

A New Method to Address Cyberbullying in the United States: The Application of a Notice-and- Takedown Model as a Restriction on Cyberbullying Speech

Brian O’Shea *

TABLE OF CONTENTS

I.	INTRODUCTION	121
II.	THE PROBLEM OF CYBERBULLYING AND THE NEED FOR A LEGAL SOLUTION.....	123
III.	STATE RESPONSES TO CYBERBULLYING AND LEGISLATIVE SHORTCOMINGS	125
	<i>A. The United States’ Response to Cyberbullying Has Occurred at the State Level</i>	126
	<i>B. Criticism of State Cyberbullying Responses and the Need for National Action</i>	126
IV.	THE RIGHT TO BE FORGOTTEN AS A POTENTIAL RESPONSE TO CYBERBULLYING AND WHY IT LIKELY WILL NOT SURVIVE FIRST AMENDMENT SCRUTINY IN THE UNITED STATES.....	127
	<i>A. The Right to be Forgotten, Criticisms of the Right, and Its Impact on Speech in the E.U.</i>	128
	<i>B. The Right to be Forgotten, as Implemented in Europe, Would Face Serious First Amendment Challenges in the United States</i>	129
	1. Low-Value Speech Can Be Restricted by the Government with Minimal First Amendment Scrutiny.....	130
	2. Restrictions on Speech That Is Not Low-Value Are Subject to Strict Scrutiny Under the First Amendment	131

* J.D., The George Washington University Law School, May 2017. Notes Editor, *Federal Communications Law Journal*, 2016–17. B.A., Saint Anselm College. The author would like to thank his mother Karen and the rest of his family and friends for their constant love and support.

C.	<i>Due to Its Chilling Effect on the Content of a Wide Range of Speech, the Right to Be Forgotten Is Not Likely to Survive Strict First Amendment Scrutiny in the United States</i>	133
V.	POLICYMAKERS SHOULD LOOK TO THE NOTICE-AND-TAKEDOWN PROCEDURES OF THE DIGITAL MILLENNIUM COPYRIGHT ACT, WHICH MAY PROVIDE A CONSTITUTIONAL MEANS FOR RESTRICTING THE CONTENT OF SPEECH	134
A.	<i>Background on the DMCA and Its Notice-and-Takedown Provisions</i>	134
B.	<i>The Argument That the DMCA’s Notice-and-Takedown Procedures Provide for a Potentially Unconstitutional Restriction of Speech</i>	136
VI.	APPLICATION OF THE DMCA NOTICE-AND-TAKEDOWN MECHANISM AS AN ALTERNATIVE MODEL TO RESTRICT THE CONTENT OF CYBERBULLYING SPEECH.....	137
A.	<i>The Elements of This Proposed Notice-and-Takedown Mechanism</i>	138
B.	<i>Why This Mechanism Is a Constitutional Speech Restriction</i> ...	139
C.	<i>Potential Counterarguments and the Need for Further Scholarship</i>	141
1.	Websites Already Have Protections in Place.....	141
2.	The Need for an Appeals Process	142
VII.	CONCLUSION.....	143

I. INTRODUCTION

Ghyslain Raza. His story is one many may not want to remember—but should never forget. One day, while at school in Quebec, Canada, Raza was going about his day like any typical 14-year-old. He had countless things to look forward to: spending time with friends, high school, and enjoying what are supposed to be some of the best years of life. His teenage innocence, however, was about to be ripped away from him far too soon.

As part of a school project, Raza entered a television studio at his school and had someone film him reenacting a lightsaber scene from *Star Wars*. Raza submitted the seemingly harmless and inconsequential video in his class and then went on with his life.¹

A year later, the video was posted on YouTube, without Raza's consent, and quickly went "viral." Within days of its posting, the video was well on its way to becoming the most popular Internet video of all time. But rather than enjoying his newfound celebrity, Raza was faced with a massive cyberbullying onslaught from people he did not know.² "What I saw was mean. It was violent. People were telling me to commit suicide," Raza said of the video's release.³ Raza further commented that "no matter how hard I tried to ignore the people telling me to commit suicide, I could not help but feel worthless, like my life was not worth living."⁴ Raza was subjected to so much bullying that he lost the few friends he did have, he transferred schools, was diagnosed with depression, and eventually was forced to enter a children's psychiatric facility.⁵

Raza's story is just one case in what has become an alarmingly common phenomenon of online bullying, popularly known as "cyberbullying." Today, almost half of all minors in the United States report being victims of cyberbullying.⁶ Between four to twenty-one percent of minors admit to having been perpetrators.⁷ While popular websites like Facebook, Instagram, and Twitter all have anti-cyberbullying policies in place,⁸ these policies alone

1. "Star Wars" Kid Breaks Silence on Cyberbullying, FOX NEWS: TECH (May 10, 2013), <http://www.foxnews.com/tech/2013/05/10/star-wars-kid-breaks-silence-on-cyberbullying/> [<https://perma.cc/7SAK-VXUZ>].

2. *Id.*

3. *Id.*

4. *Id.*

5. See Maureen O'Connor, *Star Wars Kid Is All Grown Up and Becoming a Lawyer* (Oct. 5, 2015, 1:53 PM), <http://gawker.com/5554731/stars-wars-kid-is-all-grown-up-and-becoming-a-lawyer> [<https://perma.cc/N5XQ-LJXB>].

6. Bethan Noonan, *Developments in the Law: Technology and Social Media in the 21st Century: Solutions for Minimizing the Risk to Children: Crafting Legislation to Prevent Cyberbullying: The Use of Education, Reporting, and Threshold Requirements*, 27 CONTEMP. HEALTH L. & POL'Y 330, 335 (2011).

7. *Id.*

8. *Community Standards*, FACEBOOK, <https://www.facebook.com/communitystandards> [<https://perma.cc/6VTC-C75D>] (last visited Jan. 28, 2017); *Community Guidelines*, INSTAGRAM, <https://help.instagram.com/477434105621119/> [<https://perma.cc/BG6N-28NK>] (last visited

are not sufficient. Young people continue to bully each other, often through the posting of images and videos designed to publicly shame or humiliate the subjects.⁹ Unlike with words, where the subject may be more covert, the subject of an image or video may be far more visible. The subject of visual content can often be readily identified by observers, creating the potential for more bullying in the virtual and physical worlds.¹⁰ Most disturbing of all, when the content is posted, there is often no way of getting it down from the Internet.¹¹ For people like Raza (whose video remains readily available online) and other victims, there is no escape.

Due to the Internet's ubiquity,¹² cyberbullying is not going to disappear anytime soon. Any young person, Internet user or not, is in danger of becoming a victim. While there is no obvious or perfect solution to this issue, a 2014 ruling by the European Court of Justice (ECJ) allowing individuals to petition to have certain content removed from the Internet due to a so-called "right to be forgotten."¹³ Adopting the ECJ's petition process may change the landscape for those seeking to restrict cyberbullying speech in the United States.

Currently, there is no right to be forgotten in the United States, and the constitutionality of such a right is in some doubt due to its potential to restrict, or chill, free speech.¹⁴ However, there already exists a comparable mechanism in the form of copyright notice-and-takedown procedures, which allows

Jan. 28, 2017); *Online Abuse*, TWITTER, <https://support.twitter.com/articles/15794> [<https://perma.cc/PH93-2GAS>] (last visited Jan. 28, 2017).

9. See NAT'L CRIME PREVENTION COUNCIL, STOP CYBERBULLYING BEFORE IT STARTS, <http://www.ncpc.org/resources/files/pdf/bullying/cyberbullying.pdf> [<https://perma.cc/2Z9H-YGBV>]; Temitayo Fagbenle, *Online "Shaming" A New Level of Cyberbullying for Girls*, NPR (Feb. 12, 2016, 4:46 PM ET), <http://www.npr.org/2013/01/07/168812354/online-shaming-a-new-level-of-cyberbullying-for-girls> [<https://perma.cc/MX3G-LYXG>].

10. Kimberly J. Mitchell et al., *Prevalence and Characteristics of Youth Sexting: A National Study*, 129 PEDIATRICS 13, 17 (2012) (stating that 70% of study's respondents who appeared in or created sexting images and 63% of respondents who received sexting images reported feeling "very" or "extremely" upset, embarrassed, or afraid, and that such images can lead to increased mental and emotional stress and most seriously suicide).

11. Caroline Hewitt Fischer, Comment, *GoldieBlox and the Three Beastie Boys: The Emerging Trend of Fair Use Appropriation of Protected Material as a Business Marketing Strategy*, 17 TUL. J. TECH. & INTELL. PROP. 255, 258 (2014) ("Unlike television or print media, digital media is very difficult to control and is almost impossible to eliminate after a user uploads it to the Internet.").

