

Date of Hearing: April 25, 2023

ASSEMBLY COMMITTEE ON PRIVACY AND CONSUMER PROTECTION

Jesse Gabriel, Chair

AB 994 (Jackson) – As Amended March 16, 2023

As Proposed to be Amended

SUBJECT: Law enforcement: social media

SYNOPSIS

In recent years, local law enforcement agencies have begun regularly posting the booking photos of individuals online, often referring to them as “Wanted Wednesdays,” “Turn Yourself In Thursdays,” and “Felony Fridays.” This practice of publicly shaming people who have been arrested, but not convicted of a crime, significantly infringes on those people’s right to privacy.

In 2021, the Legislature banned this practice for people accused of non-violent crimes. However the practice continues to allow law enforcement agencies to publicly out transgender men and women and non-binary people on the internet by using their former name (also known as a “dead name”) and the wrong pronouns. This bill is intended to address that by requiring that when law enforcement agencies post booking photos online, they use the preferred name and pronouns of the person in the picture.

In addition, this bill seeks to ensure that a booking photo does not remain online in perpetuity by requiring that the booking photo be removed after 14 days, unless there is a legitimate public safety reason to continue to leave up the post.

Committee staff does have one significant concern with the bill as it is currently in print. The author recently amended the section of the bill prohibiting dead naming people on social media platforms when posting a booking photo to include the following language:

A police department or sheriff’s office 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 reducing or eliminating an imminent threat to an individual or to public safety.

This amendment leaves the decision of whether or not a situation warrants dead naming entirely up to the law enforcement agency without requiring any justification beyond the agency deciding that doing so will “assist in locating or apprehending the individual.” The author may wish to strengthen this language to require evidence supporting the agency’s decision and a court order prior to posting something other than the name they were provided by the individual. Absent this, it is possible that this bill will fail to live up to the author’s intention to prohibit the public outing of transgender and nonbinary people on social media platforms.

This bill is author sponsored and supported by the ACLU, Oakland Privacy, and a number of other privacy and social justice organizations. On the other hand, the California Police Chiefs Association, the California State Sheriffs’ Association, and a number of law enforcement organizations oppose this bill.

The bill was previously heard in the Assembly Public Safety Committee, where it passed on a 5-2-1 vote.

SUMMARY: Requires that when a police department or sheriff's office shares a booking photo of someone on social media, as defined, they must use the name and pronouns given by the individual. Specifically, **this bill:**

- 1) Requires that when a police department or sheriff's department shares a booking photo of someone on social media, as defined, they must use the name and pronouns given by the individual in the post.
- 2) Limits the use of a person's former names only 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.
- 3) Requires that a booking photo shared on social media be removed within 14 days of posting unless specific circumstances exist.

EXISTING LAW:

- 1) Provides, pursuant to the California Constitution, that all people have inalienable rights, including the right to pursue and obtain privacy. (Cal. Const., art. I, § 1.)
- 2) Prohibits a police department or sheriff's office from sharing on social media the booking photos of an individual arrested on suspicion of committing a nonviolent crime unless any of the following circumstances exist:
 - a) 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.
 - b) 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.
 - c) 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(a)(1)-(3).)
- 3) Requires a police department or sheriff's office that shares a booking photo of an individual arrested for a nonviolent crime on social media to remove the booking photo from any place it was electronically posted within 14 days, upon the request of the subject of booking photo or their 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(b)(1).)
- 4) Requires a police department or sheriff's office that electronically shares a booking photo of an individual arrested for a violent felony, as specified, to remove the booking photo within 14 days upon the request of the arrestee or their representative, if the individual or their representative demonstrates any of the following:

