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# Mean Muggin' No More: *Detroit Free Press v. U.S. Dep't of Justice* and a Non-Trivial Privacy Interest in Booking Photographs

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# MEAN MUGGIN' NO MORE: *DETROIT FREE PRESS v. U.S. DEP'T OF JUSTICE* AND A NON-TRIVIAL PRIVACY INTEREST IN BOOKING PHOTOGRAPHS

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**Abstract:** On July 14, 2016, the U.S. Court of Appeals for the Sixth Circuit held that criminal defendants have a legitimate privacy interest in their booking photographs, thereby reversing and remanding a grant of summary judgment in favor of the Detroit Free Press's request for the booking photographs of four police officers who had recently been indicted for bribery and drug conspiracy. In holding that the public disclosure of booking photographs may constitute an unwarranted invasion of personal privacy, the majority overturned twenty years' worth of Sixth Circuit precedent. The court properly acknowledged that booking photographs convey a portrait of guilt to the viewer, and that the Freedom of Information Act's exemptions are meant to protect individuals who have not yet been convicted from having humiliating personal information freely disclosed to the public. This Comment argues in favor of the majority's holding, which acknowledged that defendants have a privacy interest in their booking photographs and adopted a case-by-case approach to balancing that privacy interest against the public interest in releasing the photographs. The Sixth Circuit's decision protects the personal identity of the accused in the age of the Internet, and allows defendants to truly maintain their presumption of innocence until proven guilty.

## INTRODUCTION

On January 25, 2013, the U.S. Marshal Service denied a request by the Detroit Free Press for the booking photographs, colloquially referred to as "mug shots," of four police officers awaiting trial in the U.S. District Court for the Eastern District of Michigan.[1] The four police officers, indicted for bribery and drug conspiracy charges, were awaiting a federal trial.[2] The Detroit Free

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[1] *See* Detroit Free Press, Inc. v. U.S. Dep't of Justice (*Detroit Free Press II*), 16 F. Supp. 3d 798, 800–01 (E.D. Mich. 2014), *aff'd*, 796 F.3d 649 (6th Cir. 2015), *rev'd and remanded en banc sub nom.* Detroit Free Press Inc. v. U.S. Dep't of Justice (*Detroit Free Press IV*), 829 F.3d 478 (6th Cir. 2016), *cert. denied sub nom.* Detroit Free Press, Inc. v. Dep't of Justice, No. 16-706, 2017 WL 2216947 (U.S. May 22, 2017).

[2] *See Detroit Free Press IV*, 829 F.3d at 481. However, while *Detroit Free Press II* was being litigated, all four police officers pled guilty to the charges. *See Detroit Free Press II*, 16 F. Supp. 3d at 812.

Press, the largest daily newspaper publication in Detroit, Michigan, made the request for booking photographs pursuant to the Freedom of Information Act ("FOIA"), a statute enacted by Congress in 1966 to promote the disclosure and transparency of governmental records to the public.[3] FOIA requires that each federal agency make their records readily available to the public upon request, to enhance the public's understanding of the federal government's activities.[4] An agency may only withhold information from the public if the request falls within one of nine statutory exemptions to FOIA.[5] At issue with the Detroit Free Press' FOIA request in this case is exemption 7(C), which states that FOIA does not apply to records created for the purpose of law enforcement that "could reasonably be expected to constitute an unwarranted invasion of personal privacy."[6] When the U.S. Marshals invoked exemption 7(C) to deny the newspaper's request for booking photographs, the Detroit Free Press claimed that this denial violated FOIA.[7] In response, the Detroit Free Press sued the U.S. Department of Justice, thereby commencing *Detroit Free Press II*.[8]

In 1996, the U.S. Court of Appeals for the Sixth Circuit decided *Detroit Free Press, Inc. v. United States Department of Justice* (*Detroit Free Press I*), a case with facts analogous to *Detroit Free Press II*.[9] In *Detroit Free Press I*, the majority held that upon receiving a FOIA request for booking photographs, government agencies were required to release the photographs to the requestor because defendants could not reasonably expect that this disclosure would implicate their privacy rights.[10] The majority in *Detroit Free Press I* reasoned that the Detroit Free Press' request did not fall within one of FOIA's exemptions because the mere fact that the information was embarrassing or harmful to the individual did not necessarily establish an invasion of personal privacy.[11] To reach this conclusion, the majority held that in an ongoing criminal proceeding where the defendant has already appeared in court and had his name made public, the dissemination of the defendant's booking photograph did not vio-

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[3] *See* 5 U.S.C. § 552 (2016); *Detroit Free Press IV*, 829 F.3d at 481; *see also* U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 754 (1989) (quoting Dep't of the Air Force v. Rose, 425 U.S. 352, 360–61 (1976)) (internal quotation marks omitted).

[4] *See* § 552(a); *Reporters Comm. for Freedom of the Press*, 489 U.S. at 775.

[5] *See* § 552(b).

[6] *See* § 552(b)(7)(C).

[7] *See Detroit Free Press II*, 16 F. Supp. 3d at 801.

[8] *See id.*

[9] *See* Detroit Free Press, Inc. v. U.S. Dep't of Justice (*Detroit Free Press I*), 73 F.3d 93, 95 (6th Cir. 1996), *overruled by Detroit Free Press IV*, 829 F.3d at 484. It is important to note that *Detroit Free Press I* is an entirely different case than *Detroit Free Press II*, even though the two cases have similar fact patterns and identical party names. *See Detroit Free Press II*, 16 F. Supp. 3d at 801. However, *Detroit Free Press II*, *Detroit Free Press III*, and *Detroit Free Press IV*, all refer to the same case and set of facts, and only differ procedurally. *See Detroit Free Press IV*, 829 F.3d at 481.

[10] *See Detroit Free Press I*, 73 F.3d at 97.

