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Looking Backward, Moving Forward: What Must be Remembered When Resolving the Right to be Forgotten

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LOOKING BACKWARD, MOVING FORWARD: WHAT MUST BE REMEMBERED WHEN RESOLVING THE RIGHT TO BE FORGOTTEN

“Reality exists in the human mind, and nowhere else.”¹

INTRODUCTION

Though published in 1949, the dystopia described in George Orwell’s proclaimed novel “1984” feels all too familiar today.² Orwell’s novel describes a global war that has been going on “seemingly forever”; it describes “Newspeak,” a form of stripped down English language used to limit free thought, and articulates the idea of a “memory hole.”³ A memory hole allows previously published facts that later become embarrassing to be tossed down a hole and permanently erased.⁴ Once the information is thrown down the hole, it is forever eliminated from the face of the earth, and the world is led to believe that something that genuinely existed never actually did.⁵

1. GEORGE ORWELL, 1984, 252 (1949).

2. See Michiko Kakutani, *Why ‘1984’ Is a 2017 Must-Read*, N.Y. TIMES, Jan. 26, 2017, at C17. George Orwell is one of the most “profound social critics of the modern era”; his insight is considered to be more accurate now than when his works were originally published in the 1940s. Justin King, *10 George Orwell Quotes that Predicted Life in 2017 America*, ANTI-MEDIA (Aug. 14, 2014, 2:21 AM), <http://theantimedia.org/10-george-orwell-quotes-that-predicted-life-in-2014-america/>. Orwell did not always receive such praise. The first time the New York Times reviewed *1984* in 1949, they called the novel a “work of pure horror.” Mark Schorer, *When Newspeak Was New*, N.Y. TIMES (Oct. 6, 1996), <http://query.nytimes.com/gst/full-page.html?res=9802E2DE153FF935A35753C1A960958260>.

3. Lewis Beale, *We’re Living ‘1984’ Today*, CNN (Aug. 3, 2013), <http://www.cnn.com/2013/08/03/opinion/beale-1984-now/>.

4. See Jerry Brito, *What Europe’s ‘Right to Be Forgotten’ Has in Common with SOPA*, TIME (Jan. 30, 2012), <http://techland.time.com/2012/01/30/what-europes-right-to-be-forgotten-has-in-common-with-sopa/>.

5. See *id.*

In May 2014, the European Court of Justice (ECJ)⁶ decided *Google Spain v. AEPD and González*⁷ and granted citizens their own personal memory holes through the right to be forgotten: the right to request Google, or any search engine offering services to European consumers, to remove certain results displayed after a search of a citizen's name.⁸ Search engines must grant a request for removal so long as the results are "inaccurate, inadequate, irrelevant or excessive" and the benefit to the public interest does not outweigh the individual's right to privacy.⁹ One year after this judgment, France's data protection authority, the Commission Nationale de l'Informatique et des Libertés (CNIL), determined that deleting results from European Google pages¹⁰ was not an adequate form of redress to consumers and ordered Google to remove the results at issue from the search engine's global domain, Google.com.¹¹

6. The ECJ is the highest court in the European Union. The court's decisions are binding on all national courts in the European Union. Wayne Ives, *Court of Justice of the European Union*, CIVITAS INST. STUDY CIV. SOC'Y, <http://www.civitas.org.uk/eu-facts/eu-overview/court-of-justice-of-the-european-union/> (last updated Aug. 1, 2015).

7. Case C-131/12, *Google Spain SL v. Agencia Española de Protección de Datos (AEPD)* 2014 E.C.R. 317.

8. See *id.*; Jeff John Roberts, *Google Defies France Over "Right to be Forgotten"*, FORTUNE (July 30, 2015), <http://fortune.com/2015/07/30/google-france-right-to-be-forgotten/>.

9. *Factsheet on the "Right to be Forgotten" Ruling (C-131/12)*, EUR. COMMISSION, http://ec.europa.eu/justice/data-protection/files/factsheets/factsheet_data_protection_en.pdf (last visited Jan. 18, 2016) [hereinafter *Factsheet on the "Right to be Forgotten" Ruling*].

10. Examples of European Google domains include Google.fr (France) and Google.de (Denmark). *List of All Google Domains*, TECHXT (Apr. 6, 2012), <http://techxt.com/2012/04/06/list-of-all-google-domains/>.

11. See Glyn Moody, *France Tells Google to Remove Search Results Globally, or Face Big Fines*, ARS TECHNICA (Sept. 21, 2015, 9:36 AM), <http://arstechnica.com/tech-policy/2015/09/france-confirms-that-google-must-remove-search-results-globally-or-face-big-fines/>. Although some Europeans attempt to use Google.com instead of their country-specific domain page, Google automatically redirects European users to the domain of the country of their computer's Internet Protocol (IP) address in order provide users with a "better local experience." Danny Sullivan, *How Google Made It A Little Harder To Reach Google.com From Outside The U.S.*, SEARCH ENGINE LAND (Mar. 4, 2015, 4:00 AM), <http://searchengineland.com/google-harder-to-reach-outside-us-215845>.

Two months later, in August 2015, Google informally appealed¹² the CNIL's order, contending that the data protection authority of one country cannot control the content that individuals may access around the world.¹³ In response, the CNIL rejected Google's appeal and stated that, rather than applying French law extraterritorially, they were merely requesting non-European companies to fully observe European legislation.¹⁴ As a result of the CNIL's rejection, Google faced two options: delete tens of thousands of search results from Google.com and other non-European domains,¹⁵ or face sanctions by the CNIL, including an initial penalty of €150,000.¹⁶

In February 2016, Google aimed to compromise with the CNIL's demands by applying the search result removals to all of its domains worldwide, as long as the individual browsing was located within the European Union.¹⁷ The individual's location would be determined via their Internet Protocol (IP) address.¹⁸

12. An informal appeal occurs when a claimant directly contacts the decision-making administration, asking for reconsideration of the position taken. See ORG. FOR ECON. CO-OPERATION & DEV. [OECD], *BETTER REGULATION IN EUROPE: FRANCE 2010*, at 148 (2010).

13. Rob Thubron, *France Rejects Google's Appeal Against Implementing 'Right to be Forgotten' Globally*, TECHSPOT (Sept. 22, 2015, 11:00 AM), <http://www.techspot.com/news/62191-france-rejects-google-appeal-against-implementing-right-forgotten.html>.

14. Samuel Gibbs, *French Data Regulator Rejects Google's Right-to-be-Forgotten Appeal*, GUARDIAN (Sept. 21, 2015, 6:40 AM), <http://www.theguardian.com/technology/2015/sep/21/french-google-right-to-be-forgotten-appeal>.

15. See *id.* Examples of other non-European Google domains include google.ca (Canada) and google.com.au (Australia). Google currently owns 189 domains that serve the Google searching page. *List of All Google Domains*, *supra* note 10.

16. While many consider this fine to be "relatively light," as Google is one of the most powerful corporations in the world, this is the maximum monetary penalty that the CNIL is permitted to issue. Michael Lee, *French Privacy Commission Issues Maximum Penalty on Google*, ZDNET (Jan. 9, 2014, 5:48 AM), <http://www.zdnet.com/article/french-privacy-commission-issues-maximum-penalty-on-google/>; Nick Statt, *French Regulator Says Google Must Expand 'Right to be Forgotten' to All Google Sites*, VERGE (Sept. 21, 2015, 1:12 PM), <http://www.theverge.com/2015/9/21/9365075/french-regulator-google-right-to-be-forgotten>.

17. Samuel Gibbs, *Google to Extend 'Right to be Forgotten' to All Its Domains Accessed in EU*, GUARDIAN (Feb. 11, 2016, 7:40 AM), <http://www.theguardian.com/technology/2016/feb/11/google-extend-right-to-be-forgotten-goog-lecom>.

18. *Id.*

Within a month's time, however, the CNIL still found this response to be insufficient and fined Google €100,000.¹⁹ A few weeks later, in May 2016, Google again appealed the CNIL's actions with the same argument used in the first appeal: one nation cannot apply its laws extraterritorially.²⁰ Google further contended that its actions struck a fair balance between the protections requested by the CNIL and the rights of individuals from other countries to lawfully access the information at issue.²¹

Concurrently, a U.S. court of appeals decision in *Martin v. Hearst Corporation*²² demonstrates the preference of free speech over privacy in the United States and ultimately suggests that there is no place for the right to be forgotten in the United States.²³ In *Martin*, three U.S. newspapers²⁴ published online arrest reports of a woman and her two sons in August 2010.²⁵ Fourteen months after the publications, the three individuals were "deemed to have never been arrested" under Connecticut state law.²⁶ The woman demanded the newspapers remove the online reports,²⁷ but the U.S. Court of Appeals for the Second

19. Steve Dent, *France Finds Google for Breaking 'Right to be Forgotten' Law*, ENGADGET (Mar. 25, 2016), <http://www.engadget.com/2016/03/25/france-fines-google-for-breaking-right-to-be-forgotten-law/>.

20. Julia Fioretti & Mathieu Rosemain, *Google Appeals French Order for Global 'Right to be Forgotten'*, REUTERS (May 19, 2016, 8:31 AM), <http://www.reuters.com/article/us-google-france-privacy-idUSKCN0YA1D8>.

21. Nicole Henderson, *Google Extends Right to be Forgotten Rules in Europe*, WHIR (Mar. 7, 2016), http://www.thewhir.com/web-hosting-news/google-extends-right-to-be-forgotten-rules-in-europe?utm_source=internal-link&utm_medium=foot-link&utm_campaign=next.

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

23. Jack Greiner, *Arrest Report Erased, But History Remains*, CINCINNATI (Oct. 22, 2015, 12:46 AM), <http://www.cincinnati.com/story/money/business/2015/10/22/arrest-report-erased-but-history-remains/74372462/>.

24. The three newspapers were the *Connecticut Post*, *Stamford Advocate*, and *Greenwich Time*, all owned by the Hearst Corporation. *Id.* The Hearst Corporation is one of the largest media and information companies in the United States. *About Hearst*, HEARST, <https://www.hearst.com/about> (last visited Jan. 7, 2015).

25. Police searched the family's home and found marijuana, plastic bags, and drug paraphernalia. *Martin*, 777 F.3d at 548.

26. Greiner, *supra* note 23.

27. *Martin*, 777 F.3d at 550.

Circuit (“Second Circuit”)²⁸ held in favor of the newspapers, emphasizing that the woman was only deemed to have never been arrested.²⁹ In October 2015, the U.S. Supreme Court denied a petition for certiorari³⁰ in the *Martin* case.³¹ The refusal of the U.S. Supreme Court to review the Second Circuit’s decision³² has led some experts to argue that U.S. citizens will never have a right to be forgotten.³³ Others maintain that the United States should and will establish this right.³⁴

28. There are thirteen U.S. Courts of Appeals. These courts have the second-highest level of federal jurisdiction, after the U.S. Supreme Court. *Court Role and Structure*, U.S. CTS., <http://www.uscourts.gov/about-federal-courts/court-role-and-structure> (last visited Jan. 14, 2017).

29. The U.S. Court of Appeals for the Second Circuit reasoned that a state cannot turn a historical fact into fiction, and the press cannot be sued for maintaining a record of a historical fact. *Martin v. Hearst Corp.*, 777 F.3d 546, 551 (2d Cir. 2015).

30. By denying certiorari, the U.S. Supreme Court allows the lower court decision to stand. Denying certiorari does not establish precedent. *Glossary of Legal Terms*, SCOTUSBLOG, <http://www.scotusblog.com/reference/educational-resources/glossary-of-legal-terms/> (last visited Dec. 18, 2015).

31. Greiner, *supra* note 23.

32. *Id.* Some situations that may cause the U.S. Supreme Court to grant certiorari include: conflicting outcomes between two courts of appeals, a court of appeals deciding a federal question in a way that conflicts with a decision by a state court of last resort, or a court of appeals substantially departing from the accepted and usual course of judicial proceedings. SUP. CT. R. 10(a). Ultimately, denial of certiorari is discretionary. The U.S. Supreme Court does not explain its reasons for denying certiorari. See Lisa Soronen, *Supreme Court Refuses to Hear Gun Case*, ICMA (Dec. 10, 2015, 4:33 PM), http://icma.org/en/icma/knowledge_network/blogs/blogpost/4307/Supreme_Court_Refuses_to_Hear_Gun_Case.

33. See Greiner, *supra* note 23 (“This non-action makes it unlikely that the ‘right to be forgotten’ will find a home in the United States.”); Julian Hattem, *Should US Have Right to Be Forgotten?*, HILL (May 15, 2014, 6:00 AM), <http://thehill.com/policy/technology/206169-should-us-have-right-to-be-forgotten> (“A U.S. version of . . . the ‘right to be forgotten’ seems impossible in this country.”).

34. See Giovanna Giampa, *Americans Have a Right to be Forgotten* 29 (Law Sch. Student Scholarship, Paper 740, 2016), http://scholarship.shu.edu/cgi/viewcontent.cgi?article=1727&context=student_scholarship (“[T]he United States needs [a right to be forgotten] before it falls behind the rest of the world in recognizing this essential privacy right.”); John Simpson, *Restore ‘Privacy By Obscurity,’* U.S. NEWS (Dec. 5, 2014, 1:50 PM), <http://www.usnews.com/debate-club/should-there-be-a-right-to-be-forgotten-on-the-internet/restore-privacy-by-obscurity> (“[A U.S.] right to be forgotten offers a clear path forward to help protect our privacy in the digital age.”).