12. See generally AMANDA LENHART, PEW RESEARCH CENTER, TEENS, SOCIAL MEDIA & TECHNOLOGY OVERVIEW 2015 (2015), <http://www.pewinternet.org/2015/04/09/teens-social-media-technology-2015/> [<https://perma.cc/CT4K-9RCR>] (detailing social media use by American teenagers in 2015).

13. See Case C-131/12, *Google Spain SL v. Agencia Española de Protección de Datos*, para. 100(2) (May 13, 2014), <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62012CJ0131> [<https://perma.cc/GF7V-6PBj>] ("[T]he operator of a search engine is obliged to remove from the list of results displayed following a search made on the basis of a person's name links to web pages, published by third parties and containing information relating to that person . . .").

14. See Emily Adams Shoor, Note, *Narrowing the Right to Be Forgotten: Why the European Union Needs to Amend the Proposed Data Regulation*, 39 BROOKLYN J. INT'L L. 487, 492-94 (2014).

copyright owners to easily remove unauthorized content from the Internet.¹⁵ If policymakers in the United States decide to grant cyberbullying victims a similar remedy, minors, through their guardians, other agents, or even on their own, could easily remove certain embarrassing or malicious content from the Internet.

This Note argues that if policymakers in the United States wish to implement cyberbullying policies similar to the European Union's "right to be forgotten," they should look to the notice-and-takedown provisions of the Digital Millennium Copyright Act (DMCA) as a model.¹⁶ An analogous framework for cyberbullying could enable users to petition providers of online services for the removal of images and videos where the subject can be personally identified, and the content was posted for the purpose of bullying.

Section II of this Note introduces the growing problem of cyberbullying and the need for a legal solution. Section III details the United States' current approach to cyberbullying and criticisms of that approach. Section IV discusses Europe's right to be forgotten as a potential response to cyberbullying, and why the right is not likely to survive First Amendment scrutiny in the United States. Section V discusses the notice-and-takedown procedures of the DMCA and how policymakers could use these procedures as a model for the purpose of restricting cyberbullying speech. Finally, Section VI proposes a notice-and-takedown mechanism based on the DMCA, discusses why the mechanism will likely survive First Amendment scrutiny, and addresses potential counterarguments and the need for future scholarship.

II. THE PROBLEM OF CYBERBULLYING AND THE NEED FOR A LEGAL SOLUTION

The Internet may be the greatest forum for the exercise of free speech in history.¹⁷ Unlike broadcast or print media, where communication is a one-way street, the Internet facilitates a "true marketplace of ideas"¹⁸ where individuals are able to interact with each other and share content with the rest of the world.¹⁹ It is the "most participatory form of mass speech yet developed."²⁰ Unfortunately, with all of the benefits that have accompanied the growth of the Internet, there have been several unintended

15. See Lauren Yamamoto, Note and Comment, *Copyright Protection and Internet Fan Sites: Entertainment Industry Finds Solace in Traditional Copyright Law*, 20 LOY. L.A. ENT. L. REV. 95, 126–27 (2000).

16. See 17 U.S.C. § 512(c)(1) (2012).

17. See Anthony Ciolli, *Chilling Effects: The Communications Decency Act and the Online Marketplace of Ideas*, 63 U. MIAMI L. REV. 137, 137 (2008).

18. *Id.*

19. See Sarah B. Evans, Note, *Hear No Evil, Speak No Evil, See No Evil: Protecting the Nation's Children from Sexually Explicit Material on the Internet*, 13 TEMP. POL. & CIV. RTS. L. REV. 253, 282 (2003).

20. Nicholas P. Dickerson, Comment, *What Makes the Internet So Special? And Why, Where, How, and by Whom Should Its Content Be Regulated*, 46 HOUS. L. REV. 61, 62 (2009).

consequences.²¹ One of these consequences has been the growth of cyberbullying.²²

Cyberbullying occurs “when a child, preteen, or teen is tormented, threatened, harassed, humiliated, embarrassed or otherwise targeted by another child, preteen, or teen using the Internet, interactive and digital technologies, or mobile phones.”²³ Cyberbullying, therefore, can occur in a variety of ways and can result in a range of different harms. Moreover, cyberbullying can be conducted through a number of different media forms including emails, online videos, mobile messaging, and posts on social media sites.²⁴ For example, text messages or images may be shared and distributed among an individual’s friends, peers, or people they do not even know.²⁵ With America’s teenagers, the main victims of cyberbullying,, becoming more digitally connected over the last decade,²⁶ consequentially, cyberbullying has been recognized as a serious public health problem due to the substantial and long-lasting impact it can have on its victims.²⁷

Although a lack of scientific research has prevented a comprehensive understanding of the prevalence of cyberbullying,²⁸ the available statistics paint a disturbing picture.²⁹ Since 2015, nationwide, almost twenty-percent of American high school students report having been victims of cyberbullying.³⁰

21. Cf. Jay Wexler, Book Review, 16 STAN. ENVTL. L.J. 334 (1997) (reviewing EDWARD TENNER, *WHY THINGS BITE BACK: TECHNOLOGY AND THE REVENGE OF UNINTENDED CONSEQUENCES* (1996)).

22. See *What Is Cyberbullying, Exactly?*, STOPCYBERBULLYING, http://www.stopcyberbullying.org/what_is_cyberbullying_exactly.html [<https://perma.cc/82DR-7594>] (last visited Jan. 28, 2017).

23. *Id.*

24. See Noonan, *supra* note 6, at 331.

25. See Clay Calvert, *Fighting Words in the Era of Texts, IMS, and Emails: Can a Disparaged Doctrine Be Resuscitated to Punish Cyberbullies?*, 21 DEPAUL J. ART TECH. & INTEL. PROP. L. 1, 15-16 (2010). See also Kathleen Conn, *Sexting and Teen Suicides: Will School Administrators Be Held Responsible?*, 261 ED. LAW REP. 1 (2010) (“Cyberbullies can use the anonymity of cellphones to repeatedly text and torment their teachers, school administrators, or classmates; disseminate sensitive personal information or lies; or pretend to be someone else to torment that person.”).

26. See Lauren A. Newell, *Redefining Attention (And Revamping the Legal Profession?) for the Digital Generation*, 15 NEV. L.J. 754, 775–76 (2015) (citing MARY MADDEN ET AL., PEW RES. CTR., *TEENS AND TECHNOLOGY 2013*, at 2, 3 (2013), <http://www.pewinternet.org/Reports/2013/Teens-and-Tech.aspx> [<https://perma.cc/L8SL-PVEY>] (stating that approximately 95% of teens use the Internet, approximately 93% of teens own or have access to a computer at home, and approximately 75% of teens own a cellphone or smartphone)).

27. See Alison Virginia King, Note, *Constitutionality of Cyberbullying Laws: Keeping the Online Playground Safe for Both Teens and Free Speech*, 63 VAND. L. REV. 845, 849 (2010) (citing Corinne David-Ferdon & Marci Feldman Hertz, *Electronic Media, Violence and Adolescents: An Emerging Public Health Problem*, 41 J. ADOLESCENT HEALTH S1, S5 (2007) (stating that the CDC considers cyberbullying to be an “emerging public health problem.”)).

28. See Mary Sue Backus, *OMG! Missing the Teachable Moment and Undermining the Future of the First Amendment—TISNF!*, 60 CASE W. RES. L. REV. 153, 160 (2009) (stating that “little research has been done on the phenomenon of cyberbullying, both as to its prevalence and its potential harm”).

29. See Noonan, *supra* note 6, at 335–36.

30. Ctrs. for Disease Control & Prevention, U.S. Dep’t Health & Human Servs., *Youth Risk Behavior Surveillance—United States, 2015*, MMWR SURVEILLANCE SUMMARIES, June

Equally as troubling is that between four to twenty-one percent of youths in the same age range have reported being perpetrators of cyberbullying.³¹ The problem is so prevalent that, according to a Harvard-directed study conducted at the behest of state attorneys general, “the most frequent threat minors face, both online and offline, is not sexual predators or harmful content, but rather bullying and harassment, most often by peers.”³²

As observed by one scholar, “[c]yberbullying can be harmful to children in a number of ways, including negatively impacting their health, education, and social lives.”³³ It can result in severe psychological harm including depression, anxiety, fear, and low self-esteem.³⁴ Cyberbullying can also lead to poor academic performance, increased absences from school, or even dropping out of school all together.³⁵ “In some cases, [cyberbullying can] lead to extreme violent behavior including murder and suicide.”³⁶

The effects of cyberbullying do not end upon entering into adulthood—nor are they limited to victims. Adults who were once perpetrators of cyberbullying can suffer long-term depression, emotional distress, and anxiety as a result.³⁷ Dealing with the behavioral health effects of cyberbullying can be a lifelong struggle. Policymakers in the United States have begun to take notice and have attempted to provide much needed relief to address this crisis.

