

The Pursuit of Happiness in the Digital Age: Using Bankruptcy and Copyright Law as a Blueprint for Implementing the Right to Be Forgotten in the U.S.

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Should your past mistakes—embarrassing photos, off-colored jokes, or mishaps with the law—live on the Internet forever? In this Note, I make the argument that the right to be forgotten is an American solution to the permanency of the Internet. I explain that the right does not limit free speech; rather, it diminishes the accessibility of information by raising the cost to obtain it. Critics often argue that such a right is un-American; however, the right is quintessentially American because it offers individuals an opportunity to be free from their past mistakes and avoid harm to their reputation. Just as declaring bankruptcy can act as a reputational albatross, so too can certain mistakes made during one’s life that are posted online—especially for adolescents and teenagers. Further, there are clear parallels between the value of one’s copyrightable work and one’s reputation—both are used to further opportunities and make a living. As the demand increases for an ability to remove information from the Internet, these perspectives on the right to be forgotten are descriptively helpful. They provide an analytical context to view the right within the scope of the First Amendment and facilitate fresh insights about modeling the right in America.

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INTRODUCTION

Online, the past remains fresh. The pixels do not fade with time as our memories do Since we live in a world where we tend to choose “archive” instead of “delete,” everything is saved, and memories have a way of forcing themselves to the surface in the most unexpected ways. If memories are painful, that can be paralyzing, like a digital PTSD, with flashbacks to events that you can’t control.¹

It’s 10:00 PM and you received the worst call of your life.² Your eighteen-year-old daughter slammed your car into the side of a concrete tollbooth. She was decapitated upon impact. The highway patrol secured the scene and took photographs, but given how horrific the death was, the coroner did not allow you to identify your daughter. Thus, you never saw the photographs or your daughter’s body after the accident. Two weeks later, your youngest son comes home from school distraught and tells you that children at school were talking about how photos from the accident are circulating online. A quick online search of your daughter’s name lists the website that displays the photos of her accident. Later, you find out that highway patrol employees circulated the photos among friends, and the photos worked their way to the website, which publishes gruesome photos.

You contact the website, pleading with them to remove the pictures, but they refuse. You then reach out to the various search engines, begging them to delist the website, hoping that having the website delisted will stave off the spread of the pictures and decrease the likelihood that your children will come across

1. Kashmir Hill, *How the Past Haunts Us in the Digital Age*, Forbes (Oct. 4, 2011, 9:39 AM), <https://www.forbes.com/sites/kashmirhill/2011/10/04/how-the-past-haunts-us-in-the-digital-age/#77028b9158b6> [<https://perma.cc/4Q77-9RT8>].

2. The facts presented here are based on a real story. See Jeffrey Toobin, *The Solace of Oblivion*, NEW YORKER (Sept. 29, 2014), <http://www.newyorker.com/magazine/2014/09/29/solace-oblivion> [<https://perma.cc/3AKA-X2CT>].

them online. Then the search engines refuse to remove the photos too. With no legal recourse, your only option is to forbid your children from accessing the Internet and hope that in time, the search engine algorithms will bury the photos and the website.

Sadly, this is just one of many stories exemplifying that the past can never truly be forgotten on the Internet. Ex-convicts fear that their past mistakes will prevent them from finding a job because court filings, which are public information, are becoming more organized and accessible.³ College students who have been arrested and have pleaded guilty to public intoxication worry that their mug shot will circulate online for years, hampering their opportunity for a well-paid first job upon graduation.⁴ Additionally, more than half of kids and teenagers experience online bullying.⁵ These examples show that there is a strong need for people to be able to remove content from the Internet,⁶ which is why we need a right to be forgotten.

Today, most of the American population under the age of twenty-five has likely left a digital trail consisting of photos, tweets, Facebook posts, and discussion board comments that have become eternalized in the Internet record.⁷ In addition, reports of criminal activities and other embarrassing incidents from people's pasts are just a few clicks away.⁸ As Meg Leta Jones notes, the immortalization of history on the Internet makes it "difficult for people to detach themselves from humiliating or embarrassing past moments, which can make efforts at self-improvement seem futile."⁹ This problem becomes starker when one considers the size of the global Internet population—3.8 billion.¹⁰ Jones had the following to say about the volume of Internet traffic this produces:

Every minute in 2012, 204,166,667 emails were sent, over 2,000,000 queries were received by Google, 684,478 pieces of content were shared on Facebook, 100,000 tweets were sent, 3,125 new photos were added to Flickr, 2,083

3. See, e.g., Anonymous & Sandra Sorenson, *There's a Public Shaming Industry (and It Held Me Hostage)*, CRACKED (Aug. 15, 2016), <http://www.cracked.com/personal-experiences-2366-shady-people-put-my-mugshot-online-extorted-me-money.html> [<http://perma.cc/KCP9-6CUT>]; Binyamin Appelbaum, *Out of Trouble, but Criminal Records Keep Men out of Work*, N.Y. TIMES (Feb. 28, 2015), <https://www.nytimes.com/2015/03/01/business/out-of-trouble-but-criminal-records-keep-men-out-of-work.html> [<https://nyti.ms/2ktmj3S>].

