5-1-2013

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

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Circuit Review Comment
AWR Submission
05/14/12

I. Introduction

In the comments section following a *Huffington Post* article, one commenter wrote, "look at the picture of this guy. Do you realy [sic] need to do a background check? One look and the answer shou;d [sic] have been 'no, you can't have a gun'." [sic][1] This commenter was referring to a photograph of Jared Lee Loughner, the twenty-two-year-old man allegedly responsible for shooting Congresswoman Gabrielle Gifford, killing six people, and wounding thirteen others at a political rally in Tuscon, Arizona.[2] In the photograph appearing on the *Huffington Post* article, a bald Loughner is smirking 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." [3] The *Huffington Post* commenter's quote illustrates the prejudicial effect of releasing mug shot photographs to the press.

United States courts have long recognized the prejudicial nature of submitting a defendant's mug shot into evidence during trial. In *Barnes v. United States*, the court stated, ""[t]he double-shot picture, with front and profile shots alongside each other, is so familiar

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[1] *Jared Lee Loughner's Mug Shot (PHOTO)*, HUFFINGTON POST (Jan. 10, 2011, 5:31 PM), http://www.huffingtonpost.com/2011/01/10/jared-lee-loughner-mug-shot-photo_n_807042.html.
[2] Josh Gerstein, *Media wins on Loughner mugshots, loses for now on search warrants*, POLITICO (Feb. 18, 2011), http://www.politico.com/blogs/joshgerstein/0211/Media_wins_on_Loughner_mugshots_loses_for_now_on_search_warrants.html.
[3] *Jared Lee Loughner mugshot disturbs viewers (PHOTO)*, GLOBALPOST (Jan. 10, 2011, 10 PM), http://www.globalpost.com/dispatch/america-and-the-world/110110/jared-lee-loughner-mugshot-disturbs-viewers-photos.

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, perhaps automatic."[4] Some courts have guidelines that regulate the submission of mug shot photographs into evidence. For instance, the First Circuit does not allow prosecutors to submit photographs that imply that the defendant has a prior criminal record and that suggest the source of the photographs.[5]

While these guidelines discuss the admission 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. Rather than discuss the evidentiary function of mug shot photographs in courtroom proceedings, this comment focuses on how the release of a defendant's mug shot photograph to the media implicates a defendant's privacy rights.

Currently, circuits have split over whether releasing a defendant's mug shot photograph to the media violates the defendant's right of privacy. The Sixth Circuit in *Detroit Free Press v. Department of Justice* held that no privacy rights are implicated when mug shots are disclosed 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 made court appearances."[6] On the other hand, the Eleventh Circuit in *Karantsalis v. Department of Justice* held that mug shot disclosures implicate privacy rights.[7] Both *Detroit Free Press* and *Karantsalis* discussed whether the release of a

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[4] *Barnes v. U.S.*, 365 F.2d 509, 510–11 (D.C. Cir 1966).
[5] *U.S. v. Fosher*, 568 F.2d 207, 214 (1st Cir. 1978).
[6] *Detroit Free Press v. Dep't of Justice*, 73 F.3d 93, 95 (6th Cir. 1996).
[7] *Karantsalis v. Detroit Free Press*, 635 F.3d 497, 503 (11th Cir. 2011).

defendant's mug shot photo to the press violated Exemption 7(c) of the Freedom of Information Act ("FOIA"), [8] which prohibits the disclosure of government records that could *"reasonably* be expected to constitute an invasion of personal privacy"[9]

This comment argues that the release of a defendant's mug shot to the press violates Exemption 7(c) of FOIA, which intended to preserve a reasonable expectation of personal privacy. Even if the defendant has already made a courtroom appearance, the release of a defendant's 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. The long-lasting effects of the release of a mug shot constitute a violation of a person's reasonable expectation of privacy. Section two of this comment explores the legal background of accessing 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 three analyzes the theoretical underpinnings of privacy as a legal right. This comment's ultimate purpose is to explore FOIA's application to mug shot photographs. However, section three also discusses Supreme Court and common law tort jurisprudence on privacy, because they are helpful in defining privacy interests. Section four explores the impact that the release of mug shot photographs to the press has on privacy even after the end of a criminal proceeding. In addition, section four presents social science evidence, which shows that any public benefit of releasing mug shots to the press is far from conclusive. Finally, section five concludes

[8] *Karantsalis*, 635 F.3d at 501; *Detroit Free Press*, 73 F.3d at 95.
[9] *Karantsalis*, 635 F.3d at 501; *Detroit Free Press*, 73 F.3d at 96.

this comment by discussing possible solutions to the conflict between the defendant's right to privacy and the public's right to know.

II. Legal Background on Accessing Government Information

A. Introduction to FOIA

FOIA allows any member of the public to receive information from federal government agencies.[10] However, the Act does not apply to the courts, to Congress, and to local and state government records.[11] The seeds of FOIA grew from the emphasis on government secrecy during World War II and from the activities of Senator Joseph McCarthy.[12] President Lyndon B. Johnson signed FOIA into law in 1966,[13] but the law did not go into effect until 1967.[14] Before the passage of FOIA, an individual had the burden to prove a right to access government documents.[15] After the passage of FOIA, the government had the burden to justify withholding information requested by an individual.[16]

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[10] U.S. Department of State Information Access Guide, U.S. DEPARTMENT OF STATE, 4 (Nov. 17, 2010), http://www.state.gov/documents/organization/128321.pdf.
[11] 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), *available at* http://www.justice.gov/oip/right_to_federal_records09.pdf.
[12] 112 CONG. REC. 67,13007 (1966), *available at* http://www.gwu.edu/~nsarchiv/nsa/foialeghistory/112%20Cong.%20Rec.%2013007%20(1966%20Source%20Book).pdf.
[13] HERBERT N. FOERSTEL, FREEDOM OF INFORMATION AND THE RIGHT TO KNOW: THE ORIGINS AND APPLICATIONS OF THE FREEDOM OF INFORMATION ACT 44 (1999).
[14] UNITED STATED DEPARTMENT OF JUSTICE, FREEDOM OF INFORMATION ACT: LEARN.
[15] *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.
[16] *Id.* at 3.

