THE PRIVACY DILEMMA IN DIGITAL ARRESTEE MUG SHOTS UNDER THE FOIA 7(C) AND STATE AND LOCAL POLICY RECOMMENDATIONS

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This Article examines the purpose and interpretation by courts of Freedom of Information Act’s 7(C) Exemption. Specifically, the Article sets out to unravel the current federal circuit court split over Exemption 7(C) by examining its application to the digital privacy dilemma as applied to arrestee photographs, commonly known as “mug shots.” Automated data-scraping programs continuously scour the internet, reaping, replicating, and reposting photographs of arrestees who may or may not have had charges dismissed in order to shame them into paying website owners for removal. While other commentators have argued for state law penalizing pay-to-remove mug shot websites only, this Article moves in a new direction and argues that no distinction ought to be made. Due to the sensitive nature of arrestee photographs, their indefinite shelf life on the internet, and potential for long-term harm to an individual’s reputation in the questionable interest of “public interest,” safe harbors are needed. The Article argues that to protect privacy interests, states should move quickly to clarify the blurred line between state law which penalizes pay-to-remove websites but allows websites that do not rely upon payment to continue to post arrestee mug shots. Finally, this Article concludes by recommending that local law enforcement department policy should change to reflect a refusal to disclose arrestee photographs.

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I. INTRODUCTION

Few American literature students are unacquainted with the cautionary tale of Hester Prynne in Nathaniel Hawthorne’s magnum opus—*The Scarlet Letter*.1 Forced to openly display a scarlet-colored badge of shame, Prynne suffers humiliation and ridicule by Puritan townsfolk for the remainder of her life.2 The modern analogue to Prynne’s dilemma is the recent proliferation of a peculiar type of business—the “online mug shot industry” (OMI).3 The OMI seeks to shame individuals by unearthing arrestee bookings as well as photographs or “mug shots” and displaying them prominently on its webpage.4 At first blush, this may seem akin to a public service until one realizes the unsavory business model relies heavily upon charging exorbitant fees for mug shot removal.5 The consequences of a

2 Id. at 464. “The story of the scarlet letter grew into a legend. Its spell, however, was still potent, and kept the scaffold awful where the poor minister had died and likewise the cottage by the seashore where Hester Prynne had dwelt.”
4 See id; see also David Segal, Mugged by a Mug Shot Online, N.Y. TIMES (Oct. 5, 2013) available at http://www.nytimes.com/2013/10/06/business/mugged-by-a-mug-shot-online.html; see e.g., Mugshots, MUGSHOTS.COM (last visited Mar. 20, 2015); The Smoking Gun, THESMOKINGGUN.COM. (last visited Mar. 20, 2015) (listing numerous arrestee photographs).
5 See David Kravets, Mug-Shot Industry Will Dig Up Your Past, Charge You to Bury It Again, WIRED.COM (Aug. 2, 2011, 1:52 PM), http://www.wired.com/2011/08/mugshots/ (quoting leading open-records activist and Director of the Project on Government Secrecy for the Federation of American Scientists, Steven Aftergood, “‘The business model seems to be to generate
lingering mug shot profile go beyond social stigma; arrestees may lose significant opportunities for gainful employment and housing. For example, John and Jessica Kerr were accused but found not guilty for criminal mischief for scratching a car with a key. They paid approximately $2,000 to remove their mug shots with little to no success. Despite ranking in the top 15% her first-year law school class, Ms. Keir “rarely” received interviews and believes the cause is the presence of her online mug shots. As Professor Andrew D. Leipold points out, “[a] person's ability to earn a living can obviously be harmed by an improper arrest, both in the short and long term. A defendant may lose his job immediately following arrest . . . because the employer does not want to be associated with someone under indictment . . .” Former defendants should have concern about confidentiality regarding their “unwarranted brush with the law” because although federal regulations allow some disclosure, states may disclose at their discretion.

Dr. Janese Trimaldi is one such victim. On July 2011, Dr. Trimaldi locked herself in her room to escape her drunken boyfriend. Standing at over six-feet and weighing 250 pounds, he pried open the door with a steak knife and threw the diminutive five-foot, one hundred pound woman several feet backwards. Neighbors, overhearing the screaming, quickly notified authorities. When police officers questioned Dr. Trimaldi’s boyfriend about the blood emanating from a scratch on his chest, he accused Dr. Trimaldi. Officers arrested Dr. Trimaldi and charged her with assault with a deadly weapon. The state’s attorney dropped charges, but within a few months her arrest photograph appeared online. Desperate to erase the images before they jeopardized her career in medicine, Dr.

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7 Id.
8 Id.
9 Id.
11 Id.
12 See Segal, supra note 4.
13 Id.
14 Id.
15 Id.
16 See id. According to Dr. Trimaldi, the scratch wound was from her fingernails as she attempted to evade her batterer.
17 Id.
18 Id.
Trimaldi paid to remove the mug shot, but like a game of whack-a-mole the images reappeared on other websites seeking to profit from her embarrassment.\(^{19}\)

A handful of states, equating the practice to blackmail, have enacted laws that make it difficult, or even illegal, for the OMI to require an individual to pay to remove a mug shot.\(^{20}\) Yet the problem persists, in part because despite slight changes in search engine algorithms, arrest records for individuals who are only arrested but are neither charged nor convicted are readily accessible.\(^{21}\) As one expert explains, “Once they click, they stare in disbelief, and look around a bit, which means they stay on the page. . . . Google takes that as a sign that the site is relevant, and that boosts it even more.” The problem stems from “data-scraping,” a common, automated technique used to copy and populate content from other websites.\(^{22}\) “Every corporation does it, and if they tell you they’re not they’re lying,” says Francis Irving, head of Scraper Wiki, which makes tools that help many different organisations grab and organise data. . . . [T]he best scraping programs mimic human behaviour and spread[s] the work out . . . .”\(^{23}\) While many high-trafficked websites attempt to constantly change data presence or limit its dissemination by requiring subscriptions, less-trafficked websites are especially prone to data integrity loss due to abrupt bandwidth decrease.\(^{24}\)

\(eBay\ v.\ Bidder’s\ Edge\) illustrates the ongoing concern in a slightly different context.\(^{25}\) eBay, an online conduit for retail-bidders, noticed a significant usage of bandwidth on its website from competitor Bidder’s Edge, a bidding aggregator website, and successfully sued to enforce a preliminary injunction against Bidder’s Edge on the theory of trespass to chattels.\(^{26}\) However, the decision’s weight is controversial and confined to the Northern District of California and its precedential value is unclear, at least in California’s state courts.\(^{27}\) The result is that data-scraping by third-parties is acceptable practice; websites who are the targets of data-scraping by third-parties is acceptable practice; websites who are the targets of data-scraping

\(^{19}\) See id. Dr. Trimaldi wrote, “[i]f I was not a level-headed, positive person, I would have seriously considered ending my own life.”

