
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Aisha Wahab, Chair

2023 - 2024 Regular

Bill No: AB 994 **Hearing Date:** June 20, 2023
Author: Jackson
Version: May 2, 2023
Urgency: No **Fiscal:** Yes
Consultant: AB

Subject: *Law enforcement: social media*

HISTORY

Source: Author

Prior Legislation: AB 1475 (Low, Ch. 126, Stats. of 2021)
SB 1027 (Hill, Ch. 194, Stats. of 2014)

Support: ACLU California Action; California Public Defender Association; Oakland Privacy; Prosecutors Alliance California

Opposition: California State Sheriffs Association

Assembly Floor Vote: 48 - 17

PURPOSE

The purpose of this bill is to require a police department or sheriff's office to remove a booking photo shared on the department's social media page within 14 days unless specific circumstances exist, and requires a police department or sheriff's office sharing a booking photo on social media to use the name and pronouns given by the subject of that photo.

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

- A police department or sheriff's office 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;
- A judge orders the release or dissemination of the suspect's image based on a finding that the release or dissemination is in furtherance of a legitimate law enforcement interest; or,
- There is an exigent circumstance that necessitates the dissemination of the suspect's image in furtherance of an urgent and legitimate law enforcement interest. (Pen. Code, § 13665, subd. (a)(1)-(3).)

Existing law provides that a police department or sheriff's office that shares, on social media, a booking photo of an individual arrested for the suspected commission of a nonviolent crime shall remove the booking photo 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, unless the person is a fugitive or an imminent threat, or there exists a legitimate law enforcement purpose for not removing the photo, as specified. (Pen. Code, § 13665, subd. (b)(1).)

Existing law requires a police department or sheriff's office that shares a booking photo on social media of an individual arrested a violent felony, as specified, to remove the booking photo from its social media page within 14 days upon the request of the arrestee or their representative, if the individual or their representative demonstrates any of the following:

- The individual's record has been sealed;
- The individual's conviction has been dismissed, expunged, pardoned, or eradicated, as specified;
- The individual has been issued a certificate of rehabilitation;
- The individual was found not guilty of the crime for which they were arrested; or,
- The individual was ultimately not charged with the crime, or the charges were dismissed. (Pen. Code, § 13665, subd. (b)(2)(A)-(E).)

Existing law, for the purpose of the provisions above, defines "nonviolent crime" as a crime not that is not included in Penal Code § 667.5 as a "violent felony."

Existing law 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. (Pen. Code §§ 13665, subd. (c)(2) & 632.01, subd. (a)(1).)

Existing law specifies that “social media” does not include an internet website or an electronic data system developed and administered by the police department or sheriff’s office. (Pen. Code § 13665, subd. (c)(2).)

This bill requires a police department or sheriff’s office sharing a booking photo of an individual on social media, to use the name and pronouns given by the individual.

This bill authorizes a police department or sheriff’s office to include other legal names or known aliases of an individual, if using the names or aliases will assist in locating or apprehending the individual or in reducing or eliminating an imminent threat to an individual or to public safety.

This bill requires the removal of a booking photo from the department’s social media page within 14 days regardless of the crime, unless the person is a fugitive or an imminent threat, or there exists a legitimate law enforcement purpose for not removing the photo.

This bill applies the above provisions retroactively to any booking photo shared on social media.

This bill eliminates the requirement that the individual who is the subject of a social media post, or their representative, request and make a showing, as specified, in order to have their booking photo removed from a police department’s or sheriff’s department’s social media page.

COMMENTS

1. Need for This Bill

According to the Author:

This bill brings more equality and justice to every Californian, by ensuring that no one is assumed of being guilty or being a particular gender. As we protect our due process right, so too must we protect the privacy of every Californian. True justice is fairness! Equal protection under law should also have come with an equal protection of privacy and gender expression.