[11] *See id.*

late any privacy rights.[12] Adhering to this precedent set forth in *Detroit Free Press I*, in 2014 the District Court for the Eastern District of Michigan granted summary judgment to the Detroit Free Press in *Detroit Free Press II,* and ordered that the U.S. Marshals release the booking photographs of the four police officers awaiting federal prosecution to the newspaper.[13]

On appeal, a panel of the Sixth Circuit heard *Detroit Free Press, Inc. v. United States Department of Justice* (*Detroit Free Press III*), and, similarly constrained by the precedent set forth in *Detroit Free Press I*, affirmed the district court's grant of summary judgment in favor of the Detroit Free Press.[14] However, the panel strongly advocated for the full Sixth Circuit to rehear the case and reconsider the holding set forth in *Detroit Free Press I*.[15] Upon granting a rehearing en banc to reevaluate the Sixth Circuit's precedent, the full Sixth Circuit reversed the district court and panel decisions in *Detroit Free Press IV*, holding that defendants in ongoing criminal proceedings have a "non-trivial" privacy interest in their booking photos.[16] In overturning two decades of precedent, and reversing two separate Sixth Circuit decisions, the appeals court recognized the damaging and long-lasting effects that the public release of booking photographs has on an individual's privacy interests.[17]

Part I of this Comment analyzes the history of the Sixth Circuit precedent surrounding the disclosure of booking photographs, beginning with FOIA and *Detroit Free Press I*, followed by the factual and procedural history of *Detroit Free Press II, III,* and *IV.* Part II of this Comment delves further into the Sixth Circuit's analysis of booking photograph disclosure, and the long-lasting effects of this practice as compared to the release of other types of documents. Part III of this Comment supports the Sixth Circuit majority's holding in *Detroit Free Press IV* that defendants in ongoing criminal proceedings have a significant privacy interest in their booking photographs and are thus exempt from mandatory disclosure under FOIA. In a society where public information is readily accessible and virtually indestructible, the majority properly recognized the irreparable harm that can result from disseminating booking photographs to the public.

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[12] *See id.* The court in *Detroit Free Press I* did not decide whether releasing the booking photographs following an acquittal, dismissal or conviction would affect a defendant's privacy interest. *Id.*

[13] *See Detroit Free Press II*, 16 F. Supp. 3d at 801.

[14] *See* Detroit Free Press, Inc. v. U.S. Dep't of Justice (*Detroit Free Press III*), 796 F.3d 649, 650 (6th Cir. 2015), *rev'd and remanded en banc sub nom.* Detroit Free Press Inc. v. U.S. Dep't of Justice (*Detroit Free Press IV*), 829 F.3d 478 (6th Cir. 2016), *cert. denied sub nom*. Detroit Free Press, Inc. v. Dep't of Justice, No. 16-706, 2017 WL 2216947 (U.S. May 22, 2017).

[15] *See id.*

[16] *See Detroit Free Press IV*, 829 F.3d at 484.

[17] *See id.* at 482. While the majority reversed and remanded the Sixth Circuit precedent and held that individuals have a non-trivial privacy interest in their booking photographs, the final vote was 9–7. *See id.* at 480. The dissenting author, Judge Danny J. Boggs, wrote a lengthy and heated dissent, demonstrating that this case was seriously contested. *See id.* at 486.

## I. The Sixth Circuit's Journey Toward Recognizing that Defendants in Ongoing Criminal Proceedings Have a "Non-Trivial" Privacy Interest in Their Booking Photographs

On January 12, 1996, the Sixth Circuit decided *Detroit Free Press I* and held that the privacy interests of defendants, who have appeared in open court and had their names released to the public, are not invaded when their booking photographs are released to the public.[18] Following this decision, the Sixth Circuit upheld *Detroit Free Press I* precedent for twenty years, and during that time was the only circuit court of appeals to hold that a defendant's privacy is not implicated by the release of his or her booking photographs.[19] In 2014, the District Court for the Eastern District of Michigan heard *Detroit Free Press II*, and, following Sixth Circuit precedent, ordered the disclosure of similarly-requested booking photographs to the newspaper.[20] Although a panel of the Sixth Circuit subsequently affirmed *Detroit Free Press II* on August 12, 2015, the panel urged the Sixth Circuit to rehear the case en banc.[21] Then, on July 14, 2016, Judge Deborah L. Cook of the Sixth Circuit wrote the majority decision in *Detroit Free Press IV*, which reversed Sixth Circuit precedent and held that defendants have a legitimate privacy interest in not having their booking photographs released to the public.[22]

### *A. FOIA and* Detroit Free Press I

Congress enacted FOIA in 1966 as a part of the Administrative Procedure Act ("APA"), in order to put into effect a "general philosophy of full agency disclosure" of government records.[23] Congress used specific language to foster a culture of government transparency.[24] Under FOIA, federal government

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[18] *See Detroit Free Press I*, 73 F.3d 93, 97 (6th Cir. 1996), *overruled by* Detroit Free Press Inc. v. U.S. Dep't of Justice (*Detroit Free Press IV*), 829 F.3d 478 (6th Cir. 2016) (en banc), *cert. denied sub nom*. Detroit Free Press, Inc. v. Dep't of Justice, No. 16-706, 2017 WL 2216947 (U.S. May 22, 2017).

[19] *See Detroit Free Press IV*, 829 F.3d at 484.

[20] *See* Detroit Free Press, Inc. v. U.S. Dep't of Justice (*Detroit Free Press II*), 16 F. Supp. 3d 798, 801 (E.D. Mich. 2014), *aff'd*, 796 F.3d 649 (6th Cir. 2015), *rev'd and remanded en banc sub nom. Detroit Free Press IV*, 829 F.3d 478, *cert. denied sub nom*. Detroit Free Press, Inc. v. Dep't of Justice, No. 16-706, 2017 WL 2216947 (U.S. May 22, 2017).