Currently, the United States cannot afford its citizens a right to be forgotten, given the nation's strong preference of free speech over privacy. This Note will thus examine the Internet's powerful impact on contemporary culture and demonstrate the need for a compromise that cooperates with the CNIL's demands while maintaining the United States' most foundational tenants. Part I will examine the background of the European privacy rights leading to the development of the Data Protection Directive, formally known as "Directive 95/46/EC,"³⁵ and ultimately to the creation of the current right to be forgotten. After the European preference of privacy is examined, Part II will examine U.S. culture by explaining the complex role of the Internet in daily life as well as the modern interpretations of the U.S. Constitutional rights of free speech and privacy. Once both the United States and European history and values have been examined, Part III will assess the various shortfalls contained in four recently proposed solutions aiming to narrow the overly broad scope of the current right to be forgotten: (1) giving online data an expiration date, (2) using the influence of technology companies to lobby lawmakers, (3) temporarily removing disputed links, and (4) granting a quasi right to be forgotten for minors. These theories have various deficiencies, including the failure to address the entire U.S. population, as well as the importance of web archival systems, and do not adequately address the concerns of the government having the final say over Internet companies, particularly given the current state of the right to be forgotten. Finally, taking these weaknesses into account, Part IV will propose a workable two-part solution that keeps all citizens informed about their right to be forgotten, and, furthermore, places crucial limits on the right so that it may properly exist in both the European Union and the United States. First, European and U.S. citizens of all ages must be educated on Internet responsibility to reduce the number of individuals invoking the right to be forgotten in the first place. This will ensure that all individuals fully understand their right and will also reduce the current influx of right-to-be-forgotten requests that are being imposed on search engines. Second, the European Union and the United States must implement a bilateral treaty that

35. Directive 95/46, of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L 281) 31 (EC) [hereinafter Directive 95/46].

will cease the battle between Google and the CNIL. The treaty must allow individuals to delist links in order to remove considerably harmful online material but not allow individuals to remove links falling below this proposed threshold. In its entirety, this solution harmonizes the right to be forgotten with the U.S. rights to freedom of speech and privacy by providing a balanced test where priority is given when a public or individual interest is compelling.

I. WHAT WAS REMEMBERED BEFORE ANYTHING WAS FORGOTTEN

This Part will examine European partiality of privacy over publicity,³⁶ which led to the advancement of privacy rights and data protection legislation implemented in the 1980s and 1990s.³⁷ Further, this Part will explain how this history paved the way for the current right to be forgotten in the European Union.³⁸

A. European Preference of Privacy

When it comes to the Internet, many U.S. citizens want to be famous, while most Europeans want to be forgotten.³⁹ Similarly, in the battle between publicity and privacy, U.S. citizens usually choose the former, while European citizens typically choose the latter.⁴⁰ These preferences are rationalized by the different ways

36. See David Banisar & Simon Davies, *Privacy and Human Rights: An International Survey of Privacy Laws and Practice*, GLOBAL INTERNET LIBERTY CAMPAIGN, <http://gilc.org/privacy/survey/intro.html> (last visited Nov. 2, 2015).

37. See Lawrence Siry, *Forget Me, Forget Me Not: Reconciling Two Different Paradigms of the Right to Be Forgotten*, 103 KY. L.J. 311, 314 (2014).

38. Although outside the scope of this Note, the European Union is not the only area with the right to be forgotten. Argentina has granted parties this right. Jeffrey Rosen, *The Right to Be Forgotten*, 64 STAN. L. REV. ONLINE 88, 91 (2012). Additionally, a right to be forgotten in Russia came into effect on January 1, 2016. Susana Vera, *Russia's 'Right to be Forgotten' Bill Comes Into Effect*, RT (Jan. 1, 2016, 9:13 PM), <https://www.rt.com/politics/327681-russia-internet-delete-personal/>.

39. See Jeffrey Rosen, *The Deciders: The Future of Privacy and Free Speech in the Age of Facebook and Google*, 80 FORDHAM L. REV. 1525, 1533 (2012).

40. Adam Liptak, *When Free Worlds Collide*, N.Y. TIMES, Feb. 28, 2010, at WK1.

that the two nations interpret the right to privacy.⁴¹ Generally, in Europe, privacy is viewed as a right to dignity, or as a right to control what one presents about themselves publicly.⁴² In the United States, however, privacy is viewed in terms of liberty, or as the right to keep the state out of the lives of citizens.⁴³ In Europe, the media threatens the desire for privacy, whereas, in the United States, the government threatens the U.S. desire for privacy.⁴⁴

In Europe, the global human rights framework protecting the rights of European citizens with respect to privacy is the Universal Declaration of Human Rights (UDHR).⁴⁵ The UDHR grants all individuals the right to be free of “arbitrary interference with [their] privacy” and “attacks upon [their] honour.”⁴⁶ Additionally, the European right to privacy is expressly guaranteed in two aspects.⁴⁷ Article 7 of the Charter of Fundamental Rights of

41. See Alicia P. Q. Wittmeyer, *Do Europeans Really Care More About Privacy Than Americans?*, FOREIGN POL'Y (June 11, 2013, 9:30 PM), <http://foreign-policy.com/2013/06/11/do-europeans-really-care-more-about-privacy-than-americans/>. Europeans often believe that U.S. citizens do not understand the “imperative demands of privacy” whatsoever. James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L. J. 1151, 1155 (2004). For example, a French webpage warns those traveling to the United States that the way U.S. citizens exchange information about their “private activities” is difficult for Europeans to imagine. *Seb in Geneva (Not on the Go Anymore)*, BLOGSPOT (Apr. 4, 2007), http://seb-77550.blogspot.com/2007_04_01_archive.html. Another example is demonstrated on a German webpage, which contends that “Americans are obtuse” on the issue of privacy. Von Issio Ehrlich, *Warum US-Amerikaner Nicht von Ihren Waffen Lassen: Vernarrt in die Freiheit*, N-TV (Dec. 17, 2012), <http://www.n-tv.de/politik/Vernarrt-in-die-Freiheit-article9804666.html>. To this day, European privacy protections and values are a response to the Gestapo and the Stasi, the totalitarian regimes that used surveillance and blackmail to gain and maintain power. Liptak, *supra* note 40. The United States, by comparison, has never experienced anything like this. See *id.*

42. Whitman, *supra* note 41, at 1161.

43. *Id.*

44. Both the European and U.S. views on privacy stem from “deeply felt sociopolitical ideals,” dating back to the eighteenth century. *Id.* at 1219.

45. The UDHR also protects the rights of individuals worldwide, as the declaration is addressed to “everyone.” G.A. Res. 217 (III) A, pmbl., Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter UDHR].

46. *Id.* art. 12.

47. See Robert Levine, *The Student Who Stood Up for Privacy*, N. Y. TIMES, Oct. 11, 2015, at BU1. Comparatively, in the United States, the right to privacy

the European Union⁴⁸ guarantees “respect for private and family life,” while Article 8 guarantees “protection of personal data.”⁴⁹ These protections are the central foundation for the right to be forgotten, as they are the chief justification for Directive 95/46/EC of the European Parliament and of the Council, a reference text on the protection of European citizens’ personal data.⁵⁰

B. Directive 95/46/EC of the European Parliament and of the Council

Beginning in 1979, the European Parliament⁵¹ (“Parliament”), which acts as the legislative body for the European Union, consistently demanded rules granting sufficient protection against the exploitation of personal data.⁵² The Parliament reasoned

is not explicitly stated in the U.S. Constitution. *Students: Your Right To Privacy*, AM. C.L. UNION, <https://www.aclu.org/your-right-privacy> (last visited Dec. 18, 2015).

48. Because the rights of all European citizens were established at different times, in different ways, the EU clarified such rights in 2000 by drafting a single document known as the Charter of Fundamental Rights of the European Union (“EU Charter”). *EU Charter of Fundamental Rights*, EUR. COMMISSION, http://ec.europa.eu/justice/fundamental-rights/charter/index_en.htm (last visited Mar. 19, 2017). The EU Charter became binding on the European Union in 2009, and has been updated to reflect societal and technological developments. *Id.*

49. Charter of Fundamental Rights of the European Union arts. 7–8, Oct. 26, 2012, 2012 O.J. (C 326). Articles 7 and 8 demonstrate that “privacy and data protection are distinct, yet complementary, fundamental legal rights.” Maurizio Borghi et al., *Online Data Processing Consent Under EU Law: A Theoretical Framework and Empirical Evidence from the UK*, 21 INT’L J.L. INFO. TECH. 109, 113–14 (2013).

50. See *Myth-Busting: The Court of Justice of the EU and the “Right to be Forgotten,”* EUR. COMMISSION, http://ec.europa.eu/justice/data-protection/files/factsheets/factsheet_rtbf_mythbusting_en.pdf (last visited Dec. 22, 2015); *Protection of Personal Data*, EUR-LEX (Aug. 3, 2014), <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3A114012>.

51. The European Parliament is a directly elected group of officials. *Welcome to the European Parliament*, EUR. PARLIAMENT, <http://www.europarl.europa.eu/aboutparliament/en> (last visited Jan. 6, 2016).

52. See Spiros Simitis, *From the Market To the Polls: The EU Directive on the Protection of Personal Data*, 80 IOWA L. REV. 445, 446 (1995). Personal data is information a data controller can use to identify an individual. There are many ways a data controller can identify an individual, such as by their full name, physical characteristics, pseudonyms, occupation, or address. *What is Personal Data?*, DATA PROTECTION COMMISSIONER (2014), <https://www.dataprotection.ie/docs/What-is-Personal-Data-/210.htm>.

that Europe's Internet market would not remain competitive among the globalization of escalating processing powers unless citizens were secure.⁵³ During the 1980s, the Parliament also predicted that abuse of personal data would become a huge component of the Internet economy, and cross-border data flows would flourish.⁵⁴ Nonetheless, the European Commission⁵⁵ ("Commission"), which acts as an executive body for the European Union, passively resisted.⁵⁶ The Commission viewed personal data as a "perfectly normal [good]" that should receive similar treatment as all other products and services.⁵⁷

After the establishment of the European Union in 1992,⁵⁸ the Commission's focus expanded from exclusively economic concerns to a wide variety of issues.⁵⁹ With new policies and goals in mind, the Commission recognized that it needed to respond to the Parliament's demands for data protections and began drafting a proposal that would protect European citizens and allow Internet services to prosper.⁶⁰

53. See Andrew Charlesworth, *Clash of the Data Titans? US and EU Data Privacy Regulation*, 6 EUR. PUB. L. 253, 254 (2000).

54. See Siry, *supra* note 37, at 318.

55. Established in 1951, the European Commission has experienced numerous changes in authority and structure. The modern European Commission represents the interests of the entire European Union, not the individual interests of Member States. Some responsibilities of the European Commission include: proposing legislation, enforcing European law, setting objectives and priorities for action, managing and implementing policies and budgets, and negotiating on behalf of the European Union with other countries. *About the European Commission: Organizational Structure*, EUR. COMMISSION (Oct. 27, 2015), http://ec.europa.eu/about/index_en.htm.

56. See Simitis, *supra* note 52, at 446.

57. *Id.*

58. The European Union was established by the signing of a treaty formally known as the "Treaty of Maastricht on European Union." *The Maastricht Treaty of 7 February 1992*, CVCE, <http://www.cvce.eu/en/education/unit-content/-/unit/d5906df5-4f83-4603-85f7-0cab24b9fe1/e038b310-f139-407f-9bfb-a1b2e901fb56> (last visited Mar. 15, 2017). The treaty introduced the concept of European citizenship, reinforced the powers of the European Parliament, and launched the economic and monetary union. Treaty of Maastricht on European Union art. B, Feb. 7, 1992, 1992 O.J. (C 191) [hereinafter Treaty of Maastricht].

59. Notably, the Commission began to protect the fundamental rights of European citizens. Marc Rotenberg & David Jacobs, *Updating the Law of Information Privacy: The New Framework of the European Union*, 36 HARV. J. L. & PUB. POL'Y 605, 616 (2013).

60. *Id.*

On October 24, 1995, the European Union enacted Directive 95/46/EC,⁶¹ also known as the “European Union Data Protection Directive” (“Directive”).⁶² By protecting the processing, use, or exchange of personal data collected for or about EU citizens,⁶³ the Directive is credited as a leading world model for privacy protection.⁶⁴ The overall objective of the Directive is to safeguard the “fundamental rights and freedoms of natural persons . . . while removing obstacles to the free flow of such data.”⁶⁵

Another important justification of the Directive is standardizing the various means of data protection already present in the European Union.⁶⁶ In May 2014, the ECJ aimed to modernize and further this purpose in *Google Spain v. AEPD and Mario Costeja González*, where the court reasoned that Article 12 of the Directive lays the foundation for a right to be forgotten by allowing an individual to request deletion of unnecessary personal data.⁶⁷

C. Google Spain v. AEPD and Mario Costeja González

In 1998, Spanish citizen and lawyer, Mario Costeja González, faced financial difficulties.⁶⁸ González’s property was auctioned

61. In the European Union, a directive is legislation requiring each Member State to transpose and adopt the recommendation given into its own national legislation within a set time period. Each Member State is able to determine the form and means of implementing a directive. Treaty of Maastricht, *supra* note 58, art. 288.

62. See Directive 95/46, *supra* note 35.

63. See Margaret Rouse, *EU Data Protection Directive (Directive 95/46/EC)*, TECHTARGET (Jan. 2008), <http://searchsecurity.techtarget.co.uk/definition/EU-Data-Protection-Directive>.

64. See Lilian Mitrou & Maria Karyda, Fifth International Conference of Information Law and Ethics EU’s Data Protection Reform and The Right to be Forgotten- A Legal Response to a Technological Challenge? 3 (June 29–30, 2012).

65. Court of Justice of the European Union Press Release No 70/14, Judgment in Case C-131/12 Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos (AEPD), Mario Costeja Gonzalez (May 13, 2014).

66. See DOROTHEE HEISENBERG, NEGOTIATING PRIVACY: THE EUROPEAN UNION, THE UNITED STATES, AND PERSONAL DATA PROTECTION 27 (Renée Marlin-Bennett ed., 2005).