4. See Erin Jordan, *Old Charges Can Haunt Job-Hunting College Grads*, GAZETTE (May 13, 2011), <http://www.thegazette.com/2011/05/13/old-charges-can-haunt-job-hunting-college-grads> [<https://perma.cc/V47M-TWDW>]; see also *Mugshots from around Your Campus*, CAMPUS MUGSHOTS, <http://campusmugshots.com> [<https://perma.cc/9RVM-UEGJ>].

5. See MEG LETA JONES, CTRL + Z: THE RIGHT TO BE FORGOTTEN 5 (2016).

6. See *id.* (citing *Bullying and Suicide*, BULLYING STATISTICS, <http://www.bullyingstatistics.org/content/bullying-and-suicide.html> [<https://perma.cc/B6RL-HQYR>]).

7. *Cf. id.* (discussing the "abundance of information" that is available online).

8. See *id.*

9. *Id.* at 11.

10. See *World Internet Users and 2017 Population Stats*, INTERNET WORLD STATS, <http://www.internetworldstats.com/stats.htm> [<https://perma.cc/YEA2-QM8A>].

check-ins occurred on Foursquare, 270,000 words were written on Blogger, and 571 new websites were created.¹¹

In the Digital Age, a life can be ruined in a matter of hours. In 2013, while traveling to visit family during the holidays, Justine Sacco—a communications director—tweeted out to her 170 followers before boarding an eleven-hour flight, “Going to Africa. Hope I don’t get AIDS. Just kidding. I’m white.”¹² Once she landed, her life was turned upside down. Her tweet was trending worldwide, and subject to massive scorn.¹³ The Internet ensures individuals, like Justine Sacco, may have to wear their most shameful secret like a scarlet “A.”¹⁴ When, as Jones says, “80 percent of employers, 30 percent of universities, and 40 percent of law schools search applicants online,” individuals may miss out on life-changing opportunities because they can never move past their most humiliating or embarrassing moments.¹⁵ Internet law scholar Viktor Mayer-Schönberger has warned that the Digital Age has made *forgetting* the exception and *remembering* the default.¹⁶ In Jones’s words, “[d]igital memory, in short, prevents society from moving beyond the past because it cannot forget the past.”¹⁷

The solution to our digital memory problem, many argue, is the right to be forgotten. This right has European origins.¹⁸ It is derived from the 1995 European Data Protection Directive (Directive 95/46),¹⁹ and, in 2016, Europe further updated its laws to include the right in the General Data Protection Regulation.²⁰ As a consequence of the right to be forgotten, a person can request that Internet search results about his or her private life be removed provided that certain criteria are met, such as that the information about that person is “inadequate, irrelevant or no longer relevant.”²¹ Directive 95/46’s aim, as Eleni

11. JONES, *supra* note 5, at 3 (citing Neil Spencer, *How Much Data Is Created Every Minute?*, VISUAL NEWS (June 19, 2012), <http://www.visualnews.com/2012/06/19/how-much-data-created-every-minute/?view=infographic> [<https://perma.cc/7MHC-96DA>]).

12. See Jon Ronson, *How One Stupid Tweet Blew Up Justine Sacco’s Life*, N.Y. TIMES MAG. (Feb. 12, 2015), <http://www.nytimes.com/2015/02/15/magazine/how-one-stupid-tweet-ruined-justine-saccos-life.html> [<https://nyti.ms/2k2nOSI>].

13. See *id.*

14. See DANIEL J. SOLOVE, *THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET* 76 (2007).

15. JONES, *supra* note 5.

16. See VIKTOR MAYER-SCHÖNBERGER, *DELETE: THE VIRTUE OF FORGETTING IN THE DIGITAL AGE* 2 (2011).

17. JONES, *supra* note 5, at 11.

18. See *id.* at 21.

19. See Council Directive 95/46, 1995 O.J. (L 281) 31 (EU), <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31995L0046&from=EN> [<https://perma.cc/9MXB-K7XP>].

20. See *GDPR Key Changes: An Overview of the Main Changes Under GDPR and How They Differ from the Previous Directive*, EU GEN. DATA PROT. REGULATION, <http://www.eugdpr.org/key-changes.html> [<https://perma.cc/SRG2-A76U>].

21. See *The Right to Be Forgotten: One Year Later*, BERKLEY TECH. L.J.: BLOG (Apr. 5, 2015), <http://btlj.org/2015/04/the-right-to-be-forgotten-one-year-later/> [<https://perma.cc/6CFB-S5EC>].

Frantziou notes, is to protect individuals “with regard to the processing of personal data and on the free movement of such data.”²² Prior to the European case *Google Spain SL v. Agencia Española de Protección de Datos*,²³ the question remained whether search engines, like Google, were considered “data processors,” and were thus required to remove particular search results. In 2014, however, the European Court of Justice (ECJ) held in *Google Spain* that Google and other search engines were “data processors” under Directive 95/46 and were therefore required to remove certain results.²⁴ This galvanized the right to be forgotten in Europe and causing mostly horror within the United States.

