

THE RESISTANCE OF MEMORY: COULD THE EUROPEAN UNION’S RIGHT TO BE FORGOTTEN EXIST IN THE UNITED STATES?

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As the internet establishes its presence in modern life, it continues to raise questions about the right to privacy in a digital world. However, the right to privacy in the United States must often overcome challenges based on the First Amendment right to free speech. The right to be forgotten, a new digital privacy rule that aims to protect an individual’s right to shape how the internet can define her, is in direct conflict with the rights to free speech and public information. The emergence of the right to be forgotten highlights a fundamental paradigm shift in the human experience, from an existence in which the default was to forget, the mind solely bearing the struggle to remember and retain, to one in which data in the digital world makes preservation the norm and forgetting a struggle.¹

Under the emerging conception of the right to be forgotten, an individual can request that content about her be removed from the internet. Through a recent ruling from its highest court, residents of the European Union (“EU”) now have such a right.² Specifically, data controllers (currently read to include search engine operators like Google) must process requests from individuals to remove links from search results that include their names. According to the ruling, if the linked information appears to be “inadequate, irrelevant . . . or excessive in relation to the purposes of the processing at issue,” the search engine operator must remove the link from these search results.³

This Note explores the EU right to be forgotten and the questions it raises in the United States. Part I details the EU ruling, *Google, Inc. v Costeja*. Part II discusses American sentiments towards free speech and

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1. See VIKTOR MAYER-SCHÖNBERGER, *DELETE: THE VIRTUE OF FORGETTING IN THE DIGITAL AGE* 196 (2009).

2. Case C-131/12, *Google Inc. v. Mario Costeja González* ¶ 94, *available at* <http://curia.europa.eu/juris/document/document.jsf?docid=152065&doclang=en> (May 13, 2014).

3. *Id.*

privacy in the context of a right to be forgotten. Finally, Part III discusses tensions sparked by the unspecific EU ruling, which serves as a cautionary tale for the United States. First, there are questions about what types of content a search engine operator should have to de-link. The ruling has also sparked debate about what body should be tasked with making decisions like these, which are effectively defining the boundaries of legal rights. Furthermore, the right to be forgotten may threaten the integrity of the internet by carving out “memory holes” that censor the data users can access. Some also decry the fact that the EU ruling does not seem to accommodate the rights of content owners, including media and internet users. And finally, there are concerns that if the EU forces Google to apply de-linking to all of its domains, the European right could affect search results across the world. In light of these issues and the potential constitutional and technological issues at stake, if a right to be forgotten is to exist at all in the United States, it should exist only in narrow contexts where the privacy right is strong.

I. *GOOGLE INC. V. COSTEJA*: THE CREATION OF A “RIGHT TO BE FORGOTTEN” IN THE EUROPEAN UNION

On May 13, 2014, the European Court of Justice (“ECJ”), the EU’s highest court, established a “right to be forgotten” by declaring in *Google v. Costeja* that “data controllers” (including search engine operators) had to examine and honor EU citizen requests to delete results from internet searches of their names.⁴ This Part will detail the ruling itself, followed by discussing Google’s actions after the ruling and reactions from stakeholders, journalists, and scholars.

A. *GOOGLE INC. V. COSTEJA*: THE ECJ’S MAY 2014 “RIGHT TO BE FORGOTTEN” RULING

The Court of Justice of the European Union (“CJEU”) is the EU’s judiciary consisting of three courts. The ECJ is the highest of these three courts, and thus the EU’s highest court.⁵ The terms “Court” and “Court of

4. Press Release, Court of Justice of the European Union, Press Release No 70/14, Judgment in Case C-131/12 (May 13, 2014), at 1–2 [hereinafter ECJ Press Release].

5. As for the other two, the General Court handles certain specific cases and passes them to the ECJ if necessary, while the EU Civil Service Tribunal rules on disputes between the EU and its staff. Description of the Court of Justice of the European Union, EUROPEAN UNION, http://europa.eu/about-eu/institutions-bodies/court-justice/index_en.htm (last visited Jan. 29, 2015).

Justice” are often used to refer to both the CJEU and the ECJ; many of the CJEU’s notable rulings are from the ECJ. The CJEU “interprets EU law to make sure it is being applied the same way in all EU countries,” “settles legal disputes between EU governments . . . and institutions,” and hears cases brought by private parties who believe an EU institution has infringed their rights.⁶ The Court may hear a case for various reasons, including “to interpret a point of EU law” at the request of a national court, to examine whether an EU law violates EU treaties or fundamental rights, or to check EU institutions.⁷ In doing this, it often establishes broad frameworks that member states must adhere to through their own specific laws and regulations. This Note will primarily refer to the ECJ.

This case originated in Spain, where citizen Mario Costeja Gonzalez brought suit against Google and newspaper publisher La Vanguardia. When Costeja’s name was entered into Google’s search engine, the top links included news articles from the past several years detailing a real estate auction to resolve social security debts he owed at the time.⁸ In his complaint, Costeja requested that Google remove those results for searches of his name. Costeja argued that these results about his past debts were harming his reputation and that they were entirely irrelevant since they involved resolved matters.⁹ Costeja’s original complaint also requested that the newspaper publisher La Vanguardia remove the articles from its website, but the Spanish Data Protection Agency, which oversaw the case initially, rejected this complaint.¹⁰

According to the ECJ ruling, if information or a link “in the list of results following a search made on the basis of [one’s] name” appears to be “inadequate, irrelevant, . . . excessive in relation to the purposes of the processing at issue,” or outdated, the links must be erased from that list of results.¹¹ This involves balancing the data subject’s privacy right with internet users’ interest in the information.¹² This key language is not

6. *Id.*

7. *Id.*

8. ECJ Press Release, *supra* note 4, at 1. The original articles with Costeja’s debt information are available on La Vanguardia’s website. See *Subhasta D’immobles [Auction Properties]*, LA VANGUARDIA, Jan. 19, 1998, at 23, available at <http://hemeroteca.lavanguardia.com/preview/1998/01/19/pagina-23/33842001/pdf.html> (Sp.).

9. Case C-131/12, Google Inc. v. Mario Costeja González ¶ 15, available at <http://curia.europa.eu/juris/document/document.jsf?docid=152065&doclang=en> (May 13, 2014).

10. *Id.*

11. *Id.* ¶ 94.

12. *Id.* ¶ 107.

specific, and there is not much guidance in the rest of the text to give search engine operators an idea of exactly what types of content should be eligible for removal. This Note will later highlight how this unspecific language has been an issue for Google.

The ECJ's ruling rested on the EU's 1995 Data Protection Directive, a law that aims to help protect individuals "with regard to the processing of personal data" by requiring "controllers" and "processors" of that personal data to handle it in certain ways.¹³ In the Directive, a controller is a person, public authority, agency, or other body that "determines the purpose and means of the processing of personal data."¹⁴ A processor, which "processes personal data on behalf of the controller," has fewer duties under the Directive.¹⁵ While this Directive does not directly mention search engines or search results, the Court noted that search engine operators like Google are "controllers" of personal data as described in the Directive, and so they are subject to the various articles guaranteeing citizens "the right to obtain . . . erasure or blocking of data" that are inadequate or irrelevant.¹⁶ This definition also includes Yahoo, which operates a major search engine from its main site, and Microsoft, which operates Bing. Of course, Google is by far the most-used search engine in Europe.¹⁷ It is important to note that while this ruling defined search engine operators like Google, Microsoft, and Yahoo as data controllers because of their respective web search tools, it is possible that in the future other internet entities, like Facebook, could also fall into the category of "data controllers" and be subject to similar rules. The ruling also rested on Article 8 of the Charter of Fundamental Rights of the

13. Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, 1995 O.J. (L 281) 31 [hereinafter 1995 Directive].

14. *Id.*

15. *Id.*

16. *Costeja*, Case C-131/12, at ¶ 23. The choice to call a search engine a "controller" might seem like a stretch if "processor" seems more apt (after all, it appears that search engines "process data on behalf of . . . controller[s]"). This might suggest that the court was intent on getting the right to be forgotten pushed into EU law. On the other hand, it is plausible to argue that search engines today are crossing the line into "controlling" data, especially because they have the ability to manipulate the results for a search term like one's name.

17. Tom Fairless, *Europe vs. Tech Giants: Round Two*, WALL ST. J. (Jan. 20, 2015), <http://www.wsj.com/articles/europe-vs-u-s-tech-giants-amazon-google-and-facebook-still-in-the-spotlight-1421777989> (noting that Google's share of the search market in Europe exceeds 90 percent).

European Union, which guarantees citizens a right to privacy, including their personal data.¹⁸

The Court provided an outline about how the process would work. Search engine operators such as Google, Microsoft, and Yahoo must examine the merits of requests from users to de-list a link. Based on the merits of each request, the search engine operator can either agree to the removal of the link or deny the request. However, the search engine only needs to remove the links under the search results of that person's name. For example, consider a newspaper article that mentions two Frenchman, Bernard Blanc and Pierre Pascal, and appears near the top of search results for both of their names.¹⁹ If the article casts Pierre in a negative light, Pierre can send a request to Google to de-list the article from results for the search term "Pierre Pascal," and if Google agrees to de-list it for Pierre, the article would remain available and visible for the search term "Bernard Blanc."

If Google denies the request, the user can take the matter to a supervisory authority within her country: "Where [the operator] does not grant the request [to remove the search result], the [requesting user] may bring the matter before [a] supervisory authority" ²⁰ Each member state is directed to establish such an "authority" to handle these cases.²¹ Essentially, if Google rejects a request to remove a link based on its examination of the merits, the requester can take the case to its country's supervisory authority, which further examines the request. In most member states, this responsibility has fallen to the data protection authorities that already exist in those states.²² Examples of such agencies include Agencia Española de Protección de Datos ("AEPD") in Spain, which brought the present case with Mr. Costeja, and Garante per la Protezione dei Dati Personali (the Italian Data Protection Authority),

18. *Costeja*, Case C-131/12, at ¶ 1; Charter of Fundamental Rights of the European Union art. 8.

19. These characters were created for this Article. Any real-life analogues are purely coincidental.

20. *Costeja*, Case C-131/12, at ¶ 77.

21. *Id.* ¶ 12.

