rights under FOIA Exemption 7(C) against the countervailing public need for mug shots disclosures.<sup>14</sup>

Sections II through V of this Comment demonstrate how mug shot disclosures to the press during a court proceeding violate a defendant's right of privacy guaranteed under

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<sup>9</sup> *Detroit Free Press v. Dep't of Justice*, 73 F.3d 93, 95 (6th Cir. 1996).

<sup>10</sup> *Karantsalis v. U.S. Dep't of Justice*, 635 F.3d 497, 503 (11th Cir. 2011), *cert. denied*, 132 S.Ct. 1141 (2012).

<sup>11</sup> *Id.* at 501; *Detroit Free Press*, 73 F.3d at 95; Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2009).

<sup>12</sup> *Karantsalis*, 635 F.3d at 501; *Detroit Free Press*, 73 F.3d at 96; *see also* 5 U.S.C. § 552(b)(7)(C).

<sup>13</sup> *See Times Picayune Publ'g Corp. v. U.S. Dep't of Justice*, 37 F.Supp. 2d 472, 477 (E.D. LA 1999). Plaintiff, a newspaper company, filed a request under FOIA to release a well-known businessman's mug shot after he pleaded guilty to federal criminal charges, *id.* at 473–74. The court held that even assuming a public interest justified the mug shot disclosure, such a disclosure violated the businessman's privacy rights under FOIA Exemption 7(C), *id.* at 481–82.

<sup>14</sup> *See discussion infra* Section V, Conclusion.

Exemption 7(C) of FOIA. Section II provides a background on ways the public can legally access documents in government possession. Specifically, this section examines *Karantsalis*, *Detroit Free Press*, the legislative history of FOIA and Exemption 7(C), and First Amendment rights to access government information. Section III analyzes the theoretical underpinnings of privacy as a legal right by discussing Supreme Court and common law tort jurisprudence on privacy. These legal theories are helpful in defining the privacy interests under FOIA that protect mug shot photographs. Section IV explores the impact that mug shot disclosures to the press has on privacy even after the end of a criminal proceeding. In addition, Section IV presents social science evidence showing that any public benefit of releasing mug shots to the press is far from conclusive. Finally, Section V concludes this Comment by discussing a possible solution to the conflict between the defendant's right to privacy and the public's right to know.

## II. LEGAL BACKGROUND ON PUBLIC ACCESS TO GOVERNMENT INFORMATION

### A. *The Purpose of the Freedom Of Information Act*

The Freedom of Information Act allows any member of the public to receive information from federal government agencies.<sup>15</sup> The Act, however, does not apply to the courts, to Congress, and to local and state government records.<sup>16</sup> The seeds of FOIA grew from the emphasis on government secrecy during World War II and from the activities of Senator Joseph McCarthy.<sup>17</sup> President Lyndon B. Johnson signed FOIA into law in 1966.<sup>18</sup> Before the passage of FOIA, an individual had the burden to prove a right to access government documents.<sup>19</sup> Under

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<sup>15</sup>OFFICE OF INFORMATION PROGRAMS AND SERVICES, U.S. DEPARTMENT OF STATE INFORMATION ACCESS GUIDE, 4 (2012), <http://www.state.gov/documents/organization/128321.pdf>; *see generally* 5 U.S.C. § 552 (2009).

<sup>16</sup>YOUR RIGHT TO FEDERAL RECORDS: QUESTIONS AND ANSWERS ON THE FREEDOM OF INFORMATION ACT AND THE PRIVACY ACT, GSA, OFFICE OF CITIZEN SERVICES AND COMMUNICATIONS FEDERAL CITIZEN INFORMATION CENTER, 1 (NOV. 2009), [http://www.justice.gov/oip/right\\_to\\_federal\\_records09.pdf](http://www.justice.gov/oip/right_to_federal_records09.pdf).

<sup>17</sup>112 CONG. REC. 13007, 67 (1966).

<sup>18</sup>NATIONAL SECURITY ARCHIVES, <http://www.gwu.edu/~nsarchiv/nsa/foia/lbj.html> (last visited Mar. 16, 2013).

FOIA, however, the government must justify withholding information requested by an individual.<sup>20</sup>

FOIA's purpose is to compel federal government agencies to fully disclose documents requested by members of the public.<sup>21</sup> FOIA, however, lists nine categories of information, known as "exemptions," which permit the government to withhold from the public information that falls into these exemption categories.<sup>22</sup> For instance, Exemption 7(C) applies specifically to "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy[.]"<sup>23</sup> Essentially, while FOIA creates avenues to access government information, it does not create an unqualified public right to access this information.

#### B. *Sixth Circuit: Detroit Free Press v. Department of Justice*

In *Detroit Free Press*, the *Detroit Free Press* submitted a FOIA request for the mug shots of eight defendants who were then indicted and awaiting trial.<sup>24</sup> The defendants had made a court appearance and their names appeared in public records.<sup>25</sup> The United States Marshals Service of the Department of Justice relied on FOIA Exemption 7(C) to reject the newspaper's request for the mug shots.<sup>26</sup> To determine when a government agency can reject a FOIA request for mug shots, the court used a three-prong test that triggers the application of Exemption 7(C)

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<sup>19</sup> *A Citizen's Guide On Using The Freedom Of Information Act And The Privacy Act Of 1974 To Request Government Records*, H.R. REP. NO. 109-226, at 3.

<sup>20</sup> *Id.*

<sup>21</sup> S. REP. NO. 89-813, at 38 (1965) (stating FOIA's purpose to "establish a general philosophy of full agency disclosure unless information is exempt under the clearly delineated statutory language and to provide a court procedure by which citizens and the press may obtain information wrongly withheld.").

<sup>22</sup> OFFICE OF INFORMATION PROGRAMS AND SERVICES, *supra* note 15.

<sup>23</sup> Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2009).

<sup>24</sup> *Detroit Free Press v. Dep't of Justice*, 73 F.3d 93, 95 (6th Cir. 1996). Note that this court opinion did not specify the crimes for which the eight defendants were awaiting trial.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*



when requested information is (1) “compiled for law enforcement purposes[;]” (2) is “*reasonably* . . . expected to constitute an invasion of personal privacy[;]” and (3) when the request’s intrusion of privacy is deemed unwarranted after the court “balanc[es] the need for protection of private information against the benefit to be obtained by disclosure of information concerning the workings of components of our federal government.”<sup>27</sup>

The court reasoned that while the mug shots were “compiled for law enforcement,”<sup>28</sup> defendants in mug shots “who 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” could not claim a reasonable expectation of privacy to justify withholding their mug shots.<sup>29</sup> Specifically, the court explained, “the need or desire to suppress the fact that [an] individual depicted in the mug shot [was] booked on criminal charges is drastically lessened in an ongoing criminal proceeding such as the one precipitating the dispute presently before us.”<sup>30</sup> Moreover, the court stated that “the personal privacy of an individual is not necessarily invaded simply because that person suffers ridicule or embarrassment from the disclosure of information in the possession of government agencies.”<sup>31</sup> Finally, the court opined that even if releasing the eight defendants’ mug shots constituted an invasion of privacy, “a significant public interest in the disclosure of [their] mug shots” could, nonetheless, override the defendants’ reasonable expectations of privacy.<sup>32</sup> Releasing a mug shot that patently revealed the government’s obvious error in arresting the wrong defendant would provide an example of a significant public interest that could override privacy rights.<sup>33</sup>

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<sup>27</sup> *Id.* at 96.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 98.

<sup>30</sup> *Detroit Free Press*, 73 F.3d at 97.

<sup>31</sup> *Id.* (citing *Schell v. U.S. Dep’t of Health & Human Services*, 843 F.2d 933, 938–39 (6th Cir. 1998)).

<sup>32</sup> *Id.* at 97–98.

<sup>33</sup> *Id.* at 98.

### C. *Eleventh Circuit: Karantsalis v. Department of Justice*

In *Karantsalis*, the plaintiff, a free-lance journalist, requested the mug shot of Luis Giro, who appeared in court to plead guilty to securities fraud.<sup>34</sup> The United States Marshals Service relied on Exemption 7(C) to reject the plaintiff’s request.<sup>35</sup> First, the court noted the difference in protocol for releasing mug shot photos between the Eleventh Circuit and the Sixth Circuit.<sup>36</sup> Although the court concluded that Giro’s mug shot photo was “compiled for law enforcement purposes,”<sup>37</sup> it ultimately held that releasing Giro’s mug shot photograph “would be an unwarranted invasion of his personal privacy under FOIA Exemption 7(C)[.]”<sup>38</sup> The plaintiff argued that Giro’s expectation of privacy was unreasonable because of his appearance in court to plead guilty, but the court rejected the plaintiff’s claim and noted that “a booking photograph does more than suggest guilt; it raises a unique privacy interest because it captures an embarrassing moment that is not normally exposed to the public eye.”<sup>39</sup> Finally, the court explained, “the public obtains no discernable interest from viewing the booking photographs, except perhaps the negligible value of satisfying voyeuristic curiosities.”<sup>40</sup>

### D. *Legislative History of FOIA and Exemption 7(C)*

#### 1. Legislative History of FOIA

The legislative history of FOIA does not completely support the press’s right to access mug shot photographs. Although FOIA creates a presumption of openness for government

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<sup>34</sup> *Karantsalis v. U.S. Dep’t of Justice*, 635 F.3d 497, 499, 503 (11th Cir. 2011).

<sup>35</sup> *Id.* at 499.

<sup>36</sup> *Id.* at 501 (explaining that in some circumstances, the Sixth Circuit permits the United States Marshals Service to disclose mug shot photographs, even when such a disclosure does not serve a law enforcement purpose. The Eleventh Circuit, however, only allows the disclosure of mug shot photographs for a law enforcement purpose. The *only* law enforcement purpose that the Eleventh Circuit recognizes for releasing a mug shot photograph is to address issues involving a fugitive. In this case, Giro was not a fugitive).

<sup>37</sup> *Id.* at 502.

<sup>38</sup> *Id.* at 504.

<sup>39</sup> *Id.* at 503.

<sup>40</sup> *Karantsalis*, 635 F.3d at 504.

documents, it also recognizes that important privacy rights can trump this presumption. A 1965 Senate report introducing FOIA recognized the need to protect certain “important rights of privacy with respect to certain information in Government files[.]”<sup>41</sup> Similarly, House Representative Robert Dole believed that while a healthy democracy cannot accommodate secrecy, the government must be “realistic” and “recognize that certain Government information must be protected and that the right of individual privacy must be respected.”<sup>42</sup> In fact, the 1965 Senate report that introduced FOIA clarified that balancing privacy interests with the public’s right to know is neither an easy nor impossible task, and observed that “to protect one of the interests, the other must, of necessity, either be abrogated or substantially subordinated.”<sup>43</sup> Accordingly, FOIA recognizes the possibility that the interest of full disclosure may be “abrogated” for the interest of a defendant’s privacy rights in withholding mug shot photographs from the press.

## 2. Legislative History of FOIA Exemption 7(C)

The legislative history of FOIA, together with the history of Exemption 7(C), weighs against the disclosure of a defendant’s mug shot to the public. In the 1967 version of FOIA, Exemption 7 protected “investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency.”<sup>44</sup> The 1967 wording of Exemption 7, however, was too expansive and allowed the government to withhold a broad category of information.<sup>45</sup> Thus, in 1974, Congress amended FOIA and added six specific categories of

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<sup>41</sup> S. REP. NO. 89-813, at 38 (1965).

<sup>42</sup> 112 CONG. REC. 13007, 74 (1966).

<sup>43</sup> S. REP. NO. 89-813, at 38.

<sup>44</sup> Pub. L. No. 90-23, 81 Stat. 54, 55 (1967) (current version at 5 U.S.C. §552(b)(7)(C) (2009)).