Many Americans confronted the right as misguided on the part of EU regulators, and inconsistent with some of the most fundamental American values, such as freedom of expression, freedom of the press, and the right to know.²⁵ A Facebook representative likened the right to shooting the messenger,²⁶ and Eric Schmidt, Google’s executive chairman, said he believed the court should have struck the balance between the right to be forgotten and the right to know in favor of the right to know.²⁷ Facebook and Google are not alone in this view. Andrew McLaughlin, former Deputy Chief Technology Officer of the United States, believes the right is unmistakably censorship.²⁸ Emma Llansó, a free expression scholar at the Center for Democracy and Technology, believes that the right “alter[s] the historical record” and “mak[es] information that was lawfully public no longer accessible.”²⁹ Others, like *The New Republic*’s Dawinder Sidhu have argued that whether information is a

22. Eleni Frantziou, *Further Developments in the Right to Be Forgotten: The European Court of Justice’s Judgment in Case C-131/12, Google Spain, SL, Google Inc. v. Agencia Española de Protección de Datos*, 14 HUM. RTS. L. REV. 761, 763 (2014).

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

24. *Id.* ¶ 41.

25. See Associated Press, *Spanish Claim “Right to Be Forgotten” on Web*, CBS NEWS (Apr. 20, 2011, 12:34 PM), http://www.cbsnews.com/2100-205_162-20055718.html [<https://perma.cc/LJ5E-QVA5>] (quoting the Center for Democracy and Technology’s Privacy Project director Justin Brookman, stating “In the United States we have a very strong tradition of free speech [and] freedom of expression. We would strongly caution against any interpretation of the right to be forgotten that infringes upon that.”).

26. See Kelly Fiveash, *Facebook Tells Privacy Advocates Not to ‘Shoot the Messenger.’* REGISTER (Mar. 23, 2011, 11:01 AM), http://www.theregister.co.uk/2011/03/23/facebook_shoot_messenger [<https://perma.cc/Q7VV-SSPF>].

27. See Danny Hakim, *Right to Be Forgotten? Not That Easy*, N.Y. TIMES (May 29, 2014), <http://www.nytimes.com/2014/05/30/business/international/on-the-internet-the-right-to-forget-vs-the-right-to-know.html> [<https://nyti.ms/2k4tBHv>].

28. See Transcript: The U.S. Should Adopt the ‘Right to Be Forgotten’ Online, Intelligence Squared Debates 8 (Mar. 11, 2015), <https://www.intelligencesquaredus.org/debates/us-should-adopt-right-to-be-forgotten-online> [<https://perma.cc/3JAL-6M39>] (statement of Andrew McLaughlin).

29. Farhad Manjoo, *‘Right to Be Forgotten’ Online Could Spread*, N.Y. TIMES (Aug. 5, 2015), <http://www.nytimes.com/2015/08/06/technology/personaltech/right-to-be-forgotten-online-is-poised-to-spread.html> [<https://nyti.ms/2ktFF92>].

matter of public interest should be determined by “the marketplace of ideas.”³⁰ Several law review articles and notes similarly argue that the right is antithetical to American values because it would not survive constitutional scrutiny, it would censor and chill speech, or it would conflict with democratic values.³¹

However, it is not so clear that the right is fundamentally inconsistent with American values; specifically, freedom of speech and the right to know. Indeed, a right to be forgotten can be found in America’s bankruptcy code, which is likely why Jonathan Zittrain supports the concept of “reputation bankruptcy” modeled on the Fair Credit Reporting Act.³² Additionally, the utilization of a Notice and Takedown system similar to the one devised under the Digital Millennium Copyright Act (DMCA) could ensure a successful implementation of the right in America.³³

One of the main attractions of the right to be forgotten is that it allows individuals to move on with their lives and not be tethered to their past actions. If human beings can forget elements of other people’s pasts, why not the Internet too?³⁴ As Meg Leta Jones argues, “[f]orgetting as it relates to digital privacy and identity is intended to free individuals from the weight of their digital baggage.”³⁵ Moreover, she says this reflects “a larger cultural willingness to allow individuals to move beyond their personal pasts” consistent with society’s “capacity to offer forgiveness, provide second chances, and recognize the value of reinvention.”³⁶ The right to be forgotten is therefore “the right to silence on past events in life that are no longer occurring.”³⁷

This Note comprehensively examines the right to be forgotten.³⁸ It refutes the claim that if there is an American right to know there cannot be an American right to be forgotten. This Note takes the position that the right to be forgotten

30. See Dawinder Sidhu, *We Don’t Need a “Right to Be Forgotten.” We Need a Right to Evolve: The Sad Symptom of a Judgmental Culture*, NEW REPUBLIC (Nov. 7, 2014), <https://newrepublic.com/article/120181/america-shouldnt-even-need-right-be-forgotten> [<https://perma.cc/7XMN-P2LU>]; see also Jeffrey Rosen, Response, *The Right to Be Forgotten*, 64 STAN. L. REV. ONLINE 88 (2012) [hereinafter Rosen, *Right to Be Forgotten*], <http://www.stanfordlawreview.org/online/privacy-paradox/right-to-be-forgotten> [<https://perma.cc/E7LM-983H>]; Jeffrey Rosen, *A Grave New Threat to Free Speech from Europe*, NEW REPUBLIC (Feb. 10, 2012), <https://newrepublic.com/article/100664/freedom-forgotten-internet-privacy-facebook> [<https://perma.cc/6GWF-GXQF>].

