



September 30, 2009

Chairman Robert C. Scott  
Subcommittee on Crime, Terrorism,  
and Homeland Security  
U.S. House of Representatives  
Washington, DC 20515

Ranking Member Louie Gohmert  
Subcommittee on Crime, Terrorism,  
and Homeland Security  
U.S. House of Representatives  
Washington, DC 20515

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Re: Subcommittee hearing on ‘Cyberbullying and Other Online Safety  
Issues for Children’  
H. R. 1966, the “Megan Meier Cyberbullying Prevention Act”  
H. R. 3630, the “Adolescent Web Awareness Requires Education Act  
(AWARE Act)”

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TREASURER

Dear Chairman Scott and Ranking Member Gohmert:

On behalf of the American Civil Liberties Union (ACLU), we offer this statement for the record in connection with the Crime Subcommittee’s hearing on ‘Cyberbullying and Other Online Safety Issues for Children’, H. R. 1966, the “Megan Meier Cyberbullying Prevention Act”, and H. R. 3630, the “Adolescent Web Awareness Requires Education Act (AWARE Act).” The ACLU is a non-partisan organization with more than a half million members, countless additional activists and supporters, and 53 affiliates nationwide. While recognizing the concern many Americans have about reported incidents of online bullying of young people, we urge the Subcommittee to avoid taking steps that would criminalize protected first amendment speech and, instead, to support programs that would educate and inform children, parents and educators about online risk prevention and Internet safety practices.

The Internet presents new ways for people to communicate with each other – but it does not inherently change behaviors associated with intimidation and harassment that have been present in human society for centuries. Reported incidents of online harassment have produced heartbreaking stories with which all Americans sympathize. From these reports, one can conclude that online harassment is on the rise. But it is also well-documented that online communication generally is increasing exponentially and so it is only logical that incidents of online bullying would also be increasing.

Interpersonal harassment has not come into existence by virtue of the Internet – it is safe to assume that it has been around as long as humans have inhabited the earth. People have harassed and intimidated others face to face, through third parties, through the mails, by telephone, across the airwaves, and – now – via Internet communications. This does not serve to

minimize the problems associated with Internet-based bullying and harassment of young people. Rather, it demonstrates that the focus should be on the bullying and harassing behavior and not on the means by which it is communicated. To think that serious harassment only occurs online is to miss the true nature of the phenomenon. The parent of one victim of harassment recognized as much when he said, “Even though what happened to [my son] happened online as well, it really started in school. I think that’s the first step that a lot of states are missing.”<sup>1</sup>

Criminalizing speech online is unconstitutional and will be ineffective. Harassing speech will either continue online in violation of the law or it will simply shift to other spheres within which it simultaneously exists. Moreover, the scope of ‘bullying’ speech is likely to fall short of the constitutional standard requiring the existence of a ‘true threat’.<sup>2</sup> H. R. 1966, for example, criminalizes online speech intended to intimidate a person, among other things. Unfortunate as it may be, many communications are intended to be intimidating to one degree or another – but should not be rendered criminal in nature. Can a lawyer vigorously assert a client’s rights in email communications to opposing counsel? Can a radio listener send an email to a call-in show vigorously disagreeing with something said on air? Certainly they should be able to do so – especially in the absence of making a personal threat to do harm.

Courts have looked to whether the speech in question is a true threat.<sup>3</sup> Many of these cases reflect truly disturbing communications – but not all of them are deemed to be the kind of actual threat sufficient to justify restricting an individual’s right to speak freely. In the case of most bullying behaviors – including most cyber-bullying, it is not at all clear that the communications can be viewed as the kind of threat that courts say justifies federal proscription. An attempt to ban such behavior must be narrowly drawn and it must closely define its terms so that there is no question – in the minds of law enforcement or in the minds of the general population – precisely what types of communication are banned.

A better approach, in our view, is to inform children, parents, and educators about the risks and opportunities associated with online communications. H. R. 3630 and related bill H. R. 3222 both have elements aimed at doing so. The latter bill, in particular, would direct grant funds to the development of Internet safety education programs and would provide training and tools to teachers and parents to help keep young people in a position to use the Internet safely. The former bill – H. R. 3630 – puts a greater emphasis on crime awareness which in our view misplaces priorities about the Internet, which should be viewed as a vast and expanding resource and not primarily as a place of criminality and intimidation. However, the bill also includes some of the same opportunities for education of children, parents and educators and, as such, represents a better step forward than an overbroad attempt to criminalize certain kinds of online speech.

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<sup>1</sup> Surdin, Ashley, In Several States, A Push to Stem Cyber-Bullying, Washington Post (Jan. 1, 2009)

<sup>2</sup> Watts v. U.S., 394 U.S. 705, 707 (1969). While the Watts case dealt with a threat ultimately deemed to be political speech, it serves as the foundation point for the notion that a limitation on free speech rights demands that the harassing speech be a ‘true threat’.

<sup>3</sup> *Id.*; see also, e.g., Planned Parenthood v. American Coalition of Life Activists, 290 F.3d 1058 (9<sup>th</sup> Cir. 2002); U. S. v. Alkhabaz, 104 F.3d 1492 (6<sup>th</sup> Cir. 1997).

We do not take issue with the Subcommittee's interest in looking at the issues of harassment and intimidation, but we would encourage taking a broad view of the phenomenon, not limited to the particular tools of communications used to convey such threats. For example a review of the tools that the Internet can provide to assist in limiting bullying, such as documentation of incidents and identifying when intervention is necessary, could yield valuable additional tools for fighting the problem. If additional legislation at the federal level is deemed necessary, we would urge the Subcommittee to carefully define its terms before moving forward, taking care to draw any prohibitions very narrowly so as to avoid limitations on protected First Amendment rights. In the meantime, as we still stand on the opening threshold of the Internet age, there is much good that can be done by expanding public awareness of both the benefits and risks associated with online activity and we would encourage the Subcommittee to support such efforts.

If you have questions or comments on ACLU's position on this issue, please feel free to contact me at [mmacleod@dcaclu.org](mailto:mmacleod@dcaclu.org).

Sincerely,

A handwritten signature in black ink, appearing to read "Michael W. Macleod-Ball". The signature is written in a cursive, slightly slanted style.

Michael W. Macleod-Ball  
Acting Director, Washington Legislative Office

cc: Subcommittee members