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SOCIAL MEDIA MISTAKES AND THE CALIFORNIA ERASER BILL

Theron Christensen and Chad Marler¹

Recent surveys indicate that an average of nine unemployed workers compete for every job opening in the United States.² Consequently, standing out to beat the competition is increasingly important. Previously this entailed excelling in the job interview, but with the advent of social media, successful employment outcomes can hinge on proper management of one’s online presence. In fact, some companies now hire specialty groups that conduct social media background checks on job applicants.³ One fumbled Facebook post can ruin a college student’s chance to be admitted to a prestigious university, and one tasteless tweet can disqualify an otherwise satisfactory applicant for a lucrative job offer.

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As society becomes increasingly tethered to technology, helping children better manage their personal online behavior becomes critical. SB-568, otherwise known as the “eraser” bill, will allow California minors to correct social media mistakes that might otherwise jeopardize their public image. By increasing the online anonymity of California minors, the bill will protect them from the consequences of their poor online behavior. We argue that while this unprecedented piece of legislation is well-intentioned, it is ultimately too problematic to achieve its said purposes. We recommend consideration of the objections raised in this paper before the bill goes into effect in January 2015.

After a brief overview of the bill’s background, we will divide our argument into five sections. Section II discusses how part two of the eraser bill is flawed due to ethical issues stemming from excessive anonymity. Section III argues that the bill’s age specificity is impractical and has potentially negative economic impacts. Section IV claims the bill’s ambiguous wording will offer online companies an easy escape from its constraints. Section V explores the bill’s jurisdiction practicality. After reviewing the previous arguments, Section VI concludes that due to the complications within the bill, the best course of action is to repeal SB-568.

I. BACKGROUND

As evidenced by the Bill of Rights, Americans have always cherished their privacy and their right to speak freely. Even in colonial times anonymous letters to the editor allowed for the honest expression of politically moving public opinion because they provided a means to say what otherwise might have been kept private. But the expression of public opinion is not the only advantage provided by anonymity. For instance, over 20 million Americans currently suffer from disorders left untreated because they fear their privacy will

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be compromised if they reveal their symptoms.\(^5\) However, with the advent of anonymous online threads and forums, more people are willing to discuss their symptoms without fearing negative social feedback. These Internet support groups are a promising resource for medical researchers, offering data not likely to be obtained in laboratory settings.

After reviewing some of the significant benefits of online anonymity, it is not surprising that the authors of SB-568 want to make these benefits available to young social media patrons. The eraser bill, recently signed by California Governor Jerry Brown, gives leniency to Internet patrons still learning to manage their behavior in the cyber world. It will allow minors to make certain mistakes and fix them without suffering the normal consequences. Consider the following example: In February of 2013, Justin Carter, a Texas teenager, was arrested for alleged online terrorist threats. After a round of online gaming, Justin was messaged by another gamer who called him “[messed] up in the head.” In retaliation, Justin sent “a sarcastic message” to the other gamer in which he mentioned shooting someone—which he quickly followed with “lol” and “jk.” Nevertheless, Justin was arrested and taken to a San Antonio prison. Justin’s father made the statement, “I definitely see the need to investigate [this,] but at some point during the investigation there has to be some common sense.”\(^6\) Justin’s father and others like him would most likely support the eraser bill, hoping that it might solve similar problems by expanding online privacy for minors.

The eraser bill is divided into two sections. The first section requires that all social media refrain from advertising certain products to minors, such as tobacco, spray paint, and ammunition, which already cannot be legally sold to minors.\(^7\) The second part of the bill requires all social media to allow California minors to delete (or


\(^7\) S.B. 568 § 22580(i), 2013 (Cal. 2015).
at least anonymize) unwanted posts, messages, and tags.\textsuperscript{8} In other words, Internet image management and the reconciliation of online mishaps will become a little bit easier for California residents under the age of eighteen.