31. See, e.g., McKay Cunningham, *Free Expression, Privacy, and Diminishing Sovereignty in the Information Age: The Internationalization of Censorship*, 69 ARK. L. REV. 71, 73, 85 (2016); Rosen, *Right to Be Forgotten*, *supra* note 30, at 90–91; Robert Kirk Walker, Note, *The Right to Be Forgotten*, 64 HASTINGS L.J. 257, 274 (2012).

32. See JONATHAN L. ZITTRAIN, *THE FUTURE OF THE INTERNET—AND HOW TO STOP IT* 228–29 (2008).

33. See 17 U.S.C. § 512 (2012).

34. See *The Right to Be Forgotten: One Year Later*, *supra* note 21.

35. JONES, *supra* note 5, at 11.

36. *Id.*

37. *Id.* at 9–10 (internal quotation marks omitted).

38. This Note does not argue that Americans have a constitutional right to be forgotten. As it stands today, the European version of the right to be forgotten does not exist in American law. This Note takes the position that the right is not antithetical to our laws or constitution, and in fact, laws that are aimed to forgive and forget are abundant throughout our legal system. This Note does not address how courts should handle implementing the right to be forgotten.

is, in fact, quintessentially American. Part I of this Note looks at three cases—one European and two American—articulating a right to be forgotten. Part II discusses potential criticisms of the right to be forgotten based on free speech and the public’s right to know. Finally, Part III examines the existence of the right in bankruptcy law, and posits that the American Notice and Takedown System devised under the DMCA as a protection for copyright could also be used to protect the right to be forgotten. This could be accomplished through a form like the one that Google currently uses to implement the right to be forgotten in Europe.

I. INTRODUCTION TO THE RIGHT TO BE FORGOTTEN

The right to be forgotten is not as foreign to American law as some may believe. Although the right is a European creation, American case law has dealt with the right since the 1930s and ‘40s when Samuel D. Warren and Louis D. Brandeis’s seminal piece, *The Right to Privacy*, drove judicial conceptions about privacy.³⁹ This Part describes the right’s origination in the *Google Spain* case, where the ECJ required Google to remove certain search results, and how the right exists in American case law.

A. THE RIGHT TO BE FORGOTTEN IN EUROPE: THE *GOOGLE SPAIN* CASE

In 1998, a Spanish daily newspaper, *La Vanguardia*, published announcements mentioning Mr. Mario Costeja González’s name in notices concerning real estate auctions held to pay off his social security debts.⁴⁰ A version of the edition was later made available through the newspaper’s online archive.⁴¹ In 2010, González filed a complaint with the Agencia Española de Protección de Datos (AEDP), the Spanish Data Protection Agency, against *La Vanguardia*, Google Spain, and Google Inc., requesting that Google Spain or Google Inc. “be required to remove or conceal the personal data relating to him so they ceased to be included in the search results and no longer appeared in the links to *La Vanguardia*.”⁴² González argued that his debts, which were the subject of the articles, were not relevant because they had been “fully resolved for a number of years.”⁴³

The AEDP dismissed González’s complaint against *La Vanguardia*, finding that it was legally permissible for the newspaper to keep the article on their website.⁴⁴ The AEDP allowed the claims against Google to stand, and Google appealed the AEDP’s finding to Spain’s high court, which referred three ques-

39. See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 215 (1890).

40. Case C-131/12, *Google Spain SL v. Agencia Española de Protección de Datos (AEPD)*, 2014 E.C.R. 317, ¶ 14.

41. *Id.*

42. *Id.* ¶ 15.

43. *Id.*

44. See Frantziou, *supra* note 22, at 762.

tions to the ECJ: (1) whether EU rules apply to search engines if they have a branch or subsidiary in a Member State; (2) whether Directive 95/46 applies to search engines; and (3) whether an individual has the right to request that his or her personal data be removed from search results (the “right to be forgotten”).⁴⁵

The ECJ found that Directive 95/46, which regulates the processing of personal data in the European Union, applies to search engines.⁴⁶ As a result, because Google Inc.’s subsidiary operates within Spain’s territory, Directive 95/46 applied to Google.⁴⁷ The ECJ held that individuals have a right to request that search engines remove links to personal information.⁴⁸ The Court further held that Article 12(b) of Directive 95/46 allows individuals to request that certain search results be removed by search engine operators if that information is not in the public interest or otherwise covered by Article 6 of the directive.⁴⁹ Article 12(b) of the directive gives data subjects the right to “rectification, erasure or blocking of data the processing of which does not comply with the provisions of [the] Directive.”⁵⁰ Article 6 requires that data are “adequate, relevant and not excessive in relation to the purposes for which they are collected,” “accurate and, where necessary, kept up to date,” and “kept in a form which permits identification of data subjects for no longer than is necessary.”⁵¹

