

Testimony of

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Mr. Chairman and members of the Subcommittee, let me first express my deep appreciation for the opportunity you have given me to address this vital issue of national policy. I am Robert O'Neil, Director of the Thomas Jefferson Center for the Protection of Free Expression, a non-partisan, non-profit organization in Charlottesville, Virginia. Among our Trustees are Norman Dorsen, Brit Hume and Sissy Spacek, though I should make clear that time constraints prevented me from seeking the Board's concurrence to the testimony I will offer here. Our Center files amicus curiae briefs in a host of free speech and free press cases, and I have been privileged to testify before Congressional committees on issues as varied as campaign finance reform and expression on the National Mall and in national parks.

As a lifelong specialist in constitutional law, I am in my forty-sixth year of teaching about the First Amendment, most recently for twenty five years at the University of Virginia and last semester at the University of Texas. I have written on a variety of First Amendment issues in both legal and general publications.

The issue before you this afternoon has a special urgency, which I share. Not only is cyber bullying a most venal and intolerable abuse of the freedom of speech that Internet users enjoy but, because of new and vastly different technologies, cyber bullying has eluded sanctions that protect potential victims of more traditional abuses such as stalking, threats and the like. And because of the interstate nature of such abuses, new federal legislation is critically needed. This subcommittee is clearly the optimal source of such sanctions. I applaud your initiative in addressing this challenge. I might add that the First Amendment and media communities seem quite ready, despite their firm commitment to free speech, to support such legislation if it recognizes and protects expressive interests.

Recent events only heighten that sense of urgency. When a federal district judge several weeks ago set aside the conviction of the most celebrated cyber bully in the case involving the harassment of Megan Meier, that action was clearly proper. Despite the creativity of those who charged the perpetrator, Lori Drew, her conviction stretched the Computer Fraud and Abuse Act well beyond its proper scope. That statute is critically needed to address a host of potential electronic abuses – but not this one. Thus Judge

Wu did the cause a favor by making clear the need for an Act of Congress that more precisely meets the need posed by cyber bullying.

The challenge in this, as in so many situations that involve dangerous or harmful expression, is to separate speech that is constitutionally protected from speech that may be punished consistent with the First Amendment. That task is singularly difficult in the United States, since we are the only developed nation that steadfastly refuses to criminalize “hate speech.” Indeed, the Supreme Court has made clear that even hateful and deeply hurtful words are presumptively entitled to First Amendment protection – a view that even neighbors and allies as near as Canada do not share. Uniquely, our courts insist that speech even of the most venal sort may be punished only if it falls within one of the few clearly defined exceptions to the First Amendment. But the key word here is “presumptively.” And the challenge facing us is to identify possible exceptions that might warrant imposing federal penalties on cyber bullying despite the presumption of protection. I would not have agreed to join you this afternoon if I did not believe that can and should be done.

Several possibilities have been suggested, though closer scrutiny reveals that most of them are no more helpful than the Computer Fraud and Abuse Act. First, let’s consider threats. The Supreme Court in the *Watts* case strongly implied (and lower federal courts regularly assume) that “true threats” may be punished consistent with the First Amendment, though there are differences in the scope of that exception. Congress adopted over a decade ago a law that criminalizes electronic threats; though it has been infrequently applied, First Amendment scholars assume as I do that it comports with First Amendment constraints. Though some messages that constitute cyber bullying might be criminalized under the electronic threat statute, many others would probably not meet the Supreme Court’s properly rigorous definition of “threat.” Thus, despite partial help from this source, we should explore other possible sources.

We face similar limitations with the doctrine of “incitement,” which forty years ago the Supreme Court recognized in the *Brandenburg* case as a permissible limit on free speech. But in so doing, the Justices imposed conditions that would be virtually impossible to meet in a cyber bullying case – that the targeted speech must pose a direct threat of “imminent lawless action” with a high probability such action would promptly ensue. However

grave the danger that cyber bullying ultimately poses for its victims and their families, meeting the incitement standard would be virtually impossible.

The Supreme Court has also recognized a First Amendment exception for “fighting words” – language so provocative that it would almost certainly trigger immediate violence from the person to whom it is directed. But the major problem here is that “fighting words” must occur in a face-to-face situation. Even an inflammatory telephone message probably would not be covered. An Internet message, even addressed to a named person, could not possibly meet the properly high standards that must be met in order to convict a speaker for uttering fighting words.

Another recognized exception – this one for libel and slander – yields no greater promise. Although a victim of cyber bullying would almost certainly be a non-public figure and thus unhampered by the *New York Times* privilege and other exceptions the Supreme Court has crafted, criminal sanctions for defamatory statements would be highly suspect – even if the messages sent by a cyber bully could be meaningfully subjected to the kind of truth/falsehood analysis that a libel claim would demand. Once again, a well recognized exception fails to offer helpful guidance here. Much the same could be said for “invasion of privacy,” the constitutional status of which is less clear than defamation, and the applicability of which here also seems doubtful.