22. Press Release, Article 29 Data Protection Working Party, Press Release on Expanded Guidelines for the Right to be Forgotten (Nov. 26, 2014), *available at* http://ec.europa.eu/justice/data-protection/article-29/press-material/press-release/art29_press_material/20141126_wp29_press_release_ecj_de-listing.pdf [hereinafter Press Release on Article 29 Working Party Guidelines] (noting that DPAs from each member country handle complaints from users whose removal requests are refused).

which returned the first reviews of Google decisions under the right to be forgotten.²³

Currently, Google is removing links only for country-specific Google domains, not EU-wide or worldwide, so a request for removal from Google Italy does not affect Google's German site. Because of this, one can still search Costeja's name at "google.fr" (Google's French domain) and find results about his debts.²⁴ Indeed, Google's removal request form requires a user to select what country she is submitting the request for.²⁵ However, some EU leaders are calling for a worldwide deletion right.²⁶ That is, they are demanding Google pull the link for every Google domain (of course, still limited to results for the requester's name), which would affect American search results. This is a vital issue that could raise turf wars over the internet. Part III of this Note examines this further.

The Court did not discuss the specific criteria for when a link should be removed, leaving specific questions to member states to police within their own jurisdictions. However, the Court did set a vague standard: the examination of a request should strike a "fair balance" between the general interests of internet users and the "fundamental rights" of the requester established under the Directive.²⁷ It is this lack of specificity that left Google wondering exactly how to enforce the right to be forgotten. The Court further noted that the requester's interest would "override" the

23. The Italian Data Protection Authority returned decisions in nine cases, upholding Google's rejection for seven, but reversing Google on two. In one reversal, the published material contained information about an individual unrelated to the central legal proceedings being discussed, and the Authority held it should be removed. Philip Willan, *Italy's Privacy Authority Orders Google Removals*, PCWORLD (Dec. 23, 2014, 11:10 AM), <http://www.pcworld.com/article/2863072/italys-privacy-authority-orders-google-removals.html>. In the United States, this would raise a First Amendment flag since something related to a legal proceeding is typically in the public interest.

24. Of course, those articles are now buried by results about this case.

25. Web Form for *Search Removal Request Under Data Protection Law in Europe*, GOOGLE, https://support.google.com/legal/contact/lr_eudpa?product=websearch (last visited Jan. 29, 2015) [hereinafter Google Right to be Forgotten Web Form].

26. See *Guidelines on the Implementation of the Court of Justice of the European Union Judgment on "Google Spain and Inc v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González" C-131/12*, Article 29 Data Protection Working Party, 14/EN WP 225 at 3 (Nov. 26, 2014), available at http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2014/wp225_en.pdf [hereinafter Article 29 Working Party Guidelines].

27. Case C-131/12, *Google Inc. v. Mario Costeja González* ¶ 81, available at <http://curia.europa.eu/juris/document/document.jsf?docid=152065&doclang=en> (May 13, 2014).

interest of internet users,²⁸ which could include the public's right to information and the right to free speech.

Since at least 2012, EU leaders have been trying to enact a new version of the Data Protection Directive that would codify a "right to be forgotten" more explicitly and more extensively than the 1995 Directive and the *Costeja* ruling; the enactment would directly bind all EU member states.²⁹ These proposals would go further than the ECJ ruling and allow individuals to request that data be deleted altogether.³⁰ For example, instead of only being able to request that Google remove a search result that links to a damaging newspaper article, an individual may be able to request that the publisher remove the article from the internet altogether.

B. REACTIONS TO THE RULING

A wide range of scholars, politicians, and industry leaders reacted to the ECJ's ruling. Critics noted issues surrounding free speech, the public's right to information, and potential administrative burdens. Meanwhile, supporters hailed the ruling as a major step in protecting the individual privacy of EU citizens.³¹

Google has a large stake in the right to be forgotten, since it is responsible for the vast majority of internet searches in the EU.³² Within days of the ruling, Google's executive chairman Eric Schmidt stated that "Google believes, having looked at the decision which is binding, that the balance that was struck was wrong."³³ In addition, a Google spokesperson stated that the process was "logistically complicated" and that figuring out

28. *Id.*

29. See Press Release, Eur. Comm'n, Press Release Proposing Comprehensive Reform of Data Protection (Jan. 25, 2012), *available at* http://europa.eu/rapid/press-release_IP-12-46_en.htm [hereinafter Press Release on 2012 Data Protection Proposal]; Factsheet on the "Right to be Forgotten" Ruling, European Commission (May 2014), *available at* http://ec.europa.eu/justice/data-protection/files/factsheets/factsheet_data_protection_en.pdf [hereinafter EC Factsheet].

30. *Id.*

31. See Charles Arthur, *Google Faces Deluge of Requests to Wipe Details from Search Index*, GUARDIAN (May 15, 2014), <http://www.theguardian.com/technology/2014/may/15/hundreds-google-wipe-details-search-index-right-forgotten> (citing both supporters and critics of the ruling) [hereinafter *Google Deluge of Requests*].

32. David Streitfeld, *European Court Lets Users Erase Records on Web*, N.Y. TIMES (May 13, 2014), http://www.nytimes.com/2014/05/14/technology/google-should-erase-web-links-to-some-personal-data-europes-highest-court-says.html?_r=0.

33. Samuel Gibbs, *Eric Schmidt: Europe struck wrong balance on right to be forgotten*, GUARDIAN (May 15, 2014), <http://www.theguardian.com/technology/2014/may/15/google-eric-schmidt-europe-ruling-right-to-be-forgotten>

how to handle the requests could take “several weeks.”³⁴ On May 29, 2014, Google launched a web form that allows EU citizens to request the removal of URLs in compliance with the ruling, and this web form is now the primary way to exercise one’s right to be forgotten.³⁵ One can find a link to the web form on Google’s page for web search removal requests of all types.³⁶

A few months after the ruling, Google published a transparency report providing data on all of the removal requests received since the request process started in May 2014.³⁷ By January 30, 2015, Google had received 208,821 requests; each request can cite multiple URLs for removal.³⁸ At this point, Google had evaluated 759,307 URLs total. The company granted link removals for only 40.3% of them, denying removal for over half of the links.³⁹ The transparency report continually updates as Google continues to evaluate requests.

Meanwhile, Viviane Reding, the vice president of the European Commission, supported the *Costeja* ruling as “exactly what data protection reform is about . . . empowering citizens to take the necessary actions to manage their data.”⁴⁰ Reding is one of the most prominent figures leading the push to develop and extend the right to be forgotten.⁴¹ She has been instrumental in helping to develop the Directive that would extend the right past the *Costeja* ruling.⁴²

34. Arthur, *Google Faces Deluge of Requests*, *supra* note 31.

35. Google Right to be Forgotten Web Form, *supra* note 25; *Google Sets Up ‘Right to be Forgotten’ Form After Ruling*, BBC NEWS (May 30, 2014), <http://www.bbc.com/news/technology-27631001>.

36. In English, the choice is labeled “I would like to request that certain content about me that appears in Google’s search results in breach of European privacy law be removed.” Web Form for Google Content Removal, GOOGLE, <https://support.google.com/legal/troubleshooter/1114905?rd=1#ts=1115655,6034194> (last visited Jan. 29, 2015).

37. *Transparency Report: European Privacy Requests for Search Removals*, GOOGLE, <http://www.google.com/transparencyreport/removals/europeprivacy/?hl=en-US> (last visited Jan. 30, 2015) [hereinafter Google Transparency Report].

38. *Id.*

39. *Id.* As of January 30, 2015, the most delinked websites were facebook.com (5295 removals), profileengine.com (5076 removals), groups.google.com (3582 removals), badoo.com (3248 removals), and youtube.com (3179 removals).

40. Arthur, *Google Deluge of Requests*, *supra* note 31.

41. See Jeffrey Rosen, *The Right to be Forgotten*, 64 STAN. L. REV. ONLINE 88 (Feb. 13, 2012), available at <http://www.stanfordlawreview.org/online/privacy-paradox/right-to-be-forgotten>; see also Arthur, *Google Deluge of Requests*, *supra* note 31.

42. Press Release on 2012 Data Protection Proposal, *supra* note 29.

Google assembled a group of ten panelists, the Google Advisory Council, to visit seven European capitals to discuss the right to be forgotten with citizens and policy makers throughout late 2014 and into 2015.⁴³ The panelists represented various groups with differing stances on the issue, and comprised of two Google executives, the former Director of the Spanish Data Protection Agency, a former German Federal Justice Minister devoted to defending privacy rights, the founder of Wikipedia, and various experts in technology law issues. According to Google's website, it is "seeking advice on the principles [it] ought to apply when making decisions on individual cases."⁴⁴ The head of France's data protection body said "the debates were more about getting good PR for Google" in their fight against the right to be forgotten.⁴⁵

Media organizations expressed concerns about the potential free speech effects of the ruling. Within a couple of months of the ruling, journalists and news organizations claimed that they began to receive notifications from Google that their articles had been removed from certain Google search results due to the EU ruling.⁴⁶ Some felt these moves overstepped certain free speech boundaries and clashed with the public's interest in accessing important information about public figures. James Ball of the *Guardian* wrote critically about the supposed removal of links to *Guardian* articles relating to public figures that were on trial or resigned from their jobs due to controversy.⁴⁷ He criticized the EU for the ruling, and lamented that Google was "clearly a reluctant participant in what effectively amounts to censorship."⁴⁸ In another case, BBC's Robert Peston complained about Google de-listing blog posts critical of Stan

43. Sam Schechner & David Roman, *Google Seeks Views in Europe on Right to be Forgotten*, WALL ST. J. (Sept. 9, 2014), <http://online.wsj.com/articles/google-seeks-views-in-europe-on-right-to-be-forgotten-1410268827>.

44. The Council released the final report on its findings on February 6, 2015, after the completion of this Note. The report is available on the Council's information page. Google Advisory Council Information Page, GOOGLE, <https://www.google.com/advisorycouncil/> (last visited Feb. 6, 2015).

45. *Google Plans Debates on 'Right to be Forgotten'*, BBC NEWS (Sept. 8, 2014), <http://www.bbc.com/news/technology-28344705>.

46. See, e.g., James Ball, *Guardian Articles Have Been Hidden by Google*, GUARDIAN (July 2, 2014, 10:34 AM), <http://www.theguardian.com/commentisfree/2014/jul/02/eu-right-to-be-forgotten-guardian-google>. Search engine operators are not required to provide content owners these notifications, so Google has been providing these notifications of its own volition.

