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## AN AMERICAN RIGHT TO BE FORGOTTEN

John W. Dowdell\*

### I. INTRODUCTION

In 1890, America's "Father of Psychology," William James, wrote that "[i]n the practical use of our intellect, *forgetting* is as important as recollecting."<sup>1</sup> That same year, eventual Supreme Court Justice Louis D. Brandeis and his Harvard Law classmate Samuel D. Warren co-authored *The Right to Privacy*.<sup>2</sup> The stated purpose of the latter was "to consider whether the existing law afford[ed] a principle which [could] properly be invoked to protect the privacy of the individual; and, if it [did], what the nature and extent of such protection [was]."<sup>3</sup> While the legal protection of individual privacy rights in the United States has progressed slowly through the common law in the century and a quarter since Brandeis and Warren first argued in its defense, the European Union ("E.U.") has made considerable strides in the protection of its citizens' privacy rights.<sup>4</sup> As a result, citizens of all twenty-eight E.U. member states enjoy the strongest online privacy right to date, known most commonly as the right to be forgotten.<sup>5</sup>

The E.U.'s measures in protecting individual online privacy rights, although imperfect, are necessary in the relatively unknown but rapidly changing Internet age.<sup>6</sup> In our modern world, where Americans are increasingly complacent about mass data retention and increasingly careless as to the content of online postings, it is time to reexamine if, and at what level, the United States has or needs a right to online privacy, and how that right may comport with the E.U.'s right to be forgotten.

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1. WILLIAM JAMES, TEXT-BOOK OF PSYCHOLOGY 300 (1982) (emphasis added).

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

3. *Id.* at 197.

4. Rodney A. Smolla, *Accounting for the Slow Growth of American Privacy Law*, 27 Nova. L. Rev. 289, 289-90 (2002) ("American privacy law is surprisingly weak. If privacy law were a stock, its performance over the last century would not be deemed impressive. It has been a consistently poor achiever, barely keeping up with inflation."); *See also* Megan Richardson & Andrew T. Kenyon, *Privacy Online: Reform Beyond Law Reform*, in EMERGING CHALLENGES IN PRIVACY LAW 338 (Witzleb et al. eds., 2012) (noting "the century's worth of privacy tort reform that followed the article has produced no privacy utopia in the United States.>").

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

6. THERESA M. PAYTON & THEODORE CLAYPOOLE, PRIVACY IN THE AGE OF BIG DATA: RECOGNIZING THREATS, DEFENDING YOUR RIGHTS, AND PROTECTING YOUR FAMILY 1 (2015).

Part II of this note frames the issues it seeks to resolve, and then examines Europe's cultural history regarding privacy—including legislation and case law—and explains the development of the right to be forgotten.<sup>7</sup> Part III notes the spread of the right to be forgotten into the Western Hemisphere, and discusses its implications.<sup>8</sup> Part IV chronologically discusses privacy law developments in the United States, including both common law and constitutional interpretations.<sup>9</sup> Part V briefly acknowledges arguments against the creation of a right to be forgotten in the United States.<sup>10</sup> Finally, Part VI argues that E.U. and U.S. perspectives on individual online privacy rights are not irreconcilable, and that the right to be forgotten can be adopted in the United States in a precisely tailored and improved form.<sup>11</sup>

## II. FRAMING THE ISSUE

The Internet is the most significant technological advancement in generations, dramatically changing the way the world collects, communicates, and disseminates information.<sup>12</sup> Despite the Internet's undeniable contributions to society, it has triggered a new normal where forgetting is the exception, and remembering is the norm.<sup>13</sup> The retention—or remembering—of every action of every person using the Internet has the potential to adversely affect people on and offline; and the consequences of unchecked data retention range from minor reputational harm, to harm that is severe and sometimes shocking.<sup>14</sup> For an example of the latter, consider the tragedy of the Catsouras family.<sup>15</sup> In 2006, a recent high school graduate named Nikki Catsouras was decapitated when she crashed her father's Porsche into a concrete tollbooth while driving on a highway in Southern California.<sup>16</sup> The coroner did not even allow Nikki's parents to identify the body because “[t]he manner of death was so horrific.”<sup>17</sup> Still, images from the scene of the accident were leaked when two California Highway Patrol employees emailed them to friends and family members for amusement on Halloween day.<sup>18</sup> Mr. Catsouras quickly learned that the only viable way to remove the photographs from the Internet in the United States is through copyright law.<sup>19</sup> When the Catsouras' attorney was unable to purchase the photos

7. *See infra* Part II.

8. *See infra* Part III.

9. *See infra* Part IV.

10. *See infra* Part V.

11. *See infra* Part VI.

12. Russell L. Weaver, David F. Partlett & Mark D. Cole, *Protection Privacy in the Digital Age*, in *THE RIGHT TO PRIVACY IN THE LIGHT OF MEDIA CONVERGENCE* 1-3 (Dieter Dörr & Russell L. Weaver eds., 2012).

13. VIKTOR MAYER-SCHÖNBERGER, *DELETE: THE VIRTUE OF FORGETTING IN THE DIGITAL AGE* 2 (2009).

14. *Id.* at 1-15.

15. Jeffrey Toobin, *The Solace of Oblivion: In Europe, the right to be forgotten trumps the Internet*, *THE NEW YORKER*, September 29, 2014 Issue.

16. Jessica Bennett, *One Family's Fight Against Grisly Web Photos*, *NEWSWEEK* (Apr. 29, 2004, 8:00 PM), <http://www.newsweek.com/one-familys-fight-against-grisly-web-photos-77275>.

17. Toobin, *supra* note 15.

18. Bennett, *supra* note 16.

19. Toobin, *supra* note 15.

from the California Highway Patrol, the family had no alternatives—legal or otherwise.<sup>20</sup> The gruesome photographs of Nikki Catsouras are still accessible today through a simple search on Google.<sup>21</sup>

In the aggregate, however, far more harm stems from the retention of seemingly innocuous online content.<sup>22</sup> Examples abound.<sup>23</sup> For instance, a university in Pennsylvania denied an otherwise qualified twenty-five year old a teaching certificate due solely to a picture she posted of herself—captioned “drunken pirate”—in which she was dressed as a pirate and holding a cup.<sup>24</sup> In the United Kingdom, a woman found herself unemployed because of her Facebook post referring to her job as “dull.”<sup>25</sup> In 2003, Ghyslain Raza—also known as “Star Wars Kid”—dropped out of school as a result of bullying after his classmates posted a video of him pretending to be in a light saber battle.<sup>26</sup> He entered a child’s psychiatric ward.<sup>27</sup>

Most people simply want to erase their online histories for posterity.<sup>28</sup> A businesswoman in Florida, for example, asked a committee there to take down a story of her, at age nineteen, in which she is quoted about interviewing for a position with a “naked maids” cleaning service.<sup>29</sup> These are just a few of the thousands of individuals petitioning for the erasure of a miniscule fraction of their online histories—220,000 of which have been made to Google as of February 2015.<sup>30</sup>

The issue spans internationally due to the global nature of the Internet.<sup>31</sup> Internet use and accessibility are rapidly expanding, and avoiding the Internet is impracticable, particularly in the United States.<sup>32</sup> A 2007 Pew Research survey illustrating this point found that nearly two-thirds of American teenagers regularly participated in

20. *Id.*

21. *Id.*

22. *see generally* VIKTOR MAYER-SCHÖNBERGER, DELETE: THE VIRTUE OF FORGETTING IN THE DIGITAL AGE 2-3 (2009).

23. *See* Jeffrey Rosen, *The Web Means the End of Forgetting*, THE NEW YORK TIMES MAGAZINE, July 21, 2010 (explaining that “[e]xamples are proliferating daily . . .”), available at [http://www.nytimes.com/2010/07/25/magazine/25privacy-t2.html?pagewanted=all&\\_r=1](http://www.nytimes.com/2010/07/25/magazine/25privacy-t2.html?pagewanted=all&_r=1).

24. Brian Krebs, *Court Rules Against Teacher in MySpace ‘Drunken Pirate’ Case*, SECURITY FIX (Dec. 3, 2008, 5:05 PM), [http://voices.washingtonpost.com/securityfix/2008/12/court\\_rules\\_against\\_teacher\\_in.html](http://voices.washingtonpost.com/securityfix/2008/12/court_rules_against_teacher_in.html).

25. Andrew Levy, *Teenage Office Worker Sacked for Moaning on Facebook About Her “Totally Boring” Job*, THE DAILY MAIL, Feb. 26, 2009, <http://www.dailymail.co.uk/news/article-1155971/Teenage-office-worker-sacked-moaning-Facebook-totally-boring-job.html>.

26. Eric Pfeiffer, *10 Years Later, ‘Star Wars Kid’ Speaks*, THE SIDESHOW (May 10, 2013, 7:13 PM), <http://news.yahoo.com/blogs/sideshow/10-years-later-star-wars-kid-speaks-231310357.html>.

27. *Id.*

28. Sylvia Tippmann & Julia Powles, *Google Accidentally Reveals Data on ‘Right to be Forgotten’ Requests*, THE GUARDIAN (July 14, 2015, 9:28 EDT), <http://www.theguardian.com/technology/2015/jul/14/google-accidentally-reveals-right-to-be-forgotten-requests>.

29. Terry Carter, *Erasing the News: Should Some Stories be Forgotten?*, ABA JOURNAL (Jan. 1, 2017, 12:10 AM), [http://www.abajournal.com/magazine/article/right\\_to\\_be\\_forgotten\\_US\\_law/](http://www.abajournal.com/magazine/article/right_to_be_forgotten_US_law/).

30. Julia Powles & Enrique Chaparro, *How Google Determined Our Right to be Forgotten*, THE GUARDIAN (February 18, 2015, 2:30 EDT), <http://www.theguardian.com/technology/2015/feb/18/the-right-be-forgotten-google-search>.

31. *Cf.* Russell L. Weaver, David F. Partlett & Mark D. Cole, *Protection Privacy in the Digital Age*, in THE RIGHT TO PRIVACY IN THE LIGHT OF MEDIA CONVERGENCE 2-3 (Dieter Dörr & Russell L. Weaver eds., 2012).

32. Payton & Claypoole, *supra* note 6, at 14 (“The Internet was born in the 1980s and rocketed into all of our homes through the 1990s and early 2000s, becoming a necessity of life for many, including nearly everyone in the industrialized world.”).

one of the many content-creating activities on the Internet.<sup>33</sup> This suggests that content-creating activities, such as Facebook, Instagram, and Twitter, are now inseparable from youth culture.<sup>34</sup> As these younger generations age, particularly in America, they will not have a luxury their parents took for granted: the ability to conceal or mitigate reputational damage from minor and often harmless missteps, follies, and lapses in judgment.<sup>35</sup>

The indefinite retention of every aspect of an individual's online activity is an urgent problem; and the United States and Europe are at odds regarding the solution.<sup>36</sup> To understand the divergent approaches and how each developed, we must acknowledge—according to Yale Law professor and Guggenheim Fellow James Q. Whitman—that “on the two sides of the Atlantic, [there are] two different cultures of privacy, which are home to different intuitive sensibilities . . . .”<sup>37</sup> To Professor Whitman, the divergence between contemporary conceptions of privacy in the laws of the E.U. and the U.S. boils down to a view of privacy as an aspect of dignity in the former, and as an aspect of liberty in the latter.<sup>38</sup> Neither approach is objectively superior to the other; rather, each is a product of “contrasting political and social ideals,” developed throughout history.<sup>39</sup> How Europeans arrived at a view of privacy through the lens of dignity, and Americans through the lens of liberty, therefore requires an examination of European and American culture throughout history.<sup>40</sup>

#### A. *Europe's Embrace of Privacy Rights and the Emergence of the Online Right to be Forgotten*

There is no consensus on the period of European history with the most influence on the continent's attitude toward privacy.<sup>41</sup> For example, Viktor Mayer-Schönberger, recognized as one of the intellectual godfathers of the right to be forgotten, believes that Europe's data protection laws are a product of twentieth century turmoil in Europe.<sup>42</sup> He points specifically to a Dutch National Registry, which “enabled the Nazis to identify 73% of Dutch Jews, compared with just 25% in . . . France,” where such robust records did not exist.<sup>43</sup> This is the explanation most commonly offered

33. Kathryn Zickuhr, “Teen Content Creators,” Pew Research Center, Washington, D.C. (Nov. 18, 2009), at <http://www.pewinternet.org/2009/11/18/teen-content-creators/> (accessed Nov. 11, 2015).

34. *Id.*

35. *Supra* note 12, at 3.

36. Jeffrey Rosen, *The Right to be Forgotten*, 64 STAN. L. REV. ONLINE 88 (2012), <http://www.stanfordlawreview.org/online/privacy-paradox/right-to-be-forgotten>.

37. James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1153, 1160 (2004); see also ALAN F. WESTIN, *PRIVACY AND FREEDOM* 26 (1967) (noting that “[i]t is important to realize that different historical and political traditions among contemporary democratic nations have created different types of over-all social balances of privacy.”).

38. James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1153, 1161-62 (2004).

39. *Id.* at 1164.