- a) The individual's record has been sealed.
 - b) The individual's conviction has been dismissed, expunged, pardoned, or eradicated, as specified.
 - c) The individual has been issued a certificate of rehabilitation.
 - d) The individual was found not guilty of the crime for which they were arrested.
 - e) The individual was ultimately not charged with the crime, or the charges were dismissed. (Pen. Code § 13665(b)(2)(A)-(E).)
- 5) 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.)
 - 6) 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(a)(1).)
 - 7) Defines "subject individual" to mean "an individual who was arrested." (Civ. Code § 1798.91.1(a)(2).)
 - 8) 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(e).)
 - 9) 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 § 667.5(c).)
 - 10) Requires that during the initial intake and classification process, in a private setting the California Department of Corrections (CDCR) shall ask each person in private:
 - a) The individual's gender identity of female, male, or nonbinary.
 - b) Whether the individual identifies as transgender, nonbinary, or intersex.
 - c) The individual's gender pronoun and honorific. (Pen. Code § 2605(a).)
 - 11) Prohibits staff, contractors, and volunteers at CDCR from consistently failing to use the gender pronoun and honorific an individual has specified in all verbal and written

communications with or regarding the individual that involve use of a pronoun and honorific. (Pen. Code § 3605(d).)

- 12) Requires that in all documentation of a person under the jurisdiction of CDCR or imprisoned within a county jail, the new name of a person who obtains a name change to be used, and prior names to be listed as an alias. (Code Civ. Proc. § 1279.5 (d).)
- 13) 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.)
- 14) Permits a public entity to require and accept a reasonable administrative fee to correct a booking photograph. (Civ. Code § 1798.91.1(c).)
- 15) 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(d) and (e).)
- 16) 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.)
- 17) 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 § 6254(f).)
- 18) Provides the process by which a person may petition the court for a name change, including a name change to conform the petitioner's name to the petitioner's gender identity. (Code Civ. Proc. §§ 1276, 1277.5.)
- 19) Provides that a person may file a petition with the superior court in any county seeking a judgment recognizing the change of gender to female, male, or nonbinary. (Health & Saf. Code, § 103425(a).)

FISCAL EFFECT: As currently in print this bill is keyed fiscal.

COMMENTS:

1) **Purpose.** This bill is intended to do two things:

a) Prohibit a law enforcement agency from dead naming an individual if it shares or posts that individual's booking photo. Instead, the agency must use the person's affirmed name and preferred pronouns. As the author notes, this bill, in its previous version, focused on preventing the public outing of an individual on the world stage, which could ultimately subject the person to humiliation, increased discrimination, and even violence. "This remains

entirely preventable by simply using the name and pronouns given by the individual. And yet, no existing law requires the police department to respect the privacy and humanity of these individuals by using the name and pronouns provided.”

b) Require that if law enforcement does have a reason for posting a photo online, that photo must be removed within 14 days, unless:

1. The suspect is still a fugitive or an imminent threat to an individual or to public safety and continuing to post the suspect’s image will assist in locating or apprehending the suspect or reducing or eliminating the threat.
2. A court order is in place requiring the dissemination of the suspect’s image based on a finding that the dissemination is in furtherance of a legitimate law enforcement interest.
3. There is an exigent circumstance that necessitates the continued dissemination of the suspect’s image in furtherance of an urgent and legitimate law enforcement interest.

2) **Author’s Statement.** According to the author:

This bill brings more equality and justice to every Californian, by ensuring that no one is assumed of 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.

3) **The importance of requiring law enforcement to use a person’s given name and preferred pronouns, in the event a booking photo is shared on social media.** Over the past decade, the struggles of the transgender and gender nonconforming communities have become part of the American zeitgeist, particularly as various media have explored the institutional challenges facing these communities and as the history of violence against transgender people, transgender women in particular, has been highlighted in the media. In the current political environment, the attacks on LGBTQ people have increased significantly. The American Civil Liberties Union (ACLU) is currently tracking 451 anti-LGBTQ bills introduced this year throughout the country, including one in California. In addition, transgender people face extraordinary levels of physical and sexual violence, whether on the streets, at school or work, at home, or at the hands of government officials. More than one in four transgender people have faced a bias-driven assault, and rates are higher for transgender women and transgender people of color. (*The Report of the 2015 U.S. Transgender Survey*. The National Center for Transgender Equality, available at <https://transequality.org/sites/default/files/docs/usts/USTS%20Full%20Report%20-%20FINAL%201.6.17.pdf>.)

The importance of affirming a person’s new name cannot be understated. When people refuse to acknowledge a person’s new name and continue to use their old name, it can cause significant trauma and negatively impact the person’s mental health. Furthermore, when government entities, like law enforcement, refuse to use a person’s chosen name and intentionally mis-gender them, it not only is cruel and unnecessary, but it can hinder their own criminal investigations.

