Are California's Groundbreaking Laws Constitutionally Sound?

By Katie Rucke

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Last week, California Gov. Jerry Brown (D) signed more than 36 pieces of legislation into law. Though some of the bills Brown signed were related to implementing the state health insurance exchange under the federal Affordable Care Act, others were arguably groundbreaking measures intended to protect certain vulnerable people in our society, such as children who use the Internet.

But as news of these laws broke, many began to question whether or not the state was overstepping its bounds and passing laws that were a violation of the U.S. Constitution.

Ban on revenge porn — a violation of the First Amendment?

As Mint Press News previously reported, Brown signed a law outlawing "revenge porn," which involves posting sexual photos of a former partner online in an act of revenge to publicly shame their ex-romantic partner.

The law is intended to protect people who exclusively shared photos with their partner during a relationship from a harmful invasion of privacy and applies so long as one of the involved parties lives in California.

Many revenge porn photos end up on websites that specialize in posting such materials and often charge victims a fee to remove the photos from the website. For example, MyEx.com charges $499 to remove photos from the website within 72 hours, but there is no guarantee that the photos can't be posted to the website again or to any other website.

Though the bill, loopholes and all, has mostly received support from the public and anti-revenge porn advocates, some groups, including the American Civil Liberties Union, expressed concern that the law was a violation of the First Amendment — specifically, the freedom of speech.

The ACLU argued that if someone wanted to share a photo that had political implications or contained evidence of a crime, the law may prohibit a person from sharing it.

In its objection, the ACLU said, “The posting of otherwise lawful speech or images even if offensive or emotionally distressing is constitutionally protected. The speech must constitute a true threat or violate another otherwise lawful criminal law, such as stalking or harassment statute, in order to be made illegal.The provisions of this bill do not meet that standard.”

While the ACLU objected to the laws possible infringement of First Amendment rights earlier this year, the civil liberties organization didn’t object to the final version of the California revenge porn ban since the language of the final draft said a person had to actually experience emotional distress to file a lawsuit, instead of just proving an ex-lover had posted the photos with the intent to “cause serious emotional distress.”

But in an interview with Mint Press News, Mary Anne Franks, a professor at the University of Miami Law School who is currently working with legislators in Wisconsin and New York to create a bill to outlaw revenge porn, said that the law does not violate the First Amendment.

Franks said that the ACLU’s objection was “interesting” because it misstated current doctrine.

When asked about lawmakers in Florida scrapping a piece of legislation that would ban revenge porn, Franks said the bill didn’t die because of concerns related to the First Amendment — in fact, she said the bill was tabled by a committee because so many questions were asked about the bill.

“I know a lot of people intuitively said that the California law violates free speech,” Franks said, adding that the First Amendment doesn’t apply to everything we do.

Franks said it’s worth remembering that there are several different categories of speech that are not protected by a person’s freedom of speech, including threats, obscenity, defamation and child pornograpy.

Eugene Volokh, a professor of law at the University of California Los Angeles School of Law agrees with Franks that the law is constitutional because it is so narrowly drafted. He said while many restrictions on speech are ruled unconstitutional in the name of privacy, this law is different because information such as what one looks like while naked is not an unconstitutional privacy restriction.

Internet eraser law

As Mint Press News previously reported, Gov. Brown also signed a piece of legislation into law that would grant children under the age of 18 the legal right to have content they posted on the Internet, including tweets, photos and Facebook posts, removed if they so desired.

Starting Jan. 1, 2015, all Internet website operators, online services, online application and mobile applications will be required to remove specific posts and photos at a minor’s request, especially if the material has the potential to harm their reputation. The key word is “remove,”

since website owners do not have to delete any of the content, they just have to make it inaccessible to other users of the website.

The Center for Democracy and Technology, a nonprofit group that advocates for an open Internet, has also taken an issue with the legislation, saying that the measure could lead to minors having less access to the Internet.

"We are principally concerned that this legal uncertainty for website operators will discourage them from developing content and services tailored to younger users," the group said, "and will lead popular sites and services that may appeal to minors to prohibit minors from using their services."

Since the Internet doesn't have state boundaries, Mali Friedman, a lawyer at the San Francisco office of the national law firm Covington & Burling, said that most websites will simply comply with the rules of the most restrictive state.

Vague language in the legislation has left some wondering whether a person has to currently be a minor when they ask for a post to be removed, or if an adult can ask to remove something they posted when they were a minor. Others are wondering if the law will apply to all websites in the U.S. or just those based in California.