[21] *See* Detroit Free Press, Inc. v. U.S. Dep't of Justice (*Detroit Free Press III*), 796 F.3d 649, 651 (6th Cir. 2015), *rev'd and remanded en banc sub nom. Detroit Free Press IV*, 829 F.3d 478, *cert. denied sub nom*. Detroit Free Press, Inc. v. Dep't of Justice, No. 16-706, 2017 WL 2216947 (U.S. May 22, 2017).

[22] *See Detroit Free Press IV*, 829 F.3d at 484.

[23] *See* U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 754 (1989) (quoting Dep't of the Air Force v. Rose, 425 U.S. 352, 360–61 (1976)).

[24] *See Rose*, 425 U.S. at 360. In response to growing government secrecy in the Cold War, many attempts were made by Congress to implement the Freedom of Information Act as a citizen check on the government and to maintain government transparency. *See* Elec. Frontier Found., *History of*

agencies are required to respond to requests that the public makes for agency records in order to promote transparency and enable the public to better understand the inner workings of government agencies.[25] As a limitation to FOIA's disclosure requirement, however, the statute also contains nine exemptions that allow agencies to withhold the requested records for various governmental reasons.[26]

In *Detroit Free Press I*, the U.S. Marshals Service initially rejected the Detroit Free Press' FOIA request for the booking photographs of eight individuals awaiting federal trial, claiming that the request implicated the defendants' privacy interests, pursuant to FOIA exemption 7(C).[27] Exemption 7(C) states that FOIA does not apply to requests for information or records, compiled for law enforcement purposes that, could "reasonably be expected to constitute an unwarranted invasion of personal privacy."[28] Prior to *Detroit Free Press I*, the U.S. Marshals had a policy of only disclosing booking photographs of federal defendants if the subject was a fugitive and the release of the photograph would assist in his or her capture.[29] However, the Sixth Circuit rejected the U.S. Marshals' policy in *Detroit Free Press I* and held that, because the defendants had already appeared publicly in court, they had no reasonable expectation of privacy to begin with.[30] Because the court in *Detroit Free Press I* found that defendants had no reasonable expectation of privacy with respect to their booking photographs, it did not need to determine whether such an invasion of privacy would have been unwarranted.[31]

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*FOIA*, TRANSPARENCY PROJECT, https://www.eff.org/issues/transparency/history-of-foia [https://perma.cc/88VR-BNKU].

[25] *See Rose*, 425 U.S. at 360–61. The term "records" is not explicitly defined by FOIA, and is only defined within the U.S. Code in the Federal Records Act, as "materials made or received by" an agency of the U.S. government. *See* 44 U.S.C. § 3301(a)(1)(A) (2014). However, the Department of Justice website opines that because FOIA was passed to enhance the public's right to government transparency, rather than for managerial reasons, "records" here includes "all tangible recordations of information regardless of whether they are records under 44 U.S.C. § 3301." *See FOIA Update: FOIA Counselor: What Is an "Agency Record?,"* U.S. DEP'T OF JUSTICE (Aug. 13, 2014), https://www.justice.gov/oip/blog/foia-update-foia-counselor-what-agency-record [https://perma.cc/X4K6-DU9K].

[26] *See* 5 U.S.C. § 552(b) (2016); *Rose*, 425 U.S. at 361.

[27] *Detroit Free Press I*, 73 F.3d 93, 95 (6th Cir. 1996), *overruled by Detroit Free Press IV*, 829 F.3d at 484.

[28] § 552(b)(7)(C).

[29] *See* Detroit Free Press, Inc. v. U.S. Dep't of Justice (*Detroit Free Press II*), 16 F. Supp. 3d 798, 804 (E.D. Mich. 2014), *aff'd*, 796 F.3d 649 (6th Cir. 2015), *rev'd and remanded en banc sub nom. Detroit Free Press IV*, 829 F.3d 478, *cert. denied sub nom*. Detroit Free Press, Inc. v. Dep't of Justice, No. 16-706, 2017 WL 2216947 (U.S. May 22, 2017).

[30] *See Detroit Free Press I*, 73 F.3d at 97.

[31] *See id.*

### *B. Post*-Detroit Free Press I: *The Evolution of a "Non-Trivial" Privacy Interest in Booking Photographs*

In the fifteen years following *Detroit Free Press I*, the U.S. Marshal Service developed a "bifurcated policy" by which it honored the FOIA requests for booking photos within the Sixth Circuit, but continued to refuse FOIA requests for booking photographs in all other circuits.[32] Throughout this time period, the public found ways to thwart the U.S. Marshals' policy by planting "straw man requestors" within the Sixth Circuit to request booking photographs for media outlets located outside of the four states that comprise the Sixth Circuit.[33]

While the Department of Justice adhered to its adapted policy, the Sixth Circuit litigated the issue of whether the release of booking photographs constitutes an "unwarranted invasion of personal privacy" several times.[34] The Department of Justice believed that the Sixth Circuit's "singular view" of privacy was incorrect and attempted to overturn *Detroit Free Press I* on multiple occasions.[35] Finally, in 2011, the Eleventh Circuit decided *Karantsalis v. United States Department of Justice*, which offered a contrary opinion to the Sixth Circuit's analysis of exemption 7(C).[36] Following the Eleventh Circuit's decision, in 2012 the Tenth Circuit heard *World Publishing Company v. United*

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[32] *See Detroit Free Press IV*, 829 F.3d at 481.

