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Testimony of

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Concerning

The Megan Meier Cyberbullying Prevention Act (H.R. 1966); The Adolescent Web Awareness Requires Education Act (H.R. 3630)

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I am pleased to have been asked to testify on H.R. 1966 (the "Megan Meier Cyberbullying Prevention Act") on behalf of the Cato Institute, where I serve as an Adjunct Scholar.

I approach the problem presented by this legislation not from the vantage point of a legal scholar, however. The Subcommittee, I'm certain, has ample access to members of the professoriate as well as to scholars at the various think tanks with which the Nation in general and Washington in particular are blessed. Indeed, I appear today on behalf of the libertarian Cato Institute, which over the years has presented cogent scholarly studies of many pieces of legislation that have posed threats to American liberty. But I believe that Cato has asked me to appear, and the Subcommittee has invited my testimony, because I have considerable real-world experience as a criminal defense and civil liberties trial lawyer and author who – having never served in government office – has a particular view of the role that certain types of federal legislation play in the day-to-day life of the Republic and in the lives of its citizens.

I have seen, in particular, the ways in which unwise legislation – legislation often born of good intentions – has adversely affected individuals investigated for or accused of federal crimes. Many of these individuals, including (but hardly limited to) clients of mine, have wondered how they could have been investigated, prosecuted, convicted and even sentenced to prison for engaging in conduct that a reasonable person would not have believed to lie within the ambit of the criminal law. Sometimes such a person's actions are within the range of entirely civil and proper, while at other times they

approach the edges of the socially acceptable. But unless one's conduct is clearly over the legal line, shock is a perfectly understandable reaction to a criminal charge.

This Subcommittee, as well as other subcommittees and committees of the Congress, has heard much testimony in recent years objecting to proposed legislation on grounds of federalism – the notion that the federal government has been unduly encroaching on areas of life and commerce that in theory were supposed to have been regulated by the states. One could pose a cogent critique of the proposed "Cyberbullying" legislation on such grounds, in my view, but this is not my purpose today. One could also point out, as other scholars and organizations have, that criminal legislation has been imposed on areas of American life that should not be subject to criminal law and criminal sanctions – a phenomenon known as "overcriminalization" – and that this law would represent one further step in that dangerous direction. But arguing overcriminalization is not my purpose today.

Rather, I wish to focus on another, often overlooked aspect of the proposed "Cyberbullying" legislation, growing out of its *vagueness*.

My assessment and criticism of the bill lie primarily in the area of due process of law enshrined in the Fifth Amendment, with consequent repercussions for First Amendment free speech rights. I believe that this law would not be comprehensible to the average citizen – and, indeed, to the average lawyer or judge for that matter. It does not help understanding, of course, when vague terms such as "intimidate, harass, or cause substantial emotional distress" are used in a *criminal* statute to define *verbal* conduct that can land one in federal prison. A typical citizen cannot be expected to

understand how and where to draw a line, not only because of the inherent vagueness of the terms, but also because in this instance the prohibited conduct involves solely speech – and speech, citizens are taught to believe from kindergarten on, is (or at least is supposed to be) free in America.

Hence, it is the combination of Fifth Amendment due process notions and First Amendment free speech doctrine that makes this proposed legislation particularly lethal to liberty interests. This presents us all – legislators and citizens, laymen and lawyers, political activists, scholars, and everyone who speaks his or her mind virtually every day in this often fractious (but thankfully free) nation of ours – with a profound challenge: How can we protect legitimate societal interests without posing traps for the unwary innocent?

My perspective on this, as I've said, is a product of four decades of experience as a criminal defense and civil liberties trial lawyer, as well as a civil liberties activist and a frequent writer on these phenomena. In these capacities, I have dealt directly with the socially unhealthy curtailments of free speech and of due process by the uses – and misuses – of various kinds of regulations aimed at curtailing "harassment," "hostile behavior," and other such vague terms around which this legislation is built. (In the context of this legislation, it is likely that the term "behavior" is referring primarily, if not exclusively, to speech.) Often born of good intentions, these legislative efforts have, almost without fail, produced unintended consequences, including excessive and unfair prosecutions as well as the inhibition of the sometimes unruly verbal interactions that are, and should be, the product of a free society.

