RECENT CASES

ADMINISTRATIVE LAW — FREEDOM OF INFORMATION ACT — SIXTH CIRCUIT HOLDS THAT MUG SHOTS MAY BE EXEMPT FROM DISCLOSURE UNDER FOIA PERSONAL PRIVACY EXEMPTION. — *Detroit Free Press, Inc. v. United States Department of Justice*, 829 F.3d 478 (6th Cir. 2016) (en banc).

Journalists with easy access to photographs have been accused of "invad[ing] the sacred precincts of private and domestic life"[1] since the phrase "right to privacy" first entered the legal lexicon.[2] Since its passage in 1966, the Freedom of Information Act[3] (FOIA) has offered professional reporters and amateur sleuths a powerful tool to investigate "what their government is up to."[4] But FOIA came with an exception to prevent private citizens from harnessing the power of the federal government to investigate one another. FOIA's Exemption 7(C) allows agencies to withhold disclosure of "information compiled for law enforcement purposes"[5] when producing such records "could reasonably be expected to constitute an unwarranted invasion of personal privacy."[6] In 1996, the Sixth Circuit held that "no privacy rights are implicated" by agency disclosure of mug shots once a defendant has appeared in court.[7] Recently, in *Detroit Free Press, Inc. v. United States Department of Justice* (*Free Press II*),[8] the Sixth Circuit reversed course and held that "[i]ndividuals enjoy a non-trivial privacy interest in their booking photos" even after appearing in open court,[9] and that booking photos may be exempt from disclosure under Exemption 7(C) on a case-by-case basis.[10] To reach this conclusion, the Sixth Circuit compared mug shots to rap sheets and death-scene images.[11] These comparisons focused more on online embarrassment than on the disclosure of private or personal facts. The privacy interest recognized in

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1 Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890).

2 *Id.* at 196.

3 5 U.S.C. § 552 (2012).

4 EPA v. Mink, 410 U.S. 73, 105 (1973) (Douglas, J., dissenting) (quoting Henry Steele Commager, *The Defeat of America*, N.Y. REV. BOOKS, Oct. 5, 1972, at 7, 7 (reviewing RICHARD J. BARNET, ROOTS OF WAR (1972))).

5 5 U.S.C. § 552(b)(7).

6 *Id.* § 552(b)(7)(C).

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

8 829 F.3d 478 (6th Cir. 2016) (en banc).

9 *Id.* at 480.

10 *Id.* at 485.

11 *Id.* at 481–82.

Free Press II thus calls into doubt the conventional wisdom that the "right to be forgotten" is out of step with U.S. law.[12]

In 2013, after four Michigan police officers were arrested for bribery and drug conspiracy, the *Detroit Free Press* requested the officers' mug shots pursuant to FOIA.[13] The U.S. Marshals Service denied the request, citing Exemption 7(C).[14] The *Detroit Free Press* appealed to the Department of Justice's (DOJ) Office of Information Policy, which failed to issue a determination within twenty days, as required by statute.[15] Having exhausted its administrative remedies, the newspaper sued for the photographs in the Eastern District of Michigan.[16]

The district court accepted the newspaper's contention that mug shots do not fall within FOIA's personal privacy exemption but stopped short of ordering disclosure. Bound by *Free Press I*'s holding that the release of mug shots "could not reasonably be expected to constitute an invasion of personal privacy,"[17] the district court found that DOJ had violated FOIA by withholding the booking photographs.[18] However, applying a four-factor test to assess the need for a stay pending appeal, the court found that the (now-convicted) police officers would be "irreparably harmed" without a stay and did not order the mug shots' immediate release.[19]

The Sixth Circuit affirmed.[20] In a per curiam opinion, the panel held that FOIA required the government to disclose the mug shots.[21] However, the panel noted that "several factors merit[ed] revisiting *Free Press I*"[22] and urged the full court to reconsider the case. The panel asserted that, contrary to the holding of *Free Press I*, an individual has a privacy interest in his mug shot, which conveys "potentially embarrassing or harmful information" by capturing "how an individual appeared at a particularly humiliating moment immediately after being

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[12] *See, e.g.*, Steven C. Bennett, *The "Right to Be Forgotten": Reconciling EU and US Perspectives*, 30 BERKELEY J. INT'L L. 161, 164–66 (2012) (discussing the critical U.S. reaction to Europe's recognition of a right to be forgotten); Robert G. Larson III, *Forgetting the First Amendment: How Obscurity-Based Privacy and a Right to Be Forgotten Are Incompatible with Free Speech*, 18 J. COMM. L. & POL'Y 91 (2013) (arguing that a dignity-based right to be forgotten is inconsistent with U.S. constitutional values).