[33] *See id.* The Department of Justice generally refused FOIA requests for booking photos, except those requests made within the Sixth Circuit. *See id.* In order to circumvent this practice, media outlets from other jurisdictions simply found ways to request the photos from within the Sixth Circuit, like filing requests from postal mailboxes located in Michigan, Ohio, Kentucky or Tennessee. *See* Karantsalis v. U.S. Dep't of Justice, 635 F.3d 497, 501 n.1 (11th Cir. 2011). As a result of these practices, journalists were able to secure the booking photos of celebrities such as Bernie Madoff. *See Detroit Free Press IV*, 829 F.3d at 481.

[34] *See* 5 U.S.C. § 552(b)(7)(C) (2016); Brief of Plaintiff-Appellee at 4 n.7, *Detroit Free Press III*, 796 F.3d 650 (6th Cir. 2015) (No. 14-1670).

[35] *See* Brief of Plaintiff-Appellee, *supra* note 34, at 4 n.7. In two back-to-back cases in 2005, the Department of Justice attempted to defy Sixth Circuit precedent. *See id.* In *Beacon Journal Publ'g Co. v. U.S. Dep't of Justice*, the Northern District of Ohio Eastern Division denied the Department of Justice's motion to dismiss after the Department of Justice recognized it was bound by Circuit precedent to release booking photographs, pursuant to Beacon Journal Publishing Co.'s request. *See* Beacon Journal Publ'g Co. v. U.S. Dep't of Justice, No. 5:05-cv-1396-DDD (N.D. Ohio Aug. 30, 2005). In *Detroit Free Press v. U.S. Dep't of Justice*, the Eastern District of Michigan Southern Division granted summary judgment in favor of the Department of Justice, but granted attorney's fees and costs to Detroit Free Press. Detroit Free Press v. U.S. Dep't of Justice, No. 2:05-71601-ADT-SDP (E.D. Mich. Oct. 7, 2005).

[36] *See Karantsalis*, 635 F.3d at 503. In this case, a freelance reporter submitted a FOIA request to the Department of Justice for the booking photograph of Luis Giro, the former president of Giro Investments Group, who had previously pled guilty to securities fraud. *See id.* at 499. In determining that the release of his booking photograph would implicate Giro's personal privacy, the Eleventh Circuit acknowledged that booking photographs "carry a clear implication of criminal activity," and that they are distinct from normal photos and thus raise unique privacy interests for defendants. *See id.* at 503 (internal citation omitted).

*States Department of Justice*, and similarly expressly disagreed with *Detroit Free Press I*, holding that "when the public interest is balanced against the privacy interest in a booking photo," a request for the photograph did not "further the purpose of FOIA."[37]

In response to this circuit court split, the U.S. Marshals Service stopped implementing its "bifurcated policy" and returned to its original practice of refusing to grant FOIA requests for the booking photographs of defendants on trial.[38] The Department of Justice also issued a "Booking Photo Disclosure Policy" on December 12, 2012, in response to the Tenth and Eleventh Circuits' decisions supporting the non-release of booking photographs.[39] Gerald M. Auerbach, the general counsel of the U.S. Marshals Service, further explained that, as a general rule, the release of booking photographs to the media does not serve law enforcement purposes.[40] As a result of this new policy, the U.S. Marshals Service essentially disregarded Sixth Circuit precedent and stated that it would not disclose booking photographs to the public unless it determined that the requestor "ha[d] made a requisite showing that the public interest . . . outweighs the privacy interest at stake . . . ."[41] Thus, the Department of Justice disagreed with the Sixth Circuit, and found an opportunity to re-litigate this issue in *Detroit Free Press II*, when the Detroit Free Press once again made a FOIA request for the booking photographs of recently indicted police officers.[42]

In *Detroit Free Press II*, the District Court for the Eastern District of Michigan granted summary judgment in favor of the Detroit Free Press for the violation of FOIA.[43] The court acknowledged that *stare decisis* applied, since the Sixth Circuit had previously ruled in favor of the Detroit Free Press on the

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[37] *See* World Pub. Co. v. U.S. Dep't of Justice, 672 F.3d 825, 829 (10th Cir. 2012). The World Publishing Company submitted a FOIA request to the Department of Justice for the booking photos of six pretrial detainees. *See id.* The Tenth Circuit compared the incriminating information contained within rap sheets to the "vivid and personal portrayal of a person's likeness in a booking photograph," concluding that booking photos similarly fall within FOIA exemption 7(C). *See id.*

[38] *See Detroit Free Press IV*, 829 F.3d at 481.

[39] *See* Memorandum from Gerald Auerbach, Gen. Counsel of the U.S. Marshals Serv. to All U.S. Marshals, et al. (Dec. 12, 2012) (on file with the U.S. Marshals Service) https://www.usmarshals.gov/foia/policy/booking_photos.pdf [https://perma.cc/66DM-XZJ5]. The disclosure policy stated: "in light of the weight of legal precedent now supporting the Department of Justice's conclusion that booking photographs generally should not be disclosed under the FOIA, the Department has decided a uniform policy should be applied." *Id.*

[40] *See id.*

[41] *See id.*

[42] *See id.*; Detroit Free Press, Inc. v. U.S. Dep't of Justice (*Detroit Free Press II*), 16 F. Supp. 3d 798, 801 (E.D. Mich. 2014), *aff'd*, 796 F.3d 649 (6th Cir. 2015), *rev'd and remanded en banc sub nom. Detroit Free Press IV*, 829 F.3d 478, *cert. denied sub nom*. Detroit Free Press, Inc. v. Dep't of Justice, No. 16-706, 2017 WL 2216947 (U.S. May 22, 2017).