FOIA's purpose was to compel federal government agencies to fully disclose documents that members of the public requested.[17] However, FOIA lists nine categories of information, known as "exemptions," which permit the government to withhold from the public information that falls into these exemption categories.[18] Exemption 7(c) is the category at issue in this comment. Today, Exemption 7(c) applies 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[.]"[19] 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* requested under FOIA the release of the mug shots of eight defendants who were then indicted and awaiting trial.[20] By the time the case reached the Sixth Circuit, the defendants' trial had commenced and the defendants had appeared in court. The Department of Justice relied on Exemption 7(c) to reject the newspaper's request for the mug shots.[21] FOIA Exemption 7(c) applies when the requested information is (1) "compiled for law enforcement purposes;" (2) is "*reasonably* . . . expected

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[17] 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.")
[18] U.S. DEPARTMENT OF STATE, *supra* note 10.
[19] The Freedom of Information Reform Act of 1986, Pub. L. No. 99–570, §1802, 100 Stat. 3207 (1986) (subsequently amended).
[20] *Detroit Free Press*, 73 F.3d at 95.
[21] *Id.*

to constitute an invasion of personal privacy;" and (3) the request's "intrusion into private matters [is] deemed 'unwarranted' after balancing 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."[22]

The court reasoned that while the mug shots were "compiled for law enforcement,"[23] 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.[24] 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."[25] 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."[26] Finally, the court stated, "[e]ven had an encroachment upon personal privacy been found, however, a significant public interest in the disclosure of the mug shots of the individuals . . . *could*, nevertheless, justify the release of that information to the public."[27] For example, "release of a photograph of a defendant

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[22] *Id.* at 96.
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.* at 97.
[27] *Id.* at 97–98.

can more clearly reveal the government's glaring error in detaining the wrong person for an arrest than can any reprint of only the name of an arrestee."[28]

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

In *Karantsalis*, the plaintiff, a free-lance journalist, requested the release of mug shots of Luis Giro, who appeared in court to plead guilty to securities fraud.[29] The Marshals Service rejected the plaintiff's request pursuant to Exemption 7(c).[30] The court noted the difference in protocol for releasing mug shot photos between the Eleventh Circuit and the Sixth Circuit.[31] While the court concluded that the mug shot photos were "compiled for law enforcement purposes," [32] it held that the mug shot release implicated a reasonable expectation of privacy. The plaintiff argued that Giro's expectations 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."[33] Finally, the court explained, "the public obtains no discernable interest from viewing the booking photographs, except perhaps the negligible value of satisfying voyeuristic curiosities."[34] The court held that FOIA Exemption 7(c) blocked the release of Giro's mug shot to the press.

D. Legislative History of FOIA and Exemption 7(c)

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[28] *Id.* at 98.
[29] *Karantsalis*, 635 F.3d at 499, 503.
[30] *Id.* at 499.
[31] *Id.* at 501.
[32] *Id.* at 502.
[33] *Id.* at 503.
[34] *Id.* at 504.

1. Legislative history of FOIA

The legislative history of FOIA does not fully support the press' right to access mug shot photographs. A 1965 Senate report introducing FOIA recognized the need to protect certain "important rights of privacy with respect to certain information in Government files . . . ."[35] Similarly, House Representative Robert Dole held 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."[36] Thus, although FOIA creates a presumption of openness for government documents, it also recognizes that important privacy rights can trump this presumption. 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."[37] 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 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

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[35] S. REP. NO. 89–813, at 38 (1965).
[36] 112 CONG. REC., *supra* note 12, at 74.
[37] S. REP. NO. 89–813, at 38 (1965).

to the extent available by law to a party other than an agency."[38] However, the 1967 wording of Exemption 7 was too expansive and allowed government to withhold a broad category of information.[39] Thus, in 1974, Congress amended FOIA and added six specific categories of information to which Exemption 7 applied.[40] 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[.]"[41] In 1986, Congress amended Exemption 7(c) once again and broadened its scope of protection for personal privacy.[42] The 1986 version of Exemption 7(c) is how the current version of the exemption reads 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[.]"[43]

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. The 1986 amendment of Exemption 7(c), along with other FOIA amendments, was a part of the Anti-Drug Abuse Act of 1986.[44] The 1986 amendments were in response to

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[38] *Id.*
[39] U.S. DEP'T OF JUSTICE, FREEDOM OF INFORMATION ACT GUIDE, 2004 EDITION: EXEMPTION 7, *available at* http://www.justice.gov/oip/exemption7.htm.
[40] The Freedom of Information Act And Amendments of 1974, Pub. L. No. 93–502, 88 Stat. 1561, 1563 (1974) (subsequently amended).
[41] *Id.*
[42] U.S. Dep't of Justice, *supra* note 39.
[43] The Freedom of Information Reform Act of 1986, *supra* note 19.
[44] HERBERT N. FOERSTEL, *supra* note 13, at 55.

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.[45] 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."[46]

Whereas in 1974 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." The "would disclose" language was a "dangerous standard," because it did not "clearly protect that information." [47] 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."[48] Essentially, "would" implies a higher threshold to withhold information than the "could reasonably be expected" standard and thus shows Congress' attempt to ease the government's burden to withhold information.[49]

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[45] 132 CONG. REC. S14033 (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. S14038–40 (Sept. 27, 1986) (Statement of Sen. Orrin Hatch) (listing studies showing evidence that drug dealers used information from FOIA requests to retaliate against informants).
[46] 132 CONG. REC. S14038–40 (Sept. 27, 1986) (Statement of Sen. Orrin Hatch).
[47] *Id.*
[48] 132 CONG. Rec. H.9462–68 (Oct. 8, 1986) (Statement of Reps. Glenn English and Thomas Kindness).
[49] U.S. Dep't of Justice, *supra* note 39.

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. [sic]"[50] 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.[51] The 1986 language change is noteworthy, because law enforcement records often contain the name of individuals who are not targets of investigations.[52] However, names that appear in law enforcement records elicit a strong presumption of wrongdoing.[53] Thus, Congress recognized the need to protect the privacy rights of "innocent" parties mentioned in law enforcement records.

Finally, Congressional intent to broaden the privacy protection is especially apparent from 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[.]"[54] The "clearly" unwarranted invasion of privacy standard is harder to satisfy than Exemption 7(c)'s "reasonably expected" invasion

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[50] 132 Cong. Rec., *supra* note 45.
[51] 132 Cong. Rec., *supra* note 48.
[52] DEPARTMENT OF JUSTICE GUIDE TO THE FREEDOM OF INFORMATION ACT: EXEMPTION 7(C), 566, *available at* http://www.justice.gov/oip/foia_guide09/exemption7c.pdf.
[53] *Id.* at 564.
[54] 5 U.S.C. §552(b)(6).

of privacy standard.[55] 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."[56]

In sum, reading the legislative history of FOIA alongside the history of Exemption 7(c) illustrates Congress' intent to broaden the protection of personal privacy interests. Under Exemption 7(c), the government's burden of proving its decision to withhold personal information is less than that under Exemption 6. The overall spirit 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

Finally, a discussion on legal access to government information would be remiss without noting First Amendment access rights. Both *Detroit Free Press* and *Karantsalis* involved the press' 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. Although the First Amendment states that "Congress shall make no law . . . abridging the freedom of . . . the press . . . ,"[57] the amendment does not guarantee the press an unqualified right to access information. The Supreme Court in *Zemel v. Rusk* held "[t]he right to speak and publish

[55] U.S. Dep't of Justice, *supra* note 52, at 562.
[56] 132 Cong. Rec., *supra* note 48.
[57] U.S. CONST. amend. I.

does not carry with it the unrestrained right to gather information."[58] 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."[59] Essentially, the media has a qualified right to access government information under the First Amendment.

