

Date of Hearing: April 22, 2021

ASSEMBLY COMMITTEE ON PRIVACY AND CONSUMER PROTECTION

Ed Chau, Chair

AB 1475 (Low) – As Amended March 25, 2021

SUBJECT: Law enforcement: social media

SUMMARY: This bill would prohibit a police department or sheriff's office from sharing booking photos of individuals arrested on suspicion of committing a nonviolent crime on social media, except under specified circumstances. Specifically, **this bill would:**

- 1) Prohibit 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 one of the following circumstances exist:
 - the individual is convicted of a criminal offense based on the conduct for which the individual was incarcerated at the time the booking photo was taken;
 - 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.
- 2) Require a police department or sheriff's office that shares, on social media, photos or the identity of an individual arrested for the suspected commission of any crime to remove the information from its social media page within 14 days, upon the request of the individual who is the subject of the post, or their representative, if any of the following have occurred:
 - the individual's record has been sealed;
 - the individual's conviction has been dismissed, expunged, pardoned, or eradicated pursuant to law;
 - the individual has been issued a certificate of rehabilitation; or
 - the individual was found not guilty of the crime for which they were arrested.
- 3) Specify that the subdivision shall apply retroactively to any information shared on social media.
- 4) Define the terms "nonviolent crime" and "social media".

EXISTING LAW:

- 1) 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 Sec. 1798.91.1.)
- 2) Permits a public entity to require and accept a reasonable administrative fee to correct a booking photograph. (Civ. Code Sec. 1798.91.1(c).)
- 3) 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 Sec. 1798.91.1(d) and (e).)
- 4) 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 Sec. 6250 et seq.)
- 5) States that, except as in other sections of the PRA, the PRA 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 Sec. 6254(f).)
- 6) 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 Sec. 6252(e).)
- 7) Defines "violent felony" to include all of the following: murder or voluntary manslaughter; mayhem; rape; sodomy, as defined; oral copulation, as defined; lewd or lascivious act, as defined; any felony punishable by death or imprisonment in the state prison for life; any felony in which the defendant inflicts great bodily injury on any person other than an accomplice, as specified, or any felony in which the defendant uses a firearm, as specified; any robbery; arson; sexual penetration, as defined; attempted murder; kidnapping; assault with the intent to commit a specified felony; continuous sexual abuse of a child; carjacking; extortion; threats to victims or witnesses, as specified; any burglary of the first degree; and the use of explosives that causes bodily injury or death, or with the intent to commit murder. (Pen. Code Sec. 667.5(c).)
- 8) 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 Sec. 632.01.)
- 9) 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 Sec.

1798.91.1(a)(1).)

10) Defines “subject individual” to mean “an individual who was arrested.” (Civ. Code Sec. 1798.91.1(a)(2).)

FISCAL EFFECT: None. This bill was keyed nonfiscal by the Legislative Counsel.

COMMENTS:

1) **Purpose of the bill:** This bill seeks to limit the putative harms to individual reputations and social perceptions created by law enforcement offices posting booking photos on social media by prohibiting police departments and sheriffs’ offices from posting booking photos of individuals arrested on suspicion of committing nonviolent crimes and providing a mechanism for initiating removal of those photos if innocence or rehabilitation can be demonstrated. This bill is author sponsored.

2) **Author’s statement:** 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. [...] Under current law, there is no recourse for individuals who were found not guilty, who were not convicted, who were rehabilitated, or who had their records expunged to have these posts by law enforcement removed from Facebook. Instead, these posts by a public agency follow their subjects forever.

3) **Booking photos and social media:** 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.

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].

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. 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.

As Anti-Recidivism Coalition, Ella Baker Center for Human Rights, Californians for Safety and Justice, and Initiate Justice argue in support of this bill:

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 suspects’ 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.

In 2021, it is not enough to simply ban the box. 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 suspects who were found not guilty or were rehabilitated have a fair shot at a good job and a life free from fear that a Facebook post will follow them forever. Furthermore, it will reduce implicit bias and stereotyping.

- 4) **AB 1475 likely does not run afoul of the First Amendment or the California Public Records Act (PRA):** Because the bill explicitly restricts the capacity for a government entity, i.e., a law enforcement office, to publicize specific information, the possibilities may

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].

exist that the bill either unconstitutionally suppresses free speech, or that it unlawfully impedes public access to government records necessary for transparency and accountability. Assessment of these laws as they apply to this particular practice by law enforcement offices, however, seems to indicate that AB 1475 would not run afoul of either of these laws.

First Amendment: 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.

Public Records Act: Whether or not booking photos constitute public records subject to disclosure under the PRA is not entirely clear. On one hand, the PRA 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 Sec. 6252(e)) and defines “writing” to include “any handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing[...].” (Gov. Code Sec. 6252(f).) Based on these definitions, booking photos clearly constitute public records.

