
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Steven Bradford, Chair

2021 - 2022 Regular

Bill No: AB 1475 **Hearing Date:** June 15, 2021
Author: Low
Version: April 29, 2021
Urgency: No **Fiscal:** No
Consultant: GC

Subject: *Law enforcement: social media*

HISTORY

Source: Author

Prior Legislation: AB 1027 (Hill), Ch. 194, Stats. of 2014

Support: American Civil Liberties Union California Action; Anti-recidivism Coalition; Asian Americans Advancing Justice – California; California Public Defenders Association (CPDA); Californians for Safety and Justice; Ella Baker Center for Human Rights; Initiate Justice; Legal Services for Prisoners With Children; National Association of Social Workers, California Chapter; San Francisco Public Defender

Opposition: None known

Assembly Floor Vote: 74 - 0

PURPOSE

The purpose of this legislation is to prohibit law enforcement agencies from sharing booking photographs on social media of persons arrested on suspicion of committing a non-violent offense, except as specified.

Existing law defines violent felonies to include specified crimes (Pen. Code, § 667.5, subd. (c).)

Existing law defines “social media” to mean “an electronic service or account, or electronic content, including, but not limited to, videos or still photographs, blogs, video blogs, podcasts, instant and text messages, email, online services or accounts, or Internet Web site profiles or locations.” (Pen. Code, § 632.01.)

Existing law defines “booking photograph” to mean “a photograph of a subject individual taken pursuant to an arrest or other involvement in the criminal justice system.” (Civ. Code, § 1798.91.1, subd. (a)(1).)

Existing law defines “subject individual” to mean “an individual who was arrested.” (Civ. Code, § 1798.91.1, subd. (a)(2).)

Existing law provides that it shall be an unlawful practice for any person engaged in publishing or otherwise disseminating a booking photograph through a print or electronic medium to solicit, require, or accept the payment of a fee or other consideration from a subject individual to remove, correct, modify, or to refrain from publishing or otherwise disseminating that booking photograph. (Civ. Code, § 1798.91.1, subd. (b).)

Existing law permits a public entity to require and accept a reasonable administrative fee to correct a booking photograph. (Civ. Code, § 1798.91.1, subd. (c).)

Existing law states that each payment solicited or accepted in violation of these provisions constitutes a separate violation, and permits a subject individual to bring a civil action for damages and attorney's fees, and any other legal or equitable relief. (Civ. Code, § 1798.91.1, subd. (d)-(e).)

Existing law provides pursuant to the California Public Records Act (PRA) that all records maintained by local and state governmental agencies are open to public inspection unless specifically exempt. (Gov. Code, §§ 6250 et seq.)

Existing law defines "public records" to include any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics. (Gov. Code, § 6252, subd. (e).)

Existing law states that, except as in other sections of the PRA, this chapter does not require the disclosure of specified records, which includes among other things: records of complaints to, or investigations conducted by specified agencies, including any state or local police agency, or any investigatory or security files compiled by any other state or local police agency, or any investigatory or security files compiled by any other state or local agency for correctional, law enforcement, or licensing purposes. (Gov. Code, § 6254, subd. (f).)

This bill prohibits a police department or sheriff's office from sharing on social media booking photos of an individual arrested on suspicion of omitting a nonviolent crime unless any of the following circumstances exist:

- 1) The agency has determined that the suspect is a fugitive or an imminent threat to an individual or to public safety and releasing or disseminating the suspect's image will assist in locating or apprehending the suspect or reducing or eliminating the threat.
- 2) There is an exigent circumstance that necessitates the dissemination of the suspect's image in furtherance of an urgent and legitimate law enforcement interest.

This bill provides that if a law enforcement agency shares booking photos or the identity of an individual on social media shall remove the information from its social media page within 14-days, upon the request of the individual who is the subject of the social media post or the individual's representative if any of the following have occurred:

- 1) The person's record has been sealed.
- 2) The individual's conviction has been dismissed, expunged, pardoned, or eradicated pursuant to the law.
- 3) The person has been issued a certificate of rehabilitation.
- 4) The person was found not guilty of the crime for which they were arrested.