The examples above show how the First Amendment provides only a qualified right to access government information. This qualified right complements FOIA, because FOIA does not cover access to certain categories of government information like judicial proceedings and documents.[60] The Supreme Court has also spelled out many examples of qualified First Amendment rights to access judicial proceedings. Courtroom access is an example of a qualified First Amendment right. In *Richmond Newspapers, Inc. v. Virginia*, the Court recognized a qualified First Amendment right to attend criminal trials,[61] but the Court has yet to extend this qualified right to access civil trials.[62] In addition, the Court has also announced a qualified First Amendment right to access court documents like *voir dire* transcripts.[63]

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[58] *Zemel v. Rusk*, 381 U.S. 1, 17 (1965).
[59] *Houchins v. KQED, Inc.*, 438 U.S. 1, 14 (1978).
[60] GSA, *supra* note 11.
[61] *Richmond Newspapers, Inc. v. VA*, 448 U.S. 555, 580–81 (1980).
[62] 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.
[63] *Press-Enter. Co. v. Superior Court of CA, Riverside Cnty.*, 464 U.S. 501, 512–13 (1984).

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."[64] The U.S. Supreme Court has allowed states to televise coverage of criminal proceedings in their courts.[65] In *Chandler v. Florida*, the Court approved Florida's experiment to allow electronic media and still photographic coverage of criminal trials.[66] However, the U.S. Supreme Court has never allowed the media to bring cameras into its courtroom.[67] Justice Antonin Scalia commented, "If I really thought the American people would get educated, I'd be all for [televised courtroom proceedings]."[68] The Justice went on to explain, "[f]or every 10 people who sat through our proceedings . . . there would be 10,000 would see nothing but a 30-second take out."[69] In other words, televising proceedings would create "a misimpression of the Supreme Court."[70] In contrast, Justice Elena Kagan appears to support camera access, because she believes that this access educates the public.[71] These Justices' arguments are noteworthy, because they pick up on the themes that this comment will discuss in the next section on why certain information should remain private. In

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[64] *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 610 (1978).
[65] *See Chandler v. Florida*, 449 U.S. 560, 560–61 (1981).
[66] *Id.* at 560–61.
[67] 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.
[68] 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.
[69] *Id.*
[70] *Id.*
[71] Tony Mauro, *supra* note 43.

essence, all of the examples in this section show that the media cannot always claim a general right to access government information under the First Amendment. Thus, the *Detroit Free Press* and 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? John B. Young once commented, "[p]rivacy, like an elephant, is more readily recognized than described."[72] In other words, "[w]hen people claim that privacy should be protected, it is unclear precisely what they mean." [73] 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.[74] Part A traces the legal history of privacy rights most applicable to mug shot disclosures. A useful analogy for understanding privacy would be the history of blackmail and privacy tort law. Part B addresses cultural and social justifications for privacy laws. Before tracking the legal evolution of privacy, this section first presents a framework of privacy in order to guide the discussion on the evolution of this concept as a legal right.

A. Development of privacy law most applicable to mug shot disclosures

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[72] HEATHER MACNEIL, WITHOUT CONSENT: THE ETHICS OF DISCLOSING PERSONAL INFORMATION IN PUBLIC ARCHIVES 9 (1992).
[73] Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 480 (2006).
[74] *See Griswold v. Connecticut*, 381 U.S. 479 (1965) (citing an implied constitutional right to privacy); *See Roe v. Wade*, 410 U.S. 113 (1973) (holding a woman's privacy right to make decisions on her medical care); *See Katz v. United States*, 389 U.S. 347 (1967) (holding that wiretapping conversations on a public telephone booth constitutes an unreasonable violation of privacy)

Because "privacy is too complicated a concept to be boiled down to a single essence,"[75] author Daniel J. Solove argues that "privacy violations involve a variety of types of harmful or problematic activities."[76] Specifically, people "should understand privacy as a set of protections against a plurality of distinct but related problems."[77] In essence, society designed privacy as a protection against problems that hinder activities that it values.[78] "Identify[ing] and understand[ing] the different kinds of socially recognized privacy violations" can help create a taxonomy for privacy that facilitates the development of privacy law.[79]

Such a taxonomy outlines "four basic groups of harmful activities: (1) information collection, (2) information processing, (3) information dissemination, and (4) invasion."[80] Each of these four groups covers specific categories that are harmful to privacy. [81] For instance, "disclosure" is one of the seven specific harms to privacy within the "information dissemination" group.[82] 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

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[75] Solove, *supra* note 73, at 485.
[76] *Id.* at 480.
[77] DANIEL J. SOLOVE, UNDERSTANDING PRIVACY 171 (2008).
[78] *Id.* at 174.
[79] Solove, supra note 73, at 483.
[80] *Id.* at 488.
[81] *Id.* at 490–91.
[82] *Id.* at 523.

about a person that impacts the way others judge her character."[83] 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.[84] "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 record. As section three will discuss in-depth, these disclosures also elicit reputational judgment by the public.

> Privacy and reputation are "intimately bound together":[85]
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> [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.[86]

The historical origins of laws against disclosure reveal that the government designed these laws to protect against reputational harms. Even though blackmail is distinguishable from disclosure in that it "involves a threat of disclosure rather than an actual disclosure,"[87] this section examines blackmail law under a discussion of "disclosure," because it protects

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[83] *Id.* at 491.
[84] Solove, *supra* note 73, at 529; LAWRENCE M. FRIEDMAN, GUIDING LIFE'S DARK SECRETS: LEGAL AND SOCIAL CONTROLS OVER REPUTATION, PROPRIETY, AND PRIVACY 9–10 (2007).
[85] Friedman, *supra* note 84, at 4.
[86] *Id.*
[87] Solove, *supra* note 73, at 541.

against the revelation of truthful information that could lead to reputational harms.[88]

Blackmail occurs when an individual extorts money from another by threatening to disclose information or rather, "skeletons in the man's closet."[89] The following example in a nineteenth-century context demonstrates how blackmail laws aimed to protect reputation:

> 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 loose.[90]

In other words, blackmail laws does "not protect the innocent but curiously enough . . . protect[s] the guilty,"[91] who wished to keep their guilty information *private*.

Author Lawrence M. Freidman holds that blackmail laws were an "example of the legal shield protecting reputation. . . ."[92] 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?"[93] Freidman 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

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[88] Friedman, *supra* note 84, 10; 86–97.
[89] *Id.* at 97.
[90] *Id.* at 66.
[91] *Id.* at 10.
[92] *Id.* at 99.
[93] *Id.* at 84.

keep the past safely buried."[94] 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 the "past," 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.[95] Nonetheless, blackmail laws essentially provide one type of legal analogy for safeguarding against the disclosure of mug shots.