47. *Id.*

48. *Id.*

O'Neal, the former head of Merrill Lynch.⁴⁹ The concern was that O'Neal, a public figure, was able to hide this critical content when someone searched for his name on Google. Google quickly corrected that it only de-listed the link for one of the commenters on the article (presumably upon request from the commenter); the link remained for a Google search of "Stan O'Neal."⁵⁰ Thus, the vital public interest in the information was protected. However, this confusion highlights some of the nuances and the complexity of the de-linking procedure, and suggests that there are issues of clarity that the right still has to overcome. Furthermore, some commentators suggest that Google's initially overzealous removal of search results was a "publicity stunt" by the search giant to stir up disapproval for the right to be forgotten.⁵¹ Andrew Orlowski of *The Register* suggested that Ball "walked into the trap" of Google's plan.⁵² A representative from the BBC who attended the Google Advisory Council's London meeting stated that the news organization felt "some of its articles had been wrongly hidden."⁵³ Around the same time, the BBC announced that it would publish a continually updated list of articles removed by Google under the rule.⁵⁴

49. Robert Peston, *Why Has Google Cast Me Into Oblivion?*, BBC NEWS (July 2, 2014), <http://www.bbc.co.uk/news/business-28130581>.

50. Robert Weaver, *Google 'Learning as We Go' in Row Over Right to be Forgotten*, GUARDIAN (July 4, 2014, 5:34 AM), <http://www.theguardian.com/technology/2014/jul/04/google-learning-right-to-be-forgotten>. An example will help illustrate the situation. Suppose there is a BBC news article about the misdeeds of a public official, Reggie Nixon. In a fit of rage, a citizen named Steven Johnson comments on the article and provides his name. Over time, the article with this comment becomes the top link when searching Google for "Steven Johnson." The politically charged comment has cost Mr. Johnson the opportunity at a few jobs, so he wants it removed when people Google his name. He submits a request under the right to be forgotten. Of course, it is in the public's interest for this article to remain up for searches of "Reggie Nixon," and it would clearly be wrong for a right to be forgotten to remove such results. Suppose Google grants Mr. Johnson's request, and sends the BBC an unspecific notification saying this article had been hidden for certain search results under the right to be forgotten. The BBC's first reaction may be to believe the article was hidden when searching for the public official "Reggie Nixon," which is not the case, but would raise free speech concerns. This mistake is what tripped up James Ball and may confuse others who receive such notifications.

51. Andrew Orlowski, *Google De-Listing of BBC Article 'Broke UK and Euro Public Interest Laws' - So WHY Do It?*, REGISTER (July 4, 2014, 12:31 PM), http://www.theregister.co.uk/2014/07/04/google_peston_bbc_delisting_not_compliant_w_public_interest_law_says_expert/.

52. *Id.*

53. Dave Lee, *BBC to Publish 'Right to be Forgotten' Removals List*, BBC NEWS (Oct. 17, 2014), <http://www.bbc.com/news/technology-29658085>.

54. *Id.*

However, this initial overzealous removal, coupled with Google's stated goals for its Advisory Council, suggest that the company is struggling with the vague wording of the ruling, which leaves open significant questions about exactly what types of information should and should not be de-linked. Theoretically, each member state's data protection authority has some room to determine what should be "forgotten" in their state, as long as these rules fit within the EU's prescribed framework. In Google's Transparency Report, it has provided examples of what types of links it has and has not removed.⁵⁵ Luciano Floridi, a professor of information ethics and a member of the Google Advisory Council, noted that the council has "spent quite some time" addressing such questions.⁵⁶

The following sections will touch on the major themes underlying the right to be forgotten and will demonstrate why the right to be forgotten, if it is to exist at all in the United States, should be implemented in a narrow and context-specific way. The next Part will discuss the United States' relationship with free speech and privacy jurisprudence. The final Part will outline the major issues that arise in the discussion of the unspecific European right to be forgotten, highlighting potential implications for the United States.

II. BALANCING FREE SPEECH AND PRIVACY IN AMERICA

The United States' climate for establishing a right to be forgotten fundamentally differs from that in Europe due to important cultural and historical experiences in the two regions. Many European member states have developed a deep respect for privacy, growing in part out of the post-Holocaust skepticism about the power dynamic created by personal information being available to a central authority.⁵⁷ In contrast, the right to free speech has become paramount in the United States, even with extreme forms of speech that would implicate significant privacy and dignity concerns in Europe. For example, the United States Supreme

55. Google Transparency Report, *supra* note 37.

56. Luciano Floridi, *Right to be Forgotten: Who May Exercise Power, Over Which Kind of Information?*, GUARDIAN (Oct. 21, 2014, 7:18 AM), <http://www.theguardian.com/technology/2014/oct/21/right-to-be-forgotten-who-may-exercise-power-information>.

57. Francesca Bignami, *European Versus American Liberty: A Comparative Privacy Analysis of Anti-Terrorism Data-Mining*, 48 B.C. L. REV. 609, 688 (2004).

Court has protected the right of Nazi supporters to demonstrate in American towns⁵⁸ and the right to burn the American flag.⁵⁹

The collection of personal information aided the extermination of individuals in the Holocaust, and as a result, Germans still protest census-taking activities today.⁶⁰ By contrast, many founders of the United States placed freedom of speech among the highest national principles. It was enshrined as the first right within the Bill of Rights (the first ten amendments to the U.S. Constitution, passed shortly after the Constitution was ratified).⁶¹ Though privacy is not explicitly mentioned in the Constitution, it is seen as a right emanating from certain provisions;⁶² but as this Part demonstrates, the First Amendment often limits its use. Even in U.S. law, however, there has been some acknowledgement of the philosophical underpinnings of a right to be forgotten. In *U.S. Department of Justice v. Reporters Committee for the Freedom of the Press*, the Supreme Court noted that there might be a privacy interest in “keeping personal facts away from the public eye.”⁶³

However, many early privacy rulings in the United States were overturned by a series of Supreme Court cases in the 1960s and 1970s that broadened the First Amendment, suggesting the power that free speech can have in determining the fate of privacy matters in the United States.⁶⁴ Even proponents of a right to be forgotten in the United States acknowledge that free speech may be a difficult barrier to overcome. For example, Eric Posner offered that it is “hard to imagine a ‘right to be forgotten’ in the United States” because the “First Amendment will protect Google, or any other company, that resurfaces or publishes information that’s already public.”⁶⁵ Of course, some information that people want forgotten was not public in the first place, which may justify a privacy right overcoming the First Amendment.

58. *Nat’l Socialist Party of Am. v. Vill. of Skokie*, 432 U.S. 43, 44 (1977).

59. *Texas v. Johnson*, 491 U.S. 397, 418 (1989).

60. See William Seltzer & Margo Anderson, *The Dark Side of Numbers: The Role of Population Data Systems in Human Rights Abuses*, 68 SOC. RESEARCH 481, 486 (2001).

61. U.S. CONST. amend. I.

62. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

63. 489 U.S. 749, 769 (1989).

64. See, e.g., *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (“[L]ibel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment.”).

65. Eric Posner, *We All Have the Right to be Forgotten*, SLATE (May 14, 2014, 4:37 PM), http://www.slate.com/articles/news_and_politics/view_from_chicago/2014/05/the_european_right_to_be_forgotten_is_just_what_the_internet_needs.html.

In the United States, privacy laws exist at the state and federal levels, both through statute and the common law, but are limited by the First Amendment. This Section will examine certain areas where privacy and the First Amendment interact, including the general right to privacy, defamation, invasion of privacy, the Communications Decency Act, and constitutional law. In doing so, the discussion will highlight how these interactions might affect a right to be forgotten.

A. THE GHOSTS OF A RIGHT TO BE FORGOTTEN IN U.S. CASE LAW

In the since-overturned case *Melvin v. Reid*, a California appellate court noted that there was a social value in having one's past forgotten, stopping short of noting there was a "right to privacy."⁶⁶ The plaintiff was once a prostitute and had been acquitted of a murder charge. She had since moved on from that part of her life, married, and settled down, keeping her criminal past a secret from friends in her new life. Subsequently, the defendant made a movie, "The Red Kimono," which chronicled Melvin's criminal past and even used her name.⁶⁷ This revelation caused her friends to "scorn and abandon her."⁶⁸ The California Court of Appeals upheld Melvin's claim that the movie violated her "right to pursue and obtain safety and happiness,"⁶⁹ stating that "one of the major objectives of society as it is now constituted, and of the administration of our penal system, is the rehabilitation of the fallen and the reformation of the criminal."⁷⁰ While this is no longer good law, it is a famous case that provides the earliest hints about how privacy law would manifest in America, and it suggests that the right to be forgotten is not a completely foreign concept in U.S. law. Relatedly, California now has a right to privacy in its state constitution.⁷¹

B. AN OUTLINE OF FIRST AMENDMENT PROTECTION

The First Amendment only restricts the government, not private actors,⁷² but as soon as a court rules on a private matter in a way that impinges on someone's right to free speech, the restriction kicks in as

66. *Melvin v. Reid*, 112 Cal. App. 285, 291 (Cal. Ct. App. 1931).

67. *Id.* at 287.

68. *Id.*

69. *Id.* at 291.

70. *Id.* at 292.

71. CAL. CONST. art. I.

72. U.S. CONST. amend. I. (prohibiting "Congress" from restricting freedom of speech).

“state action.”⁷³ This is the way many private entities confront free speech barriers when trying to exercise privacy rights. By default, when there is a potential violation of the First Amendment, a court will apply strict scrutiny: there must be a “compelling government interest,” and the government’s law or action must be narrowly tailored to carrying out that interest.⁷⁴ This is an incredibly difficult test for the government to overcome; restricting free speech is very rarely seen as narrowly tailored to carrying out the given goal.⁷⁵ A discussion of strict scrutiny under the First Amendment will follow later in this Section.

However, there are certain categories of speech that are less protected and do not garner strict scrutiny. These include “fighting words,” obscenity, and defamation.⁷⁶ In these categories, a privacy right has a higher chance of overcoming First Amendment concerns. However, even in some of these unprotected categories, free speech and freedom of the press have come to curb individual privacy rights in significant ways. A discussion of U.S. defamation law will demonstrate this.

C. DEFAMATION IN U.S. LAW

Actions for defamation (both libel and slander) exist at the state law level, and the Second Restatement of Torts details how it generally works. The Supreme Court has placed significant limits on defamation actions to protect the First Amendment rights of individuals and the media. A right to be forgotten could exist implicitly within the narrow margins of this right if the privacy violation could overcome the free speech barriers detailed in this Section, but the right would be restricted to the party that published the data and committed the tort, so a third party like Google would probably not be implicated. However, these limits on defamation set a backdrop for how privacy and free speech can relate at a constitutional level. This Section will walk through the doctrine and those limitations.

