
The Right to Be Forgotten or Not Exposed

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July 31, 2014

The ubiquitous and permanent availability of damning information on the Internet has been the source of countless news articles. Stories in the press commonly relate cautionary tales and downright horror stories about jobs, business opportunities, and apartments lost because of the persistence of one's digital footprint, particularly when that footprint is less than flattering. Now, the issue is becoming the subject of legislation in New York, elsewhere in the country and in the European market.

New York legislators are taking aim at one perceived problem—websites that make a business of publishing people's mug shots and demanding payment to take them down. These websites can be distasteful, maybe even extortionate in certain cases. But New York legislators are considering an ill-considered solution that would block the press' access to mug shots used by law enforcement, also called booking photos, until after a conviction is obtained, unnecessarily burdening journalists' ability to report the news and the public's right to receive it.

Mug Shot Websites

Mug shots or "booking photos" are generated when law enforcement personnel "book" a suspect who has been arrested. Mug shot websites obtain booking photos from law enforcement websites, public records, and other sources, and post them online. While some of these sites may do so for civic purposes (enabling people to check up on a potential tenant, employee, or date), most make money by charging a fee—reportedly in the range of \$30 to \$400 to take a mug shot down.¹ According to *The New York Times*, "many people whose images are now on display were never found guilty, or the charges against them were dropped."² "Some sites will remove photos at no cost for those who can show that charges were dropped or that they were found not guilty; others charge a fee," according to the National Conference of State Legislators (NCSL).³

And, of course, even if a hapless former arrestee pays one of these sites, there's a whack-a-mole problem. "Once on the web...the photographs can be copied and redistributed by other sites, and individuals who had charges dropped or were found not guilty can find it difficult to repair their online reputations," says the NCSL.⁴

Legislation

In the past two years, several states have passed laws to address the harms caused by these websites. Illinois passed a law making it an unlawful business practice to solicit or

accept payment for the removal or correction of photos and other criminal record information.⁵ Oregon passed a law requiring website operators to remove the mug shot of anyone who can prove that he was acquitted or whose record has been expunged.⁶ Other states have tried to restrict access to booking photos, at least in part. For example, Georgia and Utah limit the ability of law enforcement to post booking photos on the Internet and require those seeking booking photos in person to submit a statement affirming that it won't be placed on a website that requires payment to remove it.⁷

New York's proposed law falls into the latter camp, but goes much further. The bill, A8731 in Assembly and S7304 in the Senate, would prohibit law enforcement agencies from making booking photos publicly available to anyone until after a conviction has been obtained, with certain limited exceptions. It would amend New York Criminal Procedure Law §160.10 (dealing with fingerprinting upon arrest) to add language to subsection 3, indicated here in underlined text:

Whenever fingerprints are required to be taken pursuant to subdivision one or permitted to be taken pursuant to subdivision two, the photograph and palmprints of the arrested person or the defendant, as the case may be, may also be taken. During the pendency of the charge or charges brought with respect to such arrest, summons or appearance ticket, a photograph taken pursuant to this subdivision may not be made publicly available, but shall be made available (a) to a person, agency or entity performing a criminal justice function, ... upon its request, for any such function, which may when appropriate include public release of such photograph; (b) pursuant to a court order directing the release of such photograph; and (c) to the arrested person or defendant, upon his or her request.⁸

Although the stated purpose of the bill is to prevent "extortion" by mug shot websites, the explanatory statement also makes clear that it is intended to eliminate the media's own publication of mug shots on the theory that the media is a source for unscrupulous website owners:

In recent years, booking photographs, or "mug shots" as they are commonly known, have become available on the Internet. The mug shots are often released by police departments to local newspapers and other media. Following the release of mug shots to the press, Internet website owners and operators search local newspapers for mug shots to post on their websites. These owners may also obtain the mug shots from filing requests for public records. These websites are often the first results when an individual is looked up on search engines.

Misguided Policy

The New York bill is misguided for a number of reasons. First, it burdens a significant amount of legitimate, First Amendment-protected activity that is unrelated to the perceived bad conduct in question. Arrest information, including mug shots, have historically been a matter of public record. Journalists rely on booking photos as an

important resource for local crime reporting, and television productions use them in documentary, true-crime, and ride-along shows. Often mug shots can be quite revealing and may constitute legitimate news. While media organizations sometimes may be able to send a photographer to an arraignment for a photograph, that's not always possible, whether for logistical or economic reasons. The proposed law permits disclosure of booking photos after conviction, but by that time the news may be largely stale.

Second, imposing this burden on the press is unnecessary. For one thing, the bill rests on a questionable factual assumption—namely, that mug shot website operators comb the local press and collect mug shots in piecemeal fashion. Absent actual evidence, it's more plausible that these sites get their booking photos in bulk through more efficient processes like scraping law enforcement websites and freedom of information requests.

A much less intrusive solution would be an amendment to New York's Freedom of Information Law (FOIL) to create an exemption to a state agency's obligation to turn over public records⁹ when the agency has reason to believe booking photos will be used on a commercial website that charges a fee to remove them. One New York court even has read current exemptions to justify the Department of Corrections' withholding of mug shots in response to a FOIL request under such circumstances.¹⁰ A certification requirement for FOIL requests for booking photos, similar to the requirements in Georgia and Utah, is another possibility.