<sup>45</sup> U.S. DEP’T OF JUSTICE, FREEDOM OF INFORMATION ACT GUIDE, 2004 EDITION: EXEMPTION 7, *available at* <http://www.justice.gov/oip/exemption7.htm>.

information to which Exemption 7 applied.<sup>46</sup> One of those six categories, Exemption 7(C), allowed the government to withhold “investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would . . . constitute an unwarranted invasion of personal privacy[.]”<sup>47</sup> In 1986, Congress amended Exemption 7(C) once again and broadened its scope of protection for personal privacy.<sup>48</sup> This amendment of Exemption 7(C), along with other FOIA amendments, was a part of the Anti-Drug Abuse Act of 1986.<sup>49</sup> The 1986 amendments were in response to studies citing evidence that drug dealers used information from FOIA requests to learn about ongoing criminal investigations and to retaliate against informants who provided information to law enforcement.<sup>50</sup> The 1986 version of Exemption 7(C) is the current version of the exemption, and it withholds “records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy[.]”<sup>51</sup>

The difference in the language between the 1974 and 1986 version of Exemption 7(C) illustrates the general trend of increasing the protection of personal privacy. Senator Orrin Hatch declared, “FOIA contains an exemption that is supposed to protect informants, but even a quick look at that [1974] language reveals that the . . . protection is not sufficient.”<sup>52</sup> Whereas in 1974,

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<sup>46</sup> Freedom of Information Act And Amendments of 1974, Pub. L. No. 93-502, 88 Stat. 1561, 1563 (1974) (current version at 5 U.S.C. §552(b)(7)(C) (2009)).

<sup>47</sup> *Id.*

<sup>48</sup> U.S. DEP’T OF JUSTICE, *supra* note 45.

<sup>49</sup> HERBERT N. FOERSTEL, FREEDOM OF INFORMATION AND THE RIGHT TO KNOW: THE ORIGINS AND APPLICATIONS OF THE FREEDOM OF INFORMATION ACT 55 (1999).

<sup>50</sup> 132 CONG. REC. S14, 033 (Sept. 27, 1986) (statement of Sen. Patrick Leahy) (“The language of our amendment addresses the problem which was the concern of the original proposal, the use of FOIA by sophisticated enterprises to learn about ongoing criminal investigations.”); 132 CONG. REC. S14, 038 (Sept. 27, 1986) (statement of Sen. Orrin Hatch) (listing studies showing evidence that drug dealers used information from FOIA requests to retaliate against informants).

<sup>51</sup> Freedom of Information Reform Act of 1986, Pub. L. No. 99-570, §1802, 100 Stat. 3207, 3207-48 (1986) (current version at 5 U.S.C. §552(b)(7)(C) (2009)).

<sup>52</sup> 132 CONG. REC. S14, 038 (Sept. 27, 1986) (statement of Sen. Orrin Hatch).

information receiving exemption from government disclosure “would” have to “constitute an unwarranted invasion of personal privacy[;]” in 1986, such information “could reasonably be expected to constitute an unwarranted invasion of personal privacy.”<sup>53</sup> The “would disclose” language was a “dangerous standard” because it did not “clearly protect that information.”<sup>54</sup> Specifically, “[t]he FBI and other law enforcement agencies . . . testified that the ‘would’ language in the exemption place[d] undue strictures on agency attempts to protect against the harms specified in Exemption 7’s subparts.”<sup>55</sup> Essentially, “would” implies a higher threshold to withhold information than the “could reasonably be expected” standard and thus shows Congress’s attempt to ease the government’s burden to withhold information.<sup>56</sup>

Additional evidence of the intent to increase privacy protection comes from the contrast between Exemption 7(C)’s application solely to “investigatory” records of law enforcement in 1974 and the exemption’s application to “records or information” of law enforcement in 1986. Senator Hatch explained the problem with the 1974 FOIA language: “[i]f a request would disclose an informant’s identity, but is not an investigatory record, it must be disclosed. . . . Is this the kind of protection that our informants deserve [?]”<sup>57</sup> The replacement of “investigatory” records with “records or information” effectively expanded the scope of the exemption and guaranteed that Exemption 7 protected sensitive law enforcement information regardless of the specific format or record through which the agency maintained the information.<sup>58</sup> The 1986 language change is noteworthy, because law enforcement records often contain the names of

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<sup>53</sup> Freedom of Information Act And Amendments of 1974, Pub. L. No. 93-502, 88 Stat. 1561, 1563 (1974) (current version at 5 U.S.C. §552(b)(7)(C) (2009)); 100 Stat. at 3207-48.

<sup>54</sup> 132 CONG. REC. S14, 039 (Sept. 27, 1986) (statement of Sen. Orrin Hatch).

<sup>55</sup> 132 CONG. REC. H.94, 66 (Oct. 8, 1986) (statement of Reps. Glenn English & Thomas Kindness).

<sup>56</sup> U.S. DEP’T OF JUSTICE, *supra* note 45.

<sup>57</sup> 132 CONG. REC. S14, 038–39 (Sept. 27, 1986) (statement of Sen. Orrin Hatch).

<sup>58</sup> 132 CONG. REC. H.94, 66 (Oct. 8, 1986) (statement of Reps. Glenn English & Thomas Kindness).

individuals who are not investigation targets.<sup>59</sup> Names that appear in law enforcement records, however, elicit a strong presumption of wrongdoing.<sup>60</sup> Thus, Congress recognized the need to protect the privacy rights of “innocent” parties mentioned in law enforcement records.

Finally, Congress’s intent to broaden privacy protection is especially apparent in the language in Exemption 6. This exemption withholds “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]”<sup>61</sup> The “clearly” unwarranted invasion of privacy standard is harder to satisfy than Exemption 7(C)’s “reasonably expected” invasion of privacy standard.<sup>62</sup> A 1986 Congressional Record stated, “[b]ecause exemption 7(C) and exemption 6 are nearly identical, it would be inappropriate to make any changes that increase the difference between these two privacy standards. It is already easier to withhold law enforcement information on privacy grounds under exemption 7(C) than it is to withhold other information under exemption 6.”<sup>63</sup>

In sum, reading the legislative history of FOIA alongside the history of Exemption 7(C) illustrates Congress’s intent to broaden the protection of personal privacy interests. First, the difference in the language between the 1974 and 1986 version of Exemption 7(C) demonstrates Congress’s goal to ease the government’s burden to withhold information. Second, Congress’s aim to increase privacy protections is further apparent by the differences between Exemption 7(C) and Exemption 6. The overall spirit of Congress’s drafting of FOIA Exemption 7(C) does not support the release of mug shot photos to the press.

#### *E. The First Amendment Right to Access Government Documents*

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<sup>59</sup> DEPARTMENT OF JUSTICE GUIDE TO THE FREEDOM OF INFORMATION ACT: EXEMPTION 7(C), 566, [http://www.justice.gov/oip/foia\\_guide09/exemption7c.pdf](http://www.justice.gov/oip/foia_guide09/exemption7c.pdf).

<sup>60</sup> *Id.* at 564.

<sup>61</sup> Freedom of Information Act (FOIA), 5 U.S.C. §552(b)(6) (2009).

<sup>62</sup> DEP’T OF JUSTICE, *supra* note 59, at 562.

<sup>63</sup> 132 CONG. REC. H.94, 66 (Oct. 8, 1986) (statement of Reps. Glenn English & Thomas Kindness).

A discussion on how the public can legally access government information is remiss without noting First Amendment access rights. Both *Detroit Free Press* and *Karantalis* involved the press's attempt to access information through a FOIA request. Case law reveals that journalists cannot always rely on the First Amendment to access government information if a government agency rejects their FOIA request.<sup>64</sup> Although the First Amendment states that "Congress shall make no law . . . abridging the freedom of . . . the press[.]"<sup>65</sup> the Amendment does not guarantee the press an unqualified right to access information. The Supreme Court, in *Zemel v. Rusk*, held that "[t]he right to speak and publish does not carry with it the unrestrained right to gather information."<sup>66</sup> In *Houchins v. KQED*, the Supreme Court further stated that "[t]he public's interest in knowing about its government is protected by the guarantee of a Free Press, but the protection is indirect. The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act."<sup>67</sup> Effectively, the media has a qualified right to access government information under the First Amendment.

The qualified First Amendment right to access government information complements FOIA, because FOIA does not permit access to certain categories of government information like judicial proceedings and documents.<sup>68</sup> The Supreme Court has spelled out many examples of qualified First Amendment rights to access judicial proceedings.<sup>69</sup> Courtroom access is an example of a qualified First Amendment right. In *Richmond Newspapers, Inc. v. Virginia*, the Court recognized a First Amendment right to attend criminal trials,<sup>70</sup> but the Court has yet to

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<sup>64</sup> See *Zemel v. Rusk*, 381 U.S. 1, 17 (1965); see also *Houchins v. KQED, Inc.*, 438 U.S. 1, 14 (1978).

<sup>65</sup> U.S. CONST. amend. I.

<sup>66</sup> *Zemel*, 381 U.S. at 17.

<sup>67</sup> *Houchins*, 438 U.S. at 14.

<sup>68</sup> YOUR RIGHT TO FEDERAL RECORDS, *supra* note 16.

<sup>69</sup> See *Richmond Newspapers, Inc. v. VA*, 448 U.S. 555, 580–81 (1980); see *Press-Enter. Co. v. Superior Court of CA, Riverside Cnty.*, 464 U.S. 501, 512–13 (1984); see *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 610 (1978).

<sup>70</sup> *Richmond Newspapers*, 448 U.S. at 580–81.

extend this right to access civil trials.<sup>71</sup> In addition, the Court has also announced a qualified First Amendment right to access court documents, like *voir dire* transcripts.<sup>72</sup>

Courtroom camera access is another example of a qualified First Amendment right. In *Nixon v. Warner Communications, Inc.*, the Supreme Court held, “[i]n the first place . . . there is no constitutional right to have [live witness] testimony recorded and broadcast.”<sup>73</sup> The Court has allowed states to televise coverage of criminal proceedings in their courts.<sup>74</sup> In *Chandler v. Florida*, the Court approved Florida’s experiment to allow electronic media and still photographic coverage of criminal trials.<sup>75</sup> The Supreme Court, however, does not allow the media to bring cameras into its courtroom.<sup>76</sup> Justice Antonin Scalia commented, “[i]f I really thought the American people would get educated, I’d be all for [televised courtroom proceedings.]”<sup>77</sup> The Justice went on to explain, “[f]or every 10 people who sat through our proceedings . . . there would be 10,000 who would see nothing but a 30-second take out[.]”<sup>78</sup> In other words, televising proceedings would create “a misimpression of the Supreme Court.”<sup>79</sup> Similarly, Justice Elena Kagan and Justice Sonia Sotomayor have also voiced reservations about allowing cameras to televise the Court’s oral arguments.<sup>80</sup> These Justices’ arguments are noteworthy because they frame the themes that this Comment will discuss in Section III on why

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<sup>71</sup> Christopher Dunn, Column: *Rediscovering the First Amendment Right of Access* (*New York Law Journal*), NEW YORK CIVIL LIBERTIES UNION (Aug. 4, 2011), <http://www.nyclu.org/oped/column-rediscovering-first-amendment-right-of-access-new-york-law-journal>.

<sup>72</sup> *Press-Enter. Co.*, 464 U.S. at 512–13.

<sup>73</sup> *Warner Communications, Inc.*, 435 U.S. at 610.

<sup>74</sup> See *Chandler v. Florida*, 449 U.S. 560, 560–61 (1981).

<sup>75</sup> *Id.* at 560–61.

<sup>76</sup> Tony Mauro, *Let the cameras roll: Cameras in the courtroom and the myth of Supreme Court exceptionalism*, THE NATIONAL LAW JOURNAL (November 14, 2011), [http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202532222249&Let\\_the\\_cameras\\_roll&slreturn=1](http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202532222249&Let_the_cameras_roll&slreturn=1).

<sup>77</sup> Dan Rivoli, *Scalia, Breyer Weigh in on Televised High Court Arguments*, INTERNATIONAL BUSINESS TIMES (OCT. 6, 2011 9:07AM), <http://m.ibtimes.com/scalia-breyer-televised-arguments-226289.html>.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> Tony Mauro, *Sotomayor now opposes cameras at the court*, THE NATIONAL LAW JOURNAL (Feb. 13, 2013), [http://www.law.com/jsp/nlj/PubArticleSCI.jsp?id=1202588061400&Sotomayor\\_now\\_opposes\\_cameras\\_at\\_the\\_court\\_&slreturn=20130128184629](http://www.law.com/jsp/nlj/PubArticleSCI.jsp?id=1202588061400&Sotomayor_now_opposes_cameras_at_the_court_&slreturn=20130128184629).



certain information should remain private. In essence, all of the examples of qualified First Amendment rights establish that the media cannot always claim a general right to access government information under the First Amendment. Thus, the *Detroit Free Press* and the freelance journalist in *Karantsalis* cannot successfully rely on the First Amendment to access mug shot photographs.