40. *Id.*

41. See VIKTOR MAYER-SCHÖNBERGER, *DELETE: THE VIRTUE OF FORGETTING IN THE DIGITAL AGE* 136-37 (2009) (arguing that heightened information privacy in Europe is the result of “Europe's violent and brutal twentieth-century history.”); *But see also* Jeffrey Rosen, *The Right to be Forgotten*, 64 STAN. L. REV. ONLINE 88 (2012) (pointing to the centuries old French law of *le droit à l'oubli* as the “intellectual roots of the right to be forgotten.”).

42. Toobin, *supra* note 15.

43. *Private Data, Public Rules*, THE ECONOMIST (Jan. 28, 2012), available at <http://www.economist.com/node/21543489/print>.

by Europeans themselves.<sup>44</sup> Proponents of the Nazi explanation essentially believe that the privacy protections Europeans enjoy today are the result of a knee-jerk reaction against fascism, communism, and in particular, Nazism.<sup>45</sup> Jeffrey Rosen, Law Professor at George Washington University and Legal Affairs Editor of *The New Republic*, emphasizes early French law and specifically the doctrine of *le droit à l'oubli*.<sup>46</sup> Translated as the “right of oblivion,” *le droit à l'oubli* allowed French convicts who had served their time in prison, and presumably been rehabilitated, to prevent the publication of their incarceration as well as any details of their alleged crime.<sup>47</sup> Similar laws that protect dignity, irrespective of social class, still exist today in France, Germany, and Great Britain, among others.<sup>48</sup>

The theory that Europe’s emphasis on individual privacy rights is rooted in centuries of history—and the theory that data protection in particular was born primarily from Nazi occupation—are not mutually exclusive.<sup>49</sup> Professor Whitman acknowledges a number of factors contributing to European privacy law in the aggregate, including Nazi occupation to a small degree, but concludes that Europe’s emphasis on privacy “is the result of a centuries long, slow maturing revolt against th[e] style of status privilege.”<sup>50</sup> Put differently, while Viktor Mayer-Schönberger is correct that the Nazis’ exploitation of centralized information contributed greatly to current European digital data protection laws, a cultural value of privacy forms the base.<sup>51</sup>

Both historically and currently, privacy in Europe is most accurately viewed as protecting personal dignity.<sup>52</sup> The emphasis on dignity is apparent in light of ancient European practices for defending reputation, such as the duel.<sup>53</sup> “A duel could be provoked by insult, defamation, or gossip . . . Even the slightest of insults could spark a duel.”<sup>54</sup> This shows the lengths to which European citizens were willing to go in order to repair or protect their dignity.<sup>55</sup> The extreme reputational remedy, however, was reserved to the elite class—the members of which actually had reputations worth

44. Whitman, *supra* note 38, at 1165.

45. *Id.*

46. Rosen, *supra* note 36.

47. *Id.*

48. *On Being Forgotten*, THE ECONOMIST, May 17, 2014, available at <http://www.economist.com/node/21602219/print>; See also JAMES Q. WHITMAN, HARSH JUSTICE at 84-92 (2003) (noting in regard to punishment in France and Germany, “the obligation of wearing prison uniforms has been generally eliminated.” France also bans the use of glass partitions where inmates receive visitors, and Germany provides inmates with unemployment insurance, which they receive on release. These laws are intended to maintain the dignity and social standing of inmates.).

49. Whitman, *supra* note 38, at 1166 (noting that although the evolution of European privacy law has been “centuries-long . . . much of this leveling up took place *during* the fascist period . . .”).

50. *Id.* at 1166-69 (acknowledging factors such as the law of insult, dueling, Nazi history, and “the revolution of leveling up.”).

51. *Id.*; See also VIKTOR MAYER-SCHÖNBERGER, DELETE: THE VIRTUE OF FORGETTING IN THE DIGITAL AGE 136-37 (2009).

52. Whitman, *supra* note 38, at 1164-65.

53. See generally BARBARA HOLLAND, GENTLEMEN’S BLOOD: A HISTORY OF DUELING FROM SWORDS AT DAWN TO PISTOLS AT DUSK (2003).

54. DANIEL J. SOLOVE, THE FUTURE OF REPUTATION 114 (2007).

55. *Id.*

protecting.<sup>56</sup> Duels were not entirely extrajudicial, and adhered to a set of elaborate rules known as the *code duello*.<sup>57</sup> Europeans considered alternative mechanisms for protecting dignity, such as the courtroom, cowardly, and the elite class considered street fights primitive and reserved for the lower class.<sup>58</sup> To depict the pervasiveness of dueling in Europe, author Barbara Holland wrote that “[i]n France alone, in just the twenty-one years of Henri IV’s reign, 1589 to 1610, perhaps ten thousand gentlemen died for their honor.”<sup>59</sup> The practice eventually gave way to the courts, which today, in large part through privacy law, provide similar redress for reputational harm.<sup>60</sup>

Dueling occurred in America as well but not nearly to the extent as in Europe.<sup>61</sup> In fact, the prevalence of dueling fell drastically following the most famous duel in American history: Alexander Hamilton versus Aaron Burr.<sup>62</sup> Legal historian and University of Chicago Law professor Alison LaCroix advances a more complex theory of dueling’s American demise.<sup>63</sup> She posits that dueling faded into obscurity because, in America, traditionally aristocratic values such as honor and dignity became less important as the nation industrialized.<sup>64</sup> One’s reputation for creditworthiness, for example, became more important than honor and dignity.<sup>65</sup> In Europe, while dueling also ceased, the values it defended remained paramount.<sup>66</sup>

As laws protecting privacy and dignity supplanted dueling in Europe, the elite class remained the only protected class.<sup>67</sup> This deeply engrained social hierarchy during crucial years of the development of privacy rights distinguishes Europe from the United States.<sup>68</sup> In nineteenth century England, for example, feudalism was still firmly entrenched, whereas in the United States millions of families owned land.<sup>69</sup> While American prosperity was at least outwardly premised on the idea that “all men are created equal,” European mobility appeared, and in fact was, less realistic.<sup>70</sup> The elite class in Europe authored the laws protecting respect and dignity, which resulted

56. *Id.*; See also Holland, *supra* note 53, at 26 (“Gentlemen were careful not to enter into duels with non-gentlemen because, if they lost or got killed, it stained the family honor backward and forward for generations.”).

57. Jennie C. Meade, *The Duel*, GW MAGAZINE (2015), available at [https://www.gwu.edu/~magazine/archive/2005\\_fall/docs/feat\\_duel.html](https://www.gwu.edu/~magazine/archive/2005_fall/docs/feat_duel.html).

58. Solove, *supra* note 54, at 114-15.

59. Holland, *supra* note 53, at 22.

60. Solove, *supra* note 54, at 116.

61. Meade, *supra* note 57 (However, Meade also notes that President Andrew Jackson was believed to have participated in over 100 duels during his life).

62. Solove, *supra* note 54, at 116.

63. Alison L. LaCroix, *To Gain the Whole World and Lose His Own Soul: Nineteenth-Century American Dueling as Public Law and Private Code*, 33 HOFSTRA L. REV. 501, 550 (2004).

64. *Id.*

65. Solove, *supra* note 54, at 116.

66. Whitman, *supra* note 38, at 1174.

67. See Whitman, *supra* note 38, at 1169 (explaining that protections were “originally and primarily concerned with the doings of very high-status persons.”).

68. LAWRENCE M. FRIEDMAN, *GUARDING LIFE’S DARK SECRETS: LEGAL AND SOCIAL CONTROLS OVER REPUTATION, PROPRIETY, AND PRIVACY* 26 (2007).

69. *Id.* at 24.

70. *Id.* (Friedman strongly suggests that the quoted language in the Declaration of Independence was a veneer, as American mobility was reserved for white Americans: “Of course, nobody ever took this maxim literally. It certainly never applied to African Americans or for that matter women or Native Americans.”).

in the protection of their interests far more than the interests of lower class citizens.<sup>71</sup> An example is France, where social status permeated all areas of life to the extent that separate forms of punishment were reserved for persons of different classes and were intended to inflict “not merely pain, but dishonor as well.”<sup>72</sup>

The French Revolution of the late eighteenth century began eliminating much of the disparity between social classes in the eyes of French law.<sup>73</sup> Professor Whitman presents the argument that “in almost every area of the law [following the French Revolution], we see the same drive toward a kind of high-status egalitarianism—an egalitarianism that aims to lift everyone up in social standing.”<sup>74</sup> This is true across continental Europe.<sup>75</sup> Laws regarding punishment and privacy—which each stem from European concepts of respect and dignity—became impartially applied regardless of social class.<sup>76</sup>

Widespread adjudication of privacy disputes in Europe began in the mid-nineteenth century.<sup>77</sup> A highly publicized case demonstrating Europe’s conception of privacy as a right in post-Revolution France involves Alexandre Dumas père, the French author of *The Three Musketeers*.<sup>78</sup> In the later years of his life, Dumas began a romantic relationship with Adah Isaacs Menken, a much younger actress from Texas.<sup>79</sup> The couple posed together for several photographs that were scandalous for nineteenth century France.<sup>80</sup> When the photographer registered the copyright to the photos, which certainly would have been profitable, Dumas sued him for an invasion of privacy.<sup>81</sup> Despite admitting in court that he had sold the rights to the photographer, Dumas contested the strength of property rights compared to his right to privacy.<sup>82</sup> In a landmark decision, the Paris appeals court agreed with Dumas, holding, “that [Dumas] had a new kind of ‘right to privacy,’ which qualified the absolute claims of the law of property.”<sup>83</sup> The court couched its decision in terms of dignity, reasoning

71. Whitman, *supra* note 38, at 1165.

72. PETRUS C. SPIERENBURG, *THE SPECTACLE OF SUFFERING: DISCIPLINARY INSTITUTIONS AND THEIR INMATES IN EARLY MODERN EUROPE* 66-77 (1984); *see also* Whitman *supra* note 24, at 1166-67 (explaining that “[i]f executed, high-status offenders were beheaded, while low-status offenders were hanged; if spared, high-status offenders were housed in comfortable apartments, while low status offenders were subjected to degrading penal slavery.”).

73. Whitman, *supra* note 38, at 1167.

74. JAMES Q. WHITMAN, *HARSH JUSTICE* 10 (2003); *See also* ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 613 (observing three decades after the French Revolution that “Everybody has remarked that in our time, and especially in France, this passion for equality is every day gaining ground in the human heart.”).

75. JAMES Q. WHITMAN, *HARSH JUSTICE* 10 (2003).

76. Whitman, *supra* note 38, at 1166-67 (Whitman refers to this French legal phenomenon as “the revolution of leveling up.”).

77. *Id.* at 1175.

78. *Id.*

79. ANDRÉ MAUROIS, *THE TITANS: A THREE-GENERATION BIOGRAPHY OF THE DUMAS* 357 (Gerald Hopkins trans., 1957).

80. *Id.* at 358 (“Dumas committed the imprudence of allowing himself to be thus perpetuated, in his shirtsleeves, with his mistress, wearing a close-fitting jersey, perched on his knee. Yet another ‘picture’ shows her snuggling in his arms with her head pressed to his enormous chest.”).

81. *Id.* (noting that Dumas owed the photographer “a small sum of money,” and the photographer “thought that the loudly publicized sale of [the pictures] would compensate him for the unpaid bills.”); Whitman, *supra* note 38, at 1176.

82. Whitman, *supra* note 38, at 1176.

83. *Id.*



that even though Dumas consented to the sale of the images, he retained the right to control his image.<sup>84</sup>

The case involving Alexandre Dumas père is just one early courtroom triumph of personal privacy over property rights, but dignity has been inseparable from European privacy law ever since.<sup>85</sup> In France today, multiple legal sources protect dignity through the right to privacy.<sup>86</sup> First, the French Constitution expressly protects the right to privacy.<sup>87</sup> Additionally, numerous national statutes address specific applications of the right.<sup>88</sup> Of most historical significance to the E.U.'s right to be forgotten, however, is an international treaty: The European Convention on Human Rights.<sup>89</sup>

The European Convention on Human Rights came into force in 1953, and applies to the forty-seven member states of the Council of Europe, which includes the E.U., Russia, and Turkey, among others.<sup>90</sup> Specifically, Article 8(1) of the European Convention on Human Rights states that “[e]veryone has the right to respect for his private and family life, his home and his correspondence.”<sup>91</sup> Although the E.U. itself never overtly ratified the European Convention on Human Rights, the Court of the E.U. recognizes it as consistent with the general principles of E.U. law.<sup>92</sup> All E.U. member-states officially adopted the European Convention on Human Rights, and thus it applies to the E.U. as a whole.<sup>93</sup>

#### B. *The 1995 Data Protection Directive and Google Spain v. AEPD*

In 1995, the E.U. moved forward unilaterally in regard to online privacy by codifying a directive that includes the foundation for the right to be forgotten.<sup>94</sup> The directive is formally titled the *European Community Directive on Data Protection*, and it lays out basic principles of privacy legislation to which E.U. member-states must conform.<sup>95</sup> As is typical of many E.U. regulations, the directive provides very broad terms, but its application was initially narrow.<sup>96</sup> The European Court of Justice finally

84. *Id.*

85. Whitman, *supra* note 38, at 1193.

86. Pascal Mbongo, *The French Privacy Law, in THE RIGHT TO PRIVACY IN THE LIGHT OF MEDIA CONVERGENCE: PERSPECTIVES FROM THREE COUNTRIES* 125, 126 (Dieter Dörr & Russell L. Weaver eds. 2012).