67. Case C-131/12, Google Spain SL v. Agencia Española de Protección de Datos (AEPD), 2014 E.C.R. 317, ¶ 12; see also Directive 95/46, *supra* note 35, art. 12.

68. See Dave Lee, *What is the ‘Right to be Forgotten?’*, BBC NEWS (May 13, 2014), <http://www.bbc.com/news/technology-27394751>. The specific “financial

off, and the details of his situation were plastered in print and online⁶⁹ over a Spanish news outlet, *La Vanguardia*.⁷⁰ Over twelve years later, however, news about the auction remained among the results of a Google search of his name,⁷¹ despite resolving his financial troubles in the interim. Worried about how the information would impact his reputation and credibility as a lawyer,⁷² González requested that *La Vanguardia* remove or alter the pages reporting the auction so that the information relating to his financial difficulties would no longer appear.⁷³ González also requested that Google remove or conceal the same information from its search results.⁷⁴ The Spanish Data Protection Agency, the Agencia Española de Protección de Datos (“AEPD”), denied González’s claim against *La Vanguardia* but granted his claim against Google.⁷⁵

Subsequently, González brought suit against Google, and on May 13, 2014, the ECJ decided González’s case, setting a major precedent known as the “right to be forgotten.”⁷⁶ Reasoning that data protection rules needed to be updated to fit today’s “modern computing world,”⁷⁷ the court determined that an individual has the right to control their online reputation by requesting search

difficulties” that González endured were social security debts. *Google Spain SL*, 2014 E.C.R. ¶ 18.

69. *Google Spain SL*, 2014 E.C.R. ¶ 18.

70. *La Vanguardia* has the fourth-highest circulation rate among Spanish newspapers. *The Daily Press*, SÍ, SPAIN, http://contenidos.educarex.es/mci/2004/30/WebQuest/faseprevia_archivos/www.sispain.org/english/media/press.html (last visited Jan. 3, 2016).

71. See Jeffrey Toobin, *The Solace of Oblivion*, NEW YORKER (Sept. 29, 2014), <http://www.newyorker.com/magazine/2014/09/29/solace-oblivion>.

72. González claimed that he was never worried about his online image and was only worried about the impact of this information on his career. Danny Hakim, *Right to Be Forgotten? Not that Easy*, N.Y. TIMES, May 30, 2014, at B1. González said that he has “always been in favor of freedom of expression.” *Id.*

73. See Case C-131/12, *Google Spain SL v. Agencia Española de Protección de Datos (AEPD)*, 2014 E.C.R. 317, ¶ 19.

74. See *id.* ¶ 20.

75. See Toobin, *supra* note 71. The AEPD rejected the claim against *La Vanguardia* because the newspaper lawfully published the information about González. The AEPD upheld the claim against Google because search engines are intermediary data processors subject to the AEPD’s regulations. *Google Spain SL*, 2014 E.C.R. ¶¶ 16–17.

76. Lee, *supra* note 68.

77. Rory Cellan-Jones, *EU Court Backs ‘Right to be Forgotten’ in Google Case*, BBC NEWS (May 13, 2014), <http://www.bbc.com/news/world-europe-27388289>.

engines to delist links displayed among search results of their name.⁷⁸ The ECJ determined, however, that requests to delist links made to Google or other search engines may not be automatically granted; only links 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 elapsed, may be removed from search results of a person’s name.⁷⁹

Unfortunately for González, establishing the right to be forgotten resulted in an unlucky situation: the information about González’s financial troubles have now become relevant to the public interest because it is intertwined in the facts of his precedent-setting case.⁸⁰ After the case, González requested that any stories about his past that were published after the court’s decision be delisted from Google’s search results, but Google refused.⁸¹ The AEPD affirmed Google’s decision, reasoning that the information is pertinent to the general public.⁸² Ironically, González’s financial troubles will not be forgotten anytime soon.

The ultimate consequences and limitations of the right to be forgotten, however, are only beginning to be understood, as demonstrated by the CNIL’s insistence that search results be delisted from the U.S.-based domain, Google.com, where the

78. The information that is “forgotten” still remains online; essentially, the right to be forgotten is the right to be delisted from search engine results. *Fact-sheet on the “Right to be Forgotten” Ruling*, *supra* note 9.

79. *Id.* Only private individuals have the right to be forgotten, whereas figures of public importance do not. Specifically, “the role played by the data subject in public life” is considered when determining whether an individual has the right to be forgotten. Case C-131/12, *Google Spain SL v. Agencia Española de Protección de Datos (AEPD)*, 2014 E.C.R. 317, ¶ 81. In light of this component, Google is hesitant to remove links about “politicians and other prominent people.” Toobin, *supra* note 71.

80. See Mike Masnick, *Guy Who Won Original Right to be Forgotten Case Loses His Attempt to Have New Story About His Past Forgotten*, TECHDIRT (Oct. 15, 2015, 6:18 AM), <https://www.techdirt.com/articles/20151010/07261132493/guy-who-won-original-right-to-be-forgotten-case-loses-his-attempt-to-have-comments-about-his-win-forgotten.shtml>.

81. See Miquel Peguera, *No More Right-to-be-Forgotten For Mr. Costeja, Says Spanish Data Protection Authority*, STAN. L. SCH. (Oct. 3, 2015, 8:24 AM), <https://cyberlaw.stanford.edu/blog/2015/10/no-more-right-be-forgotten-mr-costeja-says-spanish-data-protection-authority>.

82. See *id.*

right to be forgotten does not exist in the United States.⁸³ Due to an unrecognition of this right in the United States, Google faces challenges in complying with the CNIL's demands.⁸⁴ It is now up to Google to draw the difficult line between an individual's right to be forgotten and the public's right to know.⁸⁵

II: THE U.S. NEED FOR FREE SPEECH AND FREE INTERNET

Thanks to the Internet, what happens in Vegas, no longer stays in Vegas.⁸⁶ Some say that freedom of Internet access in the world today is considered to be as important as the U.S. Constitutional right to freedom of speech,⁸⁷ but the U.S. Constitution does not provide a clear answer to countless questions invoking the application of the document to innovative technology.⁸⁸ At the time of the U.S. Constitution's framing, an "unreasonable search" under the Fourth Amendment involved the government's physical intrusion into the most private of places, a person's home,⁸⁹ to examine personal belongings, or "effects," to

83. See Gibbs, *supra* note 14; Mike Godwin, *France's Privacy Regulators Want to Dictate What You (Yes, You!) Can Find Online*, SLATE (Sept. 22, 2015, 2:07 PM), http://www.slate.com/blogs/future_tense/2015/09/22/right_to_be_forgotten_france_s_privacy_regulators_want_to_dictate_what_you.html.

84. In a post on Google's Europe Blog, the company says that the CNIL's actions are creating a "race to the bottom" that will result in the Internet being "as free as the world's least free place." Peter Fleischer, *Implementing a European, Not Global, Right to be Forgotten*, GOOGLE EUR. BLOG (July 30, 2015), <http://googlepolicyeurope.blogspot.com/2015/07/implementing-european-not-global-right.html>.

85. Alistair Barr & Rolfe Winkler, *Google Offers 'Right to Be Forgotten' Form in Europe*, WALL ST. J. (May 30, 2014, 1:12 AM), <https://www.wsj.com/articles/google-committee-of-experts-to-deal-with-right-to-be-forgotten-1401426748?tesla=y&mg=reno64-wsj&url=http://online.wsj.com/article/SB10001424052702303633604579593151552354742.html>.

86. See Jessica Ronay, *Adults Post the Darndest Things: [CTRL + SHIFT] Freedom of Speech to [ESC] Our Past*, 46 U. TOL. L. REV. 73, 93 (2014) ("Today . . . what happened in Vegas is posted on Facebook, Twitter, Instagram, Four-square, and Google.").

87. See Mark Penn, *Constitutional Amendment on Internet Freedom*, HUFFINGTON POST (Mar. 2, 2011, 5:08 PM), http://www.huffingtonpost.com/mark-penn/internet-freedom-amendment_b_830524.html.

88. See Jeffrey Rosen, *Interpreting The Constitution In The Digital Era*, NPR (Nov. 30, 2011, 12:13 PM), <http://www.npr.org/2011/11/30/142714568/interpreting-the-constitution-in-the-digital-era>.

89. See *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) ("[T]he most private of places . . . [is] the home.").

identify a critic of King George III.⁹⁰ In modern times, a search may be unreasonable if it contains unwanted results after typing an individual's name into Google's textbox.⁹¹

After briefly examining the Internet's evolution from a means for an emergency, confidential communication into a network that is used daily by the average citizen to accomplish everything from sharing nonsensical banter to finding a spouse,⁹² this Part will also explain the progression of U.S. views on free speech and privacy, with an explanation on how modern technology has caused these values to adapt and evolve.

A. The Evolution of the Internet as a Crucial Form of Communication

In 1962, J.C.R. Licklider, a scientist from the United States Department of Defense Advanced Research Projects Agency

90. See Rosen, *supra* note 88. The Fourth Amendment to the U.S. Constitution grants the right to be secure in one's "person, houses, papers, and effects, against unreasonable searches and seizures." U.S. CONST. amend. IV. The framers of the Fourth Amendment acted in response to the British rule that colonials faced, specifically, the "general warrant" the crown granted to officials to search colonial homes for any reason. Rand Paul & Chris Coons, *The Founding Fathers Would Have Protected Your Smart Phone*, POLITICO (May 27, 2014), <http://www.politico.com/magazine/story/2014/05/a-tech-challenge-for-fourth-amendment-application-107129>.

91. See Rosen, *supra* note 39, at 1527. When looking to the language and purpose of the Fourth Amendment, U.S. Senators Rand Paul and Chris Coons argue that the smartphone and the computer are the modern day "papers and effects." Paul & Coons, *supra* note 90. Jim Harper, a senior fellow at the Cato Institute, contends that warrantless searches of internet browsing history "would throw open too-wide a door onto suspects' personal and private information." Brief for the Cato Institute as Amicus Curiae Supporting Respondent, *United States v. Wurie*, 728 F.3d 1 (1st Cir. 2013) (No. 13-212), <https://object.cato.org/sites/cato.org/files/pubs/pdf/wurie-filed-brief.pdf>.

92. More than one-third of recent marriages in the United States began online. Sharon Jayson, *More than a Third of New Marriages Start Online*, USA TODAY (June 3, 2013, 3:16 PM), <http://www.usatoday.com/story/news/nation/2013/06/03/online-dating-marriage/2377961/>.

(DARPA),⁹³ proposed a solution to the Cold War threat of a Soviet attack on the U.S. telephone system.⁹⁴ Licklider yearned to create a “galactic network” of computers, enabling government officials to communicate with one another if the Soviets destroyed the telephone system.⁹⁵ By the end of 1969, four computers were connected to the so-called “ARPAnet.”⁹⁶ This was the earliest form of the Internet, but it was not until the 1980s that the Internet transformed into a worldwide network.⁹⁷ In the 1990s, the Internet finally began to take the form recognized today.⁹⁸

The modern Internet reaches far beyond any other medium; it can spread data “instantly and globally.”⁹⁹ Online information is more than just pixels; it is information that shapes how life is perceived,¹⁰⁰ and its growth continues to create a “new nervous

93. ARPA was the former name of DARPA, the U.S. government agency responsible for developing new military technology. *Advanced Research Projects Agency (ARPA)*, TECHOPEDIA, <https://www.techopedia.com/definition/5899/advanced-research-projects-agency-arpa> (last visited Jan. 14, 2016).

94. In late 1957, after the Soviet Union launched “Sputnik,” the world’s first manmade satellite, into orbit, U.S. scientists and military experts were concerned about the potential of a Soviet attack on the U.S. telephone system. Experts feared that one missile could destroy the entire network that made long-distance communication a reality. *The Invention of the Internet*, HIST. (2010), <http://www.history.com/topics/inventions/invention-of-the-internet>.

95. *Id.*

96. See *A Browse Through the History of the Internet*, HIST. COOPERATIVE (Feb. 17, 2014), <http://historycooperative.org/a-browse-through-the-history-of-the-internet/>.

97. In the 1980s, researchers and scientists began to use the Internet to share data between computers worldwide. *The Invention of the Internet*, *supra* note 94.

98. In 1991, computer programmers and colleagues, Tim Berners-Lee and Robert Caillau, introduced the World Wide Web: an Internet that was a “web” of information and the foundation for the modern Internet. Dawn Levy, *Tech Pioneer Recalls How He Brought the World Wide Web, Now 10, to America*, STAN. U. (Dec. 12, 2001), <http://news.stanford.edu/news/2001/december12/webturns10-1212.html>. In 1992, students and researchers at the University of Illinois created the first “web browser.” *The Invention of the Internet*, *supra* note 94.

99. Jon L. Mills, *The New Media in the New World: Are They Behaving Badly or Doing Their Job?*, in *FREE SPEECH IN AN INTERNET ERA* 29, 44 (Clive Walker & Russell L. Weaver eds., 2013). The Internet has been referred to as “the epitome of freedom.” Angela E. Wu, *Spinning a Tighter Web: The First Amendment and Internet Regulation*, 17 N. ILL. U. L. REV. 263, 304 (1997).

100. See Xinlan Emily Hu, *Formulating and Implementing a Right to Be Forgotten in the United States: American Approaches to a Law of International*

system for our planet.”¹⁰¹ The Internet is a venue where, every two days, people across the globe are able to generate the same amount of information as humanity created from the dawn of civilization until the year 2003.¹⁰² In light of this staggering statistic, it is unsurprising that conflicts result from substantial Internet use. Pertinently, the right to be forgotten from Google.com and other search engines creates a conflict between U.S. Constitutional rights to free speech and privacy.¹⁰³

B. The Conflicting Rights of the U.S. Constitution

In Europe, the rights to free speech and privacy are both guaranteed under the UDHR¹⁰⁴ and do not conflict with each other. In the United States, however, free expression and personal privacy arguably act as checks on one another.¹⁰⁵ Typically, in the United States, the right to free speech outweighs the right to privacy,¹⁰⁶ as free speech is considered a fundamental value of liberty¹⁰⁷ found in the First Amendment, while the word “privacy” does not ever appear in the U.S. Constitution.¹⁰⁸ Thus, in regards to the right to be forgotten, the ultimate challenge facing the United States is to determine whether information privacy

Origin 8 (Jan. 3, 2015) (unpublished manuscript), https://get-inspired.mit.edu/sites/default/files/documents/ST118_Report.pdf.

