

Introduction

Transit system operators in New York City¹, under the auspices of the MTA, have proposed amendments to their rules of conduct². Among these amendments is a ban on photography within the city's subway and bus systems³. The MTA justifies this ban as a mechanism to "improve police officer enforcement capability" and either "enhance customer safety and security" or "customer sense of safety and security." Although the MTA's efforts to maintain order, safety, and security in their transit systems are commendable, a photography prohibition is unnecessary, misguided, and unworkable. A photography prohibition also unnecessarily interferes with the public's use and enjoyment of the transit systems. A prior photography prohibition in the affected facilities was repealed when it was found that the prohibition actually decreased safety.

Security through Obscurity

The MTA's explicit justification for the photography ban⁴ indicates that the photography ban is a "security measure," although it fails to describe how such a ban would actually improve security. The most that can be said for the prohibition is that it would improve

¹ Transit operators affected are the New York City Transit Authority (NYCTA), operator of the city's subway system and portions of its nonfranchise bus system; the Manhattan and Bronx Surface Transit Operating Authority (MaBSTOA), operator of the remainder of the city's nonfranchise bus system; and the Staten Island Rapid Transit Operating Authority (SIRTOA), operator of the Staten Island Railway (SIR), also referred to as Staten Island Rapid Transit (SIRT). These operators come under the umbrella of the Metropolitan Transportation Authority (MTA). Together, NYCTA and MaBSTOA comprise the whole of "MTA New York City Transit" (NYCT); SIR is referred to as "MTA Staten Island Railway." Collectively, these operators are "MTA transit operators." The proposed amendment has no direct immediate impact on the city's private franchise bus operators or other operators under the MTA umbrella.

² Notice NTA-47-04-00002-P, titled "Use of Transit Facilities," was published as a notice of proposed rulemaking in the New York State Register on November 24, 2004. In accordance with the section 202 of the State Administrative Procedure Act (SAPA), the MTA transit operators must solicit public comment for a period at least 45 days long before submitting the proposed amendments to a vote of the MTA board. Although the 45-day period closes on January 8, 2005, the notice specified that comments will be accepted through January 10, 2005, the next business day following January 8, a Saturday. It appears that SAPA does not require the MTA transit operators to conduct any public hearings prior to a board vote and the adoption of any rule amendments, because such provisions are not apparent in the statutes that create the MTA transit operators and grant their rulemaking authority. Section 1204(5-a) of the Public Authorities Law (Pub A) for NYCTA; Pub A 1203-a(3) for MaBSTOA; and Pub A 1266(4) for SIR.

³ The proposed amendment as it pertains to photography in NYCTA and MaBSTOA facilities is embodied in section 1050.9(c) of volume 21 of the New York Consolidated Rules and Regulations (21 NYCRR). "No photograph, film or video recording shall be made or taken on or in any conveyance or facility by any person, except members of the press holding valid press identification cards issued by the New York City Police Department or by others duly authorized in writing to engage in such activity by the authority. All photographic activity must be conducted in accordance with the provisions of this Part." The proposed amendment to 21 NYCRR 1040.4(f) is similar, but relates to photography in SIRTOA facilities and inserts the words "SIRTOA or" after "such activity."

⁴ Paragraph 3(b) of the Notice of Proposed Rulemaking's Regulatory Impact Statement reads: "in light [sic] recent national and international events that have underscored the need for heightened security measures throughout the transit system, a reinstatement of a prohibition that existed until the early 1990's against photography, filming, and video recording in transit facilities and on transit conveyances without prior authorization except for members of the press."

the perception of security. It is evident that the measure is an attempt to strengthen “homeland security” as an element of the “war on terror” that was sparked by the events of September 11, 2001. Certainly, it is desirable to foil the enemies as a part of this war. Prohibiting photography seems, at first glance, as if it would prevent these enemies from gaining knowledge of what we view as both a precious asset and a possible target.

A photography prohibition attempts to create an atmosphere in which transit systems are safe because photographic documentary evidence of them and their workings is sparse and well-controlled. This is an environment of “security through obscurity,” which should not be confused with an environment that is secure by virtue of actually being secure. Security through obscurity is the bait that attracts the casual observer to a false sense of security. Someone subscribing to the notion that obscurity and security are equivalent neglects the very real possibility that, in spite of efforts to cloak the inner workings of a system, individuals will discover through other means the very attributes intended to be hidden.

Obscurity is further complicated in the case of a public transportation system, because by definition, much of it cannot be hidden from the public. Many of a system’s components are and must remain visible and accessible. Preventing individuals from photographing these components does not prevent them from viewing, remembering, and describing them.