As one can see from my *curriculum vitae* that I am submitting separately to the Subcommittee, a significant portion of my legal career has been devoted to defending academic freedom on American college and university campuses. I have litigated and advocated extensively on behalf of college and university students and faculty members in campus administrative tribunals – people who have been charged with and often disciplined for violations of campus "harassment" codes. In many of those cases, the "harassment" has been nothing more than expression of speech clearly, or at least arguably, protected by free speech and academic freedom standards. (In public universities, of course, First Amendment protections directly apply, while students and teachers at private institutions must rely on those institutions' voluntary adherence to traditional principles and protections of academic freedom.) I wrote about this problem – the serious threat to academic freedom as well as to the well-being of students who are trying to get through college without unfair blemish to their records and reputations – in my co-authored 1998 book, *The Shadow University: The Betrayal of Liberty on America's Campuses* (Free Press, 1998; paperback currently in print from HarperPerennial), a copy of which I am providing to the Subcommittee. (An appended excerpt demonstrates the intractable problems encountered in trying to enforce, in the context of the campus equivalent of a criminal proceeding, a code that employs such terms as "harassment" in order to penalize speech.)[1]

Indeed, a 1992 incident at my *alma mater*, the Harvard Law School, demonstrates in very stark terms the problematic results of punishing, or even merely threatening to punish, harsh but constitutionally-protected expression. After the tragic

murder of Professor Mary Joe Frug, a feminist legal scholar at the New England School of Law, the *Harvard Law Review* published one of her unfinished articles, a spirited and sometimes offensive critique of law and mores from a radical feminist perspective. In response, a group of students on the *Law Review* staff wrote a biting parody of the article – a critique not only of the ideas presented in the piece, but also of the decision by the august *Harvard Law Review* to run a piece of unfinished scholarship for what some deemed unacceptably politically correct reasons. An outcry against the student parodists ensued. A group of Harvard Law School professors belonging to the school's disciplinary committee – known as the Administrative Board – concluded that such "verbal harassment" could be penalized only if there were a regulation or code prohibiting such speech.

The Harvard Law faculty, in a moment when emotion clearly overcame loyalty to academic freedom and free speech principles, promptly adopted such a speech code, dubbed a "sexual harassment" code. Harvard Law School now has the equivalent of its own "bullying" statute, and the state of parody and discourse at the school is much the poorer. Indeed, the annual April Fools' Day publication of the satiric *Harvard Law Revue*, which contained the aforesaid parody of the feminist legal scholar's article, ceased publication shortly thereafter.[2] Parody and satire are, of course, very important tools of critical thought and political and social expression in our society generally, and in academia in particular. Aside from the untoward social, political and intellectual consequences of discouraging the free exchange of ideas by means of a code so vague that students speak out on "hot button" topics at their own considerable risk, one needs

to consider the unfairness of threatening to ruin a student's educational record because he or she operated on the misunderstanding that America is a free country and that campuses, in particular, value uninhibited and robust speech.

Such is the free speech mischief encountered by an academic institution's attempt to outlaw, under the rubric of "harassment," all manner and kind of unpleasant, acerbic, unsettling speech. The problem has arisen at many other campuses, and the judicial response, when litigation has been initiated by students, has been unambiguous: several federal district courts and courts of appeals have rejected the use of such vague terms as "harassment" in the context of restrictions on unpleasant campus speech.[3]

Consider, for example, an incident in 2008 at Indiana University – Purdue University Indianapolis (IUPUI). A university employee/student was found guilty of racial harassment for reading a book titled *Notre Dame vs. the Klan: How the Fighting Irish Defeated the Ku Klux Klan*. In a letter announcing and justifying the charges, the IUPUI administration explained that the student "used extremely poor judgment by insisting on openly reading the book related to a historically and racially abhorrent subject in the presence of your Black coworkers."[4] Facing public pressure, and recognizing the questionable legal grounds on which the decision stood, IUPUI dropped the harassment charges in May 2008. This episode exemplified how a campus "harassment" code can be stretched to cover activity as innocuous as reading literature on a controversial subject.

To be sure, there are differences between a university setting (where freedom of inquiry and of expression are of the utmost importance) on the one hand, and that of

society at large (where *reasonable* restrictions are more tolerable). Nonetheless, my experience with suppression of speech on campuses, and the case law striking down these harassment codes, are pertinent to this bill. Whether on a campus quad or in a public park, the same line of reasoning applies: In a free society, people will be offended, feelings will be hurt. Yet separating unsavory speech – even quite clearly disagreeable and offensive speech – from *criminal* conduct is absolutely imperative in a democratic system that celebrates freedom of expression.