Volokh said that because of its ambiguity, this law may be a violation of the constitution and pointed Mint Press News to an opinion piece at Forbes that explains why the Internet eraser law is not only unconstitutional, but just bad legislation:

"This law is just the latest attempt by legislatures to tell content database managers how to manage their databases–an endeavor that legislatures have repeatedly proved that they are terrible at doing (see, e.g., the Fair Credit Reporting Act). Given how the law substantially overlaps with current industry best practices, it's mostly annoying because it imposes extra compliance costs for little benefit.

"However, to the extent it overrides the limited cases where websites/apps would justifiably choose to restrict content removal, the law may harm the information ecosystem. It's a legislature's choice to preference the individual interests of minors over these social considerations, though it's probably a poor choice. Given that it won't actually provide minors with a well-functioning digital eraser, the choice appears even more puzzling."

One of the flaws Forbes contributor Eric Goldman points to in the law is that the legislation may be in violation of the dormant Commerce Clause in the U.S. Constitution, which gives the ability to regulate interstate commerce solely to the U.S. Congress. In other words, while states have power granted to them under the Tenth Amendment to exercise legislative power over state constituents, no state has the legal or constitutional ability to make and enforce laws for those in other states.

Goldman also says that because the law would restrict the type of advertising that can be directed at minors, the legislation is a violation of the First Amendment and provides examples of just how this law could be problematic:

"Example 1: A newspaper prepares a collection of stories, written by teens, about their first-hand experiences with cyber-bullying. These stories are combined with other content on the topic: articles by experts on cyberbullying, screenshots of cyberbullying activity online, and photos of victims and perpetrators. After the newspaper publishes the collection, one of the teenagers changes his/her mind and demands that the newspaper never reprint the collection, and seeks a court order blocking republication. Does the newspaper have a potential First Amendment defense to the court order? Yes, and I don't think the question is even close."

NDAA — California Liberty Preservation Act

Though passed back in May by California state lawmakers, Gov. Brown signed AB-351 into law last week, making it state policy to not comply with the federal mandates under the National Defense Authorization Act of 2012 to indefinitely detain a person without due process.

California is not the only state to pass legislation or legally challenge the NDAA, citing violations of First and Fifth Amendment rights, but California's law is the most aggressive yet. How federal lawmakers respond to the California law may influence other states' decisions to launch a legal battle against the NDAA laws.

The NDAA legislation has faced opposition from groups such as the ACLU, Amnesty International, Human Rights Watch, the Center for Constitutional Rights, the Cato Institute and the Council on American-Islamic Relations.

The ACLU says it is concerned about the law because the scope of indefinite detentions is "particularly dangerous because it has no temporal or geographic limitations, and can be used by this and future presidents to militarily detain people captured far from any battlefield."

California Rep. Tim Donnelly (R-San Bernadino), one of the authors of the bill, said that by definition, an indefinite detention or government kidnapping is "throwing away the basic foundations of our Constitution." He said that the new law will "prevent California from implementing indefinite detention for any reason."

If other states opt to follow California's footsteps and pass similar legislation, Judge Andrew Napolitano said that "widespread noncompliance can make a federal law 'nearly impossible to enforce.'"

While the federal government has yet to comment on California's new anti-NDAA law, some opponents of AB-351 say that the U.S. Constitution's "supremacy clause" prohibits states from not following federal orders. However, according to the Tenth Amendment Center, the federal

government "cannot 'commandeer' the states to carry out its laws," which the Supreme Court has affirmed multiple times:

"In each of these cases, the Supreme Court made is quite clear that their opinion is that the federal government cannot require the states to act, or even coerce them to act through a threat to lose funding. Their opinion is correct. If the feds pass a law, they can sure try to enforce it if they want. But the states absolutely do not have to help them in any way."

Future challenges

Though challenges against any of California's recently passed laws have not yet occurred, Gov. Brown may find himself in court over many of the laws.

The National Rifle Association has already threatened to sue the state if Brown signs a piece of legislation that expanded the definition of an assault weapon to include semi-automatic rifles with a detachable magazine or those using fixed magazine holding more than 10 rounds of ammunition. SB-374 would also outlaw most types of assault rifles and place a ban on the sale of semi-automatic weapons, including rifles commonly used for hunting.

The NRA says that the bill is unconstitutional because it violates the Second Amendment, which grants an individual the right to possess a firearm. However, California's state constitution does not guarantee the right to bear arms, making California the strictest state when it comes to gun control laws.

Brown has until Oct. 13 to decide whether or not to sign the legislation.