2. Release of Mugshots by Law Enforcement

The presumption of innocence is a cornerstone of our nation’s criminal justice system. When a person is arrested for a crime, their interaction with the criminal justice system for the purpose of the alleged crime is minimal, and they have not yet been afforded the full measure of constitutional safeguards, such as due process, that are required in order to be convicted of committing a crime. Police officers may make an arrest on the basis of “probable cause,” which requires a showing that the facts and circumstances known to the officer at the time of the arrest form a reasonable basis for believing that a crime may have been committed by the person arrested.¹ Probable cause requires more than a mere hunch or suspicion, and depends on a

¹ *Ohio v. Beck* (1964) 379 U.S. 89, 91.

consideration of the totality of the circumstances.² The United States Supreme Court has opined that the probable cause standard “protects citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime, while giving fair leeway for enforcing the law in the community’s protection.”³

Law enforcement generally captures a mugshot after an arrest at the time of booking, a practice that was historically intended to provide a photographic record of an arrested individual by victims, investigators and the public. However, since their introduction, the use of booking photos in various contexts has been increasingly recognized as prejudicial. The United States Court of Appeals for the District of Columbia has held that “the double-shot picture, with front and profile shots alongside each other, is so familiar, from ‘wanted’ posters in the post office, motion pictures and television, that the inference that the person involved has a criminal record, or has at least been in trouble with the police, is natural, perhaps automatic.”⁴ The release of a mugshot on a law enforcement social media account – a practice that has become more widespread in recent years – tells not only the community, but any user of the internet that a particular individual was arrested for an offense. Given the stigma associated with mugshots, these postings have the practical effect of giving the impression that the person portrayed in fact committed the crime for which they were arrested.

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.⁵

In recent years the Legislature has taken steps to curb the invasive use and commercial exploitation of booking photos. In 2014, the 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. 789, Stats. 2017), a so-called “ban the box” law, which prohibited an employer from inquiring about an applicant’s conviction history, and from

² *District of Columbia v. Wesby* 138 S. Ct. 577 (2018)

³ *Brinegar v. United States* 338 U.S. 160, 176 (1949)

⁴ *Barnes v. United States* 365 F.2d 509, 510-511 (1966)

⁵ 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].

considering, distributing, or disseminating information about arrests not followed by conviction, referral to or participation in pre- or post-trial diversion programs. Most recently, the Legislature passed AB 1475 (Low, Ch. 126, Stats. of 2021), which prohibited law enforcement agencies from sharing booking photos on social media of individuals arrested for non-violent offenses, except under specific circumstances.

3. Effect of This Bill

Existing law, enacted by AB 1475, prohibits a police department or sheriff's office from sharing booking photos on social media of an individual arrested for a nonviolent offense unless 1) the arrestee is a fugitive or poses an imminent threat to public safety, 2) the dissemination of the image is due to a judicial order, or 3) there is an exigent circumstance that necessitates the release of the image in furtherance of an urgent and legitimate law enforcement interest. However, existing law also requires law enforcement agencies to remove posted booking shots of individuals arrested for a nonviolent offense within 14 days of a request from the individual or their representative, unless one of the above conditions is true. For individuals arrested for violent crimes, law enforcement may post booking photos on social media, but must remove them within 14 days if the individual or their representative demonstrates that the arrestee's record has been sealed, the conviction has been dismissed or expunged, they have received a certificate of rehabilitation, or they were found not guilty of the crime or the charges were dismissed.⁶

This bill builds upon the reforms of AB 1475 in two distinct ways. First, with respect to booking photos posted on social media of an individual arrested for *any* crime, the bill requires that the law enforcement agency use the name and pronouns given by the individual. The agency may include other legal names or known aliases of an individual if using the names or aliases will assist in locating or apprehending the individual or addressing an imminent threat to public safety. Using the name and pronouns provided by an arrestee constitutes an important step toward affirming the true racial and gender identities, and preventing "deadnaming," or referring to a transgender or non-binary person by a name they used prior to transitioning. However, given that the bill mandates the use of any name provided by the arrestee, and allows the use of other aliases only if certain factors are present, this provision may lead to strange situations where, in the absence of those factors, a law enforcement agency is required to post *only* vulgarities or names they know to be false on social media when posting a mugshot. This may have the ultimate result of deterring the posting of mugshots altogether, even when doing so may serve a legitimate law enforcement interest, such as asking additional potential victims to come forward to assist with a prosecution.