The Supreme Court of the United States, in a unanimous decision in the 1988 case of *Hustler Magazine, Inc. vs. Falwell*, 485 U.S. 46, reaffirmed that even painful parody is constitutionally protected by the First Amendment. In that landmark case, *Hustler* publisher Larry Flynt used a fake Compari liquor ad to suggest that his ideological adversary, Reverend Jerry Falwell, had lost his virginity in a drunken encounter with his own mother in an outhouse. The point made by the justices was, and remains, that the First Amendment must protect even very offensive and unsettling speech. “From the viewpoint of history it is clear that our political discourse would have been considerably poorer without” such depictions, concluded Chief Justice William Rehnquist. This was in a *civil* litigation context where a defamation plaintiff was claiming that he was the victim of Flynt’s magazine article that constituted “the intentional infliction of emotional distress.” A unanimous Supreme Court, recognizing that indeed painful distress was inflicted, nevertheless reversed a *civil* money judgment against the publisher. It is perfectly obvious that a *criminal* charge would have fared even more poorly under constitutional scrutiny.

The Subcommittee is now considering a bill that would *criminally* penalize painful language that seeks to inflict distress. The bill would apply only to speech, rather than to the myriad physical actions that typically accompany a harassment claim in, for example, the workplace. Hence, not only would enactment of this statute provoke a veritable storm of constitutional litigation, but it would, even in the absence of litigation, create a chill over a vast expanse of unpleasant but protected speech. And, it bears repeating, the definitions used are exceedingly vague.

Current law, both state and federal, bans a considerable array of speech that society, state and federal legislatures, and the courts agree constitutes either a criminal threat (*e.g.*, extortion) or a genuine tort. Furthermore, the law governing free speech has for a very long time outlawed, in either a criminal or civil arena, speech that might otherwise be protected but that transgresses acceptable *time*, *place* and *manner* requirements. For example, it would be constitutionally protected to drive up and down a street at 3 o'clock in the afternoon (appropriate *time*), with a loudspeaker (effective *manner*, given the need to have one's political message heard), in the Downtown part of a city (appropriate *place* for public campaigning) touting one's preferred candidate for political office. The same message would be considered a tort or even (in an extreme case) a crime (such as "disturbing the peace") if one were to deliver it via loudspeaker in a *residential* neighborhood at 3 o'clock in the *morning*.

Those prepared to enact this bill must ask themselves whether the protection of speech (in particular) from undue curtailment is somehow invalidated simply because the *means* employed to transmit unwelcome messages happen to be electronic. In

other words, if this bill were drafted with identical language, but "electronic means" were replaced by "printed means," would the constitutional conflicts be any more, or less, apparent? Such a bill would expose the ranks of newspaper reporters, for example, to criminal prosecution for causing "substantial emotional distress" in fulfilling their democratic watchdog responsibilities. An exposé of corrupt (or even some ordinary) political activity surely causes "emotional distress" to its subject. Should these same words, when transmitted via electronic means, cause their author to fear the wrath of federal criminal law? It is vastly important, as our society becomes increasingly technologically oriented, that protections of our fundamental freedoms be applied to new modes of communication as well as to the traditional modalities.

One may claim that curtailing political expression is not the intent of this legislation; instead, it is meant to stop "cyber bullies" from causing distress to minors. Nowhere in the language of this proposed legislation, however, can any such assurance be found. To have Congress jump into the fray surrounding the control of offensive messages sent over electronic media – especially by means of a legislative vehicle which uses a vague concept like "hostile behavior" and "harassment" that causes "substantial emotional distress" – would be more of a trap for the unwary than a useful social tool. Not only is the proposed "Cyberbullying" statute vague by its own terms, but the array of speech that it would discourage surely is vast, since people tend to severely limit their speech when they even think that they *might* otherwise roam into prohibited territory. Thus, *vague* statutes also function, invariably, as *overbroad* prohibitions in that in

practice they prevent an array of speech far broader than the presumed statutory target.

My current book, *Three Felonies a Day: How the Feds Target the Innocent* (Encounter Books, September 2009), deals with a wide variety of injustices caused by unacceptably vague federal criminal statutes. (I am submitting a copy of the book along with this presentation and my testimony.) This book is written from the perspective of a trial lawyer who has seen these statutes wreak havoc with the law and with people's lives, and threaten the balance between governmental authority and civil society. The book contains some legal analysis, but primarily it is meant as a description of how vague statutes function, in practice, as a tool of terror and true prosecutorial harassment in the lives of ordinary as well as extraordinary people.