Only one other promising path remains – intentional infliction of emotional distress. Clearly this long recognized tort claim fits the facts; if a cyber bully’s heinous messages do not constitute such an intentional act, it would be hard to find a closer match. There are, however, several possible obstacles along that path. For one, the Supreme Court has not been especially friendly to this cause of action. When the late Reverend Jerry Falwell sued Hustler Magazine publisher Larry Flynt, the Justices startled First Amendment observers by reversing the intentional infliction claim (the only surviving issue on which Falwell had prevailed) on First Amendment grounds.

There were, however, special circumstances in that case that might not encumber a cyber bullying charge. Most notable was the highly visible public figure status of Reverend Falwell, which clearly barred a libel claim for the offending Hustler copy. His status also caused the majority to express grave doubts about the viability of an intentional infliction claim

tied, as it had been, to a *New York Times*-barred libel suit. (These doubts arose from the special circumstances of the case. Although the Justices seemed to leave open the possibility of an intentional infliction claim that could meet the “actual malice” standard of the *Times* case, the evidence so clearly established such animus on Flynt’s and Hustler’s part that the ruling seemed to foreclose even that remote prospect if the plaintiff was a public figure.) So let’s assume for the moment that the *Falwell/Hustler* case does not so clearly discredit intentional infliction that we should abandon this theory when it comes to cyber bullying.

There is at least one other potential obstacle. Intentional infliction has historically been the accepted basis for a civil tort remedy. In the civil context, the prototype case is familiar: As a cruel joke or hoax one person sends what in the old days would have been a telegram (today an e-mail) expressing feigned condolences upon the death of the recipient’s father or mother or other close relative, when in fact the person mentioned is in perfect health. The victim of such a vicious prank may sue for intentional infliction, as many have over the years. A damage award in such a case has never been assumed to abridge First Amendment freedoms – as the Justices noted somewhat grudgingly in the *Falwell/Hustler* case before turning to the public figure problem. While the precise basis for such an exception has not been fully defined, a close analogy to fraud, deceit, inducement and other expression that is never deemed worthy of constitutional protection naturally arises. So we may assume that in its traditional civil setting, a remedy for infliction of emotional distress should pass muster.

The ultimate question we now face is how differently a criminal sanction for such abusive speech would be viewed. I am unaware of any other context in which intentional infliction has been made unlawful or criminal penalties have been seriously considered. Those states that have already passed cyber bullying laws seem to assume the validity of such sanctions, and although at least one such case was recently filed under the Missouri statute, there seems to have been no ruling on the constitutional issue there or elsewhere. So let us assume that, in the absence of any judgment to the contrary, a case can be made for applying this historically accepted civil tort remedy in a criminal setting.

Given the several uncertainties I have noted, and clear recognition that we are charting new legal terrain, let me strongly urge consideration of two conditions I believe would enhance the prospect for a cyber bullying

criminal statute. The first would be to require proof not only of the type of vicious intent that is prescribed by the draft now before this committee, but to add a more specific element of “targeting” a particular victim as the object of that intent and of the messages that constitute the charged offense. Such a requirement has proved helpful in the “true threat” context, and should be equally persuasive here as well. While I could not say that omitting such a condition would cause a cyber bullying statute to fail, its inclusion would seem to me not only prudent but also relatively easy for prosecutors to satisfy.

The other element may be a bit more of a challenge, but I do urge its careful consideration. Civil suits for intentional infliction have been greatly enhanced by proof of impact or effect. Including such a requirement in a federal cyber bullying law would in my view be extremely helpful. Clearly evidence of a reaction as drastic as Megan Meier’s suicide would not be necessary; indeed the number of cyber bullying cases with so tragic a result should remain mercifully few. But it would be a rare charge of provable electronic bullying that lacked any evidence of harmful consequence – mental or physical illness, time lost from school or work, deterioration of performance, etc. In the application of such a law I would expect courts and juries to be relatively sympathetic and flexible in meeting this condition, so that almost any evidence of effect or impact would suffice. Proof of harmful effect or impact has been crucial in analogous contexts such as criminal neglect, for example.

What seems to me critical, and potentially beneficial, is that in crafting such a law this subcommittee and the Congress demand some such proof of harm, reflecting not only your understanding of the gravity of the offense but also of the need to satisfy First Amendment limitations. I believe you can do both and thus constitutionally target cyber bullies for truly unconscionable speech.

I would be most happy to answer any questions now or to provide information or elaboration to the Subcommittee staff at any time. Thank you for affording me this opportunity to present my views on this vital issue.