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Send the Word Over There: An Offshore Solution to the Right to Be Forgotten

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Send the Word Over There: An Offshore Solution to the Right to Be Forgotten

Jay Kaganoff

* The author would like to thank Professor Peter DiCola and Donna Etemadi for their feedback on earlier drafts, Joy Kerr for translation assistance, and SK for putting up with him through law school.

Abstract

The right to be forgotten is a subject of contention in both the United States and the European Union. In the E.U., the right to be forgotten gives one the right to demand that information—even if published legitimately—be taken down or removed from search engine results. While well-intentioned, this has led to concerns of free press restrictions. In contrast, the right to be forgotten is not recognized in the U.S., although there are scholars who would like to see such a right here. This Note takes the view that introducing a right to be forgotten would be contrary to the first amendment and privacy law frameworks in the U.S., and further is not desirable based on the European experiment.

In 2019 the European Court of Justice held in Google v. CNIL that a multinational platform does not have to comply with E.U. regulations on the right to be forgotten on its non-European platforms. Building on this distinction, this Note suggests an “offshore solution” to host articles and search engines outside the reach of European jurisdictions.

This Note is of interest to scholars and practitioners curious about the right to be forgotten debates, as well as the general differences in jurisprudence between the U.S. and the E.U. in balancing privacy rights against freedom of speech and the press.

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I. INTRODUCTION

A. *A Fishy Story*

A fish knife isn't a particularly fancy knife. All that is needed is a sharp blade made from good steel, and a good fit and grip for slippery, slimy fish.¹ The distinctive design is a long, thin knife, often with a wooden handle.² It was developed when a designer noticed that the best knives used by fish processors were those knives that were worn down.³ A seafood restaurant on the Adriatic coast of Italy would logically have fish knives on hand for use in deboning fish. Such use would normally include filleting fish, not stabbing a human being.

This particular seafood restaurant was owned by two brothers. A fight over money escalated into a stabbing. One brother stabbed the other with what he had on hand: the humble fish knife.⁴ This is what is called in the news industry a "man bites dog" story. "Restaurateur filets fish" is what is supposed to happen. There is no newsworthy story there. "Restaurateur stabs brother with fish knife" is news: it is not something that happens every day. The news organization that first picked it up was a local news website which focused on local colorful stories and government corruption.⁵

This story is more interesting for what happened afterwards, in the courts of law. There are far-reaching ramifications from this and similar stories for a free and vibrant press in the European Union. The brothers, who apparently reconciled and did not press charges, were upset that a Google search of them produced the story of the fish-knife stabbing which was harming the reputation of the restaurant.⁶ They turned to the courts to demand that the article be taken down under the "right to be forgotten."⁷ The court agreed with them, ruling that two years was enough time for the story to become outdated news, and that the article had to be taken down.⁸ The court also awarded damages of 10,000 Euros.⁹ The publisher did not

* The author would like to thank Professor Peter DiCola and Donna Etemadi for their feedback on earlier drafts, Joy Kerr for translation assistance, and SK for putting up with him through law school.

¹ Mike Toth, *The Knife That's Fed Millions (and Me)*, ANGLERS J. (May 22, 2019), <https://www.anglersjournal.com/.amp/people/the-knife-thats-fed-millions-and-me>.

² *Id.*

³ *Id.*

⁴ Adam Satariano & Emma Bubola, *One Brother Stabbed the Other. The Journalist Who Wrote About It Paid a Price.*, N.Y. TIMES (Sept. 23, 2019), <https://www.nytimes.com/2019/09/23/technology/right-to-be-forgotten-law-europe.html>.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

have the money, and eventually had to relinquish his scooter to the wielder of the fish knife.¹⁰ The local news organization eventually shut down.¹¹ It was simply too hard for the publisher to keep track of all the requests to delete information.

This story should serve as a cautionary tale of the excesses of the right to be forgotten in the European Union. The direct impact of being forced to take down newsworthy stories is the demonstrable effect on the free press. A newsworthy story has now been obscured. A local news organization, which focused on local corruption and politics, is gone. The next time a restaurant tool is used for something it is not meant to, there will be at least one fewer news organization to report it. And, while an offbeat story of a fight in a seafood restaurant may seem trivial, the stories about local government corruption are gone as well.

This is the legal atmosphere in Europe today. Although the European Union and European member states do value freedom of speech, the value of speech is balanced against the rights to privacy. In the case of the right to be forgotten, however, the European courts fail to properly balance freedom of speech and the rights of the public to information. Instead, courts have focused on information from a data privacy and data processing perspective. In addition, the European courts have put search engines in charge of the process of removing articles from view, resulting in collateral censorship. This misplaced focus results in newsworthy articles being removed and chills freedom of speech.

But in the United States, there is no such right to be forgotten. Such a story would not be taken down; instead, it would be displayed proudly. If the subject didn't want this to be his online reputation, he should have stuck his knife in fish, not in his brother. The newspaper has the right to publish this story, and the public has the right to access it. And that freedom of speech that exists in the United States can be used to help temper the excesses that stifle freedom of speech in Europe.

B. The Right to Be Forgotten: Definitions and Terminology

The right to be forgotten, also called the right to erasure or the right to delist, is the right to have information about oneself removed from public view. Unlike many other privacy rights, the right to be forgotten is not about a right to block publication. Nor is it about taking down information that should never have been in the public to begin with. The right to be forgotten is the right to erase, or restrict access to, information already legally and rightfully published and disseminated. Thus, while generally considered a privacy right, the right to be forgotten is very different from much of privacy law, which deals with keeping information safe or private.

¹⁰ *Id.*

¹¹ *Id.*

There are two ways to seek the erasure of information from a public view. The first is to try to have the original publisher remove the offending information from their publicly available website. The second way is to try to make the information less accessible by requesting from search engines (hereinafter “Google” due to the fact that the main cases involve Google) to delist the information. Since the main cases involve Google, this article will use Google as shorthand for this method. From the subject’s perspective, delisting may be most effective, if the goal is to prevent reputational harm by limiting the connection between the subject’s name and the embarrassing story. Either way, the story is effectively gone from the public eye.

The nomenclature of the “right to be forgotten” can be inexact and confusing. Strictly speaking, the right this article refers to is a right to erasure. The subject makes a request to erase an article from an online publication, or to erase the link between the article and the subject’s name in a search engine’s index, which is called delisting. There is no way to make people forget information. But the term “right to be forgotten” is the most common term encountered in researching this subject. It is also useful when separating rights to block publication or secure personal data from a right to delete published information, and accurately captures the concept of a right to put things back in the box.

C. The Right to be Forgotten in the United States and the European Union

The right to be forgotten is not universally recognized. This paper analyzes two legal jurisdictions: the European Union, which has a right to be forgotten, and the United States, which does not.

The remainder of this paper is as follows. Part II reviews the right to be forgotten and the right to delist in the European Union, and discusses the difficulties encountered in the implementation of these rights. Part III discusses the framework of privacy law in the United States, and details why there is no right to be forgotten, nor is it likely that any such right will be introduced. Part IV discusses the conflict between the European Union, where there is a right to be forgotten, and other jurisdictions, such as the United States, which does not have this right. Part IV continues by analyzing several proposals to harmonize the systems by incorporating a right to be forgotten in the United States, and concludes that they are contrary to existing jurisprudence and policy. This Part will also explain that the United States would be ill-advised to go down the path that Europe has. Moreover, European publishers should take advantage of the recent European Court of Justice decision which allows for access in the European Union to international sources to protect their publications from the draconian right to be forgotten by hosting their articles internationally. Part V concludes.