1. *The Basics of Defamation Law*

There may be a cause of action for defamation if there is publication of a false and defamatory statement.⁷⁷ A statement is “defamatory” if it “tends

73. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 265 (1964).

74. Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 741 (1996).

75. Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 803 (2006).

76. See Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

77. RESTATEMENT (SECOND) OF TORTS § 558 (1977).

so to harm [the plaintiff's] reputation . . . as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.”⁷⁸ Thus, if a statement does not arguably harm the plaintiff's reputation, there is no defamation. The statement must also be false, so a true statement cannot trigger liability,⁷⁹ and neither can an opinion that does not convey factual matter.⁸⁰

“Publication” is communication of the statement to a third party.⁸¹ Under the definition of “communication” the third party must have actually seen the information and understood its defamatory character. If nobody read or heard the defendant's defamatory statement, there is no harm to the plaintiff's reputation and no cause of action.⁸² The publication requirement does not demand that the defendant communicate the information to the public at large; communicating to one person can constitute “publication” and trigger defamation. After all, the one person who receives the lie might be the plaintiff's employer, which in itself might cause significant damage. In addition, there is no publication if the defendant only communicated the information back to the plaintiff, because there is no harm to the plaintiff's reputation.⁸³ Of course, under these rules, publishing information to a website can easily constitute publication.

2. *The First Amendment Pushback*

New York Times Co. v. Sullivan is a seminal Supreme Court case that significantly shrunk the defamation tort in the shadow of the First Amendment. The Court held that for a public official's defamation claim to succeed, the public official must prove the defendant had “actual malice,” meaning he knew the published information was false or acted in reckless disregard as to its falsity.⁸⁴ This makes it much more difficult to bring a defamation claim against a publisher, since it is difficult to prove that a particular journalist had the requisite mens rea, or state of mind. According to the Court, libel must give way to the First Amendment to ensure that the debate on public issues is “uninhibited, robust, and wide-

78. *Id.* § 559.

79. *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 138 (1967). Journalists could not do their job if they were sued for every true defamatory statement they published.

80. RESTATEMENT (SECOND) OF TORTS § 566 (1977).

81. *Id.* § 577.

82. *Id.* § 577 cmt. b.

83. *Id.*

84. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964).

open.”⁸⁵ The Supreme Court later extended the actual malice standard to public figures in addition to public officials.⁸⁶

The requirement that a statement be false embeds strong First Amendment principles into the defamation tort, and constitutes a significant difference from the European right to be forgotten. While both protect an individual’s reputation on some level, the EU right to be forgotten can involve truthful but “outdated” or “irrelevant” information.⁸⁷ Even when discussed as a possibility in America, the right to be forgotten is seen as targeting truthful information in addition to falsities.⁸⁸ This signals a strong point of tension between the defamation tort and the right to be forgotten.

However, because the two doctrines currently burden different parties in different ways, their simultaneous existence could nevertheless successfully protect privacy rights. Remember that the right to be forgotten as it currently exists burdens a third party such as the search engine operator, since this is the party controlling whether or not the public can see the information at issue. Consider a situation where information is true but “old” or “irrelevant” and subject to removal under the right to be forgotten (like in *Costeja*). The party that published truthful information would not be liable, while the search engine operator would be obligated to remove a link. This may make sense; society should not punish the publisher with a defamation suit for accurately reporting information, but the lower burden of removal placed on the search engine operator may seem fair to protect a privacy interest.

Indeed, a right to be forgotten may help mitigate some privacy problems the actual malice standard raises, which allows journalists enough room to operate; the threat of defamation suits might stifle speech, so the actual malice standard attempts to allow a journalist to work freely as long as she is not reckless in her fact-checking. However, when she does negligently publish false defamatory information about a person, damage is undoubtedly done to that person’s reputation. The injured party has a privacy interest that the defamation tort simply is not protecting. Of

85. *Id.* at 270.

86. *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 162 (1967).

87. Case C-131/12, *Google Inc. v. Mario Costeja González* ¶ 94, available at <http://curia.europa.eu/juris/document/document.jsf?docid=152065&doclang=en> (May 13, 2014).

88. Robert Krulwich, *Is the ‘Right to be Forgotten’ the ‘Biggest Threat to Free Speech on the Internet’?*, NPR (Feb. 24, 2012, 9:06 AM), <http://www.npr.org/blogs/krulwich/2012/02/23/147289169/is-the-right-to-be-forgotten-the-biggest-threat-to-free-speech-on-the-internet>.

course, as soon as the journalist discovers the information is false, the threat of defamation “turns on,” so the information needs to be removed immediately. However, when information is on the internet, it may be too late. The lie may well have spread virally and damaged the victim’s reputation. While the victim does not have recourse in suing the journalist, a right to be forgotten may be able to at least stem the tide of the lie. Here, the journalist’s First Amendment right remains intact, while the victim has some other recourse to protect his privacy and reputation. Of course, in both situations, the search engine operator may experience a burden on its free speech right by having to hide search results, and arguably with no fault or the requisite mens rea. This is a different and perhaps more problematic free speech problem than a defamation claim raises.

3. *Defamation and Credit Reports*

After establishing the actual malice standard, the Court held in *Dun & Bradstreet v. Greenmoss Builders* that when a matter involves private figures and is not of public concern, the actual malice standard does not apply.⁸⁹ The Court effectively limited rights under the First Amendment when the information is not a “matter of public concern.”⁹⁰

The facts of *Greenmoss Builders* provide an interesting comparison to those in *Costeja*. In *Greenmoss Builders*, a contractor brought a defamation action against a credit-reporting agency that issued false credit reports to creditors.⁹¹ The reporting agency challenged the defamation action, stating that free speech and the actual malice standard protected them from a defamation claim. Justice Powell noted that courts must balance the “State’s interest in compensating private individuals for injury to their reputation” with the “First Amendment interest in protecting this type of expression,” which is tied to whether it is a “matter of public concern.”⁹² The Court held that the petitioner’s credit report “concern[ed] no public issue,”⁹³ while the issue of compensating individuals for injury to their reputation was “strong and legitimate.”⁹⁴ Thus, the actual malice standard was not necessary in the context of credit reports.

89. 472 U.S. 749, 761 (1985).

90. *Id.* at 762.

91. *Id.* at 751.

92. *Id.* at 757–58.

93. *Id.* at 762.

94. *Id.* at 757.

The Fair Credit Reporting Act (“FCRA”) sets rules in place preventing credit reporting agencies from including stale and obsolete information in someone’s credit report.⁹⁵ By not requiring an actual malice standard, the Court in *Greenmoss Builders* effectively upheld the core of the FCRA. The holding may also provide groundwork to legitimize a right to be forgotten in the context of credit information. Consider a statute that requires search engines to delete links to articles containing old damaging debt information. If a private individual’s credit report is not a matter of public concern, then perhaps neither is a search result link to an article chronicling old irrelevant debts. This could reduce the free speech interest and preserve the effect of the law. Meanwhile, the injury to her reputation raises a “strong and legitimate” interest. This could succeed under the balancing test described in *Greenmoss*, but only because such a law would be narrowly constrained to credit reports.⁹⁶ In contrast, an analogue to the EU’s unspecific rule would raise many “matters of public concern” flags, since a court could imagine scenarios far beyond the credit report context.

Costeja’s case represents how the absence of a right to be forgotten might allow Google search results to undermine the FCRA. While a person may have had a very old debt issue that the FCRA hides from official reports, an article chronicling that debt issue might turn up as the first result of a Google search. Indeed, creditors are increasingly relying on internet searches to uncover more information about potential borrowers. Proponents of a U.S. right to be forgotten argue that it can restore function to certain laws like the FCRA whose substantive value the internet erodes.

D. INVASION OF PRIVACY TORTS IN U.S. LAW

Most states recognize four invasion-of-privacy torts, two of which are relevant here: publicity given to private life and false light.⁹⁷ The First Amendment limits both of these privacy torts. As with defamation, these torts exist at the state level, and the Restatement provides an adequate summary of the doctrines.

Under the publicity given to private life tort, a person may bring a cause of action against another who “gives publicity” to a private matter that “would be highly offensive to a reasonable person” and “is not of

95. 15 U.S.C. § 1681 (2012).

96. The major problem with such a statute is that it would not exist in the defamation context, so a stricter constitutional standard might apply.

97. The other two are intrusion upon seclusion and appropriation of name or likeness. RESTATEMENT (SECOND) OF TORTS § 652A (1977).

legitimate concern to the public.”⁹⁸ This action is often brought against the press for publishing private facts. The “legitimate concern to the public” limit, often called the “newsworthiness test,” is what protects the defendant’s First Amendment interest. If the information is “newsworthy,” there is no cause of action because the defendant has a First Amendment right to publicly disclose the facts.⁹⁹ States apply different standards to determine whether something is newsworthy: deferring to the press’s judgment, using social norms, or requiring a “logical nexus” between the private person and the matter of legitimate public interest.¹⁰⁰ In addition, the Supreme Court held in *Cox Broadcasting Corp. v Cohn* that if the private information is already a matter of public record, then it is newsworthy and there can be no action.¹⁰¹ Indeed, while this tort might seem to be the most promising to effectuate many remedies that people would seek under a right to be forgotten, the tort has been severely limited by the Supreme Court and may not be able to effectuate removal when content has spread across the internet.¹⁰²

Under the “false light” tort, one can be liable for giving publicity to a matter concerning another individual that places that person in a false light. The false light must be “highly offensive to a reasonable person.”¹⁰³ This closely relates to the defamation tort, and indeed the claims are often brought together. However, information may be false but not defamatory, in which case the false light claim can still stand. In *Time Inc. v. Hill*, the Supreme Court extended the defamation actual malice standard to false light claims.¹⁰⁴ In terms of helping an individual remove content from the internet, the tort suffers from problems similar to those that defamation and publicity given to private life torts do: it cannot capture the spread of content across the internet beyond the liable party, and sometimes the party is simply not liable (here, if the information is true). The

98. *Id.* § 652D. Here, “publicity” usually requires disseminating the information widely to the public. In tort law, this is distinguishable from “publication,” which merely requires sending the information to at least one person (for example, a text message to a friend would qualify as “publication”). Behavior that qualifies as “publicity” likely qualifies as “publication” as well, but not as much vice versa. Posting information to the internet in a manner that is accessible by all usually qualifies as both. *Id.* § 652D cmt. a.

99. *Id.* § 652D cmt. d.

100. *Id.*

101. 420 U.S. 469, 495 (1975).