ProPublica investigated the impact of law enforcement deliberately using former names and mis-gendering murder victims. In an August 2018 report, they noted that they had found 65 different law enforcement agencies in the United States that had investigated murders of

transgender people since January 1, 2015. In 74 of the 85 cases they reviewed, victims were referred to by law enforcement officials by names and genders they no longer used. According to the reports, not using the name and pronouns a victim is known by can slow down an investigation if potential witnesses and others people who interacted with the victim only know them by their preferred name and gender. As police in the few agencies that routinely use victim's preferred names and gender, like the Los Angeles Police Department, pointed out, routinely and purposefully misidentifying people means that they might lose the cooperation of friends and family—the exact people they need to solve the case. (Waldron and Schwencke, *Deadnamed*, ProPublica (Aug 10, 2018), available at <https://www.propublica.org/article/deadnamed-transgender-black-women-murders-jacksonville-police-investigation>.) This legislation is intended to ensure that investigations are not, in fact, hindered by law enforcement officials persistently mis-gendering and dead naming people that they may be searching for during the investigation of a serious crime.

Along with the concerns associated with refusing to recognize a transgender or non-binary person's chosen name, in the Black community, there is a long history of Black Americans adopting new names as a way of self-determination and liberation that dates back to slavery and emancipation. There are many well-known examples: Araminta Ross, after liberating herself from slavery chose the name Harriet Tubman; in 1964, Cassius Clay became known as Muhammad Ali; born Paulette Linda Williams, the poet and playwright became Ntozake Shange; and, in 1952, Malcolm Little became Malcolm X. As the latter noted in *The Autobiography of Malcom X*, “[C]ut these black people off from all knowledge of their own kind, and cut them off from any knowledge of their own language, religion, and past culture, until the black man in America was the earth's only race of people who had absolutely no knowledge of his true identity.” (Malcolm X and Alex Haley, *The Autobiography of Malcom X*, p. 188)

Within this history is also a history of government officials and others refusing to recognize those names, similar to the experiences of people who are transgender or nonbinary. One example of this is Assata Shakur, author and former leader in the Black Panther Party and the Black Liberation Army. She was born Joanne Byron, and after marrying in 1967, she became Joanne Chesimard. In 1971, she adopted the name Assata Olugbala Shakur and has been widely known by that name for over 50 years, including as the author of her well known 2001 autobiography, *Assata: An Autobiography*. However, at the time of her arrest for her involvement in a confrontation in 1973 in New Jersey that left a state trooper dead, through her conviction and escape to Cuba, where she continues to live in exile, the FBI, New Jersey officials, and other government entities, along with many news outlets, have continually referred to her as Joanne Chesimard, rather than by the name that she is widely recognized by. In 2013, on the 40th anniversary of the confrontation in New Jersey, when the FBI decided to place her on their list of most wanted terrorists, making her the first woman on the list, they continued to refer to her as Joanne Chesimard throughout their press conference and in public statements. (Harris, *FBI makes Joanne Chesimard the first woman to appear on most-wanted list*. The Guardian (May 3, 2013), available at <https://www.theguardian.com/world/2013/may/03/fbi-wanted-first-woman-joanne-chesimard>.)

This example is notable because, as with the example above of the dead naming of murdered transgender women hindering investigations into their killing, using the former name of Joanne Chesimard, which most people would not recognize, does not appear to serve the purpose of asking the public to help find her and provide information on her whereabouts if she returns to

the United States. On the contrary, research has shown that the deliberate refusal on behalf of law enforcement officials to use the chosen name of a person and their appropriate gender not only has the potential to negatively impact the person's mental health and inflict unnecessary trauma, but it also impedes the investigations, rather than helping collect information. If a person saw a social media post or a press conference asking for information about Araminta Ross and Joanne Chesimard, for example, that person could have no idea who the FBI is looking for, even though they may have had brunch with Harriet Tubman and Assata Shakur just last week.