III. STATE RESPONSES TO CYBERBULLYING AND LEGISLATIVE SHORTCOMINGS

As of January, 2016, all fifty states have passed anti-bullying legislation.³⁸ Approximately half of the states have enacted specific anti-cyberbullying statutes.³⁹ Federal legislation specifically tailored to respond to cyberbullying had been proposed in the past in the U.S. House of

10, 2016, at 10, https://www.cdc.gov/healthyyouth/data/yrbs/pdf/2015/ss6506_updated.pdf [<https://perma.cc/S4J9-QQ3G>].

31. Noonan, *supra* note 6, at 335–36.

32. Backus, *supra* note 28, at 160.

33. Bryan Morben, Note, *The Fight Against Oppression in the Digital Age: Restructuring Minnesota’s Cyberbullying Law to Get with the Battle*, 15 MINN. J.L. SCI. & TECH. 689, 694 (2014) (source refers to a proposed piece of federal anti-cyberbullying legislation called the “Megan Meir Cyberbullying Prevention Act,” which was named after a young girl who committed suicide after being bullied while on MySpace).

34. *Id.*

35. *Id.*

36. *Id.*

37. *See id.* at 695.

38. *See* SAMEER HINDUJA & JUSTIN W. PATCHIN, STATE CYBERBULLYING RESEARCH CENTER, STATE CYBERBULLYING LAWS: A BRIEF REVIEW OF STATE CYBERBULLYING LAWS AND POLICIES I (2016), <http://cyberbullying.org/Bullying-and-Cyberbullying-Laws.pdf> [<https://perma.cc/FF6E-R6JV>].

39. *Bullying and Cyberbullying Laws*, MEGAN MEIR FOUND., <http://www.meganmeierfoundation.org/laws.html> [<https://perma.cc/5S9M-VRKH>] (citing HINDUJA & PATCHIN, *supra* note 38) (defining an anti-cyberbullying law as one that specifically includes terms “cyberbullying” or “cyber-bullying,” and not just “electronic harassment or bullying using electronic means”).

Representatives, but the proposal never made it out of committee as of this writing.⁴⁰

A. The United States' Response to Cyberbullying Has Occurred at the State Level

Without a national directive, states have been given the freedom to respond to cyberbullying in a variety of different ways—with some responding more aggressively than others. North Carolina, for example, has criminalized the act of cyberbullying when the victim is a minor.⁴¹ Other states, however, have put the onus on school districts to implement plans to combat cyberbullying. Massachusetts has required school districts to implement plans to respond to and report bullying to the state's Department of Secondary and Elementary Education.⁴² If a school district fails to take proper action, the state can take punitive action.⁴³ Florida has decided to condition the dissemination of safe schools funds to its school districts contingent upon its Department of Education's approval of each district's bullying and harassment policies.⁴⁴ These individual state responses have not come without their share of controversy, with some states arguing that significant reforms are needed.⁴⁵

B. Criticism of State Cyberbullying Responses and the Need for National Action

State responses to cyberbullying have been a source of criticism for several reasons. First, states have been criticized for not doing more to combat cyberbullying that occurs off school property.⁴⁶ While students can be punished for engaging in lewd or obscene speech while on school grounds, the school's reach is typically much more limited when such conduct occurs

40. See Megan Meier Cyberbullying Prevention Act, H.R. 1966, 111th Cong. (2009).

41. N.C. GEN. STAT. § 14-458.1 (2015). The North Carolina anti-cyberbullying statute prohibits a variety of conduct on the Internet when the perpetrator's intent is to intimidate or torment a minor, including: constructing a fake website, posing as a minor in a chatroom, email, or instant message, posting or encouraging others to post private, personal, or sexual information pertaining to a minor, and posting real or doctored images of a minor on the Internet. Cyberbullying is punishable as a Class 1 misdemeanor if the perpetrator is over 18 years of age and as a Class 2 misdemeanor if the perpetrator is under 18 years of age. See *id.*

42. MASS. GEN. LAWS ch. 71, § 370 (2010).

43. *Id.*

44. See Jamie Wolf, Note, *The Playground Bully Has Gone Digital: The Dangers of Cyberbullying, the First Amendment Implications, and the Necessary Responses*, 10 CARDOZO PUB. L. POL'Y & ETHICS J. 575, 595 (2012). This mechanism in the State of Florida incentivizes schools to develop effective anti-bullying policies. Safe schools funds accounted for a total of \$64,456,019 for the 2015-16 fiscal year and \$62,660 per school district. See FLA. DEP'T OF EDUC., 2015-16 FUNDING FOR FLORIDA SCHOOL DISTRICTS 17 (2015), <http://www.fldoe.org/core/fileparse.php/7507/urlt/Fefpdist.pdf>.

45. See Backus, *supra* note 28, at 183–85 (providing an overview of state cyberbullying statutes and discussing criticisms).

46. See Wolf, *supra* note 44, at 590–92.

outside of the school or school-related functions.⁴⁷ This is problematic because most cyberbullying occurs outside of school hours.⁴⁸ Second, many statewide anti-bullying efforts concentrate on traditional disciplinary techniques designed to deter individuals from engaging in cyberbullying rather than targeting the harmful content itself.⁴⁹ Targeting the harmful content is a challenge for states because of the fear of subjecting themselves to legal action due to interfering with an individual's free speech rights.⁵⁰ Finally, with a multitude of states having their own anti-cyberbullying statutes, there is an obvious risk of inconsistent results.⁵¹ Certain online conduct may be considered cyberbullying in one state but, due to a different definition, it may not be cyberbullying in the state next door.⁵² This is problematic because cyberbullying is a national issue.

Rather than individual state responses, a legislative response to cyberbullying at the national level may be what is required.⁵³ As the evidence shows, cyberbullying is a growing public health problem with an impact across the United States.⁵⁴ The effects are serious and not only affect victims in their younger years but can affect them well into their adult lives.⁵⁵ From a policy perspective, it is essential to develop a single, uniform mechanism to address cyberbullying effectively nationwide.⁵⁶

IV. THE RIGHT TO BE FORGOTTEN AS A POTENTIAL RESPONSE TO CYBERBULLYING AND WHY IT LIKELY WILL NOT SURVIVE FIRST AMENDMENT SCRUTINY IN THE UNITED STATES

As an alternative to the patchwork approach currently in force in the United States, some have argued that the E.U.'s right to be forgotten could provide an innovative method for combatting cyberbullying by targeting the

47. *Id.* at 584.

48. Deborah Ahrens, *Schools, Cyberbullies, and the Surveillance State*, 49 AM. CRIM. L. REV. 1669, 1695 (2012).

49. *See* Wolf, *supra* note 44, at 594–95.

50. *See* *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (stating that students and teachers do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate” and, as a result, in order for free expression to be curbed, the expression must result in a “substantial disruption of or material interference with school activities”).

51. *See* Jason A. Wallace, Note, *Bullycide in American Schools: Forging a Comprehensive Legal Solution*, 86 IND. L.J. 735, 743 (2011) (discussing how different anti-bullying laws from different states produce different legal results specifically in the context of anti-gay bullying).

52. *See* Adam J. Speraw, Note, *No Bullying Allowed: A Call for a National Anti-Bullying Statute to Promote a Safer Learning Environment in American Public Schools*, 44 VAL. U.L. REV. 1151, 1153 (2010) (stating that a national anti-bullying law would bring needed consistency for the states that have passed anti-bullying legislation).

53. *Id.*

54. *See* King, *supra* note 27, at 849.

55. *See* Morben, *supra* note 33, at 694.

56. *See* Speraw, *supra* note 52, at 1153.

content itself and making it inaccessible in search results.⁵⁷ For the right to be forgotten to become legally enforceable in the United States, however, it would likely have to survive strict scrutiny under the First Amendment.⁵⁸ Due to the broad scope of the right to be forgotten and its ability to restrict speech that is not associated with cyberbullying, it is not likely to become a legally enforceable right in the United States.