More notable than the promulgation of blackmail laws is Samuel Warren's and Louis Brandeis' 1890 *Harvard Law Review* article "The Right to Privacy."[96] This article most famously articulates the privacy category of "disclosure." Warren and Brandeis were inspired to write their famous law review article from the disclosure of truthful information, namely, a non-salacious newspaper story on Warren's daughter's wedding festivities.[97]

In trying to discover a legal foundation for privacy rights, "Brandeis and Warren began by identifying the 'mental pain and distress' that resulted from the publication of true, but intimate private facts."[98] Solove explains that the "harms Warren and Brandeis

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[94] *Id.* at 98.
[95] Friedman, *supra* note 84, at 97.
[96] Samuel Warren & Louis Brandies, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).
[97] JEFFREY ROSEN, THE UNWANTED GAZE 7 (2000) (stating "Although the information wasn't inherently salacious, Brandeis and Warren were appalled that a domestic ceremony would be . . . discussed by strangers.")
[98] Rosen, *supra* note 97, at 43; Warren & Brandeis, *supra* note 96, at 197.

spoke of are dignity harms. The classic example of such a harm is reputational injury."[99] Warren and Brandeis wrote their famous article during the height of yellow journalism and the advent of the instant Kodak camera.[100] 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.'"[101]

Warren and Brandeis argued that the "existing law afford[ed] a principle which may be invoked to protect the privacy of the individual either by the too enterprising press, the photographer, or the possessor of any other modern device for recording or reproducing scenes or sounds."[102] 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."[103] The right to privacy "implie[d] the right not merely to prevent inaccurate portrayal of private life, but to prevent its being depicted at all."[104] This conceptualization of privacy "asserted the ability to control the conditions of our own exposure as a legal right."[105]

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[99] Solove, *supra* note 73, at 486.
[100] Friedman, *supra* note 84, at 214.
[101] Warren & Brandeis, *supra* note 96, at 197 (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 has become a trade . . . [t]o satisfy a prurient taste").
[102] *Id.* at 206.
[103] *Id.* at 198.
[104] *Id.* at 218.
[105] Rosen, *supra* note 97, at 44.

What remains peculiar is why Warren and Brandeis, men with good reputations, would be concerned with threats to privacy?[106] 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."[107] For Warren and Brandeis, "[*a*]*ny* intrusion into the domestic circle would lead to scandal"[108] and thus, privacy was "essential to human dignity."[109]

Essentially, in the context of this comment, mug shots are prime examples of "instantaneous photographs"[110] that capture a person's "thoughts, emotions, and sensations"[111] at a particular moment in time and undoubtedly are photographs that most individuals would prefer to keep private. The impact of Warren's 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.[112] Under the "public disclosure of private facts" tort law, the plaintiff must prove "publicity of private facts highly offensive to a reasonable person which are not of a legitimate public interest."[113] This tort law "enables people to sue others for disclosing true information about them, even if the information was obtained through lawful means."[114] In addition, the Supreme Court in *Whalen v. Roe* embraced Warren's and Brandeis' article by

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[106] *See* Friedman, *supra* note 84, at 214.
[107] *Id.*
[108] *Id.*
[109] *Id.*
[110] Warren & Brandeis, *supra* note 96, at 195.
[111] *Id.*
[112] Rosen, *supra* note 97, at 45.
[113] RESTATEMENT (SECOND) OF TORTS § 652D (1977).

recognizing a right to privacy based on the "individual interest in avoiding disclosure of personal matter."[115]

Ultimately, Solove's privacy framework, blackmail laws, and privacy tort law all demonstrate ways in which laws simultaneously implicate privacy and reputational interests. 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 has recognized that privacy violations 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."[116] 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.'"[117] In short, contrary to *Detroit Free Press*' 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."[118] 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*

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[114] Daniel J. Solove, *The Virtues Of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 DUKE L.J. 967, 971 (2003).
[115] *Whalen v. Roe*, 429 U.S. 589, 599 (1977).
[116] Solove, *supra* note 77, at 141.
[117] *Id.*
[118] *Detroit Free Press*, *supra* note 26.

reputational harms, the Supreme Court must hold that disclosure of mug shots violates an individual's "reasonable expectation of privacy" under FOIA.

B. Why should the law keep certain truthful information private?

Whereas Part A presented a legal background on how privacy laws strive to address reputational harms, Part B examines sociological and psychological justifications of privacy laws. Specifically, this part discusses 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."[119] 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. Privacy is not just freedom from social control but is in fact a socially constructed form of protection."[120] However, many scholars criticize legal privacy protections and restrictions on the disclosure of truthful information.[121]

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."[122] For instance, Judge Richard Posner views "the central issue in privacy law as 'whether a person should have a right to conceal discreditable facts about himself'."[123] Particularly, 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

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[119] Solove, *supra* note 77, at 173.
[120] *Id.* at 173–74.
[121] Solove, *supra* note 114, at 1032.
[122] *Id.*
[123] Solove, *supra* note 121; RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW, 46 (1998).

disadvantage'."[124] By concealing truthful, but damaging information, people can " 'make advantageous transactions in employment and marriage markets. . .'."[125] Similarly, Richard Epstein argues that " 'the plea for privacy is often a plea for the right to misrepresent one's self to the rest of the world'."[126] However, these critiques are based on many faulty assumptions.[127]

The first assumption that critics make is that "more disclosure will generally yield more truth. In other words, more information about a person will make one's judgment about that person more accurate." [128] Solove illustrates that "the disclosure of private information can often lead to misjudgment"[129] and argues that "the law can and should influence the way people judge each other."[130] "[A] strong social value in enabling people to make accurate assessment of others" certainly exists.[131] For instance, having accurate information is essential when individuals must trust others with their finances and childcare.[132] However, "[k]nowing certain information can distort one's judgment of another rather than increase its accuracy."[133]

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[124] Solove, *supra* note 121; RICHARD A. POSNER, THE ECONOMICS OF JUSTICE 271 (1981).
[125] Solove, supra note 121; RICHARD A. POSNER, OVERCOMING LAW 532 (1995).
[126] Solove, *supra* note 114, at 1032–33; Richard A. Epstein, *The Legal Regulation of Genetic Discrimination: Old Responses to New Technology*, 74 B.U. L. REV. 1, 12 (1994).
[127] Solove, *supra* note 114, at 1033.
[128] *Id.*
[129] *Id.* at 1035.
[130] *Id.*
[131] *Id.* at 1033.
[132] *Id.* at 1034.
[133] *Id.* at 1035.

Solove first tackles the question of "why should the law pay special attention to misjudgment based on private rather than public information."[134] Critics argue, "the problem of misunderstanding is not really a privacy problem because misunderstanding can occur with both private and public information."[135] However, Jeffrey Rosen 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'."[136] 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."[137] 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.[138]

Reputation provides an example of how disclosure of private information is particularly susceptible to misunderstanding.[139] Alan Westin argues that " 'individuals need to control information about the self because they have conflicting roles to play in

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[134] *Id.* at 1036.
[135] *Id.*
[136] Solove, *supra* note 114, at 1035–36; Rosen, *supra* note 97, at 8.
[137] Solove, *supra* note 114, at 1035–36.
[138] *Id.* at 1036–37.
[139] *Id.* at 1039.

society and must present different selves at different times. . . .' "[140] Thus, reputation needs privacy protection, because

> [e]veryone must cope with the fragility of reputation, on which the ability to function in society delicately hangs. All who value their reputations care about how others judge them. Reputation is especially important in one's public roles, because these roles shape one's career, relationship with much of society . . . The reality is that people lack much control over how they are judged. One is constantly at the mercy of others—a precarious position to be in. However, managing disclosures about one's private life is an even greater and more difficult burden, making reputation all the more vulnerable.[141]