87. *Id.* at 126 (noting “the right to privacy [was] elevated to the rank of constitutional right by a decision of July 23, 1999 of the Constitutional Council.”).

88. *Id.* at 126.

89. *Id.*

90. Udo Fink, *Protection of Privacy in the EU, Individual Rights and Legal Instruments, in EMERGING CHALLENGES IN PRIVACY LAW: EMERGING CHALLENGES* 75 (Norman Witzleb et. al. eds., 2014).

91. *Id.* at 76.

92. *Id.* at 75.

93. *Id.*

94. Council Directive, 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 95/46/EC, art. 12(b), 14(a), 1995 O.J. (L 281/31).

95. DANIEL J. SOLOVE & PAUL M. SCHWARTZ, *PRIVACY AND THE MEDIA* 38 (2008).

96. Rosen, *supra* note 36 (explaining that “Europeans have a long tradition of declaring abstract privacy rights in theory that they fail to enforce in practice.”).

enforced the directive's broad terms in *Google Spain SL v. Agencia Española de Protección de Datos* (“*Google Spain v. AEPD*”).<sup>97</sup>

*Google Spain v. AEPD* involved a claim by a Spanish national, Mario Costeja González (“Costeja”), against *La Vanguardia*—a daily newspaper—and against Google Spain and Google, Inc.<sup>98</sup> Costeja sought the removal of links to two *La Vanguardia* newspaper stories detailing a real-estate auction related to him and connected with the recovery of debts.<sup>99</sup> Embarrassed of the circumstances of the auction, Costeja requested that *La Vanguardia* remove the pages containing his personal data, arguing that the passage of time had rendered the debt issue irrelevant and misleading.<sup>100</sup> He also asked Google to expunge the links leading to the information.<sup>101</sup> When *La Vanguardia* and Google refused, Mr. Costeja went to Spain's data protection agency (AEPD) for relief.<sup>102</sup>

The AEPD, which is Spain's local branch of a wider European system of online privacy regulators, ruled in favor of *La Vanguardia* but against Google.<sup>103</sup> Google immediately appealed the order to the National High Court of Spain, which subsequently referred the issue to the European Court of Justice.<sup>104</sup> The European Court of Justice “operates as a kind of Supreme Court” for the E.U.'s twenty-eight member states, and affirmed both decisions of the Spanish Data Protection Agency.<sup>105</sup> As a result of the European Court of Justice's directive, citizens of all twenty-eight E.U. nations have the right to demand that Google delink items that are “inadequate, irrelevant, or no longer relevant, or excessive in relation to the purposes for which they were processed and in the light of the time that has elapsed.”<sup>106</sup>

It is unlikely that the right to be forgotten will remain within the E.U.'s borders.<sup>107</sup> Strictly speaking, *Google Spain v. AEPD* only applies to Google's European domains—such as Google.fr in France and Google.de in Germany—but Google.com, the company's self-declared America site, is immune.<sup>108</sup> Although the overwhelming majority of European Google searches are made to country-specific

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97. Case C-131/12, *Google Spain SL, Google, Inc. v. Agencia Española de Protección de Datos, Mario Costeja González*, available at <http://curia.europa.eu/juris/document/document.jsf?docid=152065&doclang=en> (May 13, 2014).

98. *Id.*; Ravi Antani, *Resistance of Memory: Could the European Union's Right to be Forgotten Exist in the United States?*, 30 BERKELEY TECH. L.J. 1173, 1175 (2015).

99. *Id.*

100. 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](http://www.nytimes.com/2014/05/14/technology/google-should-erase-web-links-to-some-personal-data-europes-highest-court-says.html?_r=0).

101. *Id.*

102. *Id.*

103. Toobin, *supra* note 15.

104. Streitfeld, *supra* note 100.

105. Toobin, *supra* note 15.

106. Case C-131/12, *Google Spain SL, Google, Inc. v. Agencia Española de Protección de Datos, Mario Costeja González*, <http://curia.europa.eu/juris/document/document.jsf?docid=152065&doclang=en>.

107. Farhad Manjoo, *'Right to be Forgotten' Online Could Spread*, N.Y. TIMES (Aug. 5, 2015), <http://www.nytimes.com/2015/08/06/technology/personaltech/right-to-be-forgotten-online-is-poised-to-spread.html>.

108. *Id.*

domains, Google.com is still accessible anywhere in Europe, and regulators are wasting no time in closing that loophole.<sup>109</sup> Viktor Mayer-Schönberger described the current enforcement conundrum as a “speed bump,” explaining further that “if you quickly search on Google.de, you’ll not find the links that have been removed . . . But if you spend the extra ten seconds to go to Google.com you find them.”<sup>110</sup>

C. *The Article 29 Working Party and France’s CNIL*

In November of 2014, just six months after *Google Spain v. AEPD*, an E.U. regulatory body consisting of national privacy regulators from each member state issued guidelines expanding the scope of the right to be forgotten by demanding that Google apply the ruling “to Google’s entire search empire,” including its American site.<sup>111</sup> In a statement accompanying the guidelines, the regulatory body—known as the Article 29 Working Party—stated: “Under E.U. law, everyone has a right to data protection . . . Decisions must be implemented in such a way that they guarantee the effective and complete protection of data subjects’ rights and that E.U. law cannot be circumvented.”<sup>112</sup>

Effective online privacy protection in Europe requires that Google in particular comply with the guidelines worldwide, since the company accounts for nearly eighty-five percent of Europe’s online search market.<sup>113</sup> Although it was initially unclear how the Article 29 Working Party intended to enforce the guidelines, it was immediately clear that E.U. nations would continue to fight for the global adoption of the right to be forgotten.<sup>114</sup> Pursuant to the authority provided by *Google Spain v. AEPD* and the Article 29 Working Party guidelines, the French data protection authority acted first to enforce the right to be forgotten throughout all Google domains.<sup>115</sup> On May 21, 2015, the French authority, known as the Commission Nationale de l’Informatique et des Libertés (CNIL), notified Google that compliance with E.U. law required the blanket removal of approved requests.<sup>116</sup> The CNIL rejected Google’s argument that Google.com was immune to E.U. regulation as a separate, non-European entity, reasoning that all Google domains constitute a single processing.<sup>117</sup>

109. *Id.*

110. Toobin, *supra* note 15 (Viktor Mayer-Schönberger is in favor of the speed bump approach, reasoning that it “gives people a chance to grow and get beyond these instances in their pasts.”).

111. Mark Scott, ‘Right to be Forgotten’ Should Apply Worldwide, *E.U. Panel Says*, N.Y. TIMES (Nov. 26, 2014), [http://www.nytimes.com/2014/11/27/technology/right-to-be-forgotten-should-be-extended-beyond-europe-eu-panel-says.html?\\_r=0](http://www.nytimes.com/2014/11/27/technology/right-to-be-forgotten-should-be-extended-beyond-europe-eu-panel-says.html?_r=0).

112. *Id.*

113. *Id.*

114. *Id.* (noting that “regulators did not clarify whether the guidelines would apply only to requests made by residents of the European Union” or “how the ruling could be enforced beyond the 28-member European Union . . .”).

115. Carol A.F. Umhoefer, *Right to be Forgotten: New Enforcement Trends and Perspectives*, PRIVACY MATTERS – DLA PIPER BLOG (Aug. 4, 2015), <http://blogs.dlapiper.com/privacymatters/right-to-be-forgotten-new-enforcement-trends-and-perspectives-2/>.

116. *Id.*

117. *Id.* (CNIL stated that, “the service provided by the company via its search engine ‘Google search’ constitutes a single processing. Indeed, the different domain names that the company chose to implement to facilitate the local use of its service are only means of access to this process.”).

CNIL President Isabelle Falque-Pierrotin announced the decision and gave Google fifteen days to comply with the de-indexing request.<sup>118</sup>

Country-specific privacy regulators, as opposed to the Article 29 Working Party, have the teeth to accomplish compliance.<sup>119</sup> For example, the CNIL has the authority to issue financial administrative sanctions and, under the French Criminal Code, could subject Google to a fine of up to €1,500,000 for each case of noncompliance.<sup>120</sup> In July of 2015, Google filed an unsuccessful informal appeal with the CNIL.<sup>121</sup> The French regulatory body again refuted a Google argument against the right to be forgotten removals, asserting that it was not applying French law extraterritorially, rather “[i]t simply requests full observance of European legislation by non-European players offering their services in Europe.”<sup>122</sup> French legal experts were in unanimous agreement that the CNIL demand was lawful because the 1995 Data Protection Directive lacks territorial restrictions.<sup>123</sup> The CNIL order is unappealable under French law.<sup>124</sup>

#### D. *The General Data Protection Regulation*

The European Commission proposed a new framework for online data privacy in 2012, making clear its intention to strengthen the 1995 Data Protection Directive.<sup>125</sup> The framework is titled the General Data Protection Regulation (GDPR), which itself includes in Article 17 the official codification of the right to be forgotten.<sup>126</sup> The right to be forgotten—the most controversial proposal by any measure—was described by the European Commission as “the right of individuals to have their data no longer processed and deleted when they are no longer needed for legitimate purposes.”<sup>127</sup> Viviane Reding, European Commissioner for Information, Society, and Media at the time of the proposal, insisted that the right to be forgotten already existed, and the proposal was merely illuminating current law.<sup>128</sup> Regardless of the authenticity of Commissioner Reding’s position, Article 17 of the GDPR is a significant expansion of the reach and strength of the law on which the European Court of

118. *Id.*

119. Scott, *supra* note 111 (“For now, the [Article 29 Working Party’s] decision to expand the scope of the ‘right to be forgotten’ is mostly just for show. The guidelines are not binding, and it will be up to E.U. member countries to decide how to apply them—or if they want to apply them at all.”).

120. Umhoefer, *supra* note 115.

121. CNIL, *Right to Delisting: Google Informal Appeal Rejected* (Sep. 21, 2015), available at <http://www.cnil.fr/english/news-and-events/news/article/right-to-delisting-google-informal-appeal-rejected/>.

122. *Id.*

123. Manjoo, *supra* note 107.

124. Samuel Gibbs, *French Data Regulator Rejects Google’s Right-To-Be-Forgotten Appeal*, THE GUARDIAN (Sep. 21, 2015), <http://www.theguardian.com/technology/2015/sep/21/french-google-right-to-be-forgotten-appeal>.

125. *Safeguarding Privacy in a Connected World: A European Data Protection Framework for the 21<sup>st</sup> Century*, COM (2012) 9 final (Jan. 25, 2012).

126. David Lindsay, *The ‘Right to be Forgotten’ in European Data Protection Law*, in EMERGING CHALLENGES IN PRIVACY LAW: COMPARATIVE PERSPECTIVES 290, 291 (Norman Witzleb et. al. eds., 2014).

127. *Id.*; see also *A Comprehensive Approach on Personal Data Protection in the European Union*, COM (2010) 609 final (Nov. 4, 2010).

128. Lindsay, *supra* note 126, at 311; *But see* Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos, Mario Costeja González (C-131/12), Opinion of Advocate General Jääskinen (June 25, 2013) (stating that the GDPR “does not purport to represent a codification of existing law, but an important legal innovation.”).

Justice, the Article 29 Working Party, and the CNIL relied in enforcing the right to be forgotten.<sup>129</sup>

Under the proposed GDPR, “jurisdiction will reach outside the EU, with extraterritorial jurisdiction tied to the offering of goods or services to, or the monitoring of, data subjects in the EU.”<sup>130</sup> The proposal also establishes the European Data Protection Board, which will serve as the law’s primary interpretive body.<sup>131</sup> Clearly defined boundaries will guide the application of the right to be forgotten, and fines of either two percent global profit or €1,000,000—whichever is higher—are available for violations.<sup>132</sup> According to Marcus Evans, a partner at the London offices of Norton Rose Fulbright, “[m]ost businesses will need to make some changes . . . [and] [m]any will have to make extensive changes” to bring their data processing into compliance with the GDPR.<sup>133</sup> Once the E.U.’s three primary governmental bodies agree on the regulation’s precise language—and all indications are that they will—the GDPR will go into force following a two-year period.<sup>134</sup>

### III. PROLIFERATION OF THE RIGHT TO BE FORGOTTEN – THE WESTERN HEMISPHERE

Aside from the strengthening of the E.U.’s right to be forgotten, companies such as Google should be concerned about the proliferation of similar but slightly different laws around the globe; and this is already occurring in the Western Hemisphere.<sup>135</sup> According to Graham Greenleaf, a Professor of Law and Information Systems at the University of New South Wales, “[n]early one hundred jurisdictions have enacted data privacy laws, almost half of them being outside of Europe.”<sup>136</sup> These enactments are largely in response to the E.U.’s highly consequential practice of determining the adequacy of other countries’ data protection mechanisms.<sup>137</sup> If the European Commission concludes that a country’s data privacy protections are inadequate, it has the authority to prohibit data transfers to that country.<sup>138</sup>

129. See generally Marcus Evans, *European Council Approves EU General Data Protection Regulation Draft; Final Approval May Come by End of 2015*, DATA PROTECTION REPORT BLOG (June 15, 2015), <http://www.dataprotectionreport.com/2015/06/european-council-approves-eu-general-data-protection-regulation-draft-final-approval-may-come-by-end-of-2015/>.