[43] *See Detroit Free Press II*, 16 F. Supp. 3d at 801.

same issue in *Detroit Free Press I*, which was controlling precedent.[44] However, the District Court held that the Department of Justice was not precluded from seeking en banc review of this issue in the Sixth Circuit, and found several of the Department of Justice's arguments to be persuasive.[45] The district court ultimately ruled that the Department of Justice must release the requested booking photographs to the Detroit Free Press, but it granted a request to stay the order pending appeal.[46] On appeal, a Sixth Circuit panel affirmed the district court's decision and granted summary judgment to the newspaper.[47] Although the Sixth Circuit panel was similarly bound by its own precedent from *Detroit Free Press I*, the panel expressed serious disfavor toward the holding and maintained in dicta that defendants do have a privacy interest in their booking photographs.[48]

After considering the panel decision, the Sixth Circuit reheard the case en banc and reversed and remanded the grant of summary judgment, holding that booking photos are exemptible under 7(C) of FOIA.[49] Thus, the majority in *Detroit Free Press IV* adopted a case-by-case approach to balance individual privacy interests with the public interests FOIA was enacted to protect.[50]

## II. The Sixth Circuit's Shift Toward Understanding the Long-Term Impact of Releasing Booking Photographs to the Public

In *Detroit Free Press IV*, the Sixth Circuit held that the public release of booking photographs "could reasonably be expected to constitute an unwarranted invasion of personal privacy."[51] Judge Cook of the Sixth Circuit, writing

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[44] *See id.* at 807.

[45] *See id.* at 808. For example, the court found the Department of Justice's argument that because of FOIA's liberal venue provision, it is possible that continuing to follow Sixth Circuit precedent could directly conflict with the contrary precedent in the Tenth and Eleventh Circuits, to be persuasive. *See id.*

[46] *See id.* at 813.

[47] *See* Detroit Free Press, Inc. v. U.S. Dep't of Justice (*Detroit Free Press III*), 796 F.3d 649, 651 (6th Cir. 2015), *rev'd and remanded en banc sub nom. Detroit Free Press IV*, 829 F.3d 478, *cert. denied sub nom*. Detroit Free Press, Inc. v. Dep't of Justice, No. 16-706, 2017 WL 2216947 (U.S. May 22, 2017).

[48] *See id.* The Sixth Circuit panel acknowledged that it was bound by Sixth Circuit precedent, but it questioned the conclusion that defendants have no privacy interest in keeping their booking photographs from being released to the public throughout the criminal proceedings. *See id.* The panel also quoted from Judge Alan Norris' heated dissent in *Detroit Free Press I*, "maintaining that a booking photograph conveys 'much more than the appearance of the pictured individual . . . .'" *See id.* at 651 (Norris, J., dissenting) (quoting Detroit Free Press, Inc. v. U.S. Dep't of Justice (*Detroit Free Press I*), 73 F.3d 93, 95 (6th Cir. 1996), *overruled by Detroit Free Press IV*, 829 F.3d 484).

[49] *See Detroit Free Press IV*, 829 F.3d at 484.

[50] *Id.* at 485.

[51] 5 U.S.C. § 552(b)(7)(C) (2016); Detroit Free Press Inc. v. U.S. Dep't of Justice (*Detroit Free Press IV*), 829 F.3d 478 (6th Cir. 2016) (en banc), *cert. denied sub nom*. Detroit Free Press, Inc. v. Dep't of Justice, No. 16-706, 2017 WL 2216947 (U.S. May 22, 2017).

for the majority, found that *Detroit Free Press I* expressed an "impermissibly cramped notion of personal privacy that is out of step with the broad privacy interests recognized by our sister circuits."[52] After analyzing the requirements of FOIA exemption 7(C), the majority concluded that the public release of booking photographs could reasonably be found to violate a defendant's privacy interests, and therefore held that this practice fell within the exemption.[53]

The majority in *Detroit Free Press IV* determined that *Detroit Free Press I* had defined privacy far too narrowly.[54] To evaluate whether the release of a booking photograph falls within FOIA exemption 7(C), the majority analyzed 7(C)'s requirements individually, much like Judge Martha Craig Daughtrey did in *Detroit Free Press I*.[55] The three-step checklist for coverage within FOIA exemption 7(C) requires that: 1) the records be "compiled for law enforcement purposes," 2) the "release of the information by the federal agency must reasonably be expected to constitute an invasion of personal privacy," and 3) the "intrusion into private matters must be deemed unwarranted."[56] Since there was no dispute in *Detroit Free Press IV* that booking photographs are "compiled for law enforcement purposes," the majority next considered whether the release of the photographs could reasonably be expected to constitute a violation of the defendants' privacy.[57] The government bore the burden to show that FOIA exemption 7(C) shielded the defendants from the release of their booking photographs.[58]

To evaluate the privacy issue, the court looked first to the very nature of booking photographs.[59] Booking photographs are taken at arguably the most vulnerable moment of a person's life—immediately after they are "accused, taken into custody, and deprived of most liberties."[60] The Supreme Court of the United States has held that FOIA exemption 7(C) is meant to protect citizens against the public disclosure of personal matters and to help maintain control over information pertaining to their own person.[61] The Sixth Circuit reasoned

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[52] *Detroit Free Press IV*, 829 F.3d at 484.

[53] *See id.*

[54] *See id.*

[55] *See id.* at 481; Detroit Free Press, Inc. v. U.S. Dep't of Justice (*Detroit Free Press I*), 73 F.3d 93, 96 (6th Cir. 1996), *overruled by Free Press IV*, 829 F.3d 484.

[56] § 552 (b)(7)(C); *Detroit Free Press I*, 73 F.3d at 96.

[57] *See Detroit Free Press IV*, 829 F.3d at 481. In *Jones v. Federal Bureau of Investigation*, the Sixth Circuit endorsed the *per se* rule that any record compiled by a law enforcement agency qualifies as "compiled for law enforcement purposes." *See* 41 F.3d 238, 246 (6th Cir. 1994).

[58] *See Detroit Free Press IV*, 829 F.3d at 481.

[59] *See id.* at 482.