A. The Right to be Forgotten, Criticisms of the Right, and Its Impact on Speech in the E.U.

In *Google Spain SL v. Agenda Española de Protección de Datos*, the ECJ recognized, for the first time, a legally binding “right to be forgotten” online.⁵⁹ In this case, the Court held that citizens of E.U. member states could petition Google, and other search engines engaged in the processing of personal data, to remove links to webpages containing personal information about the citizen that appears “to be inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes of the [data] processing.”⁶⁰

Since the *Google Spain SL* ruling, Google has evaluated over 1.8 million links for removal based on over 660,000 requests.⁶¹ Approximately forty-three percent of evaluated URLs have been removed to date.⁶² As a result, critics of the right to be forgotten have argued that the policy is a serious infringement upon the right to free speech and the right to freely access information.⁶³ Rather than restricting online speech through takedown

57. See Scott H. Greenfield, *Cyberbullying: We'll Know It When We See It*, SIMPLE JUSTICE (Feb. 10, 2012) <http://blog.simplejustice.us/2012/02/10/cyberbullying-we-know-it-when-we-see-it/> [<https://perma.cc/3DY5-3FT7>]; see also Michelle Ghossoub, *Censorship Versus Privacy: The Implications of the “Right to be Forgotten,”* DIGITAL TATTOO (May 21, 2014), <http://digitaltattoo.ubc.ca/2014/05/21/censorship-versus-privacy-the-implications-of-the-right-to-be-forgotten-online/> [<https://perma.cc/SJN7-N39F>].

58. See, e.g., *Burson v. Freeman*, 504 U.S. 191, 208–10 (1992).

59. See Case C-131/12, *Google Spain SL v. Agencia Española de Protección de Datos*, (May 13, 2014), <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62012CJ0131> [<https://perma.cc/W5DB-6M2A>]. The newly passed EU Data Protection Regulation codifies much of the right to be forgotten online that was originally created by the ECJ. This information can be found within Article 17 of the Regulation. See *Commission Proposal for a Regulation of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data (General Data Protection Regulation)*, COM (2012) 11 final (Jan. 25, 2012) [hereinafter *Data Protection Regulation*], http://ec.europa.eu/justice/data-protection/document/review2012/com_2012_11_en.pdf [<https://perma.cc/J4P8-5HSZ>].

60. See *Google S.L.*, Case C-131/12, at paras. 92–94.

61. *European Privacy Requests for Search Removals*, GOOGLE, <https://www.google.com/transparencyreport/removals/europeprivacy/> [<https://perma.cc/9WF2-HPX9>] (last visited Feb. 4, 2017) [hereinafter *Google Transparency Report*].

62. *Id.*

63. See Stephen C. Bennett, *The “Right to be Forgotten”: Reconciling EU and US Perspectives*, 30 BERKELEY J. INT’L L. 161, 169 n.30 (2014) (citing FRANZ WERRO, *THE RIGHT TO INFORM V. THE RIGHT TO BE FORGOTTEN: A TRANSATLANTIC CLASH* 286, 298–99 (2009), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1401357 [<https://perma.cc/4QMB-X9DW>]) (suggesting that “the right to be forgotten is unprotected” in the United States and

requests, critics argue that a greater emphasis should be placed on education and personal responsibility while on the Internet.⁶⁴

In order to determine which takedown requests should be granted, Google has put together an Advisory Council made up of members of its legal team, as well as individuals from the media, the legal community, government, and other sectors.⁶⁵ In the event that an individual's takedown request is denied by Google, which occurs a little more than half of the time for evaluated links,⁶⁶ the requesting individual is notified and can appeal the decision to her country's data protection agency.⁶⁷ If a search engine is found not to be fulfilling its duty to enforce the right to be forgotten, it can face a monetary sanction of up to €500,000, or, for an enterprise, one percent of its annual worldwide turnover.⁶⁸

The right to be forgotten, while still in its infancy, could allow Internet users to erase speech connected with their cyberbullying experience. Allowing victims to detach themselves from insulting and harmful content through a takedown request could provide them with an opportunity to heal and to reclaim control of their online identities.⁶⁹ However, differences between the U.S. and E.U. legal systems, specifically on the issue of freedom of speech, might prevent the wholesale importation of the right to be forgotten into the United States.

B. The Right to be Forgotten, as Implemented in Europe, Would Face Serious First Amendment Challenges in the United States

The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech."⁷⁰ While the language may seem to indicate otherwise, the right to free speech is not absolute.⁷¹ Rather, the U.S. Supreme

"noting 'a fairly dramatic transatlantic schism in the law of privacy,' regarding right to be forgotten, and explaining cultural and historical sources of divergence.").

64. John Walsh, *When It Comes to Facebook, EU Defends "Right to Disappear,"* CHRISTIAN SCI. MONITOR (Apr. 6, 2011), <http://www.csmonitor.com/World/Europe/2011/0406/When-it-comes-to-Facebook-EU-defends-the-right-to-disappear> [<https://perma.cc/X2WR-FKQL>].

65. GOOGLE ADVISORY COUNCIL, REPORT OF THE ADVISORY COUNCIL TO GOOGLE ON THE RIGHT TO BE FORGOTTEN (2015), <https://www.google.com/advisorycouncil/> [<https://perma.cc/65DH-EJMM>].

66. See Google Transparency Report, *supra* note 61.

67. See Danny Sullivan, *How Google's New "Right to be Forgotten" Form Works: An Explainer*, SEARCH ENGINE LAND (May 30, 2014, 2:54 AM), <http://searchengineland.com/google-right-to-be-forgotten-form-192837> [<https://perma.cc/K6X6-6RGF>]; Loek Essers, *Right to Be Forgotten "Dashboard" to Help EU's Data Protection Authorities*, PC WORLD (Sept. 18, 2014, 8:25 AM PT), <http://www.peworld.com/article/2685732/righttobeforgotten-dashboard-to-help-eus-data-protection-authorities.html> [<https://perma.cc/HMC6-LG9A>].

68. Data Protection Regulation, *supra* note 59, at art. 79(5)(c).

69. See Ghoussoub, *supra* note 57.

70. U.S. CONST. amend. I.

71. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925); see also John M. Beahn, *Recent Decision: Reno v. ACLU: The Communications Decency Act Hits a Red Light on the Information Superhighway*, 47 CATH. U.L. REV. 333, 333 (1997) ("Although the language of

Court has ruled that the federal and state governments have the power to restrict the exercise of free speech in certain limited circumstances.⁷² Low-value speech—including “the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words”—can generally be restricted without violating the First Amendment.⁷³ But these categories of low-value speech are narrow.⁷⁴ If the government wishes to restrict the content of speech outside of these limited categories, the restriction must survive strict First Amendment scrutiny, meaning the restriction must be narrowly-tailored to achieve a compelling government interest.⁷⁵ The questions that must be answered, therefore, are: (1) what type of speech is cyberbullying, and (2) what level of scrutiny will be applied by a reviewing court.

1. Low-Value Speech Can Be Restricted by the Government with Minimal First Amendment Scrutiny

Low-value speech, which includes libel,⁷⁶ obscenity,⁷⁷ and fighting words,⁷⁸ does not receive heightened constitutional protection.⁷⁹ This is because low-value speech forms “no essential part of any exposition of ideas,” and possesses “such slight social value as a step to truth that any benefit that may be derived from [its expression is] clearly outweighed by the social interest in order and morality.”⁸⁰

Some scholars consider fighting words, a limited category of low-value speech, to be the closest analog to cyberbullying.⁸¹ Fighting words are words “which by their very utterance inflict injury or tend to incite an immediate breach of the peace.”⁸² This means that fighting words are limited to speech that has “a direct tendency to cause acts of violence by the person to whom . . . the remark is addressed.”⁸³ As a result, words “conveying disgrace” or “harsh, insulting language” are not fighting words because, even though these words could have a debilitating effect on the subject in the long-run, these are not words “which by their very utterance . . . tend to incite an immediate

the First Amendment appears absolute, the Supreme Court has never held the First Amendment to confer an absolute right to free speech.”).

72. See, e.g., *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1972).

73. *Roth v. United States*, 354 U.S. 476, 483 (1957); *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952).

74. See Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166, 2173 (2015).

75. See, e.g., *R.A.V. v. St. Paul*, 505 U.S. 377, 403 (1992).

76. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

77. See *Roth*, 354 U.S. at 486.

78. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1972).

79. Lakier, *supra* note 74, at 2168.

80. *Chaplinsky*, 315 U.S. at 572.

81. See, e.g., Katherine McCabe, *Founding Era Free Speech Theory: Applying Traditional Speech Protection to the Regulation of Anonymous Cyberspeech*, 24 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 823, 826 (2014) (stating that “cyberbullying is analogous to fighting words”).

82. *Chaplinsky*, 315 U.S. at 571–72.