The author of the bill, Tem Darrell Steinberg, said his motivation for drafting the bill stemmed from the following hypothetical situation. Imagine a teenage girl—call her Sally—innocently beginning an online search for fashion. Online dietary supplement marketers, alerted by Sally’s search, flood the girl with ads for diet pills through her Facebook account. “That was where my radar went off,” Steinberg said. “I have a teenage daughter. [This hypothetical situation] was the clearest example of how an appropriate activity, by a teenager, using great technology, can easily be turned . . . a way that can harm them.”\textsuperscript{9}

Though the internet does pose definite threats to minors, the eraser bill may not solve these problems as it intends. The bill, as will now be shown, may have unanticipated negative consequences. While the legislation is appealing, significant complications have been overlooked in the eraser bill, and these should be considered.

\textbf{II. Excessive Anonymity and Its Consequences}

As previously stated, the Eraser Bill will increase online anonymity for minors, which may unintended consequences. Consider the following quotation from a concerned mother in Oregon, who highlights some of these problems:

\begin{quote}
Oregon shouldn’t follow California’s example on this unenforceable, misleading law. It’s corrosive to imply to teenagers that being a good person is just a matter of proper image
\end{quote}

\textsuperscript{8} Id. at § 22581(a)(1).

management. It also doesn’t do teens any favors to enable their most immature online behavior, as if the hurt they inflict could be deleted with video-game ease.\footnote{Susan Nielson, \textit{An Internet “Eraser” Law Would Hurt, Not Help, Oregon Teens}, OREGON LIVE (Sept. 28, 2013, 12:05 PM), http://www.oregonlive.com/news/oregonian/susan_nielsen/index.ssf/2013/09/susan_nielsen_an_internet_eras.html.}

Giving children an “online eraser,” though it helps to correct embarrassing mistakes, may discourage personal responsibility and ownership of behavior. Removing the consequences of poor decisions might lead children to wonder why they should make the right choice at all.

Imagine a Plato-inspired scenario where Sally (our hypothetical teenage girl) receives a ring that can turn her invisible. She is a well-intended youth, but this new power enables her to do things in public that she had never considered doing before.\footnote{Plato, \textit{The Republic} (Benjamin Jowlett trans., Book II, 358d—361d) (inspiring the scenario of gifting a powerful ring of invisibility to a young girl).} With her total anonymity, and without the social consequences normally associated with her actions, what will direct her choices now? It may be that Sally will make socially offensive choices, simply because she can without any social repercussions. Even if Sally is determined to act appropriately and not abuse the power to become invisible, all her actions are now effectively detached from corresponding social consequences. In other words, Sally can no longer see the difference between the social consequences of appropriate actions and inappropriate actions—for there are no social consequences at all. Further, if the consequences of her actions had previously been the unique factor helping her distinguish between good and bad decisions, Sally will now be unable to identify whether a choice is socially appropriate because all choices appear to be equal. Thus, Sally has no references for decision-making and she is more likely to choose that which under normal circumstances would be socially offensive.
While the consequences of the eraser bill may not be so dramatic, the bill’s implementation may put California minors in a similar predicament: they will be making choices without having to consider social consequences. Although California’s youth will likely still maintain some level of appropriate online behavior, other problems arise from the increased anonymity.

The eraser bill could potentially protect a malicious adult posing as a minor due to the difficulty of accurately deriving the age of Internet patrons (which will be discussed more fully in Section II). With a delete button at their fingertips, online abusers will be less concerned about the consequences of their actions, especially the risk of getting caught. In 2006, a 49-year-old woman created an online profile of a teenage boy who then flirted with a 13-year-old girl, Megan Meier. After the fake boy said the world would be a better place without her, Megan committed suicide.12 Had the eraser bill been in place in 2006, the woman posing as a minor could have erased her online fingerprints (since she was considered a minor online). Although this woman was not convicted, her involvement with this suicide might never have been discovered. While the eraser bill intends to protect minors online, it has the potential to create an environment in which cyber prowlers and predators can thrive.