\(^{20}\) See infra notes 134–152 and accompanying text.

\(^{21}\) See Segal, supra note 4 (discussing how Google’s response in altering its search algorithms is ineffective due to the general tendency to click on the mug shot photograph and stay on that page).


\(^{23}\) Id.

\(^{24}\) Id. “Up to 40% of the data traffic visiting our clients sites is made up of scrapers,” says Mathias Elvang, head of security firm Sentor, which makes tools to thwart the data-grabbing programs.”


\(^{26}\) Id. at 1069–72.

\(^{27}\) See id; see also Intel Corp. v. Hamidi, 71 P.3d 1342, 1364 (Cal. 2003) (a divided California Supreme Court holding that an employer could not use a trespass to chattels theory against employee who intentionally flooded employer’s e-mail system).
scrapers and wish to avoid the practice must either engage in prevention mechanisms or passively allow data-scrapers to raid their servers.

Given the current circuit court split over an individual’s private interest in their mug shot versus the public’s interest in disclosure, this Note will argue that the privacy interests in the mug shot substantially outweighs any public interest in disclosure. Whereas other commentators have suggested that the OMI should be bifurcated between penalizing pay-to-remove mug shot websites while traditional media outlets are left unchecked, this Note moves in a new direction and argues that this model is inadequate. Instead, this Note advocates for efficient resolution of the circuit court split by arguing for a broader regulatory oversight under the standard espoused by the United States Supreme Court in Department of Justice v. Reporters Committee for Freedom of the Press.

This Note argues that while current state initiatives are a strong step in the right direction, the OMI will continue to thrive off the embarrassment of arrestees because (1) there is no substantial difference between arrestee mug shots posted on pay-to-remove websites or in traditional newspapers and (2) even if there were a substantial difference the OMI will continue to grow because it can successfully scrap this sensitive data. Therefore, arrestee mug shots should not be posted online or in print unless the mug shot meets the criteria of Reporters Committee. This balancing test would protect the privacy interest in mug shots by disallowing blanket releases of individual arrestee mug shots while maintaining a vital public interest in mug shots when necessary to disclose under the Freedom of Information Act (“FOIA”) Exemption 7(C).

Part II briefly explores the background, purpose, and relevant scope of the FOIA, in particular Exemption 7(C). Part III unpacks the recent federal circuit court split over the application of the FOIA to the disclosure of the arrestee mug shots and includes a thoughtful analysis regarding the implications to mug shots. Part IV discusses recent state initiatives and why these initiatives are a step in the right direction but are ultimately futile. Part IV also suggests improvements to current state legislation which ignores the privacy dilemma in mug shot disclosure and leaves significant loopholes for the OMI to exploit. There are two general proposals to reduce potentially damaging effects from mug shot disclosure: (1) states should codify legislation that prohibits sheriff’s departments from disclosing mugshots; and (2) even if states do not enact such legislation, sheriff’s departments should, sua sponte, create policies that bar posting mug shots online.

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II. BACKGROUND

A. An Abridged History of the FOIA and Scope

While the modern FOIA has its beginnings in the early 1960s, early American statesmen, such as James Madison, recognized the public need to access government information: “A popular government without popular information or the means of acquiring it, is but a prologue to a farce or tragedy or perhaps both.” During the eighty-ninth U.S. Congress, momentum built in the Senate for an Act which would shed light upon government agencies including “the hundreds of departments, branches, and agencies that are not directly responsible to the people,” in order facilitate discovery. In 1966, President Johnson signed the Freedom of Information Act into law with the caveat that illustrated the balancing function of FOIA: “[f]airness to individuals also requires that information accumulated in personnel files be protected from disclosure . . . . [O]fficials . . . cannot operate effectively if required to disclose information prematurely or to make public investigative files and internal instructions that guide them in arriving at their decisions.”

The FOIA provides for the disclosure of any government agency information unless the requested information falls within one of nine exemptions. For purposes of this Note, only Exemption 7(C) is relevant. It provides for the nondisclosure of “records or information compiled for law enforcement purposes.” The FOIA works under a disclosure presumption, meaning that in order for the relevant government agency to avoid disclosure, it must show that the requested information falls within one of the nine exemptions. Exemption 7(C) in full states:

“This section does not apply to matters that are . . . records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or

31 Id.
34 Id. at § 552(b)(7) (2012).
35 See MARK J. MEAGHER, GOVERNMENT CONTRACT DISPUTES § 18:7 (2014 ed.).
information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy. . . .”

At its core, Exemption 7(C)’s essence is to guarantee that the records or information sought after, “contributes significantly to public understandings of the operations or activities of the government.”

In 1986, Congress amended Exemption 7(C)’s language, substituting “could reasonably be expected to constitute,” where it previously stated “would constitute . . .”

The Supreme Court noted that the statutory change embodied “[a] congressional effort to ease considerably a Federal law enforcement agency’s burden in invoking [Exemption 7(C)].”

Exemption 7(C) provides an exemption to dissemination of information that could result in an “unwarranted invasion of privacy.”

Prior to disclosure, the relevant government entity must entertain the idea of avoiding “foreseeable harm” which may result from disclosure.

A “[c]learly unwarranted invasion of personal privacy” requires shielding an individual’s private dealings from the public eye while preserving a public right to scrutinize government information.

**B. The Supreme Court Interprets the FOIA in the Context of “Rap Sheet” Disclosure**

In 1989, the Supreme Court’s watershed decision in *United States Department of Justice v. Reporters Committee for Freedom of the Press* set the stage for the coming battle in the federal circuit courts.

The case involved a FOIA request from CBS and Reporters Committee for Freedom of the Press for the

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37 2 JAMES T. O’REILLY, FEDERAL INFORMATION DISCLOSURE § 17:67 (Summer 2013) (quoting City of Chicago v. U.S. Dep’t of Treasury, 287 F.3d 628, 637 (7th Cir. 2002) (internal quotation marks omitted).
38 Dep’t of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 756 n.9 (1989); see also Halloran v. Veterans Admin., 874 F.2d 315, 319 (5th Cir. 1989) (quoting 132 Cong. Rec. S16504 (Oct. 15, 1986) (statement of Sen. Hatch) “[i]n determining the impact on personal privacy from disclosure of law enforcement records or information, the stricter standard of whether such disclosure ‘would’ constitute an unwarranted invasion of such privacy gives way to the more flexible standard of whether such disclosure ‘could reasonably be expected to’ constitute such an invasion.”)
39 Reporters Committee, 489 U.S. at 756 n.9.
40 Id.
41 O’REILLY, supra note 37 at § 9:1 (citing U.S. DEP’T OF JUSTICE, FREEDOM OF INFORMATION ACT GUIDE & PRIVACY ACT OVERVIEW 431, 436 (1998)).
43 Reporters Committee, 489 U.S. at 749.
Medico family’s criminal records. At issue was whether disclosure of FBI “rap sheets” to third parties, “could reasonably be expected to constitute an unwarranted invasion of personal privacy” under the FOIA.