83. *Gooding v. Wilson*, 405 U.S. 518, 523 (1972).

breach of the peace.”⁸⁴ Given the narrow definition of fighting words particularly the requirement of immediacy, it may be difficult to successfully argue that cyberbullying speech can be categorically restricted in the same way as fighting words.⁸⁵

2. Restrictions on Speech That Is Not Low-Value Are Subject to Strict Scrutiny Under the First Amendment

The government is not limited only to restricting the content of speech that is low-value. Rather, the government can restrict the content of higher-value speech if the restriction survives strict First Amendment scrutiny.⁸⁶ Strict scrutiny means that the government can restrict the content of higher-value speech if the restriction is narrowly-tailored to achieve a compelling government interest.⁸⁷ This determination is an “ends and means” inquiry by which, “[t]he [c]ourt makes a normative judgment about the ends: Is the interest important enough to justify a speech restriction?”⁸⁸ The court will then make a judgment about the means: “[i]f the means do not actually further the interest, are too broad, are too narrow, or are unnecessarily burdensome, then the government can and should serve the end through a better-drafted law.”⁸⁹ If both prongs of the test are met, then the restriction passes the strict scrutiny test and is upheld as constitutional.⁹⁰

The Supreme Court has stressed that a compelling government interest is a rigorous standard to meet.⁹¹ It includes “only those interests of the highest order.”⁹² One compelling government interest that has been recognized by the Court is the protection of “the physical and psychological well-being of minors.”⁹³ This interest exists because “a democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens.”⁹⁴ In order to protect this interest, the Court has upheld

84. *Id.* at 525 (quoting *Chapinsky*, 315 U.S. at 571–72).

85. Susan S. Bendlin, *Far from the Classroom, the Cafeteria, and the Playing Field: Why Should the School’s Disciplinary Arm Reach Speech Made in a Student’s Bedroom*, 48 WILLAMETTE L. REV. 195, 238 (2011) (stating that hostile language does not generally constitute fighting words and that it would be difficult to argue that fighting words constitute cyberbullying).

86. *See* *Burson v. Freeman*, 504 U.S. 191, 208–10 (1992) (upholding under strict scrutiny a content-based restriction on certain speech at polling places).

87. *See* *R.A.V. v. St. Paul*, 505 U.S. 377, 403 (1992) (J. White, concurring).

88. Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2418 (1996) (citing *Sable Comm. v. FCC*, 492 U.S. 115, 126 (1989)).

89. *Id.* at 2491.

90. *See* *Burson*, 504 U.S. at 208–10.

91. Derek L. Gaubatz, *RLUIPA at Four: Evaluating the Success and Constitutionality of RLUIPA’s Prisoner Provisions*, 28 HARV. J.L. & PUB. POL’Y 501, 540 (2005).

92. *Id.* (citing *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972)).

93. *Sable Comm.*, 492 U.S. at 126 (citing *Ginsberg v. New York*, 390 U.S. 629, 639–40 (1968)).

94. *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944).

legislation aimed at protecting the physical and emotional well-being of youth, even when such laws have affected the right to free speech.⁹⁵

Courts striking down content-based speech restrictions, however, primarily rely on the narrowly-tailored prong of the strict scrutiny test rather than the compelling government interest prong.⁹⁶ Generally, four elements must be met to convince a reviewing court that a speech restriction is narrowly tailored.⁹⁷ First, the government must prove that the law advances the interest at issue.⁹⁸ If the government does not make a common-sense showing that the law will advance its interest, the restriction is not narrowly tailored.⁹⁹ Second, the law must not restrict “a significant amount of speech that does not implicate the government interest.”¹⁰⁰ Third, the government must use the least restrictive means to address the interest at issue.¹⁰¹ If there are less restrictive means available that would serve the government’s interest just as well as the speech restriction, then the restriction is not narrowly tailored.¹⁰² Finally, the law cannot “fail[] to restrict a significant amount of speech that harms the government interest to about the same degree as does the restricted speech.”¹⁰³ Put differently, if there is a significant amount of speech that harms the government interest to a similar degree and manner, but is not regulated, then the restriction is not narrowly-tailored due to its under inclusiveness.¹⁰⁴ In sum, under this two-step strict scrutiny analysis, it is difficult to develop a law restricting the content of speech that is not considered low-value.

95. See *New York v. Ferber*, 458 U.S. 747, 757–64 (1982) (upholding constitutionality of New York statute that made it a criminal offense to knowingly promote a sexual performance by a child under the age of 16 by distributing material which depicted such a performance because the threat such material posed to children and its intrinsic relation to child sexual abuse outweighed any de minimis interest in protecting the speech); see also *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969) (recognizing as part of the compelling government interest in the well-being of minors, the importance of maintaining order and discipline in schools which, therefore, justifies a speech restriction).

96. Volokh, *supra* note 88, at 2421.

97. See *id.* at 2421–23.

98. *Id.* at 2422 n.30 (citing *Meyer v. Grant*, 486 U.S. 414, 426 (1988); *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986); *Globe Newspaper Co. v. Superior Court for Norfolk*, 457 U.S. 596, 609–10 (1982); *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 789–90 (1978); *Buckley v. Valeo*, 424 U.S. 1, 45–47, 53 (1976)).

99. *Id.* at 2422 n.31 (citing *Burgson v. Freeman*, 504 U.S. 191, 211 (1992) (stating that government can make simple common-sense argument to show law is narrowly-tailored); see also *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1666 (2015) (holding that a restriction on judges personally soliciting campaign contributions complied with First Amendment because the restriction was narrowly-tailored to achieve the State’s compelling concern of maintaining public confidence in the impartiality of the judiciary).

100. *Id.* at 2422 n.32 (citing *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 120–21 (1991); *FEC v. Nat’l Conservative Political Action Comm.*, 470 U.S. 480, 500–01 (1985); *First Nat’l Bank*, 435 U.S. at 794).

101. *Id.* at 2422.

102. *Id.* at 2422 n.33.

103. *Id.* at 2423 n.39.

104. *Id.*

C. Due to Its Chilling Effect on the Content of a Wide Range of Speech, the Right to Be Forgotten Is Not Likely to Survive Strict First Amendment Scrutiny in the United States

Assuming that a reviewing court determines that a right to be forgotten statute is broader than restricting low-value speech like libel, obscene speech and fighting words, the statute would likely have to survive strict First Amendment scrutiny by being deemed a narrowly-tailored restriction of speech designed to achieve a compelling government interest.¹⁰⁵ While some have made the argument that cyberbullying should be restricted like fighting words and receive lower First Amendment scrutiny,¹⁰⁶ most cyberbullying—although insulting and sometimes threatening—is not face-to-face in a way that it would tend to incite an immediate breach of the peace under traditional fighting words jurisprudence.¹⁰⁷ Therefore, a right to be forgotten statute on par with the E.U.’s recognized protection would likely have to survive the two-pronged strict-scrutiny test.

As previously discussed, cyberbullying has the potential to inflict devastating physical, psychological, and educational consequences on victims as well as perpetrators.¹⁰⁸ It is possible that a reviewing court would conclude that a right to be forgotten, implemented for the purpose of preventing cases of cyberbullying or mitigating their effects, would pass the compelling government interest prong of the analysis.

The overriding problem with the right to be forgotten, however, is that it is not a narrowly-tailored speech restriction designed to respond to the issue of cyberbullying. Due to the broad nature of the ECJ’s ruling, countless individuals have been given the opportunity to petition Google and other search engines to remove links to webpages containing personal information.¹⁰⁹ Out of more than 630,000 takedown requests received by Google, approximately half have been granted, which has resulted in the blocking of access to a large amount of information contained on the Internet.¹¹⁰

Although Americans and Europeans may have varying expectations when it comes to privacy, no evidence suggests that Americans would be any less likely to avail themselves of a right to be forgotten. The chilling of speech could be substantial and result in the removal of speech that has little or nothing to do with cyberbullying. Therefore, application of the right to be forgotten—at least as implemented in the European Union—likely could not

105. See *R.A.V. v. St. Paul*, 505 U.S. 377, 403 (1992).

106. See McCabe, *supra* note 81, at 849.

107. See *Gooding v. Wilson*, 405 U.S. 518, 523 (1972) (“The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight Derisive and annoying words can be taken as coming within the purview of the statute . . . only when they have this characteristic of plainly tending to excite the addressee to a breach of the peace.”).

108. See Morben, *supra* note 33, at 694–95.

109. See *Google Transparency Report*, *supra* note 61.

110. See *id.*

be justified as a speech restriction that is narrowly-tailored to the interest of protecting minors from the harms of cyberbullying.

A mechanism that is more narrowly-tailored towards addressing the specific harm of cyberbullying content on the Internet likely stands a better chance at surviving strict scrutiny. Policymakers, however, do not have far to go to find a model for such a mechanism. There already exists a notice-and-takedown mechanism in the DMCA that, like the right to be forgotten, allows individuals to petition to have certain information removed from the Internet.¹¹¹ This mechanism, with appropriate protections and procedures put in place, could provide policymakers with a model to restrict the content of speech associated with cyberbullying without violating the First Amendment.