[13] Detroit Free Press, Inc. v. U.S. Dep't of Justice, 16 F. Supp. 3d 798, 805–06 (E.D. Mich. 2014).

[14] *Id.* at 806.

[15] *Id.*

[16] *Id.*

[17] *Free Press I*, 73 F.3d 93, 97 (6th Cir. 1996).

[18] *Detroit Free Press*, 16 F. Supp. 3d at 815.

[19] *Id.* at 812; *see also id.* at 815.

[20] Detroit Free Press, Inc. v. U.S. Dep't of Justice, 796 F.3d 649, 650 (6th Cir. 2015) (per curiam).

[21] *Id.*

[22] *Id.* at 653.

taken into federal custody."[23] Further, the court noted that the privacy interest is heightened because "booking photographs often remain publicly available on the Internet long after a case ends."[24]

After granting rehearing en banc, the Sixth Circuit reversed and remanded.[25] Writing for the majority, Judge Cook[26] held that individuals have a nontrivial privacy interest in their mug shots that, under FOIA, must be balanced against the public interest in disclosure.[27] To reach that holding, Judge Cook first concluded that booking photos implicate personal privacy. Judge Cook argued that Exemption 7(C)'s notion of personal privacy encompasses "[e]mbarrassing and humiliating facts — particularly those connecting an individual to criminality."[28] Mug shots qualify. Booking photos, Judge Cook explained, are "snapped 'in the vulnerable and embarrassing moments immediately after [an individual is] accused, taken into custody, and deprived of most liberties.'"[29] The majority also considered the internet's long memory. Relying on the Supreme Court's allusion to the morbid potential abuses of death-scene image disclosure in *National Archives & Records Administration v. Favish*,[30] the Sixth Circuit concluded that courts must look to the consequences of disclosure to define FOIA's statutory privacy interest.[31] Because *Free Press I* was decided before Google, when mug shots "appeared on television or in the newspaper and then, for all practical purposes, disappeared," Judge Cook concluded that the logic of *Free Press I* was no longer persuasive.[32]

Judge Cook rejected the *Detroit Free Press*'s arguments in favor of upholding *Free Press I*.[33] The newspaper had argued that constitutional, common law, and state statutory notions of privacy favored disclosure of booking photographs.[34] First, Judge Cook countered that *constitutional* privacy rights have a limited role to play in giving meaning to FOIA's *statutory* privacy interest.[35] Second, at common law, an individual retains a privacy interest in information that is part of the public record when that information is limited to "a particular

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[23] *Id.* at 652.

[24] *Id.*

[25] *Free Press II*, 829 F.3d at 485.

[26] Judge Cook was joined by Chief Judge Cole, Senior Judge Guy, and Judges Gibbons, Rogers, Sutton, McKeague, Kethledge, and White.

[27] *Free Press II*, 829 F.3d at 484–85.

[28] *Id.* at 481.

[29] *Id.* at 482 (alteration in original) (quoting Karantsalis v. U.S. Dep't of Justice, 635 F.3d 497, 503 (11th Cir. 2011) (per curiam)).

[30] 541 U.S. 157 (2004).

[31] *Free Press II*, 829 F.3d at 482.

[32] *Id.*

[33] *Id.* at 483–84.

[34] *Id.* at 483.