The Court held that the request for a private citizen’s law enforcement records can “reasonably be expected to invade that citizen’s privacy . . . .” under the FOIA, and “the invasion of privacy is ‘unwarranted’” when the same request does not relate to any governmental inquiry, but only seeks records in the government’s database. In reaching this conclusion, the Court created a three-part test. First, the trial court needs to determine if the privacy interest involved is the type of interest Congress intended to protect under Exemption 7(C). Second, if the releasing agency meets its requirements under the FOIA, the court should decide if the release’s privacy interest erosion is warranted. Generally, an acceptable public interest that could plausibly warrant such an invasion of a privacy interest must relate to the FOIA’s central purpose. The only legitimate purpose under 7(C) is citizen’s right to be cognizant about the operations of a given governmental agency such as “information that sheds light on an agency’s performance of its statutory duties.” The sought after information must actually relate to said governmental agency’s operation; it is not appropriate for a FOIA requester to search through government databases for a person’s information. Third, the court must balance the privacy interest protected by 7(C) against the public’s interest in disclosure.

Together, this three-part test presents a set of principles, generally known as the “central purpose test.” Following Reporters Committee, the Court applied

44 Id. at 757; (By the time the case reached the Court, only one of four Medico family members was alive. The Pennsylvania Crime Commission alleged the Medico family had significant influence from organized crime figures as well as inappropriately procured a Department of Defense contract through a corrupt federal lawmaker, id.).
45 Id. at 751.
46 Id. at 780.
47 Id. at 762.
48 Id. at 771.
49 Id. at 774.
50 Id. at 773.
51 Id.; see also Fred H. Cate et al. The Right to Privacy and the Public’s Right to Know: The “Central Purpose” of the Freedom of Information Act, 46 ADMIN. L. REV. 41, 45 (arguing that although FOIA exemptions are permissive and not mandatory “agencies should be prohibited from disclosing information about a private individual other than the requester, unless that information sheds light on ‘what the Government is up to . . . .’”).
52 See Reporters Committee, 489 U.S. at 776.
53 See Martin E. Halstuk & Bill F. Chamberlin, The Freedom of Information Act 1966–2006: A Retrospective on the Rise of Privacy Protection over the Public Interest in Knowing What the Government’s Up To, 11 COMM. & POL’Y 511, 555 (2006) (discussing how FOIA requests generally are rejected unless the information-seeker meets his burden by establishing proof that the information sought after illuminates an agency’s operations); see also Martin E. Halstuk & Charles
the central purpose test in two cases that further explained balancing under the FOIA’s exemptions. United States Department of State v. Ray, involved Haitians seeking political asylum in the United States who sought the names of Haitian nationals in State Department interview documents who were involuntarily removed to Haiti. Writing for the Court, Justice Stevens held that Exemption 6 properly applied to deportee name release and therefore would “clearly constitute an unwarranted invasion of their privacy.” Exemption 6 prohibits the disclosure of: “[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy . . . .” In reaching this conclusion, the Court reversed the lower court for providing inadequate weight to a number of privacy-related factors, such as: deportees’ identification by name and address, marital and employment status, and probable retaliatory action by Haitian officials. The Court explained that while “[d]isclosure of such personal information constitutes only a de minimis invasion of privacy when the identities of the interviewees are unknown . . . [the relative] invasion of privacy becomes significant when the personal information is linked to particular interviewees.”

Three years later in United States Department of Defense v. FLRA, the Court held Exemption 6 also safeguarded the names and addresses of nonunion employees in an unfair labor practices action. The Court reasoned that the “only relevant public interest in the FOIA balancing analysis” is whether the information gained would “shed light” on the agency’s actions or “let them know what the government is up to.” The Court explained that the pertinent public interest for disclosure was “[n]egligible. . . . Disclosure of the addresses might allow the unions to communicate more effectively with employees, but it would not appreciably

N. Davis, The Public Interest Be Damned: Lower Court Treatment of the Reporters Committee “Central Purpose” Reformulation, 54 ADMIN. L. REV. 983, 992 (2002) (explaining that while federal agencies may collect “warehouses of information on nearly every aspect of American life,” the public can may only access that information within the “narrow” central purpose of the FOIA as prescribed by Reporters Committee).

55 Ray, 502 U.S. at 168.
57 Id.
58 Ray, 502 U.S. at 176.
59 Id.
60 Id.
61 Id.
63 Id. (quoting Reporters Committee, 489 U.S. at 773 (internal quotation marks omitted)).
further the citizens’ right to be informed about what their government is up to.\textsuperscript{64} Because the sole reason for the request was for the names and home addresses of the nonunion employees, the FOIA request fell outside the ambit of Exemption 6 and was denied.\textsuperscript{65}

III. ANALYSIS

A. The Federal Circuit Split over FOIA’s Application to Mug Shots

1. Detroit Free Press

The United States Marshals Service (USMS) had denied access to mug shots under the FOIA’s two privacy exemptions since at least 1993.\textsuperscript{66} Eventually, the repeated denials led to the first federal circuit court decision on the FOIA’s application to mug shots by the Sixth Circuit in Detroit Free Press, Inc. v. Department of Justice.\textsuperscript{67} In Detroit Free Press, a newspaper put forth a FOIA mug shot disclosure request for eight indictees.\textsuperscript{68} The USMS denied the FOIA requests under 6 and 7(C).\textsuperscript{69} In order to ascertain if disclosure is proper, the court noted that a FOIA Exemption 6 and 7(C) balancing test is typically required to determine whether public interest outweighs the individual’s privacy rights.\textsuperscript{70}

The Court reviewed the case de novo and held that the indicted individuals do not have a privacy right in the mug shots if (1) there is an ongoing criminal proceeding, (2) the names are publicized, and (3) the individuals appear in open court.\textsuperscript{71} After deciding the case on these narrow grounds, and without dicta as guidance, it left unsettled a number of situations where mug shots could have serious implications, such as “whether the release of a mug shot by a government

\textsuperscript{64} Id. at 497 (quoting Reporters Committee, 489 U.S. at 773 (internal quotation marks omitted)).
\textsuperscript{65} Id.
\textsuperscript{67} Detroit Free Press, Inc. v. Dep’t of Justice, 73 F.3d 93, 97 (6th Cir. 1996).
\textsuperscript{68} Id. at 95.
\textsuperscript{69} Id.
\textsuperscript{70} See id. at 96 (noting that Exemption 6 is “less sweeping” than Exemption 7(C)).
\textsuperscript{71} Id. at 97. See id. at 97–98 (“Even had an encroachment upon personal privacy been found, however, a significant public interest in the disclosure of the mug shots of the individuals awaiting trial could, nevertheless, justify the release of that information to the public.”).
agency would constitute an invasion of privacy in situations involving dismissed charges, acquittals, or completed criminal proceedings.\textsuperscript{72} Judge Norris responded with a stinging solo dissent;\textsuperscript{73} he noted the special privacy interest at issue in a mug shot by stating that unlike a normal photograph, a mug shot “relates a number of facts about a person, including his expression at a humiliating moment and the fact that he has been booked on criminal charges.”\textsuperscript{74} Furthermore, Judge Norris noted that the mug shots usage in federal trials is a distasteful practice which is generally frowned upon.\textsuperscript{75} Despite the rebuke, the Court’s majority opinion went unchallenged for fifteen years.\textsuperscript{76}