4) Legislative efforts to address barriers faced by transgender and non-binary communities. In recent years, the Legislature has addressed a number of hurdles faced by the transgender community. To address the barriers faced by transgender individuals going through the court process for name changes, AB 1121 (Atkins, Chap. 651, Stats. 2013) was introduced and enacted into law. It *required* courts to grant petitions for a change of name sought to conform an individual's name to the individual's gender identity without a hearing if no timely objection is made. Four years later, SB 179 (Atkins, Chap. 853, Stats. 2017) further streamlined these processes and updated the required documentation to reflect an evolved understanding of gender identity.

In 2021, AB 218 (Ward, Chap. 577, Stats. 2021) took the next step in providing more inclusive processes for the transgender and gender nonconforming communities. That bill extended the existing framework for petitioners changing their names and/or genders on their own birth certificates to further update their marriage licenses and certificates and the birth certificates of their children. It also extended eligibility for certain processes to persons not born or residing within the state and recognizes orders in foreign jurisdictions for purposes of sufficient documentation.

In the realm of criminal justice, in particular, SB 132 (Wiener, Chap. 182, Stats. 2020) specifically requires that CDCR ask each person entering prison their gender identify, preferred first name, pronouns and honorific. It further requires the prisons to use those preferred identifiers and issue CDCR identification reflecting that name and gender identity.

5) Broad definition of "social media" in the current statute. As this Committee noted in its 2021 analysis of AB 1475 (Low, Chap. 126, Stats. 2021), the code section referenced (Pen. Code § 632.01.(a)(1)) defines "social media" broadly.

6) Potential concerns with recent amendments. The author recently amended the section of the bill prohibiting dead naming people on social media platforms when posting a booking photo to include the following language:

A police department or sheriff's office 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 reducing or eliminating an imminent threat to an individual or to public safety.

This amendment leaves the decision of whether or not a situation warrants dead naming when their booking photo is posted entirely up to the law enforcement agency without requiring any justification beyond the agency deciding that doing so will "assist in locating or apprehending the individual." The author may wish to strengthen this language to require evidence supporting the agency's decision and a court order prior to posting something other than the name provided by the individual. Otherwise, it is possible that this bill will fail to live up to the author's intention to protect the privacy and prohibit the public outing of transgender and nonbinary

people on social media platforms. As an example, if the New York Police Department arrested Marsha P. Johnson and posted her mug shot and information on social media as “Marsha P. Johnson, also known as Malcolm Michaels, Jr.” it has the same effect as outing her by referring to her by her dead name. The opposition argued that the original language in the bill would lead suspects to give a false name and gender identity to muddy an investigation. If this were to happen, such an effort would be the kind of evidence that can be presented to obtain a court order to post former names.

7) **Committee amendments.** The law limiting the posting of the booking photos of people who are suspected of committing non-violent crimes has only been in place for just over one year. Giving the Legislature more time to determine the impact of that restriction seems prudent. Toward that end, the amendments *remove the expansion of this prohibition to any crime that is committed.*

So, under the bill as it will be amended, *law enforcement agencies will be required to use the given name and pronouns to identify someone in a booking photo that is shared online. In addition, dead naming anyone through the addition of aliases or former names in a posted booking photo is prohibited, unless there is a legitimate law enforcement reason.*

8) **Related legislation.** AB 223 (Ward, 2023) of this Session enhances protections for minors seeking changes of name or gender by making the proceedings presumptively confidential. This bill is currently pending in the Senate.

AB 1475 (Low, Chap. 126, Stats. 2021) limited police departments and sheriff’s departments from sharing mug shots electronically.

AB 218 (Ward, Chap. 577, Stats. 2021) extended the existing framework for petitioners changing their names and/or genders on their own birth certificates to further update their marriage licenses and certificates and the birth certificates of their children. It also extended eligibility for certain processes to persons not born or residing within the state and recognizes orders in foreign jurisdictions for purposes of sufficient documentation.

SB 132 (Wiener, Chap. 182, Stats. 2020) required the California Department of Corrections and Rehabilitation (CDCR), during the initial intake and classification process, to ask each individual entering into its custody to specify the individual’s gender identity and sex assigned at birth, as well as preferred first name, gender pronoun, and honorific. In addition, the bill required a person incarcerated by CDCR to be issued identification reflecting a gender marker consistent with the gender identity the individual has most recently specified.