102. Robert K. Walker, *The Right to be Forgotten*, 64 HASTINGS L.J. 257, 266 (2012).

103. RESTATEMENT (SECOND) OF TORTS § 652E (1977).

104. 385 U.S. 374, 387–88 (1967).

Communications Decency Act (“CDA”) erects a similar barrier preventing users from being able to remove content from the internet.

E. THE COMMUNICATIONS DECENCY ACT

Section 230 of the CDA protects internet services from liability based on information it hosts or provides access to.¹⁰⁵ The statute states that “no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”¹⁰⁶ Without the statute, as soon as an internet service provider (“ISP”) was informed that some user or publisher’s content violated a certain law, the ISP would meet the knowledge element and may be held liable for the same violation. Because of § 230, these ISPs are immune from being put in the third party’s shoes. For example, in *Zeran v. AOL*, the Fourth Circuit held that AOL was not liable for defamation when the company knowingly failed to remove defamatory messages posted by a third party.¹⁰⁷ Section 230 protects a wide variety of internet companies from suit for the actions of others. Notably, it protects search engine operators like Google from suit for not pulling search result links.

Section 230 has allowed internet companies to thrive by having them avoid a large volume of suits. Relatedly, it helps preserve First Amendment principles on the internet by ensuring that ISPs do not indirectly stifle speech through their services in order to avoid liability.¹⁰⁸ Indeed, Chief Judge Wilkinson noted in *Zeran* that “liability upon notice has a chilling effect on the freedom of internet speech.”¹⁰⁹

However, § 230 has also limited the ability of some users to get relief for significant violations of their privacy rights.¹¹⁰ Third parties on the internet are often hard to track down. Sometimes the most effective way to stop the spread of viral information is to ask the internet company that somehow controls access to the information to remove it, even if that company was not initially responsible for the privacy violation. Often, Google Search is this service. However, because of the CDA, Google is under little legal obligation to heed user requests to remove links. Of

105. 47 U.S.C. § 230 (2012).

106. *Id.* § 230(c)(1).

107. *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997).

108. *See id.* at 333.

109. *Id.*

110. *See, e.g.,* Frequently Asked Questions, END REVENGE PORN, <http://www.endrevengeporn.org/faqs/> (last visited Jan. 29, 2015) (noting that claims brought by victims of nonconsensual pornography are barred by §230) [hereinafter END REVENGE PORN FAQ].

course, the company attends to user requests regarding cyberbullying and other practices, but a right to be forgotten could expand privacy rights in the face of the CDA. On the other hand, it could also cause many of the First Amendment problems that the CDA tries to protect against. Indeed, these potential First Amendment problems might be the subject of significant constitutional analysis.

F. STRICT SCRUTINY UNDER THE FIRST AMENDMENT

The Supreme Court has long held that a law potentially impinging on any fundamental right, like the First Amendment, is subject to strict scrutiny: that is, the law must be justified by a compelling government interest, and the law at issue must be narrowly tailored to achieving that interest.¹¹¹ Under this standard, courts have struck down most laws attempting to restrict free speech.¹¹² Laws that restrict the content of speech are particularly likely to be struck down by the Court.¹¹³ While certain narrow categories have historically been exempt from strict scrutiny (for example, defamation, which opens the door to cases like *Greenmoss Builders*),¹¹⁴ the standard could apply to a right to be forgotten law passed in the United States.

The broadness of the EU approach to a right to be forgotten likely spells its doom under First Amendment strict scrutiny. First, it may not suffice to say that protecting “privacy” and “reputation” on the internet in general is a compelling governmental interest. On the other hand, since privacy and reputation lie at the heart of certain exceptions to the First Amendment strict scrutiny standard, a court may be willing to accept this as sufficient.¹¹⁵ However, it would be tough to justify that the vague rule is “narrowly tailored.” Without further specificity, the rule leaves room for the removal of content that does not impinge on a privacy right. The “narrowly tailored” standard is incredibly difficult to meet, and the vagueness of this rule means it would have very little chance of survival. Of course, this reflects concerns noted earlier that the EU’s right to be forgotten ruling may impinge on free speech on the internet precisely because it is so vague and it is unclear how member states will effectuate it. Rather, a narrow, contextual right to be forgotten might be more likely to succeed constitutional scrutiny.

111. *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 741 (1996); Winkler, *supra* note 75, at 803.

112. Winkler, *supra* note 75, at 844.

113. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

114. *Id.* at 383.

115. Defamation enjoys a lower standard of review. *Id.*

However, a contextual right to be forgotten may fall under the category of “content-based” regulation of free speech.¹¹⁶ Indeed, the Court has stated that in such cases, the law must be the least restrictive means of achieving the government’s goal.¹¹⁷ If there is an equally effective method that is less restrictive on First Amendment rights, the law is struck down. It could be argued that a contextual right to be forgotten is indeed the least restrictive means of effectuating the given privacy right on the internet, since it maps a violation of the user’s privacy right to the remedy. For example, a law requiring a search engine operator to heed users’ requests to remove links for search results of their names, but only for links to outdated credit report information, might be the least restrictive means of preventing third parties from using a Google search to circumvent the FCRA. Perhaps this is the least restrictive means of effectuating the government’s goals of protecting an individual’s creditworthiness from old credit problems. However, content-based regulation of speech does not often survive in the courts. If a court can argue a less restrictive means exists, it is likely to strike down the law. This threat hangs over even a narrow contextual right to be forgotten. This constitutional problem and other free speech concerns are among the many tensions that the right to be forgotten has produced. Part III surveys many of the issues that have come to light in the wake of the EU *Costeja* ruling.

III. TENSIONS UNDERLYING THE RIGHT TO BE FORGOTTEN

The EU’s open-ended right to be forgotten rule has sparked many questions about how Google and member states should implement it in practice. The issues that have surfaced since the EU ruling highlight concerns that lawmakers in the United States should consider when examining the potential of a right to be forgotten rule. This Section explores these issues, which include what types of content the rule should regulate, whether a private entity should have to define the right, whether the right should supersede internet exceptionalism, what rights content owners should have, and what problems might occur in expanding the right to all domains of a search engine. The analysis concludes that any effort to develop a right to be forgotten in the United States should

116. Patrick M. Garry, *A New First Amendment Model for Evaluating Content-Based Regulation of Internet Pornography: Revising the Strict Scrutiny Model to Better Reflect the Realities of the Modern Media Age*, 2007 BYU L. REV. 1595, 1599 (2007).

117. *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004).

consider the rights of all parties involved and should be narrowly tailored to address serious privacy invasions while minimizing effects on freedom of speech.

A. DRAWING LINES: WHAT TYPES OF CONTENT SHOULD WE FORGET?

This Section explores what types of information a right to be forgotten should regulate. One of the main purposes of Google's European tour, the Google Advisory Council, was to confront this very question in the face of the ECJ ruling.¹¹⁸ The search giant has published examples of some of the scenarios in which it has and has not rejected user requests for removal.¹¹⁹ While the ECJ's ruling is not specific on the matter, commentators have started to draw lines that, coupled with Google's open discussions, may give the public a clearer picture of exactly what this right can entail. However, uncertainty about the nature of the right suggests that it would not be wise to implement the rule similarly in the United States when so many questions remain open about exactly what other rights may be set aside and in what contexts. This Section will explore various areas where a right to be forgotten might apply.

There are many parameters that could strengthen or weaken the validity of a right to be forgotten. The nature of the information can play a role: whether it is sensitive or intimate; whether its presence undermines an existing law; whether it is valuable to the public; and how old it is. How the information was posted can affect the analysis: whether a third party or the requester herself posted the information; and if a third party posted the information, then whether it was done consensually. In regards to the requester, important factors could include whether she is a public figure; whether she a convicted criminal, and if so, whether the information relates to the crime; and whether she is a minor. In addition, the person discussed may turn into a public figure. This list of relevant parameters highlights the complexity of the inquiry. Each will become relevant at various points in this Section, which explores where the right to be forgotten might apply. It will analyze two major areas where the right can operate: legal forgiveness and personal information. Values that might

118. Google states that a goal of its European tour is to seek "advice on the principles [it] ought to apply when making decisions on individual cases." GOOGLE ADVISORY COUNCIL, *supra* note 44.

119. Google Transparency Report, *supra* note 37.

clash with a right to be forgotten in these areas include free speech, the public's right to information, and freedom of the press.¹²⁰

1. *Legal Forgiveness*

Legal forgiveness already has its place in U.S. law to help those with a criminal past rehabilitate and re-assimilate into society,¹²¹ or those with past debts shake off old financial shadows.¹²² It is possible to extend this notion to the internet through a right to be forgotten. Consider a juvenile who once committed petty theft but is trying to re-align his life, or someone who was in debt in her youth but has since managed her credit well. While legal forgiveness laws exist to attempt to lift the burden off these old problems (by burying non-violent juvenile records and old credit information) so that people can better their lives, a Google search can undo the benefits of these laws. Eric Posner argues that the internet has eroded existing legal forgiveness laws, and that a right to be forgotten would restore their effectiveness.¹²³ However, problems may occur when attempting to balance this policy goal with a public interest in knowing about someone's criminal offenses. Indeed, some view being able to uncover this information more readily as one of the benefits of the internet, which emboldens a defense of the public right to information. How far in the past must a legal matter be for the public interest to be diminished? What should the law permit to "disappear" from the public eye? Some laws already exist to address these questions, and they may provide guidance in the context of a right to be forgotten. This Section discusses serious crimes, minor crimes, and other legal matters such as credit issues.

a) Legal Forgiveness and Serious Crimes

The right to be forgotten should not affect internet content chronicling certain serious crimes, including those involving sexual offenses and significant violent behavior, since the public has a strong right to access the information about this behavior. This public interest

120. See Krulwich, *Is the 'Right to be Forgotten' the 'Biggest Threat to Free Speech on the Internet'?*, *supra* note 88.

121. See, e.g., 11 U.S.C. § 525(a) (2012) (requiring forgiveness from various entities for former debtors who have repaid their debts); Meg Leta Ambrose & Jef Ausloos, *The Right to be Forgotten Across the Pond*, 3 J. INFO. PRIVACY 1, 9 (2013); Meg Leta Ambrose et al., *Seeking Digital Redemption: The Future of Forgiveness in the Internet Age*, 29 SANTA CLARA COMP. & HIGH TECH. L.J. 99, 124-37 (2012).