2. Karantsalis v. Department of Justice

In 2009, Theodore Karantsalis, a freelance reporter, requested the federal mug shot of Florida businessman and former corporation president Luis Giro who pled guilty to securities fraud earlier that year.\textsuperscript{77} The USMS denied Karantsalis’ under Exemption 7(C) and Karantsalis filed suit under the FOIA to obtain the mug shots.\textsuperscript{78} In contrast to the 6th Circuit’s opinion in \textit{Detroit Free Press}, the 11th Circuit found that Giro retained a privacy interest in his mug shot despite appearing in open court.\textsuperscript{79} In reaching its conclusion, the court noted that while the 11th Circuit had not previously addressed the issue, a previous 11th Circuit case noted that “mug shots carry a clear implication of criminal activity.”\textsuperscript{80}

\textsuperscript{72} Id. at 97. The court expressly refused to review or offer guidance in these situations.

\textsuperscript{73} Id. at 99.

“The majority attempts to lessen the impact of the Supreme Court’s privacy exemption cases by observing that the subjects of the mug shots ‘had already been identified by name by the federal government and their visages had already been revealed during prior judicial appearances.’ However, the Court rejected a very similar argument in \textit{Reporters Committee}. Although the information contained in the requested rap sheets was a matter of public record, the Court found that reliance upon the fact that the information had been previously disseminated reflected a ‘cramped notion of personal privacy.’” (quoting \textit{Reporters Committee}, 489 U.S. at 763) (Norris, J. dissenting).

\textsuperscript{74} Id.

\textsuperscript{75} (quoting Eberhardt v. Bordenkircher, 605 F.2d 275, 280 (6th Cir. 1979)) (“The use of mug shots has been strongly condemned in federal trials, as effectively eliminating the presumption of innocence and replacing it with an unmistakable badge of criminality.”) (Norris, J. dissenting).

\textsuperscript{76} In 2011, the Eleventh Circuit discussed the FOIA’s application to mug shots in Karantsalis v. Dep’t of Justice, 635 F.3d 497, 497 (11th Cir. 2011).

\textsuperscript{77} See id. at 499. Luis Giro was indicted on one fraud charge in 2003 and was a fugitive on the run for six years before authorities in Venezuela tracked him down in 2009. \textit{See also} Press Release, FBI, Former Fugitive Investment Manager Luis Giro Pleads Guilty to Securities Fraud (June 23, 2009), http://www.fbi.gov/miami/press-releases/2009/mm062309b.htm.

\textsuperscript{78} Id.

\textsuperscript{79} See id. at 503.

\textsuperscript{80} Id. (quoting United States v. Hines, 955 F.2d 1449, 1455 (11th Cir. 1992)).
Similar to Judge Norris’ dissent in *Detroit Free Press*, the court reasoned that because mug shots are a “unique and powerful type of photograph that raise[] personal privacy interests distinct from normal photographs,” their release could contravene privacy interests. The court noted the privacy dilemma behind a mug shot’s intrinsic nature as “[a] vivid symbol of criminal accusation, which, when released to the public . . . is often equated with, guilt. . . . Further, a booking photograph captures the subject in the vulnerable and embarrassing moments immediately after being accused, taken into custody, and deprived of most liberties.” Next, the court examined if there was a compelling public interest in the mug shot. Karantsalis argued that the public interest in knowing if Giro is smirking in this federal mug shot may imply that the accused received preferential treatment. The court questioned Karantsalis’ dubious logic by explaining the common sense notion that if he were receiving preferential treatment, he would not risk said treatment by smiling or smirking in an arrest photograph.

In so reasoning, the court stated that an argument which rested upon a facial expression would not advance the public interest by shedding light upon the “operations or activities of the government.” Finally, the court explained that because Giro’s interest in the nondisclosure of his mug shot substantially outweighs the “negligible” public interest in disclosure, the USMS properly withheld disclosure under Exemption 7(C). Recognizing the circuit split, the court noted that the USMS could reconsider its prior practice of granting mug shot requests outside the Sixth Circuit and its *Detroit Free Press*.

3. World Publishing Company v. Department of Justice

In 2008, the *Tulsa World* placed a FOIA request for mug shots of six pretrial detainees under the Tenth Circuit’s jurisdiction and the USMS denied the request under Exemption 7(C). The Tenth Circuit reviewed the case de novo in 2012 and held that under Exemption 7(C), a pretrial detainee during an ongoing criminal proceeding retains a privacy interest in his mug shot which outweighs any public interest in disclosure. In so doing, the Tenth Circuit aligned itself with the
Eleventh Circuit, creating a 2-1 circuit court split. The court reach its conclusion after noting that a three-part test exists regarding whether particular information is covered under Exemption 7(C): “a court must (1) determine if the information was gathered for a law enforcement purpose; (2) determine whether there is a personal privacy interest at stake; and (3) balance the privacy interest against the public interest in disclosure.”

Examining the Tulsa World’s arguments for disclosure, the court quickly disposed of the first factor by finding that the photographs were compiled for law enforcement purposes. Second, the court further noted that a federal district court had spoken on the subject, and used its reasoning to find that a “subject of a booking photo has a protectable privacy interest under the FOIA.”

In *Times Picayune*, the court explained the uniqueness of mug shots as “more than a photograph of a person . . . .[M]ug shots in general are notorious for their visual association of the person with criminal activity.” According to one court, a mug shot’s prejudicial effect may outweigh probative value under the Federal Rules of Evidence. Tulsa World attempted to draw a distinction between rap sheets and mug shots. The court responded to that distinction noting that “rap sheets are protected statutorily, 28 U.S.C. § 534(a)(4) & (b) booking photographs are protected by DOJ policies. We do not see this distinction as helpful to Tulsa World because, in both cases, the government has expressed a desire to prevent public disclosure of the information.” The court also saw other subtle differences by drawing a “comparison between the sensitive nature of the subject matter in a rap sheet, and the vivid and personal portrayal of a person’s likeness in a booking photograph. Furthermore, all of the information in a rap sheet is available to the public . . . .” whereas a USMS mug shot is unavailable to the public unless it is released to capture a fugitive.

Third, the court, in applying the privacy interest in the photographs against the public’s interest in disclosure and found that the pretrial detainee’s privacy interest outweighed the public’s interest in disclosure.