II. THE RIGHT TO BE FORGOTTEN IN THE EUROPEAN UNION

A. Legal and Historical Background

European Union caselaw introduced¹² the right to be forgotten and the right to be delisted in the landmark *Costeja* case.¹³ This right was then integrated into European privacy law in the General Data Protection Regulation (GDPR).¹⁴ The GDPR governs privacy law in the European Union,¹⁵ but it has ramifications for worldwide businesses, search engines, and media outlets. One of the provisions of the GDPR is the “right to be forgotten” (also known as the right to erasure), which is covered by Article 17.¹⁶

Under this provision, and in accordance with the preceding caselaw, after a certain amount of time, a person may request that information about them be removed from the internet.¹⁷

1. *Costeja* and the Right to Delist

The right to be forgotten has older roots but more recently stems from the 2014 *Costeja* case.¹⁸ *Costeja* introduced the right to be forgotten and the right to delist at the European Union level.¹⁹ *Costeja* predated the GDPR, and is based on the 1995 Data Protection Directive (DPD).²⁰ The *Costeja* case started in 2010 at the local level in Spain and culminated in the European Court of Justice ordering Google to delist search results, despite the fact that Google had not created and did not own the offending content.²¹

Costeja González had property publicly auctioned off in a regional newspaper some time before. He filed a request with the *Agencia Española de Protección de Datos* (AEPD), Spain’s data protection agency, asking that the auction listing be taken down from the newspaper’s website, and also that Google searches of his name not produce this link.²² The AEPD ruled that the newspaper did not have to take down the posting, since it was

¹² While some member states had an independent right to be forgotten previously, this case introduced the right throughout the European Union to all member states.

¹³ Case C-131/12, *GoogleSpain S.L. v. Agencia Española de Protección de Datos*, 2014 E.C.R. 317.

¹⁴ Commission Regulation 2016/679, art. 17, 2016 J.O. (119) 1.

¹⁵ Commission Regulation 2016/679, 2016 J.O. (119) 1.

¹⁶ Commission Regulation 2016/679, *supra* note 14, at 43.

¹⁷ *Id.*

¹⁸ Case C-131/12, *Google Spain S.L. v. Agencia Española de Protección de Datos*, 2014 E.C.R. 317.

¹⁹ *Id.*

²⁰ Council Directive 95/46, 1995 O.J. (L 281) 31 (EC).

²¹ Case C-131/12, *Google Spain S.L. v. Agencia Española de Protección de Datos*, 2014 E.C.R. 317.

²² *Id.* ¶¶ 14-17.

properly advertised “upon order of the Ministry of Labour and Social Affairs and was intended to give maximum publicity to the auction in order to secure as many bidders as possible,” but that Google could possibly be required to delist the information from its indexed searches.²³ The case then went on the European Court of Justice to determine whether Google had to delist the search result. The court addressed two main issues: first, if Google was subject to European regulations, and second, if there exists a right to be forgotten.

On the jurisdictional issue and the applicability of the DPD to Google, the Court of Justice ruled that Google Spain is subject to European Union law.²⁴ The court also ruled that Google, as a search engine operator, is a “controller” that conducts the processing of personal data in the context of the DPD.²⁵ However, the court avoided ruling on whether Google’s non-Spain activities were subject to E.U. law.²⁶ This further jurisdictional question would not be resolved until the later *CNIL* case in 2019.

On the substantive question of whether Costeja González had the right to request removal of the information, the court ruled that there exists a right to be forgotten, and that this right applies to delisting from a Google search.²⁷ The court found that after a certain amount of time, a person has the right to request that their name not be linked to an old story.²⁸ The court held that an individual’s right to privacy outweighs the public’s interest in the information and the interests of the search engine operator.²⁹ “[I]nclusion in the list of results, displayed following a search made on the basis of a person’s name” interferes with a person’s right to privacy.³⁰

[T]he operator of a search engine is obliged to remove from the list of results displayed following a search made on the basis of a person’s name links to web pages, published by third parties and containing information relating to that person, also in a case where that name or information is not erased beforehand or simultaneously from those web pages, and *even*, as the case may be, *when its publication in itself on those pages is lawful*.³¹

This result may seem counterintuitive. The information was legally published, and in this case, there was not even an enforceable right to erasure from the original publisher. But the court still found that Google’s search engine was “processing of data” that violated Costeja González’s rights.³² Including the right to be forgotten as a data processing issue, even

²³ *Id.*

²⁴ *Id.* ¶ 60.

²⁵ *Id.* ¶¶ 26-28, 41, 57.

²⁶ *Id.* ¶ 61.

²⁷ *Id.* ¶¶ 92-99.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* ¶ 87.

³¹ *Id.* ¶ 88 (emphasis added).

³² Council Directive 95/46, art. 14, 1995 O.J. (L 281) 31 (EC).

where the underlying data is allowed to be public, confirms the concept of a right to erase information that is lawfully published.

With *Costeja*, the right to be forgotten, and the right to be delisted from a search, became law in the European Union.

2. CNIL and the Limits to European Jurisdiction

In 2015, the *Commission nationale de l'informatique et des libertés* (CNIL), France's data protection authority, demanded that Google de-reference requests from not only Google France, but from all of Google's domain name extensions.³³ Google refused, and was fined 100,000 Euros.³⁴ The French authority's view was that all of Google's websites needed to comply with European law. The Court of Justice did not agree, ruling that a search engine is not required to de-reference a search made on a version of the search engine not intended for the European Union.³⁵ The court ruled however, that the search engine must:

“effectively prevent or, at the very least, seriously discourage an internet user conducting a search from one of the Member States on the basis of a data subject's name from gaining access, via the list of results displayed following that search, to the links which are the subject of that request.”³⁶

3. From DPD to GDPR

The 1996 Data Protection Directive was superseded by the GDPR in 2016, effective 2018.³⁷ The DPD had become outdated and was considered ill-suited to the modern data privacy processing.³⁸ The GDPR is designed, among other things, to protect privacy retroactively.³⁹ In addition, the GDPR introduced much heavier fines for data breaches up to 4% of annual turnover—a similar fine amount to antitrust violations.⁴⁰

The right to be forgotten is expressly enumerated in the GDPR, which provides specific steps for data controllers to follow in erasing information.⁴¹ The court in *Google v. CNIL*⁴² analyzed the issues based on

³³ Case C-507/17, *Google LLC v. Comm'n nationale de l'informatique et des libertés*, 2019 E.C.R. 772 ¶ 30. [hereinafter *Google v. CNIL*].

³⁴ *Id.* ¶¶ 31, 33.

³⁵ *Id.* ¶ 62-65.

³⁶ *Id.* ¶ 73.

³⁷ Commission Regulation 2016/679, art. 94, 2016 J.O. (119) 1.

³⁸ Lawrence Siry, *Forget Me, Forget Me Not: Reconciling Two Different Paradigms of the Right to Be Forgotten*, 103 KY. L.J. 311, 325 (2014).

³⁹ *Id.* at 326.

⁴⁰ Samuel Gibbs, *European parliament approves tougher data privacy rules*, THE GUARDIAN, (Apr. 14, 2016) <https://www.theguardian.com/technology/2016/apr/14/european-parliament-approve-tougher-data-privacy-rules>.