The ECJ found that a balance should be struck between the collection, use, and public dissemination of data and the data subject’s privacy rights.⁵² Specifically, the individual privacy interest had to be balanced with the public’s right to know.⁵³ The ECJ determined that the balance must be struck on a case-by-case basis, taking into account “the nature of the information in question and its sensitivity for the data subject’s private life” and the public’s interest in the information.⁵⁴ The public’s interest will vary “according to the role played by the data subject in public life,” meaning that if the data subject was a public figure, the public interest will be greater than if the data subject was a private figure.⁵⁵ Under this test, the Court concluded that Google’s economic interest and the public’s interest in González’s articles did not outweigh González’s privacy interests, which were protected under Directive 95/46.⁵⁶

Within a few days after the ruling Google received about 1,000 take down requests, with about half of those requests relating to criminal convictions.⁵⁷

45. *Id.* at 764–65.

46. *See Google Spain*, 2014 E.C.R. ¶ 41.

47. *See id.* ¶ 60.

48. *See id.* ¶ 76.

49. *See The Right to Be Forgotten (Google v. Spain)*, ELEC. PRIVACY INFO. CTR., <https://epic.org/privacy/right-to-be-forgotten> [<https://perma.cc/8977-KJBN>].

50. Council Directive 95/46, *supra* note 19, art. 12(b).

51. *Id.* art. 6.

52. *See Google Spain*, 2014 E.C.R. ¶ 81.

53. *See id.* ¶ 97.

54. *See id.* ¶ 81.

55. *See id.*

56. *See id.* ¶ 98.

57. *See Hakim, supra* note 27.

After about a month, according to Meg Leta Jones, “Google received a reported 70,000 requests to remove 250,000 search results linking individuals in the EU to information they would rather be dissociated from.”⁵⁸ The removals that are not granted by Google are either rejected or referred to an internal appeals process.⁵⁹ Isabelle Falque-Pierrotin, the chairwoman of the French data protection agency, said the court ruling “echoes what we identify as a social trend, which is the will of individuals to master their online life.”⁶⁰

B. THE RIGHT TO BE FORGOTTEN IN AMERICA: *MELVIN* AND *SIDIS*

Although many argue the ECJ’s decision was incorrect,⁶¹ the right to be forgotten has judicial precedent in American law that is consistent with the European ruling. One can find the first existence of the right to be forgotten in a well-known 1931 American privacy case, *Melvin v. Reid*.⁶² The plaintiff in that case, who was previously named Gabrielle Darley, claimed that a movie about her past life violated her privacy rights.⁶³ A number of years prior to the film, Darley had been a prostitute and was tried and acquitted for murder.⁶⁴ After her trial, Darley “abandoned her life of shame and became entirely rehabilitated.”⁶⁵ Darley married, lived an “exemplary, virtuous, honorable, and righteous life,” and “made many friends who were not aware of the incidents of her earlier life.”⁶⁶ Seven years after the trial and six years after she got married, a film named *The Red Kimono* about Darley’s previous life was released and advertised using Darley’s full name.⁶⁷

The California Appellate Court concluded that given Darley’s change in her life, “she should have been permitted to continue its course without her reputation and social standing destroyed by the publication.”⁶⁸ The court found that including Darley’s name in the publication “was not justified by any standard of morals or ethics” and concluded that this “was a direct invasion of her inalienable right . . . to pursue and obtain happiness.”⁶⁹

The court defended its holding by citing the need to incentivize rehabilitation and reward social reformation.⁷⁰ This defense underscores the intersection of laws, interests, and values that relate to the right to be forgotten. As Meg Leta

58. JONES, *supra* note 5, at 27.

59. *See id.*

60. Hakim, *supra* note 27.

61. *See, e.g.*, Manjoo, *supra* note 29; Rosen, *Right to Be Forgotten*, *supra* note 30; Sidhu, *supra* note 30; Transcript, *supra* note 28 (statement of Andrew McLaughlin).

62. 297 P. 91 (Cal. Dist. Ct. App. 1931).

63. *Id.* at 91.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 93.

69. *Id.*

70. *See id.*

Jones illustrates, individuals “seeking a second chance and hoping for reinvention” built the United States.⁷¹ America has always been viewed as the “land of opportunity,” a place for anyone to come and start a new life.⁷² Initially, this patriotic lore is what attracted Europeans who were “negatively labeled” in their home countries.⁷³ Today, evidence of the American ethos for opportunity and reinvention is found in common law, specifically in the public disclosure tort,⁷⁴ as well as in statutory law, such as in the Fair Credit Reporting Act⁷⁵ and the Digital Millennium Copyright Act.⁷⁶ Moreover, based on the federal Do Not Track Kids bill record, 94% “of U.S. adults and parents believe that individuals should have the ability to request the deletion of personal information stored by a search engine, social networking site, or marketing company after a specific period of time.”⁷⁷