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91 *Id.*
92 *Id.*
93 *World Publ’g Co.*, 672 F.3d at 827 (quoting *Times Picayune Publ’g Corp. v. Dep’t of Justice*, 37 F. Supp. 2d 472, 477 (E.D. La. 1999)).
94 *Id.* (quoting *Times Picayune*, 37 F. Supp. 2d at 477) (“[Mug shots] include front and back profiles shots, a backdrop with lines showing height, and, arguably most humiliating of all, a sign under the accused’s face with a unique Marshals Service criminal identification number.”)
95 See United States v. Romero-Rojo, 67 Fed. Appx. 570, 572 (10th Cir. 2003) (unpublished) (finding that in certain circumstances a mug shot may violate Rule 404(b) of the Federal Rules of Evidence because “mugshots carry a clear implication of criminal activity that breaches the rule against admitting evidence of the defendant’s bad character or previous brushes with the law.”).
96 *World Publ’g Co.*, 672 F.3d at 829.
97 *Id.*
98 *Id.*
99 *Id.* at 830.
In reaching this conclusion, the court observed the burden of proof under the FOIA: the requester has the burden of showing that in seeking the information, he intends to discover the “conduct of the agency that has possession of the requested records.”100 Tulsa World put forth a number of public interests which would be advanced if mug shots are disclosed, such as, inter alia: favorable treatment, whether the detainee is mentally competent, and capturing a fugitive.101 However, the court quickly dismissed these arguments as inadequate in meeting FOIA’s basic purpose and because mere speculation about putative public benefits is insufficient to outweigh a robust privacy interest.102 The court found Tulsa World’s argument flawed because it relied on tangential reasoning and not the FOIA’s central purpose.103 Tulsa World’s reasoning relied upon: (1) perceiving favorable treatment; (2) no relation to law enforcement’s effectiveness; and (3) the unlikely prospect that the mug shots could dissuade bad actors within government.104

B. Confronting the Privacy Dilemma

The 2-1 federal circuit court split protecting arrestee mug shots who appear in open court as well as pretrial detainees is welcome news. However, as the World Publishing court noted, other federal courts have yet to weigh in regarding whether

100 Id.
101 Id. at 831.

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

102 Id.

“Interests 1, 7, and 8 relate to the public's ability to assist federal law enforcement—not to the ability of citizens to know how well the government is performing its duties. Interest 9 also says nothing about law enforcement’s successful performance of its role. Finally, while it is true that Interests 2–6 are legitimate public interests under the FOIA, there is little to suggest that releasing booking photos would significantly assist the public in detecting or deterring any underlying government misconduct.”

103 Id.
104 Id.
disclosure “might invade privacy given ‘dismissed charges, acquittals, or completed criminal proceedings.’” This glaring loophole allows entities to aggregate and compile mug shots online of individuals who might have been arrested and subsequently had their charges dropped. Having denied certiorari in *Karantsalis*, the Supreme Court is unlikely to resolve the dispute—leaving the federal courts to grapple with an increasingly volatile, and fluid area of law that requires careful scrutiny in balancing an individual’s privacy interest versus the public’s interest in disclosure.

Recently, an Ohio lawsuit against two pay-to-remove mug shot websites alleged violation of the state’s right to publicity statute. The lawsuit was eventually settled and resulted in the websites paying $7,500 in restitutionary damages to three plaintiffs and removing the offending photographs. Attorney for plaintiffs, Scott Ciolek called the practice immoral, likening it to extortion. The second, much broader effect is that the same websites have stopped charging the unfortunate individuals pictured in the mug shots.

The line is blurring between online mug shots that do not require a fee for removal and traditional media outlets. Is there a significant difference then between websites that simply repost public information versus traditional media outlets that do the same? Traditional media outlets may not require individuals to pay to remove their mug shots, but they still have a pecuniary interest in their own survival. Worse yet, some commentator in the field have explained that new

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105 *World Publ’g Co.*, 672 F.3d at 829 (quoting *Detroit Free Press*, 73 F.3d 93, 97 (6th Cir. 1996)).


109 See id. (“The real effect is that you’re not going to find these mug shots in general online searches,” Ciolek said. “What these companies did was wrong in charging to take down the photos.”).

110 Id. The attorney representing the defendant companies stated that they would revise policy and cease charging arrestees to remove their mug shots.

111 See e.g., Tyler Dukes, *Proposals Would Do Little to Limit Mugshot Publications*, WRAL.COM (June 23, 2014), http://www.wral.com/proposed-mugshots-laws-may-do-little-to-curb-worst-actors/13720084/#Q83b1PQtLw0vCEHV.99 (one state lawmaker believes that while the practice of requiring payment to remove a mugshot is a scam, republishing a public record is acceptable.)

legislation designed to tackle the pay-to-remove aspect of mug shot websites has actually let online mug shot websites retain photographs under the umbrella of freedom of speech similar to that of traditional media outlets.\textsuperscript{113} In the midst of the recent circuit split, a few states have taken measures to ensure that pay-to-remove websites cannot charge arrestees to remove their mug shots.\textsuperscript{114} The right to be forgotten is an idea that individuals should be allowed “to determine for themselves when, how, and to what extent information about them is communicated to others.”\textsuperscript{115} The battle is a difficult one, fraught with questions such as: “Are mug shots ‘newsworthy?’”\textsuperscript{116} No state has responded unequivocally, leaving significant gaps for traditional news outlets to exploit arrestee records and booking photographs using the same techniques that the OMI uses, namely, data-scraping sheriff’s websites.

Compared to its European Union sister states, the “right to be forgotten” in the United States remains a foreign concept and individuals have little control over the public dissemination of embarrassing and damaging data.\textsuperscript{117} Despite a European Court of Justice ruling requiring the deletion of potentially defamatory, irrelevant, it would have little effect in America because of the “shield” of Section 230 of the Commutations Decency Act wielded by search engines.\textsuperscript{118} Mug shot disclosure’s most problematic characteristic is that “mugshots carry a clear implication of criminal activity,” without further proof that the individual has been convicted, or, in many circumstances has had his or her charges dismissed.\textsuperscript{119} This is not to say that there is no public interest, instead, the public interest is substantially outweighed by an individual’s privacy interest in nondisclosure.