In other words, privacy law that protects reputation benefits all of society. This argument essentially expresses Solove's general precept that privacy's value lies in its value to society. As Solove explains, "[s]ociety accepts that public reputations will be groomed to some degree. . . . Society protects privacy because it wants to provide individuals with some degree of influence over how they are judged in the public area."[142] 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 and enabling some limited degree of freedom from the harsh and often unfair judgments that everyone regularly encounters in public."[143]

Note that scholars are not impervious to problems with privacy law regulating reputational judgment. For instance, Eugene Volokh argues, " 'in a free speech regime, others' definitions of me should primarily be molded by their own judgments, rather than

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[140] Solove, *supra* note 114, at 1037; ALAN F. WESTIN, PRIVACY AND FREEDOM 33 (1967).
[141] Solove, *supra* note 114, at 1039
[142] *Id.* at 1040.
[143] *Id.* at 1040–1041.

by my using legal coercion to keep them in the dark'."[144] 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?"[145]

The first response to this argument draws an analogy to evidence law.[146] Evidence law can exclude relevant evidence from a trial because "it is more prejudicial than probative."[147] Similarly, although certain information may help in assessing a person's character, the law must recognize that keeping such information private is necessary for a fair judgment.[148] Second, legal regulation of private information benefits not just the individual, but also society.[149] 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. . . . "[150] In sum, 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.[151]

Reputations need protection from truthful information and privacy law can provide

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[144] Solove, *supra* note 114, at 1047; Eugine 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).
[145] Solove, *supra* note 114, at 1047.
[146] *Id.* at 1048.
[147] *Id.*
[148] *Id.*
[149] *Id.*
[150] *Id.*
[151] *Id.* at 1054.

this protection.

Finally, a second faulty assumption by critics of privacy is that gossip has an educational benefit in learning about human nature.[152] While gossip in certain contexts has an educational value, in other contexts, gossip solely "satisf[ies] idle curiosity."[153] For instance, Solove asks, "What precisely is the educative value of a celebrity's sex life, drug use, or dating history?"[154] Moreover, in terms of private figures, "the educative function of gossip could readily be satisfied without revealing the identities of the individuals involved."[155] Finally, many disclosures about a person's private life are made to people who do not need to judge that person.[156] In short, disclosure of private information is often unnecessary, rather than educationally helpful.

Ultimately, this discussion has presented reasons why the law must keep certain truthful information private. Because private information often represents only partial information about a person, disclosure of such information leads to character misjudgments and in turn, reputational problems. The disclosure of private information can disadvantage society. The law must protect private information in order to protect society from these disadvantages. The justifications that Solove and other commentators provide for keeping certain information private help give meaning to "reasonable expectation of privacy" under FOIA. Next, Section IV will illustrate how mug shot

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[152] *Id.* at 1044.
[153] Solove, *supra* note 114, at 1044; *See* Warren & Brandeis, *supra* note 96.
[154] Solove, *supra* note 114, at 1045.
[155] *Id.*
[156] *Id.* at 1044.

disclosures implicate all of the problems that provide Solove and other commentators a legal justification for protecting privacy.

IV. Social Science Analysis

Part A will present social science research that illustrates how the release of mug shot photos violates reasonable expectations of privacy under FOIA Exemption 7(c). Evidence will suggest that mug shots create an unfavorable impression and diminish the public's leniency towards the defendant in the mug shot. Specifically, three studies demonstrate how mug shots affect public perceptions. The results of these studies support the justifications in part two of this comment for why certain information should be private.

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

First, the Millicent H. Abel *et al.* study found that that attractiveness and smiling affect people's attribution of guilt and punishment.[157] The researchers showed participants four photos depicted in a mug shot style.[158] The four mug shots contained a male or a female with either a felt smile or a neutral expression.[159] The researchers told participants a crime scenario in which the mug shot subject may have allegedly been involved.[160] The researchers designed the scenario "to induce suspicion of guilt but not certain guilt."[161]

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[157] Millicent H. Abel et al., *Attributions of Guilt and Punishment as Functions of Physical Attractiveness and Smiling*, *in* THE JOURNAL OF SOCIAL PSYCHOLOGY, 145(6), 700 (2006).
[158] *Id.* at 692.
[159] *Id.*
[160] *Id.* at 692-93.
[161] *Id.* at 693.

Then, participants answered four questions on the mug shot subject.[162] The first question asked the likelihood that the mug shot subject committed the crime; the second question asked the degree to which the mug shot subject should receive the benefit of the doubt; the third question asked the likelihood that the mug shot subject committed a crime in the past; and the fourth question asked the likelihood that the mug shot subject will commit a crime in the future.[163] These four questions elicited the participant's attributions of *guilt* on the mug shot subject. Researchers then asked the participants how many years of imprisonment—from zero to sixty years—that they would impose on the mug shot subject assuming that the subject is guilty.[164] This question measured participants' *leniency* towards the mug shot subject. Finally, participants rated the attractiveness of the mug shot subjects on a sliding scale.[165]

Although participants assigned the same level of *guilt* to smiling and non-smiling mug shot subjects,[166] the study found a significant positive correlation between guilt and leniency for the mug shot subject whom the participants rated low in physical attractiveness and who was not smiling.[167] The research ultimately 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."[168] Therefore, "if a person is

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[162] *Id.* at 694.
[163] *Id.*
[164] *Id.*
[165] *Id.*
[166] *Id.* at 698.
[167] *Id.* at 687.
[168] *Id.* at 700.

actually guilty and physically unattractive, he or she should smile; whereas if the person is actually guilty and physically attractive, he or she should not smile."[169]

Similarly, the Marianne LaFrance *et al.* study suggested that smiling affects how people attribute guilt and determine punishment of a person.[170] Researchers gave participants mug shots of a person with varying degrees of a smile to a non-smile.[171] Researchers explained to them that school officials accused the person on the mug shot of cheating on an exam.[172] Researchers asked the participants on the mug shot subject's likelihood of cheating in the present scenario, in the past, and in the future.[173] Researchers also asked participants the degree to which they believed that the mug shot subject should receive a benefit of the doubt.[174] Finally, researchers asked the participants the degree of punishment the mug shot subject should receive, from no punishment to maximum punishment.[175] 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."[176] In essence, "smiling transgressors received significantly greater benefit of the doubt and less punishment than non-smiling

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[169] *Id.*
[170] Marianne LaFrance et al., *Why Smiles Generate Lenience*, *in* PERSONALITY AND SOCIAL PSYCHOLOGY BULLETIN, 21(3), 213 (1995).
[171] *Id.* at 207.
[172] *Id.* at 210.
[173] *Id.*
[174] *Id.*
[175] *Id.*
[176] *Id.* at 212.

transgressors."[177]

Finally, the Lain *et al.* study illustrated that the nature of a mug shot influences readers' appraisal of a news story accompanying the photo.[178] Researchers gave participants a newspaper story with "little drama and about which few subjects could be expected to have a strong opinion."[179] Essentially, the news story was neutral. The newspaper article contained a mug shot of a person with either a positive, negative, or neutral facial expression.[180] However, one newspaper article had no accompanying mug shot.[181] 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."[182] Results show 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. [183] In other words, "mug shots have a differential effect on the meaning newspaper readers attribute to individuals who are subjects of accompanying news stories."[184] The study states, "results suggested that readers who can see pictures of news story subjects are quicker to ascribe personal characteristics to those subjects than are readers who no such pictures."[185] The study goes on to caution:

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[177] *Id.* at 213.
[178] Laurence B. Lain et al., *Mug Shots And Reader Attitudes Toward People In The News*, *in* JOURNALISM QUARTERLY, 69(2), 299 (1992).
[179] *Id.* at 296.
[180] *Id.* at 297.
[181] *Id.*
[182] *Id.*
[183] *Id.* at 298.
[184] *Id.* at 299.
[185] *Id.* at 300.