V. POLICYMAKERS SHOULD LOOK TO THE NOTICE-AND-TAKEDOWN PROCEDURES OF THE DIGITAL MILLENNIUM COPYRIGHT ACT, WHICH MAY PROVIDE A CONSTITUTIONAL MEANS FOR RESTRICTING THE CONTENT OF SPEECH

The notice-and-takedown procedures contained within the DMCA,¹¹² although in the context of copyright law, may provide policymakers with effective guidance on how to develop a takedown mechanism comparable to the right to be forgotten for the purpose of restricting the content of certain images and videos associated with cyberbullying. Rather than a broad speech restriction that happens to restrict cyberbullying speech, a notice-and-takedown mechanism would put the onus on targeting specific content, and the content would only be removed if it meets certain required elements. A speech restriction modeled after the notice-and-takedown procedures of the DMCA could thus provide policymakers with a tool to limit cyberbullying and its effects.

A. *Background on the DMCA and Its Notice-and-Takedown Provisions*

Congress enacted the DMCA to provide greater protection to copyright holders by allowing for the removal of material posted on the Internet that infringes upon their intellectual property rights.¹¹³ The DMCA's notice-and-takedown procedures are contained in Title II of the statute, which discusses certain "safe harbors" for online service providers to avoid liability for unknowingly hosting infringing material.¹¹⁴ These procedures require that a provider of online services, such as a website or a similar entity, expeditiously remove or disable access to material in its system upon receiving notice from the copyright holder or her agent that it is hosting copyright infringing

111. See 17 U.S.C. § 512(c)(1) (2012).

112. *Id.*

113. See Yamamoto, *supra* note 15, at 126–27.

114. See 17 U.S.C. § 512(c)(1), (3).

material.¹¹⁵ Importantly, if the provider, upon receiving notice that it is hosting infringing material on its domain, moves expeditiously to remove or disable access to the infringing material, the provider is not liable for any monetary, injunctive, or equitable relief resulting from its hosting or removal of the material.¹¹⁶

Notice is given to the provider through the submission of a takedown notice.¹¹⁷ The takedown notice must include:

(1) the signature of the copyright owner or someone authorized to act on the owner's behalf; (2) identification of the copyrighted work(s) claimed to have been infringed upon; (3) identification of the infringing material and information reasonably sufficient to permit the provider to locate the material; (4) the contact information of the infringing party; (5) a statement that it is the good faith belief of the complaining party that the use of the material at issue is not authorized by the copyright owner; and, (6) a statement that the information in the notification is accurate and that the complaining party is authorized to act on behalf of the copyright owner.¹¹⁸

If the notification does not include this information, the material at issue does not have to be removed by the provider.¹¹⁹ If the complainant is found to have knowingly misrepresented the infringing nature of the material, that party is liable for damages and fees incurred by the copyright owner or the provider of online services who is injured due to relying on the misrepresentation when removing or disabling access to the material.¹²⁰

The notice-and-takedown procedure does contain a reactive measure for subscribers of a service provider to submit a counter-notification, arguing that material was improperly removed and that access should be restored.¹²¹ A counter-notification requires the same measure of accountability in order to assign liability for erroneous takedown requests.¹²² Upon receiving this counter-notification, the provider must both promptly provide the person who filed the initial takedown notification with a copy of the counter-notification and restore access to the material identified in the counter-notification in no less than ten and in no more than fourteen business days.¹²³ If there are misrepresentations in the counter-notification, the party who submitted the counter-notification can be held liable for damages if such misrepresentations were knowingly made.¹²⁴ Additionally, the provider cannot be held liable for copyright infringement by complying with the provisions of a counter-notification.¹²⁵

115. *Id.* § 512(c)(1)(C).

116. *Id.* § 512(c)(1), (g)(1).

117. *Id.* § 512(c)(3)(A).

118. *Id.*

119. *Id.* § 512(c)(3)(B).

120. *Id.* § 512(f).

121. *Id.* § 512(g)(2), (3).

122. *Id.* § 512(g)(2), (3).

123. *Id.* § 512(g)(2)(B)–(C).

124. *Id.* § 512(f)(2).

125. *Id.* § 512(g)(4).

B. The Argument That the DMCA's Notice-and-Takedown Procedures Provide for a Potentially Unconstitutional Restriction of Speech

Some have argued that the DMCA's notice-and-takedown regime is an unconstitutional infringement upon the right to free speech.¹²⁶ These critics assert that "if notices are sent when copyright infringement is alleged but unclear, or defective notices are the norm . . . [this notice-and-takedown regime] may represent a wolf in sheep's clothing, allowing information protected by the First Amendment to be removed from the Internet cheaply, expeditiously, and without check."¹²⁷ In fact, it has been asserted that as much as thirty percent of DMCA takedown notices are improper.¹²⁸ Additionally, a recent study concluded that out of more than twenty-five million allegedly infringing URLs over a six month period, including more than thirteen million URLs sent to site operators, only eight counter-notifications were received, thereby allowing for material to be removed from the Internet that potentially never should have been removed in the first place.¹²⁹ Finally, the fairness of the extrajudicial removal of information from websites has been called into question.¹³⁰ Critics argue that courts should be making the decision on whether to remove allegedly infringing material rather than copyright owners and providers of online services.¹³¹

These arguments are unconvincing. The DMCA's notice-and-takedown regime is constitutional because it reinforces the "constitutional directive to 'promote the [p]rogress' of knowledge and learning."¹³² As Justice O'Connor famously said in *Harper & Row, Publishers, Inc. v. Nation Enterprises*, copyright is the "engine of free expression."¹³³ Copyright

126. See Kathleen Brennan Hicks, Note, *The Right to Say, "I Didn't Write That": Creating a Cause of Action to Combat False Attribution of Authorship on the Internet*, 22 J. INTELL. PROP. L. 375, 398 (2015) (citing Wendy Selzer, *Free Speech Unmoored in Copyright's Safe Harbor: Chilling Effects of the DMCA on the First Amendment*, 24 HARV. J.L. & TECH. 171 (2010)).

127. *See id.*

128. See Hannibal Travis, *WIPO and the American Constitution: Thoughts on a New Treaty Relating to Actors and Musicians*, 16 VAND. J. ENT. & TECH. L. 45, 90 n.239 (2013) (citing Brief of Electronic Frontier Foundation as Amicus Curiae Supporting Defendant-Appellee and Urging Affirmance at 29, *Sony BMG Music Entm't v. Tenenbaum*, 660 F.3d 487 (1st Cir. 2011) (No. 10-1883) ("One 2006 study estimated that fully one-third of DMCA takedowns were improperly asserting infringement claims; indeed with media companies sending as many as 160,000 takedown notices at a time, it could hardly be otherwise."), <https://www EFF.org/files/filenode/inresonybmgetal/EFFamicustenenbaum.pdf> [<https://perma.cc/5EWJ-TPVW>]).

129. See BRUCE BOYDEN, CTR. FOR THE PROT. OF INTELL. PROP., *THE FAILURE OF THE DMCA NOTICE AND TAKEDOWN SYSTEM: A TWENTIETH CENTURY SOLUTION TO A TWENTY-FIRST CENTURY PROBLEM* (2013), <http://cpip.gmu.edu/wp-content/uploads/sites/31/2013/08/Bruce-Boyden-The-Failure-of-the-DMCA-Notice-and-Takedown-System1.pdf> [<https://perma.cc/2DN9-AJFE>].

130. Hicks, *supra* note 126, at 398.

131. *See id.*

132. Brian Leary, Note, *Safe Harbor Startups: Liability Rulemaking Under the DMCA*, 87 N.Y.U. L. REV. 1135, 1164 (2012) (citing U.S. CONST. art I, § 8, cl. 8).

133. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985).

balances the holder's monopoly entitlement with the public's interest in the dissemination and distribution of information.¹³⁴ While free speech is restricted to a certain extent, society has an interest in promoting the dissemination of materials that add to scholarship, and, to incentivize the production of this material, the author is granted exclusive rights through copyright.¹³⁵ An individual with something significant to add to the collective knowledge is less likely to go through the effort of developing the material if she knows that she will not have any exclusive right to it.¹³⁶ Without new ideas and developments, the growth of a vibrant civil society is hindered by a lack of contributions to the expansion of public knowledge.¹³⁷ A similar argument should be true for protecting Internet users from cyberbullying, because greater privacy rights online, and a greater ability to manage one's online profile, promote "diversity of speech and behavior," and the "expression of eccentric individuality."¹³⁸

VI. APPLICATION OF THE DMCA NOTICE-AND-TAKEDOWN MECHANISM AS AN ALTERNATIVE MODEL TO RESTRICT THE CONTENT OF CYBERBULLYING SPEECH

The DMCA's notice-and-takedown procedures could provide a model for implementing something similar to a right to be forgotten in the United States. The framework proposed in this Note, which is designed for the specific purpose of protecting minors from the harmful effects of cyberbullying, would allow minors, through their guardians or potentially through another adult, such as a teacher or other care provider, to request that online service providers remove specific online images or video content from their domains. As discussed in the following sections, this proposal is more likely to survive strict scrutiny than the European Union's right to be forgotten due to the compelling government interest in preventing cyberbullying and protecting minors from its harmful effects, combined with the fact that this mechanism only targets a narrow range of content and contains multiple layers of protection for free speech.

134. *Id.*

135. See David M. Morrison, *Bridgeport Redux: Digital Sampling and Audience Recoding*, 19 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 75, 76 (2008).

136. See *id.*

137. See Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 *YALE L.J.* 283, 349–51 (1996) (stating that for citizens to participate in a rich cultural, social, and political life, they must have wide latitude to express and reformulate ideas embodied in copyrighted expression).

138. Daniel J. Solove, *The Virtues of Knowing Less: Justifying the Privacy Protections Against Disclosure*, 53 *DUKE L.J.* 967, 991 (2003) (quoting Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as an Object*, 52 *STAN. L. REV.* 1373, 1425–26 (2000)).

A. The Elements of This Proposed Notice-and-Takedown Mechanism

Under this proposed model, Congress would enact a law enabling minors, through their guardian, other adult caretaker, or even on their own, who are the subject(s) of online images or video content posted without their consent, to submit a takedown request to the applicable online service provider. If granted, the request would result in “erasing” the content from the service provider’s domain. The notice-and-takedown request would contain multiple required elements, including:

1. The signature of the minor’s guardian, other agent, or the minor herself who is seeking to have content taken down due to its association with cyberbullying;
2. Identification of the image or video that contains personally identifiable information on the subject (the minor) and was posted without the minor’s consent;
3. A statement, citing specific evidence, on why it is the complaining party’s good faith belief that the image or video at-issue was posted with the specific intent to torment, threaten, harass, humiliate, embarrass, or otherwise inflict significant emotional harm upon the subject; and
4. The contact information of the complaining party.¹³⁹

If the takedown request contains all of these elements, the provider must remove the content in an “expeditious” manner.¹⁴⁰ If the provider does remove the material expeditiously, it is immune from any potential civil liability for previously hosting the material. Additionally, signing the request certifies that the request is being submitted in good faith. Similar to the DMCA, policymakers could introduce various sanctions against the complaining party—including damages to the posting party and/or costs and fees to the online service provider—if it is determined that a request is not submitted in good faith.

The next step in the proposed mechanism is to allow the party who originally posted the content at issue to submit a counter-notification seeking to have access to the content restored. For the counter-notification to be granted, it would have to contain:

1. The signature of the party who posted the image or video, or an agent or guardian if the poster is a minor;
2. Identification of the image or video at issue;
3. The party’s contact information; and

139. *Cf.* 17 U.S.C. § 512(c)(1), (3) (2012) (the elements of the proposed notice-and-takedown test are derived from the notice-and-takedown elements of the DMCA).

140. *Cf. id.* § 512(c)(1)(C) (upon notification of the claimed infringement, the posting-party must expeditiously remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity).

4. A statement, in good faith, explaining why the content was not posted with the intent to torment, threaten, harass, humiliate, embarrass or otherwise target the complaining party.

Once the provider of online services receives the counter-notification, the provider must review the notification in order to determine whether it contains the required information. Once the provider determines that the counter-notification does contain the required information, the provider must expeditiously restore access to the material. If the provider does not restore access to the material, it opens itself to the potential for civil liability for its failure to repost.

B. Why This Mechanism Is a Constitutional Speech Restriction

The essential constitutional question is whether this mechanism is a narrowly-tailored speech restriction designed to achieve a compelling government interest.¹⁴¹ In order to be narrowly-tailored, the proposed mechanism must advance the interest at issue, avoid restricting a significant amount of speech that does not implicate the government interest, be the least restrictive means to accomplish the interest at issue, and avoid the failure to restrict a significant amount of speech that harms the government's interest to about the same degree as does the restricted speech.¹⁴² This section addresses these elements in turn.

First, this proposed notice-and-takedown mechanism could do a great deal to prevent cases of cyberbullying and mitigate their effects. While there are statutes currently in existence that seek to construct strong anti-bullying policies and punish individuals who engage in cyberbullying,¹⁴³ this mechanism is unique because it provides for a guaranteed right, across the Internet, to petition providers of online services to remove harmful and malicious content. When victims of cyberbullying, like Raza, grow up and attempt to move on from their past, current laws do not fully capture the reality that Internet content is virtually impossible to remove once it has been uploaded.¹⁴⁴ This mechanism will change that reality. Upon receiving the takedown request from the complaining party, the provider is *required* to remove the identified material unless it receives a valid counter-notification. By utilizing this proposed mechanism, victims of cyberbullying stand a chance to distance themselves from their cyberbullying experiences.

Second, this proposed mechanism avoids restricting a significant amount of speech unrelated to the interest in protecting minors from cyberbullying. By way of contrast, Europe's right to be forgotten law is more broadly construed to include restricting speech associated with cyberbullying, speech among adults (which receives greater First Amendment deference),

141. See *Burson v. Freeman*, 504 U.S. 191, 198 (1992).

142. See Volokh, *supra* note 88, at 2423.

143. See, e.g., N.C. GEN. STAT. § 14-458.1 (2012); MASS. GEN. LAWS ch. 71, § 370 (2010).

144. See Fischer, *supra* note 11, at 258.

and speech that has nothing to do with cyberbullying.¹⁴⁵ By successfully submitting a notice-and-takedown request, the complaining party is identifying a specific online image or video and meeting multiple layers of protection designed to ensure that cyberbullying speech, rather than other forms of speech, is what is being restricted. Also, if non-cyberbullying speech is removed, the posting party can easily submit a counter-notification to have the content restored. If the counter-notification meets the required elements, access to the content must be restored or the provider opens itself to civil liability. This complementary provision would evince the government's intent to find the least restrictive means available for furthering its compelling interest.

Finally, this notice-and-takedown regime does not exclude a substantial amount of speech associated with cyberbullying. There would be a strong argument that the mechanism excluded speech (and is therefore under inclusive) if it had been limited just to low-value speech like fighting words. While fighting words could be considered cyberbullying, not all speech that constitutes cyberbullying counts as fighting words.¹⁴⁶ Cyberbullying includes harassing speech, tormenting speech, and embarrassing speech that is abusive, but not likely to result in an immediate breach of the peace.¹⁴⁷ This mechanism, by seeking to restrict expression beyond the narrow category of fighting words, encompasses much, if not all, of the speech that constitutes cyberbullying. It is unlikely that a substantial amount of cyberbullying speech will fall through the cracks. This proposed notice-and-takedown mechanism, when compared to the right to be forgotten, is in greater alliance with the First Amendment and can provide victims of cyberbullying with a unique remedy unlike anything currently in force today.

While the mission to protect privacy is a noble one, a European-style right to be forgotten poses a threat to a vibrant civil society by restricting too much speech.¹⁴⁸ Search engines have had to put together large legal teams in order to respond to the flood of takedown requests;¹⁴⁹ and, in theory, anything

145. *Interview / Peter Fleischer: Google Performs Balancing Act Over the Right to be Forgotten*, ASAHI SHIMBUN (Aug. 24, 2016, 5:05 JST), <http://www.asahi.com/ajw/articles/AJ201608240005.html> [https://perma.cc/HX42-37NB] (discussing popular takedown requests received by Google, including requests from doctors and dentists seeking to have information related to past malpractice convictions removed, businesses seeking to remove information related to past fraud accusations, an art seeking to remove information related to a past conviction for forgery, and government officials seeking to have information related to past political views removed when their views have changed).

146. *See* Evie Blad, *Free Speech at Issue in New York Cyberbullying Case*, ED. WEEK: BLOG (June 17, 2014, 4:10 PM), http://blogs.edweek.org/edweek/rulesforengagement/2014/06/free_speech_at_issue_in_new_york_cyberbullying_case.html [https://perma.cc/EBC4-NBD7].

147. Jacqueline D. Lipton, *Combating Cyber-Victimization*, 26 Berkeley Tech. L.J. 1103, 1109 (2011).

148. *See* WERRO, *supra* note 63.