### III. DEFINITION OF PRIVACY

The decisions in *Detroit Free Press* and *Karantsalis*, as well as the language and legislative history of FOIA, leave one question unanswered: What is privacy? Scholar John B. Young once commented, “[p]rivacy, like an elephant, is more readily recognized than described.”<sup>81</sup> In other words, people are often unclear on what they precisely mean when they argue that their privacy needs protection.<sup>82</sup> The Supreme Court’s position on privacy suggests that it is not a singular concept. Instead, privacy is a multi-faceted concept and protects many categories of rights.<sup>83</sup> Part A, below, presents a framework of privacy in order to guide the discussion on the evolution of this concept as a legal right. Part B traces the legal history of privacy rights most applicable to mug shot disclosures. A useful analogy for understanding privacy in this context would be the history of blackmail and privacy tort law. Finally, Part C addresses cultural and social justifications for privacy laws.

#### A. A Framework for Understanding Privacy

Because “privacy is too complicated a concept to be boiled down to a single essence[,]”<sup>84</sup>

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<sup>81</sup> HEATHER MACNEIL, WITHOUT CONSENT: THE ETHICS OF DISCLOSING PERSONAL INFORMATION IN PUBLIC ARCHIVES 9 (1992).

<sup>82</sup> Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 480 (2006) [hereinafter Solove, *Taxonomy of Privacy*].

<sup>83</sup> See *Griswold v. Connecticut*, 381 U.S. 479, 479 (1965) (citing an implied constitutional right to privacy); *Roe v. Wade*, 410 U.S. 113, 153 (1973) (holding a woman’s privacy right to make decisions on her medical care); *Katz v. United States*, 389 U.S. 347, 347 (1967) (holding that wiretapping conversations on a public telephone booth constitutes an unreasonable violation of privacy).

<sup>84</sup> Solove, *Taxonomy of Privacy*, *supra* note 82, at 485.

author Daniel J. Solove argues that “privacy violations involve a variety of types of harmful or problematic activities.”<sup>85</sup> Specifically, people “should understand privacy as a set of protections against a plurality of distinct but related problems.”<sup>86</sup> In essence, society designed privacy as a protection against problems that hinder the activities which society values.<sup>87</sup> Recognizing and understanding the various types of socially recognized privacy violations can help create a taxonomy for privacy that facilitates the development of privacy law.<sup>88</sup>

Such a taxonomy outlines four categories of activities harmful to privacy: (1) information collection, (2) information processing, (3) information dissemination, and (4) invasion.<sup>89</sup> Each of these four groups covers specific categories that are harmful to privacy.<sup>90</sup> For instance, “disclosure” is one of the seven specific harms to privacy within the “information dissemination” group.<sup>91</sup> This Comment adopts this framework in analyzing the privacy implications of mug shot disclosures. Specifically, this section examines “disclosure,” as this category is most relevant to a discussion on mug shot disclosures.

“Disclosure,” in the privacy context, involves “the revelation of truthful information about a person that impacts the way others judge her character.”<sup>92</sup> Untruthful information undoubtedly impacts a person’s reputation, but some individuals may inquire why the law would protect against the disclosure of truthful information. “Disclosure” laws aim to prevent reputational harms.<sup>93</sup> “Disclosure” is an apt vehicle for analyzing the privacy implications of mug shot disclosures, because mug shots reveal truthful information of a person’s criminal

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<sup>85</sup> *Id.* at 480.

<sup>86</sup> DANIEL J. SOLOVE, UNDERSTANDING PRIVACY 171 (2008) [hereinafter SOLOVE, UNDERSTANDING PRIVACY].

<sup>87</sup> *Id.* at 174.

<sup>88</sup> Solove, *Taxonomy of Privacy*, *supra* note 82, at 483–84.

<sup>89</sup> *Id.* at 488.

<sup>90</sup> *Id.* at 490–91.

<sup>91</sup> *Id.* at 523.

<sup>92</sup> *Id.* at 491.

<sup>93</sup> Solove, *Taxonomy of Privacy*, *supra* note 82, at 529; *see generally* LAWRENCE M. FRIEDMAN, GUARDING LIFE’S DARK SECRETS: LEGAL AND SOCIAL CONTROLS OVER REPUTATION, PROPRIETY, AND PRIVACY 9–10 (2007).

record and, as Section IV will discuss in-depth, mug shots also elicit reputational judgment by the public. In truth, privacy and reputation are “intimately bound together[.]”<sup>94</sup>

[y]our reputation, of course, is what other people think of you. What they think of you is, obviously, a function of what they know about you or think they know about you. Hence any study of reputation is also a study of the flow of information about other people—and the power to control that flow. . . . Many people earn and keep a reputation not because of what people know about them so much as because of what other people do *not* know. For people with skeletons in their closet, reputation depends on secrecy and privacy.<sup>95</sup>

Ultimately, laws against the disclosure of truthful information are based on the inherent connection between privacy and reputation, and mug shot disclosures perfectly illustrate this connection. In fact, the history of disclosure laws reveals that lawmakers developed these laws because they recognized the strong link between privacy and social status.

#### B. *Development of Privacy Law Most Applicable to Mug Shot Disclosures*

The historical origins of laws against disclosure reveal that the government designed these laws to protect against reputational harms. Blackmail laws and privacy tort law show the evolution of disclosure laws and offer legal analogies for protecting against the disclosure of mug shots. Blackmail law is an early example of a “disclosure” law, because it protects against the revelation of truthful information that could lead to reputational harms,<sup>96</sup> even though it “involves a threat of disclosure rather than an actual disclosure.”<sup>97</sup> Blackmail occurs when an individual extorts money or something else from another by threatening to disclose information, or rather, “skeletons in the man’s closet.”<sup>98</sup> The following example in a nineteenth-century context demonstrates how blackmail laws aimed to protect reputation:

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<sup>94</sup> FRIEDMAN, *supra* note 93, at 4.

<sup>95</sup> *Id.* at 3-4.

<sup>96</sup> *See generally id.* at 10, 86-97.

<sup>97</sup> Solove, *Taxonomy of Privacy*, *supra* note 82, at 541.

<sup>98</sup> FRIEDMAN, *supra* note 93, at 97.

The blackmailer knows a dirty secret about someone. He knows, let us say, that his banker, this pillar of the church, this leader of the community . . . fathered a bastard child. The blackmailer threatens to tell the truth unless the banker pays. . . . Threatening to punish the blackmailer was no doubt supposed to deter him, but by the same token it protected the banker's guilty secret. Here, the law protects a "respectable" man who has broken the rules . . . . There is no point trying to squeeze money out of a pauper, or out of someone with no reputation to lose.<sup>99</sup>

Hence, blackmail laws do "not protect the innocent but curiously enough . . . protect the guilty,"<sup>100</sup> who wish to keep their guilty information *private*.

Author Lawrence M. Friedman contends that blackmail laws were an "example of the legal shield protecting reputation[.]"<sup>101</sup> He inquires, "[i]n a society that exalts freedom of speech and freedom of contract and bargaining, even sharp and relentless bargaining, why *do* we have laws against blackmail?"<sup>102</sup> Friedman posits: "Did blackmail laws actually deter? Doubtful. But the point of the laws seems reasonably clear. The blackmail laws were supposed to protect respectable people with guilty secrets. The laws were supposed to keep the past safely buried."<sup>103</sup> Ultimately, blackmail laws function as privacy laws that allow individuals to safeguard truthful information that has the potential to ruin their reputations. Mug shots are an example of information that is truthful, but harmful to one's reputation. Mug shots represent past "guilty secrets," which most people want to keep private. Blackmail laws protect against the disclosure of both truthful and untruthful information, because a blackmailer cannot claim as a defense to violating a blackmail law that he or she threatened to disclose truthful information.<sup>104</sup> Nonetheless, blackmail laws essentially provide one type of legal analogy for safeguarding against the disclosure of mug shots.

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<sup>99</sup> *Id.* at 66.

<sup>100</sup> *Id.* at 10.

<sup>101</sup> *Id.* at 99.

<sup>102</sup> *Id.* at 84.

<sup>103</sup> *Id.* at 98.

<sup>104</sup> FRIEDMAN, *supra* note 93, at 97.

More notable than the promulgation of blackmail laws is Samuel Warren and Louis Brandeis' 1890 *Harvard Law Review* article, "The Right to Privacy."<sup>105</sup> This article most famously articulates the privacy category of "disclosure" and provides legal reasons to prevent the disclosure of mug shots. Warren and Brandeis were inspired to write their famous article by a non-salacious newspaper story on Warren's daughter's wedding festivities.<sup>106</sup> In trying to discover a legal foundation for privacy rights, Brandeis and Warren began their analysis by recognizing the "mental pain and distress" that stemmed from the publication of true, but private facts.<sup>107</sup> Solove explains that the "harms Warren and Brandeis spoke of are dignity harms. The classic example of such a harm is reputational injury."<sup>108</sup> Warren and Brandeis wrote their famous article during the height of yellow journalism and the advent of the Kodak camera.<sup>109</sup> Privacy needed protection, because "[i]nstantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house-tops.'"<sup>110</sup>

Warren and Brandeis argued that the "existing law afford[ed] a principle which may be invoked to protect the privacy of the individual from invasion either by the too enterprising press, the photographer, or the possessor of any other modern device for recording or

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<sup>105</sup> Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

<sup>106</sup> JEFFREY ROSEN, *THE UNWANTED GAZE* 7 (2000) (stating "[a]lthough the information itself wasn't inherently salacious, Brandeis and Warren were appalled that a domestic ceremony would be . . . discussed by strangers.").

<sup>107</sup> *Id.* at 43; Warren & Brandeis, *supra* note 105, at 196.

<sup>108</sup> Solove, *Taxonomy of Privacy*, *supra* note 82, at 486.

<sup>109</sup> FRIEDMAN, *supra* note 93, at 214; for more background on the meaning and history of yellow journalism, see U.S. DEPARTMENT OF STATE, OFFICE OF THE HISTORIAN, U.S. DIPLOMACY AND YELLOW JOURNALISM, 1895–1898, [http://history.state.gov/milestones/1866-1898/Yellow\\_journalism](http://history.state.gov/milestones/1866-1898/Yellow_journalism) (last visited Mar. 14, 2013).

<sup>110</sup> Warren & Brandeis, *supra* note 105, at 196 (criticizing the press for "overstepping in every direction the obvious bounds of propriety and of decency. Gossip [was] no longer the resource of the idle and of the vicious, but . . . [became] a trade . . . [t]o satisfy a prurient taste.").

reproducing scenes or sounds.”<sup>111</sup> The common law already “secure[d] to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others.”<sup>112</sup> The right to privacy implied not only one’s right to inhibit false portrayal of private life, but to prevent its depiction entirely.<sup>113</sup> This conceptualization of privacy fundamentally expresses an individual’s ability to control his personal exposure as a legal right.<sup>114</sup>

What remains peculiar is why Warren and Brandeis, men with good reputations, would be concerned with threats to privacy?<sup>115</sup> Freidman argues, “although Warren and Brandeis did not say so (and perhaps did not even think so), no doubt *some* respectable people in fact had dark and dirty secrets to hide. Even for these people, privacy—the veil of secrecy—was . . . an aspect of the social order that had to be protected.”<sup>116</sup> For Warren and Brandeis, “[a]ny intrusion into the domestic circle would lead to scandal”<sup>117</sup> and thus, privacy was “essential to human dignity.”<sup>118</sup>

In the context of this Comment, FOIA Exemption 7(C)’s protection of an individual’s reasonable expectation of privacy quintessentially represents the right “to control the conditions of our own exposure as a legal right[.]”<sup>119</sup> Mug shots are prime examples of “instantaneous photographs”<sup>120</sup> that capture a person’s “thoughts, sentiments, and emotions”<sup>121</sup> at a particular moment in time and undoubtedly are photographs that most individuals would prefer to keep

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<sup>111</sup> *Id.* at 206.

<sup>112</sup> *Id.* at 198.

<sup>113</sup> *Id.* at 218.

<sup>114</sup> ROSEN, *supra* note 106, at 44.

<sup>115</sup> *See* FRIEDMAN, *supra* note 93, at 214.