[60] § 552 (b)(7)(C); *see Detroit Free Press IV*, 829 F.3d at 482 (quoting Karantsalis v. U.S. Dep't of Justice, 635 F.3d 497, 503 (11th Cir. 2011)).

[61] *See* U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press, 489 U.S. 749, 762 (1989). The Supreme Court held that the disclosure of criminal identification records, or "rap sheets," to the public is prohibited by FOIA exemption 7(C) because this practice could reasonably be seen as a violation of personal privacy. *See Reporters Comm. for Freedom of Press*, 489 U.S. at 780.

that because booking photographs convey a portrait of guilt to viewers, regardless of the outcome of the case, releasing these photographs constitutes an invasion of privacy against which exemption 7(C) is meant to protect.[62] The Sixth Circuit also recognized that, in the age of the Internet, releasing a booking photograph to a newspaper like the Detroit Free Press renders the photograph readily accessible around the world on the Internet, where it can remain indefinitely.[63] Although individuals are sometimes able to pay a website to remove a booking photograph, the majority noted that the complicated steps individuals take to have the photographs removed further reinforces that they have a non-trivial privacy interest in the photographs.[64]

After establishing that defendants have a non-trivial privacy interest in their booking photographs, the court then evaluated whether the privacy violation was unwarranted such that the disclosure would fall within exemption 7(C).[65] To make this determination, the majority in *Detroit Free Press IV* adopted the Department of Justice's proposed case-by-case approach for weighing the public's interest in disclosing booking photographs with the privacy interests implicated by this practice.[66] The court rejected the Detroit Free Press' proposed categorical approach, whereby privacy interests are always outweighed by the public interest in releasing the booking photographs to the public.[67] The court held that the public's interest in disclosing booking photographs pursuant to FOIA would depend on whether the disclosure would advance the "core purpose" of FOIA.[68] Because FOIA was enacted for the core purpose of enhancing the public's understanding of government activities and operations, the public interest in disclosing the booking photographs would only outweigh the private interests of the defendant if the photographs shed light on the inner-workings of the Department of Justice as an agency.[69] Thus, the Sixth Circuit reversed the grant of summary judgment and remanded the case to the district court to decide whether the facts of this case would warrant the release of the booking photographs under FOIA.[70]

Chief Judge Ransey Cole of the Sixth Circuit penned a concurrence in *Detroit Free Press IV*, emphasizing the important role that technology played

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[62] *See Detroit Free Press IV*, 829 F.3d at 481. The court noted that booking photographs have such a powerful impact on viewers, and so uniformly convey an image of criminality, that it strongly disfavors showing booking photographs to a jury. *See id.*

[63] *See id.* at 483.

[64] *See id.*

[65] *See id.* at 484–85; Detroit Free Press, Inc. v. U.S. Dep't of Justice (*Detroit Free Press I*), 73 F.3d 93, 96 (6th Cir. 1996), *overruled by Free Press IV*, 829 F.3d 484.

[66] *See Detroit Free Press IV*, 829 F.3d at 485.

[67] *Id.*

[68] *See id.*

[69] *See id.*

[70] *See id.*

in overruling *Detroit Free Press I*, and reiterating that the holding of *Detroit Free Press IV* does not foreclose the possibility that significant public interests could outweigh the privacy interests of defendants.[71] Chief Judge Cole described the drastic shift in technology in the last twenty years, and explained that because of the shift in the prominence of the Internet, the holding of *Detroit Free Press I* no longer comports with justice.[72] Thus, although *Detroit Free Press I* stood on solid ground in 1996, he agreed with the majority that it was no longer workable.[73] Chief Judge Cole also provided several examples of significant public interests that could outweigh the privacy interest in booking photographs, such as allowing public oversight of law enforcement conduct or uncovering government misconduct in investigations.[74] He concluded that both public disclosure and personal privacy are equally important, and thus they must be weighed on a case-by-case basis.[75]

Judge Danny Julian Boggs dissented in *Detroit Free Press IV*, arguing that the majority's reversal of the decades-old precedent set forth in *Detroit Free Press I* was justified only by a "vague privacy interest in inherently non-private matters."[76] The dissent used the same three-part analysis of FOIA exemption 7(C) as the majority, and agreed with the majority that booking photographs are compiled for law enforcement purposes.[77] Thus, Judge Boggs analyzed the remaining two questions – whether booking photographs contain private information pursuant to exemption 7(C), and, if so, whether disclosing such photographs would be an unwarranted invasion of personal privacy.[78]

With respect to the privacy interest, the dissent outlined a history of disclosure of booking photographs, as well as common law and state law practices in favor of disclosing booking photographs to the public, and concluded that after a defendant has appeared in open court, he has no cognizable privacy interest in his booking photograph.[79] Further, the dissent favored a categorical approach that would always favor the public interests in disclosure over the defendant's privacy interest, reasoning that this procedure would help prevent mistaken identification and reduce racial profiling.[80] However, the majority stated that these reasons were "phantoms," because defendants can simply waive their privacy interest if they were concerned about mistaken identification.[81] The

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[71] *See id.* at 485–86 (Cole, C.J., concurring).
[72] *See id.* at 486.
[73] *See id.*
[74] *Id.*
[75] *See id.*
[76] *See id.* at 486 (Boggs, J., dissenting).
[77] *See id.* at 487.
[78] *See id.*
[79] *See id.* at 488–92.
[80] *See id.* at 492–93.
[81] *See id.* at 485 (majority opinion).

majority also correctly recognized that while there may be a strong public interest in disclosing booking photographs, this does not preclude the possibility of an equally strong individual interest in keeping the photograph private.[82]

## III. The Impact of the Majority's Holding on Protecting the Presumption of Innocence and Preventing the Dissemination of Booking Photographs Across the Nation

