

**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)”**

United States House of Representatives  
Committee on the Judiciary  
Subcommittee on Crime, Terrorism, and Homeland Security

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Thank you, Mr. Chairman, and members of the Subcommittee on Crime, Terrorism, and Homeland Security. Through this hearing and your work to advance legislation, you are focusing public attention on an important issue: the extent to which our young people, and adults, are harming one another in online spaces. Cyberbullying is a complex and growing problem. Your leadership is greatly appreciated. Together, there is much that we can do, especially on behalf of America’s young people, to keep them safer online, from this and other threats to their health and well-being.

Problem.

By virtually all accounts, bullying of young people by their peers online is on the rise. The magnitude of this increase depends heavily on how one defines the term “bullying,” exactly. Results of recent studies vary widely in this respect. The harm caused to young people by their peers, primarily psychological in nature, can be substantial. Sometimes the harm falls in the category of teasing that few would say we should regulate; sometimes, the actions are so harmful in nature that they already violate civil or criminal law. And unfortunately, in the worst cases, bullying properly falls on the spectrum of physical and sexual abuse. No serious observer disputes that we are observing a significant increase in bullying online.

The topic of cyberbullying caught the attention of the members of the Internet Safety Technical Task Force last year, which I chaired. The Task Force brought together representatives of twenty-nine leading companies, child advocacy groups, and academics. We worked together throughout 2008 to analyze the safety issues facing young people online. We began, as the Attorneys General who commissioned the study requested, looking at the problems of unwanted contact and access to harmful content online.

In the process of researching the risks to children online, concern about bullying kept arising as a key concern. The final report of the Task Force included an extensive literature review, drafted by the scholars danah boyd and Andrew Schrock and supported by a blue-ribbon academic advisory board. While sexual predation and unwanted content continue to be substantial concerns which merit our attention, the dramatic rise in recent years has

been the increase in the likelihood that children will suffer harm online at the hands of their peers. (See <http://cyber.law.harvard.edu/pubrelease/isttf/>)

The data that show a sharp increase in bullying online need to be considered in light of a series of additional bits of context. First, overwhelmingly, most of the ways in which young people use digital technologies is positive. (See, for instance, the work of Mimi Ito et al. at <http://digitalyouth.ischool.berkeley.edu/report>) These technologies have become part of the fabric of the life of young people. Most young people, at least in the United States, do not distinguish between their “online” and “offline” lives. As a result, many of the good things that have gone on offline also happen, in one form or another, online; so, too, do many of the bad things that happen in everyday life play out also online. We should fundamentally be talking about “bullying,” not “cyber-bullying.”

Second, it’s an open question among researchers as to whether bullying overall is on the rise or not. Again, it is quite clear that more young people are bullying one another than ever before via digital technologies. What is not clear is whether this replaces any traditional, offline forms of bullying. It could be that bullying is neither up nor down as an overall trend, but rather just shifting venues – and coming to our attention more prominently as a result. It also may be that bullying is all of a sudden brought to the attention of adults who previously could not see it happening on the playground or in the schoolyard. It may be, too, that bullying is, for the first time, recorded for adults and others to see after the fact. That does not change the very real harm caused to individual young people by bullying (online or offline), but it does mean that we should be cautious before we call this bullying an epidemic.

As a side note, worth pausing on briefly: It’s also the case that sometimes adults are part of the problem, not part of the solution. Adults can be involved in bullying online. Adults are, too rarely, part of the solution in terms of modeling good behavior and helping to support young people who are seeking to do the right thing.

The third important thing is to focus on the behavior – how people use digital media – and not solely on the technology. Digital technologies themselves do not have a “nature.” The Internet, as one core part of the digital architecture, is famously a “stupid” network. A key design principle of the Internet, the end-to-end principle, calls for it to “pass all packets.” The network, and the applications that are built upon it, is not inherently “good” or “bad”; it is merely a conduit for human and machine-to-machine interaction. A related point: technology design, or architecture, can affect behavior. As we consider solutions, we should pay close attention to the fact that both technological design and changes in how people are likely to behave can be drivers of solutions.

No single solution to cyberbullying – or, more properly, bullying in general – exists. There is no one thing that we can do that will protect America’s young people from being harmed online. The behavior that we would like to curtail – most commonly, young people saying or doing harmful things to other young people online – is part of typical adolescent behavior to some extent. In many cases, what concerns us is behavior that we want to stop, but not to criminalize; the image of filling our prisons with teenagers and young adults who have been teasing one another online is plainly unattractive. And many of the more

aggressive responses to online bullying would curtail First Amendment freedoms that minors ought to enjoy as their parents and teachers do. All the same, it's too great a worry to make throwing up our hands an adequate response.