<sup>116</sup> *Id.* at 215.

<sup>117</sup> *Id.* at 214.

<sup>118</sup> *Id.* at 215.

<sup>119</sup> ROSEN, *supra* note 106, at 44.

<sup>120</sup> Warren & Brandeis, *supra* note 105, at 195.

<sup>121</sup> *Id.* at 198.

private. When the government prevents the disclosure of mug shots under FOIA Exemption 7(C), it is ultimately controlling how others use private information about an individual. Specifically, pursuant to FOIA Exemption 7(C), the government holds the power to prevent the media from using an individual's mug shot and more significantly, to foreclose any reputational impact on an individual from such use.

The impact of Warren and Brandeis' law review article on privacy and disclosure laws today is highly evident. Tort law recognizes the potential privacy violation resulting from the disclosure of truthful information.<sup>122</sup> Under the "Publicity Given to Private Life" tort law, the plaintiff must prove publicity of private facts "highly offensive to a reasonable person" and that are "not of a legitimate concern to the public."<sup>123</sup> This tort law enables individuals to sue another person for revealing true information about them, even if the other person obtained the information through lawful means.<sup>124</sup> In addition, the Supreme Court, in *Whalen v. Roe*, embraced Warren and Brandeis' article by recognizing a right to privacy based on the "individual interest in avoiding disclosure of personal matter[.]"<sup>125</sup>

Ultimately, Solove's privacy framework, blackmail laws, and privacy tort law all demonstrate how privacy laws strive to address reputational harms. These examples provide a legal justification for why mug shot disclosures implicate FOIA's "reasonable expectation of privacy," because they show how the American legal system recognizes that privacy violations

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<sup>122</sup> ROSEN, *supra* note 106, at 45.

<sup>123</sup> RESTATEMENT (SECOND) OF TORTS § 652D (1977).

<sup>124</sup> Daniel J. Solove, *The Virtues Of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 DUKE L.J. 967, 971 (2003) [hereinafter Solove, *Knowing Less*].

<sup>125</sup> *Whalen v. Roe*, 429 U.S. 589, 599 (1977). Appellees, a group of physicians and patients, argued that a New York statute, which required Schedule II drug prescriptions to contain the prescribing physician's name and the patient's name, address, age, and other information and required healthcare providers to file the prescription with the State Department, violated their constitutionally protected "zone of privacy[.]" *id.* at 589, 598. Specifically, patients argued that readily available information about their health would become publicly known and adversely impact their reputations, *id.* at 600. The statute prohibited the public disclosure of the patient's identity and permitted only a limited number of health department and investigatory personnel to access the patient's file, *id.* at 589. Accordingly, the Court held that the statute, on its face, did not violate an individual's privacy interest in avoiding disclosure of personal matters, *id.* at 599, 600.

stem from reputational harms caused by truthful disclosure of information. In fact, other countries have laws that echo the design of American blackmail laws and privacy tort law. For instance, in Argentina, the Civil Code prohibits “publishing photos, divulging correspondence, mortifying another’s customs or sentiments or disturbing his privacy by whatever means.”<sup>126</sup> In Mexico, the Federal Civil Code “allows people to sue for ‘moral damage’ if one prints photographs of an individual that inflict ‘an injury in his sentiments, affections, or intimate life.’”<sup>127</sup> Contrary to *Detroit Free Press*’s contention, the personal privacy of an individual is invaded when “that person suffers ridicule or embarrassment from the disclosure of information in the possession of government agencies.”<sup>128</sup> Unfortunately, American privacy tort law is not an adequate protection for victims of mug shot disclosures, because victims must often suffer reputational harms before they can bring a cause of action. Thus, in order to *prevent* reputational harms, the Supreme Court must hold that disclosure of mug shots violates an individual’s “reasonable expectation of privacy” under FOIA.

C. *Why Should the Law Keep Certain Truthful Information Private?*

While blackmail and tort law illustrate *how* privacy law protects individuals from reputational harms, sociological and psychological reasons justify *why* the law should protect against the disclosure of truthful information with the potential to harm one’s reputation. Solove believes that “the value of privacy should be understood in terms of its contribution to society.”<sup>129</sup> Specifically, “when privacy protects the individual, it does so because it is in society’s interest. Individual liberties should be justified in terms of their social contributions.

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<sup>126</sup> CÓDIGO CIVIL [CÓD. CIV.] [CIVIL CODE] art. 1071; SOLOVE, UNDERSTANDING PRIVACY, *supra* note 86, at 141.

<sup>127</sup> SOLOVE, UNDERSTANDING PRIVACY, *supra* note 86, at 141 (quoting Jorge A. Vargas, *Privacy Rights Under Mexican law: Emergence and Legal Configuration of a Panoply of New Rights*, 27 HOUS. J. INT’L L. 73, 111 (2004)).

<sup>128</sup> *Detroit Free Press v. Dep’t of Justice*, 73 F.3d 93, 97 (6th Cir. 1996) (citing *Schell v. U.S. Dep’t of Health & Human Services*, 843 F.2d 933, 938-39 (6th Cir. 1988)).

<sup>129</sup> SOLOVE, UNDERSTANDING PRIVACY, *supra* note 86, at 173.



Privacy is not just freedom from social control but is in fact a socially constructed form of protection.”<sup>130</sup> Many scholars, however, criticize legal privacy protections and restrictions on the disclosure of truthful information.<sup>131</sup>

One general criticism of legal privacy protections is that they “inhibit a person’s ability to assess other people’s reputations and make accurate judgments about them.”<sup>132</sup> For instance, Judge Richard Posner believes that the core issue in privacy law is whether individuals should have the right to conceal disreputable facts about themselves.<sup>133</sup> Judge Posner explains: ““when people today decry lack of privacy, what they want, I think, is . . . more power to conceal information about themselves that others might use to their disadvantage.””<sup>134</sup> By concealing truthful, but damaging information, people can gain advantageous footing in employment and marriage markets.<sup>135</sup> Similarly, Richard Epstein, a professor at New York University School of Law, argues that privacy is often synonymous with the right to be disingenuous about one’s self to the public.<sup>136</sup>

The critiques on privacy are based on many faulty assumptions.<sup>137</sup> The first assumption that critics make is that more information disclosure about a person will lead to a more accurate judgment about that person.<sup>138</sup> Solove rebuts this assumption by illustrating that “the disclosure of private information can often lead to misjudgment”<sup>139</sup> and by arguing that laws should sway

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<sup>130</sup> *Id.* at 173–74.

<sup>131</sup> Solove, *Knowing Less*, *supra* note 124, at 1032–34.

<sup>132</sup> *Id.* at 1032.

<sup>133</sup> *Id.*; RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW*, 46 (1998).

<sup>134</sup> Solove, *Knowing Less*, *supra* note 124, at 1032 (quoting RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 271 (1981)).

<sup>135</sup> Solove, *Knowing Less*, *supra* note 124, at 1032 (quoting RICHARD A. POSNER, *OVERCOMING LAW* 532 (1995)).

<sup>136</sup> Solove, *Knowing Less*, *supra* note 124, at 1032–33 (quoting Richard A. Epstein, *The Legal Regulation of Genetic Discrimination: Old Responses to New Technology*, 74 B.U. L. REV. 1, 12 (1994)).

<sup>137</sup> Solove, *Knowing Less*, *supra* note 124, at 1033.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 1035.

the way people judge each other.<sup>140</sup> While having accurate information is essential when individuals must trust others with their finances and childcare,<sup>141</sup> “[k]nowing certain information can [also] distort one’s judgment of another person rather than increase its accuracy.”<sup>142</sup>

Solove first tackles the question of “why should the law pay special attention to misjudgment based on private rather than public information?”<sup>143</sup> Critics argue, “the problem of misunderstanding is not really a privacy problem because misunderstanding can occur with both private and public information.”<sup>144</sup> Author Jeffrey Rosen, however, observes that “[p]rivacy protects us from being misidentified and judged out of context in a world of short attention spans, a world in which information can easily be confused with knowledge.”<sup>145</sup> Furthermore, “when intimate [private] information is removed from its original context and revealed to strangers, we are vulnerable to being misjudged on the basis of our most embarrassing, and therefore, most memorable, tastes and preferences.”<sup>146</sup> In sum, the critics are:

correct that misunderstanding can occur in many ways, not exclusively through revelation of private information. Just because this is so, however, need not tarnish Rosen’s insight. Much misunderstanding occurs because of the disclosure of private information, and therefore, privacy is an important way of protecting against misunderstanding. It may not be the exclusive way to safeguard being judged out of context, but there are many reasons why the disclosure of private information is particularly susceptible to misunderstanding.<sup>147</sup>

Reputation provides an example of how disclosure of private information is particularly susceptible to misunderstanding.<sup>148</sup> Legal scholar Alan Westin argues that individuals must control information about themselves because they have contradictory roles to play in society

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<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 1034.

<sup>142</sup> Solove, *Knowing Less*, *supra* note 124, at 1035.

<sup>143</sup> *Id.* at 1036.

<sup>144</sup> *Id.* (citing Robert C. Post, *Three Concepts of Privacy*, 89 GEO. L. J. 2087, 2087–89 (2001)).

<sup>145</sup> *Id.* at 1035 (quoting ROSEN, *supra* note 106, at 8).

<sup>146</sup> Solove, *Knowing Less*, *supra* note 124, at 1035–36 (quoting ROSEN, *supra* note 106, at 8).

<sup>147</sup> *Id.* at 1036–37.

<sup>148</sup> *Id.* at 1039.

and must present different aspects of themselves at different times.<sup>149</sup> A properly functioning society depends on everyone’s ability to deal with reputation’s precarious nature, but “[t]he reality is that people lack much control over how they are judged. . . . [and] managing disclosures about one’s private life is an even . . . more difficult burden[.]”<sup>150</sup> Effectively speaking, privacy law that protects reputation benefits all of society. As Solove explains, “[s]ociety accepts that public reputations will be groomed to some degree.”<sup>151</sup> In short, laws must protect against the disclosure of truthful private information “not only because private information will lead to judging out of context, but also because of the value of preserving partial control over how people are judged[.]”<sup>152</sup>

Scholars are not impervious to problems with privacy law regulating reputational judgment. For instance, UCLA School of Law Professor Eugene Volokh argues, “in a free speech regime, others’ definitions of me should primarily be molded by their own judgments, rather than by my using legal coercion to keep them in the dark.”<sup>153</sup> In other words, “[i]f people desire to make bad judgments about others based on partial information, it is their prerogative. What business does the law have in telling people how they should judge other people?”<sup>154</sup> The first response to this argument draws an analogy to evidence law.<sup>155</sup> Evidence law can exclude relevant evidence from a trial because “it is more prejudicial than probative.”<sup>156</sup> Similarly, although certain information may help in assessing a person’s character, the law must recognize

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<sup>149</sup> *Id.* at 1037 (citing ALAN F. WESTIN, *PRIVACY AND FREEDOM* 33 (1967)).

<sup>150</sup> Solove, *Knowing Less*, *supra* note 124, at 1039.

<sup>151</sup> *Id.* at 1040.

<sup>152</sup> *Id.* at 1040–41.

<sup>153</sup> *Id.* at 1047 (quoting Eugene Volokh, *Freedom of Speech and Information Privacy: The troubling Implications of a Right to Stop People from Speaking About You*, 52 *STAN. L. REV.* 1049, 1093 (2000)).

<sup>154</sup> Solove, *Knowing Less*, *supra* note 124, at 1047.

<sup>155</sup> *Id.* at 1048.

<sup>156</sup> *Id.*

that keeping such information private does not necessarily obstruct a fair judgment.<sup>157</sup>

Second, legal regulation of private information benefits not just the individual, but also promotes vital government interests.<sup>158</sup> For instance, “the bright spotlight of the media can deter capable people from seeking public office . . . It can deter all those who have engaged in some deviant activity or who have a few eccentricities. This has the result of de-democratizing the public sphere to a select group of individuals[.]”<sup>159</sup> Overall, the law should regulate private information, because

[m]ost people have embarrassing moments in their past. Everyone has done things and regretted them later. . . . There is a great value in allowing individuals the opportunity to wipe the slate clean. Society protects against such disclosures not just to protect the individual, but to further society’s interest in providing people with incentives and room to change and grow.<sup>160</sup>

Reputations need protection from the disclosure of truthful information and privacy law can provide this protection.