⁴¹ Commission Regulation 2016/679, art. 17, 2016 J.O. (119) 1.

⁴² *See supra*, Part II.A.2.

both the DPD and the GDPR.⁴³ The definitions of “process” and “controller” in both the DPD and the GDPR are notably very similar.⁴⁴ Although the *Costeja* and *CNIL* cases predate the GDPR, the legal standard is the same.

This is thus the framework of the right to be forgotten under the GDPR. Any subject, with information that is outdated, irrelevant, or no longer of use to the data controller, can request that the information be erased from the original website, or delisted from a search engine. Any website or search engine servicing anywhere in the European Union must comply with the request. But an international website or search engine or an international version of a website or search engine does not have to comply with this European regulation.

B. Complications with the European Right to be Forgotten

1. Problems of Practical Enforcement and Excessive Censorship

Google’s compliance with the right to be forgotten has been far from smooth. The responsibility placed on the search engine to deal with, and ultimately decide, each request to delist a search engine result has led to criticism of Google’s role. As one critic put it, “Google is taking decisions that are publicly relevant. As such, it is becoming almost like a court or government, but without the fundamental checks on its power.”⁴⁵

Robert Peston wrote about the experience of being delisted without explanation.⁴⁶ In 2014, after *Costeja*, the BBC received a notice from Google that they were delisting a 2007 article about Stan O’Neal, the former chairman and CEO of Merrill Lynch.⁴⁷ The notice from Google simply stated, “Notice of removal from Google Search: we regret to inform

⁴³ *Google v. CNIL*, *supra* note 33, at 40,41.

⁴⁴ Compare the DPD definition of data processing: “‘processing of personal data’ (‘processing’) shall mean any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organization, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction” (Council Directive 95/46, art. 2(b), 1995 O.J. (L 281) 31 (EC)) with the GDPR definition of data processing: “‘processing’ means any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organization [sic], structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction” (Commission Regulation 2016/679, art. 4(2), 2016 J.O. (119) 1).

⁴⁵ Sylvia Tippman & Julia Powles, *Google accidentally reveals data on ‘right to be forgotten’ requests*, THE GUARDIAN (July 14, 2015) <https://www.theguardian.com/technology/2015/jul/14/google-accidentally-reveals-right-to-be-forgotten-requests>.

⁴⁶ Robert Peston, *Why Has Google Cast Me into Oblivion?*, BBC NEWS, <https://www.bbc.com/news/business-28130581> (July 2, 2014).

⁴⁷ *Id.*

you that we are no longer able to show the following pages from your website in response to certain searches on European versions of Google: [the URL of the delisted page],” with no details or explanations.⁴⁸

How, asked Peston, was an article about a prominent public figure related to the financial crisis “inadequate, irrelevant or no longer relevant,” in the words of *Costeja*?⁴⁹ Peston notes that being delisted by Google “means that to all intents and purposes the article has been removed from the public record, given that Google is the route to information and stories for most people.”⁵⁰

There is some ambiguity as to the extent of the Peston delisting. In an update, Peston wrote that the story had not been completely delisted but was instead only delisted from being found in connection to a search by name of the commenters on the article.⁵¹ However, a contemporaneous account in *Recombu* claims that the search was censored from a search result using Google’s United Kingdom version of the search engine, but not from a United States version of the search engine result.⁵²

Peston is not the only journalist to have seen his story disappear. Three articles about a football⁵³ referee who lied about a call and was forced out as a result were delisted as of July 2015.⁵⁴ The search for the referee’s name in the United States version of Google showed the articles, but the exact same search in the United Kingdom version did not.⁵⁵ (In an interesting quirk, the search *did* find the article when searching “Scottish referee who lied” without the referee’s name, in line with the *Costeja* ruling requiring delinking from the subject’s name.)⁵⁶ Other articles that disappeared from a Google search include an article about an attorney running for a seat on the Law Society’s ruling board while facing fraud charges, and a weekly index of articles in the Guardian.⁵⁷

Peston suggests that Google may have been too zealous in delisting this search result and may not actually have had to delist it.⁵⁸ But therein lies the problem. This overzealousness is an inevitable complication that

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Rene Millman, *Google’s right to be forgotten creates Streisand effect*, RECOMBU (July 3, 2014), <https://recombu.com/digital/article/google-creates-streisand-effect-bbc-mail-guardian>.

⁵³ Soccer.

⁵⁴ James Ball, *EU’s right to be forgotten: Guardian articles have been hidden by Google*, THE GUARDIAN (July 2, 2014), <https://www.theguardian.com/commentisfree/2014/jul/02/eu-right-to-be-forgotten-guardian-google>.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Peston, *supra* note 46.

results from a framework that places the burden on the search engine to determine what content needs to be removed or delisted. It may make financial sense for Google to err on the side of delisting in order to avoid a tedious analysis or the risk of being fined. However, Google's prudence has far-reaching consequences to the author, to the publication, and to the wealth of knowledge accessible to the public.

Google has set up a website to demonstrate transparency and compliance with this rule.⁵⁹ As of January 3, 2021, Google delisted 1,825,591 URLs, out of a total of 3,900,836 URLs for which delisting was requested.⁶⁰ Google employs "an army of [paralegals]" to deal with all of these requests.⁶¹ When Google is the gatekeeper determining what should be delisted, without oversight, there is a problem of collateral censorship: censorship that isn't imposed by the law, but results from the legal framework.⁶² Here, the legal framework requires Google to determine which articles hosted by publishers should be hidden from the internet. It may seem like a minor thing to delist a search engine link, but the article then sinks into obscurity, and that has an effect on freedom of expression.⁶³

2. The (Im)balance Between the Right to Be Forgotten and Freedom of Speech.

In theory, the right to be forgotten in the European Union is limited by freedom of speech and expression.⁶⁴ In practice, the right to be forgotten has clashed with media interests and free speech, and some local media companies have had to shut down due to excessive litigation over the right to be forgotten.⁶⁵ "[I]n Italy at least, 'the right to be forgotten' now has a new meaning: the right to remove inconvenient journalism from archives after two years."⁶⁶ *PrimaDaNoi*, the Italian local news organization in the story this paper started with, received 240 requests for deletions and

⁵⁹ *Transparency Report*, GOOGLE, <https://transparencyreport.google.com/eu-privacy/overview> (last visited Jan. 3, 2021).

⁶⁰ *Id.*

⁶¹ Peston, *supra* note 46.

⁶² See generally Ira Rubinstein & Bilyana Petkova, *The International Impact of the General Data Protection Regulation*, COMMENTARY ON THE GENERAL DATA PROTECTION REGULATION (forthcoming).

⁶³ Miquel Peguera, *The Shaky Ground of the Right to be Delisted*, 18 VAND. J. ENT. & TECH. L. 507, 556 (2016).

⁶⁴ Commission Regulation 2016/679, art. 17(3)(a), 2016 O.J. (L 119) 1.

⁶⁵ Hazard Owen, *The Offshore Journalism Project Would Let Newsrooms Send a "Distress Signal" When Their Content Is at Risk of Being Lost Forever*, NIEMAN LAB (Jan. 8, 2018), <https://www.niemanlab.org/2018/01/the-offshore-journalism-project-would-let-news-rooms-send-a-distress-signal-when-their-content-is-at-risk-of-being-lost-forever/>.