This bill specifies that it is retroactive as to any information on social media.

This bill defines “nonviolent crime” as a crime not identified as a violent felony under Pen. Code § 667.5; subd. (d).

This bill defines social media as an electronic service or account, or electronic content, including, but not limited to, videos or still photographs, blogs, video blogs, podcasts, instant and text messages, email, online services or accounts, or Internet Web site profiles or locations.

COMMENTS

1. Need for This Bill

According to the author:

AB 1475 seeks to remedy two interconnected problems. With the advent of social media, public agencies, including local police and sheriff’s departments, increasingly use Facebook and Twitter to connect with community members and highlight their work. Used effectively, these accounts can foster trust and familiarity between a community and their public agencies. However, in recent years, many law enforcement departments across California have used their social media accounts to shame suspects arrested by officers, posting suspects’ mug shots, names, and descriptions of their alleged crimes on Facebook. Some examples of those posts are included here.

These mug shots are often unflattering and do nothing to warn the public of an ongoing public safety threat, as the suspect is already in custody at the time of posting. Instead, their purpose is to shame and ridicule (often targeting people with serious addiction issues and mental health problems). Commenters leap on these posts, calling the suspect names and rushing to judgement *even though the subjects of these posts have not yet been convicted of a crime and frequently have not even been formally charged with a crime.*

These posts have devastating consequences for their subjects, including loss of employment if a post is circulated to work colleagues and emotional turmoil if the post is circulated to family and friends. For example, Tremayne Nez was wrongfully arrested in June 2019 after police mistook Mr. Nez for the actual suspect, who was also Native American. Mr. Nez’s mugshot was released by police and he was immediately placed on administrative leave at work and his reputation was tarnished.

Furthermore, these mug shots vastly overstate the propensity of communities of color to commit crimes. Posts perpetuate harmful racial stereotypes and foster implicit bias in a community and police force. It was for those reasons that San Francisco Police Chief Bill Scott recently instituted a policy against releasing the mug shots of most people who have been arrested by the SFPD. The Los Angeles Police Department has long considered the release of any photograph or mug shot “non-releasable information” unless the release will aid in arrest or investigation, will warn the public of danger, or the arrestee has been booked for a particular

crime. In addition, more and more news outlets are cutting their mugshot galleries and declining to publish mug shots of people arrested on suspicion of committing certain crimes. Some newspapers like the Boston Globe have launched initiatives to allow people to petition to have their information removed from old stories or have stories updated to reflect case outcomes.

AB 1475 prohibits police departments and sheriff's departments from sharing on social media the booking photos of suspects arrested on suspicion of committing a nonviolent crime.

It creates exemptions for circumstances in which there is a need for a law enforcement to share a booking photo on social media if a suspect is a fugitive or an imminent threat to public safety, or if there are exigent circumstances. It will also allow a judge to order the release or dissemination of a suspects' image on social media based on a finding that the release or dissemination of a photo is in furtherance of a legitimate law enforcement interest.

Finally, it requires a police department or sheriff's department to remove a post about that individual that includes their booking photo and identity, if that person was found not guilty, not charged with the crime, if their record was sealed or expunged, or if the person was pardoned or issued a certificate of rehabilitation.

2. Release of Mugshots

It is important to realize that when a person is arrested they have had minimal involvement with the criminal justice system, and they have certainly not been afforded the constitutionally required safeguards of due process of law in order to be convicted of committing a crime. In fact, a peace officer may make an arrest upon a "probable cause" standard. It is generally taught that probable cause requires more than just a mere suspicion that a suspect has committed a crime. Because probable cause is such an abstract concept, courts generally have to determine whether there was probable cause to arrest on a case by case basis. But certainly, probable cause is not a standard that indicate that a person actually committed a crime.

The release of a mugshot on a law enforcement social media account tells not only the community, but any user of the internet that a particular named individual was arrested for an offense. It has the practical effect of giving the impression to the community, and anyone searching for the person, that they committed whatever crime they were arrested for. Additionally, unlike many records that can be sealed, a social media post by a law enforcement agency is there indefinitely until the agency decides to remove it.