The PRA also provides that “state and local law enforcement agencies shall make public the following information, except to the extent that disclosure of a particular item of information would endanger the safety of a person involved in an investigation or would endanger the successful completion of the investigation or a related investigation” and includes among the specified information “the full name and occupation of every individual arrested by the

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

agency [and] the individual's physical description including the date of birth, color of eyes and hair, sex, height and weight." (Gov. Code Sec. 6254(f)(1).)

On the other hand, the PRA explicitly exempts from its disclosure requirements "records of complaints to, or investigations conducted by, or records of intelligence information or security procedures of, the office of [...] any state or local police agency, or any investigatory or security files compiled by another state or local police agency [...]" (*Id.*) In a 2003 opinion published by the Office of the Attorney General, Attorney General Bill Lockyer ultimately concluded that "a sheriff has discretion to furnish copies of photographs of arrested persons, commonly known as "mug shots," in response to a request from a member of the general public, including the news media; however, once a copy is furnished to one member of the general public, a copy must be made available to all who make a request." (86 Ops. Cal. Atty. Gen. 132.)

Regardless, AB 1475 does not prohibit the public disclosure of booking photos, but rather specifically prohibits, under specified circumstances, the posting of booking photos on social media, i.e., a single medium for disclosure. As the Public Safety Committee Analysis of this bill concludes:

[T]his bill does not disturb the public right to request and access mug shots, nor does it limit a police agencies' ability to disclose such documents to the public under the [PRA]]. The California Constitution requires a bill that limits the public's right of access to information to adopt findings that support limiting the public's right of access. No such findings are included in this bill, further indicating that there is no intent to disturb the public's right to access such records under the law.

That said, staff notes that the definition of social media adopted by this bill, which 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 Sec. 632.01(a)(1)) is remarkably broad, and could include many avenues by which public disclosure could be accomplished. The author may therefore wish to consider whether foreclosing the possibility of public disclosure of booking photos through virtually all electronic media is consistent with the author's intent, and, if not, may consider adopting a narrower definition for "social media."

- 5) **Limitation to nonviolent crimes arguably undermines the bill's intent:** When booking photos are posted on the social media of law enforcement, the potential harms that can arise are experienced disproportionately by marginalized communities, including people of color and of lower socioeconomic status. As the author of the bill points out:

Marginalized communities and people of color are, according to Dr. Lageson, "less likely to have the ability to address, remedy, or overcome a criminal record. The ability to curate an online reputation or challenge a government record is inextricably linked (and proportional) to one's relationship with technology and one's capacity to argue for the right to privacy in the first place." [...] In addition, 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.

By providing specified limitations on circumstances in which police departments or sheriff's offices can post booking photos on social media, as well as a mechanism for their removal, the author seeks to address a critical issue that currently contributes to system-wide racial disparities in criminal justice in this state and in the nation as a whole. However, by limiting the bill's provisions to only nonviolent crimes, and by placing the burden on those whose photos were posted to demonstrate rehabilitation or innocence to have their photos removed, the bill arguably falls short of this goal.

The bill in print prohibits a law enforcement office from sharing booking photos of individuals arrested on suspicion of committing nonviolent crimes on social media unless that individual was convicted of the offense, or if there is a legitimate law enforcement interest in doing so. It is difficult to conceive of a circumstance that lacks a legitimate law enforcement interest, even if the individual was convicted of the offense, in which the posting by the office could be in any way beneficial. Considering the lack of upside and immense risk of unnecessary harm to the subject, the author has offered the following amendment, which would eliminate conviction as a circumstance for which a nonviolent offender's photo can be posted on social media:

Author's amendment:

On page 2, strike lines 13-15, inclusive.

Though this amendment improves the bill significantly, it should be noted that the bill in print does not provide any limitations on the posting of booking photos for individuals arrested on suspicion of committing *violent crimes*. It is true that it is more likely that a legitimate law enforcement interest would underlie the decision to post such a photo, especially if a suspected violent criminal is still at large, but the in the case of nonviolent offenders, the bill already excepts such circumstances from the prohibition. By limiting the prohibitions to nonviolent crimes, the bill implicitly permits the practice of posting the booking photos of those suspected of committing violent crimes, even if they have not been convicted of the crime. In other words, the bill in print arguably distinguishes between the value of the presumption of innocence of those arrested on suspicion of committing violent crimes, and those arrested with respect to nonviolent crimes. As a matter of law, both are innocent until proven guilty.