As one legal scholar notes, the “presumption of innocence is a legal requirement, not a social norm.”\textsuperscript{120} This goes to the heart of the matter regarding

\begin{footnotes}
\item[113] Id. “At one time, you could pay these guys, and they go away,” Tyronne Jacques said in a phone interview. “What they do now is they don’t take people off.”
\item[114] See infra notes 134–152 and accompanying text.
\item[115] See Jasmine E. McNealy, \textit{The Emerging Conflict Between Newsworthiness and the Right to Be Forgotten}, 39 N. KY. L. REV. 119, 121 (2012) (arguing that because individuals develop, they should not be linked to potentially damaging information from the past).
\item[116] See Tyler Dukes, \textit{Under Scrutiny Mugshot Publishing Industry Evolves}, WRAL.COM (June 24, 2014), http://www.wral.com/under-scrutiny-online-mugshot-industry-evolves/13756083/ (Dukes quotes WRAL.com general manager John Conway who explains the online newspaper’s policy in publishing potentially damaging arrest photographs: “Individual mug shots are . . . used when WRAL.com and WRAL-TV cover newsworthy crimes or arrests. Those mug shots remain in the online archive.”). See also Collier, supra note 3.
\item[117] Jacob Gershman, \textit{'Right to Be Forgotten' Is a Foreign Concept in America}, WALL ST. J. LAWBLOG, (May 14, 2014), http://blogs.wsj.com/law/2014/05/14/the-right-to-be-forgotten-is-a-foreign-concept-in-america/; see e.g., Fields and Emshwiller supra note 4.
\item[118] Gershman, supra note 117.
\item[120] Leipold, supra note 10 at 1299.
\end{footnotes}
the privacy dilemma of individuals whose public arrest photograph, depicts them in their most vulnerable form, and is replicated online. There is little to no presumption of innocence if the OMI, whether for commercial exploitation or in its most role as guardians of freedom of speech, continue to publish photographs despite any disclaimer that tells the reader that the unfortunate individuals depicted are “innocent until proven guilty.”

IV. RECOMMENDATION

Historically, criminal mug shots a troubled past with a mixed purpose: they have been used as tools of identification but also as a public service masquerading as a guilty pleasure. As early as the mid-nineteenth century, photographers captured photographs to more accurately render physical appearance. Mug shots were linked to pseudoscience of physiognomy, “a popular theory that ‘all human beings carry charts of their mentality and character at their mast-heads, legible, even in detail, by all who know how read them.’” As soon as the negatives were printed, mug shots entered the public realm and law-abiding citizens were asked to etch the arrestee’s image into their mind, an early form of a “crowd-sourced project.” Because “rouge galleries” were often too voluminous for a single police department to handle, agencies around the country asked citizens to commit the images to memory.

Today, the responsibility to publicly disseminate or restrict public records such as mug shots falls upon county sheriff’s departments. As demand to restrict mug shot dissemination increased around the country, several state legislatures have either severely curtailed pay-to-remove websites or banned their unsavory practice. However, such legislation while necessary is not sufficient; traditional media sources and tabloid newspapers continue disseminating mug shots while hiding under the First Amendment guise of freedom of the press. For example,

121 See e.g., MUGSHOTS.COM (last visited Mar. 20, 2015) (“All are presumed innocent until proven guilty in a court of law. The mugshots and/or arrest records published on mugshots.com are in no way an indication of guilt and they are not evidence that an actual crime has been committed. Mugshots.com does not guarantee the accuracy or timeliness of the content of this website . . . ”).
123 Id.
124 Id.
125 Id.
126 Id.
127 See infra notes 134–152 and accompanying text.
Lance Winchester, an attorney for Citizens Information Associates, a company that operates bustedmugshots.com and mugshotsonline.com, explains that while legislatures are cracking down on online websites which charge a fee for mug shots, it is not “extortion when the Tampa Tribune publishes a mug shot.” This glaring loophole is created by the argument that arrestee photographs are “public records” or “newsworthy information.” As a consequence, the OMI, much like the aggregator in eBay v. Bidder’s Edge, may still copy and populate data through screen scraping technology from traditional media websites—whether or not for profit.

A. Current State Initiatives Are a Step in the Right Direction but Ultimately Lack Teeth to Enforce Rules

![Figure 1](image)

Figure 1. Data compiled from site. See e.g., Mug Shots and Booking Photo Websites, NAT’L CONF. ST. LEGISLATURES (Nov. 19, 2014), http://www.ncsl.org/research/telecommunications-and-information-technology/mug-shots-and-booking-photo-websites.aspx (listing legislative initiatives since 2012 to prohibit mug shot disclosure).

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129 Id.
130 Id.
It is often said that states are the “laboratories of democracy”\textsuperscript{133} and in the case of arrestee mug shots, this is especially true. Since 2012, state legislatures have seen thirty-three bills filed across the country that either restrict or severely curb the pay-to-remove OMI, with twelve bills proposed in 2013 and twenty-one bills proposed in 2014.\textsuperscript{134} Unfortunately, most proposals failed to gain legislative approval.\textsuperscript{135} However, a small handful of the proposed bills did pass state legislatures and received the Governor’s signature in states such as Colorado, Georgia, Illinois, Oregon, Texas, Utah, and Wyoming.\textsuperscript{136}

States have attempted to grapple with the dilemma in different ways. For instance, the Oregon and Wyoming state laws only apply to pay-to-remove websites.\textsuperscript{137} However, these laws place the burden upon arrestees to prove that their charges were acquitted, dismissed, or expunged to these websites before the photographs can be removed.\textsuperscript{138} Lastly, the Oregon and Wyoming laws do not apply to individuals who are convicted of a crime nor do they apply to websites that do not charge to remove mug shots.\textsuperscript{139}

Georgia seemingly applies a broad-brush approach by targeting those who are “engaged in any activity involving or using a computer or computer network who publishes on such person’s publicly available website” a booking photograph.\textsuperscript{140} The Georgia law, unfortunately, creates a carve-out for traditional news media by granting immunity to outlets covering the “publication or dissemination” of “[n]ews or commentary.”\textsuperscript{141} Colorado’s law seems to follow in Georgia’s footsteps by outlawing mug shots “placed in a publication or posted to a website that requires the payment of a fee or other exchange for pecuniary gain.”\textsuperscript{142}

\textsuperscript{133} The now-famous phrase is derived from Justice Brandeis’ dissent in a 1932 Supreme Court case. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”) (Brandeis, J., dissenting).

\textsuperscript{134} NAT’L CONF. ST. LEGISLATURES, supra note 132.

\textsuperscript{135} See Shullman & Caramanica, supra note 66.


\textsuperscript{138} See id.


\textsuperscript{141} Id. § 2.

Utah passed a law disallowing sheriffs from posting mug shots in their websites in certain formats, if the record could find its way into a website or publication that charges a fee for removal.\textsuperscript{143} The Utah law is by far, one of the most progressive laws dealing with arrestee mug shots, but unfortunately it still places the onus of proving innocence on the formerly accused as well as allowing traditional news sources from acquiring mug shot data.\textsuperscript{144} However, there are two positive steps in the Utah legislature’s reasoning. First, it prohibits sheriff’s departments from releasing mug shots.\textsuperscript{145} Secondly, it attempts to address the issue of data-scraping by disallowing placement in certain format from which it may be gleaned by other aggregator websites.\textsuperscript{146}

Texas’ legislature has taken a different approach to the dilemma of privacy rights and mug shot disclosure. It requires that mug shot website cannot charge more than “$150 or more for other consideration of comparable value” for removal.\textsuperscript{147} Furthermore, the websites posting criminal backgrounds are obligated to edit incorrect information after they are placed on notice, and cannot charge for corrections.\textsuperscript{148} Finally, these websites cannot publish the information if there is an order of nondisclosure or the information has been expunged.\textsuperscript{149}