Yet, nearly a decade after *Melvin*, the Second Circuit reached an entirely different result in *Sidis v. F-R. Publishing Corp.*⁷⁸ In August 1937, William James Sidis was the subject of a brief biographical sketch in *The New Yorker*.⁷⁹ Sidis had previously been a child prodigy whose “name and prowess were well known to newspaper readers of the period.”⁸⁰ Sidis chose to live “as unobtrusively as possible,” and until the *New Yorker* article, he was successful in living a private life.⁸¹ The article—a “Where Are They Now” piece—described Sidis’s accomplishments and then focused on Sidis’s reclusive lifestyle, commenting on “[t]he untidiness of his room, his curious laugh, his manner of speech, and [his] other personal habits.”⁸²

The court recognized that the *New Yorker* article could be interpreted as a “ruthless exposure of a once public character, who has since sought and has now been deprived of the seclusion of private life.”⁸³ Nevertheless, the court found that the public’s interest in his past affairs, especially concerning his potential for a bright future, was substantial enough to be considered newsworthy.⁸⁴ Thus, the court held that the public’s right to know precluded Sidis from

71. JONES, *supra* note 5, at 139.

72. *See id.*

73. *Id.*

74. *See* RESTATEMENT (SECOND) OF TORTS § 652D (AM. LAW INST. 1977) (prohibiting the unauthorized disclosure of truthful, offensive, private facts that are not of public concern).

75. *See* 15 U.S.C. § 1681 (2012).

76. *See* Digital Millennium Copyright Act, 17 U.S.C. § 512 (2012). Of course, these are not the only U.S. laws that provide forgiveness. For a comprehensive analysis of well-established law that provides forgiveness, see Meg Leta Ambrose et al., *Seeking Digital Redemption: The Future of Forgiveness in the Internet Age*, 29 SANTA CLARA COMPUTER & HIGH TECH L.J. 99, 101 (2012).

77. JONES, *supra* note 5, at 138.

78. *See* 113 F.2d 806 (2d Cir. 1940).

79. *Id.* at 807.

80. *Id.* (“At the age of eleven, he lectured to distinguished mathematicians on the subject of Four-Dimensional Bodies. When he was sixteen, he was graduated from Harvard College . . .”).

81. *Id.*

82. *Id.*

83. *Id.* at 807–08.

84. *Id.* at 809.

recovering for the article's invasion of his privacy.⁸⁵

Despite the decision in *Melvin*, modern courts have almost overwhelmingly sided with the Second Circuit's reasoning in *Sidis*.⁸⁶ Regardless of courts' apparent repudiation of the right to be forgotten, *Sidis* truly hinges on when the public's right to know is extinguished. Like the issue of private facts falling outside the realm of public affairs, the lapse of time factor considers whether the publication is consistent with notions of decency in the community.⁸⁷ Aspects of people's private lives can be disclosed without offending reasonable members of the community as long as that information is of legitimate interest to the public.⁸⁸ In *Melvin*, unlike in *Sidis*, the court noted that the defendant's sole purpose in producing the movie was to gain profit.⁸⁹ There was no initial public interest in Darcey's life until the creation of the film. In *Sidis*, on the other hand, the article was not solely about gaining a profit; rather, it was seeking to quell the public's curiosity about a once public figure.⁹⁰

Although many view the distinction between *Melvin* and *Sidis* as a matter of interpreting privacy law in light of the First Amendment, the courts have made a subtle, yet unknowing, distinction between information created with the sole intent of creating a profit and information created with the intent of quelling public interest.

II. CRITIQUES OF THE RIGHT TO BE FORGOTTEN AS UN-AMERICAN

As discussed earlier, most American commentators have criticized the right to be forgotten and have deemed it completely foreign to American laws and values. The criticisms of the right derive from two American bedrocks: freedom of speech and the right to know. The freedom of speech argument was built upon the holding in *Sidis* and sharpened with the Supreme Court's rulings in *Cox Broadcasting Corp. v. Cohn*⁹¹ and *Florida Star v. B.J.F.*⁹² Some contend that the right to be forgotten infringes on freedom of speech,⁹³ so there is a concern that limiting someone's access to information—the right to know—is akin to censorship. However, this Part explains how the right to be forgotten

85. *Id.*

86. See *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1231–32 (7th Cir. 1993) (noting modern courts' movement toward the *Sidis* view of privacy and away from the *Melvin* view).

87. See RESTATEMENT (SECOND) OF TORTS § 652D cmt. k (AM. LAW INST. 1977) (“Again the question is to be determined upon the basis of community standards and mores.”).

88. See *Haynes*, 8 F.3d at 1232–33; *Shulman v. Grp. W Prods., Inc.*, 955 P.2d 469, 485 (Cal. 1998) (noting that private facts about a person's life cease to be a matter of public interest when they no longer reasonably relate to the subject matter).