The majority's opinion in *Detroit Free Press IV* is a monumental step toward protecting the personal privacy rights of all U.S. citizens.[83] One of the most cherished tenants of the U.S. judicial system is the notion that defendants are innocent until proven guilty, and in *Detroit Free Press IV*, the Sixth Circuit acknowledged that releasing booking photographs to the public "effectively eliminates the presumption of innocence and replac[es] it with an unmistakable badge of criminality."[84] When booking photographs are freely released to the media and posted on the internet, the person in the photograph is no longer innocent in the eyes of the public.[85] In American society, booking photographs are unique and vivid symbols of criminality and guilt.[86] These humiliating photographs are taken just after a person has been accused of a crime, deprived of personal liberties, and is awaiting the consequences of his or her arrest.[87] For these reasons, it is detrimental for a defendant awaiting trial to have his photograph available on the Internet indefinitely.[88]

The majority in *Detroit Free Press IV* properly reasoned that releasing a defendant's booking photograph to the public has a substantially more profound impact on a defendant now than it did in 1996, when the Sixth Circuit decided *Detroit Free Press I*.[89] The court found that in 1996, the release of a booking photograph could undoubtedly tarnish a defendant's reputation in the short-term, by displaying his or her face on local television or newspapers, but that it would eventually disappear into the archives.[90] Nowadays, many websites exist that regularly post booking photographs online in order to exploit

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[82] *See id.*

[83] *See* Detroit Free Press Inc. v. U.S. Dep't of Justice (*Detroit Free Press IV*), 829 F.3d 478, 484 (6th Cir. 2016) (en banc), *cert. denied sub nom.* Detroit Free Press, Inc. v. Dep't of Justice, No. 16-706, 2017 WL 2216947 (U.S. May 22, 2017).

[84] *See id.* at 482 (quoting Eberhardt v. Bordenkircher, 605 F.2d 275, 280 (6th Cir. 1979)).

[85] *See id.*

[86] *See* Karantsalis v. U.S. Dep't of Justice, 635 F.3d 497, 503 (11th Cir. 2011). In explaining the distinct impact of a booking photograph, the Eleventh Circuit showcased the obvious difference between two types of government photos—a person's driver's license, which indicates no showing of criminality, and booking photograph, which blatantly exudes guilt to the viewer. *See id.*

[87] *Id.*

[88] *See id.*; *Detroit Free Press IV*, 829 F.3d at 482.

[89] *See Detroit Free Press IV*, 829 F.3d at 482.

[90] *Id.*

defendants, charging significant fees to remove the photos from the webpage.[91] As a result, the majority appropriately recognized that publicly releasing a booking photograph could cast a permanent shadow on a defendant's future, even if he or she is never convicted of the crime charged.[92]

Just as the Supreme Court held that the public disclosure of criminal identification records, or "rap sheets," violates a defendant's personal privacy interests, it would hold that FOIA exemption 7(C) would apply to booking photographs.[93] While criminal identification records merely provide basic personal information about a defendant such as their criminal history or height and weight, booking photographs are even more revealing because they display the unforgettable image of the defendant's face to the world.[94] Further, a booking photograph is not protected by the mundane, formulaic order of a rap sheet, which is completely disassociated with the image of the defendant.[95] Instead, booking photographs typically portray the face of an unkempt defendant with a grimace and a sign bearing a criminal identification number.[96] This image is a nationally recognized symbol of guilt, and it unfairly portrays the accused in a moment of weakness.[97] Thus, just as the Supreme Court has held that publicly disclosing criminal identification records violates defendants' personal privacy interests, it logically follows that FOIA exemption 7(C) applies to the public disclosure of booking photographs, since they are even more intimate and more private.[98]

The outcome of *Detroit Free Press IV* also has a profound impact on the criminal justice system, particularly because non-white individuals are overrepresented among those arrested.[99] As of 2006, African American indi-

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[91] *See id.* at 482–83; David Segal, *Mugged by a Mug Shot Online*, N.Y. TIMES (Oct. 5, 2013), http://www.nytimes.com/2013/10/06/business/mugged-by-a-mug-shot-online.html [https://perma.cc/C62C-Z9HA]. This 2013 New York Times article lists several websites, including "BustedMugshots," "MugshotsOnline," and "JustMugshots," which post booking photographs online and require a fee for them to be removed. *See* Segal, *supra*.

[92] *See Free Press IV*, 829 F.3d at 482.

[93] *Id.* 483–84; *see* U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press, 489 U.S. 749, 780 (1989).

[94] *See* World Pub. Co. v. U.S. Dep't of Justice, 672 F.3d 825, 827 (10th Cir. 2012).

[95] *See id.* at 828–29.

[96] *See id.*

[97] *See id.*

[98] *See Reporters Comm. for Freedom of Press*, 489 U.S. at 780.

[99] *See* CHRISTOPHER HARNEY & LINH VUONG, NAT'L COUNCIL ON CRIME & DELINQUENCY, CREATED EQUAL: RACIAL AND ETHNIC DISPARITIES IN THE U.S. JUSTICE SYSTEM (Mar. 2009), http://www.nccdglobal.org/sites/default/files/publication_pdf/created-equal.pdf [https://perma.cc/SZU6-92MU]. In addition to the racial disparities in arrest rates, minority populations are also more at risk of being wrongfully convicted. *See* Brandon L. Garrett, *Convicting the Innocent Redux*, U. VA. SCH. L.: PUB. L. & LEGAL THEORY RES. PAPER SERIES 2015-39, at 5 (Aug. 2015). As a result of DNA testing, at least 330 people in the United States have been exonerated after being wrongfully convicted of a crime they did not commit. *See id.* at 4. Of these 330 people, eighty percent were racial minorities. *Id.* at 5. Further, African Americans are nearly six times more likely to be incarcerated than Cau-

viduals were 2.5 times more likely to be arrested than white individuals.[100] Further, the widest disparities across race were found in drug crimes, and violent crimes such as murder, non-negligent manslaughter and robbery.[101] When booking photographs could be disseminated in the Sixth Circuit pursuant to FOIA, these minority groups were not only stigmatized by law enforcement, but they were also further disadvantaged in society because their reputation could be tarnished, further perpetuating cycle of systematic injustice.[102] Thus, as a result of *Detroit Free Press IV,* statistically disadvantaged individuals in the criminal justice system directly benefit from having their privacy interests protected, and need not worry that their booking photographs will be disseminated to the public without careful judicial oversight.[103]