III. Age Specificity and Advertising Restrictions

As the previous section demonstrates, the eraser bill’s age specifications make it unrealistic. The bill’s intentions to protect only those under the age of eighteen13 simply cannot be enforced. Some advocates of the bill might suggest that age identification is not an issue because most social media providers already require minor or adult verification upon registration. They admit that patrons can lie about their age, but supporters still hold that requiring age verifica-

13 S.B. 568 § 22580(d), 2013 (Cal. 2015).
tion on social networks is enough to make the bill tenable. However, since the bill restricts advertisements by age, every patron whose age is inaccurately represented in the online universe will slip through the cracks of the bill’s jurisdiction inflicting several unintended consequences.

Correct age distinction is crucial in implementing the eraser bill, yet implementing the bill may cause even more Internet patrons to lie about their age. For instance, suppose Sally is now an adult, but she wants to take advantage of the bill’s protection from unwanted advertisements. She lies about her age in order to claim the protection reserved for California minors. If many other Internet patrons take the same course of action to avoid unwanted advertisements, the profitability of advertising through social media would decrease. This would in turn result in revenue loss for online social media providers, like Facebook, who thrive off of online advertisers. Consequently, some social media providers may no longer be able to offer their services without charging consumers for their use. Consider the following statement by the Information Technology and Innovation Foundation, ITIF, revealing the magnitude of Internet commerce:

It is surprising that policymakers would want to tamper with one of the most successful drivers of economic activity in the United States as the national economy struggles to rebound from a recession. Let’s be clear—the Internet is a critical component of the economy both globally and domestically. [The ITIF] estimates that the annual global economic benefits of the commercial Internet equal $1.5 trillion.\(^\text{14}\)

Legislators drafting this bill may not have considered its potential economic impacts. By restricting Internet commerce, the eraser bill may not only negatively influence social media providers financially, but also adversely affect numerous businesses that advertise through social media.

Despite the ITIF’s urging lawmakers to not tamper with online advertising, some may think that blocking online advertisements will have little impact on the California economy. Even if they are right, privately provided resources already exist for those looking to block online advertisements. For instance, the free application Adblock Plus restricts unwanted advertisements on four of the most commonly used web browsers. It can even be downloaded on some types of phones. The app is entirely capable of blocking all ads on social media sites such as Facebook and YouTube.\footnote{Adblock Plus, https://adblockplus.org/en/firefox (last visited Feb. 21, 2014).} Since the Internet already provides efficient means to deflect unwanted advertisements, the eraser bill will unnecessarily apportion limited government resources to fixing a problem adequately solved by the private market.

To summarize, the difficulty in accurately identifying the age of every Internet patron will likely have a negative impact on the California economy by incentivizing adult Internet users to lie about their age. Thus, part one of the eraser bill cannot be enforced or fulfill its intended purpose. Furthermore, the consumer benefits of restricting social media advertising can already be obtained through the private market, thus negating a need for legislative solutions.

IV. Escape by Exemption

Both part one and part two of the eraser bill will force companies to significantly alter their advertising strategies. In order to comply with new laws, companies will have to change integral software for web and mobile systems. Since companies are unlikely to receive compensation for these changes, they will likely seek exemption from the bill’s constraints. Conveniently, the bill’s poor and ambiguous wording provides ample opportunities to qualify for exemption.

Section 1 part (e) of SB-568 contains one such loophole, which specifies that only social networks serving a predominantly minor patronage can be held liable to the bill’s terms.\footnote{S.B. 568 § 22580(e), 2013 (Cal. 2015).} To claim exemption
from the bill, online companies would need only to show that their audience is *predominantly* comprised of adults. Even a children’s toy store that advertises through social media could easily show that adult spending comprises most of their online sales, thereby becoming exempt from the bill’s jurisdiction.

If a social media provider or a website that advertises through social media cannot claim its site to be predominantly frequented by adults, there is yet another way to claim exemption from the bill. This second loophole is in Section 1 part (g), which states that no website is required to gather age specification from their patrons.\(^\text{17}\) This incentivizes social media sites to simply stop collecting age information from their patrons so as to avoid hindering their progress or marketability. Theoretically, companies could claim exemption from the bill without any real legal or commercial repercussions. The eraser bill is flawed in that it is far too simple to opt out.