101. Hillary Rodham Clinton, Speech on Internet Freedom (Jan. 21, 2010), <http://www.cfr.org/internet-policy/clintons-speech-internet-freedom-january-2010/p21253>. Digital connections over the internet cause individuals to be “lonely but fearful of intimacy,” as online relationships create an impression of companionship without the difficulties and requirements of face-to-face friendship. Matthew Ingram, *Is Modern Technology Creating a Culture of Distraction?*, GIGAOM (June 23, 2012, 9:49 AM), <https://gigaom.com/2012/06/23/is-modern-technology-creating-a-culture-of-distraction/>.

102. MG Siegler, *Eric Schmidt: Every 2 Days We Create as Much Information as We Did Up to 2003*, TECHCRUNCH (Aug. 4, 2010), <http://techcrunch.com/2010/08/04/schmidt-data/>.

103. Sarah Halzack & Craig Timberg, *Right to be Forgotten vs. Free Speech*, WASH. POST (May 14, 2014), https://www.washingtonpost.com/business/technology/right-to-be-forgotten-vs-free-speech/2014/05/14/53c9154c-db9d-11e3-bda1-9b46b2066796_story.html.

104. See UDHR, *supra* note 45, arts. 12, 19.

105. See Paul M. Schwartz, *Free Speech vs. Information Privacy: Eugene Volokh’s First Amendment Jurisprudence*, 52 STAN. L. REV. 1559, 1559 (2000).

106. See Walid Al-Saqaf, *Privacy vs. Free Speech? Questioning the Conflict*, GLOBAL VOICES (Feb. 11, 2014, 1:24 AM), <https://advoc.global-voices.org/2014/02/11/privacy-vs-free-speech-questioning-the-conflict/>.

107. See Whitman, *supra* note 41 at 1171.

108. See Liptak, *supra* note 40.

is an integral element of free speech.¹⁰⁹ If so, the resulting development would be a First Amendment emphasizing the right of individuals to communicate personal information about themselves and others, which is currently the clearest conflict between free speech and information privacy.¹¹⁰ This is also the main underlying conflict of a U.S. right to be forgotten.

1. The Right to Free Speech

The First Amendment of the U.S. Constitution grants all citizens the right to express their thoughts and opinions within a free society,¹¹¹ and this right is “fiercely defended” in the U.S. legal system.¹¹² United States citizens strongly value freedom of speech because, without such a guarantee, democracy fails,¹¹³ as the political process is at the core of First Amendment freedoms,¹¹⁴ and broad freedom of expression is vital to individual liberty.¹¹⁵

Though not every type of speech is protected under the First Amendment,¹¹⁶ speech that appears online is entitled to the

109. See Schwartz, *supra* note 105, at 1572.

110. See *id.*

111. See U.S. CONST. amend. I. Along with the protection of freedom of speech, the First Amendment also protects the freedoms of religion, press, assembly, and petition. *First Amendment Rights*, AM. GOV'T, <http://www.ushistory.org/gov/10b.asp> (last visited Jan. 6, 2016).

112. Franz Werro, *The Right to Inform v. the Right to be Forgotten: A Transatlantic Clash*, in *LIABILITY IN THE THIRD MILLENNIUM* 285, 291 (Aurelia Colombi Ciacchi et al. eds., 2009).

113. See Kenneth D. Ward, *Free Speech and the Development of Liberal Virtues: An Examination of the Controversies Involving Flag-Burning and Hate Speech*, 52 U. MIAMI L. REV. 733, 739 (1998) (“Few would deny that democracy fails without some guarantees of free speech.”).

114. See *Williams v. Rhodes*, 393 U.S. 23, 32 (1968) (“Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms.”).

115. *Frequently Asked Questions – Speech*, NEWSEUM INST., <http://www.firstamendmentcenter.org/faq/frequently-asked-questions-speech> (last visited Jan. 6, 2016).

116. Unprotected categories of speech include obscenity, child pornography, true threats, fighting words, incitement to imminent lawless action, criminal solicitation, and defamation. *Id.*

same level of protection as speech that appears in print.¹¹⁷ Internet speech is protected because government interference with such speech is more likely to hinder, rather than encourage, the free exchange of ideas.¹¹⁸ Although the framers did not forecast modern technology,¹¹⁹ it does not follow that these forms of speech have any less First Amendment protection than the forms of communication available at the time of the adoption of the U.S. Bill of Rights.¹²⁰ Modern technology presents opportunities for the instant spread of information, but it equally presents opportunities for a more invasive government.¹²¹ In order to stay in touch with its underlying purposes in light of these new challenges, the right to free speech must continue to adapt to these technological changes.¹²²

2. The Right to Privacy

Just as the right to free speech has adapted to modern technology, so has the right to privacy.¹²³ The first discussion of a

117. See *Citizens United v. FEC*, 558 U.S. 310, 352 (201) (“With the advent of the Internet and the decline of print and broadcast media . . . the line between [individuals] who wish to comment on political and social issues becomes far more blurred.”).

118. See *Reno v. ACLU*, 521 U.S. 844, 885 (1997) (“[G]overnmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it.”); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) (discussing the need to “maintain the robust nature of Internet communication, and, accordingly, to keep government interference [with Internet speech] to a minimum.”).

119. See *Bartnicki v. Vopper*, 532 U.S. 514, 518 (2001) (“The Framers of the First Amendment surely did not foresee the advances in science that produced [modern technology.]”).

120. *Citizens United*, 558 U.S. at 353–54 (“The Framers may have been unaware of certain types of speakers or forms of communication, but that does not mean that those speakers and media are entitled to less First Amendment protection than those types of speakers and media that provided the means of communicating political ideas when the Bill of Rights was adopted.”).

121. See Michael P. Seng, *Freedom of Information, Government Secrets and the Challenge of New Technology*, J. MARSHALL L. SCH. (Feb. 28, 2014), <http://lawreview.jmls.edu/freedom-of-information-government-secrets-and-the-challenge-of-new-technology/>.

122. See *Free Speech*, ELECTRONIC FRONTIER FOUND., <https://www EFF.ORG/issues/free-speech> (last visited Mar. 19, 2017).

123. Brian McNicoll, *Privacy Law Adapted to a New Technological World in Age of Cloud Computing*, HUM. EVENTS (Oct. 22, 2015, 8:57 AM), <http://humanevents.com/2015/10/22/privacy-law-adapted-to-a-new-technological->

U.S. right to privacy occurred in 1890 when the *Harvard Law Review* published *The Right to Privacy*,¹²⁴ written by scholars Samuel Warren and Louis Brandeis.¹²⁵ The article adamantly called for “the right to be let alone.”¹²⁶ Warren and Brandeis discussed the importance of members of society meeting the demands of changing technology and argued for the U.S. Constitution to adapt to such advances in order to protect citizens’ privacy.¹²⁷ *The Right to Privacy* is regarded as one of the most influential legal essays in the world, and was even referenced in the first sentence of the *Google Spain* opinion.¹²⁸

In 1960, legal scholar William L. Prosser¹²⁹ furthered Warren and Brandeis’ discussion by dividing violations of the right to privacy into four individual torts.¹³⁰ Prosser’s four torts included the following: (1) an intrusion upon a person’s seclusion or solitude, (2) public disclosure of embarrassing private information about a person, (3) publicly placing a person in a false light, and (4) appropriating a person’s name or likeness for one’s own advantage.¹³¹ Many courts eagerly adopted Prosser’s classification, which serves as the foundation for the subject of privacy in the

world-in-age-of-cloud-computing/ (“[N]ew understandings of . . . privacy . . . have arisen.”).

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

125. Brandeis and Warren graduated from Harvard Law School in 1877, and were ranked first and second in their class, respectively. See DOUGLAS M. FRALEIGH & JOSEPH S. TUMAN, FREEDOM OF EXPRESSION IN THE MARKETPLACE OF IDEAS 319 (Todd R. Armstrong et al. eds., 2011). In 1916, Louis Brandeis was appointed as an Associate Justice of the U.S. Supreme Court. *History of the Federal Judiciary*, FED. JUD. CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=241&cid=999&ctype=na&instate=na> (last visited Jan. 18, 2016).

126. See Warren & Brandeis, *supra* note 124.

127. See *id.*

128. See Case C-131/12, *Google Spain SL v. Agencia Española de Protección de Datos (AEPD)*, 2014 E.C.R. 317, ¶ 1; Susan E. Gallagher, *The Right to Privacy in Historical Perspective*, READING NEW ENG., <http://readingnewengland.org/app/books/righttoprivacy/> (last visited Nov. 9, 2015).

129. William L. Prosser is a renowned tort law scholar. There are few individuals in the history of U.S. legal education who have been “so clearly identified with [their] subject as the name of William L. Prosser is with the law of torts.” Craig Joyce, *Keepers of the Flame: Prosser and Keeton on the Law of Torts (Fifth Edition) and the Prosser Legacy*, 39 VAND. L. REV. 851, 852 (1986).

130. See *Privacy and Business*, PRIVACILLA, <http://www.privacilla.org/business/privacytorts.html> (last updated Dec. 19, 2000).

131. See generally William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 407 (1960).

Second Restatement of Torts.¹³² Five years after the publication of Prosser's article *Privacy*, the U.S. Supreme Court, in *Griswold v. Connecticut*, established the right to privacy as a fundamental U.S. Constitutional right for the first time in the nation's history.¹³³

Although *Griswold* established the right to privacy as fundamental, this right is not absolute in the United States.¹³⁴ For example, data privacy is regulated at the federal level to some extent, but these "fragmented and industry-specific" laws¹³⁵ protect only the most sensitive types of data.¹³⁶ By comparison, the U.S. Constitution directly prevents Congress from passing laws that abridge the freedom of speech, suggesting that the U.S. values speech over privacy.¹³⁷ After considering the expansive history of the U.S. right to free speech against the newer, and seemingly lesser, right to privacy, establishing a right to be forgotten in the United States presents a delicate task that balances two incredibly important, but not perfectly equal, rights.

132. See Neil M. Richards & Daniel J. Solove, *Prosser's Privacy Law: A Mixed Legacy*, 98 CAL. L. REV. 1887, 1890 (2010). Prosser was the original draftsman for the Second Restatement of Torts. The Second Restatement of Torts is a treatise issued by the American Law Institute summarizing the general principles of U.S. tort law. See *Torts*, A.L.I., <https://www.ali.org/publications/show/torts/> (last visited Nov. 4, 2015).

133. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965). Though a six-to-three majority held that the right was fundamental, the majority could not agree as to where the right to privacy was guaranteed in the constitution. Justice Douglas argued in the majority opinion that the right to privacy is "formed by emanations from those guarantees that help give them life and substance," Justice Goldberg argued in his concurring opinion that the Ninth Amendment affords such protection, and Justices Goldberg, Harlan, and White argued that the right to privacy is protected by the Due Process Clause of the Fourteenth Amendment. See *id.* at 484–502. These U.S. Supreme Court justices are not alone: a comprehensive definition of privacy does not exist among the legal profession. See HEISENBERG, *supra* note 66, at 13.

134. Comparatively, the right to privacy is an absolute right in the EU. See ALAN F. WESTIN, *PRIVACY AND FREEDOM* 25 (1967).

135. McKay Cunningham, *Privacy in the Age of the Hacker: Balancing Global Privacy and Data Security Law*, 44 GEO. WASH. INT'L L. REV. 643, 664 (2012).

136. Such data includes: financial, insurance, and medical information, information about children and students, credit and consumer reports, and background investigations. See Alan Charles Raul et al., *United States*, in *THE PRIVACY, DATA PROTECTION AND CYBERSECURITY LAW REVIEW* 268, 272 (Alan Charles Raul ed., 2014).

137. See U.S. CONST. amend. I.

III. WHAT MUST BE FORGOTTEN: UNWORKABLE PROPOSALS

The conflict between Google and the CNIL cannot simply be ignored because the CNIL is forcing Google to follow European law and delist pages in the United States, where the right to be forgotten does not exist, or pay monetary sanctions that would increase the company's operation costs by 2 to 5 percent.¹³⁸ As a result, various scholars have proposed different ways of limiting the overly broad right to be forgotten so that it may be applicable in the United States.¹³⁹ This Part addresses four proposals that aim to narrow the scope of the current right to be forgotten: (1) giving online data an expiration date, (2) using the influence of technology companies to lobby lawmakers, (3) temporarily removing disputed links, and (4) granting a quasi right to be forgotten for minors. These solutions are discussed in order to raise awareness of their weaknesses and to prevent their invocation.

One proposed compromise is giving online data an expiration date, in which a user can determine how long their data would be available.¹⁴⁰ Once a set date passes, the data would be removed.¹⁴¹ Data expiration dates, however, would be undermined by web-archival systems that collect and preserve data for future use.¹⁴² Web-archiving services preserve information on the Internet and make it available at a later date, even after the information has been changed.¹⁴³ Dozens of web-archival systems exist around the globe,¹⁴⁴ some of which archive hundreds of billions of webpages.¹⁴⁵ Because of web archiving, information

138. Elizabeth Nolan Brown, *French Win Right to Censor Internet All Over the World*, HIT & RUN BLOG (Sept. 21, 2015, 3:12 PM), <https://reason.com/blog/2015/09/21/france-wins-right-to-censor-internet-all>.