> 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.[186]

In sum, despite a neutral characterization of a subject in a news story, the nature of a mug shot of the news story subject can ascribe a non-neutral (perhaps, even negative) meaning onto a story. Ultimately, all three studies show how mug shots create a prejudicial public impression.[187] The research evidence foreshadows negative implications for defendants whose mug shots appear in the press.

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

The three social science studies[188] illustrate the justifications for keeping certain information private.[189] Namely, mug shot photographs can lead to misjudgment about a defendant. Whereas the research above[190] differentiates between hypothetical smiling and non-smiling defendants, 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."[191] 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

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[186] *Id.*
[187] *See* Abel et al., *supra* note 157; La France et al., *supra* note 170; Lain et al., *supra* note 178.
[188] Abel et al., *supra* note 157; La France et al., *supra* note 170; Lain et al., *supra* note 178.
[189] *See* Solove, *supra* note 136; *See* Rosen, *supra* note 136.
[190] Abel et al., *supra* note 169; LaFrance et al., *supra* note 177; Lain et al., *supra* note 183.
[191] *Karantsalis*, 635 F.3d at 503.

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."[192] In essence, mug shots capture only one moment in a defendant's entire life span. A photograph capturing one moment cannot accurately reveal any characteristics about a person. Nonetheless, the research shows that people will make judgments about a defendant in a mug shot.[193]

Unfortunately, the social science research implies that society will not judge real-life subjects of mug shots with leniency, given that most defendants will not smile or look 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.[194] 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.[195]

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 would hold that releasing a mug shot does not

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[192] 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.
[193] *See* Abel et al., *supra* note 157; La France et al., *supra* note 170; Lain et al., *supra* note 178.
[194] Abel et al., *supra* note 168.
[195] LaFrance, *supra* note 177.

implicate privacy, because the public can easily access arrest and conviction records. However, the Lain *et al.* study[196] shows that mug shots have an impact over and above having a criminal record of arrest and conviction in the first place. 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.[197] Nobody wants to associate with a person whom they deem has committed a serious crime. The Lain *et al.* research results[198] show the power of an unflattering mug shot and how people can unreasonably magnify negative judgments of a defendant in a mug shot. Based on the justifications that Solove and other commentators[199] voice for privacy, the Lain *et al.* results[200] contradict *Detorit Free Press*' contention that a defendant in a mug shot does not have a reasonable expectation of privacy when he or she has appeared in court.[201] Ultimately, a mug shot *uniquely* implicates 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. Mug shots are not representative of people at their best moments. People appreciate the benefit of the doubt,

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196 *See* Lain et al., *supra* note 185.
197 *Id.*
198 *Id.*
199 *See* Solove, *supra* note 136; *See* Rosen, *supra* note 136.
200 *See* Lain et al., *supra* note 185.
201 *Detroit Free Press*, *supra* note 24.

but a defendant in a mug shot, who most likely does not look attractive or happy, will not receive this benefit of the doubt. Congress amended FOIA Exemption 7(c) in 1986 to protect the privacy rights of innocent individuals in law enforcement records or information.[202] However, studies indicate that the public will not give the subjects of mug shots a benefit of the doubt, 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 also prevent them 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. Essentially, releasing mug shot photos violates defendants' reasonable expectation to privacy and ultimately violates the spirit of FOIA Exemption 7(c).

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

Part B will show that mug shots negatively impact defendants long after the conclusion of a criminal trial. The research in Part A indicates that people have negative attitudes—in the form of minimal leniency and benefit of the doubt—towards subjects of mug shot photos. The ensuing discussion presents three social science publications that show the great longevity and strength of those negative attitudes. These publications will ultimately illustrate how mug shot disclosures violate FOIA Exemption 7(c).

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[202] U.S. Dep't of Justice, *supra* note 52.

The first study, through a series of experiments, found that people have a negativity bias,[203] which the study defines as the "greater sensitivity to negative information."[204] Specifically, the study wanted to determine whether negativity bias operates at the evaluative-categorization stage.[205] 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.[206] In the second experiment of the study, researchers presented participants with pictures depicting positive, negative, or neutral stimuli.[207] Researchers instructed participants to evaluate whether the picture they saw "showed something they found positive, negative, or neutral."[208] The study explained, "[w]hen people naturally evaluate objects in their environment, it is more likely that they choose from a full range of evaluative responses, which includes positivity, negativity, and neutrality."[209]

As participants evaluated the pictures, the researchers measured the participants' late positive potential (LPP), which measure "changes in electocortical activity that occur in response to discrete stimuli."[210] Specifically, the LPP shows how people emotionally

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[203] Tiffany A. Ito et al., *Negative Information Weighs More Heavily on the Brain: The Negativity Bias in Evaluative Categorizations*, *in* JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY, 75(4), 896 (1998).
[204] *Id.* at 887.
[205] *Id.*
[206] *Id.*
[207] *Id.* at 894.
[208] *Id.*
[209] *Id.*
[210] *See Id.*; *accord* Yen NS et al., *Emotional modulation of the late positive potential (LPP) generalizes to Chinese individuals*, *in* INTERNATIONAL JOURNAL OF PSYCHOPHYSIOLOGY, 75(3), 319 (2010).

process information.[211] The amplitude of the LPP reflects the extent to which an individual in engaging in emotional processing.[212] 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."[213] The researcher's hypothesis was correct and results showed the "operation of a negativity bias at the evaluative-categorization stage of information processing."[214] In other words, 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.[215] In simulated interviews, researchers gave interviewers negative information about one applicant and no information about another applicant.[216] 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").[217] Results indicate, "interviewers in the no-goal condition formed more negative impressions

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[211] Yen NS et al., *Emotional modulation of the late positive potential (LPP) generalizes to Chinese individuals*, *in* INTERNATIONAL JOURNAL OF PSYCHOPHYSIOLOGY, 75(3), 319 (2010).
[212] *See* Tiffany A. Ito et al., *supra* note 208, at 889.
[213] *Id.*
[214] *Id.* at 896.
[215] Steven L. Neuberg, *The Goal of Forming Accurate Impressions During Social Interactions: Attenuating the Impact of Negative Expectancies*, *in* JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY, 57(3), 378 (1989).
[216] *Id.* at 374.
[217] *Id.*

of the negative-expectancy applicants than of the no-expectancy applicants [the applicants on whom the interviewers did not receive any information]."[218] Meanwhile, negative information about an applicant did not influence the judgments of the interviewers in the accuracy-goal condition.[219] 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 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.[220] For instance, for the psychological phenomenon of impression formation, the survey affirms, "[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."[221] 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."[222] The survey essentially

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[218] *Id.* at 378.
[219] *Id.*
[220] Roy F. Baumeister et al., *Bad is Stronger Than Good*, *in* REVIEW OF GENERAL PSYCHOLOGY, 5(4), 324 (2001).
[221] *Id.* at 323-24.
[222] *Id.* at 344.

summarizes its findings through "the general principal that bad is stronger than good."[223] Thus, if an employer saw a mug shot, 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. Moreover, any negative reputation that a defendant acquires from a mug shot will be difficult to abandon.