Finally, another faulty assumption by critics of privacy is that gossip provides an educational benefit in learning about human nature.<sup>161</sup> While gossip in certain contexts has an educational value, in other contexts, gossip solely “satisf[ies] idle curiosity.”<sup>162</sup> For instance, Solove strains to precisely identify the educational value in knowing a celebrity’s sex life or dating history.<sup>163</sup> Moreover, in terms of private figures, “the educative function of gossip could readily be satisfied without revealing the identities of the individuals involved.”<sup>164</sup> Many disclosures about a person’s private life are also made to people who do not need to judge that

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<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 1048–49.

<sup>159</sup> *Id.* at 1048.

<sup>160</sup> Solove, *Knowing Less*, *supra* note 124, at 1054.

<sup>161</sup> *Id.* at 1044.

<sup>162</sup> *Id.*; see Warren & Brandeis, *supra* note 105, at 197.

<sup>163</sup> Solove, *Knowing Less*, *supra* note 124, at 1045.

<sup>164</sup> *Id.*

person.<sup>165</sup> Thus, disclosing private information is often unnecessary, rather than educationally helpful.

Ultimately, the justifications that scholars like Solove provide for why the law must keep certain truthful information private help give meaning to a “reasonable expectation of privacy” under FOIA Exemption 7(C). In short, a reasonable expectation of privacy encompasses the right to control and protect one’s reputation. Because private information often represents only partial information about a person, disclosure of such information leads to character misjudgments and, in turn, reputational problems. Disclosing private information can disadvantage society. The law must protect private information in order to protect society from these disadvantages.

#### IV. SOCIAL SCIENCE ANALYSIS OF MUG SHOT DISCLOSURES

Mug shots can lead to negative misperceptions about an individual. Social science research illustrates how the release of mug shot photos violates reasonable expectations of privacy under FOIA Exemption 7(C). Evidence suggests that mug shots create an unfavorable impression and diminish the public’s leniency towards the defendant in the mug shot. Specifically, three studies, respectively by Millicent H. Abel *et al.*,<sup>166</sup> by Marianne LaFrance *et al.*<sup>167</sup> and by Laurence B. Lain *et al.*,<sup>168</sup> demonstrate how mug shots affect public perceptions. The results of these studies support the justifications in Section III for why certain information should be private.

##### A. *Mug Shots Carry a Negative Connotation by Diminishing Assessments of Leniency*

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<sup>165</sup> *Id.* at 1044.

<sup>166</sup> Millicent H. Abel *et al.*, *Attributions of Guilt and Punishment as Functions of Physical Attractiveness and Smiling*, 145 J. SOC. PSYCHOL. 687 (2005).

<sup>167</sup> Marianne LaFrance *et al.*, *Why Smiles Generate Leniency*, 21 PERSONALITY & SOC. PSYCHOL. BULL. 207 (1995).

<sup>168</sup> Laurence B. Lain *et al.*, *Mug Shots And Reader Attitudes Toward People In The News*, 69 JOURNALISM Q. 293 (1992).

Mug shots lead to unflattering judgments and harsh appraisals of a defendant. First, the Millicent H. Abel *et al.* study found that attractiveness and smiling affect people’s attribution of guilt and punishment.<sup>169</sup> The researchers showed participants four photos depicted in a mug shot style.<sup>170</sup> The four mug shots contained a male or a female with either a felt smile or a neutral expression.<sup>171</sup> The researchers told participants a crime scenario in which the mug shot subject may have allegedly been involved.<sup>172</sup> The researchers designed the scenario “to induce suspicion of guilt but not certain guilt.”<sup>173</sup> Then, participants answered four questions that elicited their attributions of *guilt* on the mug shot subjects.<sup>174</sup> Researchers next asked the participants how many years of imprisonment—from zero to sixty years—they would impose on the mug shot subject, assuming that the subject is guilty.<sup>175</sup> This question measured participants’ *leniency* towards the mug shot subject. Finally, participants rated the physical attractiveness of the mug shot subjects on a sliding scale.<sup>176</sup>

Although participants assigned the same level of *guilt* to both smiling and non-smiling mug shot subjects,<sup>177</sup> the study found a significant positive correlation between guilt and leniency for the mug shot subject who the participants rated low in physical attractiveness and who was not smiling.<sup>178</sup> The research summarized that “[i]f the target is unattractive, his or her smile may lead to leniency; whereas if the target is attractive, the target’s smile may lead to harsher punishment.”<sup>179</sup> Therefore, “if a person is actually guilty and physically unattractive, he

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<sup>169</sup> Millicent H. Abel *et al.*, *supra* note 166, at 700.

<sup>170</sup> *Id.* at 692.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 692–93.

<sup>173</sup> *Id.* at 693.

<sup>174</sup> *Id.* at 694.

<sup>175</sup> Millicent H. Abel *et al.*, *supra* note 166, at 694.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 698.

<sup>178</sup> *Id.* at 687.

<sup>179</sup> *Id.* at 700.

or she should smile; whereas if the person is actually guilty and physically attractive, he or she should not smile.”<sup>180</sup>

Similarly, the Marianne LaFrance *et al.* study suggested that smiling affects how people attribute guilt and determine punishment of a person.<sup>181</sup> Researchers gave the participants mug shots of a person exhibiting varying degrees between a smile and a non-smile.<sup>182</sup> Researchers explained that school officials accused the person on the mug shot of cheating on an exam.<sup>183</sup> Participants then gauged the mug shot subject’s likelihood of cheating in the present scenario, in the past, and in the future.<sup>184</sup> Researchers also asked participants the degree to which they believed that the mug shot subject should receive favorable judgment in the absence of full evidence.<sup>185</sup> Finally, participants chose the degree of punishment the mug shot subject should receive – from no punishment to maximum punishment.<sup>186</sup> The study found that, compared to those subjects who did not smile, “leniency (granting the transgressor more benefit of the doubt and applying a less severe sentence) was given more to smiling targets, even though they were not seen as more likely to have cheated in the past, present, or future.”<sup>187</sup> Overall, “smiling transgressors received significantly greater benefit of the doubt and less punishment than non-smiling transgressors.”<sup>188</sup>

Finally, the Lain *et al.* study illustrated that the nature of a mug shot influences readers’ perception of a news story accompanying the photo.<sup>189</sup> Researchers gave participants a “neutral” newspaper story about which few research subjects could be expected to form a strong

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<sup>180</sup> *Id.*

<sup>181</sup> Marianne LaFrance et al., *supra* note 167, at 213.

<sup>182</sup> *Id.* at 207.

<sup>183</sup> *Id.* at 210.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> Marianne LaFrance et al., *supra* note 167, at 212.

<sup>188</sup> *Id.* at 213.

<sup>189</sup> Laurence B. Lain et al., *supra* note 168, at 299.

opinion.<sup>190</sup> The newspaper article contained a mug shot of a person with either a positive, negative, or neutral facial expression.<sup>191</sup> One newspaper article, however, had no accompanying mug shot.<sup>192</sup> Researchers instructed participants to evaluate how the newspaper article portrayed the story subject among fourteen qualities, such as “unethical-ethical,” “impersonal-personal,” and “antisocial-social.”<sup>193</sup> Results showed that differences in readers’ appraisal of how the newspaper article portrayed the story subject were due primarily to the positive or negative nature of the mug shots.<sup>194</sup> Specifically, “mug shots can have a differential effect on the meaning newspaper readers attribute to individuals who are subjects of accompanying news stories.”<sup>195</sup> The study states, “[t]hese results suggest that readers who can see pictures of news story subjects are quicker to ascribe personal characteristics to those subjects than are readers who have no such pictures.”<sup>196</sup> and cautions:

Newspaper editors, if indeed they are concerned with objectivity, should be aware of the impact of mug shots accompanying stories and exercise care in their selection. . . . Likewise, it is caveat emptor for the consumer, the reader. As he or she strives to be an informed citizen, the reader should do well to remember the mug shot’s contribution . . . to the news story’s tenor and meaning for him or her.<sup>197</sup>

Ultimately, despite a neutral characterization of an individual featured in a news story, the nature of a mug shot of such an individual can ascribe a non-neutral (perhaps even negative) meaning onto a story. All three studies show how mug shots create a prejudicial public impression.<sup>198</sup> The research evidence foreshadows negative implications for defendants whose

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<sup>190</sup> *Id.* at 296.

<sup>191</sup> *Id.* at 297.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 298.

<sup>195</sup> Laurence B. Lain et al., *supra* note 168, at 299.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 300.

<sup>198</sup> See Millicent H. Abel et al., *supra* note 166, at 700; see Marianne LaFrance et al., *supra* note 167, at 213; see Lain et al., *supra* note 168, at 299.



mug shots appear in the press.

### 1. Implications of Social Science Research on the Release of Mug Shots

The three social science studies illustrate the justifications for keeping certain information private.<sup>199</sup> Namely, mug shot photographs can lead to misjudgment about a defendant. Whereas the research above differentiates between hypothetical smiling and non-smiling defendants,<sup>200</sup> real life defendants will most likely not be smiling for their mug shots. Posing for a mug shot is not a celebratory moment. Imagine taking a mug shot “after being accused, taken into custody, and deprived of most liberties.”<sup>201</sup> Clearly, a person generally does not have time to look attractive by putting on make-up, combing his or her hair, and wearing his or her best attire for a mug shot photo. Rather, a person may look distressed, or even hostile, as he or she realizes that the camera will capture the pain and embarrassment of having a criminal record. As one person explained, “[m]ug shots showcase us at our lowest point, stripped of all trappings that made us look like kings. They reveal what we in fact are: Flawed, Possibly Drunk Human Beings in Bad Lighting.”<sup>202</sup> In essence, mug shots capture only one moment in a defendant’s entire life span.

Although a photograph capturing one moment cannot accurately reveal any true characteristics about a person, research shows that people will, nevertheless, make judgments about a defendant in a mug shot.<sup>203</sup> The social science studies imply that society will not judge real-life subjects of mug shots with leniency, given that most defendants will not smile or look

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<sup>199</sup> See Millicent H. Abel et al., *supra* note 166, at 700; see Marianne LaFrance et al., *supra* note 167, at 213; see Lain et al., *supra* note 168, at 299; see Solove, *Knowing Less*, *supra* note 121, at 1035–36; see ROSEN, *supra* note 103, at 8.

<sup>200</sup> Abel et al., *supra* note 166, at 692; La France et al., *supra* note 167, at 207; Lain et al., *supra* note 168, at 297.

<sup>201</sup> Karantsalis v. U.S. Dep’t of Justice, 635 F.3d 497, 503 (11th Cir. 2011).

<sup>202</sup> Alexandra Petri, *The John Edwards Rule of Mug Shots*, THE WASHINGTON POST (Jun. 15, 2011, 7:25 PM), [http://www.washingtonpost.com/blogs/compost/post/the-john-edwards-rule-of-mugshots/2011/03/03/AGWcWVWH\\_blog.html](http://www.washingtonpost.com/blogs/compost/post/the-john-edwards-rule-of-mugshots/2011/03/03/AGWcWVWH_blog.html).

<sup>203</sup> See Abel et al., *supra* note 166, at 700; see La France et al., *supra* note 167, at 213; see Lain et al., *supra* note 168, at 299.

attractive in their mug shots. These judgments are unreasonable, as they are based on impartial information about a person. The Millicent H. Abel *et al.* study indicates that the public will not have a lenient attitude towards a real-life person who looks guilty in his mug shot.<sup>204</sup> Furthermore, the Marianne LaFrance *et al.* study suggests that the public is not likely to give a real-life defendant in a mug shot the benefit of the doubt, regardless of the defendant's guilt.<sup>205</sup>

One possible argument in favor of releasing mug shots is that a criminal record, documenting arrest or conviction, has more of a negative stigma than releasing an unflattering mug shot. This argument suggests that releasing a mug shot does not implicate privacy, because the public can easily access arrest and conviction records. The Lain *et al.* study, however, shows that mug shots have an impact over and above having a criminal record of arrest and conviction in the first place.<sup>206</sup> On paper, a crime may appear minor, but a really unflattering mug shot can exacerbate perceptions about the seriousness of the crime that a defendant committed, just as a negative mug shot can negatively color a neutral newspaper story.<sup>207</sup> Common observations indicate that many people would not want to associate with a person who they deem has committed a serious crime.<sup>208</sup> The Lain *et al.* research results show the power of an unflattering mug shot and how people can unreasonably magnify negative judgments of a defendant in a mug shot.<sup>209</sup> Based on the justifications that Solove and other commentators voice for privacy, the Lain *et al.* results contradict *Detorit Free Press'* contention that a defendant in a mug shot does

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<sup>204</sup> Abel et al., *supra* note 166, at 700.