### Solutions.

The most effective solution to cyberbullying is to combine a series of approaches to protect minors. This notion is true of the vast majority of problems online; there is rarely a single approach that will satisfactorily solve the problem. Education, intervention by social workers, technology, and law reform each have a role to play.

The first place to look is to the young people themselves. Minors can help address the problem because they can lead by example. Young people listen to one another, and together they establish powerful social norms. This is particularly true in terms how young people act in the context of online social environments. Constructive social norms can lead to widespread change in how young people act in online environments; likewise, social norms (such as a willingness to download music illegally) can lead to widespread lawbreaking.

Education is crucial. Parents, teachers, social workers, and other adult mentors need to intervene with the young people in their lives, to give guidance about how to interact with one another and to lead by example. Parents and teachers can, in the course of conversation, shed light on the potential harm that online bullying can cause and the consequences for both the bully and the person who is being harmed. Other young people – say, college students returning to their high school for a community meeting – might help to spark these important conversations within schools and after-school environments. It is possible to make certain harmful behavior “uncool” in such a way as to reduce the incidence of young people hurting one another in these ways.

Technology companies can help, too. The large social networks that youth frequent – Facebook, MySpace, MyYearbook, BlackPlanet, LiveJournal, Bebo, and so forth – can help to set a tone for behavior that is permissible and that which is not. Communities can be given tools to self-police and rules on the site can ban harmful speech. By contrast, some online web sites – the AutoAdmit message board for admitted law students leaps to mind, as does the now-defunct JuicyCampus – too often support a very negative, often nasty sort of online discourse.

### New law.

In light of the growing likelihood of harm occurring to young people at the hands of online bullies, our instinct to regulate the digital environment through law more aggressively makes perfect sense. As parents and teachers, we find ourselves at a loss to stop harm that is happening to their children and students. School administrators worry that their policies are out of date. Law enforcement officials puzzle over when and whether they have a role in helping young people in these circumstances.

New legislation could help to address cyberbullying and other online safety problems. But newly criminalizing a broad swath of online speech is not the right general approach. Nor

do I favor a set of rules that apply only in cyberspace and not in offline life. The rules should, to the greatest extent possible, be the same in the online context as offline. We should strive to apply rules of general applicability to the Internet context. Where the facts change – as in the realm of Internet safety – we ought to rethink the way we write and apply these general rules, to be sure.

In many respects, the law already helps to provide causes of action against bullies, whether they use the Internet or not. If online speech involved is defamatory, the bully (whether an adult or a young person) may be found directly liable for harm done to her peer. If the speech is obscene, if it rises to the level of a true threat, or if it is intimidating, the act of posting it online might violate a host of civil and criminal laws. The issue in these cases is enforcement, not whether or not the speech is unlawful in the first place.

There are legal approaches – other than newly criminalizing online speech – that make sense.

The “Adolescent Web Awareness Requires Education Act of 2009” is a terrific proposal. The Act’s proposed grant program would make a great deal of difference for young people in the near term and potentially in the long term. The priorities stated in the bill track effectively the research about young people and their risky behaviors. It emphasizes at-risk youth. It calls for partnerships between the private and public sectors. It calls for close connection between the research community and those in our schools and communities.

Some of the innovation that we ought to explore involves the use of technology within online communities to provide support for young people in these contexts. We ought to develop, refine, and implement curricular approaches to cyberbullying. We need to provide training to parents, teachers, administrators, social workers, and other staff in schools and other environments where young people spend time. The terrific network of social workers and pediatricians and other professionals who support children need to be part of the solution, too. And we need to put tools in the hands of the young people who are helping one another address this problem by investing in peer-driven solutions. This grant program could help creative people to build this infrastructure.

#### Rethinking existing law.

Just as we consider new legislation, we ought to consider changes to existing laws to address this safety concern among children. In particular, we need to re-examine existing law with a view toward enforceability, which tends to be the biggest problem with cyberlaws in general, and toward ensuring that our core principles and desired outcomes are accomplished by laws that were written for an analog-only age. Where law enforcement officers don’t have the tools they need, in law or in budget, we need to address these shortfalls. But the answer is not to create a layer of new, cyber-specific rules on top of the existing legal regime that governs any particular area of activity.