In 2015, *The New York Times* reported on the widespread practice of police departments posting booking photos of arrestees on their social media pages, either with the objective of informing the public, or in an attempt to evoke greater community engagement. As the article explains:

"Posting on the Internet is kind of like a bell you can't unring," Chief Whipple said at the time.

But uploading the photographs has become a common practice at some police departments from New England to California, where Facebook pages and department websites have become a popular spot for posting digital lineups.

Police officers often say their aim is transparency, not public shaming. But Ms. Foley’s case highlights a challenge for the digital age: When does public notice become public punishment in a world where digital images can live forever? Many states consider the photographs to be public information, and those deemed newsworthy are published by the news media, sometimes in great numbers. But as the police put them on their own websites, lawyers, residents and the accused have raised concerns. They say the practice can serve as its own punishment and violate the privacy of individuals who have not been convicted of a crime.¹

Recognizing the potential harms that can arise from subjecting individuals to public scrutiny, especially without first providing due process, many law enforcement agencies, along with numerous media outlets, have taken steps to prohibit the practice of publishing booking photos, citing social media’s role in perpetuating dangerous stereotypes and implicit biases that associate people of color with criminality.

The San Francisco Police Department is one such agency. As a 2020 NBC News op-ed describes:

On July 1, the [San Francisco Police Department] announced that it would stop the practice of releasing police booking photos, or mug shots, to news media and the public. In a statement on the department’s website, Chief William Scott explained, “This policy emerges from compelling research suggesting that the widespread publication of police booking photos in the news and on social media creates an illusory correlation for viewers that fosters racial bias and vastly overstates the propensity of Black and brown men to engage in criminal behavior.”

While far more changes are needed, Scott’s statement acknowledges the racist ripple effects of this longstanding tradition. Mug shots have long functioned much more broadly than pure documentation. While they are of course visual indexes of arrested people, they are also part of the collection of biometric data that accumulate in police databases and follow people for the rest of their lives. Moreover, the circulation of mug shots among the public functions as a form of punitive entertainment based in the public shaming of arrested people.

In public life, little thought goes into understanding that the mug shot is a coerced photo of someone arrested, often taken during a moment of crisis, embarrassment and despair. The person arrested and detained may have been charged with a crime but they have not been convicted. Yet, the stigma of the image affixes guilt to the photographed person.² In 2014, this Legislature passed SB 1027 (Hill, Ch. 194, Stats. 2014), which prohibited a person from publishing or otherwise disseminating a booking photograph to solicit payment of a fee or other consideration from a subject to remove, correct, modify, or to refrain from publishing or otherwise disseminating the photo. In 2017, this Legislature also passed AB 1008 (McCarty, Ch.

¹ Jess Bidgood, “After Arrests, Quandary for Police on Posting Booking Photos,” *The New York Times*, Jun. 26, 2015, <https://www.nytimes.com/2015/06/27/us/after-arrests-quandary-for-police-on-posting-booking-photos.html>, [as of Apr. 20, 2021].

² Nicole R. Fleetwood, “Racist police practices like mug shots normalize the criminalization of Black Americans,” *NBC News*, Aug. 6, 2020, <https://www.nbcnews.com/think/opinion/racist-police-practices-mug-shots-normalize-criminalization-black-americans-ncna1235694>, [as of Apr. 20, 2021].

789, Stats. 2017), a so-called “ban the box” law, which prohibited an employer from inquiring about an applicant’s conviction history, and from considering, distributing, or disseminating information about arrests not followed by conviction, referral to or participation in pre- or post-trial diversion programs, or convictions that have been sealed, dismissed, expunged, or statutorily eradicated.

AB 1475 would continue the Legislature’s interest in addressing the sustained impact of publication of criminal and arrest history by placing certain limitations on the posting of booking photos of individuals arrested on suspicion of committing nonviolent crimes on social media, and providing for the removal of those photos on request, subject to specified conditions.