130. *Id.*

131. *Id.* (referring to the European Data Protection Board as “a reincarnation of the Article 29 Working Party.”).

132. *Id.*

133. *Id.*

134. Evans, *supra* note 129.

135. Manjoo, *supra* note 107 (“Since Europe’s decision last year, several countries in Latin America and Asia have pushed for their own delinking rules, and some of these may elide the protections for free speech outlined in Europe’s version of the law. A more troubling prospect for search engines is the potential for the new laws to be applied beyond local jurisdictions.”).

136. Graham Greenleaf, *A World Data Privacy Treaty? ‘Globalisation’ and ‘Modernisation’ of Council of Europe Convention 108*, in EMERGING CHALLENGES IN PRIVACY LAW: COMPARATIVE PERSPECTIVES 92, 93 (Norman Witzleb et. al. eds., 2014).

137. European Commission, *Commission Decisions on the Adequacy of the Protection of Personal Data in Third Countries*, [http://ec.europa.eu/justice/data-protection/international-transfers/adequacy/index\\_en.htm](http://ec.europa.eu/justice/data-protection/international-transfers/adequacy/index_en.htm) (last visited Mar. 5, 2016).

138. DOROTHEE HEISENBERG, NEGOTIATING PRIVACY: THE EUROPEAN UNION, THE UNITED STATES, AND PERSONAL DATA PROTECTION 1 (2005).

### A. *Argentina*

Since the European Court of Justice's ruling in *Google Spain v. AEPD*, countries outside of the E.U. have begun pushing for similar online privacy protections.<sup>139</sup> Argentina, as the first Latin American country to obtain the EU's adequacy finding, is a logical starting point.<sup>140</sup> Argentine notions of privacy are similar to those in Europe; they are historically rooted and protected by law.<sup>141</sup> In the first half of the twentieth century, revered Argentinian author Jorge Francisco Isidoro Luis Borges abstractly captured Argentine attitudes toward privacy, the past, and the value of forgetting.<sup>142</sup> The protagonist of one of Borges' most well-known stories—Ireno Funes—is cursed with the inability to forget.<sup>143</sup> Writing on Argentina's right to be forgotten, Professor Edward L. Carter, Associate Professor of Communications at Brigham Young University, explains that “[f]or Funes, the present was worthless because it was consumed by his memories of the past.”<sup>144</sup> Although the story's relation to Argentina's right to be forgotten may seem attenuated, Professor Carter notes that “[t]he struggle between remembering and forgetting . . . has manifested itself in Argentina in poignant ways . . . [and] has played out in Argentina's courts in the form of lawsuits by celebrities against the Internet search engines Google and Yahoo.”<sup>145</sup>

Argentina regulates online privacy rights under the Personal Data Protection Act of 2000, which closely mirrors Europe's Data Protection Directive of 1995.<sup>146</sup> Like Europe, Argentina justifies the law in terms of dignity, its stated purpose being “the comprehensive protection of personal information . . . in order to guarantee the right of individuals to their *honor* and privacy.”<sup>147</sup> Argentina's law is even more expansive than Europe's Data Protection Directive, however, defining “personal data” as the information of entities as well as individuals.<sup>148</sup> Recent applications of the law also suggest that its protections may extend to celebrities, athletes, and even government officials.<sup>149</sup> In 2007, an Argentine court granted a temporary restraining order

139. Manjoo, *supra* note 107.

140. Heisenberg, *supra* note 138, at 104.

141. Edward L. Carter, *Argentina's Right to be Forgotten*, 27 EMORY INT'L L. REV. 23, 31-32 (2013).

142. JORGE LUIS BORGES, *Funes, the Memorious*, in FICCIONES (Anthony Kerrigan ed. & trans., 1962); Edward L. Carter acknowledges that commentators have credited Borges with “presaging the Internet,” JORGE LUIS BORGES, *The Garden of Forking Paths*, in FICCIONES 89, 100 (“He believed in an infinite series of times, in a dizzily growing, ever spreading network of diverging, converging, and parallel times. This web of time . . . embraces every possibility.” (emphasis in original)).

143. JORGE LUIS BORGES, *Funes, the Memorious*, in FICCIONES 107, 112-15 (Anthony Kerrigan ed. & trans., 1962) (similar to the Internet, “Funes not only remembered every leaf on every tree of every wood, but even every one of the times he had perceived or imagined it.” The narrator concludes the story: “It occurred to me that each one of my words (each one of my gestures) would live on in [Funes'] implacable memory; I was benumbed by the fear of multiplying superfluous gestures.”).

144. Carter, *supra* note 141, at 23.

145. *Id.*

146. JACQUELINE KLOSEK, *THE WAR ON PRIVACY* 130 (2007).

147. Personal Data Protection Act, Law No. 25, 326 (Oct. 4, 2000) (emphasis added), available at <http://www.protecciondedatos.com.ar/law25326.htm>.

148. Klosek, *supra* note 146.

149. Uki Goni, *Can A Soccer Star Block Google Searches?*, TIME (Nov. 14, 2008), <http://content.time.com/time/world/article/0,8599,18593239,00.html>.

against Google and Yahoo, forcing the companies to delist results of plaintiffs evoking their rights under the Personal Data Protection Act of 2000.<sup>150</sup> One such plaintiff was Diego Maradona, the Argentinian soccer star turned coach.<sup>151</sup> Even Argentinian judges have become litigants by filing their own suits against search engines pursuant to the right to be forgotten.<sup>152</sup>

The case of Argentinian entertainer Virginia da Cunha is the strongest indicator that courts in Argentina are willing to enforce the right to be forgotten.<sup>153</sup> Da Cunha, along with the previously mentioned plaintiffs, asserted her right to be forgotten against Google and Yahoo, alleging specifically that results from the search engines “linked to . . . websites offering sexual content, pornography, escorts, and other activities related to sex trafficking.”<sup>154</sup> On July 29, 2009, Judge Virginia Simari ruled in her favor, reasoning that da Cunha had the “right to control her own image in the present time.”<sup>155</sup> Google and Yahoo were ordered to remove the links and images, and to pay 50,000 pesos each for moral damages.<sup>156</sup> The right to be forgotten thus prevailed despite multiple provisions in the Argentine Constitution protecting speech, expression, and the press; and despite Judge Simari’s acknowledgment that the prevailing right “was not a right explicitly protected in the Constitution of Argentina.”<sup>157</sup>

On appeal, a divided three-judge panel partially overturned the lower court.<sup>158</sup> The appeals court held that no damages were due da Cunha, reasoning that search engines can be held liable only if they were notified of clearly illegal content and were negligent in failing to remove it.<sup>159</sup> Although the court revoked money damages, it upheld the lower court’s order that the search engines remove the da Cunha links.<sup>160</sup> However, the appeals court’s decision is inconclusive for a few reasons.<sup>161</sup> First, the appeals court was split and offered no guidance on the specific da Cunha-related links Google and Yahoo were required to remove.<sup>162</sup> Second, the court did not elaborate

150. Stephanie Condon, *Argentine Judge: Google, Yahoo Must Censor Searches*, CNET (Nov. 12, 2008, 9:20 AM PST), <http://www.cnet.com/news/argentine-judge-google-yahoo-must-censor-searches/>.

151. Goni, *supra* note 149 (although Maradona is considered one of the greatest soccer players in history, he would like some of his past to be forgotten: “he was banned from [a] professional game in Italy in 1991 for cocaine use, and he tested positive for drugs at the 1994 World Cup tournament.”).

152. *Id.* (suggesting the Argentine law is far too expansive: “the litigants also include three important judicial figures, among them high-profile judge Maria Servini de Cubria . . .”)

153. Carter, *supra* note 141, at 24-25.

154. *Id.* at 26

155. *Id.* at 28

156. *Id.* (noting that “moral damages” were assessed even though “[t]he judge concluded that no material damage had occurred . . .”).

157. *Id.* at 27

158. Vinod Sreeharsha, *No Safe Harbors in Argentina*, N.Y. TIMES (Aug. 20, 2010, 6:40 PM), [http://bits.blogs.nytimes.com/2010/08/20/no-safe-harbors-in-argentina/?\\_r=0](http://bits.blogs.nytimes.com/2010/08/20/no-safe-harbors-in-argentina/?_r=0).

159. Eduardo Bertoni & Elizabeth Compa, *Emerging Patterns in Internet Freedom of Expression: Comparative Research Findings in Argentina and Abroad*, CENTRO DE ESTUDIOS EN LIBERTAD DE EXPRESIÓN Y ACCESO A LA INFORMACIÓN [CELE] (Document prepared for the Latin American Regional Meeting on Freedom of Expression and the Internet, Buenos Aires, Argentine, Oct. 19, 2010).

160. *Search Engines Not Responsible for Content*, BUENOS AIRES HERALD (Sep. 5, 2013), <http://www.buenosairesherald.com/article/139989/>.

161. *See infra* notes 162-64.

162. *See* Carter, *supra* note 141, at 28-31 (this lack of guidance from the court of appeals is illustrated by the fact that as of May 2013, “Yahoo Argentina has still blocked all searches related to Da Cunha, although Google Argentina

as to what constitutes notice, or at what point search engines are “made aware” and thus liable for the negligent failure to remove links.<sup>163</sup> Finally, Judge Ana María R. Brillo de Serrat—who joined in the majority position—“spent most of her brief opinion defending the idea that individuals should have a right to be forgotten.”<sup>164</sup>

B. *The Rest of the Western Hemisphere*

Argentina, as the first country to obtain an adequacy finding from the E.U., receives the most international attention regarding privacy legislation.<sup>165</sup> Chile addressed data privacy before Argentina, however, and has regulated the area pursuant to the Law for the Protection of Private Life since 1999.<sup>166</sup> The Chilean law sets forth guidelines for “the collection, use, and disclosure of personal information . . . [and] provides individuals with the right to access and correct their personal information.”<sup>167</sup> Brazil on the other hand has weak privacy laws in comparison to both Argentina and Chile.<sup>168</sup> According to some estimates, Google faces upwards of six hundred Brazilian lawsuits because of Brazil’s lack of data privacy legislation.<sup>169</sup> Despite rampant litigation, efforts to legislate regarding online data privacy in Brazil have been met with fierce opposition.<sup>170</sup>

Canada began debating online privacy legislation in 1998 in anticipation of the E.U.’s Data Protection Directive entering into force.<sup>171</sup> The primary catalyst to Canada’s swift action was the general public, eighty-one percent of which felt it was time to overhaul privacy laws that were inadequate in light of the Internet.<sup>172</sup> On April 13, 2000, the Canadian government passed The Canadian Personal Information Protection and Electronic Documents Act, which the European Commission deemed adequate.<sup>173</sup>

The key point is that the countries that did implement online privacy regulations did so largely if not exclusively in response to the 1995 European Data Protection Directive, and the international reaction is unlikely to be any different following the implementation of the GDPR.<sup>174</sup> Online privacy is not a passing trend, and the E.U.’s

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has not.”

163. Berti & Compa, *supra* note 159 (“Despite the implications this finding holds for future litigation, the Court did not further elaborate on how or when the search engines could be considered having been made aware nor on what exactly constitutes ‘proper [advisory] mechanisms.’”).

164. Carter, *supra* note 141 at 30 (Judge Ann María R. Brilla de Serrat cited and discussed Viktor Mayer-Schönberger extensively in her opinion).

165. Klosek, *supra* note 146 at 130.

166. *Id.* at 130-31.

167. *Id.* at 131.

168. *Id.* at 130; *See also* Vinod Sreeharsha, *No Safe Harbors in Argentina*, N.Y. TIMES (Aug. 20, 2010, 6:40 PM), [http://bits.blogs.nytimes.com/2010/08/20/no-safe-harbors-in-argentina/?\\_r=0](http://bits.blogs.nytimes.com/2010/08/20/no-safe-harbors-in-argentina/?_r=0).

169. Sreeharsha, *supra* note 158 (“Marcel Leonardi, a Brazilian professor of Internet law at Fundação Getulio Vargas-Sao Paulo estimates that Google currently faces at least 600 lawsuits in Brazil.”).

170. *Id.*

171. Heisenberg, *supra* note 138, at 103 (debate began “three weeks before the entry into force of the European Data Protection Directive.”)