⁶⁶ Athalie Matthews, *How Italian Courts Used the Right to Be Forgotten to Put an Expiry Date on News*, THE GUARDIAN (Sept. 20, 2016), <https://www.theguardian.com/media/2016/sep/20/how-italian-courts-used-the-right-to-be-forgotten-to-put-an-expiry-date-on-news>.

eventually gave up trying to fight them in court.⁶⁷ The site shut down for good in 2018.⁶⁸ Other publications simply comply with these requests and do not fight them.⁶⁹

Scholars have noted that the court in *Costeja* did not even consider the right of freedom of expression in its balance between the data subject and the data controller, instead focusing on the balance between corporate interests and access to information.⁷⁰ Instead of balancing the privacy rights of the subject with the fundamental freedom of expression and information, the Court focused on the access to the information.⁷¹ The Court is also criticized for not laying out clear criteria to use to balance the competing interests.⁷² Instead, the Court operates from a presumption of privacy and data protection, balanced only against the public interest to access the information.⁷³ The *Costeja* court's focus on the access and data protection aspects represents a right that emerges from a broad data protection act, not from a personal right.

Despite the criticism on legal, practical, and policy grounds, the right to be forgotten in the European Union remains. Any subject can complain about an article about them that they do not like, and can either get the article removed, or get the article hidden from search results on European Union versions of a search engine. But these rights do not exist in many other jurisdictions, including the United States.

III. THE RIGHT TO BE FORGOTTEN IN THE UNITED STATES

The right to be forgotten “is not recognized in the United States.”⁷⁴ If the right were to be recognized, it would need to be introduced either as a new right or through some existing privacy right since the United States does not have a national privacy or data protection statute. The trend in United States law is against the kind of dignitary or retroactive privacy rights such as a right to be forgotten, and towards a presumption of freedom of speech. This makes it difficult for a right to be forgotten to be introduced.

⁶⁷ Satariano & Bubola, *supra* note 4.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Peguera, *supra* note 63, at 555.

⁷¹ MARIA TZANOU, *The Unexpected Consequences of the EU Right to Be Forgotten: Internet Search Engines as Fundamental Rights Adjudicators in PERSONAL DATA PROTECTION AND LEGAL DEVELOPMENTS IN THE EUROPEAN UNION* 279-301 (ed. Maria Tzanou, 2020).

⁷² *Id.* at 284.

⁷³ *Id.*

⁷⁴ *Garcia v. Google, Inc.*, 786 F.3d 733, 745 (9th Cir. 2015).

A. The Current Legal Status

No Federal court to date has recognized a right to be forgotten. A 2015 case from the Second Circuit Court of Appeals helps elucidate how courts in the United States have reacted to attempts to introduce a right to be forgotten. In *Martin v. Hearst Corporation*, the court ruled that a local news organization did not have to remove an article about an individual who was arrested for a crime but ultimately not charged.⁷⁵ The cause of action in that case was the tort of defamation, and not an attempt to introduce a direct right to be forgotten. The court's position was that reporting factual events is not defamation since people know that not all arrests lead to guilty verdicts.⁷⁶ A right to be forgotten does not enter the equation.

In another case that had the potential to be groundbreaking, a New Jersey court ordered Google to remove Google search results related to an older incident.⁷⁷ The case, *Malandrucco v. Google, Inc.*, involved images showing the effects of police brutality. Interestingly, it was the victim of the beating, a man not charged with a crime, who requested removal of the images. Although the images did not implicate him with a crime, and, if anything, made him look sympathetic, Malandrucco was apparently simply tired of people Googling him and seeing graphic photos of him after the beating. To him, the pictures may have been a source of embarrassment and an invasion of privacy. The most vulnerable moment in his life had now become the defining characteristic of his online presence.

Unfortunately for the development of United States caselaw, Malandrucco would drop the case after it was removed to federal court on diversity jurisdictional grounds.⁷⁸ It is not known why Malandrucco dropped the lawsuit. It could have been because of the risks of the "Streisand Effect", which is the phenomenon where people trying to make information go away by making a big deal about it, have the opposite effect as intended and make the story far more famous.⁷⁹ In this example, it is possible that the plaintiff was wary of this happening to him and decided to withdraw his suit once the case was getting more prominence in federal court. This may be an inhibition in the development of privacy caselaw, since plaintiffs may have apprehensions of being the trendsetter.

It is also possible that the plaintiff withdrew the case because he

⁷⁵ *Martin v. Hearst Corp.*, 777 F.3d 546, 553 (2d Cir. 2015).

⁷⁶ *Id.*

⁷⁷ Eugene Volokh, *N.J. Court Orders Google to Vanish Plaintiff's Photo—Published at the Chicago Tribune—From Search Results*, REASON: THE VOLOKH CONSPIRACY (Aug. 3, 2018), <https://reason.com/2018/08/03/nj-court-orders-google-to-vanish-plainti/> [hereinafter Volokh on Malandrucco].

⁷⁸ Eugene Volokh, *Plaintiff Dropping Case in Which He Got Order to Google to Vanish Photo from Search Results*, REASON: THE VOLOKH CONSPIRACY (Aug. 13, 2018), <https://reason.com/volokh/2018/08/13/plaintiff-dropping-case-in-which-he-got/>.

⁷⁹ T.C., *What Is the Streisand Effect?*, THE ECONOMIST (Apr. 16, 2013), <https://www.economist.com/the-economist-explains/2013/04/15/what-is-the-streisand-effect>.

expected to lose in federal court or lacked the financial resources to pursue a prolonged lawsuit. It may also be that Google complied with the request in order to prevent a precedent.⁸⁰ Constitutional scholar and professor Eugene Volokh, in reviewing the case, assessed the chances of a federal court finding that Malandruccho had the right to compel Google to delist search results as very slim.⁸¹

Pending any changes, the right to be forgotten does not exist in the United States. The nature of the way privacy law developed in the United States makes it unlikely that there will be a right to be forgotten in the United States. In order to understand why, an introduction to privacy law in the United States is in order.

B. Overview of Privacy Law in the United States

Privacy law in the United States, in stark contrast to the framework in the European Union, does not stem from one overall privacy statute. Instead, privacy rights are scattered throughout the legal system, and each category of privacy rights may stem from several sources of law. There are statutes that cover individual industries and actions⁸²; there are various torts related to privacy right, from older common law torts to newer privacy torts; and there are constitutional rights, both explicit⁸³ and implied⁸⁴.

The first modern attempt to clarify privacy was an 1890 article by Samuel Warren and Louis Brandeis.⁸⁵ Warren and Brandeis were concerned mainly with reputational damage and dignitary harm.⁸⁶ They proposed introducing new privacy torts to the law.⁸⁷ The article had a huge influence on American privacy law. By 1960, William Prosser, a well-known expert on tort law, was able to identify over 300 court cases inspired by the Warren and Brandeis article.⁸⁸ The four Warren and Brandeis inspired torts, as defined by Prosser, are: (1) Intrusion; (2) Public Disclosure; (3) False Light Publicity; and (4) Appropriation of Likeness.⁸⁹

Aside from these torts, there have been other developments in privacy law in the United States. More recently, Professor Daniel Solove proposed

⁸⁰ A Google search of the name “Malandruccho” made on December 14, 2020, did not produce the offending images or articles.

⁸¹ Volokh on Malandruccho, *supra* note 77.

⁸² *See, e.g.*, Health Insurance Portability and Accountability Act of 1996 (HIPAA) (governing health privacy).