The Sixth Circuit's decision has an impact that goes beyond its borders of Ohio, Michigan, Kentucky and Tennessee.[104] Although the Sixth Circuit was the only circuit in which the U.S. Marshals honored FOIA requests for booking photographs, essentially every media outlet had access to these documents.[105] In the U.S. Department of Justice's Opening Brief in *Detroit Free Press III*, the government explained that national media entities frequently exploited the Sixth Circuit "exception," and essentially "created a nationwide loophole" through which requestors could access booking photographs from any state.[106] Thus, by overturning long-standing Sixth Circuit precedent, the court in *Free Press IV* effectively protected the privacy interests of an entire class of Americans.[107]

After *Detroit Free Press IV*, citizens arrested on federal charges can rest assured that the government will not immediately disseminate their booking photographs pursuant to a FOIA request, but rather will evaluate on a case-by-case basis the public's interest in disclosing the photographs.[108] The majority in *Detroit Free Press IV* properly recognized that, in addition to stigmatizing and

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casians, and, as of 2001, one out of six black men are incarcerated. *See* NAACP, *Criminal Justice Fact Sheet*, NAACP.ORG, http://www.naacp.org/pages/criminal-justice-fact-sheet [https://perma.cc/D8LB-22CS]. Allowing the media to request and publish booking photographs exacerbates an already broken criminal justice system, and exposes minority populations to more suspicion and racial bias in the future, as a result of their publicly available booking photographs. *See id.*

[100] *See* HARNEY & VUONG, *supra* note 99.

[101] *See id.*

[102] *See id.*; Detroit Free Press Inc. v. U.S. Dep't of Justice (*Detroit Free Press IV*), 829 F.3d 478 (6th Cir. 2016) (en banc), *cert. denied sub nom.* Detroit Free Press, Inc. v. Dep't of Justice, No. 16-706, 2017 WL 2216947 (U.S. May 22, 2017).

[103] *See Free Press IV*, 829 F.3d at 482.

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

[105] *See Free Press IV*, 829 F.3d at 481.

[106] *See* Brief of Defendant-Appellant at *14–*15, Detroit Free Press, Inc. v. U.S. Dep't of Justice (*Detroit Free Press III*), 796 F.3d 649 (6th Cir. 2015) (No. 14-1670), *rev'd and remanded en banc sub nom. Detroit Free Press IV*, 829 F.3d 478, *cert. denied sub nom*. Detroit Free Press, Inc. v. Dep't of Justice, No. 16-706, 2017 WL 2216947 (U.S. May 22, 2017).

[107] *See id.*

[108] *See Free Press IV*, 829 F.3d at 484–85.

humiliating a defendant, the release of a booking photograph might also hamper an individual's "professional and personal prospects."[109] Thus, by reversing *Detroit Free Press I* and ensuring that the public can only obtain booking photographs upon a showing that the public interests outweigh the private interests, the Sixth Circuit's decision in *Detroit Free Press IV* adequately protects the reputation and dignity of future generations of individuals arrested on federal charges in the United States.[110] By closing off the Sixth Circuit loophole for media outlets to obtain booking photographs, the court has also protected defendants across the country from being automatically deprived of their innocence, long before they are ever found guilty.[111]

## CONCLUSION

The Constitution promises Americans that the government will protect certain inalienable rights, such as the presumption of innocence until proven guilty. In *Detroit Free Press IV*, the Sixth Circuit decided that defendants have a non-trivial privacy interest in their booking photographs, and thus that this category of government records can be exempted from FOIA, pursuant to exemption 7(C), if the privacy interests of the defendant outweigh the public's interest. Instead of ordering the systematic release of these deeply personal photographs, which arguably portray the most shameful moment of a person's life, the majority agreed with the Department of Justice that this practice constitutes an invasion of personal privacy, and adopted a case-by-case approach. The majority also refuted the dissent's misaligned position that because defendants have already appeared publicly in court, they no longer have a reasonable privacy interest in their booking photograph. After *Detroit Free Press IV*, in order to justify releasing the booking photograph of a defendant awaiting federal prosecution to the public, the requestor must have a reason for the request that aligns with the purpose of FOIA, which is to better the public's understanding of government activities.

Prior to *Detroit Free Press IV*, even though the Sixth Circuit was the only circuit to allow FOIA requests for booking photographs, it was easy for entities in other states to make requests through loopholes in the U.S. Marshals' system. Thus, by reversing *Free Press I*, the Sixth Circuit was able to truly end the media's practice of obtaining booking photographs for the first time. Further, the court's decision protects minority groups, who are already overrepresented in the criminal justice system, from having their privacy interests violated and reputations tarnished by the public release of booking photographs for crimes they may not have even committed. In today's world, running a preliminary

[109] *Id.* at 483.
[110] *See id.*
[111] *See id.* at 482–83.

Google search of someone's name is commonplace for job interviews, school admissions, and even online dating. By rightfully reversing *Detroit Free Press I*, the majority ensured that the media cannot mercilessly subject a defendant to a lifetime of humiliation without first showing that the public's interest in releasing the booking photograph outweighs this blatant invasion of personal privacy.