3. First Amendment Constitutionality

The question of whether or not this bill violates the First Amendment to the U.S. Constitution one must ask whether or not the right of a law enforcement agency (as a government entity) to freely express themselves is unconstitutionally suppressed by this law.

The First Amendment of the U.S. Constitution provides that “Congress shall make no law [...] abridging the freedom of speech [...]” (U.S. Const., 1st Amend.), and courts have consistently held that this prohibition on legislation abridging speech applies to state and local governments. (*See, e.g., Gitlow v. New York* (1925) 268 U.S. 652.) Though it remains an open question whether state and local governments are entitled to First Amendment rights with respect to federal law³, the Supreme Court has consistently held that local governments and subdivisions thereof are not entitled to First Amendment rights with respect to the state law, since they themselves are considered political subdivisions of the state. As the Supreme Court held in *Ysursa v. Pocatello Educ. Ass’n* (2009) 555 U.S. 353:

“Political subdivisions of States – counties, cities, or whatever – never were and never have been considered as sovereign entities.” [Citation] They are instead “subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions.” [Citation] State political subdivisions are “merely..department[s] of the State, and the State may withhold, grant or withdraw powers and privileges as it sees fit.” [Citation] [...] a political subdivision, “created by a state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator.” (*Id.* at pp. 362-363.)

AB 1475 does not bar speech made in a personal capacity by employees of the State, but rather bars speech made in a professional capacity on the social media page of the law enforcement office itself. Thus, since the law enforcement office is a subdivision of the State or local government, it is not endowed with First Amendment rights with respect to state law, making AB 1475’s restrictions on speech likely to pass constitutional muster.

4. Implementation

This bill takes a very measured approach to the issue of public disclosure of arrest photos by law enforcement agencies. The most reasonable and direct approach would be mandating agencies remove all mugshots previously posted and to ban the procedure moving forward absent a

³ *See* David Fagundes, “State Actors as First Amendment Speakers,” *Northwestern University Law Review*, Vol. 100, 2006.

legitimate need to apprehend an individual or to warn of imminent and dangerous threats to the community. This bill limits the prohibition significantly both prospectively and retroactively.

Prospectively, the bill provides that no new mugshots may be posted unless they are an arrest for specified felony offenses or the suspect is a fugitive, an imminent threat, or exigent circumstances exist that necessitate the dissemination of the image. Retroactively, the bill outlines relatively stringent requirements for removal of a previously posted image. Namely, the person requesting removal must show one of the following:

- 1) The person's record has been sealed.
- 2) The individual's conviction has been dismissed, expunged, pardoned, or eradicated pursuant to the law.
- 3) The person has been issued a certificate of rehabilitation.
- 4) The person was found not guilty of the crime for which they were arrested.

The provisions of the bill would likely be easier to implement and more effective to simply ban the process moving forward (absent emergencies and imminent danger) and to require agencies remove the images after suspects are apprehended. Additionally, a requirement to simply remove all previously posted images would be a much clearer standard. This bill is taking a very measured approach.

5. Argument in Support

According to the ACLU:

Our criminal justice system is built on the premise that the accused is innocent until proven guilty, but the routine practice by some local police departments of posting mugshots on Facebook in order to shame and ridicule flies in the face of that premise. This practice can cause great financial harm to the accused if such a post is shared with a current or prospective employer and great emotional harm if family and friends see it.

Previously, the state legislature has worked to prevent the online mugshot publishing industry from charging exorbitant fees for a person to have their mugshot removed from a database. However, there is no recourse for an individual to have their name and mugshot removed from a public agency's social media page after they are found not guilty or have their record expunged.

With a quick internet search, a prospective employer can find information that may no longer be accurate or reflect charges that were ultimately not prosecuted. AB 1475 will ensure that people who were found not guilty or were rehabilitated have one less barrier to obtaining employment and will not have to live in fear that a Facebook post you will live in the fear that a Facebook post will follow them forever. Furthermore it will reduce implicit bias and stereotyping.

-- END --