⁸³ *See, e.g.*, U.S. CONST. amend. IV (governing unreasonable searches).

⁸⁴ *See, e.g.*, the decisional privacy cases.

⁸⁵ Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

⁸⁶ *See id.* at 195-96.

⁸⁷ *Id.* at 219.

⁸⁸ William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 388 (1960).

⁸⁹ *Id.* at 389.

a new taxonomy of privacy law to bring this area of law more up to date.⁹⁰ Solove identified sixteen different privacy rights within four overall categories.⁹¹ The full list of privacy rights as enumerated by Solove are: (A) Information Collecting, two rights: (1) Surveillance, and (2) Interrogation; (B) Information processing, five rights: (3) Aggregation, (4) Identification, (5) Insecurity, (6) Secondary Use, and (7) Exclusion; (C) Dissemination, seven rights: (8) Breach of Confidentiality, (9) Disclosure, (10) Exposure, (11) Increased Accessibility, (12) Blackmail, (13) Appropriation or Exploitation, (14) Distortion; and (D) Invasion, two rights: (15) Intrusion and (16) Decisional Interference.⁹²

These categories define the ideas of privacy, but not the source of laws. Within the categories listed by Professor Solove are various sources of law and inconsistent application.⁹³ For example, Interrogation (category 2 above, defined by Professor Solove as “the pressuring of individuals to divulge information”⁹⁴) is not a single, coherent right, but is instead a group of rights, which include the Fifth Amendment right to refuse questions from the government about a crime, the First Amendment right when being questioned by the government about one’s associations and beliefs, evidentiary privileges from both common law and court rules, as well as more recent statutes protecting employees from employers, rape shield laws, and others.⁹⁵

The difficulty with the taxonomy and the lack of structure in privacy law in the United States extends beyond a simple technical problem of creating a list of what rights exist. These different rights do not come together to create a cohesive body of law. For a law professor writing an exam, a legal topic that covers many issues dotting the landscape is the ideal opportunity for an issue spotter. But from a practical perspective, many of these rights are ill-defined and patchy. Unlike the GDPR, with its framework of processors and data responsibilities, the landscape of privacy rights in the United States does not provide a framework to introduce a right to be forgotten. Because each individual law stands on its own island, so to speak, application to other situations such as the right to be forgotten would not flow naturally without a specific statute.

⁹⁰ See generally Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PENN. L. REV. 477 (2006).

⁹¹ *Id.* at 488-91.

⁹² *Id.*

⁹³ Indeed, a point of Solove’s article was to propose a new taxonomy, and to point out these inconsistencies.

⁹⁴ Solove, *supra* note 90, at 500.

⁹⁵ *Id.* at 499, 502-03.

C. Categorizing a Right to Be Forgotten

The right to be forgotten does not sit easily in any of the Solove privacy categories, or even in any of Solove's four groupings. The first grouping involves information collection. A right to be forgotten can be included in "information," as the European courts view it. But Solove's grouping only covers information gathered illicitly. The information collection rights that Solove identifies do not include a right to later require removal of information that was gathered properly. The third (dissemination) and fourth (invasion) groupings also do not apply: the dissemination aspects of the third grouping cover areas such as distortion or exposure, where there was a fraud of sorts, and in the fourth grouping there is no "invasion" at any point.

One could theorize a right to be forgotten through the second (information processing) grouping or through the aggregation, identification, or increased accessibility categories, which apply to the issue of the Google search aggregating all known information easily in a few clicks and linking it to a person's name. This would require a broader recognition of data processing rights, recognizing a search engine as a data processor that, in the aggregation of data, causes a social harm and that can be prevented from listing search engine results which a subject does not want. Like the European framework, this could introduce a right to be forgotten from the data processing angle. Unlike the European framework, such an approach would not introduce the direct right to erasure from the original publishers; it introduces only a right to delist search engine results. However, the European courts were able to rely on a robust underlying statute defining the roles of a controller and process. Without such a framework in the United States, it is hard to see how a court could find that Google has a data processing responsibility based on gathering public information.

1. Privacy Law and Dignitary Harms

Solove notes that the Fifth Amendment's right to be free from interrogation (category 2 in his taxonomy) is restricted to where there are criminal consequences and does not protect dignitary or employment harms.⁹⁶ "Privacy law's theory of interrogation is not only incoherent, it is nearly nonexistent. Despite recognizing the harms and problems of interrogation—compulsion, divulgence of private information, and forced betrayal—the law only addresses them in limited situations."⁹⁷

A privacy right that recognizes the dignitary harms in interrogations would provide greater protection in a variety of human interactions. For example, such a right might eliminate "the box" in job applications asking

⁹⁶ *Id.* at 503-04.

⁹⁷ *Id.* at 504.

if an applicant has a criminal record.⁹⁸ This would enable applicants to have a fresh start, move on with their lives, and leave the mistakes of the past behind, a right very similar to a right to be forgotten.

However, the legal framework in the United States does not recognize such dignitary rights as an inherent component of a right to be free from interrogation. Instead, “interrogation” is a stand-alone protection from the government, and any additional right will need to be introduced via legislation. This demonstrates how the United States’ patchwork of privacy rights fails to come together and recognize a right that can be easily applied to new situations. The right to be forgotten is about reputational and dignitary harms and would not fit in with the current framework.

The right to be forgotten is, at its core, a dignitary right to allow a subject to erase prior misdeeds. A legal system that does not recognize dignitary harms would not find a place for a right to be forgotten. But, so far, there is no reason why a right to be forgotten could not be introduced in future scholarships and legislation. The Secrecy Paradigm, discussed in the next sub-part, and the Truthfulness principle, discussed later,⁹⁹ explain why the right to be forgotten not only had no place in the United States’ current system of privacy rights, but would also be extremely disfavored.

2. The Secrecy Paradigm

Among other critiques of privacy law in the United States, Solove also critiques the law’s approach to surveillance. The real issue with surveillance, according to Solove, is that it is a “tool of social control.”¹⁰⁰ The awareness of being under surveillance creates a chilling effect.¹⁰¹ Big Brother is watching you. And yet, the law only addresses surveillance from the prism where it takes place—that is, in public or private—as opposed to what it does.¹⁰² This is part of what Professor Solove calls the “secrecy paradigm”:

Under the secrecy paradigm, privacy is tantamount to complete secrecy, and a privacy violation occurs when concealed data is revealed to others. If the information is not previously hidden, then no privacy interest is implicated by the collection or dissemination of the information. In many areas of law, this narrow view of privacy has limited the recognition of privacy violations.¹⁰³

⁹⁸ See *Take the Fair Change Pledge*, BAN THE BOX, <http://bantheboxcampaign.org> (last visited Dec. 4, 2020) (advocating for a “Ban of the Box” on employment applications, in order to “give people with past convictions a fair chance”).

⁹⁹ *Infra*, Part III.C.4.

¹⁰⁰ Solove, *supra* note 90, at 493.

¹⁰¹ *Id.* at 495–99.

¹⁰² *Id.* at 495–99.

¹⁰³ *Id.* at 497 (citing DANIEL J. SOLOVE, *THE DIGITAL PERSON: TECHNOLOGY AND PRIVACY IN THE INFORMATION AGE* 42–44 (2004)).

One of those “privacy violations” whose recognition is limited by the secrecy paradigm is the right to be forgotten. The right to be forgotten is the right to delete information legitimately made public. It is a dignitary right that does not fit in with the secrecy paradigm.