172. Heisenberg, *supra* note 138, at 103.

173. *Id.*

174. *Id.* at 120-21 (Heisenberg refers to the European Data Protection Directive as the “catalyst for most, if not all, of the privacy legislation” enacted by other countries. She continues that the “impetus for the spate of data



quick reaction to it has made it “the most influential voice in global privacy regulation, in part because it seems to care the most.”<sup>175</sup> The United States on the other hand has “remained an outlier by not having comprehensive privacy legislation.”<sup>176</sup>

#### IV. THE AMERICAN PERSPECTIVE

Jennifer Granick, the director of civil liberties at the Center for Internet and Society at Stanford Law School, recently wrote that “[p]rivacy’s obituary has been written many, many times, but the patient lingers on.”<sup>177</sup> Michael Rogers Rubin, writing about American privacy law nearly thirty years earlier, expressed a similar view.<sup>178</sup> He posited that “[i]n our nation’s history, three great waves of technological and social change have forced major revisions to our laws in order to ensure the continued protection of personal privacy”: the American Revolution; yellow journalism at the turn of the century; and the practice of electronic eavesdropping.<sup>179</sup> The fourth wave, which Rubin accurately predicted, is the computer age.<sup>180</sup>

##### A. *The Founding Fathers’ Privacy*

Privacy was certainly a point of emphasis to the Founding Fathers in the development of early American law, but the texts from the era are tame, narrow, and inadequate to address privacy concerns today.<sup>181</sup> The public was outraged at British use of general writs of assistance, which provided British officers unfettered access to any location they wished to search.<sup>182</sup> In response to the writs of assistance and to the British practice of quartering soldiers in American homes, the Founding Fathers created the Third and Fourth Amendments.<sup>183</sup> It is notable that despite the concern for personal privacy rights during the drafting of our nation’s founding documents, the word ‘privacy’ is absent from the Declaration of Independence, the Constitution, and the Bill of Rights.<sup>184</sup> However, the intent of the founding fathers, and the context of the times in which they created the documents, must be considered.<sup>185</sup> The pri-

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protection laws that emerged in the 1998 – 2004 time frame was the European initiative.” In her view, the European Union unilaterally “created an international data protection regime,” without consulting or negotiating with any other nations, most notably the United States.)

175. Tim Wu, *The International Privacy Regime*, in SECURING PRIVACY IN THE INTERNET AGE 91, 104 (Anupam Chander, Lauren Gelman, Margaret Jane Radin eds., 2008).

176. Heisenberg, *supra* note 138, at 120.

177. Jennifer Granick, *Data and Protecting the Right to Privacy*, THE CENTER FOR INTERNET AND SOCIETY BLOG (Sep. 29, 2015, 10:56 AM), <http://cyberlaw.stanford.edu/blog/2015/09/data-and-protecting-right-privacy>.

178. See MICHAEL ROGERS RUBIN, PRIVATE RIGHTS, PUBLIC WRONGS: THE COMPUTER AND PERSONAL PRIVACY 7 *ff.* (1988).

179. MICHAEL ROGERS RUBIN, PRIVATE RIGHTS, PUBLIC WRONGS: THE COMPUTER AND PERSONAL PRIVACY 7-9 (1988).

180. *Id.* at 133.

181. FREDERICK S. LANE, AMERICAN PRIVACY 15-17 (2009).

182. Rubin, *supra* note 179, at 9-10 (noting “Independence was fought for and won partly to put in place protections for the individual against unreasonable searches and seizures.”).

183. U.S. CONST. amends III, IV.

184. Lane, *supra* note 181, at 15 (the word *privacy* is similarly absent from all seventeen amendments subsequently added to the Constitution).

185. Rubin, *supra* note 179, at 10-11 (explaining that “[t]he absence of a declaration of human rights [to address

mary author of the Declaration of Independence—Thomas Jefferson—listed grievances against the Crown, including violations of American independence and autonomy.<sup>186</sup> As explained by author and attorney Frederick Lane, “[i]ndependence and autonomy are central components of the concept of privacy, and although Jefferson . . . may have eschewed the word itself, there is little question that [the Founders] were motivated in large part by the belief that the British Crown was illegally infringing on their private affairs.”<sup>187</sup>

B. *Justice Louis Brandeis: The Right to Privacy and the Olmstead Dissent*

The contemporary right to privacy in America arose from a revered law review article—*The Right to Privacy*—by Samuel Warren and eventual Supreme Court Justice Louis Brandeis.<sup>188</sup> Warren and Brandeis were the first to assert that privacy should stand alone, independent from other recognized rights.<sup>189</sup> The article, written in response to the *Saturday Evening Gazette’s* harassing stories toward Samuel Warren’s elite family, and in particular his wife and daughter, has “the unique distinction of having synthesized at one stroke a whole new category of legal rights and of having initiated a new field of jurisprudence.”<sup>190</sup> In 1960, recounting how the article came to be, Professor William Prosser explained that the conflict culminated “when the newspapers had a field day on the occasion of the wedding of a daughter and Mr. Warren became annoyed . . . It was an annoyance for which the press, the advertisers and the entertainment industry of America were to pay dearly over the next seventy years.”<sup>191</sup>

Aside from their immediate motivation in writing the article, Brandeis and Warren were concerned about the invention of a camera that could capture images without requiring a long, sustained pose.<sup>192</sup> The authors feared the repercussions of a device that could capture pictures with such ease, lamenting that “[i]nstantaneous photographs . . . and numerous mechanical devices threaten to make good the prediction that ‘what is whispered in the closet shall be proclaimed from the house-tops.’”<sup>193</sup> In other words, individuals should have control of their personality and public image, and the law should protect such control by preventing the nonconsensual exposure of either.<sup>194</sup> Borrowing a phrase by Judge Thomas Cooley, and increas-

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general writs of assistance] should not be mistaken as a lack of interest in these topics on the part of the Constitutional framers. Rather, the omission is but one aspect of the cultural perspective of two centuries past.”)

186. THE DECLARATION OF INDEPENDENCE para. 2 *ff.* (U.S. 1776).

187. Lane, *supra* note 181, at 16.

188. Warren & Brandeis, *supra* note 2.

189. RICHARD F. HIXSON, THE RIGHT OF PRIVACY 29 (1987) (explaining that the article by Warren and Brandeis “propounded the concept [of privacy] as independent from the rights of property, contract, and trust.”).

190. SAMUEL HOFSTADTER & GEORGE HOROWITZ, THE RIGHT OF PRIVACY 17 (1964) (citing XLI AMERICAN JURISPRUDENCE, 926).

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

192. Granick, *supra* note 177.

193. Warren & Brandeis, *supra* note 2, at 195.

194. MICHAEL F. MAYER, RIGHTS OF PRIVACY 2 (1972) (noting that Warren and Brandeis’ right to privacy “was aimed at counteracting exploitation and exposure of the personality.”).

ing its popularity immeasurably, Brandeis and Warren declared that in order to protect individuals from unwanted exposure or exploitation, a “right to be let alone” was required.<sup>195</sup>

Privacy existed as an elusive concept during the infancy of the United States, but Warren and Brandeis gathered its scattered pieces and molded them into an intelligible right.<sup>196</sup> By the time they published the article, Warren had discontinued his legal practice to devote his full attention to an inherited family paper business, and Brandeis was a young lawyer destined for the Supreme Court.<sup>197</sup> Although Brandeis’ position on privacy was not realized during his illustrious career, “[t]he seed planted by Warren and Brandeis has borne fruit in numerous decisions of courts of high repute affirming a right to privacy.”<sup>198</sup>

As a member of the Supreme Court, Justice Brandeis’ first significant stand in support of privacy rights was his dissent in *Olmstead v. United States*.<sup>199</sup> In *Olmstead*, the Court considered whether evidence of private telephone conversations, obtained through wire-tapping, was admissible against a criminal defendant.<sup>200</sup> Chief Justice William Howard Taft, writing for a 5-4 majority, declared that wire-tapping did not violate the Fourth Amendment because there was neither a physical search nor a seizure, only evidence obtained by ear.<sup>201</sup> Although *Olmstead* involved an alleged invasion of privacy by the government, Justice Brandeis’ dissent addressed privacy more broadly and is still applicable to encroachments on privacy rights—even online privacy rights—nearly a century later.<sup>202</sup> The arguments Justice Brandeis advanced in his dissent mirror those introduced in *The Right to Privacy*, and the focus of the latter was clearly personal—not governmental—invasions of privacy.<sup>203</sup>

After reciting the facts of the case, Justice Brandeis referenced Chief Justice Marshall’s famous line in *McCulloch v. Maryland*, declaring: “We must never forget that it is a Constitution that we are expounding.”<sup>204</sup> By this reference he sought to impress upon his colleagues, the government, and the general public, his firm belief in the ability of the Constitution to address and resolve modern problems unknown at the time of its drafting.<sup>205</sup> He offered as an example the Fourth Amendment—crucial to the determination in *Olmstead*—which when adopted provided individuals security

195. Warren & Brandeis, *supra* note 2, at 195.

196. JON L. MILLS, PRIVACY: THE LOST RIGHT 5 (2008).

197. Prosser, *supra* note 191.

198. SAMUEL H. HOFSTADTER & GEORGE HOROWITZ, THE RIGHT OF PRIVACY 19 (1964).

199. 277 U.S. 438 (1928).

200. *Id.* at 455.

201. *Id.* at 464.

202. Compare *Olmstead v. U.S.*, 277 U.S. 438, 456-57 (stating that the “well-known historical purpose of the Fourth Amendment . . . was to prevent the use of governmental force to search a man’s house, his person, his papers, and his effects, and to prevent their seizure against his will.”) (emphasis added), *with* *Olmstead v. U.S.*, 277 U.S. 438, 478 (Brandeis, J., dissenting) (arguing that “[t]he protection guaranteed by the amendments is much broader in scope . . . [the Founding Fathers] sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations.”).

203. ALAN F. WESTIN, PRIVACY AND FREEDOM 348 (1967).

204. *McCulloch v. Maryland*, 17 U.S. 316, 407 (1819).

205. *Olmstead*, 277 U.S. at 472 (Brandeis, J., dissenting) (Justice Brandeis emphasized that this was not a novel concept: “Since [McCulloch v. Maryland] this court has repeatedly sustained the exercise of power by Congress, under various clauses of that instrument, over objects of which the fathers could not have dreamed.”).

“in their persons, houses, papers, and effects” by protecting against unreasonable searches and seizures.<sup>206</sup> Threats to privacy existing when the states ratified the Constitution in 1788, Brandeis reasoned, “had been necessarily simple,” and thus the Fourth Amendment was necessarily simple.<sup>207</sup> At the time of the Constitution’s enactment, information was improperly obtained through tactics such as breaking and entering, theft, torture, and forced testimony.<sup>208</sup> However, “[t]ime works changes, brings into existence new conditions and purposes. Therefore a principal to be vital must be capable of wider application than the mischief which gave it birth.”<sup>209</sup>

Nearly forty years after *Olmstead*, and over a quarter century after Justice Brandeis’ death, the Court revisited the issue of government wiretapping.<sup>210</sup> In the 1967 case of *Katz v. United States*, the issue was almost identical to that in *Olmstead*.<sup>211</sup> In a narrow opinion overruling *Olmstead*, the Supreme Court adopted Justice Brandeis’ view and his dissent virtually became law.<sup>212</sup> As a result, under the Fourth Amendment, individuals now have a right to privacy against government intrusion where there is “an actual (subjective) expectation of privacy . . . [and] the expectation [is] one that society is prepared to recognize as ‘reasonable.’”<sup>213</sup>

### C. American Privacy Through the Twentieth Century

*Katz* illuminates Professor Whitman’s theory that the American understanding of privacy is tied tightly to liberty, and specifically to freedom from government overreach.<sup>214</sup> It must be acknowledged, however, that Supreme Court decisions regarding privacy are not confined to Fourth Amendment search and seizure issues.<sup>215</sup> For example, in 1958 in *NAACP v. Alabama*, the Court recognized the right to associational privacy under the First Amendment.<sup>216</sup> In unanimously striking down an Alabama law requiring the NAACP to share a list of all members and officers, the Court explained that the First Amendment’s freedom of association required a right to privacy in such associations, and thus a new constitutionally protected privacy right emerged.<sup>217</sup>

Similarly in 1965, in *Griswold v. Connecticut*, the Supreme Court created a new privacy right by utilizing the First, Third, Fourth, Fifth, and Ninth Amendments.<sup>218</sup>

206. U.S. CONST. amend. IV.

207. *Olmstead* 277 U.S. at 473 (Brandeis, J., dissenting).

208. *Id.*

209. *Id.* at 472-73.

210. *Katz v. United States*, 389 U.S. 347 (1967).

211. *Id.* at 348-49 (similar to *Olmstead*, the evidence at issue was “overheard by FBI agents who had attached an electronic listening device to the outside of the public telephone booth from which [the petitioner] had placed his calls.”).

212. *Id.* at 352-53 (citing Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890)).

213. *Id.* at 361 (Harlan, J. Dissenting).

214. Whitman, *supra* note 38, at 1161.

215. *Id.* at 1214.

216. 357 U.S. 449 (1958).

217. *Id.* at 462 (“This Court has recognized the vital relationship between freedom to associate and privacy in one’s associations.”).

218. 381 U.S. 479 (1965).