Clearly, some of the most sensitive parts of any transit system’s infrastructure are located in areas off-limits to the public’s eye. A photography ban is not required to prevent photographs of these areas from being taken. Any unauthorized individual in a position to so much as look at such elements is already trespassing at the very least.

The photography prohibition also ignores the vast number of photographs of transit systems that have found their way into personal albums and even into widespread circulation on the Internet. These photographs already exist, as do descriptions and diagrams of more technical operations. The implementation of a photography ban in the near future cannot reduce the volume of photographs of transit systems already in existence.

Furthermore, some amount of documentation of a transit system must be provided to the public. MTA transit operators publish maps and timetables in order for the riding public to make effective use of their transit systems. Although some of this information is required by statute⁵, its withdrawal even in the absence of such statute would render a transit system useless to those who need to use it. This information seems both as innocuous and at the same time at least as threatening as any photograph taken within a transit facility. The very existence of this information serves to limit whatever benefits might be realized through any amount of obfuscation.

⁵ Pub A 1204(16-a) requires the publication of timetables for NYCTA facilities; Pub A 1203-a(9) requires the same of MaBSTOA.

Under this analysis, it is evident that limitations placed on photography actually do very little to improve security. They may promote the sense of security, but if that sense is false, the restrictions may actually serve to make transit systems less secure by creating an unwarranted feeling of complacency when actual security has yet to be achieved.

Any policy that improves the actual security of transit systems ought to be explored and implemented. Any policy that claims to do the same but fails threatens to decrease security by substituting for it a false sense of security. These policies must not be tolerated.

The Threat of Photography to Safety and Security

There has been no documentation, by the MTA or by any other governmental entity, either directly or by reference, showing that photography introduces any negative impact to the safety or security of a transit system. The most that can be said for prohibiting photography is that there is a mild speculation that photographs may be employed in planning a security breach. Even so, this mild speculation alone is sufficient only to create a limited presumption of suspicious activity when the subject of the photography is considered "critical infrastructure." Transit operators and law enforcement officers already have the requisite authority to investigate incidents of suspicious activity when photographic activity, in combination with other factors, rises to a level warranting investigation.

Upon investigation of suspicious activity, any individual with sinister motives, whether taking photographs or not, is in violation of more than just the rules of conduct. These people are conducting criminal acts, and may be prosecuted regardless of the rules of conduct, and regardless of the adoption of a photography ban.

An Analysis of the Effects of a Photography Prohibition

Employed as a rule of conduct, a photography ban is powerless to prevent photographs of transit systems from being taken and retained⁶. Specifically, there is no mechanism by which photographs that have been taken may be confiscated from the offender. As such, the sole function of a photography ban would be to serve as a deterrent against photography, and to collect fines from those who do choose to photograph. Even so, the fines are relatively insignificant to the extent that those determined to take photographs of a transit system will do so, paying any fines incurred while continuing to amass a growing archive of photographs.

Compare these penalties to the criminal penalties already available to be used against those planning to breach the security of a transit system. Unlike the small fines that the TAB is empowered to assess, criminal courts are able to impose punishments commensurate with the nature of the violations.

⁶ Pub A 1204(5-a) provides that violations of established rules of conduct may be punished by a maximum \$25 fine and 10 days' imprisonment when heard in a court of competent jurisdiction, or by a maximum \$100 fine when heard by the Transit Adjudication Bureau (TAB). The TAB handles most citations for violations, absent other grounds to remove the case to a court of general jurisdiction. The TAB sets its own schedule of fines.

The only people who will quell their photographic activities in response to a ban on photography are those who are aware of the prohibition and who do not wish to incur a potential fine. The only people who fall into this category are some, but not all, of those who would engage in harmless “snapshot” photography. Considering that the only photographs that can be prevented are harmless ones, a ban on photography seems counterproductive. A ban would not suppress photographic activity by tourists, dedicated amateur journalists, amateur photographers, enthusiasts, and even those with criminal motives, even when they are aware of the ban, because the value of the photographs to these people exceeds the risk of incurring a fine.

The Incredible Shrinking Camera: An Enforcement Problem

With the rapid advancement of technology, it is now possible to produce small cameras in volume and at reasonable prices. The camera has become so small that it has been integrated into other devices. It is not uncommon for cameras to be components of modern telephones and personal organizers. The decreasing sizes of cameras and their integration into other devices tends to limit their conspicuousness, which in turn limits the efficacy of any attempt to enforce a prohibition on their use.

Assuming it is possible to identify and prevent the use of every consumer camera on a transit system, and to direct enforcement efforts at such use, empirical and anecdotal evidence might indicate 100% success in curtailing photography. However, the concealed use of shrinking and integrated cameras poses a threat that will only become more significant as we progress into the future. It is impossible to enforce a ban on items that can't be readily detected. As in the case of security through obscurity, observers are lured into a false sense of security. Although there may be no visible photography, there is little that can be done with regard to concealed efforts.