Solove lists a number of cases where courts in the United States have found that there is no right to privacy since information was already public. Most of these cases involve torts of intrusion. In Solove’s taxonomy, these would be included either in intrusion or in exposure. For example, a couple filmed being wrongfully arrested did not have a right to privacy because it was in public.¹⁰⁴ The sexual orientation of the man who saved President Ford and was outed was not a secret since this information was already known to hundreds of people.¹⁰⁵ The address of a former Columbian judge who had a bounty on her head from drug lords was not private because several people already knew the address.¹⁰⁶

To be clear, Solove decries the secrecy paradigm and sees it as a fault in how courts in the United States have approached privacy law. But is it this “faulty” secrecy paradigm that explains why the right to be forgotten does not fit in the legal framework of privacy law in the United States? Privacy law in the United States focuses on secrecy, and anything that is already non-secret is outside of the realm of privacy. A published article is already non-secret because the cat is out of the bag.

The standard of how many people have to know something before it is considered public information is not precisely delineated and can vary by court. In fact, some courts have held that just by sharing information with a small circle of acquaintances a subject did not render “otherwise private information public by cooperating in the criminal investigation and seeking solace from friends and relatives.”¹⁰⁷ But these courts are still operating within the secrecy paradigm. They are not recognizing a right to restrict public information; rather, they are expanding the definition of what is considered “secret” to include information shared with a small group of people. Lior Strahilevitz has argued that the definition of “disclosure” should be based on the expectations of the subject. Information disclosure would occur when information travels beyond the subject’s expectations.¹⁰⁸ This standard has not been adopted by the courts.¹⁰⁹ But even the Strahilevitz standard is limited to preventing the containment of information, since it relies on the expectations of disclosure. There is no basis for a right to roll back expected disclosure.

¹⁰⁴ *Penwell v. Taft Broadcasting Co.*, 469 N.E.2d 1025 (Ohio Ct. App. 1984).

¹⁰⁵ *Sipple v. Chronicle Publishing Co.*, 201 Cal. Rptr. 665, 669 (Cal. Ct. App. 1984).

¹⁰⁶ *Duran v. Detroit News, Inc.*, 504 N.W.2d 715, 718 (Mich. Ct. App. 1993).

¹⁰⁷ *Times-Mirror Co. v. Superior Court*, 244 Cal. Rptr. 556, 561 (Cal. Ct. App. 1988); Solove, *supra* note 90, at 532 n.310.

¹⁰⁸ Lior Jacob Strahilevitz, *A Social Network’s Theory of Privacy*, 72 U. CHI. L. REV. 919, 974 (2005).

¹⁰⁹ *Id.*; Solove, *supra* note 90, at 532.

Some courts have seemingly abandoned the secrecy paradigm when the disclosure involves personal dignity.¹¹⁰ These different cases that involve personal privacy in public spaces are defined by Professor Solove's taxonomy as "exposure" and are distinct because of the social norms attached to nudity and personal dignity.¹¹¹ But even where courts have found the right to privacy in a public space, the logic depends on the inherent private nature of the activity captured. Despite being in a public space, there may still be an expectation of privacy norms for accidental nudity.¹¹² However, the element of personal dignity merely informs the standard of expectations of secrecy, and there is no recognition of a dignitary right on its own.

The different perspectives on the spread of information, thus, differ only in what information is considered public. The assumption remains that once information has spread into the public sphere, it remains there and cannot be put back in the box.

3. Intellectual Property, Copyright and Privacy

The Malandruccho case discussed above raises some fascinating questions about copyright and the right to be forgotten. One of the legal arguments made by Malandruccho was a copyright claim.¹¹³ It should be noted that even if there is a successful path to using copyright law to remove and delist information about oneself, it would be limited to something that is copyrightable (for example, a picture) and where the subject actually owns the copyright to the picture.¹¹⁴ Even there, the subject is unlikely to win, since the copyright principle of "fair use" would probably allow use of a copyrighted image for a news story.¹¹⁵

Professor Eugene Volokh argues against what was, in 2000, a growing body of scholarship arguing that people should have a property right to information about themselves.¹¹⁶ This view would have allowed people to stop publications from writing about them.¹¹⁷ Volokh forcefully argues that:

¹¹⁰ Compare *Daily Times Democrat v. Graham*, 162 So. 2d 474, 476-78 (Ala. 1964) (woman photographed when wind blew up her skirt had the right to protection from indecent and vulgar violation of privacy), with *McNamara v. Freedom Newspapers, Inc.*, 802 S.W.2d 901 (Tex. App. 1991) (participant in public athletic performance had no right to privacy when genitalia was photographed and published in local paper).

¹¹¹ Solove, *supra* note 90, at 533-36 (see his definition of exposure v. disclosure and critique of the lack of definition in the courts for it).

¹¹² See *Graham*, 162 So. 2d 474, 476 (Ala. 1964).

¹¹³ Volokh on Malandruccho, *supra* note 77.

¹¹⁴ 17 U.S.C. §§ 102, 201 (1976).

¹¹⁵ See Shyamkrishna Balganesh, *Privative Copyright*, 73 VAND. L. REV. 22-24 (2020).

¹¹⁶ Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049, 1063 (2000) [hereinafter *Volokh on Freedom and Privacy*].

¹¹⁷ *Id.*

“Calling a speech restriction a ‘property right,’ though, doesn’t make it any less a speech restriction, and it doesn’t make it constitutionally permissible. Broad, pre-*New York Times v. Sullivan* libel laws can be characterized as protecting a property right in reputation; in fact, some states consider reputation a property interest.”¹¹⁸

Thus, even if one sees an intellectual property right to personal information about individuals, Supreme Court First Amendment jurisprudence as expressed in *New York Times v. Sullivan*¹¹⁹ would still allow the offending material to be published. Volokh also notes that the copyright distinction between ideas (which cannot be copyrighted) and expression (which can be copyrighted) reflects a strong free speech presumption.¹²⁰ “Copyright’s idea/expression dichotomy¹²¹ strikes a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author’s expression.”¹²² Intellectual property is not a pathway to a right to be forgotten.

4. Distortion, the First Amendment and Truthfulness

Solove’s taxonomy groups the older common law tort of defamation, the Warren and Brandeis-inspired false light tort, and various modern statutes giving a right to correct inaccurate information in databases into Distortion.¹²³ This could appear to be a way to introduce a right to be delisted via data controllers. But long-standing caselaw in the United States restricts defamation to falsehoods. In the landmark case *New York Times v. Sullivan*, the United States Supreme Court balanced speech and public debate against privacy and reputation, and speech won.¹²⁴ “Truth trumps privacy.”¹²⁵ The First Amendment is a “major restraint” on American privacy law.¹²⁶ It is perhaps ironic that the right to be forgotten has not found its place in the United States, land of the American Dream of leaving one’s life behind and starting fresh.¹²⁷ In other areas of law such as bankruptcy, the United States has been at the forefront of allowing people

¹¹⁸ *Id.*

¹¹⁹ *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

¹²⁰ Volokh on Freedom and Privacy, *supra* note 116, at 1066 (citing *Harper & Row v. Nation Enterprises*, 471 U.S. 539, 556 (1985)).

¹²¹ 17 U.S.C. § 102(b). An “idea” in copyright refers to an umbrella category that includes any “idea, procedure, process, system, method of operation, concept, principle, or discovery.”