Third, the proposed bill is oddly toothless because it fails to directly target the bad acts (and bad actors) in question. Under the bill, it appears to be permissible to operate a mug shot website in New York, or extort payment from New York residents, so long as you get your booking photos from another state.

More fundamentally, the impetus for this legislation and the growing efforts to restrict publication of information about an individual's past misdeeds recalls an earlier controversy that media lawyers consider long-resolved. The Supreme Court has repeatedly held unconstitutional state laws that penalize the press for publishing truthful information about criminal activity when that information is obtained lawfully from official records or government agencies.¹¹ Subsequent state cases held that publishing information about past crimes is not an invasion of privacy because such information is legitimately newsworthy, even after the lapse of significant time.¹² Yet, the same motivation—to protect individuals from information about their past transgressions—is currently playing itself out to disastrous effect in connection with Europe's so-called "right to be forgotten."

In May 2014, the European Court of Justice issued a ruling that EU citizens have a right to remove material about themselves from search engine results. As a result, Google now responds to requests to remove "inadequate, irrelevant or no longer relevant" information from its search results in EU countries, subject to a "public interest" balancing test that it applies behind closed doors.¹³

Cries of censorship erupted this month when the BBC, the Guardian, and the Daily

Telegraph announced that they had received notices from Google that some of their news stories were being removed from search results on European versions of the search engine. Articles that were "disappeared" include news stories about a former Merrill Lynch executive fired over risky investments, a former soccer referee who allegedly lied about awarding a penalty kick in a 2010 match, a solicitor facing a fraud trial, and an airline accused of racism by a Muslim job applicant.¹⁴ Google, an unwilling participant in the whole thing, restored some of the links, but that raised questions about transparency and accountability in the process.¹⁵

Upon first glance, some might argue that the New York mug shot bill avoids the threat of censorship that we see with the "right to be forgotten." While it does not punish the publication of newsworthy information, it has a similar effect by cutting off the source of newsworthy information. This could be a dangerous first step where access to traditionally public information is removed out of a perceived concern that the information is being abused by certain bad actors. Yet, as explained above, less extreme measures can limit bad actors' access to booking photos without burdening the press and the public.

More importantly, under the circumstances, the choice between punishing publication and restricting access is a false one. While "the States may not impose sanctions on the publication of truthful information contained in official court records open to public inspection," [*Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469](#), 496 (1975), the First Amendment does not protect the extortionist or blackmailer simply because the perpetrator "uses words to carry out his illegal purpose."¹⁶ So there's nothing stopping New York from cutting to the chase and going directly after the wrongdoers who are misusing public information for their own purposes. In the end, the mug shot issue is an easier one than the "right to be forgotten" because there is easily identifiable bad conduct to target and a way to proceed that does not unnecessarily burden legitimate speech activities.

Endnotes:

1. David Segal, Mugged by a Mug Shot Online, New York Times, Oct. 5, 2013, at <http://www.nytimes.com/2013/10/06/business/mugged-by-a-mug-shot-online.html?pagewanted=all>.

2. Id.

3. Mug Shots and Booking Photos Websites—June 12, 2014, National Conference of State Legislators, at <http://www.ncsl.org/research/telecommunications-and-information-technology/mug-shots-and-booking-photo-websites.aspx#NJ>.

4. Id.

5. 815 ILCS 505/2QQQ.

6. Oregon Rev. Stat. §646.608.
7. Ga. Code Ann., §35-1-18; Utah Code Ann. §17-22-30.
8. The text of the bill and an explanatory statement are available at <http://open.nysenate.gov/legislation/bill/S7304-2013>. The underlined text would be added to the current law by the proposed bill.
9. The current FOIL exemptions are found in N.Y. Pub. Off. Law §87(2)(a)-(n).
10. *Matter of Prall v. New York City*, 40 Misc.3d 940, 946 (Sup. Ct., Queens Cty. May 23, 2013).
11. *Florida Star v. B.J.F.*, 491 U.S. 524 (1989); *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97 (1979); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).
12. *Gates v. Discovery Communications*, 101 P.3d 552 (Cal. 2004); *Uranga v. Federated Publications*, 28 Med. L. Rptr. 2265 (Idaho Ct. App. 2000); *Montesano v. Donrey Media Group*, 668 P.2d 1081 (Nev. 1983).
13. Gail Sullivan, "Right to be forgotten' gets real as Google wipes stories from search results," Washington Post, July 3, 2014; James Ball, "EU's right to be forgotten: Guardian articles have been hidden by Google," The Guardian, July 2, 2014.
14. Sullivan, supra; Ball, supra; Mark Scott, "Google Reinstates European Links to Articles from The Guardian," New York Times, July 4, 2014.
15. Scott, supra.
16. *United States v. Barnett*, 667 F.2d 835, 842 (9th Cir. 1982) ("The use of a printed message to a bank teller requesting money coupled with a threat of violence, the placing of a false representation in a written contract, the forging of a check, and the false statement to a government official, are all familiar acts which constitute crimes despite the use of speech as an instrumentality for the commission thereof.").

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