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

The three studies essentially indicated that negative information, in this case, mug shot appearances, has a stronger impact than positive information on a person's impression of another person.[224] The salient negative features of a defendant in a mug shot can lead to long-lasting and overly negative judgments about the defendant. Thus, the studies provide evidence for why mug shots should remain private, because they exemplify the argument that "[k]nowing certain information can distort one's judgment of another rather than increase its accuracy."[225] 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.[226] However, in real life, 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.[227]

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[223] *Id.* at 324.
[224] Ito et al., *supra* note 204; Neuberg, *supra* note 218; Baumeister et al., *supra* note 220.
[225] Solove, *supra* note 133.
[226] Neuberg, *supra* note 219.
[227] *See* Ito et al., *supra* note 204; Neuberg, *supra* note 218; Baumeister et al., *supra* note 220.

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Circuit Review Comment
AWR Submission
05/14/12

The internet has only exacerbated the public's uninformed judgments about mug shots. People can easily access mug shots through the internet. 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 paraphrases sociologist Erving Hoffman's theory that, "[w]hen we first meet somebody, we have little invested in that person. . . . So if we learn about a piece of that person's private life that seems bizarre or unpleasant, it's easy to just walk away. . . . With time to gain familiarity with a person, we're better able to process information, see the whole person, and weigh secrets in context."[228] Unfortunately, the people who "just walk away" can be potential employers, friends, and spouses.

Three hypothetical examples illustrate just how irrational judgments on mug shots impact the defendant, the defendant's family, and society long after the end of a criminal trial. These examples show some of the arguments for why certain information should remain private. First, disclosing mug shots will negatively impact a defendant's rehabilitation into society and hence, privacy is necessary to "further society's interest in providing people with incentives and room to grow and change."[229] Assume a falsely arrested person whose mug shots law enforcement has released to the media. Lois Wilson is such a person and she recounted the effect of her mug shot on 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."[230] The reactions that Wilson receives are not

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[228] DANIEL J. SOLOVE, THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET 69 (2007).
[229] Solove, *supra* note 151.
[230] Brian Morrin, *Arrested reputation: Woman upset after mug shot goes public* (Sept. 14, 2011), http://www.kboi2.com/internal?st=print&id=129786933&path=/news/local.

surprising. Education has not been completely effective in fighting stigma.[231] For instance, despite the highly public campaigns educating citizens on AIDS, many people still make faulty assumptions on the causes of AIDS.[232] Accordingly, even a disclaimer next to Wilson's mug shot proclaiming "This person is innocent until proven guilty" may not effectively eradicate her association with guilt.

Second, 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. However, this person in jail 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 provides an example of how the release of her unflattering mug shot affected her family.[233] 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.[234] Wood detailed how her grandson feared humiliation at school from the release of the photos.[235]

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 by the mug shot of just one

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[231] *See* Solove, *supra* note 228, at 70.
[232] *Id.*
[233] 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.
[234] *Id.*
[235] *Id.*

family member. This inaccurate judgment is a prime reason for why scholars like Solove justify the privacy of certain information.[236] Note that the Supreme Court in *National Archives and 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."[237] 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.

Third, suppose a jury convicted a defendant of fraud and sentenced him or her to ten years in prison. Also presume that this defendant is a "business genius." Finally, assume that the defendant has learned from his mistakes during his jail sentence and hopes to become a contributing member of society after leaving jail. Despite this defendant's moral failings of committing fraud, he clearly has many valuable skills that he can contribute to the workforce. However, research establishes the stigma of having a mug shot photo by showing the strength and longevity of the public's negative attitudes.[238] Basically, "people with stigma are often shunned or not fully accepted by society."[239] Accordingly, protection from disclosure of mug shot photographs "permits room to change, to define oneself and one's future without become a 'prisoner of [one's] recorded past.' Society has a tendency to tie people too tightly to the past and to typecast people in particular roles. . . . Society benefits, however, when people can rehabilitate themselves and

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[236] Solove, *supra* note 136; Rosen, *supra* note 136.
[237] *Nat'l Archives Records Admin. v. Favish*, 541 U.S. 157, 157 (2004).
[238] Ito et al., *supra* note 204; Neuberg, *supra* note 218; Baumeister et al., *supra* note 220.
[239] Solove, *supra* note 228, at 73.

start new, more productive lives."[240] Unfortunately, studies suggest[241] 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 if they have immense talents. In other words, mug shot disclosures could lead to the "de-democratization" of society that Solove warns could result from the absence of privacy.[242]

In sum, social science undermines *Detroit Free Press*' contention that the need to protect privacy diminishes in an ongoing trial where the defendant has already appeared.[243] Specifically, social science supports how the release of mug shots violates a defendant's *reasonable* expectation to 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[244] indicate how one negative mug shot can overshadow any "perfect" behavior during a trial. However, the negative impression that people form from seeing just one mug shot is not always accurate.

When law enforcement releases mug shots, the public is able to invade the

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[240] *Id.* at 73.
[241] Ito et al., *supra* note 204; Neuberg, *supra* note 218; Baumeister et al., *supra* note 220.
[242] Solove, *supra* note 150.
[243] *Detroit Free Press*, *supra* note 24.
[244] Ito et al., *supra* note 204; Neuberg, *supra* note 218; Baumeister et al., *supra* note 220.

defendant's privacy beyond a defendant's trial and beyond a criminal's sentence. The American legal system promotes the principle that criminals who served their sentence have paid their debts to society and should no longer reimburse society.[245] However, mug shots are a *permanent* record of a private episode of defendants' lives. The invasion of privacy 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. However, the release of mug shots crosses the boundary of reasonable expectation to privacy that FOIA Exemption 7(c) established. As Solove explains, the value of privacy lies in its value to society. Because "[e]veryone must cope with the fragility of reputation," society values privacy protections of embarrassing private information.[246] Social science shows how damaging mug shot disclosures can be to a defendant's reputation.[247] 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 famous1890 *Harvard Law Review* article, Warren and Brandeis articulated that a privacy law should:

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[245] G. Scott Rafshoon, Comment, *Community Notification Of Sex Offenders: Issues Of Punishment, Privacy, And Due Process*, 44 EMORY L.J. 1633, 1670 (1995).
[246] Solove, *supra* note 141.
[247] Baumeister et al., *supra* note 222.