[35] *Id.*

person or group or class of persons."[36] The Supreme Court has held in *United States Department of Justice v. Reporters Committee for Freedom of the Press*[37] that an individual has a privacy interest in his rap sheet.[38] Like rap sheets, booking photos are "not open to public inspection" and can therefore be considered private.[39] Judge Cook also rejected the newspaper's argument that mug shots are not traditionally considered private because several states mandate their release. Highlighting divergent state approaches, Judge Cook concluded that "state laws favor neither wholesale disclosure nor nondisclosure."[40] Furthermore, federal law and policy, not state law, was relevant in determining whether a broadly recognized privacy interest existed.[41]

The Sixth Circuit adopted a "case-by-case approach" to weighing the privacy interest in mug shots against the public's interest in disclosure.[42] Applying the balancing test to the mug shots in question, the majority found that the public interests offered by the dissent, such as avoiding cases of mistaken identity, did not shed sufficient light on government activity to outweigh the private interest.[43] When disclosure might reveal government mistake or misconduct, Judge Cook reasoned, a defendant may waive his privacy interest in the mug shot.[44]

Judge Boggs[45] dissented. First, Judge Boggs disputed the existence of a privacy interest in mug shots. He argued that mug shots do not fall within the historical notion of privacy Congress contemplated when enacting Exemption 7(C).[46] The dissent also argued that the majority conflated embarrassing information with private information, though information can be both embarrassing *and* public.[47] In Judge Boggs's view, the majority failed to distinguish photographs from other information connecting defendants to criminality that becomes public at trial.[48] Second, Judge Boggs argued that the public's interest in disclosure outweighed whatever privacy interest a defendant may have

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[36] *Id.* (quoting U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 764 (1989)).

[37] 489 U.S. 749.

[38] *See id.* at 780.

[39] *Free Press II*, 829 F.3d at 483 (quoting RESTATEMENT (SECOND) OF TORTS § 652D cmt. b (AM. LAW INST. 1977)).

[40] *Id.* at 484.

[41] *Id.*

[42] *Id.* at 485.

[43] *See id.*

[44] *Id.* Chief Judge Cole concurred in the judgment, further emphasizing that the internet has "worked unpredictable changes" in how we store photos and pointing to online mug shot–extortion businesses as an example. *Id.* at 486 (Cole, C.J., concurring).

[45] Judge Boggs was joined by Judges Batchelder, Moore, Clay, Griffin, Stranch, and Donald.

[46] *Free Press II*, 829 F.3d at 487–90 (Boggs, J., dissenting).

[47] *Id.* at 490–91.

[48] *Id.* at 491.

in a mug shot. Judge Boggs proposed several potential public interests, such as avoiding mistaken identity, overseeing the demographics of populations the federal government prosecutes, and holding law enforcement accountable for prearrest uses of excessive force.[49] By allowing DOJ to make mug shot disclosure determinations on a case-by-case basis, Judge Boggs argued, the majority "provide[d] DOJ with a tool to selectively shield itself from public scrutiny."[50]

In *Free Press II*, the Sixth Circuit compared mug shots to both rap sheets and death-scene images — but both analogies are limited. Unlike rap sheets, mug shots do not reveal comprehensive, difficult-to-obtain information about an individual's brushes with law enforcement. Unlike a death-scene image, a mug shot does not intrude upon a primal or fundamental aspect of life that is traditionally concealed. Instead, the balancing test the Sixth Circuit used and the privacy interest the court recognized recalls the European "right to be forgotten," calling into question the conventional wisdom that this right has no place in the American legal system.

Professor Daniel Solove's *A Taxonomy of Privacy* distinguishes between seven types of information dissemination, two of which are relevant here: disclosure and exposure.[51] A disclosure privacy interest is implicated when the release of accurate information causes reputational harm that can "inhibit people from associating with others, . . . mak[ing] a person a 'prisoner of [her] recorded past.'"[52] In contrast, exposure refers to information dissemination that reveals "certain physical and emotional attributes about a person . . . that people view as deeply primordial" and which human beings "have been socialized into concealing."[53] In cases of exposure, certain emotional states and "primal" acts considered most sacred and profane — Solove lists "[g]rief, suffering, trauma, injury, nudity, sex, urination, and defecation" — are made public.[54] While both involve the release of information, both theory and case law recognize that disclosure and exposure privacy interests are meaningfully different.[55] The Sixth Circuit drew analogies to FOIA requests for rap sheets, which implicate disclosure, and death-scene imag-

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[49] *Id.* at 492–93.

[50] *Id.* at 494.

[51] Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 530–39 (2006).

[52] *Id.* at 532–33 (quoting U.S. DEP'T OF HEALTH, EDUC., & WELFARE, RECORDS, COMPUTERS, AND THE RIGHTS OF CITIZENS 112 (1973)).

[53] *Id.* at 536.