Allocation of Resources: Another Enforcement Problem

Under a no-photography regime, law enforcement officers will have cause to stop any tourist, amateur photographer, or amateur journalist who attempts to take a photograph in a transit system. Law enforcement officers are an integral component in maintaining peace and imposing order, and play a major role in maintaining the security of transit systems. Every law enforcement minute spent handling a tourist taking a snapshot is a minute that would be better spent if dedicated to seeking out turnstile “swipers⁷,” fare evaders, and even those who chose to breach security.

As it stands now, law enforcement officers already have the discretion and authority to investigate individuals using a transit system for non-transit purposes⁸. Although

⁷ “Swipers” are the modern equivalent of “token-suckers,” having dispensed with tokens and replaced them with unlimited-ride fare media from which they illegally sell entry to a transit system. Michael Luo, “Subway Headache: MetroCard Devices Often Need Repairs,” *The New York Times*, February 3, 2004, section A, page 1, column 6.

⁸ 21 NYCRR 1050.6(c), 21 NYCRR 1050.11, and 21 NYCRR 1050.12 for NYCTA and MaBSTOA; 21 NYCRR 1040.3(e) and 21 NYCRR 1040.12 for SIRTOA.

photography is expressly permitted under the current rules⁹, there has been no showing that this has interfered with any efforts directed at improving security. The breadth of the non-transit prohibition tends to allow officers to investigate, eject, or issue a notice of violation to any individual engaging in activities that threaten the security of a transit system.

The MTA claims that it has considered, as an alternative, a rule that only prohibits the photography of sensitive areas, but rejected it because of the uncertainty inherent in allowing law enforcement officers to exercise their own judgment¹⁰. Obviously, the enforcement of any rule will require law enforcement officers to use judgment and discretion, and when necessary, the judgment and discretion of a court having jurisdiction. Blanket prohibitions do not make it any easier to enforce against wrongdoers; they merely make it easier to prevent those innocent of any wrongdoing from conducting harmless activities.

I ♥ NY: Tourism

New York City's transit systems are so much a part of the city that they are more than just a means of transportation for the millions of visitors hosted annually¹¹. The subways, often romanticized with such descriptions as "the lifeline of the city," are themselves an attraction.

Tourists who visit the city will want pictures of our transit systems just as much as they will want pictures of the other attractions. They will take snapshots of their visits to New York, and they will want to do so just as much on the city's transit systems as anywhere else in the city. The subways and buses of the city are as much an appropriate backdrop for memories forged during a trip to New York as the skyline, streets, and parks. It is arbitrary and inappropriate to deprive these tourists of the ability to document and retain memories of their visits.

Amateur Photography: Transit Art and Transit Enthusiasm

Just as transit systems provide the backdrop for much of tourists' visits to New York, they provide the atmosphere for an important part of the daily lives of New Yorkers. The accessibility of the city's transit infrastructure to the general public has reinforced

⁹ 21 NYCRR 1050.9(c): "Photography, filming or video recording in any facility or conveyance is permitted except that ancillary equipment such as lights, reflectors or tripods may not be used. Members of the press holding valid identification issued by the New York City Police Department are hereby authorized to use necessary ancillary equipment. All photographic activity must be conducted in accordance with the provision of these Rules."

¹⁰ Paragraph 8 of the Notice of Proposed Rulemaking's Regulatory Impact Statement, as pertaining to photography: "Alternatives: Consideration was given to restricting photography, etc. of sensitive areas only. However, it was felt that a less restrictive approach would not yield the necessary security enhancements and given the nature of the activities in question enforcement of a rule which required law enforcement personnel to make a judgment as to the precise subject matter being photographed would be highly problematic."

¹¹ 39.4 million visitors projected in 2004. Source: NYC & Company.

this to the point where it is more convenient than ever to travel between two points within the city solely by transit¹².

With transit systems as important as they are to riders, it is no surprise that they will become the objects of art or documentation portraying what has become a part of the natural environment. Similarly, it is unsurprising that transit systems will become the objects of harmless enthusiasm. Pride in the city's transit infrastructure ought to be encouraged, not suppressed. Historical preservation, enthusiasm, and pride are all elements that the MTA's own New York Transit Museum in Brooklyn seeks to promote. The Museum and other organizations sponsor exhibits and excursions, which many visitors would not attend were it not for the ability to experience and photograph transit history. Even if these excursions were to be exempt from the photography ban, a prohibition on transit photography would limit the number of artifacts that might otherwise be preserved for a future generation's Transit Museum. A photography prohibition seems fully incompatible with the Museum's principles, and the principles of expression.