122. Ambrose et al., *The Future of Forgiveness in the Internet Age*, *supra* note 121, at 124.

123. Posner, *We All Have the Right to be Forgotten*, *supra* note 65.

outweighs any interest to the offender himself or the societal value in rehabilitation, and indeed, legal frameworks already establish the significance of the public's right to information here. Laws exist that require sex offenders to register in federal databases¹²⁴ and report their crimes to neighbors, and a right to be forgotten is likely not to cover links to this type of information. As one proponent of the right to be forgotten states, "some criminal activity will never be considered for informational forgiveness, particularly ones with high recidivism rates and severe public concern (e.g., the sex offender list)," and "online informational forgiveness should be no different."¹²⁵ According to its report, Google has already been rejecting requests to remove such links.¹²⁶

b) Minor Crimes and the More Compelling Case for the Right to be Forgotten

Other types of criminal convictions pose more difficult questions. Should someone be allowed to remove a link to an article that chronicles a less serious past crime, such as drug possession or shoplifting? These crimes significantly hinder a person's opportunities in society.¹²⁷ Legal forgiveness laws in the criminal context attempt to prevent precisely such a restriction of opportunity. However, in the age of the internet, the person who stole food as a teenager to feed his family, or got caught with a small amount of marijuana, may not be able to get a job. Even though legal forgiveness laws have buried his record, searching his name on Google turns up that old petty crime.¹²⁸ If this is where legal forgiveness has the most social value in the criminal context, then a right to be forgotten can prevent the internet from undermining such value.¹²⁹

c) Credit and Other Non-Criminal Legal Issues

In addition to criminal activity, legal forgiveness aims to protect those with past debts and other legal issues. Consider a scenario such as the one that confronted Costeja and discussed above, where a person is not able to take out a loan because search results of their name turn up old debts that

124. 18 U.S.C. § 2250 (2012).

125. Ambrose et al., *The Future of Forgiveness in the Internet Age*, *supra* note 121, at 150.

126. See Google Transparency Report, *supra* note 37.

127. See, e.g., Ambrose et al., *The Future of Forgiveness in the Internet Age*, *supra* note 121, at 129.

128. Some legal forgiveness laws exist under a philosophical presumption that smaller crimes like these do more damage than perhaps they should.

129. See Ambrose et al., *The Future of Forgiveness in the Internet Age*, *supra* note 121, at 162–63.

have since been resolved.¹³⁰ This scenario stirred resistance to a right to be forgotten among some commentators.¹³¹ On the other hand, defenders of a right to be forgotten could argue that these search results actually undermine existing U.S. laws like the FCRA that protect individuals from old financial issues.

The FCRA provides one specific example where a parallel right to be forgotten might work well to sew up loopholes created by the internet while not being problematically overbroad. One of the Act's main purposes is to "protect individuals from inaccurate or arbitrary information and preserve their creditworthiness and reputation."¹³² The FCRA has explicit provisions that prevent "consumer reporting agencies" from including certain old legal issues in consumer reports about an individual.¹³³ "Consumer reporting agencies" include parties that "assembl[e] or evaluat[e] consumer credit information and other information on consumers for the purpose of furnishing that information to third parties..."¹³⁴ Specifically, a report cannot include information about certain bankruptcy issues more than ten years old,¹³⁵ civil suits or arrest records more than seven years old,¹³⁶ or any other adverse information older than seven years.¹³⁷ However, the entire effect of this law can vanish with a simple Google search. An internet search result could quickly damage the individual's reputation in the precise way the FCRA attempts to prevent. A narrowly tailored right to be forgotten could allow a user to request certain links be removed that report the information protected by FCRA. However, accepting a right to be forgotten here means accepting that the FCRA policy, which burdens consumer reporting agencies, should extend to internet companies that are

130. See Julia Powles, *What We Can Salvage From 'Right to be Forgotten' Ruling*, WIRED.CO.UK (May 14, 2014), <http://www.wired.co.uk/news/archive/2014-05/15/google-vs-spain>; see also Case C-131/12, *Google Inc. v. Mario Costeja González*, ¶ 94, available at <http://curia.europa.eu/juris/document/document.jsf?docid=152065&doclang=en> (May 13, 2014).

131. See, e.g., *Last Week Tonight with John Oliver* (HBO broadcast May 18, 2014), available at <https://www.youtube.com/watch?v=r-ERajkMXw0>.

132. Ambrose et al., *The Future of Forgiveness in the Internet Age*, *supra* note 121, at 144 (citing *Ackerley v. Credit Bureau of Sheridan, Inc.*, 385 F. Supp. 658, 659 (D. Wyo. 1974)); see also *Pinner v. Schmidt*, 805 F.2d 1258, 1261 (5th Cir. 1986).

133. 15 U.S.C. § 1681c (2012).

134. *Id.* § 1681a(f).

135. *Id.* § 1681c(1).

136. *Id.* § 1681c(2).

137. *Id.* § 1681c(5). For a more in-depth discussion of the FCRA in the legal forgiveness context, see Ambrose et al., *The Future of Forgiveness in the Internet Age*, *supra* note 121, at 144–46.

not explicitly in the consumer reporting business.¹³⁸ Curbing a public right to information may be harder to justify in this context, but on the other hand, the growing trend of using internet searches as de facto background checks could mean that the right to be forgotten will be seen as necessary to effectuate the FCRA's policy goals, and Google will have to accept its new identity as a de facto consumer reporting agency.

2. *Personal Information*

Personal information, including photographs, data, posts, comments, news articles, and much more, provide a contentious area of deliberation. Whether this information is stolen, sexual in nature, or related to public figures can complicate matters. These issues can become pressing to an individual in an age when information can spread across the internet and out of one's control almost instantly.¹³⁹

The simplest scenarios with personal information are ones that affect many Americans. Personal information can include embarrassing photographs, or news articles, or comments capturing an individual's unpopular political view. Argentina has a right to be forgotten law that allows even public figures to remove embarrassing photos in certain situations.¹⁴⁰ Should someone be able to request that a photo of their "drunken night out" be de-listed from search results? Whether the first party or a third party initially posted that photo could make a difference. If the person is a minor, or was a minor when the photograph was taken, there may be a greater need to forgive. In America, the privacy interest in dignity, when cyberbullying and sexual content are not involved, is simply not strong enough in the face of the First Amendment. Dignity alone is not a compelling enough privacy issue to merit the potential burden on free speech.¹⁴¹ On the other hand, Viktor Mayer-Schönberger notes that digital remembering of this nature poses the danger of "self-censorship": he poses whether "our children will be outspoken in the online equivalents of newspapers if they fear their blunt words might hurt their future career."¹⁴²

138. Ambrose et al., *The Future of Forgiveness in the Internet Age*, *supra* note 121, at 145 (noting that FCRA currently applies to "people and entities that assemble or evaluate consumer report information and furnish that information to third parties.").

139. See Krulwich, *Is the 'Right to be Forgotten' the 'Biggest Threat to Free Speech on the Internet'?*, *supra* note 88.

140. *Id.*

141. See generally James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151 (2004).

142. MAYER-SCHÖNBERGER, *supra* note 1, at 111.

Some in the American media have suggested younger generations may be less concerned about dignity alone,¹⁴³ but others have noted that this context is of growing importance as employers and schools increasingly use internet searches as background checks.¹⁴⁴ Some suggest that Americans ought to accept that most people have a less than stellar internet identity, and that even employers and admissions officers should ease up on their standards for search results.¹⁴⁵ Indeed, if the policy value of dignity does not hold much sway in the United States,¹⁴⁶ this relaxing of social standards may be an approach that works well with American values. In light of this unsettled discussion, a broad right to be forgotten rule would unnecessarily clash with free speech, which would be especially unfortunate if Americans were prepared to endure their flawed internet identities anyways. On the other hand, when embarrassing photos or information involve cyberbullying or more sensitive personal content, there may be a stronger argument for a right to be forgotten. Indeed,

143. John Hendel, *In Europe, a Right to be Forgotten Trumps the Memory of the Internet*, ATLANTIC (Feb. 3, 2011), <http://www.theatlantic.com/technology/archive/2011/02/in-europe-a-right-to-be-forgotten-trumps-the-memory-of-the-internet/70643/>.

144. In an ACLU paper advocating a “right to delete,” Chris Conley noted that “a teacher’s career may be ruined by a picture of her holding a drink at a party long ago.” Chris Conley, *The Right to Delete*, ACLU (Mar. 23, 2010), <http://www.aaii.org/ocs/index.php/SSS/SSS10/paper/view/1158/1482>. In the context of employment and school admission, it may be prudent to simply regulate the concerning behavior instead of targeting the information itself for removal. For example, legislators could pass laws that ban employers from discriminating based on certain personal information on the internet, or at the very least, information that chronicles a person’s behavior when they were a minor. Indeed, this solution may be empowering to an internet user, who does not have to worry about regulating her internet life for the sake of employment. Of course, this solution raises the problems of proof that confront other areas of employment discrimination law: it could be difficult to confirm that an employer has discriminated based on personal information on the internet. In addition, such laws would not address potentially deeper problems with personal information on the internet. Certain types of personal information raise deeper concerns than employment and university admission.

145. See, e.g., *Last Week Tonight with John Oliver* (HBO broadcast May 18, 2014), available at <https://www.youtube.com/watch?v=r-ERajkMXw0> (in a piece criticizing the right to be forgotten, political comedian John Oliver asks Americans to collectively post their most embarrassing photos on the internet, hashtagging the effort #mutuallyassuredhumiliation).

146. See generally Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, *supra* note 141.

Google already has policies in place to pull links for such content with products other than search, such as YouTube.¹⁴⁷

Certain violent, sexual, and graphic content will garner more support for a right to be forgotten, since the privacy right at stake is much stronger. Jeffrey Toobin tells the story of a teenage girl whose gruesome decapitation in a car accident was captured by police photos that leaked and spread virally across the internet.¹⁴⁸ The family's lawyer stated that because of an absence of a right to be forgotten in U.S. law, "we knew people were finding the photos by Googling [her] name or just 'decapitated girl,' but there was nothing we could do about it."¹⁴⁹ Google's Transparency Report suggests that under a right to be forgotten, a victim of a serious crime (or their family member) is able to de-link search results to articles chronicling that crime; Google removed search results after "a victim of rape asked . . . to remove a link to a newspaper article about the crime."¹⁵⁰ Invasion of privacy cases have succeeded for similar types of content, suggesting that even with a different target (a search engine or website rather than a tortfeasor), a privacy right may be strong enough here to trump free speech concerns. Thus, a narrow right to be forgotten might succeed.