[54] *Id.*

[55] *See id.* ("Unlike disclosure, exposure rarely reveals any significant new information that can be used in the assessment of a person's character or personality."); *see also* Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 166 (2004) ("The family does not invoke Exemption 7(C) on behalf of Vincent Foster . . . for fear that the pictures may reveal private information about Foster to the detriment of his own posthumous reputation . . . . If that were the case, a different set of considerations would control.").

es, which implicate exposure — but the privacy interest the Sixth Circuit ascribed to mug shots is not fully explained by either concept.

Initially, the thrust of *Free Press II* is that the privacy interest in a mug shot stems from the photograph's ability to reveal "[e]mbarrassing and humiliating facts . . . connecting an individual to criminality," like a rap sheet.[56] The Supreme Court has held that a rap sheet is categorically exempt from disclosure under FOIA.[57] The Sixth Circuit argued that "[b]ooking photos, like rap sheets," fit within the category to which the Supreme Court extended privacy protection.[58] However, this analogy misses the mark. *Reporters Committee* distinguished between "disclosure of the bits of information contained in a rap sheet and revelation of the rap sheet as a whole,"[59] explaining that the scattered nature of individual arrest and conviction records creates a "practical obscurity."[60] The effort required to assemble these records by visiting county archives and police stations across jurisdictions meant that, as a practical matter, a rap sheet equivalent was inaccessible to the public.[61] This inaccessibility, not the ability to connect an individual to criminality, was the critical source of the privacy interest in *Reporters Committee*. Mug shots are not practically obscure. They do not reveal hard-to-find information about an individual's involvement in a criminal investigation. Unlike a rap sheet, a mug shot captures a moment, not a lifetime. The Sixth Circuit found a privacy interest in police officers' mug shots even though the officers had appeared in open court and pleaded guilty, suggesting that the privacy interest does not stem purely from the record's ability to "connect[] an individual to criminality."[62] If a mug shot conveys little new information, there must be something private about the photograph itself, not the information it conveys, that warrants exemption under 7(C).

That something is exposure. The rap sheet analogy addresses only an individual's interest in avoiding disclosure. *Free Press II* acknowledges that a "booking photo casts a long, damaging shadow over the depicted individual" and that public access to those photos may "hamper[] the depicted individual's professional and personal prospects."[63] However, the opinion also extensively discusses the embarrassment suffered by the subjects of mug shots — a harm associated with the distinct privacy interest Solove terms "exposure."

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[56] *See Free Press II*, 829 F.3d at 481.

[57] U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 752 (1989).

[58] *Free Press II*, 829 F.3d at 483.

[59] *Reporters Comm.*, 489 U.S. at 764.

[60] *Id.* at 762.

[61] *Id.*

[62] *Free Press II*, 829 F.3d at 481.

[63] *Id.* at 483.

The Sixth Circuit's analogy between mug shots and death-scene images better captures this exposure interest. Cases invoking Exemption 7(C) often involve autopsy photos or other death-scene images.[64] Because autopsy photographs usually show weakened, vulnerable bodies and are associated with a survivor's grief, the privacy interest in death-scene images is a typical exposure interest. Death-scene image cases reflect an interest in avoiding the anguish linked to the haunting quality of images as opposed to text. In *Favish*, the Supreme Court recognized surviving family members' privacy interest in preventing release of their loved ones' death-scene images, emphasizing Exemption 7(C)'s role in helping survivors "secure their own refuge from a sensation-seeking culture for their own peace of mind and tranquility."[65] Just as *Favish* recognized that criminals could use FOIA to exploit death-scene images of victims,[66] *Free Press II* lamented the potential abuse of FOIA to populate mug shot–extortion websites.[67]

However, mug shots differ from death-scene images in salient ways. For one, the typical mug shot is not a graphic depiction of injury, showing the body in a vulnerable or traumatized state. For another, mug shots do not have the same historical link with personal privacy or well-established cultural significance as burial rites.[68] Far from belonging to the class of near-universal human experiences, an arrest and its resulting mug shot do not reveal "physical, instinctual, and necessary" aspects of life.[69] The police precinct is hardly the "sacred precinct[]" to which Samuel Warren and Justice Brandeis referred.[70] In sum, neither the disclosure interest implicated by rap sheets nor the exposure interest implicated by death-scene images fully explains the privacy interest in mug shots developed in *Free Press II*.