One law that ought to be reconsidered in light of youth safety online is the Communications Decency Act Section 230, part of the Telecommunications Act of 1996. CDA 230 is a cornerstone of the legal framework that has enabled the information technology sector to

thrive over the past decade. It has also had a crucial part in ensuring that the Internet has become a place where free expression, like innovation, also thrives. Both economic growth (promoted through technological innovation) and free expression are much to be celebrated and supported through careful policymaking. Those who drafted and fought to sustain CDA 230 deserve our thanks.

But it is time to re-examine how far CDA 230's immunity extends. A lot has happened over the past decade. Those who drafted this provision would have had a hard time anticipating the changes that have ensued – and quite how broadly this immunity would extend over time. To be clear, courts that have extended the immunity fairly broadly (the general posture of most courts that have taken up cases at the edges of this area of doctrine) have been right – on the law as it stands – to do so. The law, as written, shields from liability MySpace, for instance, in the Julie Doe case in Texas, or Craigslist in the cases associated with Section 8 housing, and so forth.

In my view, these types of cases are not rightly decided, though, from the perspective of what the law ought to protect or not to protect.

In the context of online safety, the law needs to provide an incentive for technology companies to do the right thing. The law should avoid establishing a framework that allows technology companies to ignore the problems that their young users are encountering online. Take the hypothetical case of a young person who is physically harmed after meeting someone in an online environment. The young person (or his parents, more likely) seeks to bring suit against the service provider involved. In my view, the service provider should not have special protection from such a tort claim. Such a claim should be decided on the merits. Was the service provider negligent? Or not? The fact that the service provider is offering an Internet-based service, rather than a physically-based service, should not result in an automatic shield to liability – especially if our concern is that cyberbullying may be worse in some cases than old-school, in-person bullying, as young people in research studies tell us.

Most major social networks in the United States would not likely be liable for the harm in such terrible instances. The most prominent social networks, like Facebook and MySpace, are taking more and more affirmative steps to make their online environments safer for kids – such that a negligence claim ought not reach them. But the claim should not be barred at the courthouse door, in my view. The opposite incentive should be at work: to encourage them to continue their innovation to protect kids.

The Congress ought to consider how to ensure that online intermediaries have an obligation not to ignore harm that is occurring to their users online. Online gossip sites like AutoAdmit and Juicy Campus have become symbols of bad behavior because the site operators often refuse to cooperate with victims to help those who were harmed by defamation on their site. Many students, among others, are bullied – presumably by peers who knew them – through defamatory online expression on these online forums. For quite some time, the students harmed had no recourse: the site operators refused to take down the harmful material, even when notified of the harm, and the students could not identify the people who had posted the harmful speech anonymously because the site operators

claimed not to keep any log files. The site operators hid behind federal law: Section 230 of the Communications Decency Act, which provided them a safe harbor.

The growth of online bullying and other online safety risks means it is time to rethink this particular safe harbor in terms of its breadth. The question to ask is whether such site operators might have some form of affirmative obligation in cases where harm to minors is clear.

One could imagine at least three ways to amend the safe harbor. The light-touch approach would be to require intermediaries to retain log files for a certain period of time and to participate in law enforcement efforts to bring those who defame others to justice. Alternately, one could require online intermediaries to respond to notice from those who have been defamed by taking down the defamatory content if the intermediary wishes to be protected by the safe harbor (which is what we do in the context of copyright, through Section 512 of the Digital Millennium Copyright Act). A third approach could be to exempt intermediaries from the safe harbor of CDA 230 altogether in cases where there has been harm to young people as a result of harmful speech, a carve-out that parallels the carve-out in CDA 230 for copyright complaints.

Each of these changes to the law would have demerits. Critics of such tinkering with Section 230 point – correctly – to the risks to innovation online that such changes to the liability regime might give rise. To establish a notice and take-down procedure to track to the copyright processes would no doubt have a chilling effect on some speech online and it would add to transaction costs associated with running an online intermediary which presently do not exist. A requirement to retain log files would have a negative effect on individual privacy in an era where privacy interests are already under attack. But these demerits are outweighed by the need to address present, and potentially growing, risks to young people online.

### Conclusion.

There is no easy answer to the problem of online bullying. The most effective approach – education, with a view toward getting toward the root cause of bullying and establishing positive social norms – is the hardest to accomplish. It is also the least satisfying as an answer. The AWARE Act is a good step in the right direction. We should consider other approaches, including law reform and the use of new technologies in online environments, but we should do so in the knowledge that these approaches are likely half-measures at best – partial solutions to this growing problem facing our kids and our society at large.