*Griswold* considered and invalidated a Connecticut law barring the use of contraceptives and the practice of medical professionals assisting anyone in acquiring contraceptives.<sup>219</sup> The Court recognized that reproductive autonomy in a marriage is “a right of privacy older than the Bill of Rights . . . .”<sup>220</sup> It stated bluntly that the “[v]arious guarantees [in the Bill of Rights] create zones of privacy.”<sup>221</sup> Seven years after *Griswold*, in *Eisenstadt v. Baird*, the Court applied its reasoning to unmarried people, further expanding the right of privacy in intimate relations.<sup>222</sup> These decisions represent “a shift in logic,” which “provided the doctrinal basis for the Court’s subsequent decision to protect women’s reproductive freedom in *Roe v. Wade*, and its decision striking down a Texas antisodomy statute in *Lawrence v. Texas*.”<sup>223</sup> In each instance the Court recognized that the newly created privacy rights were fundamental rights, and although not absolute, they required and still receive the highest level of protection under the law.<sup>224</sup> These cases and others, known as the constitutional privacy decisions, clearly evince at some level the Court’s recognition of an implied right to privacy.<sup>225</sup> The presence of government involvement in cases finding an invasion of privacy, however, is a glaring common denominator that supports the proposition that American privacy is understood as liberty from government.<sup>226</sup>

To emphasize the American view of privacy as a form of liberty from government, Professor Whitman juxtaposes two Supreme Court cases.<sup>227</sup> In *Florida Star v. J.B.F.*, the plaintiff—a rape victim—sued a local newspaper that identified her by name in an article.<sup>228</sup> She sought damages pursuant to a state statute prohibiting newspapers and similar entities from identifying a victim of a sexual offense by name.<sup>229</sup> In *Hanlon v. Berger*, a couple claimed a violation of their Fourth Amendment rights where officials from the Fish and Wildlife Service executed a valid search warrant, accompanied by a CNN news crew.<sup>230</sup> In weighing the First Amendment’s protection of the free press against the plaintiffs’ privacy rights, the Court handed down

219. *Id.* at 480.

220. *Id.* at 486.

221. *Id.* at 484.

222. 405 U.S. 438 (1972).

223. AUSTIN SARAT, LAWRENCE DOUGLAS, AND MARTHA MERRILL UMPHREY, IMAGINING NEW LEGALITIES: PRIVACY AND ITS POSSIBILITIES IN THE 21<sup>ST</sup> CENTURY 4 (2012).

224. *See generally* NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460 (1958) (“We thus reach petitioner’s claim that the production order in the state litigation trespasses upon fundamental freedoms protected by the Due Process Clause of the Fourteenth Amendment.”); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (“The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees.”); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (“If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child. . .”).

225. Whitman, *supra* note 38, at 1214.

226. *See generally* NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 463 (1958) (“The crucial factor is the interplay of governmental and private action . . . .”); *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965) (“the First Amendment has a penumbra where privacy is protected from governmental intrusion.”); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (“If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters . . . .”); *Roe v. Wade*, 410 U.S. 113, 153 (“The detriment the that the State would impose upon the pregnant woman by denying this choice altogether is apparent.”).

227. Whitman, *supra* note 38, at 1215.

228. 491 U.S. 524 (1989).

229. *Id.* at 526.

230. 526 U.S. 808, 809 (1999).

seemingly inconsistent decisions.<sup>231</sup> In *Florida Star* the rape victim's privacy claim was trumped by the First Amendment's protection of the free press.<sup>232</sup> In *Hanlon*, however, the Court found a violation of the plaintiffs' privacy rights despite the First Amendment.<sup>233</sup> The inconsistency is explained by the presence of law enforcement in *Hanlon*, and the lack thereof in *Florida Star*.<sup>234</sup> According to Professor Whitman, "[o]nce the police come into it, American intuitions shift . . . You can count on Americans to see privacy violations once the state gets into the act."<sup>235</sup>

For representative democracy in the United States to function, it is essential that the views of the people are reflected in the government's policies; and although judicial interpretation of public policies may lag behind public sentiment, it is equally essential that it catch up.<sup>236</sup> Privacy rights in the United States expand and contract over time in reaction to the realities of the day and the views of the people.<sup>237</sup> As has been shown, the Court has created constitutional rights to privacy in addressing issues emerging throughout the latter half of the twentieth century; issues that could not be foreseen by the Founding Fathers.<sup>238</sup> The Internet—like modern contraceptives and reproductive sciences—could not have been foreseen.<sup>239</sup>

The Supreme Court has not yet recognized a right to information privacy, but there is reason to believe that it can—and will—do so.<sup>240</sup> In 1977, the Court stated in dicta that it was "not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks . . . much of which is potentially embarrassing or harmful if disclosed."<sup>241</sup> Later, in a case considering the newsworthiness of the Nixon Tapes, the Court disallowed the press access beyond that afforded the general public, reasoning that such access could be used for "improper purposes," such as to "gratify private spite or promote public scandal."<sup>242</sup> One year later, in a case considering the Freedom of Information Act, the Court employed language that could encompass a right to be forgotten, noting the "vast difference" between information available from a "diligent search" of files and archives, and a "computerized summary located in a single clearinghouse of information."<sup>243</sup> There the Court found an unwarranted invasion of personal privacy, and "recognized the privacy interest inherent in the nondisclosure of certain information

231. Whitman, *supra* note 38, at 1215.

232. *Florida Star*, 526 U.S. at 532.

233. *Hanlon*, 526 U.S. at 809-10 (although the Court also held that petitioners were entitled to the defense of qualified immunity).

234. Whitman, *supra* note 38, at 1215.

235. *Id.*

236. PRISCILLA M. REGAN, LEGISLATING PRIVACY: TECHNOLOGY, SOCIAL VALUES, AND PUBLIC POLICY 42 (1995).

237. *Id.*

238. *Supra* notes 216-25.

239. Jerry Berman & Deidre Mulligan, *Privacy in the Digital Age: Work in Progress*, 23 NOVA L. REV. 551, 568-69 (1998) ("It is clear that our existing legal framework did not envision the pervasive role information technology would play in our daily lives.").

240. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 1061 (4th ed. 2013).

241. *Whalen v. Roe*, 429 U.S. 589, 605.

242. *Nixon v. Warner Communications*, 435 U.S. 589, 598.

243. *United States DOJ v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 764.

even where the information may have been at one time public.”<sup>244</sup> As recently as 2011, the Court “assume[d], without deciding, that the Constitution protects a privacy right.”<sup>245</sup> Justice Scalia concurred in that opinion, joined by Justice Thomas, but asserted his belief that the “right to ‘informational privacy’ does not exist.”<sup>246</sup>

Justice Scalia’s death in February of 2016, like that of any Supreme Court Justice, will change the composition of the Court, and could provide the conditions necessary for the recognition of an American right to be forgotten.<sup>247</sup> Joseph Thai, the Watson Centennial Chair in Law and Presidential Professor at the University of Oklahoma College of Law, recently wrote that it “is clear today that the theory of constitutional interpretation that Justice Scalia championed—originalism—is just one justice away from extinction on the Supreme Court.”<sup>248</sup> It is by this originalist interpretation that Justice Scalia, joined by Justice Thomas, declared, “‘informational privacy’ does not exist.”<sup>249</sup> Even the most conservative of the eight remaining justices on the Court are more forward-looking and flatly reject originalism.<sup>250</sup>

Justice Scalia’s seat remains vacant even as we approach the one-year anniversary of his death and the inauguration of a new President.<sup>251</sup> The myriad factors at play in discussing Scalia’s replacement deserve more attention than this Note can provide.

Nevertheless, a growing embrace of foreign law is replacing the departure of originalism from the Court.<sup>252</sup> The history of the Court is replete with support from—and in some cases reliance on—foreign law.<sup>253</sup> The United States today, however, is confronted with more challenges that are global in nature than ever before.<sup>254</sup> Justice Stephen Breyer argues that meeting these challenges “requires information and understanding that often lie outside our borders.”<sup>255</sup> Addressing privacy online through a right to be forgotten, tailored to the traditions of the United States and consistent with the Constitution, would show that the Founding Fathers’ great experiment is still viable, and that our government is still able to solve the world’s emerging problems. Justice Breyer has not addressed the right to be forgotten but his

244. *Id.* at 767.

245. Chemerinsky, *supra* note 240 (citing *National Aeronautics and Space Administration v. Nelson*, 131 S. Ct. 746 (2011)).

246. *Id.*

247. Adam Liptak, *Key Questions and Answers About Antonin Scalia and His Legacy*, N.Y. TIMES (Feb. 14, 2016), <http://www.nytimes.com/2016/02/15/us/key-questions-and-answers-about-antonin-scalia-and-his-legacy.html>.

248. Joseph Thai, *Honey (Said Justice Scalia) I Shrank the Constitution*, AMERICAN CONSTITUTION SOCIETY BLOG (Feb. 22, 2016), <https://www.acslaw.org/acsblog/honey-said-justice-scalia-i-shrank-the-constitution>.

249. Chemerinsky, *supra* note 246.

250. See Jeffrey Toobin, *Looking Back*, THE NEW YORKER, Feb. 29, 2016, at 17, recounting Justice Alito interrupting Justice Scalia’s “harangue of a lawyer” in a case concerning warning labels on violent video games: “I think what Justice Scalia wants to know is what James Madison thought about video games. Did he enjoy them?”

251. Linda Greenhouse, *What the Chief Justice Should Have Said*, N.Y. TIMES (Jan. 5, 2017), <https://www.nytimes.com/2017/01/05/opinion/sunday/what-the-chief-justice-should-have-said.html>.

252. See generally STEPHEN BREYER, *THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES* (2015).

253. *Id.* at 241 (noting that “Supreme Court Justices from John Marshall to Felix Frankfurter have filed opinions with reference to decisions by foreign courts.”)

254. *Id.* at 3-4 (“More and more, cases before the Court involve foreign activity.”)

255. *Id.* at 281.

words certainly apply: “[T]he world will follow someone’s example if not ours. Failing to lend our voices, we may find ourselves not so well served by, or happy with, the results.”<sup>256</sup>

#### D. *The Twenty-First Century*

The United States is changing dramatically.<sup>257</sup> The three largest corporations in the world by equity value as of 2015 are Apple, Google, and Microsoft—all American technology companies.<sup>258</sup> Facebook, another well-known American company which ranked twelfth worldwide by equity value, boasts nearly 1.6 billion users, or half of all Internet users worldwide.<sup>259</sup> The booming Internet industry is no longer confined to desktop computers; instead, people are now able to literally wear the Internet with products such as Google Glass and Apple Watch.<sup>260</sup> This trend suggests the continued development of devices posing threats to individual online privacy rights.<sup>261</sup>

American public opinion, unlike the law, is keeping pace with the aforementioned technological innovations.<sup>262</sup> A 2013 Pew Research Center study revealed that sixty-eight percent of American Internet users “believe current laws are not good enough in protecting people’s privacy online . . . .”<sup>263</sup> Further, a 2014 study by *Software Advice* surveyed five hundred American adults and found that “[a] solid majority—61 percent—were in favor of a ‘right to be forgotten’ law for U.S. citizens.”<sup>264</sup> Despite public opinion, American tech companies have pushed against the adoption of any form of a right to be forgotten, and, reinforced by well-founded criticism from American legal and technological scholars, have thus far succeeded.<sup>265</sup>

#### V. ACKNOWLEDGING CRITICISM OF AN AMERICAN RIGHT TO BE FORGOTTEN

In 2013, Google paid D.C. lobbyists \$15.8 million to influence legislation.<sup>266</sup> While Silicon Valley corporations are certainly opposed to an American right to be forgotten, a more significant obstacle to its adoption is the First Amendment of the United States Constitution.<sup>267</sup> The First Amendment establishes in relevant part that

256. Breyer, *supra* note 251, at 283.

257. Payton & Claypoole, *supra* note 6, at 14 (noting that in the 1970s, there was less than one computer per thousand people in the United States; by the 1990s, there was one for every three; and in 2012, there were more computers in the United States than there were United States citizens).

258. William White, *Largest Companies by Market Cap 2015: Facebook Topples Walmart*, INVESTORPLACE (Jun. 23, 2015, 1:11 PM EST), <http://investorplace.com/2015/06/largest-companies-by-market-cap-facebook-walmart-fb-wmt/#.Vt2nyTYffUo>.

259. Josh Constine, *Facebook Climbs to 1.59 Billion Users and Crushes Q4 Estimates With \$5.8B Revenue*, TECHCRUNCH (Jan. 27, 2016), <http://techcrunch.com/2016/01/27/facebook-earnings-q4-2015/>.

260. PAUL BERNAL, INTERNET PRIVACY RIGHTS 3-4 (2014).

261. Payton & Claypoole, *supra* note 6, at 225, 230.

262. *Infra* notes 263, 264.

263. Lee Rainie, Sara Kiesler, Ruogu Kang & Mary Madden, *Anonymity, Privacy, and Security Online*, PEW RESEARCH CENTER (Sep. 5, 2013), <http://www.pewinternet.org/2013/09/05/anonymity-privacy-and-security-online/>.

264. David Humphries, *U.S. Attitudes Toward the ‘Right to be Forgotten,’* SOFTWARE ADVICE (Sep. 5, 2014), <http://www.softwareadvice.com/security/industryview/right-to-be-forgotten-2014/>.

265. *See infra* Part V.

266. Victor Luckerson, *Americans Will Never Have the Right to Be Forgotten*, TIME (May 14, 2014), <http://time.com/98554/right-to-be-forgotten/>.