<sup>205</sup> LaFrance, *supra* note 167, at 212.

<sup>206</sup> See Lain et al., *supra* note 168, at 298.

<sup>207</sup> *Id.*

<sup>208</sup> See *infra* note 240 and accompanying text; see Steve Osunsami, *Mug Shot Websites: Profiting off People in Booking Photos?*, ABC NEWS (Mar. 7, 2013), <http://abcnews.go.com/Technology/mug-shot-websites-profiting-off-people-booking-photos/story?id=18669703> (“As long as the [mug shot] picture is out there, you are defending yourself.”).

<sup>209</sup> See Lain et al., *supra* note 168, at 298.

not have a reasonable expectation of privacy when he or she has appeared in court.<sup>210</sup> Mug shots *uniquely* implicate defendants' privacy rights.

In short, social science research shows how the release of mug shots violates defendants' reasonable expectations of privacy. Recall that law enforcement takes mug shots of defendants before a jury convicts defendants of guilt. Unfortunately, social science shows that mug shot photos are not judgment-free. Most people publicize only their most flattering pictures, and hide their least desirable photographs,<sup>211</sup> but mug shots are not representative of people at their best moments. Congress amended FOIA Exemption 7(C) in 1986 to protect the privacy rights of innocent individuals in law enforcement records or information.<sup>212</sup> Studies, however, indicate that the public will not give the subjects of mug shots the benefit of the doubt, a conclusion which is contrary to the idea behind Exemption 7(C)'s protections.

Not only do mug shots expose a moment that defendants prefer to keep private, but they also prevent defendants from controlling their reputations. Mug shots implicate privacy interests because they represent incomplete information about a person. In turn, people use this incomplete information to make snap judgments about defendants, which subsequently affect defendants' standing in society. People will view a defendant with a mug shot with suspicion, rather than with warm acceptance. Releasing mug shot photos violates defendants' reasonable expectations of privacy and ultimately violates the spirit of FOIA Exemption 7(C), as well as most other American jurisprudence regarding privacy.

#### B. *Mug Shots' Effects Last Beyond the End of a Criminal Trial*

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<sup>210</sup> See Solove, *Knowing Less*, *supra* note 124, at 1035–36; see also ROSEN, *supra* note 106, at 8; Lain et al., *supra* note 168, at 298; *Detroit Free Press v. Dep't of Justice*, 73 F.3d 93, 96 (6th Cir. 1996).

<sup>211</sup> See Shelley Galasso Bonanno, *Your Facebook Self: Reality and unreality as we self-style on social media*, PSYCHOLOGY TODAY MEANINGFUL YOU: VOICES OF CONTEMPORARY PSYCHOANALYSIS (Jan. 8, 2013), <http://www.psychologytoday.com/blog/meaningful-you/201301/your-facebook-self> (“We post ourselves, smiling and engaged, usually only the best, most flattering photographs[.]”).

<sup>212</sup> U.S. DEP'T OF JUSTICE, *supra* note 59.

People’s negative attitudes—in the form of minimal leniency and diminished benefit of the doubt—toward subjects of mug shot photos impact defendants *long after* the conclusion of a criminal trial. Specifically, three social science research papers, respectively by Tiffany A. Ito *et al.*,<sup>213</sup> by Steven L. Neuberg<sup>214</sup> and by Roy F. Baumeister *et al.*,<sup>215</sup> show that people’s negative attitudes have great strength and longevity. Research will summarily illustrate that mug shot disclosures violate FOIA Exemption 7(C), because the negative attitudes people form towards defendants in mug shots are intensely robust and last well beyond defendants’ courtroom proceedings.

The first study, through a series of experiments, found that people form a “negativity bias,” which the study defines as the “greater sensitivity to negative information” than to “comparatively extreme positive information,” as early as the evaluative-categorization stage of information processing.<sup>216</sup> The evaluative-categorization stage is when people first process information into categories (*e.g.*, negative, positive, or neutral) about a person or object that they encounter.<sup>217</sup> In one experiment, researchers presented participants with pictures depicting positive, negative, or neutral stimuli.<sup>218</sup> Researchers instructed participants to evaluate whether the picture “showed something they found positive, negative, or neutral.”<sup>219</sup> As participants evaluated the pictures, the researchers measured the amplitude of participants’ late positive potential (LPP), which reflects the extent to which an individual processes the emotional

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<sup>213</sup> Tiffany A. Ito *et al.*, *Negative Information Weighs More Heavily on the Brain: The Negativity Bias in Evaluative Categorizations*, 75 J. PERSONALITY & SOC. PSYCHOL. 887 (1998).

<sup>214</sup> Steven L. Neuberg, *The Goal of Forming Accurate Impressions During Social Interactions: Attenuating the Impact of Negative Expectancies*, 56 J. PERSONALITY & SOC. PSYCHOL. 374 (1989).

<sup>215</sup> Roy F. Baumeister *et al.*, *Bad is Stronger Than Good*, 5 REV. GEN. PSYCHOL. 323 (2001).

<sup>216</sup> Ito *et al.*, *supra* note 213, at 887, 891.

<sup>217</sup> *Id.* at 887.

<sup>218</sup> *Id.* at 894.

<sup>219</sup> *Id.*

stimuli.<sup>220</sup> The researchers hypothesized that “if the negativity bias operates at the evaluative-categorization stage, it should manifest itself as larger LPPs to evaluatively negative pictures as compared with positive pictures.”<sup>221</sup> The researcher’s hypothesis was correct, and results showed the “operation of a negativity bias at the evaluative-categorization stage of information processing.”<sup>222</sup> To paraphrase, people are more sensitive to negative information than to positive information when they first form an impression of an individual by evaluating him or her. Thus, this study suggests that people have greater sensitivity to a negative mug shot photo than to a positive photo of an individual.

In a second study, Steven L. Neuberg found that negative information about an individual creates a negative expectancy for that person.<sup>223</sup> In simulated interviews, researchers gave interviewers negative information about one applicant (the “negative-expectancy” applicant) and no information about another applicant (the “no-expectancy” applicant).<sup>224</sup> Researchers encouraged half of the interviewers to form accurate impressions about the applicants (the “accuracy-goal condition”), while the other half of the interviewers received no encouragement (the “no-goal condition”).<sup>225</sup> Results indicate, “interviewers in the no-goal condition formed more negative impressions of the negative-expectancy applicants than of the no-expectancy applicants.”<sup>226</sup> Meanwhile, negative information about an applicant did not bias the judgments of the interviewers in the accuracy-goal condition.<sup>227</sup> Given that mug shots are an example of negative information in society, this study essentially predicts that the public will characterize subjects of mug shots from a visceral, rather than from a rational level. The public is more likely

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<sup>220</sup> *See id.* at 889.

<sup>221</sup> *Id.*

<sup>222</sup> Ito et al., *supra* note 213, at 896 Figure 2.

<sup>223</sup> Steven L. Neuberg, *supra* note 214, at 378.

<sup>224</sup> *Id.* at 374.

<sup>225</sup> *Id.*

<sup>226</sup> *Id.* at 378.

<sup>227</sup> *Id.*

to make the worst assumptions about an individual in a mug shot, rather than make an effort to empathize or fully understand the individual.

Finally, a research survey reviewing studies across a wide range of psychological phenomena gives firm support to the proposition that negative information has a stronger impact on people than positive information.<sup>228</sup> For instance, for the psychological phenomenon of impression formation, the survey affirms that, “[i]n general, and apart from a few carefully crafted exceptions, negative information receives more processing and contributes more strongly to the final impression than does positive information. Learning something bad about a new acquaintance carries more weight than learning something good, by and large.”<sup>229</sup> In its review of studies on stereotype formation, the survey conclusively summarizes, “bad reputations are easy to acquire but difficult to lose, whereas good reputations are difficult to acquire but easy to lose.”<sup>230</sup> To state otherwise, bad reputations have great longevity. The survey essentially recapitulates its findings through “the general principal that bad is stronger than good.”<sup>231</sup> Thus, if an employer saw a mug shot indicating a negative characteristic of an applicant, and also learned that the applicant is a hero, a positive characteristic, then the negative characteristic of having a mug shot will contribute more strongly to the employer’s impression of the applicant than the positive characteristic of being a hero. A defendant will face a difficult time eliminating the negative impressions that people form from viewing a mug shot.

#### 1. Implications of Social Science Research on the Release of Mug Shots

The three studies indicate that negative salient features of a defendant’s mug shot remain in people’s minds long after a criminal trial has ended and easily overshadow any positive

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<sup>228</sup> Baumeister et al., *supra* note 215, at 324.

<sup>229</sup> *Id.* at 323–24.

<sup>230</sup> *Id.* at 344.

<sup>231</sup> *Id.* at 324.

information about a defendant.<sup>232</sup> Not only do people form negative judgments of a defendant in a mug shot, but such judgments tend to be extreme and long-lasting. In other words, judgments about individuals in mug shots are often *unreasonable*. The studies ultimately provide evidence for why mug shots should remain private, because they exemplify the proposition that “[k]nowing certain information can distort one’s judgment of another rather than increase its accuracy.”<sup>233</sup> For instance, in the Neuberg study, only the interviewers who were encouraged by researchers to form an accurate impression of applicants did not let negative information bias their appraisal of the applicants.<sup>234</sup> In real life, however, individuals do not have researchers to encourage them to view a mug shot with an open mind. Rather, studies ultimately suggest that people will react with hasty, overly emotional, and inaccurate judgments if they view an individual’s mug shot.<sup>235</sup>

The internet has only exacerbated the longevity of the public’s uninformed judgments about mug shots. People can easily access mug shots through the internet.<sup>236</sup> When people view mug shots on the internet, they are most likely viewing the photo of a stranger whom they have little interest in knowing accurately. Solove discusses sociologist Erving Goffman’s theory that when people first meet an individual, they have little incentive to overlook strange or distasteful information about that individual’s private life, because “it’s easy to just walk away.”<sup>237</sup> With time to become familiar with a person, however, “we’re better able to process information, see

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<sup>232</sup> See Tiffany A. Ito et al., *supra* note 213, at 887; see Neuberg, *supra* note 214, at 378; see Baumeister et al., *supra* note 215, at 324.

<sup>233</sup> Solove, *Knowing Less*, *supra* note 124, at 1035.

<sup>234</sup> Neuberg, *supra* note 214, at 378.

<sup>235</sup> See Ito et al., *supra* note 213, at 891; see Neuberg, *supra* note 214, at 378; see Baumeister et al., *supra* note 215, at 324.

<sup>236</sup> See *infra* note 280 and accompanying text.

<sup>237</sup> DANIEL J. SOLOVE, *THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET* 69 (2007) [hereinafter SOLOVE, *FUTURE OF REPUTATION*] (citing Erving Goffman, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* 96 (1963)).

the whole person, and weigh secrets in context.”<sup>238</sup> Unfortunately, the people who “just walk away” can be potential employers, friends, and spouses.

Three hypothetical examples illustrate how irrational judgments based on mug shots impact the defendant, the defendant’s family, and society long after the end of a criminal trial. These examples show that the federal government should not disclose mug shots, because such disclosures overwhelmingly hinder the ability to control one’s reputation and thus violate one’s reasonable expectation of privacy under FOIA Exemption 7(C). First, mug shot disclosures negatively impact individuals who are victims of false arrests and who are attempting to rehabilitate into society. For such individuals, privacy is necessary to “further society’s interest in providing people with incentives and room to grow and change.”<sup>239</sup> Lois Wilson, a victim of a false arrest, recounted the effect of having her mug shot posted onto a sheriff department website: “I don’t like that—that’s not who I am. People look at you differently now . . . everybody is telling you you’re guilty.”<sup>240</sup> The reactions that Wilson receives are not surprising. Education would not be completely effective in fighting the stigma that follows a public mug shot.<sup>241</sup> For instance, despite the highly public campaigns educating citizens on AIDS, many people still make faulty assumptions about the causes of AIDS.<sup>242</sup> Accordingly, even a disclaimer next to a mug shot proclaiming, “[t]his person is innocent until proven guilty” may not effectively eradicate a defendant’s association with guilt after his or her criminal trial ends. Furthermore, companies that remove customers’ mug shots from the internet often charge a hefty

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<sup>238</sup> *Id.*

<sup>239</sup> Solove, *Knowing Less*, *supra* note 124, at 1054.