Efforts to end nonconsensual pornography, which includes but is not limited to revenge porn, might be able to rely on a narrow right to be forgotten to effectuate certain goals. Nonconsensual pornography is the distribution of sexually explicit images of individuals without their consent.¹⁵¹ This could occur in many ways, including through phone-hacking, sharing without permission intimate photos exchanged during a relationship, or using hidden cameras.¹⁵² While other legal remedies exist for some of these activities, these remedies are hard to achieve due to certain evidentiary burdens or to the fact that statutes have not been updated for modern technology. Furthermore, these remedies cannot practically effectuate removing the photos from Google searches.¹⁵³ A narrow right to be forgotten here could help realize an important goal; the

147. YouTube Cyberbullying and Harassment Policy, GOOGLE, <https://support.google.com/youtube/answer/2801920?hl=en> (last visited Jan. 29, 2015).

148. Jeffrey Toobin, *The Solace of Oblivion: In Europe, The Right to be Forgotten Trumps the Internet*, NEW YORKER (Sept. 2014), <http://www.newyorker.com/magazine/2014/09/29/solace-oblivion>.

149. *Id.*

150. Google Transparency Report, *supra* note 37.

151. END REVENGE PORN FAQ, *supra* note 110.

152. *Id.*

153. *Id.*

victim of an incident of “revenge porn” could at the very least remove links to these images or videos for search results of their name. With friends, family, and colleagues less likely to encounter the images, this could mitigate one of the most terrible consequences for a victim of nonconsensual pornography.¹⁵⁴ It is easy to see a strong privacy interest in removing links in this context. Indeed, even a deeper right to be forgotten that removes content altogether may be justifiable to defend this privacy right.

Relating to existing free speech and freedom of press laws, the public has an interest in the activities of public figures such as politicians and celebrities, so these figures are generally believed to have far less protection than those living private lives.¹⁵⁵ However, the fear that public figures would essentially be able to “censor” their own misconduct colored some of the commentary following the ECJ ruling, notably in *The Guardian*.¹⁵⁶ As of now, Google is generally refusing to remove links regarding public figures, which suggests that the EU’s right to be forgotten may remain in line with free speech doctrine on this front.¹⁵⁷ However, implementing the rule with similar uncertainty may raise alarms in the United States, even though the Supreme Court has resoundingly reaffirmed free speech rights in these contexts.¹⁵⁸

Specifically, what happens when a person “turns into” a public figure? Consider a situation where a non-famous person exercises his right to be forgotten and de-lists links from Google searches of his name. Later, he runs for political office. If he submitted the same requests now, Google would deny him because there is a public interest in this person. Should a picture of someone holding a beer be deemed for removal? But the links are down, and a person who searches for this man will see a pristine Google history. Who exactly is going to tell Google to “re-list” those links for the public good? Perhaps Google can implement an algorithm to detect upswing in the interest in a person, or perhaps it remains the duty

154. *See id.* The website notes how the potential of having friends, family, and colleagues potentially see the images is one of the worst aspects of nonconsensual pornography.

155. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 268 (1964); Curtis Publ’g Co. v. Butts, 388 U.S. 130, 155 (1967); *see also* Posner, *We All Have the Right to be Forgotten*, *supra* note 65.

156. *See* Ball, *Guardian Articles Have Been Hidden by Google*, *supra* note 46.

157. Of course, this is a broad EU law, and Google, without other guidance, currently has to make its own judgments. In that context, Google may be imposing American free speech values on the EU.

158. *See, e.g.,* Hustler v. Falwell, 485 U.S. 46, 51–52 (1987).

of internet users to remain vigilant. Either way, this problem places significant burdens on certain groups to police the internet for content that must be “remembered” and concretizes the concern about the suppression of free speech on the internet. To preserve First Amendment rights on the internet, any deliberation about a right to be forgotten must pause to examine solutions for this problem.

Recent news has led to a potential clash of the public figure doctrine with the issue of nonconsensual pornography. In the summer of 2014, large numbers of private nude photos of numerous female celebrities, obtained by hacking their phones and Apple iCloud accounts, were released on to the internet.¹⁵⁹ Perhaps the most famous of these celebrities, Jennifer Lawrence, called the hack a “sex crime” and noted that “just because I’m a public figure, just because I’m an actress, does not mean I asked for this.”¹⁶⁰ Is there truly a “public interest” in these pornographic photos, or at this point is it a delusion as Jennifer Lawrence suggests? The public figure doctrine should not hold in the context of nonconsensual pornography. Clearly, this issue is salient and active, and approaching a right to be forgotten cautiously allows the right to track with this conversation about privacy in the twenty-first century.

In light of the *Costeja* ruling, European courts and search engine operators like Google will have to continue to draw lines around all of these scenarios in the EU. While some scenarios are easier to decide on, others sit at the center of the right to be forgotten debate. Decisions in these areas could draw the ire of free speech advocates and defenders of privacy rights alike. As the conversation about internet privacy continues, it is important to note that a right to be forgotten may have merit in certain contexts. However, because there are difficult unresolved questions surrounding other scenarios, a broad sweeping rule could inadvertently curb important rights. In the United States, which leans at least slightly more in favor of free speech than the EU, more of these issues will tip against a right to be forgotten, further suggesting that an analogous broad law would be imprudent. Rather, narrow rules that address vital privacy concerns would effectuate proper policy goals.

159. David Kedmey, *Hackers Leak Explicit Photos of More than 100 Celebrities*, TIME (Sept. 1, 2014), <http://time.com/3246562/hackers-jennifer-lawrence-cloud-data/>.

160. Sam Kashner, *Both Huntress and Prey*, VANITY FAIR (Oct. 17, 2014), <http://www.vanityfair.com/vf-hollywood/2014/10/jennifer-lawrence-photo-hacking-privacy>.

B. THE PROPER BODY TO DEFINE THE RIGHT: COURTS,
LEGISLATURES, OR SEARCH ENGINES?

Decisions about what types of content should be de-listed or kept up effectively define the right to be forgotten. There are questions about whether private companies are the proper entities to be making these decisions rather than courts, but regardless of how companies and courts distribute the load, a narrow statutory right to be forgotten could properly put many of those decisions in the hands of the legislature in the first place, leaving the courts and private companies with the duty to implement the law. In the first months after the ECJ's *Costeja* ruling, it was Google that was seemingly left with the burden of making these decisions. Google's ability to handle other flagged content may suggest it is capable of making such judgments, but there are concerns that placing the balancing decisions for these requests in the hands of search engine operators may be impractical and imprudent. Since Google is not a legal institution, is it right to allow the company to make pivotal decisions about privacy, an issue of deep concern to many? The executive director of the Wikimedia Foundation, Lila Tretikov, commented that "accurate search results are vanishing in Europe with no public explanation, no real proof, no judicial review and no appeal process."¹⁶¹ Jules Polonetsky of the Future of Privacy Forum stated that "for the Court to outsource to Google complicated case-specific decisions about whether to publish or suppress something is wrong. Requiring Google to be a court of philosopher kings shows a real lack of understanding about how this will play out in reality."¹⁶² Critics have also noted that the burden on search engine operators could be immense to try to filter these results. Google examined over 500,000 removal requests in the first five months,¹⁶³ and it may cost too much to properly examine these as thoroughly as the high court has demanded.

On the other hand, Google has set up systems of its own services (such as YouTube) to handle content flagged for violating its content policies.¹⁶⁴ These incidents can revolve around internet bullying, hate speech, and other matters often left up to subjective interpretations. This suggests that Google is able to handle the role of "philosopher king" in at least some

161. Lila Tretikov, *European Court Decision Punches Holes in Free Knowledge*, WIKIMEDIA BLOG (Aug. 6, 2014), <http://blog.wikimedia.org/2014/08/06/european-court-decision-punches-holes-in-free-knowledge/>.

162. Toobin, *supra* note 148.

163. See Google Transparency Report, *supra* note 37.

164. See, e.g., YouTube Cyberbullying and Harassment Policy, *supra* note 147.

capacity, and that this practice can extend to the right to be forgotten. Furthermore, per the ECJ ruling, data protection agencies in member states serve as the proper legal institutions to calibrate decisions made by these private entities.¹⁶⁵ This suggests that with any right to be forgotten rule in the United States, courts would play at least some role, which may assuage certain fears about extra-judicial conflict resolution.

Regardless of who bears what burden, implementing the right to be forgotten narrowly and contextually would likely reduce the amount of necessary litigation compared to an unspecific rule like the EU's, which has clearly resulted in many open legal questions. Effectively, the legislature would be doing much of that policy work, streamlining the process down the line for courts and companies.

In addition, it is important to consider that the burden of handling right to be forgotten requests might favor larger internet entities like Google over smaller companies, stifling competition and subduing the entrepreneurial spirit of the internet. While Google arguably has the resources to handle the burden of reviewing right to be forgotten claims, smaller internet services are likely not as experienced and as well-equipped to sort out individual issues. This reinforces the need to implement any right to be forgotten narrowly rather than broadly. While a narrow right to be forgotten would still burden these internet services with questions about specific cases, it could avoid the additional burdens of a broad rule.

C. "MEMORY HOLES" AND THE INTEGRITY OF THE INTERNET

The principle of "internet exceptionalism" suggests that the internet is a special medium that should exist outside of ordinary legal structures. Related to this principle is the idea that the internet provides an opportunity to finally preserve all of human knowledge, without the holes or gaps that currently riddle history: a fire cannot burn down the modern Library of Alexandria. However, a right to be forgotten would arguably introduce "memory holes" that could run against these hopes for the internet. The "memory hole" was a concept popularized by George Orwell in his novel *Nineteen Eighty-Four*. In the story, oppressive government officials would drop politically inconvenient documents into physical "memory holes" to wipe the information from history.¹⁶⁶ The concept is often invoked when discussing revisionist history or censorship. Of course,

165. Case C-131/12, *Google Inc. v. Mario Costeja González* ¶ 94, *available at* <http://curia.europa.eu/juris/document/document.jsf?docid=152065&doclang=en> (May 13, 2014).