89. See *Melvin v. Reid*, 297 P. 91, 93 (Cal. Dist. Ct. App. 1931) (emphasis added).

90. See *Sidis v. F-R. Pub'g Corp.*, 113 F.2d 806, 810 (2d Cir. 1940).

91. See 420 U.S. 469, 496 (1975).

92. See 491 U.S. 524, 540–41 (1989).

93. See, e.g., Hans Bader, *European “Right to Be Forgotten” Eats Free-Speech Rights of Google and Its Users’ Rights Too*, COMPETITIVE ENTER. INST. (May 13, 2014), <https://cei.org/blog/european-right-be-forgotten-eats-free-speech-rights-google-and-its-users-rights-too> [<https://perma.cc/X6FW-2BJZ>].

neither infringes on freedom of speech nor improperly diminishes one's right to know; rather, the right to be forgotten can be construed in a manner that is consistent with these existing rights.

A. THE FREEDOM OF SPEECH CRITIQUE AND ITS RESOLUTION WITH THE RIGHT TO BE FORGOTTEN

Arguably, the main critique of the right to be forgotten is that the right is antithetical to free speech. Andrew McLaughlin, a former Deputy Chief Technology Officer of the United States, firmly believes that the right to be forgotten is unmistakably censorship.⁹⁴ McLaughlin argues that the right to be forgotten is “the regulation of speech and, really, the regulation of thought which is ultimately what memory is.”⁹⁵ Jeffrey Rosen, Professor of Law at George Washington University, has echoed McLaughlin's view, arguing that the right represents “the biggest threat to free speech on the Internet in the coming decade.”⁹⁶ These criticisms overlook a crucial fact: First Amendment law perfectly encapsulates the right to be forgotten.

As Franz Werro argues, the development of a right to be forgotten in the United States originates “from a series of attempts by the various states to carve out for their citizens a sphere of individual privacy inviolable from the mass media.”⁹⁷ Privacy rights, like the right to be forgotten, have often been limited by First Amendment concerns.⁹⁸ The common law tort Public Disclosure of Private Facts⁹⁹ is the closest common law right in American law to the right to be forgotten.¹⁰⁰ Anyone, including the media, can be held liable for disclosing true facts if those facts “would be highly offensive to a reasonable person” and “are not of concern to the public.”¹⁰¹ Werro notes:

The tort of public disclosure, in appealing both to social “reasonableness” norms regarding aspects of a person's life that ought to be left private, and to the idea that some facts, though true, are of no concern to the public at large, seems to embody a European, dignity-based view of privacy.¹⁰²

The tort also complements the ECJ opinion in *Google Spain*.

However, in hearing lawsuits against the press for privacy violations, the Supreme Court has held that the interests of the press triumph in the vast

94. See Transcript, *supra* note 28 (statement of Andrew McLaughlin).

95. *Id.*

96. Rosen, *Right to Be Forgotten*, *supra* note 30, at 88.

97. See Franz Werro, *The Right to Inform v. The Right to Be Forgotten: A Transatlantic Clash*, in *LIABILITY IN THE THIRD MILLENNIUM* 285, 292 (Aurelia Colombi Ciacchi et al. eds., 2009).

98. See *id.*

99. See RESTATEMENT (SECOND) OF TORTS § 652D (AM. LAW INST. 1977).

100. See Werro, *supra* note 97.

101. *Id.* (citing RESTATEMENT § 652D).

102. *Id.*

majority of privacy claims.¹⁰³ The first significant strike against the tort was in *Cox Broadcasting Corp.* In that case, the Court rejected a state's ability to impose liability on a media corporation for publishing information about a deceased rape victim's name.¹⁰⁴ Although her name was listed in the publicly available indictments, the Court found the media company's disclosure of the name to be inconsistent with the First Amendment.¹⁰⁵ The Court grounded its decision in longstanding First Amendment principles strongly opposed to punishing the dissemination of truthful information relevant to the public interest.¹⁰⁶

A second blow to the right to be forgotten came in *Florida Star*. There, the Supreme Court overturned compensatory and punitive damages awarded to a sexual assault victim whose name was published in a local newspaper when the suspect was still at large and the police investigation was ongoing.¹⁰⁷ The Court held that imposing liability on a publisher for publishing a name, regardless of the content of the article, was unconstitutional because the interests at stake, and the limited effect of liability, could not justify the inroads made against the freedom of the press.¹⁰⁸

At first glance, both Supreme Court cases appear to repudiate the right to be forgotten. However, as Werro notes, the "public significance" test that has been applied by the Court "presents a means of balancing the right of a democratic society to remain informed and the right of an individual not to have her affairs dragged out into the open when they are of no civic value."¹⁰⁹ Specifically, the "public significance test" holds that "information that is not of public significance is not entitled to [First Amendment] protection."¹¹⁰ In essence, this enables courts to prevent frivolous and socially irredeemable forays into the private lives of individuals from being perpetrated under the guise of the First Amendment.¹¹¹ Additionally, in the Digital Age, this test offers courts an opportunity to determine whether the information at issue is still considered "newsworthy," and, therefore, protected by the First Amendment, or whether its "newsworthiness" has lost its muster and can be forgotten.¹¹²

103. See James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1209 (2004).

104. See *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 471, 495–96 (1975).

105. See *id.*

106. See *id.* at 496 (finding that a rule imposing liability on the media in this context "would invite timidity and self-censorship and very likely lead to the suppression of many items that would otherwise be published and that should be made available to the public").