In my book, there are many examples of the mischief caused by vague criminal statutes in all areas of civil society. One chapter examines how the federal anti-corruption laws, on account of vagueness, are used to unfairly harass and prosecute governmental officials, state as well as federal. I have appended to this written submission an excerpt from the text that seeks to explain the nature and scope of the problem posed by vague criminal statutes.[5]

There is, in my view, currently a veritable epidemic caused by the proliferation of prosecutions based upon vague federal statutes. I was readily able, from my own litigation experience as well as from research done on other cases, to pinpoint myriad inappropriate prosecutions of many an unwary innocent citizen in the medical community, the medical device and pharmaceutical manufacturing industry, investment

houses, bankers, lawyers, accountants and auditors, academics, artists, newspaper reporters, merchants, as well as public officials. The time has come, it seems to me, to *reduce or eliminate* – rather than to enlarge – the number of these affronts to liberty and fair treatment of our citizens. It is difficult enough for a law-abiding citizen to keep track of all of his or her *clear* legal obligations. We citizens should not be faced with an ever-growing number of vague statutes that threaten liberty by failing to define precisely what conduct might constitute yet another new felony.

I selected the title of my book – *Three Felonies a Day* – from a notion that occurred to me when I was defending one after another client whose conduct was, in my view, particularly innocuous, and who faced serious felony charges nonetheless. My thought was that a typical professional gets up in the morning, has breakfast, sends the children off to school, goes to work, spends the day dealing with matters that entail the use of the mails or other facilities of interstate communication or commerce, comes home, has dinner, puts the kids to sleep, finishes the day's newspapers, and goes to sleep. Little does such a citizen know that he or she has likely committed three arguable federal felonies that day – a problem that would ripen into a life-unsettling event only if somehow he or she were to come within the sights of a federal prosecutor. Congress should be seeking to lessen this problem, not add to it. In my view, the "Cyberbullying" bill creates more problems than it could possibly solve, especially in view of the fact that existing law is already more than adequate to deal with truly outrageous or dangerous harassment.

[1] Appendix 1.

[2] I have written about this controversy, available at http://thephoenix.com/Boston/News/65590-Parody-flunks-out/, and have appended to this submission a copy of my article. (Appendix 2.)

[3] In April 2009, the *Harvard Law Review* criticized a decision from the U.S. Court of Appeals for the Third Circuit in which the court struck down a harassment code at Temple University (*DeJohn v. Temple University*, 537 F.3d 301 (3d Cir. 2008)). Kelly Sarabyn, former Jackson fellow at FIRE, wrote on *the Torch* (FIRE's blog: http://www.thefire.org/torch/) that this *HLR* comment disregarded a string of federal court decisions that struck down campus harassment codes. Sarabyn listed the cases and citations:

> *Dambrot v. Central Michigan University*, 55 F.3d 1177 (6th Cir. 1995) (declaring university discriminatory harassment policy facially unconstitutional); *College Republicans at San Francisco State University v. Reed*, 523 F. Supp. 2d 1005 (N.D. Cal. 2007) (enjoining enforcement of university civility policy); *Roberts v. Haragan*, 346 F. Supp. 2d 853 (N.D. Tex. 2004) (finding university sexual harassment policy unconstitutionally overbroad); *Bair v. Shippensburg University*, 280 F. Supp. 2d 357 (M.D. Pa. 2003) (enjoining enforcement of university harassment policy due to overbreadth); *Booher v. Board of Regents*, 1998 U.S. Dist. LEXIS 11404 (E.D. Ky. Jul. 21, 1998) (finding university sexual harassment policy void for vagueness and overbreadth); *The UWM Post, Inc. v. Board of Regents of the University of Wisconsin System*, 774 F. Supp. 1163 (E.D. Wis. 1991) (declaring university racial and discriminatory harassment policy facially unconstitutional); *Doe v. University of Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989) (enjoining enforcement of university discriminatory harassment policy due to unconstitutionality).

[4] A video produced by the Foundation for Individual Rights in Education (FIRE), a nonprofit organization of which I am the Chairman and co-founder, can be accessed at: http://www.thefire.org/article/10067.html.

[5] Appendix 3.