¹²² *Harper & Row v. Nation Enterprises*, 471 U.S. 539, 556 (1985).

¹²³ Solove, *supra* note 90, at 546–48.

¹²⁴ *Siry, supra* note 38, at 330–31 (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, (1964)).

¹²⁵ *Id.* at 331.

¹²⁶ *Id.* at 328.

¹²⁷ *Id.* at 313.

to start over.¹²⁸ But there is another competing value here, that of the freedom of speech.

The current First Amendment framework would, therefore, make a right to erase factual information virtually impossible, since the right to be forgotten is about erasing information, even accurate information, that was lawfully published. The residual privacy rights to protection from distortion only refer to inaccurate information. If a subject alleges that compiling or presenting information distorts the facts or circumstances, the cause of action would still be the inherent dishonesty of the publisher, and not the right to be forgotten as it exists in the European Union. There can only be an objection where the publisher never had the right to present the information in this misleading way. This is very distinct from a right to be forgotten where the information is accurate and truthful.

The right to be forgotten, therefore, has no position in United States law. There is no current federal legal standard in the United States that would include this right. Further, it would come into conflict with the secrecy paradigm and the principle of truthfulness. Long-standing Supreme Court decisions allow publications of truthful information, and recent opinions by the Second and Ninth Circuits courts have disclaimed any right to be forgotten.

IV. JURISDICTIONAL CLASH BETWEEN THE EUROPEAN UNION AND THE UNITED STATES

The legal and constitutional approaches towards privacy and freedom of speech are very different in the European Union and in the United States. The United States legal system values free speech above all,¹²⁹ while the European Union values privacy more. The European Convention on Human Rights (ECHR) provides a fundamental right to privacy that does not exist in the United States Bill of Rights.¹³⁰ Furthermore, European value systems place a higher premium on personal honor.¹³¹

¹²⁸ *Id.*

¹²⁹ *Supra* Part III.C.

¹³⁰ Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 8, Nov. 4, 1950, E.T.S. 005. The full text of the right is as follows:

Article 8 – Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others

¹³¹ May Crockett, *The Internet (Never) Forgets*, 19 SMU SCI. & TECH. L. REV. 151, 159 (2016) (citing Tom Gara, *The Origins of the 'Right to be Forgotten': Sir, I Demand a Duel*, THE WALL ST. J. (May 14, 2014)).

While the ECHR also has a freedom of speech right, the wording is clearly distinct from the First Amendment of the Constitution of the United States. Article 10, Freedom of Expression, of the ECHR states that “[e]veryone has the right to freedom of expression,” but also immediately states that this right is subject to various restrictions including “the protection of the rights and freedoms of others.”¹³² In contrast, the First Amendment simply states that “Congress shall make no law . . . prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press”¹³³ It is this framework that enabled the European Court of Justice to balance the right to be forgotten against the right to speech and come out on the side of dignitary rights.

In a globalized world, these starkly different jurisdictions come into conflict with each other. As already seen, the European Court of Justice has had to contend with Google’s right to display search results on the international versions of its search engine that would be prohibited in the European Union. The internet does not always have clear borders and boundaries to delineate different legal standards.

A. Attempts to Harmonize the Jurisdictions

There have been several attempts and proposals to harmonize the European and the American ways of dealing with personal data on the internet. Several scholars propose introducing an element of a right to be forgotten in the United States.¹³⁴ Conversely, there are scholars who sound the alarm at the encroachment of the European approach on civil liberties and freedom of the press.¹³⁵

¹³² Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 10, Nov. 4, 1950, E.T.S. 005.

¹³³ U.S. CONST. amend. I.

¹³⁴ See generally Amy Gajda, *Privacy, Press, and the Right to be Forgotten in the United States*, 93 WASH. L. REV. 201 (2018) (arguing in favor of Right to be Forgotten In the United States); Andrea Gallinucci-Martinez, *Is the European Right to Be Forgotten Viable in the Land of the First Amendment?*, 122 PENN ST. L. REV. STATIM 1 (2018) (focusing on a specific proposed N.Y. law and proposes to view privacy law via contractual obligations); Ben Medeiros, *The Reputation-Management Industry and the Prospects for a Right to Be Forgotten in the US*, 51 FIRST AMEND. STUDIES 14 (2017) (focusing on a reputation-management industry solution); Michael L. Rustad & Sanna Kulevska, *Reconceptualizing the Right to be Forgotten to Enable Transatlantic Data Flow*, 28 HARV. J. L. & TECH. 349 (2015) (making the case for a modified right to be forgotten that would be enacted by both the United State and the European Union).

¹³⁵ See generally McKay Cunningham, *Free Expression, Privacy, and Diminishing Sovereignty in the Information Age: The Internationalization of Censorship*, 69 ARK. L. REV. 71, 114 (2016) (critiquing the excesses of the right to be forgotten, this article is nonetheless dated by its assumption that European laws would apply worldwide and the EU would be the “keeper of the Internet”—Google won its case on September 24, 2019); Miquel Peguera, *The Shaky Ground of the Right to Be Delisted*, 18 VAND. J. ENT. & TECH. L. 507 (2016); Shaniqua Singleton, Note, *Balancing a Right to be Forgotten with a Right to Freedom of Expression in the Wake of Google Spain v. AEPD*, 44 GA. J. INT’L & COMP. L. 165 (2015);

Professor Amy Gajda writes that there is a right to be forgotten in the United States.¹³⁶ Gajda argues that a right to be forgotten is included in the tort of public disclosure of private facts.¹³⁷ Gajda also quotes a series of cases from state courts in the 1800s that essentially outlaw publishing truthful but “improper” information, such as a clergyman having an affair.¹³⁸ The court doubted the motives of the publishers.

Throughout the article, Gajda confuses various rights to privacy with the right to be forgotten. The first case Gajda uses as support involves a person in witness protection who was removed due to the personal security of the subject.¹³⁹ This is clearly a case about information that should never have been released, not a right to be forgotten. Another case was about keeping information out of the public eye, which would be consistent with the secrecy paradigm.¹⁴⁰ A key point in the article is the contention that “some modern courts believe that individuals in the United States should be able to *keep their past histories private* under certain conditions.”¹⁴¹ Gajda infers from this a “right to put one’s embarrassing and hurtful history behind him.”¹⁴² But there is a big difference between recognizing a dignitary privacy right to keeping past secrets private and recognizing a right to remove from public view information that is not a secret.

This old-school dignitary value system was articulated by the Texas Court of Appeals in 1878. That court held that it was tortious to suggest that someone was “notoriously of bad or infamous character” even if it was a true suggestion.¹⁴³ This type of tort reflects old-fashioned notions of gentlemanly conduct and predates the expansion of First Amendment freedom of the press rights in such cases as *New York Times v. Sullivan*.¹⁴⁴ Even allowing for dignitary violation in such a defamation, this case bears no connection to the right to be forgotten, since it refers to original publication, not removal of justified publication.

Gajda also cites a series of Supreme Court cases involving the Freedom of Information Act (FOIA) where the court found that information such as old rap sheets, death scene photos, and military academy

May Crockett, Comment, *The Internet (Never) Forgets*, 19 SMU SCI. & TECH. L. REV. 151 (2016).

¹³⁶ Gajda, *supra* note 134.

¹³⁷ *Id.* at 206–07.

¹³⁸ *Id.* at 208–10.