> protect those persons 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.[248]

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

The first argument that supports mug shot disclosure is public shaming. Law enforcement officials believe that publicizing mug shots will create deterrence for crime. For instance, one city considered posting DUI mug shots on Facebook. The councilman behind the proposal explained, "If it takes shaming people to save lives, I am willing to do it."[249] Essentially the theory behind posting mug shots is that the shame and embarrassment from having strangers see one's mug shot will deter the subject of the mug shot and other individuals 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."[250] For instance, some individuals commit crimes from an addiction or

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[248] Warren & Brandeis, *supra* note 96, at 216.
[249] Thomas Watkins, *City Considers Posting DUI Mug Shots on Facebook* (Jan. 18, 2011 7:11 AM), http://www.huffingtonpost.com/2011/01/18/dui-mug-shots facebook_n_810180.html.
[250] Toni M. Massaro, *The Meanings Of Shame: Implications for Legal Reform*, *in* PSYCHOLOGY, PUBLIC POLICY, AND LAW 3(4), 5 (1997).

compulsion, in which case, shame punishment may not be effective.[251] In fact, some psychologists assert that shame is the root of certain crimes, thus punishing an individual with shame is counter-productive.[252] In addition, some psychological research suggests shame punishment causes anger and a drive to retaliate against the person administering the punishment.[253] Conversely, research also theorizes that "[s]hame has a way of alienating people, inhibiting their ability to rehabilitate and reintegrate themselves into the community."[254] For example, the stigma associated with shame punishment leaves criminals "with no hope of becoming a productive member of society," and may "produce the feeling that improvement and change is hopeless."[255] 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.[256] Solove concedes that "information can be highly relevant . . . especially when a person with a history of violent criminal conduct has contact with children."[257] Under Megan's Law, parents "have the right to find out the names of . . . sex offenders, their photos, their addresses. . . ."[258] Mug shots may help parents identify a neighborhood sex offender more so than simply knowing an offender's name and address from a sex offender registration list. While

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[251] *Id.* at 24.
[252] *Id.* at 24.
[253] *Id.* at 5.
[254] Solove, *supra* note 228, at 95.
[255] 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).
[256] *See also* Solove, *supra* note 114, at 1055.
[257] *Id.* at 1056.
[258] NATIONAL ALERT REGISTRY, MEGAN'S LAW: WHAT IT IS AND WHO MEGAN'S LAW OFFENDERS ARE., http://www.registeredoffenderslist.org/megans-law.htm; Solove, *supra* note 114, at 1059.

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.

First, studies on the effect of Megan's Law are scanty and the few studies available report inconclusive results. One commentator lamented, "[s]tate and federal governments have not been proactive in commissioning studies as to the effectiveness of registration in preventing future sex offenses. They have likewise failed to make inquiries into how these registries affect victims. . . ."[259] A 2008 study shows no effect in sexual offense recidivism in New Jersey.[260] However, "there is also not much proof that Megan's Laws fail."[261] 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." [262] In fact, under one estimate, family members or close family friends commit 92% of sexual offenses against children.[263] 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.[264]

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[259] Ho, *supra* note 255, at 455; Solove, *supra* note 114, at 1060; Rafshoon, *supra* note 245, at 1665.
[260] 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), available at https://www.ncjrs.gov/pdffiles1/nij/grants/225370.pdf.
[261] Solove, *supra* note 114, at 1060.
[262] Ho, *supra* note 255, at 432.
[263] Solove, *supra* note 261.
[264] *Id.*

Essentially, 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."[265] Research also shows that sex offenders loose jobs and experience difficulty adjusting into society, which in turn, can increase the likelihood that they may return to committing crimes.[266] Inevitably, sexual offense will occur in some neighborhoods, just as any other crime. However, the possibility of sexual offense should not *always* supersede laws that protect privacy. Essentially, 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.[267] These publications sell for one dollar and provide "little editorial content outside photographs, names, and charges."[268] The Orlando *Sentinel* digital news manager attested that mug shot postings created a "huge traffic" for

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[265] Solove, *supra* note 261; Ho, *supra* note 255, at 444.
[266] Solove, *supra* note 161; Ho, *supra* note 255, at 442-43.
[267] Elliot 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.
[268] *Id.*

the paper.[269] In fact, the *Sentinel* mug shot webpage draws about 2.5 million views a month.[270] Clearly, not all of those 2.5 million views were from crime victims hoping to identify crime suspects. A journalism professor explained that viewing mug shots is akin to enjoying a horror movie.[271] The professor further explained, "[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."[272] 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.[273] 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

If the Supreme Court decides to review the split between the Sixth and Eleventh Circuits, the Court should 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's 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*. Social science research more heavily supports *Karantsalis*' view of privacy rights than the views of *Detroit Free Press*. Hence, social

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[269] 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.
[270] *Id.*
[271] McLaughlin, *supra* note 271.
[272] *Id.*
[273] *See* Solove, *supra* note 114, at 1044; *See* Warren & Brandeis, *supra* note 96.

science firmly supports the legislative intent of FOIA Exemption 7(c). Finally, any benefit that the public receives from the release of mug shots is trivial compared to the privacy invasions of defendants.

Despite the strong social science support against the release of mug shots, discussions of privacy inevitably elicit questions on the public's right to know. Specifically, an inquiry generally arises on how to balance legitimate public need for mug shot disclosures and Exemption 7(c)'s protection of privacy. For instance, in *Karantsalis*, the plaintiff argued that the public needed Giro's mug shot photo because Giro's demeanor in the photograph could reveal whether law enforcement gave him preferential treatment.[274] 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,"[275] the requester of information protected by Exemption 7(c) must show evidence that would "warrant a belief by a reasonable person that the alleged Government impropriety might have occurred."[276] To address the balance between *legitimate* public need for disclosure and privacy protections under FOIA Exemption 7(c), the Supreme Court could extend the *Favish* standard specifically 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

[274] Karantsalis, 635 F. 3d at 504.
[275] *Favish*, 541 U.S. at 173.
[276] *Id.* at 174.

a person's reasonable expectation to privacy, unless the requester of the mug shot photos puts forth evidence satisfying the *Favish* standard.

In sum, social science shows that "disclosures of information about a person will not enhance our ability to judge . . . in fact, it may distort our assessments."[277] This distortion starkly contrasts with FOIA's overall goal to create an openness, honesty, and transparency. Moreover, reputation distortion certainly runs afoul against Exemption 7(c)'s goal to protect individuals whose information appears in law enforcement records. Mug shot disclosures are not merely embarrassing; they detrimentally impact a whole range of sociological factors that last beyond a criminal trial. Essentially, mug shot disclosures unreasonably invade the privacy rights of the individual in a mug shot, with little to no corresponding advantages for society.

[277] Solove, *supra* note 77, at 144.