<sup>240</sup> Brian Morrin, *Arrested reputation: Woman upset after mug shot goes public*, KBOI 2 NEWS BOISE, IDAHO (Sept. 14, 2011), <http://www.kboi2.com/internal?st=print&id=129786933&path=/news/local>.

<sup>241</sup> *See* SOLOVE, *FUTURE OF REPUTATION*, *supra* note 237, at 70.

<sup>242</sup> *Id.*



price: one Florida woman paid \$850 to remove her mug shot from private websites.<sup>243</sup>

Second, mug shots impact the privacy rights of a defendant's family, thus illustrating the substantial (*unreasonable*) extent of privacy violations that stem from an individual's mug shot disclosure. Assume that a newspaper publishes the mug shot of a person whom a jury has given a life sentence. One possible argument holds that a person with a life sentence already has enough privacy from society and thus, the release of this person's mug shots has a meaningless impact on his or her privacy rights. This person in prison, however, may have family members. Perhaps these family members have an interest in withholding the release of a mug shot. The release of an incarcerated person's mug shots implicates the privacy rights of family members. Penny Wood, a grandmother, provides an example of how the release of her unflattering mug shot affected her family.<sup>244</sup> In a plea bargain deal, Wood agreed to let law enforcement publish photographs of her for a campaign to show the damages of methamphetamine use.<sup>245</sup> Following Wood's consent, however, her grandson endured the shame from the release of the photos.<sup>246</sup>

A defendant's mug shot does not always accurately portray his or her family, but Wood's example shows how people could judge an entire family from the mug shot of just one family member. This inaccurate judgment is a prime reason why scholars like Solove justify the privacy of certain information.<sup>247</sup> Note that the Supreme Court, in *National Archives and*

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<sup>243</sup> Anita Ramasastry, *Mug Shot Mania: The Legal and Policy Issues Surrounding Private Websites' Postings of Arrest Photos*, VERDICT: LEGAL ANALYSIS AND COMMENTARY FROM JUSTIA (Apr. 24, 2012), <http://verdict.justia.com/2012/04/24/mug-shot-mania> (discussing the prices charged by certain web reputation companies, such as RemoveSlander.com, which charges customers \$699 to remove a mug shot from multiple websites.); see also Michael McLaughlin, *Mug Shot Websites Face Lawsuit Alleging Violations of Arrestee Publicity Rights*, THE HUFFINGTON POST (last updated Jan. 14, 2013, 6:01 PM), [http://www.huffingtonpost.com/2013/01/14/mug-shot-websites-lawsuit-publicity-rights\\_n\\_2472607.html](http://www.huffingtonpost.com/2013/01/14/mug-shot-websites-lawsuit-publicity-rights_n_2472607.html) (reporting on a law suit brought by two Ohio residents against five websites for violating "their rights of publicity by demanding fees—sometimes hundreds of dollars—to delete their booking [mug shot] photos.").

<sup>244</sup> Kate McCann, *Ex-Addict hates being anti-drug poster child*, CHICAGO TRIBUNE (Mar. 5, 2003), [http://articles.chicagotribune.com/2003-03-05/news/0303050300\\_1\\_homemade-drug-meth-drug-arrest](http://articles.chicagotribune.com/2003-03-05/news/0303050300_1_homemade-drug-meth-drug-arrest).

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> Solove, *Knowing Less*, *supra* note 124, at 1035–36; ROSEN, *supra* note 106, at 8.

*Records Administration v. Favish*, held that FOIA recognized “surviving family members’ right to personal privacy with respect to their close relative’s death-scene images[.]”<sup>248</sup> Only an illogical result would emerge if *Favish*’s FOIA ruling did not apply to family members of individuals serving a life sentence. Innocent family members should not suffer privacy right violations for the mistakes of a close relative.

Finally, even individuals with criminal convictions deserve privacy protections once they have served their criminal sentence. These privacy protections not only benefit the individual with the criminal conviction but also benefit society. Suppose a jury convicted an individual of fraud and sentenced him to ten years in prison. Also, presume that this individual is a “business genius.” Finally, assume that the individual has learned from his mistakes during his prison sentence and hopes to become a contributing member of society after prison. Despite this individual’s moral failings of committing fraud, he clearly has many valuable skills that he can contribute to the workforce.

Research, however, proves the existence of a stigma in having a mug shot photo, and demonstrates the strength and longevity of the public’s negative attitudes.<sup>249</sup> Recall that mug shots can exacerbate perceptions about the seriousness of a defendant’s crime, thus creating a stigma over and above having a public record of an arrest and conviction.<sup>250</sup> In turn, “people with stigma are often shunned or not fully accepted by society.”<sup>251</sup> Accordingly, protection from mug shot disclosure “permits room to change, to define oneself and one’s future without become a ‘prisoner of [one’s] recorded past.’ . . . Society benefits . . . when people can rehabilitate

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<sup>248</sup> Nat’l Archives Records Admin. v. Favish, 541 U.S. 157, 157 (2004).

<sup>249</sup> See Ito et al., *supra* note 213, at 887; see Neuberger, *supra* note 214, at 378; see Baumeister et al., *supra* note 215, at 324.

<sup>250</sup> See Lain et al., *supra* note 168, at 293.

<sup>251</sup> SOLOVE, FUTURE OF REPUTATION, *supra* note 237, at 70.

themselves and start new, more productive lives.”<sup>252</sup> Unfortunately, studies suggest that if the government discloses mug shots, then defendants in those mug shots will not be able to change themselves in the public eye and will not be able to benefit society, even if they have immense talents.<sup>253</sup> In other words, mug shot disclosures could lead to the “de-democratization” of society that Solove warns could result from the absence of privacy.<sup>254</sup>

In brief, social science undermines the Sixth Circuit’s contention in *Detroit Free Press* that the need to protect privacy diminishes in an ongoing trial where the defendant has already appeared.<sup>255</sup> Specifically, social science supports the conclusion that mug shot disclosures violate a defendant’s reasonable expectation of privacy under FOIA Exemption 7(C). Mug shots need privacy protection, because studies indicate that not only will people make inaccurate and negative conclusions about defendants in a mug shot, but they will also hold those conclusions long after a criminal trial ends. While attorneys, who are experts in public relations, guide their clients on how to behave during a trial, they are generally not present to remind their clients to take the “perfect” mug shot photo. Thus, mug shots are the most candid portrayal of an individual at his or her most vulnerable moment. The studies indicate how one negative mug shot can overshadow any “perfect” behavior during a trial.<sup>256</sup> The negative impression that people form after seeing just one mug shot, however, is not always accurate.

When law enforcement releases mug shots, the public is able to invade the defendant’s privacy beyond a defendant’s trial and beyond a criminal’s jail sentence. The American legal system promotes the principle that criminals who served their sentence have paid their debts to

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<sup>252</sup> *Id.* at 73.

<sup>253</sup> See Ito et al., *supra* note 213, at 887; see Neuberger, *supra* note 214, at 378; see Baumeister et al., *supra* note 215, at 324.

<sup>254</sup> Solove, *Knowing Less*, *supra* note 124, at 1048.

<sup>255</sup> *Detroit Free Press v. Dep’t of Justice*, 73 F.3d 93, 97 (6th Cir. 1996).

<sup>256</sup> See Ito et al., *supra* note 213, at 887; see Neuberger, *supra* note 214, at 378; see Baumeister et al., *supra* note 215, at 324.

society and should no longer reimburse society.<sup>257</sup> Mug shots, however, are a *permanent* record of a private episode of defendants' lives. The invasion of privacy that results from disclosing mug shots *perpetually* affects a defendant's rehabilitation into society and a defendant's innocent family members. FOIA Exemption 7(C) does not create an unlimited access to a defendant's criminal record. Moreover, FOIA Exemption 7(C) clearly does not condone the privacy intrusion of family members with relatives whose names appear in law enforcement records. *Detroit Free Press's* holding quintessentially allows the government to transgress the boundary established by FOIA Exemption 7(C) to protect an individual's *reasonable* expectation of privacy.<sup>258</sup> As Solove explains, the value of privacy lies in its value to society because "[e]veryone must cope with the fragility of reputation," and society values privacy protections of embarrassing private information.<sup>259</sup> Social science research shows how damaging mug shot disclosures can be to a defendant's reputation.<sup>260</sup> Talented defendants with negative reputations will undoubtedly find difficulty in contributing to society. This difficulty from the disclosure of mug shots translates into a disadvantage for society. Thus, mug shots need privacy protection.

### *C. Mug Shot Disclosures have an Inconclusive Effect on Public Benefit*

In their famous 1890 *Harvard Law Review* article, Warren and Brandeis articulated that a privacy law should:

protect those persons with whose affairs the community has no legitimate concern, from being dragged into an undesirable and undesired publicity and to protect all persons, whatsoever; their position or station, from having matters which they may properly prefer to keep private, made public against their will.<sup>261</sup>

In addition to showing the perpetual negative attitudes towards subjects of mug shot photos,

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<sup>257</sup> G. Scott Rafshoon, Comment, *Community Notification Of Sex Offenders: Issues Of Punishment, Privacy, And Due Process*, 44 EMORY L.J. 1633, 1670 (1995).

<sup>258</sup> *Detroit Free Press*, 73 F.3d at 96–97.

<sup>259</sup> Solove, *Knowing Less*, *supra* note 124, at 1039.

<sup>260</sup> See Baumeister et al., *supra* note 215, at 344.

<sup>261</sup> Warren & Brandeis, *supra* note 105, at 214–15.

social science research indicates that any public benefit derived from releasing mug shot photographs is inconclusive, if not minimal. Two popular arguments support the release of mug shots, but research does not adequately support these arguments.

Public shaming is the first theory that supports mug shot disclosures. Law enforcement officials believe that publicizing mug shots will deter crime. For example, one U.S. city considered posting DUI mug shots on Facebook. The councilman behind the proposal explained, “[i]f it takes shaming people to save lives, I am willing to do it[.]”<sup>262</sup> Essentially, the public shaming theory holds that the shame and embarrassment from having strangers see one’s mug shot will deter all members of society, including the mug shot subject, from committing crime.

Although posting mug shots will undoubtedly deter some criminal activity, “[b]oth the psychological and the anthropological works indicate that the general deterrence and expressive effects of shame measures are likely to be highly contextual and unpredictable.”<sup>263</sup> For instance, some individuals commit crimes to support an addiction or compulsion, in which case, shame punishment may not be effective.<sup>264</sup> In fact, some psychologists assert that shame is the root of certain crimes; thus, punishing an individual with shame is counter-productive.<sup>265</sup> In addition, some psychological research suggests shame punishment causes anger and a drive to retaliate against the person administering the punishment.<sup>266</sup> Conversely, research also theorizes that “[s]hame has a way of alienating people, inhibiting their ability to rehabilitate and reintegrate

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<sup>262</sup> Thomas Watkins, *City Considers Posting DUI Mug Shots on Facebook*, THE HUFFINGTON POST (Jan. 18, 2011, 7:11 AM), [http://www.huffingtonpost.com/2011/01/18/dui-mug-shots-facebook\\_n\\_810180.html](http://www.huffingtonpost.com/2011/01/18/dui-mug-shots-facebook_n_810180.html).

<sup>263</sup> Toni M. Massaro, *The Meanings Of Shame: Implications for Legal Reform*, 3 PSYCHOL., PUB. POL’Y, & L. 645, 649 (1997).

<sup>264</sup> *Id.* at 672.

<sup>265</sup> *Id.*

<sup>266</sup> *Id.* at 648.

themselves into the community.”<sup>267</sup> For example, the stigma associated with shame punishment leaves criminals “with no hope of becoming a productive member of society,” “producing the feeling that improvement and change is hopeless.”<sup>268</sup> Essentially, the effect of using mug shots photographs for punishment is inconclusive.