Lastly, Illinois makes it illegal to “solicit or accept payment of a fee or other consideration to remove, correct, or modify” criminal records.\textsuperscript{150} However, the Illinois law lacks any procedure or right through which a person may have their image removed.\textsuperscript{151} Like all other states that have passed laws on mug shots, the implicit right of the press to publish arrestee records online is maintained in Illinois.\textsuperscript{152}

\textbf{B. Why State Legislation is Thus Far is Problematic and Possible Solutions}

Thus far, state laws enacted to prohibit mug shot publication are problematic. First, as noted above, all states that have passed laws on mug shot publication have maintained the right of traditional media outlets to publish arrestee records. This is done through denoting a negative right: an entity may not charge to remove a mug shot. Troublingly, in several states, the burden is on arrestees to prove their innocence. Other states, such as Illinois, omit a procedure through
which an individual may explain his innocence to a website aggregating criminal information through a legalized process.153

By leaving the statutory language in its current form, the handful of states that have enacted laws on the matter allow traditional news outlets to exploit arrestee mug shots through shaming by posting mug shots in prominent newspapers such as the Chicago Tribune.154 What state legislatures do not realize, or realize but refuse to enact, is that this is precisely the type of opportunity that data-scrapers need to take content from the host website. The Utah legislature was thinking in the right direction by mandating that sheriffs not place mug shots in a format where it may easily be scrapped. Ideally states should prohibit sheriff’s offices from posting arrestee mug shots online. States should follow the example of one local jurisdiction and require county sheriff’s offices not post arrestee mug shots online.155 Otherwise, sheriff’s departments across the nation may become targets for would-be data-scrapers. For instance, Salt Lake County Sheriff Jim Winder explained that the County had unwittingly become “an accomplice” to the [OMI] because of its policy in posting mug shots to its website.156 A single entity data-scraped nearly 520,000 mugshots from the Salt Lake County Jail.157

Recent anti-data-scraping techniques have cropped up, such as evanescent photographs that are timed to automatically erase themselves if copied from one site to another.158 Websites for photographers, such as Flickr, attempt to curtail copyright infringement by disallowing users from copying and pasting images onto other programs.159 These techniques are necessary, but not sufficient in reducing data-scraping if state legislatures fail to enact bills prohibiting sheriff’s departments from disclosing photographs and sheriff’s departments from creating internal policies barring the dissemination of photographs. The reason these techniques are ultimately insufficient is because data-scraping techniques are likely to become more robust, rendering any attempts at transparency to backfire upon the former

153 See supra notes 134–152 and accompanying text.
156 Id.
157 Id.
158 Jennifer Kyrnin, How to Protect Your Digital Photos from Being Copied: Understand How to Protect Your Images, ABOUT.COM, (last visited Mar. 20, 2015), http://webdesign.about.com/od/graphics/a/aa102406.htm (explaining various methods such as “shrink-wrapping,” which involves placing a transparent image upon the protected image, watermarking, and using a Flash slideshow).
arrestee. Moreover, they do not address the central issue regarding mug shots because these images “carry a clear implication of criminal activity . . .”

C. Resolving the Privacy Dilemma in Mug Shot Disclosure

State legislatures must be proactive and follow the central purpose test guidelines put forth by the United States Supreme Court in Reporters Committee: a request for a private citizen’s law enforcement records can “reasonably be expected to invade that citizen’s privacy . . .” under the FOIA, and “the invasion of privacy is ‘unwarranted’” when the same request does not relate to any governmental inquiry, but only seeks records in the government’s database. Thus, in addition to enacting state laws that mirror Reporters Committee, state legislatures must disallow sheriff departments from posting arrestee records.

1. States Should Prohibit Law Enforcement from Mass Mug Shots Disclosure Through the Application of the Central Purpose Test

A return to the Reporters Committee standard is useful at this point. First, an individual loses control over his or her privacy rights once it is converted into “public property.” Because the arrestee has lost control over the information, he or she must rely upon the government agency that holds dominion over the same information in order to propose a privacy interest. Secondly, the Reporters Committee case is illustrative because the central purpose test is the proper standard through which the FOIA 7(C) requests should be measured. As the Court notes, a request through a third-party intermediary “can reasonably be expected to invade that citizen’s privacy.” Application of the Reporters Committee central purpose test at the state level should be the means through which law enforcement in every state disseminate arrestee records and mug shots. In other words, state and local law enforcement should not open their files to a blanket raid by traditional media outlets under the guise of freedom of press. Instead, law enforcement should recognize that the data held in their servers can and often is used adversely to punish individuals who might not have committed a wrong in the first instance.

Mug shot dissemination creates significant problems for individuals in a medium where one may find it difficult to leave his or her past behind. American

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161 Reporters Committee, 489 U.S. at 780.
163 Reporters Committee, 489 U.S. at 780.
164 See Gershman, supra note 117 (explaining that United States citizens have significantly weaker rights to delete reputational information online compared to their European counterparts.)
society has long surpassed the era of “practical obscurity,” a doctrine which argues that privacy rights gain strength through the passage of time due to fading memory. The Reporters Committee Court wrote the opinion at a time when electronic access to mug shot data could not be accessed through personal electronic devices; hence, the term “practical obscurity” and the necessity to physically enter a courthouse or sheriff’s office to request mug shots. Whether states should allow sheriff’s departments to disclose mug shots should turn upon “the nature of the requested document” and its connection to public access. Unfortunately, arrestee data’s utility under the FOIA is slim in circumstances where it is intentionally given to the public by sheriff’s departments through social media or their own websites, further diminishing practical obscurity’s weight.

Professor Leipold argues for a novel approach to this problem. He believes that acquitted defendants should have the right to request a finding that he is innocent: “If a defendant is acquitted in a bench trial, or if the charges are dismissed prior to trial, the defendant should be permitted to ask the judge for a finding that, not only has the government failed to prove guilt, but also that the evidence shows his innocence.” This counsels for a more thorough, careful approach. No individual has a right to request a law enforcement records if it would reasonably seem that the disclosure of such records “could constitute unwarranted invasion of privacy.”