Holes like these will cause SB-568 to choke itself out of application and usefulness, leading one to wonder what the bill will ultimately accomplish. The bill’s promises offer solace to some concerned parents, but in reality the forthcoming California laws cannot fulfill their pledged protections. Not only was the bill drafted without sufficient consideration of social and economic consequences, but it also lacks the legal robustness necessary to withstand real-world application.

V. Internet Jurisdiction

Perhaps an even stronger ground for rejecting the bill’s implementation is that the bill simply attempts to bite off more than it can chew. Part one of the bill will impose regulations on certain forms of online advertising, the vast majority of which are regulated as interstate commerce. Since the regulation of interstate commerce is a power given specifically to the federal government,\(^\text{18}\) this area of law is a field over which state legislatures should not assume authority. California lawmakers, therefore, cannot require interstate and

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\(^{17}\) *Id.* at § 22580(g).

\(^{18}\) *U.S. Const.* art. I, § 8, cl. 3.
international social media companies to make special allowances exclusively for their state.

The case *Southern Pacific Co. v. Arizona* clearly demonstrates this point. In 1912, Arizona lawmakers passed legislation that restricted interstate and intrastate trains to seventy cars, which led to significant commercial burdens for interstate train companies. The U.S. Supreme Court ruled the Arizona law unconstitutional because it “seriously interfere[d]” with interstate commerce. The court ruled,

\[\text{[T]he states have not been deemed to have authority to impede . . . free flow of commerce from state to state, or to regulate those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority.}\]

California’s eraser law steps into the field of interstate commerce, whose stewardship belongs to the federal government. Defenders of the eraser bill might argue that the bill will only impede commerce that is already restricted to California minors (such as handguns, ammunition, ultraviolet tanning, and fireworks); thus, the bill will not seriously interfere with the flow of interstate commerce. While they may be correct in their claim, defenders of the bill have overlooked a critical point. The underlying premise of California’s eraser bill is that if a product or service is not in the best interest of the state or its citizens, it can be regulated by state legislation. This is not sufficient to guarantee the constitutionality of the law.

Consider, for example, the case of *Philadelphia v. New Jersey* in 1976. New Jersey lawmakers passed a law making it illegal to import garbage from other states. They based this legislation on the

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20 *Id.* at 767.
21 *Id.*
22 U.S. Const. art. I, § 8, cl. 3.
23 S.B. 568, § 22580(i), 2013 (Cal. 2015).
premise that it would improve the condition of the state—similar to the premise that the eraser bill will improve the moral condition of California. The court concluded that garbage is commerce and ruled the New Jersey law unconstitutional. New Jersey lawmakers justified their garbage ban based on state values and welfare interests, but these reasons were not sufficient to ratify such a law. If laws are instituted based solely on state interests, they may disregard key constitutional principles and processes—namely, that the interests of the state do not necessarily align with the interests of the nation.

If such legislation becomes necessary for the American people, it should be considered at a federal level and not in the state of California. Without this principle of essential national unity and deference to higher authority, one state’s legislation may disregard and impose on the stewardship of other states, the federal government, and even other nations.

VI. Repeal

In its current form, the eraser bill simply cannot fulfill its promises. Increasing online anonymity has greater potential to hurt rather than to help California minors, since it detaches youth from the consequences of their actions. This detachment may result in an increase in cyber bullying. Also, the bill’s age specificity requirement will be difficult to enforce and will likely have negative effects on the profitability of social media advertising. Furthermore, the private market already provides a solution for blocking unwanted advertisements through web browser add-ons. The bill is written in such a way that the targeted companies would likely find exemption from its protective measures, which raises questions about the vacuity of the bill. Finally, the bill oversteps California’s legal jurisdiction. For all these reasons, SB-568 should be repealed and the issue left for consideration at the national level.