139. See Dawinder Sidhu, *We Don't Need a "Right to Be Forgotten." We Need a Right to Evolve*, NEW REPUBLIC (Nov. 7, 2014), <https://newrepublic.com/article/120181/america-shouldnt-even-need-right-be-forgotten>.

140. See Austin Allen, *Should Information Have an Expiration Date?*, BIG THINK (Apr. 22, 2010), <http://bigthink.com/videos/should-information-have-an-expiration-date-2>.

141. See *id.*

142. See *Why Archive the Web?*, INT'L INTERNET PRESERVATION CONSORTIUM, <http://www.netpreserve.org/web-archiving/overview> (last visited Nov. 14, 2015).

143. See *id.*

144. See Jinfang Niu, *An Overview of Web Archiving*, D-LIB MAG. (Mar.–Apr. 2012), <http://www.dlib.org/dlib/march12/niu/03niu1.html>.

145. See, e.g., *Internet Archive: Wayback Machine*, INTERNET ARCHIVE, <https://archive.org/web/> (last visited Feb. 16, 2017).

would still be retrievable even if it perished from the original link. Further, it is unlikely that archive systems would be banned because these tools frequently produce important evidence in pending legal actions.¹⁴⁶ This proposal is thus impracticable.

Another proposed solution is using technology companies as a means to influence the protection of online freedom.¹⁴⁷ Alessandro Mantelero, a Privacy Law professor at the University of Turin,¹⁴⁸ argues that major Internet technology companies should determine and implement a solution themselves.¹⁴⁹ Mantelero contends that such companies have the ability to influence the protection of online freedoms because these companies develop new products and the standards by which an individual uses such advancements.¹⁵⁰ Google and other technology companies, however, have been unsuccessful in appealing decisions made by data protection agencies and other legal entities, meaning that these players often do not have the final say in regards to regulating the Internet.¹⁵¹

146. See, e.g., *Getty Images (US) Inc. v. Advernet, Inc.*, 797 F. Supp. 2d 399 (S.D.N.Y. 2011) (invoking web-archival systems to obtain evidence to demonstrate a copyright violation); *Sam's Riverside, Inc. v. Intercon Solutions, Inc.*, 790 F. Supp. 2d 965 (S.D. Iowa 2011) (invoking web-archival systems to obtain evidence to support a false advertising claim).

147. Molly Land, *Toward an International Law of the Internet*, 54 HARV. INT'L L. J. 393, 395–96 (2013).

148. Located in Turin, Italy, the University of Turin is one of the oldest and most prestigious research institutions in all of Europe. See *Unito at a Glance*, L'UNIVERSITÀ DI TORINO ONLINE, <https://en.unito.it/about-unito/unito-glance> (last visited Jan. 6, 2016).

149. Alessandro Mantelero, *Finding a Solution to the Google's Dilemma on the "Right to be Forgotten", After the "Political" ECJ Decision*, ICT L. & DATA PROTECTION (Nov. 18, 2014), <https://ictlawanddataprotection.wordpress.com/2014/11/18/finding-a-solution-to-the-googles-dilemma-on-the-right-to-be-forgotten-after-the-political-ecj-decision/>.

150. Land, *supra* note 147, at 395–96.

151. See, e.g., Trisha Thadani, *Facebook Loses Appeal in Dispute Over Search Warrants for User Data*, USA TODAY, <https://www.usatoday.com/story/tech/2015/07/22/facebook-user-data/30510235/> (last updated July 22, 2015, 4:46 PM); Kate Tummarello, *We Won't Let You Forget It: Why We Oppose French Attempts to Export the Right To Be Forgotten Worldwide*, ELECTRONIC FRONTIER FOUND. (Nov. 29, 2016), <https://www.eff.org/deeplinks/2016/11/we-wont-let-you-forget-it-why-we-oppose-french-attempts-export-right-be-forgotten>.

Mantelero also proposes temporarily removing disputed links, where the subject of the link could request search engines to delete a result, and the link removal would be maintained for a set period of time.¹⁵² The link would then be reactivated after the time passes.¹⁵³ Determining standards for this system is illogical because there is not adequate justification for any amount of time suggested as the cut-off period. While more harmful links could be deleted for longer than less harmful links, it would be difficult to determine a consistent standard for removal time, as even identical information may be substantially more harmful to one person than to another.¹⁵⁴ Web-archival systems would also undermine this proposal¹⁵⁵ because, through these systems, a link would resurface, and no definitive change would be made. The lack of a permanent change thus makes this solution inadequate as well.

A final solution worth addressing exists in the form of state law within the United States. In January 2015, California enacted legislation akin to the right to be forgotten for residents under the age of eighteen.¹⁵⁶ Known as the “eraser law,”¹⁵⁷ the law was established with the intent of giving adolescents a “fresh start”¹⁵⁸ and allows minors to request websites to delete personally posted content.¹⁵⁹ As the United States is apprehensive of the sociological implications of advancing technology on

152. See Mantelero, *supra* note 149.

153. See *id.*

154. For example, a photo of an individual legally consuming alcohol may not be substantially important to many households, but some cultures and religions, such as the Mormon faith, would shun and avoid an individual after seeing such an image. *How Do I Introduce the Concept of Me Drinking Casually at Family Gatherings to my Very Religious Family*, REDDIT (Dec. 15, 2014), https://www.reddit.com/r/beer/comments/2pb879/how_do_i_introduce_the_concept_of_me_drinking/.

155. See discussion *supra* pp. 864–65.

156. See Boris Segalis & Susan Ross, *California Enacts “Right to be Forgotten” for Minors*, NORTON ROSE FULBRIGHT (Jan. 14, 2015), <http://www.dataprotectionreport.com/2015/01/california-enacts-right-to-be-forgotten-for-minors/>.

157. The term “eraser law” is widely used within the media. See David Yangli Wang, *Can We Really Have a Right to be Forgotten?*, B.C. L. SCH. (Mar. 25, 2015), <http://bciprf.org/?p=1678>.

158. Richard A. Chapo, *The New California Minor Eraser Law*, SOC. INTERNET LAW. (Jan. 13, 2015), <http://www.socalinternetlawyer.com/california-minor-eraser-law/>.

159. See S.B. 568, 2013 Leg., 2013–14 Sess. (Cal. 2013).

children,¹⁶⁰ a right to be forgotten for minors could be a good starting point.¹⁶¹ Nevertheless, while the California law is “well-intentioned and compassionate,”¹⁶² it is ultimately incomplete because it does not address content posted by other individuals,¹⁶³ nor does it speak to members of the population over the age of eighteen.¹⁶⁴

IV. WHAT MUST BE REMEMBERED: A REALISTIC AND REFLECTIVE SOLUTION

Since the CNIL is applying European law in the United States, it is only a matter of time before the United States is forced to react to the agency’s extraterritorial reach.¹⁶⁵ This Part will discuss two key actions that must be taken. First, the European Union and the United States must educate their citizens about Internet responsibility in order to minimize the need to invoke the right to be forgotten. Second, the European Union and the United States must agree to a well-defined bilateral treaty. Such

160. See, e.g., *Sable Comm. of Cal. v. FCC*, 492 U.S. 115, 119 (1989) (“[T]he government unquestionably has a legitimate interest in . . . protect[ing] children from expos[ure] to [sexually explicit phone messages.]”); *FCC v. Pacifica Found.*, 438 U.S. 726, 750 (1978) (“The ease with which children may obtain access to broadcast material . . . justifi[es] special treatment of indecent broadcasting.”); see also Dawn L. Johnson, *It’s 1996: Do You Know Where Your Cyberkids Are? Captive Audiences and Content Regulation on the Internet*, 15 J. MARSHALL J. COMPUTER & INFO. L. 51, 51 (1996) (“[N]ovel communications technology has fostered public apprehension of the harmful effects the medium’s content may have on children.”).

161. See Michelle Silverthorn, *Do Americans Want A Right To Be Forgotten?*, 2CIVILITY (Oct. 16, 2014), <http://www.2civility.org/americans-want-right-for-gotten/>.

162. Katy Waldman, *California’s Internet Eraser Law: Nice Idea, but It Won’t Work*, SLATE (Sept. 25, 2013, 3:07 PM), http://www.slate.com/blogs/xx_factor/2013/09/25/sb_568_california_digital_eraser_law_for_minors_is_unlikely_to_work.html.

163. Content posted about a subject by another individual is the type of content that is principally taken down from European Google domains via right-to-be-forgotten requests. See *European Privacy Requests for Search Removals*, GOOGLE, <http://www.google.com/transparencyreport/removals/europeprivacy/?hl=en-US> (last updated May 15, 2017).

164. As of July 1, 2015, approximately 77 percent of the U.S. population is over the age of eighteen. See *QuickFacts*, U.S. CENSUS BUREAU, <http://www.census.gov/quickfacts/table/PST045214/00> (last visited Dec. 25, 2015).

165. See John Naughton, *In the Battle of Free Speech Now it’s France v Google*, GUARDIAN (Aug. 9, 2015, 2:30 PM), <http://www.theguardian.com/commentisfree/2015/aug/09/battle-free-speech-france-google-right-to-be-forgotten>.

a treaty will improve the quality of life for both U.S. and EU citizens and will also raise international awareness of the effects of establishing a right to be forgotten.¹⁶⁶

A. Education as a Means to Minimize the Need for a Right to Be Forgotten

Children worldwide are spending more time online than in the classroom.¹⁶⁷ On average, both U.S. and European children ages six to eighteen spend nearly forty-five hours per week on the Internet, but only thirty hours per week in school.¹⁶⁸ School administrators view the Internet as a necessary teaching tool, but due to its ability to infringe upon the privacy of students, more than 90 percent of school officials are in favor of teaching students about Internet responsibility.¹⁶⁹ Teaching Internet responsibility in schools would minimize the future invocation of the right to be forgotten by alerting children of the potentially disastrous effects of posting what may be considered harmless content. En-

166. See discussion *infra* Part IV.B.

167. See Alexandra Ossola, *The Surprising Amount of Time Kids Spend Looking at Screens*, ATLANTIC (Jan. 22, 2015), <http://www.theatlantic.com/education/archive/2015/01/the-surprising-amount-of-time-kids-spend-looking-at-screens/384737/>.

168. See Jim Hull & Mandy Newport, *Time in School: How Does the U.S. Compare?*, CENT. PUB. EDUC. (Dec. 1, 2011), [http://www.centerforpubliceducation.org/Main-Menu/Organizing-a-school/Time-in-school-How-does-the-US-compare](http://www.centerforpubliceducation.org/Main-Menu/Organizing-a-school/Time-in-school-How-does-the-US-compare;); *Too Much Time Online*, IKEEPSAFE, <http://rethinkyourphone.com/too-much-time-online-ikeepsafe-org/> (last visited May 15, 2017); Jane Wakefield, *Children Spend Six Hours or More a Day on Screens*, BBC NEWS (Mar. 27, 2015), <http://www.bbc.com/news/technology-32067158>.

169. Mary Kay Hoal, *Teaching Our Kids Internet Safety – Parents or Teachers Responsibility? How About Both*, YOURSPHERE (Mar. 1, 2010), <http://internet-safety.yoursphere.com/2010/03/teaching-our-kids-internet-safety-parents-or-teachers-responsibility-how-about-both/>.

couraging responsible Internet use would also reduce other issues facing schools, such as cyberbullying¹⁷⁰ and class distractions.¹⁷¹ This education is the first step toward informing citizens that Internet posts can last a lifetime.¹⁷²

The adult population must also receive instruction regarding Internet responsibility, considering their preexisting presence online. Ironically, the Internet itself is the best means to educate adults about responsible Internet use.¹⁷³ One recent example of using the Internet to spread awareness was the 2014 ALS¹⁷⁴ Ice Bucket Challenge. During the summer months of 2014, the ALS Ice Bucket Challenge became the world's largest social media phenomenon, as more than seventeen million individuals uploaded videos of themselves dumping a bucket of ice water over their head in order to increase awareness of amyotrophic lateral sclerosis (ALS).¹⁷⁵ Along with raising USD \$115 million in donations, the ALS Association saw a dramatic rise in their social

170. See Ken Riccardi, *Cyber Bullying: Responsibilities and Solutions*, TECH & LEARNING (Sept. 1, 2008, 5:00 AM), <http://www.techlearning.com/news/0002/cyber-bullying-responsibilities-and-solutions/65317>. Approximately 50 percent of teens have been the victims of cyberbullying. *Cyber Bullying Statistics*, BULLYING STAT., <http://www.bullyingstatistics.org/content/cyber-bullying-statistics.html> (last visited Jan. 11, 2016).

171. See Michelle Harven, *Top 5 Problems with Technology in Education Today*, EDTECHTIMES (Nov. 6, 2013), <http://edtechtimes.com/2013/11/06/top-5-problems-technology-education-today/>. Students who are interrupted by technology while taking a standardized test score 20 percent lower than students without such interruptions. Bob Sullivan, *Students Can't Resist Distraction for Two Minutes . . . and Neither Can You*, NBC NEWS (May 18, 2013, 12:23 PM), <http://www.nbcnews.com/business/consumer/students-cant-resist-distraction-two-minutes-neither-can-you-f1C9984270>.

172. While an individual can "certainly prevent" themselves from posting embarrassing information online, they cannot always control what others post. Adam Dachis, *How to Fix Internet Embarrassments and Improve Your Online Reputation*, LIFEHACKER (Oct. 17, 2011, 8:00 AM), <http://lifehacker.com/5850288/how-to-fix-internet-embarrassments-and-improve-your-online-reputation>. It is particularly important to teach individuals to be mindful of the content they post about others because information posted by one individual about another is the most common type of information that users request to be removed from European Google domains. See *European Privacy Requests for Search Removals*, *supra* note 163.

173. See Sarita Harbour, *The Social Media Marketer*, INTERACT MEDIA (June 5, 2012), <http://www.interactmedia.com/social-media-marketing-blog/bid/75909/4-Simple-Ways-To-Spread-The-Word-With-Social-Media>.