166. GEORGE ORWELL, 1984, at 34–35 (1954).

these ideas find their philosophical origin in the public rights to information and free speech. Some critics of the EU's rule suggest that the right to be forgotten threatens the integrity of the internet because removing information can create internet "memory holes" that modify history and steer the internet away from being a haven of preserved information. On the other hand, as Mayer-Schönberger notes, "what digital remembering yields is not the entire picture, but at best only those elements of it that are captured in digital memory."¹⁶⁷

Representatives from Wikipedia have been fiercely critical of the EU's right to be forgotten on these grounds. In response to the ECJ ruling, Jimmy Wales, the founder of Wikipedia, noted that "history is a human right," and that "some people say good things, some people say bad things . . . that's history and I would never use any kind of legal process like this to try to suppress the truth."¹⁶⁸ Tretikov, executive director of the Wikimedia Foundation, wrote that "the European court abandoned its responsibility to protect one of the most important and universal sets of rights: the right to seek, receive, and impart information," and "the result is an internet riddled with memory holes—places where inconvenient information disappears."¹⁶⁹ Relatedly, Google has argued that the right violates the objectivity of the internet.¹⁷⁰

However, support for internet exceptionalism may be eroding,¹⁷¹ and memory holes may already exist in significant ways on the internet. For example, when scores of nude photos of celebrities were stolen from their personal databases, members of Reddit, a social media website where many of the photos were re-posted, immediately pulled down some subpages that were linking to the images.¹⁷² In effect, some members of an

167. MAYER-SCHÖNBERGER, *SUPRA* NOTE 1, AT 122.

168. Sophie Curtis & Alice Philipson, *Wikipedia Founder: EU's Right to be Forgotten is 'Deeply Immoral'*, TELEGRAPH (Aug. 06, 2014), <http://www.telegraph.co.uk/technology/wikipedia/11015901/EU-ruling-on-link-removal-deeply-immoral-says-Wikipedia-founder.html>.

169. Tretikov, *supra* note 161.

170. Elizabeth Flock, *Should We Have a Right to be Forgotten Online?*, WASH. POST (Apr. 20, 2011), http://www.washingtonpost.com/blogs/blogpost/post/should-we-have-a-right-to-be-forgotten-online/2011/04/20/AF2iOPCE_blog.html.

171. See Tim Wu, *Is Internet Exceptionalism Dead?* in THE NEXT DIGITAL DECADE – ESSAYS ON THE FUTURE OF THE INTERNET 179 (Berin Szoka, Adam Marcus, eds., 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1752415.

172. Chiderah Monde, *Reddit Pulls Down Subpages Hosting Celebrity Nude Photos Week After Hacking*, N.Y. DAILY NEWS (Sept. 8, 2014), <http://www.nydailynews.com/entertainment/gossip/reddit-pulls-subpages-hosting->

internet giant willingly created memory holes in their own content in order to protect a significant privacy right. In addition, studies on internet content persistence have shown that a significant amount of content disappears within a day.¹⁷³ As the argument goes, if the internet is not as permanent as it first seems, should one truly be concerned about the disappearance of some Google search result links? Furthermore, recall that Google and other content engines have mechanisms in place to remove illegal and unacceptable content,¹⁷⁴ which suggests that there is precedent for carving out memory holes to govern the internet with the prevailing values of a society (for example, the removal of cyberbullying content). However, one could counter-argue that the memory holes that the EU's right to be forgotten create are particularly problematic because they often do not reflect a vital privacy right like cyberbullying and nonconsensual pornography. Rather, individuals are actively trying to hide minimally damaging information that individually or in the aggregate would contribute value to a thorough database of history. Furthermore, the fact that the information to be forgotten is popping up high on a list of search results suggests the public may find the information valuable in the context of that search term (here, the person's name). This is not surprising: what a person most wants everyone to forget can be exactly what others find interesting or valuable. And this search result may be valuable for long-term preservation.¹⁷⁵ If any right to be forgotten is to exist in the United States, a narrow and contextual one could navigate these nuances and target content that has a strong enough privacy right attached to overcome concerns about maintaining the internet's value as a tool of preservation.

D. TRANSPARENCY AND THE RIGHTS OF CONTENT OWNERS

The unspecific EU right to be forgotten rule may abrogate free speech in another way. In no way does the EU rule require search engine operators to tell content owners (for example, the publishers that post the

celebrity-nude-photos-article-1.1931908. However, other subpages on the site still linked to the stolen images.

173. Meg Ambrose, *It's About Time: Privacy, Information Lifecycles, and the Right to be Forgotten*, 16 STAN. TECH. L. REV. 369, 392 (2013).

174. See, e.g., Jacqueline Fuller, *Our Continued Commitment to Combating Child Exploitation Online*, GOOGLE OFFICIAL BLOG (June 15, 2013), <http://googleblog.blogspot.com/2013/06/our-continued-commitment-to-combating.html>.

175. For a thoughtful consideration about the tension between "Preservationists" and "Deletionists," see Ambrose, *It's About Time: Privacy Information Life Cycles, and the Right to be Forgotten*, *supra* note 173, at 396–97.

de-listed articles) that links to their works have been removed from search results. Google has made it a policy to send notices to content owners anyways, citing transparency concerns.¹⁷⁶ This highlights important issues: 1) whether content owner rights are being abrogated by the EU's right to be forgotten, and 2) whether a right to be forgotten law should include provisions aimed at promoting transparency about removals.

E. THE "ALL-DOMAINS" GUIDELINE: HOW FAR SHOULD REMOVAL STRETCH?

The scope of removal is a contentious debate: whether the search engine operator should only have to remove the link for one domain (i.e. Google.com or Google.fr), or for every domain it runs all across the world. This poses complex jurisdictional issues, and an expanded rule may stretch a right to be forgotten rule beyond certain legal boundaries. Currently, Google is removing links only for a specific country domain: a requester can remove a link under a search on "Google.fr" (Google's France site), and the link would still appear on other EU sites like "Google.co.uk" (Google's United Kingdom site) and across the world like on "Google.com" (Google's U.S. site). However, under an "all-domains" rule, the removal would have to occur for every domain. This would mean that a request would remove links from a search on the U.S.'s Google.com, as well.

For many months, EU leaders had not specified whether the right needed to be executed across all domains, so Google has kept removals as narrow as it can (country-specific). However, in November 2014 the EU's Article 29 Data Protection Working Party, largely made up of representatives from member states' data protection agencies, adopted guidelines that state removals should occur for all Google domains.¹⁷⁷ These guidelines do not immediately bind Google. Rather, they contain the "common interpretation of the ruling as well as the common criteria to be used by the data protection authorities when addressing complaints."¹⁷⁸

176. Frequently Asked Questions About the Right to be Forgotten, GOOGLE, <http://www.google.com/transparencyreport/removals/europeprivacy/faq/?hl=en> (last visited Jan. 30, 2015); see, e.g., Geoff Brigham & Michelle Paulson, *Wikipedia Pages Censored in European Search Results*, WIKIMEDIA BLOG (Aug. 6, 2014), <https://blog.wikimedia.org/2014/08/06/wikipedia-pages-censored-in-european-search-results/>.

177. See Article 29 Working Party Guidelines, *supra* note 26.

178. Press Release on Article 29 Working Party Guidelines, *supra* note 22. EU Working Party guidelines operate more as strong suggestions about how each member state should execute or comply with certain EU laws. The legal effect is yet to be seen.

Basically, the legal effect is yet to be seen, and it depends on how European authorities react in policing Google.

Applying removal to all domains might be necessary for a full protection of the right. Indeed, currently a European employer doing a search on an applicant can easily circumvent potential removal by sliding over to the U.S. “google.com,” under which there is absolutely no removal, and reliably return all search results for someone’s name (the employer could also slide over to another EU Google domain, but a diligent requester might have covered all member states).¹⁷⁹ According to the Working Party, “de-listing decisions must be implemented in such a way that they guarantee the effective and complete protection of data subjects’ rights and that EU law cannot be circumvented.”¹⁸⁰

On the other hand, it is concerning that a European law could have a strong effect on the search results of users across the world. First, it is problematic that a European requester’s privacy right would include being able to hide results from a U.S. user. And the extended implications raise deeper concerns. An “all-domains” rule might mean that any user across the world could use the EU right to remove links. Currently, there is no specific bar from a U.S. user submitting a request on Google’s web form, nor is there a suggestion from EU agencies that they would stop such requests. As of now, such a request may be relatively useless: a U.S. requester is more concerned about being forgotten on “google.com” than on “google.de.” But if the Article 29 Working Party’s “all-domain” guideline becomes reality, then the U.S. user might be able to submit a request on the web form and pull the link down for search results of her name across all Google sites. Thus, the “EU right” could effectively expand to all people. While Google could push back in various ways,¹⁸¹ the vagueness of the ruling leaves the above a clear possibility under an “all-domains” rule. This could be hugely concerning from an international law standpoint.

179. Of course, there may be a shuffling of results based on the search engine’s algorithm. For example, the U.S. search engine may lower the ranking of a European newspaper and raise the ranking of a U.S. newspaper, simply based on the fact that the U.S. newspaper is more relevant for a U.S. search result.

180. Press Release on Article 29 Working Party Guidelines, *supra* note 22.

181. One can imagine that if the Working Party guideline did become reality, Google might push back by demanding that it be able to filter requests regionally (by IP address or ISP) so that requests coming from anywhere but the EU would be blocked. However, even then, proxies or other technological tools could allow savvy American users to submit requests anyways. This may push Google to demand that it be able to require proof of EU residence or citizenship before granting any removal (if it wanted to take on the extra burden of examining such proof).

Ultimately, an all-domains rule is more imprudent than it is useful. It raises numerous vital issues pertaining to international law, cyber law, and privacy law: to what extent the EU can regulate the worldwide operations of a U.S. search engine; to what extent the EU can create privacy rights in other jurisdictions (including the United States); to what extent the EU can limit the internet-based rights of people outside its jurisdiction (rights such as free speech, freedom of the press, and access to knowledge); and to what extent the EU can assert its philosophy on the whole internet and users worldwide.

IV. CONCLUSION

The EU's broad language and lack of specificity have raised numerous questions both legal and philosophical, leaving the actual legal right in limbo and creating heavy administrative burdens. A narrow statutory or regulatory scheme encouraging private dealing would also harness the efficiency of technology and help avoid litigation. In addition, a law in the United States that reflects the ECJ ruling's broad approach could be struck down as unconstitutional on First Amendment grounds. While the EU has been actively considering a broad right to be forgotten for years, U.S. law generally holds free speech and the public right to information in high regard and strictly construes limits on most speech. A broad rule is likely to cross First Amendment lines by curbing speech while not being narrowly tailored to any particular goal.

If a right to be forgotten is to exist in the United States, it should not be implemented in a broad sweeping manner as it is in the EU. Rather, the right should manifest in narrow contexts where the right is deemed appropriate. For example, a right to be forgotten could be justified where analogs already exist in the law (credit reporting), private entities already engage in the practice (Google removing cyberbullying content), or important conversations surround a problematic issue (revenge porn). In this way, the United States can allow a right to be forgotten to evolve naturally with the nation's ongoing discussion about privacy in the internet age.