SB 179 (Atkins, Chap. 853, Stats. 2017) streamlined the process by which a person could obtain a name change to conform with their gender identity and updated the required documentation to reflect an evolved understanding of gender identity.

SB 1027 (Hill, Chap. 194, Stats. 2014) prohibited a person or private entity from soliciting or accepting a fee to remove, correct, or modify a booking photograph.

AB 1121 (Atkins, Chap. 651, Stats. 2013) required courts to grant petitions for a change of name seeking to conform an individual’s name to the individual’s gender identity without a hearing, if no timely objection is made.

ARGUMENTS IN SUPPORT: American Civil Liberties Union California Action writes in support:

Our criminal justice system is built on the premise that the accused is innocent until proven guilty. The routine practice by some local police departments of posting mugshots on Facebook to shame and ridicule the arrested person 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.

With a quick internet search, a prospective employer can find information about an arrest that may not have been justified, charges that were not prosecuted, or charges for which the person was found not guilty. AB 994 addresses this problem through its general prohibition on law enforcement posting booking photos and its 14-day removal timeline for any photos that are posted due to exigent circumstances. This bill will ensure that people who come into contact with law enforcement have one less barrier to obtaining employment and housing and will not have to live in fear that a social media post will follow them forever. It is also likely to reduce some of the sources of implicit bias and stereotyping.

Prosecutors Alliance California writes in support:

In addition, some law enforcement have intentionally posted booking photos to social media with the incorrect gender pronouns and name of the arrested person. This conduct is deeply harmful not just to the individual but to the entire LGBTQI community.

AB 994 will [...] require that a booking photo shared on social media be removed within 14 days, except for limited circumstances. Finally, AB 994 will require that postings to social media use the chosen name and gender pronouns of the arrested individual, with limited exceptions for posting aliases.

ARGUMENTS IN OPPOSITION: The California State Sheriffs' Association writes in opposition:

The law being amended by this bill was only created in 2021 and did not take effect until last year. AB 994 seeks a significant expansion of a law that was negotiated to address many of the concerns that were raised during the debate. This bill rejects the limitation that was included in current law to keep the bill's reach to nonviolent crimes. The ability to post booking photos, while being restricted, left the door open for government to balance privacy considerations and the interest in communicating with the public about those who are accused of committing serious and violent crimes.

Note: provisions affecting posting of photos involving violent crimes will be removed by Committee amendments. See Section 7 above.

A coalition of police officers associations argues in their opposition letter that:

If an arrestee prefers to go by his street name of "Mickey Mouse" or any other moniker, the sheriff's department would be mandated under AB 994 to publish that information, preventing the publication of the arrestee's real name which could lead to additional information coming forward [sic] from the public.

As amended, the bill no longer precludes the listing of other names the person has used in the past, “*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.*”

REGISTERED SUPPORT / OPPOSITION:

Support

ACLU California Action
California Public Defenders Association (CPDA)
Communities United for Restorative Youth Justice (CURYJ)
Ella Baker Center for Human Rights
Initiate Justice
Oakland Privacy
Prosecutors Alliance California
Sacramento LGBT Community Center
Sister Warriors Freedom Coalition
The San Diego LGBT Community Center
The Source LGBT + Center
The Translatin@ Coalition
Transgender, Gendervariant, Intersex Justice Project

Opposition

Arcadia Police Officers' Association
Burbank Police Officers' Association
California Coalition of School Safety Professionals
California Law Enforcement Association of Records Supervisors (CLEARS)
California Police Chiefs Association
California State Sheriffs' Association
Claremont Police Officers Association
Corona Police Officers Association
Culver City Police Officers' Association
Deputy Sheriffs' Association of Monterey County
Fullerton Police Officers' Association
Los Angeles School Police Officers Association
Murrieta Police Officers' Association
Newport Beach Police Association
Palos Verdes Police Officers Association
Placer County Deputy Sheriffs' Association
Pomona Police Officers' Association
Riverside Police Officers Association
Riverside Sheriffs' Association
Santa Ana Police Officers Association
Upland Police Officers Association

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