174. See *What is ALS?*, ALS ASS'N, <http://www.alsa.org/about-als/what-is-als.html> (last visited Nov. 5, 2015).

175. ALS is a disease that affects nerve cells in the brain and spinal cord. *Id.*

media following, allowing the group to substantially increase the number of people they were able to educate about the disease.¹⁷⁶ The ALS Ice Bucket Challenge is one of many successful examples of when the Internet can serve as a means to educate the public about specific issues.¹⁷⁷ The same concept could apply to the right to be forgotten, where a short and memorable campaign could be easily spread across social media and consumed by users.

B. An International Treaty that Remembers Before Forgetting

In regards to the right to be forgotten, educating citizens on Internet responsibility is a great start because citizens will become more mindful of their online sharing activity.¹⁷⁸ Awareness on its own, however, does not solve the dilemma between Google and the CNIL. The European Union Article 29 Data Protection

176. The Ice Bucket Challenge created the “single largest episode of giving” ever recorded, aside from an emergency or disaster. John Bonifield, *One Year Later, Your ALS Ice Bucket Money Goes To . . .*, CNN (July 15, 2015, 8:05 PM), <http://www.cnn.com/2015/07/15/health/one-summer-after-the-als-ice-bucket-challenge/>. The number of followers of the ALS Association Twitter account increased by 146 percent, and the number of “likes” on the ALS Association Facebook page increased by 849 percent. *Id.*

177. Other examples include “Kony 2012,” a viral video educating the public on the indicted war criminal, Joseph Kony, and “#BringBackOurGirls,” a social media campaign protesting the kidnappings of female students in Nigeria by an Islamic Jihadist organization opposed to Western-style education. Caitlin Dewey, *#Bringbackourgirls, #Kony2012, and the Complete Divisive History of ‘Hashtag Activism,’* WASH. POST (May 8, 2014), https://www.washingtonpost.com/news/the-intersect/wp/2014/05/08/bringbackourgirls-kony2012-and-the-complete-divisive-history-of-hashtag-activism/?utm_term=.6a740a730193.

178. This reduced need for a right to be forgotten will lift a significant burden from Google as well. Google has been forced to hire a “big team of lawyers, engineers and paralegals,” who have evaluated hundreds of thousands of right-to-be-forgotten requests. Loek Essers, *This is How Google is Dealing with ‘Right to be Forgotten’ Requests*, PCWORLD (Nov. 19, 2014, 12:40 PM), <http://www.pcworld.com/article/2850072/this-is-how-google-is-dealing-with-right-to-be-forgotten-requests.html>. A lessened need for a right to be forgotten will not only reduce the monetary costs of hiring additional employees but will also ensure that right-to-be-forgotten requests are handled appropriately. The floods of requests currently facing Google are “virtually impossible” to handle with care. *UnGoogled: The Disastrous Results of the ‘Right to be Forgotten’ Ruling*, WASH. POST (July 12, 2014), https://www.washingtonpost.com/opinions/ungoogled-the-disastrous-results-of-the-right-to-be-forgotten-ruling/2014/07/12/91663268-07a8-11e4-bbf1-cc51275e7f8f_story.html.

Working Party (“Working Party”)¹⁷⁹ suggests creating a system of standards for when data protection law can extend outside the European Union.¹⁸⁰ But, in order to be successful, such criteria must be fashioned in the form of a bilateral treaty that accomplishes the Working Party’s objective of harmonizing the “perceived needs and political practicalities of the [European Union and the United States].”¹⁸¹

In order to bridge ideological differences between the European Union and the United States with respect to the right to be forgotten, the two regions must agree to a bilateral treaty. It is not practical to litigate the application of the right to be forgotten in local courts, where differences of values among the parties are not easily accounted for;¹⁸² solutions to Internet issues tend to be more isolationist and policy-driven in Europe, while those in the United States are more mindful of technology and encourage its integration into daily life.¹⁸³ Therefore, the most realistic solution is updating international law so that it reflects the ideals on both sides of the Atlantic Ocean.

The two primary sources of international law are customary practices and international treaties.¹⁸⁴ Customary practices are the general, consistent standards that a state feels legally obligated to follow.¹⁸⁵ Because customary practices only form when

179. The Working Party consists of data protection representatives from the European Union as well as members of the European Commission. See *Article 29 Working Party*, EUR. DATA PROTECTION SUPERVISOR, <https://secure.edps.europa.eu/EDPSWEB/edps/site/mySite/Art29> (last visited Jan. 14, 2016). The Working Party aims to provide expert advice to the European Commission on data protection matters, promote the uniform application of Directive 95/46/EC in all EU Member States, and advise the European Commission on any law affecting the protection of personal data. See *id.*

180. See *Opinion 8/2010 of the Article 29 Data Working Party on Applicable Law*, 0836-02/10/EN WP 179 (Dec. 16, 2010), http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2010/wp179_en.pdf.

181. Steven C. Bennett, *The “Right to Be Forgotten”: Reconciling EU and US Perspectives*, 30 BERKELEY J. INT’L L. 161, 193 (2012).

182. See Naughton, *supra* note 165.

183. See Tim Leberecht, *Is the “Right to Disconnect” a Human Right?*, PSYCHOL. TODAY (Jan. 4, 2017), <https://www.psychologytoday.com/blog/the-romance-work/201701/is-the-right-disconnect-human-right>.

184. See MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., RL32528, INTERNATIONAL LAW AND AGREEMENTS: THEIR EFFECT UPON U.S. LAW (2015), <https://fas.org/sgp/crs/misc/RL32528.pdf>.

185. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 102(2) (AM. LAW INST. 1987). If, however, a state generally follows a particular practice but does not

there is a general and consistent practice within a state and a sense of legal obligation to act in such a way,¹⁸⁶ the opposing historical inclinations and obligations to uphold free speech rights in the United States, and privacy rights in the European Union, make this option unworkable. The remaining alternative is signing an international treaty.¹⁸⁷ The right to be forgotten from Google (and other search engines more generally) should be addressed in this manner because implementing this treaty will not only improve the quality of life for citizens of both the European Union and United States¹⁸⁸ but will also inform the international community about the policy behind, and effects of implementing, the right to be forgotten as it currently stands.¹⁸⁹ Using the situations in Europe and the United States as examples could assist many other countries who are considering implementing their own form of a right to be forgotten. Additionally, this knowledge could prevent future battles between European data protection agencies and foreign search engines by motivating other nations to establish their own laws regarding the right to be forgotten.

The following subsections will propose a test within the treaty that will determine when links can be removed under a compromised right to be forgotten. Additionally, each prong of the test will be explained in detail to provide greater context for what types of content should remain and what types of content should be forgotten.

feel legally bound to do so, such a practice does not constitute customary international law. *Id.* § 102 cmt. c.

186. See Silke Sahl, *Researching Customary International Law, State Practice and the Pronouncements of States Regarding International Law*, N.Y.U. L. GLOBAL (June 2007), http://www.nyulawglobal.org/globalex/Customary_International_Law.html. Additionally, the voluntary recognition of a law and participation in its enforcement is likely to arise only when the party is able to internalize the substantial benefits. BRUCE BENSON, *THE ENTERPRISE OF LAW: JUSTICE WITHOUT THE STATE* 13 (1990).

187. See GARCIA, *supra* note 184. An international treaty is a written, binding agreement between states. Vienna Convention on the Law of Treaties art. 2(1)(a), May 23, 1969, 1155 U.N.T.S. 331.

188. See Geraldine Van Bueren, *Deconstructing the Mythologies of International Human Rights Law*, in *UNDERSTANDING HUMAN RIGHTS* 596, 605 (Conor Gearty & Adam Tomkins eds., 1996). The specific improvement will be in the lives of individuals suffering actual harm from Google.com search results, as the new treaty will allow for these results to be removed. See *infra* Part IV.

189. See Van Bueren, *supra* note 188, at 605.

1. The Proposed Treaty: Removing Harm Versus Gaining Benefit

Successful international treaties are narrowly worded and tackle precise problems.¹⁹⁰ In light of these characteristics, the new treaty must establish a right to be forgotten from search engines in the most compelling circumstances.¹⁹¹ This follows the global trend of establishing a right to be forgotten¹⁹² while respecting the U.S. tradition of strong free speech rights.¹⁹³ Such circumstances would allow delisting of a link that contains considerably harmful online material but would not allow a link to be delisted merely for the individual's personal preferences.¹⁹⁴

190. A narrow agreement will be easier to understand and implement, resulting in a higher level of agreement among the United States and the European Union. *See id.*

191. *See* discussion *infra* pp. 870–78.

192. *See, e.g.,* Arunima Bhattacharya, *In A First An Indian Court Upholds the 'Right to be Forgotten' [Read Order]*, LIVE L. (Feb. 3, 2017, 10:50 AM), <http://www.livelaw.in/first-indian-court-upholds-right-forgotten-read-order/> (“[T]he Karnataka High Court . . . recently has accepted, applied and approved the ‘Right to be Forgotten’ in [the] Indian context.”); Michael Geist, *Did a Canadian Court Just Establish a New Right to Be Forgotten Online?*, GLOBE & MAIL, http://www.theglobeandmail.com/report-on-business/rob-commentary/did-a-canadian-court-just-establish-a-new-right-to-be-forgotten-online/article33915916/?cmpid=rss1&click=sf_globe (last updated Feb. 6, 2017, 4:17 PM) (“[T]he Federal Court of Canada [recently] issued a landmark ruling that paves the way for a Canadian version of the right to be forgotten.”); Mike Masnick, *South Korea Embraces Ridiculous Right to be Forgotten as Well*, TECHDIRT (Feb. 29, 2016, 12:40 PM), <https://www.techdirt.com/articles/20160221/22523033668/south-korea-embraces-ridiculous-right-to-be-forgotten-as-well.shtml> (“South Korea . . . will release guidelines for people who wish to remove information from the internet.”); Greg Sterling, *Japan Courts Order Removal of Criminal Activity from Search as Privacy Violation*, SEARCH ENGINE LAND (Dec. 10, 2015, 8:52 AM), <http://searchengineland.com/japan-courts-order-removal-criminal-activity-from-search-as-privacy-violation-238117> (“[T]here may soon be a European-style ‘Right to be Forgotten’ in Japan.”); Vera, *supra* note 38 (“‘Right to be forgotten’ legislation came into effect in Russia on January 1, [2016].”).

193. In 2010, the U.S. Supreme Court declined to add “depictions of animal cruelty” to the categories of speech unprotected by the First Amendment because it is not a historically unprotected category of speech. *United States v. Stevens*, 559 U.S. 460, 472 (2010). Nevertheless, the court stated that they “need not foreclose the future recognition of such additional categories [of unprotected speech].” *Id.*

194. *See infra* p. 871. Notably, these phrases are originally differentiated by the principle of beneficence, which essentially means “to do good.” Samuel Freeman, *Criminal Liability and the Duty to Aid the Distressed*, 142 U. PA. L.

The right to be forgotten itself is seemingly focused around the reputational management of ordinary citizens, as more than 95 percent of take down requests submitted to Google are from private citizens seeking to protect personal information on social media sites.¹⁹⁵ Indeed, the right to be forgotten was granted in *González* as a result of a man being concerned with his reputation and appearance on the Internet.¹⁹⁶ Under the First Amendment, however, reputational interests alone cannot justify the prohibition of truthful speech.¹⁹⁷ When this justification is extended, it suggests that a right to be forgotten in the United States may only be invoked under “‘exceptional circumstances’ of the ‘highest order’ of state interest.”¹⁹⁸ Reputational impairment is not an interest of the highest order; however, the state’s interest in protecting its citizens from acts inflicting considerable harm may rise to this level.¹⁹⁹ Therefore, a link deletion that solely seeks to improve one’s reputation would not invoke the most compelling state interests, while a link deletion to remove

REV. 1455, 1470 (1994). The principle of beneficence distinguishes the idea of removing impairment from promoting personal advantage. *Beneficence vs. Nonmaleficence*, U. CAL. S.F., http://missinglink.ucsf.edu/lm/ethics/Content%20Pages/fast_fact_bene_nonmal.htm (last visited Jan. 16, 2015) (“Beneficent actions can be taken to help prevent or remove harms or to simply improve the situation of others.”).

195. Sylvia Tippmann & Julia Powles, *Google Accidentally Reveals Data on ‘Right to be Forgotten’ Requests*, GUARDIAN (July 14, 2015, 9:28 AM), <https://www.theguardian.com/technology/2015/jul/14/google-accidentally-reveals-right-to-be-forgotten-requests>. Facebook, the world’s largest social networking site, is the website from which the highest amounts of links have been delisted. See *European Privacy Requests for Search Removals*, *supra* note 163; *What is Facebook*, GCFLEARNFREE, <http://www.gcflearnfree.org/facebook101/what-is-facebook/1/> (last visited Mar. 24, 2017).

196. See Case C-131/12, *Google Spain SL v. Agencia Española de Protección de Datos (AEPD)*, 2014 E.C.R. 317.

197. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 272 (1964) (“Injury to . . . reputation affords no . . . warrant for repressing speech that would otherwise be free.”).