267. Chelsea E. Carbone, *To Be Or Not To Be Forgotten: Balancing the Right to Know with the Right to Privacy in the Digital*



“Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .”<sup>268</sup>

#### A. *Legal Opposition*

Dawinder Sidhu, a professor at the University of New Mexico School of Law, is among the voices arguing that the right to be forgotten is incompatible with the First Amendment.<sup>269</sup> Professor Sidhu points out that even Louis Brandeis and Samuel Warren distinguished between private and public information in *The Right to Privacy*.<sup>270</sup> The European right to be forgotten, on the other hand, provides individuals a privacy interest in their personal information even where the individual is solely responsible for exposing that information to the Internet.<sup>271</sup> The right to be forgotten as adopted in Europe is unchecked by competing rights that exist in the United States, and thus, it is argued, is incompatible with the U.S. Constitution.<sup>272</sup>

Jeffrey Rosen has written extensively on privacy in the United States, and although he generally supports it, he is adamantly opposed to the right to be forgotten.<sup>273</sup> He echoes First Amendment arguments, pointing to a lawsuit filed against Wikipedia by two Germans convicted of murder.<sup>274</sup> The German plaintiffs sought the removal from Wikipedia of their criminal histories, which is allowed under German law but is far more complicated in America where the First Amendment protects the publication of criminal history, with some state-imposed exceptions.<sup>275</sup> He additionally argues that monetary sanctions for noncompliance would have “a serious chilling effect” on free speech and the free press.<sup>276</sup>

Judge Richard Posner of the United States Court of Appeals for the Seventh Circuit, while not specifically addressing the right to be forgotten, believes that the right to privacy is more fairly characterized as a right to misrepresent.<sup>277</sup> Like many legal issues, Judge Posner views privacy through an economic lens.<sup>278</sup> He reasons that the law does not allow sellers to misrepresent their goods, and since people sell

*Age*, 22 VA. J. SOC. POL’Y & L. 525, 555 (2015).

268. U.S. CONST. amend. I.

269. Dawinder Sidhu, *We Don’t Need a “Right to Be Forgotten.” We Need a Right to Evolve*, THE NEW REPUBLIC (Nov. 7, 2014) (acknowledging the position that the right to be forgotten is incompatible with the First Amendment, but advancing an alternative argument for a “social norm that can regulate harmful attitudes” as opposed to a legally enforceable right).

270. Dawinder Sidhu, *Privacy Doesn’t Exist in a Vacuum*, U.S. NEWS AND WORLD REPORT (Dec. 8, 2014, 12:45 PM), <http://www.usnews.com/debate-club/should-there-be-a-right-to-be-forgotten-on-the-internet/privacy-doesnt-exist-in-a-vacuum>.

271. *Id.*

272. *Id.*

273. Compare JEFFREY ROSEN, THE UNWANTED GAZE 25 (2000) (arguing throughout his book that privacy erosions can and should be rebuilt in America), with Rosen, *supra* note 36 (referring to the right to be forgotten as “the biggest threat to free speech on the Internet in the coming decade.”).

274. Rosen, *supra* note 36.

275. John Schwartz, *Two German Killers Demanding Anonymity Sue Wikipedia’s Parent*, N.Y. TIMES (Nov. 12, 2009).

276. Rosen, *supra* note 36.

277. Richard Posner, *The Right of Privacy*, 12 GA. L. REV. 393, 395 ff. (1978).

278. *Id.* at 393.

themselves on a regular basis, personal misrepresentations should be similarly disallowed.<sup>279</sup> Writing decades before the E.U.'s right to be forgotten, Posner stated: "Very few people want to be let alone. They want to manipulate the world around them by selective disclosure of facts about themselves."<sup>280</sup>

### B. *Technological Opposition*

Pavel Krčma, the CTO of an online password management company, refers to the right to be forgotten as an "excellent example of the huge gap between how the world is perceived by lawmakers and how current technology works."<sup>281</sup> To Krčma, the information age is irreversible, and the right to be forgotten is either "a funny attempt [to control it], or it's the start of a dictatorship."<sup>282</sup> The highly regarded online technology publication *TechCrunch* offers more practical critiques of the law, which it considers well-intentioned but impotent.<sup>283</sup> First, almost every website already provides users with the option to delete posts.<sup>284</sup> Second, once information spreads from its original source, it is almost impossible to delete because it is automatically archived.<sup>285</sup>

Critics also attack the right for requiring companies to expend valuable labor and resources, arguing that such companies should not be responsible for determining the validity of every claim.<sup>286</sup> Jimmy Wales, a co-founder of *Wikipedia*, is just one proponent of this position.<sup>287</sup> Aside from the added burden, which is significant, charging search engines and other online entities—as opposed to the government or an administrative agency—with the responsibility of analyzing thousands of requests pursuant to the right to be forgotten has resulted in some unusual problems.<sup>288</sup>

### C. *The Streisand Effect*

In 2003, Barbara Streisand sued the California Coastal Records Project for invasion of privacy after the organization—which photographs and archives the California coastline—posted on its website a picture of her Malibu mansion.<sup>289</sup> The lawsuit drew far more attention to her home than it would have received otherwise.<sup>290</sup>

279. *Id.* at 399.

280. *Id.* at 400.

281. Humphries, *supra* note 264 (interviewing Pavel Krčma).

282. *Id.* (Krčma retreats somewhat: "My statement is about the general direction. This law is just a small step, and it doesn't change anything itself—but it could serve as a test of what people and companies are able to accept.")

283. Gregory Ferenstein, *On California's Bizarre Internet Eraser Law for Teenagers*, TECHCRUNCH (Sep. 24, 2013), <http://techcrunch.com/2013/09/24/om-californias-bizarre-internet-eraser-law-for-teenagers/> (discussing, as the title suggests, the state of California's specific version of the right to be forgotten).

284. *Id.*

285. *Id.*

286. *Cf.* Humphries, *supra* note 264 (Joseph Steinberg notes that the burden will be acutely felt by smaller companies and startups).

287. Rowena Mason, *Right to be Forgotten: Wikipedia Chief Enters Internet Censorship Row*, THE GUARDIAN (Jul. 25, 2014, 5:48 EDT), <http://www.theguardian.com/technology/2014/jul/25/right-to-be-forgotten-google-wikipedia-jimmy-wales>.

288. See discussion *infra* Section V.C.

289. *The Economist Explains: What Is The Streisand Effect?*, THE ECONOMIST (Apr. 15, 2013, 23:50 BY T.C.), <http://www.economist.com/blogs/economist-explains/2013/04/economist-explains-what-streisand-effect>.

290. *Id.*

Today, this inadvertent backlash in publicity is referred to as the “Streisand Effect.”<sup>291</sup>

It must be remembered that Europe’s right to be forgotten, as interpreted by the European Court of Justice in *Google Spain v. AEPD*, requires search engines, and not the websites creating the content, to delist links that are “inadequate, irrelevant, or no longer relevant . . . in the light of the time that has elapsed.”<sup>292</sup> In other words, the published material still exists, but access via search engines is hindered.<sup>293</sup> The right to be forgotten provides prime conditions for the Streisand Effect, which is exacerbated by Google’s policy of notifying online publications that it has delisted their articles from its results.<sup>294</sup> In 2014, James Ball of the *Guardian* republished six of the publication’s stories that Google delisted, and provided loopholes for readers to view future delisted stories.<sup>295</sup> Later that year, employing some restraint, the *New York Times* pointed to five of its articles that Google delisted.<sup>296</sup> Three of the articles were “intensely personal,” and thus left alone, but the *Times* exposed the other two.<sup>297</sup> That the *Times* had to self-filter these stories based on its own editorial judgment suggests that Google’s process of evaluating right-to-be-forgotten-requests is flawed.<sup>298</sup> Google is ill equipped to handle the hundreds of thousands of annual requests, and journalists such as those at the *Times*—although displaying integrity—are not a disinterested party.<sup>299</sup> Although criticism of the European implementation of the right is valid in many respects, the United States can accommodate a similar but narrowly tailored right to be forgotten.<sup>300</sup>

## VI. THE AMERICAN RIGHT TO BE FORGOTTEN

Americans already have a right to be forgotten, just not online.<sup>301</sup> This is the position taken by University of Chicago Professor of Law, Eric Posner—the son of

291. *Id.*

292. Case C-131/12, *Google Spain SL, Google, Inc. v. Agencia Española de Protección de Datos, Mario Costeja González*, <http://curia.europa.eu>.

293. See James Ball, *EU’s Right to be Forgotten: Guardian Articles Have Been Hidden by Google*, THE GUARDIAN (Jul. 2, 2014, 10:34 EDT), <http://www.theguardian.com/commentisfree/2014/jul/02/eu-right-to-be-forgotten-guardian-google>.

294. Laura Entis, *EU’s Right to Be Forgotten’ Ruling Is Already Getting Messy*, ENTREPRENEUR (July 3, 2014), <http://www.entrepreneur.com/article/235370>.

295. Ball, *supra* note 293 (Ball went as far as to provide direct links to the “disappeared” articles).

296. Noam Cohen & Mark Scott, *Times Articles Removed From Google Results in Europe*, N.Y. TIMES (Oct. 3, 2014), [http://www.nytimes.com/2014/10/04/business/media/times-articles-removed-from-google-results-in-europe.html?\\_r=0](http://www.nytimes.com/2014/10/04/business/media/times-articles-removed-from-google-results-in-europe.html?_r=0).

297. *Id.*

298. *Id.*; See also Steven M. LoCascio, *Forcing Europe to Wear Rose-Colored Google Glass: The “Right to be Forgotten” and the Struggle to Manage Compliance Post Google Spain*, 54 COLUM. J. TRANSNAT’L L. 296, 327-28 (2015) (emphasizing that “Google . . . is in the tech business, not the business of legal adjudication.”).

299. Katie Engelhart, *The Right to be Forgotten: Will it Ruin the Internet?*, MACLEAN’S (Nov. 10, 2014), <http://www.macleans.ca/news/world/the-right-to-be-forgotten-online-will-it-ruin-the-internet/> (referring to the task faced by Google and other search engines as “formidable and perhaps untenable. Google has reportedly hired dozens of lawyers and paralegals to deal with the de-link requests on a case-by-case basis.”).

300. See discussion *infra* Part VI.

301. Humphries, *supra* note 264 (interviewing Joseph Steinberg).

Judge Richard Posner of the Seventh Circuit Court of Appeals.<sup>302</sup> Professor Posner dismisses First Amendment criticisms of the right to be forgotten, and in contrast argues that before the digital era, the law struck a balance between First Amendment rights and the right to privacy.<sup>303</sup> “On paper,” asserts Professor Posner, “this is still the case.”<sup>304</sup> For example, missed mortgage payments disappear from a credit report after ten years even though the information is true.<sup>305</sup> The law protects medical records and financial information, and many states have provisions expunging certain crimes from the public record.<sup>306</sup> Tort law also still recognizes the “Privacy Torts,” one of which—Public Disclosure of Private Facts—closely mirrors the right to be forgotten and demonstrates the American legal tradition’s willingness to protect privacy offline.<sup>307</sup> The Internet, however, has undermined the previously existing balance between privacy and First Amendment protections.<sup>308</sup> Taken together, privacy is deeply rooted in the traditions of the United States, and although it is not an absolute right, it is applicable at some level online.<sup>309</sup>

Professor Posner, like his father, also offers an economic perspective to the current online privacy debate.<sup>310</sup> Google’s opposition to the right to be forgotten is not necessarily rooted in freedom of expression, speech, or the press; rather, Google sells targeted “pay per click” advertising by utilizing a complicated and invasive algorithm that analyzes emails, searches, and third party content relating to individuals.<sup>311</sup> The right to be forgotten would chip away at Google’s ability to target individuals based off of their information and profit for every click.<sup>312</sup>

Newly relevant to the debate is the European Court of Justice’s October 2015 invalidation of the United States’ “Safe Harbor” agreement.<sup>313</sup> The Safe Harbor agreement functioned in lieu of a formal adequacy finding since 2000, allowing the transatlantic free flow of data between U.S. companies and EU member states.<sup>314</sup>

302. 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](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).

303. *Id.*

304. *Id.*

305. Humphries, *supra* note 264 (interviewing Joseph Steinberg).

306. Posner, *supra* note 302.

307. DANIEL J. SOLOVE & PAUL M. SCHWARTZ, INFORMATION PRIVACY LAW 105 (3rd ed. 2009).

308. Posner, *supra* note 302 (arguing that the right to be forgotten would merely restore the balance between “the public’s interest in knowing” and “the ordinary person’s right to be left alone.”).

309. ALAN F. WESTIN, PRIVACY AND FREEDOM 330-338 (1967) (discussing privacy in America from 1790-1880 and concluding that “the notion put forward by legal commentators from Brandeis down to the present—that privacy was somehow a ‘modern’ legal right which began to take form only in the late nineteenth century—is simply bad history and bad law. Pre-Civil War America had a thorough and effective set of rules with which to protect individual and group privacy from the means of compulsory disclosure and physical surveillance known in that era.”).