Another provision of this bill requires law enforcement to remove any booking photo from its social media page – regardless of whether the individual or their representative has requested the removal – within 14 days of the photo being posted. However, the agency may keep the photo posted if 1) the arrestee is a fugitive or poses an imminent threat to public safety, 2) the dissemination of the image is due to a judicial order, or 3) there is an exigent circumstance that necessitates the release of the image in furtherance of an urgent and legitimate law enforcement interest.

⁶ Penal Code §13665

4. Argument in Support

According to Oakland Privacy:

Assembly Bill 994 builds upon and expands protections already enacted by the Legislature in 2022 in AB 1475, which passed the Assembly floor 74-0, and the Senate floor 39-0. Assemblymember Low's legislation was brought about by several municipal scandals, when law enforcement agencies chose to post mugshots to their social media accounts of individuals who had been charged with crimes, but not convicted. These mugshots ended up shared many, many times and caused reputational damage despite charges that were later dropped. Because of the nature of social media, the images remained in circulation long after the events transpired. Such pictures floating around can have downstream consequences for the people posted when seeking employment and housing for years to come, which is especially egregious when the mugshot is related to First Amendment protected activity and/or when charges are later dismissed.

The events that transpired in Berkeley, California are a particularly instructive example and one which received national attention. In August of 2018, "free speech protests" came to the university town and protesters and counterprotesters squared off in the city's Civic Center Park. The counterprotesters were characterized by the Berkeley Police Department as "anti-fa" or anti-fascistic protesters who believed they were responding to a white-supremacist oriented attack on the city which has been famously liberal over the years in its politics. After some street scuffles, a number of counterprotesters were hit with charges that were never actually pursued and had their arrest images posted on the Berkeley Police Department's Twitter account. Police department emails later secured by Berkeley Copwatch and the Lucy Parsons Lab in Chicago showed that the stated intent of the postings was to create a "counter narrative". The emails further revealed that the police department had internally celebrated the number of retweets the postings had received. Arrest photos of 20 people were retweeted more than 8,000 times.

The department policy of posting mugshots to their Twitter account was restricted to events characterized as protests. While at the time of arrest, charges such as weapons and assault were offered up, it was later revealed that the weapons in question were scarves, bandanas and protest signs and that no significant injuries had taken place. Charges were either never filed or dismissed against all 20 people who had their arrest photos immortalized on Twitter. After a national outcry, the local City Council moved to end the policy and AB 1475 followed.

Assembly Bill 994 strengthens the work done in AB 1475 in three specific ways. Firstly, AB 994 correctly links the available exemption to what matters: whether or not there is a clear public interest in posting the mugshot due to an imminent threat to the public that could be alleviated by posting the mugshot. There is no other public interest in posting a mugshot on social media. Secondly, AB 994 states that if it is found necessary to post a mugshot on social media, it is the responsibility of the posting entity to use the correct pronouns for the individual and not to dead name them. This is an important protection for people in transition, who may have different levels of openness in different sectors of their lives about their gender assignment at birth and avoids unanticipated collateral damage from a posted mugshot that can

endure long beyond the particular arrest in question. Thirdly, AB 994 restricts the posting period to a maximum of 14 days and removes the impetus for removal from the individual whose mugshot was posted. Under AB 994, people whose mugshots were posted do not have the burden of specifically requesting a takedown. Instead, it happens by default after a maximum of 14 days.

5. Argument in Opposition

According to the California State Sheriffs' Association:

By requiring an agency that posts a booking photo to use the name given by the individual, AB 994 seems to mandate that the posting agency use whatever name the arrestee gives, even if it is known to be false. Our concern with this provision is not related to a person's ability to use their preferred name and pronouns, but rather the ability to clearly articulate who is shown in a photo. While AB 994 allows an agency to include other legal names or aliases, it only does so if using the names or aliases will assist in locating or apprehending the individual or reducing or eliminating an imminent threat to an individual or to public safety.

Additionally, the bill requires the posting agency to remove the booking photo within 14 days as opposed to current law, which requires the individual to request the photo be removed. This provision creates additional workload for public agencies.

-- END --