198. Robert Kirk Walker, *The Right to Be Forgotten*, 64 HASTINGS L.J. 257, 277 (2012).

199. See *id.*; see also S. Elizabeth Wilborn Malloy & Ronald J. Krotoszynski, Jr., *Recalibrating the Cost of Harm Advocacy: Getting Beyond Brandenburg*, 41 WM. & MARY L. REV. 1159, 1166–67 (2000) (“The time has come . . . [for] the courts . . . to impose the cost of Harm Advocacy on the speaker, provided that the rules used to assign such costs do not unduly chill otherwise protected expression.”).

considerable harm would invoke the most compelling state interests.²⁰⁰

A link deletion to “remove considerably harmful online speech” would allow the victim to eliminate search results that cause a person to be made significantly less valuable or successful. A link that considerably harms a person substantially injures them and does not contain societal value or a benefit.²⁰¹ Removing a link to “gain benefit,” however, occurs when a link does not make a person substantially less valuable or successful.²⁰² Rather, deletion of the link merely makes the person more valuable or successful as a result.²⁰³

To determine whether a link is harmful, and thus should be removed from search engines, a test modeled after the three-prong test for obscenity, established in *Miller v. California*,²⁰⁴ should be created. Under the *Miller* test, a court looks to the following factors to assess whether the speech is considered obscene:

- (a) whether ‘the average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the word depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether

200. These state interests of the highest order can be determined through the “compelling state interest test.” The test asks whether “(1) the challenged law served not just an important public purpose, but a genuinely compelling one; (2) the law was well tailored to achieve that purpose, and (3) the purpose could not be achieved by some less burdensome method.” Bette Novit Evans, *Religious Freedom vs. Compelling State Interests*, KRIPKE CENT., <http://moses.creighton.edu/csrs/news/s98-1.html> (last visited Jan. 11, 2016). Various interests have passed this test. *See, e.g.*, *Employment Div. v. Smith*, 494 U.S. 872 (1990) (regulating drug use); *Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989) (preventing racial discrimination); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (upholding a compulsory education system).

201. This idea stems from the first general rule of beneficence, which forbids deliberately injuring a person without a justification. *See Beneficence*, YALE U., <http://assessment-module.yale.edu/human-subjects-protection/beneficence> (last visited Jan. 17, 2016).

202. This idea stems from the second general rule of beneficence, which discusses maximizing potential benefits by minimizing potential harm. *See id.* This is distinguished from the first general rule of beneficence because it is focused on an individual’s gains instead of an individual’s injuries. *See id.*

203. *See id.*

204. *Miller v. California*, 413 U.S. 15 (1973).

the work, taken as a whole, lacks serious literary, artistic, political or scientific value.²⁰⁵

The *Miller* test should be altered and incorporated into the bilateral treaty to test when harmful material is posted against a victim, thus providing grounds to invoke the right to be forgotten from Google and other search engines, as it requires a work to have actual societal value in order to be protected under the First Amendment.²⁰⁶ Additionally, because obscene material is abhorrent to moral principles,²⁰⁷ it is presumably parallel to the material an individual wants forgotten. A link that an individual wants forgotten is likely offensive to their morality in some degree, otherwise, they would not oppose the content's association with their name.²⁰⁸ Ultimately, the new test will assist in determining material that is so worthless to society that it must be forgotten.²⁰⁹

205. *Id.* at 39. The first prong of the test requires the reviewing individual to apply local (typically state) standards, versus a national standard. *See Chapter Overview: The Law of Obscenity*, MCGRAW HILL, http://higher.ed.mheducation.com/sites/0072492171/student_view0/chapter13/chapter_overview.html (last visited Feb. 18, 2017). The jury or judge will determine this standard based on their knowledge of what is acceptable within the given community. *See id.* In regard to the second prong, either the local legislature or state supreme court must define the types of material that are considered "patently offensive" enough to be obscene. *See id.* The third and final prong presents the most straightforward aspect, which is another question of law, not fact, to be decided by the judge or jury. *See id.*

206. *See Miller*, 413 U.S. at 20–22.

207. *See Obscene*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/obscene> (last visited Dec. 26, 2015). Though not "well-defined" or "narrowly limited," obscenity is "in no way protected by the First Amendment." *Ashcroft v. ACLU*, 535 U.S. 564, 569 (2002) ("[O]bscene speech enjoys no First Amendment protection."). The difficulty of defining obscenity was previously exemplified by Justice Stewart, who described obscenity as: "I know it when I see it." *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

208. By allowing the removal of harmful links, this treaty is not only tolerant of free speech but also respectful of individual autonomy, a core justification of the First Amendment. Individual autonomy is the idea that moral principles are grounded in the self-governing individual. To be autonomous is essentially being "one's own person," or one's "authentic self." John Christman, *Autonomy in Moral and Political Philosophy*, STAN. U., <http://plato.stanford.edu/entries/autonomy-moral/> (last updated Jan. 9, 2015).

209. *See R. A. V. v. St. Paul*, 505 U.S. 377, 400 (1992) (White, J. concurring) ("[T]he First Amendment does not apply to [speech if its] expressive content is worthless or of *de minimis* value to society.").

2. The New Test

Using a new test to determine whether online material is “considerably harmful” acts as a compromise of European and U.S. values, as it prevents the delisting of material closely connected with free speech,²¹⁰ while also allowing for removal of the most sensitive material that is not otherwise protected under the First Amendment.²¹¹ Taking into account the *Miller* factors, the test under the proposed bilateral treaty to determine if the online speech is “considerably harmful” will read as follows:

(a) whether ‘the average person, applying contemporary community standards’ would find that the material displayed by the link, taken as a whole, appeals to repugnant and vulgar interests, (b) whether the material displayed by the link depicts or describes, in a patently offensive way, substantially demeaning or degrading content, and (c) whether the material displayed by the link, taken as a whole, lacks significant value to a legitimate public interest.

If all parts of this test are answered in the affirmative, the link at issue is considerably harmful to the individual, and it must be delisted from search engine results to “remove considerably harmful online material.” If the test is partially met, or not met at all, the link would have to remain available, as removing the link would result in a violation of free speech.

210. A key purpose of the First Amendment is “the continuation of a marketplace of ideas.” *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). The marketplace of ideas is based on the notion that “[t]he best test of truth is the power of thought to get itself accepted in the competition of the market.” *Id.* This theory assumes that robust debate free from government interference will produce the discovery of truth. Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 3 (1984). Individual autonomy is another key purpose of the First Amendment. See discussion *supra* note 208. Material that is closely connected to these justifications will not satisfy the new right-to-be-forgotten test because information that actually harms an individual has no place in the marketplace of ideas and does not benefit one’s individual autonomy. See Steven P. Lee, *Hate Speech in the Marketplace of Ideas*, in FREEDOM OF EXPRESSION IN A DIVERSE WORLD 13, 24–25 (2010); see also Christman, *supra* note 208.

211. Although never an official holding, the U.S. Supreme Court has suggested that some kinds of speech should get less protection than others. See, e.g., *Young v. Am. Mini Theatres*, 427 U.S. 50, 70–71 (1976) (“[E]ven though we recognize that the First Amendment will not tolerate the total suppression of erotic materials . . . few of us would march our sons and daughters off to war to preserve the citizen’s right to see [erotic materials] exhibited in the theaters of our choice.”).

The following subsections will explain each prong of the proposed test and demonstrate its application by using the example of a link leading to revenge porn. Revenge porn is the sharing of sexually explicit images or videos of an individual without obtaining that individual's consent.²¹² In many instances, the material is acquired by a romantic partner in a relationship and is then distributed after a breakup.²¹³ Revenge porn can humiliate a person and destroy their reputation and well-being,²¹⁴ all without adding any worth or advantage to society.²¹⁵ While privacy-minded individuals would not protest the removal of a revenge porn link,²¹⁶ some free speech enthusiasts argue that the "First Amendment is not a guardian of taste."²¹⁷ The following subsections will demonstrate why some links, such as those including revenge porn, should be delisted worldwide, despite potentially infringing upon the freedom of speech.

212. See Loulla-Mae Eleftherio-Smith, *'Revenge Porn' Criminalised: What Is It and What Are the Consequences?*, INDEP. (Sept. 23, 2015), <http://www.independent.co.uk/news/uk/crime/revenge-porn-criminalised-what-is-it-and-what-are-the-consequences-10042291.html>.

213. See *id.*

214. Victims of revenge porn have shared countless stories of breakups resulting in the victim's partner sharing intimate material with the victim's family, friends, co-workers, and/or the general public. Many situations resulted in victims being fired from their jobs, forced to move to new cities, and/or diagnosed with mental illnesses. See Nina Bahadur, *Victims Of 'Revenge Porn' Open Up on Reddit About How It Impacted Their Lives*, HUFFINGTON POST (Jan. 25, 2014, 4:01 PM), http://www.huffingtonpost.com/2014/01/09/revenge-porn-stories-real-impact_n_4568623.html.

215. See Adrienne N. Kitchen, *The Need to Criminalize Revenge Porn: How a Law Protecting Victims Can Avoid Running Afoul of the First Amendment*, 90 CHI.-KENT. L. REV. 247, 263 (2015).

216. Although outside the scope of this Note, some scholars would go further and argue that all revenge porn should not only be removed, but that the poster should be subjected to criminal punishment. See, e.g., Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345 (2014).

217. Erin Fuchs, *Here's What the Constitution Says About Posting Naked Pictures of Your Ex to the Internet*, BUS. INSIDER (Oct. 1, 2013, 1:08 PM), <http://www.businessinsider.com/is-revenge-porn-protected-by-the-first-amendment-2013-9>.

a. Modern Community Standards and Repugnant and Vulgar Interests

The first prong of the proposed test for “considerably harmful online material” considers “whether ‘the average person, applying contemporary community standards’ would find that the material displayed by the link, taken as a whole, appeals to vulgar and repugnant interests.” The phrase “contemporary community standards” was issued by the U.S. Supreme Court when deciding *Miller*²¹⁸ and was coined in such a manner that allows local communities to apply their own norms in determining what material is obscene.²¹⁹ *Miller* was decided in 1973, however, when the Internet’s modern impact was simply unimaginable. Determining the standards of an Internet community presents some difficulties, predominantly because Internet communities lack geographic boundaries.²²⁰ Since information can be shared worldwide with a click of a mouse, an individual’s harm cannot be judged by the community standards where the post was submitted onto the Internet.²²¹ The transatlantic treaty must therefore require that all right-to-be-forgotten requests describe how the link harms the individual at issue and identify which physical community the harm would persist. By requiring an individual

218. *Miller v. California*, 413 U.S. 15 (1973).

219. See Carl S. Kaplan, *Considering ‘Community Standards’ and Internet Pornography*, N.Y. TIMES (Nov. 30, 2001), <http://www.nytimes.com/2001/11/30/technology/considering-community-standards-and-internet-pornography.html>.

220. While Chief Justice Berger’s rationales may have been ample in 1973, the modern internet prevents a community from existing “as an island unto itself, able to maintain its own set of morals” unique from any other. Sarah Kagan, *Obscenity on the Internet: Nationalizing the Standard to Protect Individual Rights*, 38 HASTINGS CONST. L.Q. 233, 244 (2010); see also Colleen Cavanaugh, *Obscenity, Community Standards and Internet Filtering in the Information Age*, DREXEL U. (Aug. 25, 2003), <http://www.pages.drexel.edu/~ctc27/community.html>.

221. For example, an article about an individual might be acceptable in the author’s current address in Vashon Island, Washington, but harmful to the subject living in Hereford, Texas. Regarding these locations, a 2015 study done by Crowdpac, a nonpartisan group, researched twenty-five years of campaign donations and found that Vashon Island, Washington is the most liberal city in the United States, and that Hereford, Texas is the most conservative city in the United States. Amber Phillips, *The 10 Most Liberal and Conservative Cities in the U.S. – As Judged by Campaign Donors*, WASH. POST (Dec. 14, 2015), <https://www.washingtonpost.com/news/the-fix/wp/2015/12/14/the-10-most-liberal-and-conservative-cities-in-the-u-s-as-judged-by-campaign-donors/>.

to state a precise reason for why they would suffer harm from a link in a specific geographic community, the law will restrict no more speech than necessary to reduce considerable harm suffered by members of the population.²²²

Additionally, the phrase “vulgar and repugnant” must be expanded to prevent vagueness and overbreadth interpretation issues.²²³ A “vulgar and repugnant interest” is crude, indecent, and objectionable.²²⁴ Such an interest rises beyond something that the society merely disagrees with or finds to be offensive,²²⁵ as the First Amendment, for example, already protects embarrassing speech.²²⁶ This type of interest must be so harmful that it goes against reasonable moral sensibilities.²²⁷

Applying the first prong in its entirety to a link containing revenge porn will show why such material should be delisted from search results. Any reasonable community’s standards would determine that revenge porn appeals to the vulgar and repugnant interests of the impermissible distribution of sexually explicit content, as well as, the poster’s “enjoyment” in harming

222. See, e.g., *The De-licensing of Occupation in the United States*, U.S. DEP’T LAB. (May 2015), <https://www.bls.gov/opub/mlr/2015/article/the-de-licensing-of-occupations-in-the-united-states.htm> (“[T]he government . . . has a compelling interest in protecting against the present and recognizable harm to the public health or safety.”). Additionally, the specific explanation requirement reduces the concern of “forum shopping” for community standards. “Forum shopping” is an informal name referring to the practice of choosing the most favorable jurisdiction for a claim to be heard. See Richard Maloy, *Forum Shopping? What’s Wrong With That?*, 24 QUINNIPIAC L. REV. 25, 27 (2005).

223. See Adrian Wallwork, *Avoiding Ambiguity and Vagueness*, in ENGLISH FOR WRITING RESEARCH PAPERS 89 (2011); Joe Moxley, *Avoid Vagueness*, WRITING COMMONS, <http://writingcommons.org/index.php/open-text/style/description/104-avoid-vagueness> (last visited Jan. 6, 2016).

224. See *Repugnant*, DICTIONARY, <http://www.dictionary.com/browse/repugnant> (last visited Mar. 24, 2017); *Vulgar*, DICTIONARY, <http://www.dictionary.com/browse/vulgar> (last visited Mar. 24, 2017).

225. See *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”).

226. See, e.g., *People v. Marquan M.*, 24 N.Y.3d 1, 11 (2014) (holding that a cyberbullying statute was overbroad and facially invalid under the First Amendment, partially because the First Amendment protects “annoying and embarrassing speech”).