Importantly, the racial disparities in arrests extend to violent crimes. According to the federal Bureau of Justice Statistics, in 2019, Black individuals were nearly 3.5 times more likely to be arrested for a violent crime compared to White individuals. When considering juveniles, who arguably have the most to lose from the permanency of these types of internet postings, Black juveniles were over 4.5 times more likely to be arrested for a violent crime than White juveniles.⁴ Data examining exonerations for violent crimes by race also suggest that Black individuals are significantly more likely to be *wrongfully* convicted of such crimes. According to a report by the National Registry of Exonerations at UC Irvine, "judging from exonerations, innocent black people are seven times more likely to be convicted of murder than innocent white people" and "a black prisoner serving time for sexual assault is three-and-a-half times more likely to be innocent than a white sexual assault

⁴ "Violent crime" here is defined as murder, robbery, and aggravated assault. Bureau of Justice Statistics, "Arrest rates by offense and race, 2019," *United States Department of Justice*.

convict.” The report points out that “the major cause for this huge racial disparity appears to be the high danger of mistaken eyewitness identification by white victims in violent crimes with black assailants.”⁵ The data in the report suggest that for robbery, which falls under the definition of “violent crime” in this bill, Black individuals are over 15 times more likely to be wrongfully convicted than White individuals. Coupled with similar racial disparities in virtually all stages of the criminal justice system, people of color remain disproportionately harmed by the practice of posting booking photos, even if nonviolent crimes are taken off the table. In fact, permitting posting without limitation for those arrested on suspicion of violent crimes may actually exacerbate some of the practice’s most substantial harms. Because the posting of booking photos “vastly overstate[s] the propensity of communities of color to commit crimes,” thereby perpetuating “harmful racial stereotypes and foster[ing] implicit bias in a community and police force,” continuing the practice for only violent offenses arguably ensures that these problematic racial stereotypes are not only associated with criminality, but specifically with violence, i.e. the most egregious offenses.

To resolve this issue, the author may wish to consider amending the bill to apply its provisions equally to those arrested on suspicion of nonviolent and violent crimes.

- 6) **Placing the burden of removing booking photos on the individual disadvantages indigent individuals:** AB 1475 provides a mechanism for removal of a nonviolent arrestee’s booking photo from a law enforcement office’s social media account so long as the arrestee can demonstrate State action reflecting their innocence or rehabilitation. Specifically, the bill requires a police department or sheriff’s office to 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 individual’s record has been sealed; (2) the individual’s conviction has been dismissed, expunged, pardoned, or eradicated pursuant to law; (3) the individual has been issued a certificate of rehabilitation; or (4) the individual was found not guilty of the crime for which they were arrested. The bill does not specify how an individual is to initiate this process, and what type of proof is necessary.

Providing such a mechanism is critical, since items posted on the internet generally remain indefinitely until removed. However, predating the removal of these items on the request of the individual and only with demonstration of completion of certain legal processes maintains the possibility that those with their image posted could continue to be harmed even if they are demonstrably innocent. Because the burden is on the subject to request the removal of the image, the subject must first be aware that the image was posted, and that they have the right to make the request for removal. Even if they manage to overcome this substantial hurdle, they must then be able to demonstrate that they were found innocent, that their record has been sealed, that their conviction has been expunged, or that they have received a certificate of rehabilitation.

Notably, the latter three conditions all require completion of legal processes that are onerous and costly, assuming the individual is aware that they are available. According to an article in the Harvard Law Review, among the factors most significant for failure of eligible

⁵ S. Gross, M. Possley, & K. Stephens, “Race and Wrongful Convictions in the United States,” *National Registry of Exonerations*, University of California Irvine, Mar. 7, 2017.

individuals to seek expungement are lack of information, administrative hassle and time constraints, fees and costs, and lack of access to counsel.⁶

Additionally, the harms associated with failing to remove a photo may be disproportionately experienced by people of color. According to a 2018 report to the United Nations prepared by The Sentencing Project:

African American job applicants, who are less likely to receive callbacks than whites to begin with, experience an even more pronounced discrimination related to a criminal record. As scholar Devah Pager’s research has revealed, whites *with* criminal records receive more favorable treatment than blacks *without* criminal records.⁷

Add to this the possibility of a booking photo surfacing through a cursory online search, and the potential adverse consequences are clear. Should this Committee choose to pass this bill, it may wish to require the author to further examine the serious issues of equity and justice raised in this analysis.

REGISTERED SUPPORT / OPPOSITION:

Support

American Civil Liberties Union California Action
 Anti-Recidivism Coalition
 Asian Americans Advancing Justice – California
 California Attorneys for Criminal Justice (if amended)
 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 on file

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⁶ J. Prescott & S. Starr, “Expungement of Criminal Convictions: An Empirical Study,” *Harvard Law Review*, Vol. 133 No. 8, Jun. 2020, pp. 2501-2506.

⁷ The Sentencing Project, “Regarding Racial Disparities in the United States Criminal Justice System,” Report to the United Nations Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance, Mar. 2018.