The second argument holds that mug shots serve as public notice to people about criminals, such as sexual offenders, who live in their neighborhoods.<sup>269</sup> Solove concedes that “information can be highly relevant . . . especially when a person with a history of violent criminal conduct has contact with children.”<sup>270</sup> Under Megan’s Law, parents “have the right to find out the names of . . . sex offenders, their photos, their addresses[.]”<sup>271</sup> Mug shots may make it easier for parents to identify a neighborhood sex offender than by merely knowing an offender’s name and address from a sex offender registration list. While shielding children from sexual offenders is a compelling interest, this interest does not *always* justify overriding privacy rights. In fact, mug shot disclosures of sexual offenders may unnecessarily invade privacy interests when the effectiveness of such disclosures is uncertain.

First, studies on the effectiveness of Megan’s Law are scant and the few studies available report inconclusive results. The inconclusive benefits to the public from mug shot disclosures boosts arguments for keeping mug shots private. One commentator lamented, “[s]tate and federal governments have not been proactive in commissioning studies as to the effectiveness of

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<sup>267</sup> SOLOVE, *FUTURE OF REPUTATION*, *supra* note 237, at 95 (citing MARTHA C. NUSSBAUM, *HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW* 230, 235 (2004)).

<sup>268</sup> Jocelyn Ho, Note, *Incest And Sex Offender Registration: Who Is Registration Helping And Who Is It Hurting?*, 14 *CARDOZO J.L. & GENDER* 429, 443 (2008) (quoting Bruce J. Winick, *A Therapeutic Jurisprudence Analysis of Sex Offender Registration and Community Notification Laws*, in *PROTECTING SOCIETY FROM SEXUALLY DANGEROUS OFFENDERS: LAW, JUSTICE, AND THERAPY* 213, 220 (Bruce J. Winick & John Q. La Fond, eds., 2003)).

<sup>269</sup> See Solove, *Knowing Less*, *supra* note 124, at 1056.

<sup>270</sup> *Id.*

<sup>271</sup> *What is Megan’s Law? What is Megan’s List? Who are Megan’s Law Offenders*, REGISTEREDOFFENDERSLIST.ORG, <http://www.registeredoffenderslist.org/megans-law.htm> (last visited Feb. 1, 2013); Solove, *Knowing Less*, *supra* note 124, at 1059.

registration in preventing future sex offenses. They have likewise failed to make inquiries into how these registries affect victims[.]”<sup>272</sup> A 2008 study shows Megan’s Law had no effect on sexual offense recidivism in New Jersey.<sup>273</sup> Conversely, “there is also not much proof that Megan’s Laws fail.”<sup>274</sup> Thus, mug shot disclosures do not necessarily protect the safety of children.

Second, “[w]hile many assume that sex crimes are perpetrated by strangers, such as the mysterious neighbor who lives down the street, most sex offenses are perpetrated by family members or people who know the victim.”<sup>275</sup> In fact, according to one estimate, family members or close family friends commit ninety-two percent of sexual offenses against children.<sup>276</sup> Thus, Megan’s Law is often useless in identifying sex offenders because most parents know the sex offender. Moreover, Megan’s Law also lists “harmless” offenders like high school students convicted for having sex with their underage boyfriends or girlfriends.<sup>277</sup> In effect, the release of mug shots *unnecessarily* invades the privacy rights of neighbors with sexual offense convictions.

Unfortunately, mug shot disclosures can have unintended effects. For instance, “Megan’s Laws may stigmatize the very victims of sex offenses whom they are designed to protect, many of whom are children living in the same house as the sex offender.”<sup>278</sup> Research also shows that sex offenders lose their jobs and experience difficulty adjusting into society, which, in turn, can increase the likelihood that they may return to committing crimes.<sup>279</sup> Inevitably, sex crimes will occur in some neighborhoods, just as any other crime. The possibility of sex crimes, however,

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<sup>272</sup> Ho, *supra* note 268, at 455; see Solove, *Knowing Less*, *supra* note 124, at 1060.

<sup>273</sup> THE RESEARCH AND EVALUATION UNIT OFFICE OF POLICY AND PLANNING NEW JERSEY DEPARTMENT OF CORRECTIONS, MEGAN’S LAW: ASSESSING THE PRACTICAL AND MONETARY EFFICACY 2 (2008), <https://www.ncjrs.gov/pdffiles1/nij/grants/225370.pdf>.

<sup>274</sup> Solove, *Knowing Less*, *supra* note 124, at 1060.

<sup>275</sup> Ho, *supra* note 268, at 432.

<sup>276</sup> Solove, *Knowing Less*, *supra* note 124, at 1060.

<sup>277</sup> *Id.*

<sup>278</sup> *Id.*; Ho, *supra* note 268, at 444.

<sup>279</sup> Solove, *Knowing Less*, *supra* note 124, at 1060; Ho, *supra* note 268, at 442–43.

should not *always* supersede laws that protect privacy, because mug shot disclosures do not conclusively benefit the public's protection of children.

Instead of aiding the criminal justice system, mug shot disclosures provide entertainment fodder to the public. Mug shots have become trendy features for publications and websites. *Jail*, *Cellmates*, *Busted*, and *Gotch-ya!* are examples of publications devoted exclusively to mug shots.<sup>280</sup> These publications sell for one dollar and provide “little editorial content outside photographs, names, and charges.”<sup>281</sup> The *Orlando Sentinel* even attests that mug shot postings created “huge [internet] traffic” for the paper.<sup>282</sup> In fact, the *Sentinel* mug shot webpage draws about 2.5 million views a month.<sup>283</sup> Clearly, not all of those 2.5 million views were from crime victims hoping to identify crime suspects. John Watson, a journalism professor, explained that viewing mug shots is akin to enjoying a horror movie.<sup>284</sup> Specifically, “[t]hese [mug shots] are pictures of monsters who actually exist, and we can look at them from the safety of wherever we are, and they disappear when we close the book.”<sup>285</sup> The mug shot publications essentially provide the kind of idle gossip that Warren and Brandeis in 1890 and Solove in the twenty-first century feel is a reason for keeping truthful information private.<sup>286</sup> The public's pleasure-seeking, voyeuristic interests should never trump a person's privacy interest in withholding the release of a mug shot.

## V. CONCLUSION

Disclosing mug shots, even after a defendant has made a courtroom appearance, defies a

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<sup>280</sup> Elliott C. McLaughlin, *Media taking mug shots—foreign, familiar—to bank*, CNN (DEC. 8, 2008), [http://articles.cnn.com/2008-12-08/justice/mugshots.fascination\\_1\\_mug-shots-web-sites-book-publishers?\\_s=PM:CRIME](http://articles.cnn.com/2008-12-08/justice/mugshots.fascination_1_mug-shots-web-sites-book-publishers?_s=PM:CRIME).

<sup>281</sup> *Id.*

<sup>282</sup> Tim Padgett, *Newspapers Catch Mug-Shot Mania*, TIME (SEPT. 21, 2009), available at <http://www.time.com/time/magazine/article/0,9171,1921604,00.html>.

<sup>283</sup> *Id.*

<sup>284</sup> McLaughlin, *supra* note 280.

<sup>285</sup> *Id.*

<sup>286</sup> See Solove, *Knowing Less*, *supra* note 124, at 1044; see also Warren & Brandeis, *supra* note 105, at 197.



defendant's reasonable expectation of privacy and hence, violates FOIA Exemption 7(C). When the Supreme Court decides to review the split between the Sixth and Eleventh Circuits, the Court must side with the *Karantsalis* decision. First, the legislative history of FOIA Exemption 7(C) is more aligned with the *Karantsalis* holding than it is with the *Detroit Free Press* holding. Second, blackmail laws, Warren and Brandeis' famous law review article, and privacy tort law all point to an American legal tradition that uses privacy as a legal right to protect reputations. Thus, *Karantsalis* has a more realistic view of privacy rights than does *Detroit Free Press*. Third, social science research more heavily supports the legislative intent of FOIA Exemption 7(C) and *Karantsalis*' view of privacy rights than the views of *Detroit Free Press*. Finally, the privacy invasions that defendants suffer from mug shot disclosures are highly shocking in comparison to the inconclusive benefit that the public receives from viewing mug shots.

Despite the strong social science support against the release of mug shots, discussions of privacy inevitably elicit questions on the public's right to view mug shots. Note that the Supreme Court has spelled out certain categorical standards that balance the public's right to know and privacy under FOIA Exemption 7(C). For example, in *Favish*, the Court held that “[i]n the case of photographic images and other data pertaining to an individual who died under mysterious circumstances,”<sup>287</sup> the requester of information protected by Exemption 7(C) must “establish more than a bare suspicion” of government misconduct and rather, must produce evidence that would “warrant a belief by a reasonable person that the alleged Government impropriety might have occurred.”<sup>288</sup> To address the balance between *legitimate* public need for disclosure and privacy protections under FOIA Exemption 7(C), the Supreme Court should

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<sup>287</sup> Nat'l Archives Records Admin. v. Favish, 541 U.S. 157, 173 (2004).

<sup>288</sup> *Id.* at 174; see U.S. Dep't of Def. v. Fed. Labor Relations Auth., 510 U.S. 487, 495 (1994) (“[T]he only relevant public interest in disclosure to be weighed in this balance is the extent to which disclosure would serve the core purpose of FOIA, which is contribut[ing] significantly to public understanding of the operations or activities of the government.”) (citations omitted) (internal quotation marks omitted).

extend the *Favish* standard to mug shot photographs if it decides to review the split between the Eleventh and the Sixth Circuits.

In general, the law should *presume* that mug shot disclosures violate a person's reasonable expectation of privacy, unless the requester of the mug shot photos puts forth evidence satisfying the *Favish* standard. Only when the FOIA requester has met this standard “will there exist a counterweight on the FOIA scale for the court to balance against the cognizable privacy interests in the requested records.”<sup>289</sup> Requesters of mug shot photos must meet this high standard of establishing “more than a bare suspicion” of government misconduct, because “[a]llegations of government misconduct are ‘easy to allege and hard to disprove’”<sup>290</sup> and thus a “meaningful evidentiary showing”<sup>291</sup> is vital to safeguard strongly against reputational and privacy harms resulting from mug shot disclosures.

Ultimately, the reasonable expectation of privacy encompasses the right to protect one's reputation. Social science shows that “disclosures of information about a person will not enhance our ability to judge . . . in fact, it may distort our assessments.”<sup>292</sup> This distortion starkly contrasts with FOIA's overall goal to create openness, honesty, and transparency. Moreover, reputation distortion certainly runs afoul of Exemption 7(C)'s goal to protect individuals whose

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<sup>289</sup> *Favish*, 541 U.S. at 174–75.

<sup>290</sup> *Id.* at 175 (quoting *Crawford-El v. Britton*, 523 U.S. 574, 585 (1998)).

<sup>291</sup> *Id.* For specific examples of evidence *not* indicating “more than a bare suspicion” of government misconduct, see *World Publ'g Co. v. U.S. Dep't of Justice*, 672 F.3d 825, 831 (10th Cir. 2012). In this case, the plaintiff argued that the disclosure of a defendant's mug shot would further nine public interests: (1) verifying the correct identity of the detainee, (2) determining favorable or biased treatment of the defendant, (3) detecting disparate treatment, (4) exposing racial, ethnic, or sexual profiling in arrest, (5) assessing whether a defendant is competent or impaired by his outward appearance, (6) comparing a defendant's appearance at arrest and during a trial, (7) allowing members of the public to assist law enforcement in solving crimes, (8) catching a fugitive, and (9) revealing whether the detainee took the charges seriously, *id.* The Tenth Circuit held that interests 1, 7, and 8 related to the public's capability of aiding law enforcement—“not to the ability of the citizens to know how well the government is performing its duties[,]” *id.* Additionally, interest 9 did not reveal any information about law enforcement's performance, *id.* Finally, while the court conceded that interests 2-6 are “legitimate public interests under FOIA, there is little to suggest that releasing [mug shot] photos would significantly assist the public in detecting or deterring any underlying government misconduct[,]” *id.*

<sup>292</sup> SOLOVE, UNDERSTANDING PRIVACY, *supra* note 86, at 144.

information appears in law enforcement records. Mug shot disclosures are not merely embarrassing; they *unreasonably* impact a whole range of sociological factors that last beyond a criminal trial.