310. Posner, *supra* note 302.

311. Samuel Gibbs, *Gmail Does Scan All Emails, New Google Terms Clarify*, THE GUARDIAN (Apr. 15, 2014, 8:24 EDT), <http://www.theguardian.com/technology/2014/apr/15/gmail-scans-all-emails-new-google-terms-clarify>.

312. Aoife White, *Google Ad Business Under Scrutiny as EU Said to Revive Probe*, BLOOMBERG BUSINESS (Feb. 22, 2016, 9:21 CST), <http://www.bloomberg.com/news/articles/2016-02-22/google-ad-business-under-scrutiny-as-eu-said-to-revive-probe-ikxydulu> (“Most of Google’s \$74.5 billion 2015 revenue came from advertising.”).

313. Samuel Gibbs, *What is ‘Safe Harbour’ and Why Did the EUJ Just Declare it Invalid?*, THE GUARDIAN (Oct. 6, 2015, 7:09 EDT), <http://www.theguardian.com/technology/2015/oct/06/safe-harbour-european-court-declare-invalid-data-protection>.

314. Heisenberg, *supra* note 138, at 125.

The invalidation was in reaction to Edward J. Snowden's revelation that the NSA regularly accessed information stored in the databases of American tech companies—even information from databases located in Europe.<sup>315</sup> The NSA's unfettered access to European citizens' information, the court reasoned in a press release, “must be regarded as compromising the essence of the fundamental right to respect for private life.”<sup>316</sup> Whereas the Safe Harbor agreement previously shielded U.S. companies from interruptions in data flow, these same companies must now negotiate with each E.U. member state independently, and each member state has the ability to halt data flow to the U.S. altogether.<sup>317</sup> According to James Cook and Rob Price of the online publication *Business Insider*: “In theory, American companies with European customers could now end up trying to follow 20 or more different sets of national data-privacy regulations. Up to 4,500 U.S. companies—not just tech firms—have relied on Safe Harbor.”<sup>318</sup> Although the NSA's surveillance techniques are beyond the scope of this Note, a comprehensive overhaul of online privacy protections in the United States—including a right to be forgotten—would result in an adequacy finding and avoid a bureaucratic nightmare.<sup>319</sup>

A step in the right direction is underway in California, which in 2015 became the first state to implement a right to be forgotten for minors.<sup>320</sup> The California law requires websites to provide individuals eighteen and younger with a process for deleting posted content before transmission to a third party, and it requires those websites to clearly articulate the right.<sup>321</sup> Additionally, websites that are youth-oriented or otherwise know that they have users who are minors cannot advertise products that are illegal for minors.<sup>322</sup> The latter provision simply closes an online advertising loophole, while the former addresses the reality that college admission offices and future employers have become quite sophisticated in profiling applicants based on online postings that could be ten or more years old.<sup>323</sup> The law itself is not unduly burdensome on businesses with an online presence, but, because it only applies in

315. Peter Sayer, *Europe's Top Court Rules the Safe Harbor Data Transfer Agreement with U.S. is Invalid*, PCWORLD (Oct. 6, 2015, 4:56 AM), <http://www.pcworld.com/article/2989735/privacy/eu-us-safe-harbor-agreement-is-invalid-court-rules.html>.

316. Press Release No. 117/15, Court of Justice of the European Union, The Court of Justice declares that the Commission's US Safe Harbour Decision is invalid (Oct. 6, 2015).

317. James Cook & Rob Price, *Europe's Highest Court Just Rejected the 'Safe Harbor' Agreement Used by American Tech Companies*, BUSINESS INSIDER (Oct. 6, 2015), <http://www.businessinsider.com/european-court-of-justice-safe-harbor-ruling-2015-10>.

318. *Id.*

319. Heisenberg, *supra* note 138, at 120 (“Although comprehensive laws do not guarantee the Commission's adequacy finding, there is a well founded perception that the Article 29 Working Party is more amenable to government regulatory solutions than to self regulatory schemes.”).

320. CAL. BUS. & PROF. CODE §§ 22580-22581 (Deering 2015).

321. *Id.*

322. *Id.*; See also Andrea Peterson, *Author of California Online Eraser Law: It's Not Always Easy to Find the Delete Button*, THE WASHINGTON POST (Sep. 25, 2013), <https://www.washingtonpost.com/news/the-switch/wp/2013/09/25/author-of-california-online-eraser-law-its-not-always-easy-to-find-the-delete-button/> (aside from the obvious examples such as guns, alcohol, and tobacco, California Senate President pro Tem Darrell Steinberg offered as an example his teenage daughter, who, when looking at fashion online, is “barrage[d] . . . with ads for diet pills.”).

323. Andrea Peterson, *Author of California Online Eraser Law: It's Not Always Easy to Find the Delete Button*, THE WASHINGTON POST (Sep. 25, 2013), <https://www.washingtonpost.com/news/the-switch/wp/2013/09/25/author-of-california-online-eraser-law-its-not-always-easy-to-find-the-delete-button/>.

California, businesses are now tasked with distinguishing between California and non-California minors.<sup>324</sup> This is easy enough, but the problem posed by the invalidation of the United States' Safe Harbor agreement will now be more acutely felt in transactions within America's borders—no longer contained to international transactions.<sup>325</sup>

Increased globalization, perpetual technological advancement, and the 2015 invalidation of the Safe Harbor agreement together suggest that the United States needs to comprehensively bolster and clearly define the American right to privacy as applied to the Internet. The California law, although in its infancy, reflects the American will and ability to harmonize at some level with the European approach.<sup>326</sup> Despite cultural differences between the E.U. and the U.S., and in light of globalization and technology, an American concession in favor of increased online privacy protections is now being described as inevitable.<sup>327</sup> Further, widespread misunderstanding of the right to be forgotten—fueled heavily by Google—has plagued the debate regarding the implementation of a similar right in the United States.<sup>328</sup> Clarifying misinformation will soften opposition to the right to be forgotten.<sup>329</sup>

In 2015, Google accidentally revealed data concerning over seventy-five percent of all right to be forgotten requests.<sup>330</sup> Although Google previously emphasized the more outrageous requests to be forgotten, the data suggest that a majority of the requests were legitimate.<sup>331</sup> In fact, the *Guardian* reported that “[l]ess than 5% of nearly 220,000 individual requests . . . concern criminals, politicians, and high-profile public figures . . . with more than 95% of requests coming from everyday members of the public.”<sup>332</sup> This revelation supports two points: (1) the right to be forgotten is legitimate and requests pursuant to it are genuine, and (2) Google and similar online entities are ill-equipped to act as neutral arbiters in the delisting process.

Trusting Google and other online corporate entities with control over determining what does and does not qualify for removal—which the E.U. has done—is not just ineffectual, it is plainly counterintuitive. The American right to be forgotten, in contrast, should be tasked to either a newly created administrative agency or an appropriate, already existing agency—the Federal Communications Commission, for example—and overseen by the courts. The agency would ideally set objective criteria to quickly resolve a majority of right to be forgotten requests, and an independent

324. Cf. Christopher Avery, *Is Your Website Ready for California's "Minor Eraser" Law?*, PRIVACY AND SECURITY LAW BLOG (Dec. 1, 2014), <http://www.privsecblog.com/2014/12/articles/marketing-and-consumer-privacy/is-your-website-ready-for-californias-minor-eraser-law/>.

325. Kathleen Miles, *Teens get Online 'Eraser Button' With New California Law*, HUFFPOST LOS ANGELES (Mar. 3, 2014), [http://www.huffingtonpost.com/2013/09/24/teens-online-eraser-button-california\\_n\\_3976808.html](http://www.huffingtonpost.com/2013/09/24/teens-online-eraser-button-california_n_3976808.html).

326. Humphries, *supra* note 264 (interviewing Andy Kahl).

327. Steven C. Bennett, *The Right to be Forgotten: Reconciling EU and US Perspectives*, 30 BERKELEY J. INT'L LAW. 161, 178 (2012).

328. Engelhart, *supra* note 299 (“Google’s alleged strategy to stoke opposition might be working.”).

329. See *infra* notes 331-32 and accompanying text.

330. Sylvia Tippmann & Julia Powles, *Google Accidentally Reveals Data on 'Right to be Forgotten' Requests*, THE GUARDIAN (Jul. 14, 2015, 9:28 PM), <http://www.theguardian.com/technology/2015/jul/14/google-accidentally-reveals-right-to-be-forgotten-requests>.

331. *Id.*

332. *Id.*

panel would address novel first impression requests.<sup>333</sup> An administrative agency would be more efficient and more consistent than Google, and its carefully established precedents would engender confidence in the American public.<sup>334</sup> Also, current fears that some companies are indiscriminately granting right to be forgotten requests in order to avoid costly litigation would be alleviated.<sup>335</sup>

When opponents of an American right to be forgotten attack it as abrogating the First Amendment's freedom of expression, they are referring specifically to freedom of speech and freedom of the press.<sup>336</sup> However, in announcing the E.U.'s most recent framework for the right to be forgotten—the 2012 GDPR—Viviane Reding, vice president of the European Commission, said “[n]either must the right [to be forgotten] take precedence over freedom of expression or freedom of the media.”<sup>337</sup> This statement, translated in terms of the United States Constitution, reaffirms the precedence of the First Amendment. John Hendel of *The Atlantic*, after hearing Reding's statement, wrote that, from the perspective of a journalist, the right to be forgotten “shouldn't worry proponents of free expression.”<sup>338</sup> Professor Posner explains further that any perceived effect on the free press is *de minimis*.<sup>339</sup> Before the Internet, and specifically Google, “the barrier of the physical search almost always provided adequate protection for privacy” from the press.<sup>340</sup> The right to be forgotten merely regulates a tool that for the past two decades has removed the physical barrier and provided, in fractions of a second, content that, while true, naturally faded into obscurity due to its irrelevance and the passage of time.<sup>341</sup> Professor Posner asks: “Shouldn't new laws and rulings, like [Google Spain v. AEPD,] give people back the privacy that technology has taken away?”<sup>342</sup>

## VII. CONCLUSION

The Supreme Court has used the right to privacy throughout its history to imply fundamental rights from various provisions of the Constitution.<sup>343</sup> Today, in light of globalization, the increasing ubiquity of the Internet, and the changing composition

333. Humphries, *supra* note 264 (interviewing Joseph Steinberg).

334. Steven M. LoCascio, Forcing Europe to Wear Rose-Colored Google Glass: The “Right to be Forgotten” and the Struggle to Manage Compliance Post Google Spain, 54 COLUM. J. TRANSNAT'L L. 296, 328 (2015).

335. Daphne Keller, *The New, Worse Right to be Forgotten*, POLITICO (Jan. 27, 2016, 7:28 PM), <http://www.politico.eu/article/right-to-be-forgotten-google-defense-data-protection-privacy/> (“The problem is that the GDPR's combination of rigid procedural rules, unclear application to Internet platforms, and bankruptcy-inducing high fines will encourage Internet platforms to erase their users' content—whether the law actually requires it or not.”).

336. U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech, or of the press . . .”).

337. Viviane Reding, Vice-President of the European Commission, EU Justice Commissioner, The EU Data Protection Reform of 2012: Making Europe the Standard Setter for Modern Data Protection Rules in the Digital Age (Jan. 22, 2012, Munich, Germany).

338. John Hendel, *Why Journalists Shouldn't Fear Europe's 'Right to be Forgotten'*, THE ATLANTIC (Jan. 25, 2012), <http://www.theatlantic.com/technology/archive/2012/01/why-journalists-shouldnt-fear-europes-right-to-be-forgotten/251955/>.

339. Posner, *supra* note 302

340. *Id.*

341. Evan Leatherwood, *Why Google's Removal of New Links in the EU is a Good Thing*, HUFFPOST TECH (Sep. 8, 2014), [http://www.huffingtonpost.com/evan-leatherwood/why-googles-take-down-of-\\_b\\_5572225.html](http://www.huffingtonpost.com/evan-leatherwood/why-googles-take-down-of-_b_5572225.html).

342. Posner, *supra* note 302.

343. See *supra* notes 214-26 and accompanying text.

of the Court, it is possible that the Court could find a right to informational privacy in the form of the right to be forgotten.<sup>344</sup> Unlike the E.U. and Latin America, however, the American right to be forgotten cannot be controlled by the search engines that make it necessary and cannot extend protections to public figures and public officials.<sup>345</sup> Tasking an administrative agency with the responsibility of investigating and deciding requests under this new right would prevent such a result, and court oversight would provide additional credibility. Objective criteria and the development of precedent would streamline the process, which would eventually serve as the standard for an international right to be forgotten. Setting the global standard is in the best interest of the United States. The trade partnership between the U.S. and the E.U. is the most significant in the world, and if the U.S. wants to preserve it, it either has to obtain an adequacy finding from the European Commission, or take the lead in the area of Internet privacy law.<sup>346</sup>

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344. See *supra* note 326; See also Jeffrey Toobin, *Looking Back*, THE NEW YORKER, Feb. 29, 2016, at 17.

345. *Supra* note 335; See also Goni, *supra* note 149 (discussing Argentinian right to be forgotten plaintiffs such as soccer star Diego Maradona, entertainer Virginia da Cunha, and even judges).

346. Heisenberg, *supra* note 138, at 1.