There is neither proof that disseminating arrestee records reduce crime nor dissuade otherwise law-abiding citizens from engaging in criminal actions. At best, sheriff departments across the country post arrestee records through similar reasoning that many states allow law enforcement officials to post sex offender photographs and location—to shame the victims and alert neighbors to conduct of prior bad behavior. As one court so poignantly noted: “[a]rrest is a public act that may seriously interfere with the defendant’s liberty . . . that may disrupt his employment, drain his financial resources, curtail his associations, subject him to

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165 See Meg Leta Ambrose, A Digital Dark Age and the Right to Be Forgotten, 17 J. INTERNET L. 1, 18 (2013) (explaining that while current initiatives seek data retention, online data should be preserved if it accurate).
166 Reporters Committee, 489 U.S. at 772 (quoting Dep’t of Air Force v. Rose, 425 U.S. 352, 370(1976)) (internal quotation marks omitted).
167 Ambrose, supra note 165; see e.g., Lane County Mugshots, FACEBOOK (last visited Mar. 20, 2015) https://www.facebook.com/LaneCountyMugshots; Mugshots, ETOWAH CNTY. SHERIFF’S OFFICE (last visited Mar. 20, 2015), http://www.etowahcountysheriff.com/mugshots.php (listing daily arrestee photographs).
168 Leipold, supra note 10 at 1300.
170 See Sadiq Reza, Privacy and the Criminal Arrestee or Suspect: In Search of A Right, in Need of A Rule, 64 Md. L. REV. 755, 773 (2005) (arguing that the primary motive in “shaming” through exposing arrestee data is unlawful without due process).
171 Id. at 772–73.
public obloquy, and create anxiety in him, his family and his friends.”\footnote{172} Arrestee photographs and data is rather dissimilar from sex offender registration data which requires a final judgment; significantly, many arrestees are not subsequently charged with a crime or charges are dismissed.\footnote{173}

2. Local Law Enforcement Agencies Should Create Internal Policies Consistent with Exemption 7(C)

Even if states prohibit sheriff’s departments from releasing mugshots under a standard similar to the central purpose test, sheriff’s departments should, sua sponte, create internal policies that mandate disclosure in conformity with the Reporters Committee decision. A sheriff’s department policy may take into account the nature of the record, the purpose guiding the request, and whether the disclosure could contravene privacy interest consisted with the FOIA’s exemption 7(C). Such an approach is consistent with Exemption 7(C), but take into account the justifications proffered by Karantzas and World Publishing Company holdings which stress the need to protect privacy interests. An arrestee’s brush with the law, leads to propensity arguments that because an individual might have used poor judgment in one instance, that this individual should be in the public’s mind and his photograph subject to the public’s interest. This is precisely the type of reasoning that is prohibited by the Federal Rules of Evidence\footnote{174} and enshrined in our most basic understanding of criminal law: “The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.”\footnote{175}

However, there must be proportional exceptions for extraordinary circumstances. If, for example, a sheriff’s office receives notice that a fugitive is on the run or if a sex offender refuses to register his location, it can apply the central purpose test and balancing the public interest versus the individual’s privacy interest, and sensibly come to the conclusion that it is in the public interest to disclose the arrestee record as well as the mug shot. A well-known example is the

\footnote{172}{United States v. Marion, 404 U.S. 307, 320 (1971).}
\footnote{173}{See e.g., Reza, supra note 170 at 773–774 (listing high dismissed charge rates in large population centers).}
\footnote{174}{Fed. R. Evid. 404(a)(1) (“Evidence of a person’s character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.”).}
\footnote{175}{Coffin v. United States, 156 U.S. 432 (1895). The presumption of innocence is deeply rooted in Western Antiquity as well as Canon Law. Justice White, quoted, amongst others: Ammianus Marcellinus, Giuseppe Mascalchi, Justinian’s Digest and Code, Pope Innocent III, and Pope Gregory IX; Leipold, supra note 10 at 1299.}
FBI’s 10 Most Wanted List of criminal fugitives.\textsuperscript{176} Flexibility is implicitly built-into the central purpose test’s structure, allowing law enforcement to react quickly to exigencies warranting disclosure.\textsuperscript{177}

FOIA’s central purpose is to increase the public’s awareness of government agency functions through disclosing “information that sheds light on an agency’s performance of its statutory duties.”\textsuperscript{178} But this purpose does not extend to searching agency databases, instead, as the Eleventh Circuit notes, disclosure should rest on the FOIA’s objective in shedding light on “what the government is up to” rather than “[o]n the particular purpose for which the document is being requested.”\textsuperscript{179} The flip side of the argument, by proponents of press rights, is that public dissemination of government information allows them to understand law enforcement activity and performance.\textsuperscript{180} However, as the 2-1 federal circuit court split demonstrates, the public awareness of law enforcement activity through dissemination of mug shots is largely unhelpful. As the Eleventh Circuit correctly notes, the public gains little law enforcement operational understanding through mug shot disclosure.\textsuperscript{181} FOIA’s framers did not have in mind arrestee photograph dissemination, which would expose arrestee’s addresses, names, and appearance.\textsuperscript{182} FOIA’s central purpose is not met, let alone the critical balancing test, there is consequently no public interest gained through mug shot disclosures and, accordingly, mug shots should be released only if the central purpose test espoused by the Reporters Committee Court is met.\textsuperscript{183}

V. CONCLUSION

Arrestee mug shots should not be disclosed publicly unless there is a compelling public interest for their disclosure. The Reporters Committee decision highlighted a three-part test that is useful in balancing the privacy interest in a photograph versus the public’s interest in its disclosure.\textsuperscript{184} However, the nascent industry of arrestee mug shots online threatens to dismantle the framework so

\begin{itemize}
  \item \textsuperscript{176} See e.g., Ten Most Wanted, FBI (last visited Mar. 20, 2015), http://www.fbi.gov/wanted/topten.
  \item \textsuperscript{177} See Cate, supra note 51 at 72 (discussing cost, delay, and discovery issues associated with the central purpose test).
  \item \textsuperscript{178} Reporters Committee, 489 U.S. at 773.
  \item \textsuperscript{179} See World Publ’g Co., 672 F.3d at 830 (quoting Times Picayune, 37 F. Supp. 2d at 479 (E.D. La. 1999)).
  \item \textsuperscript{180} Id.
  \item \textsuperscript{181} Id. at 831. (“[B]ooking photographs are not likely to contribute significantly to public understanding of federal law enforcement operations or activities.”).
  \item \textsuperscript{182} Reporters Committee, 489 U.S. at 765.
  \item \textsuperscript{183} Id. at 773.
  \item \textsuperscript{184} Id. at 762–776.
\end{itemize}
careful crafted by the Supreme Court, with the circuit courts declining to review the impact that private individuals have in their arrestee mug shots. This has led to mug shot proliferation on both pay-to-remove mug shot sites, as well as traditional media outlets and mug shot sites that post the same content without a payment requirement, and do not prove a means to remove the photograph. The line has now blurred between an OMI which increasingly is not charging to remove mug shots and traditional media outlets that claim freedom of the press to publish potentially damaging photographs.

This unsavory practice has the potential to significantly impair a person’s reputation long after their publication. This is true, even if the individual subsequently has charges against him or her dropped. Individuals have little redress when it comes to blanket disclosures of public documents as the old model of “practical obscurity” gives way to a digital age of easy access. Consequently, privacy rights suffer in a medium where photographs are easily replicated and aggregated on other internet websites; the individual no longer can leave his past behind. He or she does not have the right to be forgotten, and like Hester Prynne in The Scarlet Letter must endure a lifetime of humiliation even if charges are dismissed.