227. See Mathias Reimann, *Prurient Interest and Human Dignity: Pornography Regulation in West Germany and the United States*, 21 U. MICH. J. L. REFORM 201, 227 (1987).

the subject.²²⁸ Further, if the link to the revenge porn is removed, the First Amendment is not jeopardized because there are ample alternatives for individuals to obtain legal pornography featuring consenting individuals.²²⁹ Because any contemporary community standards would suggest that revenge porn is a vulgar and repugnant interest, it would thus satisfy the first prong of the test for “considerably harmful online speech.”

b. Patently Offensive . . . Demeaning or Degrading Content

The second prong of the proposed test for “considerably harmful online speech” considers “whether the material displayed by the link depicts or describes, in a patently offensive way, substantially demeaning or degrading content.” The phrase “patently offensive” first appeared in *Memoirs v. Massachusetts*²³⁰ when the U.S. Supreme Court clarified its initial effort to establish a test for obscene material.²³¹ In determining whether the material to be delisted is displayed in a manner that is “patently offensive,” the material’s full context is “critically important.”²³² Material within a link would not be displayed in a “patently offensive” manner if it merely displays sexual terms or descriptions but may be considered to be displayed in such a manner if

228. See David Barrett, *What is the Law on Revenge Porn?*, TELEGRAPH (Apr. 13, 2015, 9:18 AM), <http://www.telegraph.co.uk/news/uknews/law-and-order/11531954/What-is-the-law-on-revenge-porn.html>; Jill Filipovic, *‘Revenge Porn’ Is About Degrading Women*, GUARDIAN (Jan. 28, 2013, 5:23 PM), <http://www.theguardian.com/commentisfree/2013/jan/28/revenge-porn-degrades-women>.

229. In the United States, pornography that is not obscene and is not child pornography is protected under the First Amendment. David L. Hudson Jr., *Pornography & Obscenity*, FIRST AMEND. CENT. (Sept. 13, 2002), <http://www.firstamendmentcenter.org/pornography-obscenity>.

230. See *A Book Named “Jon Cleland’s Memoirs of a Woman of Pleasure” v. Attorney Gen. of Mass.*, 383 U.S. 413 (1966).

231. See *Roth v. United States*, 354 U.S. 476 (1957). Though outside the scope of this Note, the phrase “patently offensive” also appears in other free speech cases. See, e.g., *Denver Area Educ. Telcoms. Consortium v. FCC*, 518 U.S. 727 (1996) (considering if television broadcasts exposed children to patently offensive material); *FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (addressing whether radio broadcasts contained language that was patently offensive).

232. Fed. Comm’n Comm’n, Policy Statement FCC 01-90, In the Matter of Industry Guidance on the Commission’s Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency (Apr. 6, 2001), <https://transition.fcc.gov/Bureaus/Enforcement/Orders/2001/fcc01090.pdf>.

the material's sexual content is "inescapable."²³³ The phrase "demeaning or degrading content," however, directly targets what the link would display rather than the manner it is being displayed in. Such content would be material that objectively reduces the individual's dignity.²³⁴ Ultimately, the individual's dignity would be harmed by material aiming to "disrespect and distort" the individual's integrity.²³⁵

Turning to the example of revenge porn, such a link would also satisfy this test for delisting. A victim of revenge porn would likely find its content to be "inescapable," given that revenge porn frequently leads to loss of professional and educational opportunities as well as psychological damage.²³⁶ Revenge porn victims have described their experiences as "completely traumatizing"²³⁷ and filled with "shame and embarrassment to a paralyzing level."²³⁸ Such reactions certainly suggest that the content of revenge porn is demeaning and degrading; these reactions objectively demonstrate a loss in the victim's dignity, which is being disrespected and distorted. Thus, because revenge porn is demeaning and degrading content displayed in a patently offensive manner, it would satisfy the second prong of the test for "considerably harmful online speech."

c. Significant Value to a Legitimate Public Interest

The third and final prong of the test for "considerably harmful online speech" considers "whether the material displayed by the link, taken as a whole, lacks significant value to a legitimate

233. This type of material is such where the sexual innuendo persists to an extent that the material's sexual meaning is undeniable. *See id.*

234. *See Degrading*, DICTIONARY, <http://www.dictionary.com/browse/degrading> (last visited Mar. 19, 2017). U.S. Courts have not established a concrete test for when human dignity has been harmed. *See* Roberta Rosenthal Kwall, *A Perspective on Human Dignity, the First Amendment, and the Right of Publicity*, 50 B.C. L. REV. 1345, 1364 (2009).

235. C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 1002 (1978).

236. Citron & Franks, *supra* note 216, at 347. It is worth noting that these results do not happen in every revenge porn case.

237. *Being a Victim of Revenge Porn*, REACHOUT.COM, <http://ie.reachout.com/real-stories/inform-yourself/bullying-and-personal-safety/being-a-victim-of-revenge-porn/> (last visited Mar. 19, 2017).

238. Annmarie Chiarini, *I was a Victim of Revenge Porn. I Don't Want Anyone Else to Face This*, GUARDIAN (Nov. 19, 2013, 7:30 PM), <https://www.theguardian.com/commentisfree/2013/nov/19/revenge-porn-victim-maryland-law-change>.

public interest.” A “legitimate public interest” exists in nearly all newsworthy events as well as in the private lives of prominent figures.²³⁹ A legitimate public interest is not, however, something that people are “merely interested” in knowing about.²⁴⁰ Such an interest features subject matter of genuine public concern, where the revelation of the information does not result in an invasion of privacy.²⁴¹ In the proposed test, “significant value” to a legitimate public interest would mean material that is of sufficient worth to the genuine public concern.²⁴²

Returning to the example of revenge porn, such material is not a legitimate public interest. Revenge porn is a nonconsensual invasion of an individual’s most private conduct.²⁴³ Exposing such conduct of a nonpublic figure does not provide sufficient worth to the public concern;²⁴⁴ in fact, courts have determined that the privacy of sexual conduct is not a legitimate public concern even when it involves public figures.²⁴⁵ Thus, because re-

239. See *Publication of Private Facts*, DIG. MEDIA L. PROJECT, <http://www.dmlp.org/legal-guide/publication-private-facts> (last visited Mar. 19, 2017).

240. DAVID E. MORRISON & MICHAEL SVENNEVIG, *THE PUBLIC INTEREST, THE MEDIA, AND PRIVACY* 1 (2002), <http://downloads.bbc.co.uk/guidelines/editorial-guidelines/research/privacy.pdf>. An example of such a situation is when Gawker, an online news organization, published an article revealing that Peter Thiel, the co-founder of PayPal and Silicon Valley billionaire, is “totally gay.” Andrew Ross Sorkin, *Tech Billionaire in a Secret War With Gawker*, N.Y. TIMES, May 26, 2016, at A1. Thiel described the articles as “very painful and paralyzing” and had “no connection with the public interest.” *Id.*

241. See RESTATEMENT (SECOND) OF TORTS § 652D cmt. d (AM. LAW INST. 1977).

242. See *Significant*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/significant> (last visited Mar. 19, 2017); *Value*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/value> (last visited Mar. 19, 2017).

243. See *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (“[T]he most private human conduct [is] sexual behavior.”).

244. See Benjamin A. Genn, *What Comes Off, Comes Back to Burn: Revenge Pornography as the Hot New Flame and How It Applies to the First Amendment and Privacy Law*, 23 AM. U. J. GENDER SOC. POL’Y & L. 163, 184 (2014). Additionally, legal pornography is still obtainable through many alternatives. See *supra* p. 881 and note 229.

245. See, e.g., Nick Madigan, *Jury Adds \$25 Million to Gawker’s Bill*, N.Y. TIMES, Mar. 22, 2016, at B2 (finding that online news organization Gawker invaded the privacy of former professional wrestler Terry Bollea, also known as

venge porn fails to provide significant value to a legitimate public interest, it would satisfy the third and final prong of the “considerably harmful online speech” test.

3. Advancing Interests on Both Sides of the Atlantic

While privacy is a greatly honored fundamental right in the European Union, so too is freedom of expression in the United States. These values must therefore be balanced with the utmost delicacy.²⁴⁶ As currently written, the right to be forgotten does not respect such a balance; it grants an excessive amount of privacy rights that inevitably trump free expression.²⁴⁷ The treaty must therefore limit the excessive privacy protections provided, while maintaining the values of free speech. Establishing such a treaty would be a significant accomplishment, but the voluntary recognition of the treaty and participation in its enforcement will arise only when each party is able to internalize its substantial benefits.²⁴⁸ Therefore, it must be explained how this treaty advances both U.S. and EU values and interests.

The treaty’s proposed test is mindful of the United States’ strong freedom of speech protections but also remains consistent with other actions that have already been taken by U.S. search engines to protect an individual’s privacy rights. For example, on Google’s “Removal Policies” page, the company already agrees to delist content from their search results if it includes images of child sexual abuse, or if it is in response to a valid legal request, such as a request by a copyright holder aiming to delist a link displaying copyright infringement.²⁴⁹ Additionally, Google

Hulk Hogan, when Gawker posted a video of Bollea in a “behind-closed-doors sexual encounter” viewed by millions of people).

246. See Eric Barendt, *Freedom of Speech and Privacy*, FREE SPEECH DEBATE (Jan. 27, 2012), <http://freespeechdebate.com/discuss/freedom-of-speech-and-privacy/>.

247. See Emily Adams Shoor, *Narrowing the Right to Be Forgotten: Why the European Union Needs to Amend the Proposed Data Protection Regulation*, 39 BROOK. J. INT’L L. 487, 518 (2014).

248. See BRUCE L. BENSON, *THE ENTERPRISE OF LAW: JUSTICE WITHOUT THE STATE* 13 (1990).

249. See *Removal Policies*, GOOGLE, <https://support.google.com/web-search/answer/2744324> (last visited Mar. 20, 2017).

is willing to remove personal information that creates “significant risks of . . . specific harms.”²⁵⁰ The proposed test within the treaty thus clarifies and solidifies actions that Google is already willing to take.²⁵¹

In the European Union, however, the treaty would narrow the right to be forgotten, but this would end up benefiting, rather than hurting, EU citizens. Currently, the right to be forgotten is a “particular source of confusion” within the European Union,²⁵² and even experts cannot agree on its interpretation.²⁵³ If no action is taken to reduce such misunderstandings, the right to be forgotten could end up suppressing substantially greater amounts of information than ever intended.²⁵⁴

Narrowing the right to be forgotten to the most compelling circumstances would continue to respect the European desire for privacy, while also reducing the overwhelming burden on Google.²⁵⁵ Nearly 75 percent of the right to be forgotten requests that Google has received have not been granted, with the most

250. *Id.* Such harms specifically identified as removable information by Google include government-issued identification numbers, information relating to common financial transactions, information that could result in financial harm or identity theft, and personally identifiable nude or sexually explicit material featuring an individual that was shared without their consent. *Id.*

251. In regards to the example of revenge porn, Google is willing to delist links leading to such content that meet its current standards. These standards include: (1) the individual is nude or shown in a sexual act, (2) the content was intended to be private, and (3) the individual never consented to the content being publicly available. *Remove “Revenge Porn” from Google*, GOOGLE, <https://support.google.com/websearch/answer/6302812?hl=en> (last visited Mar. 27, 2017).

252. Daphne Keller, *The New, Worse ‘Right to be Forgotten,’* POLITICO (Jan. 27, 2016, 9:03 AM), <http://www.politico.eu/article/right-to-be-forgotten-google-defense-data-protection-privacy/>.

253. *Id.*

254. *Id.*

255. See David Hoffman, *Creating an Internet Obscurity Center: Reducing the Burden of Google Spain on Businesses*, LAWFARE (Aug. 1, 2016, 10:43 AM), <https://www.lawfareblog.com/creating-internet-obscurity-center-reducing-burden-google-spain-businesses>; L. S., *The Right to be Forgotten: Cut That Link*, ECONOMIST, <http://www.economist.com/blogs/schumpeter/2014/05/right-be-forgotten> (last updated May 14, 2014). From May 29, 2014 to March 19, 2017, Google has considered the removal of nearly two million links. See *European Privacy Requests for Search Removals*, *supra* note 163. It is worth noting, however, that because very little is known about Google’s process of evaluating a link removal request, Google has the ability to both “overdramatize, or . . . play down” the link removal process. Tippmann & Powles, *supra* note 195.

common reason for denial being that the link contains an individual's professional activity.²⁵⁶ By reducing the flood of requests on Google, the treaty will help ensure that requests are examined more carefully, leading to more accurate responses.²⁵⁷

CONCLUSION

A limited form of Orwell's prediction in "1984" was brought to life in the European Union three decades late, where it now seems that "he who controls the past, controls the future."²⁵⁸ The right answer to prevent Orwell's dystopia before it's too late requires both privacy and free speech to prevail whenever either value is compelling. The proposed approach of establishing a right to be forgotten that cooperates with the CNIL's demands and, simultaneously, reflects U.S. free speech values would allow for privacy-minded European citizens, as well as citizens of the United States, to be forgotten in the most compelling circumstances. This saves important facts from being tossed down a memory hole, while simultaneously allowing information that should be forgotten to become accordingly undiscoverable.

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256. Greg Sterling, *Report: 2 Years in, 75 Percent of Right to Be Forgotten Asks Denied By Google*, SEARCH ENGINE LAND (May 12, 2016, 5:28 PM), <http://searchengineland.com/report-2-years-75-percent-right-forgotten-asks-denied-google-249424>. Of the reasons Google has given, "concerns your professional activity" accounts for 29.7 percent of the reasons why a link removal is denied. *Id.* Other reasons given by Google include "you are at the origin of this content," which accounts for approximately 20 percent of denials, and "the information is about another person," which accounts for approximately nine percent of denials. *Id.*

257. See generally Hoffman, *supra* note 255.

258. ORWELL, *supra* note 1 at 35.

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