Furthermore, transit systems, due to their ubiquity, are the natural site of many photographs whose content is entirely non-transit in nature. There is no more justification for restricting photography of humorous signs, interesting people, or curious objects which are incidentally found within a transit system than there is for restricting pictures being taken of the same subjects in any other setting.

Passes: Press and Otherwise

The proposed photography ban contains an exception for members of the press with credentials issued by the New York City Police Department (NYPD), and for those with written permission of the transit system operator. NYPD press credentials carry an unnecessarily high bar that effectively excludes amateur, freelance, and even professional journalists who do not routinely do "beat" reporting in the city¹³. Their purpose is to control press access to crime and emergency scenes within cordoned-off areas delineated by police and fire lines, a purpose which seems distinct and distant from controlling photographers' access to public areas of transit systems.

There has been no indication that any MTA transit system operator would offer written permission to amateur journalists, photographers, or tourists who wish to take photographs within the transit systems. Previous attempts to obtain such permission, which is currently not necessary to take photographs in transit facilities, have failed and were met by erroneous assertions that photography is currently prohibited. Furthermore, much photography by nature is conducted spontaneously, without the photographer being afforded the requisite time to apply for and wait for the approval of a photography pass.

¹² The city's "One City, One Fare" initiative, in effect since 1997, has contributed to a surge in ridership.

¹³ The NYPD requires a letter from a news director or editor and recent samples of the applicant's work.

Mixed Messages

MTA spokesman Tom Kelly was quoted saying that the proposed prohibition “is not meant to stop the average person from taking photos¹⁴.” However, the plain language of the proposed amendment leaves no room for this construction. It is a reckless abuse of power to adopt a rule that is incapable of accurately communicating itself. It is also inappropriate to misrepresent the content of the proposed rule, especially during the critical period when it is subject to public comment. If Mr. Kelly is correct, and the prohibition is intended to target terrorism and not “average people,” the rule should be worded as such. Concerns about ambiguity in the rules are raised in other proposed amendments. The same diligence should be applied in adequately identifying the classes of people and activities a photography ban seeks to restrict.

News FLASH! Photography Enhances Safety, Security, and Compliance

The opportunity for individuals to take photographs within a transit system is beneficial to public safety, system security, and compliance with the rules of conduct. When cameras are permitted to circulate freely throughout a system, they will be able to document and record conditions and events as they occur. The risk of being photographed only serves to enhance the deterrent function of the rules of conduct.

There have been incidences of individuals using their cameras to document unsafe conditions or illegal behavior within transit facilities. Law enforcement officers cannot be expected to be in all areas of a transit system at once, but with passenger volume as high as it is in New York, odds are in the favor of there being many passengers present to witness any potential incidents. A photography prohibition eviscerates any advantage that this secondary avenue of enforcement offers. On the contrary, an encouragement of passenger photography would reinforce the deterrent effect against any individuals engaged in improper behavior, and provide evidence against such individuals in the event of a prosecution. This would be an excellent extension of the MTA’s current campaign encouraging “whistle-blowing¹⁵.”

It is interesting to note that a prior prohibition on photography in transit facilities was lifted for this very reason. The former photo ban, worded identically to the one now proposed, was rescinded in late 1992 in response to the case of a woman who was fined for taking pictures of dangerous conditions in a subway station¹⁶. In that instance, the woman was attempting to notify the operator of the dangerous conditions so that they might be repaired. After unsuccessful complaints, she sought to provide evidence of the conditions in the form of photographs. Rather than deriding her for attempting to improve the state of a station, the ban that served no useful purpose was repealed, in recognition that, at worst, photography is an innocuous activity. At best, it is the means through which individuals can help ensure the safety and security of the transit systems they frequent by working together with transit system operators toward that end.

¹⁴ Adam Hutton, “Camera Shy,” *amNewYork*, November 30, 2004, page 1.

¹⁵ The MTA’s “If You See Something, Say Something” campaign has been in effect since 2002.

¹⁶ Ellis Henican, “Fotog Focuses on TA Failures,” *Newsday*, July 21, 1992, page 6.

Conclusion

To achieve the stated goals of improving safety and security, robust security policies should be developed. A photography prohibition will do nothing to improve security and has the potential to damage security by altering perceptions while allowing insecure conditions to flourish. It is difficult to enforce, and does not enable law enforcement officers to discharge their duties with any greater ease than they currently enjoy. It directly limits the safety of transit systems, and curbs an otherwise viable enforcement avenue. It interferes with the otherwise legitimate use and enjoyment of transit systems. In light of the foregoing, it is my strong recommendation that there be no adoption of a general ban on photography.

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