149. *See* GOOGLE ADVISORY COUNCIL, *supra* note 65.

that is posted online, at the point that it becomes no longer relevant, could be removed.¹⁵⁰

In contrast, the proposed notice-and-takedown mechanism both actively seeks to restrict cyberbullying speech, but also contains institutional mechanisms to protect speech essential for public knowledge, a vibrant culture, and political engagement. Furthermore, this notice-and-takedown mechanism is going to reduce the burden on providers of online services. By restricting the content of online images and videos, rather than all online speech, there is not likely to be a flood of takedown requests as was the case in the weeks and months after the right to be forgotten was approved.¹⁵¹ A significant showing is required to have online content removed under this notice-and-takedown mechanism and the need for a large team of lawyers to analyze takedown requests would be minimized.

C. Potential Counterarguments and the Need for Further Scholarship

There are potential counter-arguments, however, against the mechanism proposed in this note that should be addressed. These arguments include: (1) the fact that most websites already have policies in place within their terms of use designed to address cases of cyberbullying on their platforms and (2) the need for a robust appeals process.

1. Websites Already Have Protections in Place

In response to some high-profile cases of cyberbullying, many websites have made the decision to develop their own notice-and-takedown mechanisms to allow users to request that certain content be removed from their platforms.¹⁵² Some may argue that, as a result, the notice-and-takedown mechanism proposed by this Note is unnecessary. Websites are dealing with cyberbullying on their own through their terms of use policies and it is unnecessary to add another level of bureaucracy.¹⁵³

Leaving the response to cyberbullying in the hands of the private sector, however, is a flawed solution. While these terms of use do exist, having a federal mechanism to set a uniform policy across the board for providers of online services, and to potentially hold them liable for not complying, is very important. An example of why this is the case can be found in the case of Rebecca Ann Sedwick, a young woman who committed suicide after being tormented by embarrassing images and messages on ASKfm.¹⁵⁴ While

150. See C-131/12, *Google Spain SL v. Agencia Española de Protección de Datos*, paras. 92–94 (May 13, 2014), <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62012CJ0131> [<https://perma.cc/ZBL3-6H7L>].

151. See GOOGLE ADVISORY COUNCIL, *supra* note 65.

152. See Tijana Milosevic, *Social Media Companies' Cyberbullying Policies*, 10 INT'L J. COMM'N 5164, 5165 (2016).

153. *Id.* at 5174.

154. See *Rebecca Ann Sedwick, 12 Year Old Florida Girl, Commits Suicide After Online Bullying*, HUFFINGTON POST (Sept. 12, 2013),

ASKfm does have an anti-harassment policy in its terms of use, several suicides have nonetheless been linked to cyberbullying on the online application.¹⁵⁵ ASKfm's terms of use simply were not strong or effective enough to protect Rebecca,¹⁵⁶ and the bullying she experienced on the platform directly contributed to her death.¹⁵⁷

The solution proposed here is necessary, even with many websites having terms of use in place, because the health and wellbeing of some of this country's most vulnerable citizens should not be left in the hands of for-profit websites. Cyberbullying is a public issue that should be addressed by public authorities as it not only affects victims while they are young, but it can affect a victim well into adulthood.¹⁵⁸ Like what occurred with Rebecca, cyberbullying can ruin an innocent victim's life. It has been recognized as a growing public health problem,¹⁵⁹ and, because of the continued growth of the Internet, the problem is not going to go away anytime soon. The reality is that the lives of young people are at stake and it is society's solemn duty to protect them. In fact, by protecting providers from civil liability if they expeditiously comply with takedown requests, providers are incentivized to take cyberbullying more seriously and to be a part of the solution. Finally, rather than being at the mercy of an individual website's terms of service, this mechanism provides much needed uniformity across the Internet—something that is sorely lacking today. Terms of use, by themselves, are not an adequate solution for remedying the harm associated with cyberbullying.

2. The Need for an Appeals Process

A second foreseeable counterargument is that this mechanism requires a meaningful appeals process beyond the notification and counter-notification process. In Europe, where Google has rejected removal requests for almost one-million web links, an appeals process has been put in place to ensure that all takedown requests are properly considered.¹⁶⁰ This notice-and-takedown mechanism should have a comparable appeals process to provide the same protection.

http://www.huffingtonpost.com/2013/09/12/rebecca-ann-sedwick-bulli_n_3915883.html [<https://perma.cc/QW76-8DZZ>].

155. See Jessica Guynn & Janet Stobart, *Ask.fm, New Social Site, Same Bullying*, L.A. TIMES (Aug. 20, 2013), <http://articles.latimes.com/2013/aug/20/business/la-fi-britain-cyberbullying-20130820> [<https://perma.cc/32R6-3ZNM>].

156. See *Terms of Use*, ASKFM (last visited Feb. 11, 2017), <http://about.ask.fm/legal/en/terms.html> [<https://perma.cc/U85A-EJVA>] (ASKfm's terms of use provide that "we reserve the right, at any time and without prior notice, to remove or disable access to any content that we, for any reason or no reason, consider to be objectionable, in violation of the TOU or otherwise harmful to the Services or our users").

157. See *The Story of Rebecca Ann Sedwick*, NOBULLYING.COM (last modified Aug. 6, 2015), <https://nobullying.com/rebecca-ann-sedwick/> [<https://perma.cc/4JVJ-KFMW>].

158. Morben, *supra* note 33, at 695.

159. King, *supra* note 27, at 849.

160. See Natasha Lomas, *Europe Seeks a Common Appeals Process for the "Right to be Forgotten,"* TECHCRUNCH (Sept. 19, 2014), <https://techcrunch.com/2014/09/19/rbf-appeals-guidelines/> [<https://perma.cc/UW4P-KUJ7>].

Additionally, an appeals process is important to prevent abuse on both sides of the equation. Not only could it be possible for an individual to submit a counter-notification to ensure that a victim continues to be tormented online, but an alleged victim may submit a notice-and-takedown request to have an image or video removed just because he does not like what it depicts. It should not be the job of Google or Facebook to adjudicate these disputes. Also, if a complaining party may be fined for submitting a notice-and-takedown request in bad faith, some appeals process is necessary to ensure that the fine is paid.

However, the answer to the question of what this appeals process should look like is unclear. One potential solution could be to allow the original complaining party to make a further showing, by clear and convincing evidence to a third-party adjudicator, that the content was posted with the intent to “torment, threaten, harass, humiliate, embarrass, or otherwise inflict significant emotional harm upon the subject.”¹⁶¹ If this showing is successfully made, then the adjudicator could order the material to be removed. For example, the adjudicator could be an administrative law judge at the Federal Communications Commission (FCC) due to the agency’s expertise, independence, and its recent decision to regulate the Internet under Title II of the Communications Act.¹⁶²

The complaining party could also potentially have access to a remedy in court. If Congress was to write a statute containing the proposed notice-and-takedown procedure, the complaining party could sue the posting party directly, thereby allowing the website hosting the content to get out from the middle of the dispute after fulfilling its initial responsibilities in the notice and counter-notice phase. In court, the complaining party would have to make a showing by clear and convincing evidence that the content was posted with the requisite intent. Upon making the required showing, the court would be able to issue an order requiring that the content at issue be removed within a specified period of time. To reach the point of ultimately having content taken down from the Internet, the complaining party must communicate a significant amount of evidence to the court to show why the speech constitutes cyberbullying. The posting party, of course, will have an opportunity in court to show why the speech at-issue is not cyberbullying. As a result, it is possible that an appeals process will result in many takedown requests ultimately being denied due to the built-in mechanisms designed to protect free speech. The ultimate question of exactly how to develop this appeals process remains open for future scholarship.

VII. CONCLUSION

Cyberbullying is a serious public health problem in the United States that deserves the utmost attention from policymakers, the media, and the public. While the Internet has brought society many benefits, the growth of cyberbullying has been an unintended consequence. Cyberbullying has led to

161 See 17 U.S.C. § 512(c)(1), (3) (2012).

162. See Protecting and Promoting the Open Internet, *Report and Order*, 30 FCC Rcd 5601 (2015).

devastating physical and psychological harm for victims, the majority of whom are minors. As society comes to grips with the problem of cyberbullying and seeks to address the problem in future years, this Note provides an innovative notice-and-takedown mechanism modeled after the DMCA, to address cyberbullying on a national level. In contrast to past efforts, this proposed mechanism goes directly after the source of the harm—the online content itself. A notice-and-takedown mechanism where cyberbullying speech can be removed from the Internet would provide victims with a meaningful opportunity to move on with their lives. This is the least we can do for some of the most vulnerable members of our society.