¹³⁹ *Id.* at 202–03.

¹⁴⁰ *Id.* at 203.

¹⁴¹ *Id.* (emphasis added).

¹⁴² *Id.* at 204 (citing Case C-131/12,

GoogleSpain, S.L. v. Agencia Española de Protección de Datos, 2014 E.C.R. 317).

¹⁴³ *Id.* at 210 n.53 (quoting *Morton v. State*, 3 Tex. App. 510, 518 (1878)).

¹⁴⁴ See *Siry, supra* note 38, at 330–31 (2014) (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, (1964)).

disciplinary records were considered private.¹⁴⁵ Again, these are about disclosure, not removal. In addition, the author makes no notice of the fact that the FOIA cases involve the question of whether information is exempt from disclosure by the government, not the question of whether a private citizen would be allowed to publish something.

Gajda relies on a Seventh Circuit decision in 2015 that rejected a First Amendment defense to publishing information obtained illegally, despite the accuracy of the information, to support the assertion that United States jurisprudence is moving towards a right to be forgotten.¹⁴⁶ Notably, truthfulness was not an excuse. But even if this becomes the legal standard, it will not support a right to be forgotten. As with *Daily Times Democrat v. Graham*,¹⁴⁷ the issue is the public disclosure of information that should not have been public. It would not apply to information lawfully published.

B. The Offshore Solution

The European framework of the right to be forgotten has demonstrated many flaws. These include a failure to balance the right to expression against the right to privacy, placing the responsibility (and power) of delisting on the search engines, expanding the right in areas of public interest, and overly harsh remedies that harm the press. Rather than attempting to make the United States adopt the European framework in some shape, there is another alternative. The legal system in the United States can instead be used to provide the balance that is lacking in the European right to be forgotten. American freedoms can be used to solve European excesses that threaten to stifle freedom of speech.¹⁴⁸

The roadmap to this solution rests in the recent *CNIL* case, where Google won the right to list on its international sites the links to articles that are “banned” by the European Union.¹⁴⁹ Instead of coming head-to-head with European regulators, media companies that fear censorship should simply place their operations in jurisdictions that respect freedom of speech and expression. This type of tactic is entirely consistent with the European caselaw.

Had the view of the French courts prevailed, the European right to be

¹⁴⁵ Gajda, *supra* note 134, at 221–24.

¹⁴⁶ Gajda, *supra* note 134, at 243–47 (citing *Dahlstrom v. Sun-Times Media, LLC*, 777 F.3d 937 (7th Cir. 2015)).

¹⁴⁷ *Daily Times Democrat v. Graham*, 162 So. 2d 474 (Ala. 1964).

¹⁴⁸ The United States is not the only jurisdiction not to have a right to be forgotten. This offshore solution can be proposed in many different jurisdictions that do not have a right to be forgotten. The United States is an ideal location due to its legal framework that makes it is extremely unlikely to adopt any significant form of a right to be forgotten. Furthermore, many technology and media companies have headquarters, or at least a presence, in the United States. This makes the United States the ideal location to focus on for this type of “offshore” solution.

¹⁴⁹ *Google v. CNIL*, *supra* note 33.

forgotten could have de facto applied internationally and set a precedent that legal jurisdictions can control what is done outside of their borders. The European Court of Justice's decision not to extend the right to delist to Google's international sites provides for a stark imbalance in international law, not only between jurisdictions and continents, but between two different versions of the same website in the same place. But the results of the *CNIL* case point to a roadmap to bypass the right to be forgotten in the European Union by hosting the offending information elsewhere.

It is instructive that in researching for this paper, details of the stories being removed were only available on websites of organizations in the United States, and not in Europe. The *New York Times* version of the "fish knife stabbing" story details that *PrimaDaNoi*, the Italian local news site founded in 2005, reported on the fight between two brothers in the restaurant business in 2008.¹⁵⁰ The European sources did not have as many details. In the post-*CNIL* world, a multinational company can host content that would be removed in the European Union on the international or American versions of its website. Media companies that wish to be free from the European restrictions can create an international site, or perhaps share the information by syndication.

Smaller media companies may not have the resources to create international versions. But they too can join together and create safe havens where information can be hosted outside of the European Union. The Offshore Journalism Project has an ongoing project to "maximize free speech by exploiting different jurisdictions."¹⁵¹ This project takes inspiration from the pirate radio era. This project and others like it can provide a platform for those smaller media companies that do not have resources for a presence in the United States. The "offending" information can be hosted in a location outside the reach of the jurisdictions that would prohibit it, for example, by having a completely United States-based organization that would store all of the backed-up information.

One key factor that would make these solutions feasible is that the right to be forgotten does not prohibit the publication of information (unless otherwise prohibited). Nor does the right to be forgotten kick in automatically. The subject has the right to request removal, and until the subject makes the request, the publication can host the information on its European site as well. This timeline would enable publications to back up all of their stories in the interim.

The offshore solution would ensure that valuable information is not lost. It would also enable media companies and local publications to

¹⁵⁰ Satariano & Bubola, *supra* note 4.

¹⁵¹ Nicolas Keyser-Bril & Mario Tedeschini-Lalli, *Preliminary Report, June 2017*, OFFSHORE JOURNALISM, available at <http://www.offshorejournalism.com/data/Offshore%20Journalism%20Report.pdf>.

comply with deletion requests while still maintaining their integrity, allowing them to live to fight another day. In order to make this solution truly viable, there would need to be significant cooperation among media and technology companies worldwide to create these options.

While the stories themselves can be hosted in the United States safely, they will still not be visible from a Google search made from a version based in a European Union nation-state. There are, however, other search engines that do not tailor their searches by location.¹⁵² While the stories will be limited somewhat, they will not be entirely hidden from view.

V. CONCLUSION

The right to be forgotten in the European Union enables subjects to request the removal of information, news articles, and search engine results linking to this information. The subjects have this right even if the information had a newsworthy purpose, or indeed, even if the information is a legally mandated posting. While many cases are sympathetic, the broad right has the capacity for abuse and is a restriction on freedom of speech. It has the potential to cause serious harm to the free press in Europe.

The right to be forgotten does have boundary limitations. The recent European Court of Justice case, *Google v. CNIL*, restricted the delisting obligation to the European Union and did not extend it to Google's worldwide operations. In a global world and a global internet, this opens a window to using various jurisdictions to temper the dangers of unfettered press restrictions.

Privacy rights in the United States do not allow for a right to be forgotten. The legal framework does not contain a broad data privacy regulatory framework which could include such a right. Courts have generally been skeptical of the kind of dignitary harms and retroactive action necessary for a right to be forgotten. This is seen in the secrecy paradigm, which allows for publication of personal information once it is no longer considered a secret, and in the truthfulness standard for defamation. A right to be forgotten would be at odds with the premium placed on freedom of speech in the United States. Publishers and search engines should utilize the legal framework that allows them to host information and search engines outside of the reach of the European Union. The United States is likely to stay free from a right to be forgotten for some time and can provide a safe haven for the information.

¹⁵² E.g., Matt Southern, *DuckDuckGo Hits a Record 1 Billion Monthly Searches in January 2019*, SEARCH ENGINE J. (Feb. 4, 2019), <https://www.searchenginejournal.com/duckduckgo-hits-a-record-1-billion-monthly-searches-in-january-2019/291609/> (the search engine DuckDuckGo does not track personal information and is a small company based in the United States.).