Instead, the court's language suggests that the privacy interest in a mug shot is more akin to an interest in being forgotten in the age of the internet. In *Google Spain SL v. Agencia Española de Protección de Datos*,[71] the Court of Justice of the European Union recognized a so-

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[64] *See, e.g.*, Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157 (2004) (autopsy and crime-scene photos); Prison Legal News v. Exec. Office for U.S. Att'ys, 628 F.3d 1243 (10th Cir. 2011) (autopsy photos and video of the aftermath of a prison murder); Katz v. Nat'l Archives & Records Admin., 862 F. Supp. 476 (D.D.C. 1994) (autopsy photos of President Kennedy).

[65] *Favish*, 541 U.S. at 166.

[66] *Id.* at 170.

[67] *Free Press II*, 829 F.3d at 486 (Cole, C.J., concurring).

[68] *Favish*, 541 U.S. at 167–68 ("Burial rites or their counterparts have been respected in almost all civilizations from time immemorial. . . . [T]his well-established cultural tradition acknowledging a family's control over the body and death images of the deceased has long been recognized at common law.").

[69] Solove, *supra* note 51, at 536.

[70] *See* Warren & Brandeis, *supra* note 1, at 195.

[71] Case C-131/12, Google Spain SL v. Agencia Española de Protección de Datos 2014 E.C.R. 317.

called "right to be forgotten" — an individual's right to prevent search engines from indexing accurate, lawfully obtained information about himself that he wishes "to be consigned to oblivion."[72] The Sixth Circuit also focused on the role of search engines to make the point that "[i]n 1996, this court could not have known or expected that a booking photo could haunt the depicted individual for decades."[73] Moreover, FOIA's Exemption 7(C) and the European Union's Directive 95/46,[74] which governs privacy rights under European law, employ the same balancing test to similar effect. Both *Free Press II* and *Google Spain* weighed personal privacy interests against the public interest and found that the humiliation endured, not the type of information conveyed, tipped the balance in favor of personal privacy.[75]

The conventional wisdom is that when courts balance freedom of information and personal privacy, in the United States, freedom of information always wins.[76] *Free Press II* suggests that this is not strictly the case. *Google Spain* and *Free Press II* use different mechanisms to prevent the harms caused by preserving unflattering, painful, or simply irrelevant information online. The European right targets post-publication information in the hands of private actors, while FOIA's exemptions ensure that government information never reaches publication at all. The underlying concern and the ultimate outcome, however, are the same: in the interest of privacy, a moment in time is "consigned to oblivion." At least with respect to the statutory personal privacy interest under FOIA, the Sixth Circuit has not hesitated to recognize a right to obscurity in light of an internet that never forgets.

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[72] *Id.* ¶ 20.3.

[73] *Free Press II*, 829 F.3d at 485.

[74] 1995 O.J. (L 281) 31 (EC).

[75] *Compare Free Press II*, 829 F.3d at 484 ("Having found a non-trivial privacy interest, the court must balance that interest against the public's interest in disclosure."), *with Google Spain*, Case C-131/12 ¶ 81 ("[I]nasmuch as the removal of links . . . have effects upon the legitimate interest of internet users potentially interested in having access to that information, . . . a fair balance should be sought in particular between that interest and the data subject's fundamental [privacy] rights under Articles 7 and 8 of the Charter.").

[76] *See, e.g.*, Kirsty Hughes & Neil M. Richards, *The Atlantic Divide on Privacy and Free Speech*, *in* COMPARATIVE DEFAMATION AND PRIVACY LAW 164–65 (Andrew T. Kenyon ed., 2016) ("[D]espite [the United States and England's] shared legal heritage, the two legal systems have struck the balance in radically different ways. [U.S.] decisions balancing privacy and the First Amendment have invariably favoured the free speech interest . . . . By contrast, English judges are required by legislation to engage actively in balancing the two rights under . . . the European Convention on Human Rights."); Jeffrey Toobin, *The Solace of Oblivion*, NEW YORKER (Sept. 29, 2014), http://www.newyorker.com/magazine/2014/09/29/solace-oblivion [https://perma.cc/Y5GS-HVQQ] ("In Europe, the right to privacy trumps freedom of speech; the reverse is true in the United States.").