107. See *Florida Star v. B.J.F.*, 491 U.S. 524, 527 (1989).

108. See *id.* at 540–41.

109. Werro, *supra* note 97, at 296 (citing J.R. Rolfs, Note, *The Florida Star v. B.J.F.: The Beginning of the End for the Tort of Public Disclosure*, 1990 WIS. L. REV. 1107, 1120–22).

110. Rolfs, *supra* note 109, at 1120. As Rolfs states, "[t]he public significance limitation on the tort of public disclosure is not new. Under the *Restatement's* formulation of the tort, individual privacy is invaded only if the matter publicized is 'not of legitimate concern to the public.'" *Id.* at 1120–21.

111. See *id.* at 1122.

112. See, e.g., *Briscoe v. Reader's Digest Ass'n*, 483 P.2d 34, 43 (Cal. 1971) (holding that publishing true facts may give rise to an actionable invasion of privacy when the information published is no longer newsworthy).

Unfortunately, the heated debate surrounding the right to be forgotten in America often overlooks that the ECJ decision did not elevate the right to be forgotten as a right to trump other fundamental rights—specifically freedom of speech. Although we have the First Amendment in America, the European Court of Justice had to square the *Google Spain* decision with Article 11(1) of the EU Charter of Fundamental Rights.¹¹³ That provision states that “[e]veryone has the right to freedom of expression” and that “[t]his right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.”¹¹⁴ In fact, the ECJ affirmed in *Google Spain* that the right to be forgotten is not absolute and has clear limitations.¹¹⁵ Requests for data erasure are assessed on a case-by-case basis by Google and similar companies after an individual files a request to have the specific URL taken down from the search engine’s indexing.¹¹⁶ The erasure only applies when personal data storage is no longer necessary or relevant for the original purposes for which the data was collected.¹¹⁷ Therefore, removing irrelevant or outdated URL links is not tantamount to deleting or censoring content.

The ECJ, however, did not rule that the content—the newspaper article—had to be removed from the newspaper’s archive.¹¹⁸ The article, which González requested to be removed, is still accessible on the Spanish newspaper’s website,¹¹⁹ but it will no longer be ubiquitous on the web through a search engine. Nor did the ECJ hold that the newspaper could not republish the article if González became relevant again in the public discourse, say if he ran for Finance Minister or sued Google for not taking down the article.¹²⁰ The court, in its ruling, empowered individuals to manage their personal data and reputation but also explicitly protected the media’s ability to engage in freedom of expression.¹²¹

The relationship of the right to be forgotten with the First Amendment is complicated. Implementing the right makes it more difficult to learn something

113. See Charter of Fundamental Rights of the European Union, art. 11(1), 2000 O.J. (C 364) 1, 11.

114. *Id.*

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

116. See *id.* ¶ 63.

117. See *id.* ¶ 72.

118. See *id.* ¶¶ 16, 98.

119. See *Subhasta d’Inmobles*, LA VANGUARDIA (Spain), Jan. 19, 2008, at 23, <http://hemeroteca.lavanguardia.com/preview/1998/01/19/pagina-23/33842001/pdf.html> [<https://perma.cc/RY24-88SD>].

120. See *Google Spain*, 2014 E.C.R. ¶ 93; cf. Warren & Brandeis, *supra* note 39 (“There are others who, in varying degrees, have renounced the right to live their lives screened from public observation.”).

121. See Press Release No 70/14, Court of Justice of the European Union, Judgment in Case C-131/12 *Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos, Mario Costeja González* (May 13, 2014), <https://curia.europa.eu/jcms/upload/docs/application/pdf/2014-05/cp140070en.pdf> [<https://perma.cc/S7WQ-MWMK>] (noting the complaint was dismissed against *La Vanguardia* but not Google).

about someone else. In other words, the barrier to access information has been raised. This barrier is not vast, and it is perfectly within Warren and Brandeis's notion that publishing information about "a modest and retiring individual" and his private affairs would be impermissible, whereas publishing about "the same characteristics found in a would-be congressman could not be regarded as beyond the pale of propriety."¹²² Thus, if González were to be considered for Finance Minister, both the ECJ and Warren and Brandeis would hold that the right to be forgotten should not apply because the information—an article regarding González's past finances—would be relevant to those judging whether he should be considered for the next Finance Minister. The right to be forgotten gives individuals an opportunity to move forward with their lives and not to be shackled from their past mistakes. As the philosopher and political theorist Hanna Arendt noted, "Without being forgiven, released from the consequences of what we have done, our capacity to act would, as it were, be confined to one single deed from which we could never recover"¹²³

B. THE RIGHT TO KNOW CRITIQUE AND ITS ROLE IN PREVENTING US FROM FORGETTING

Following the European Court of Justice's decision in *Google Spain*, an executive from Google, Eric Schmidt, "invoked an intriguing legal defense to justify his company's aggressive business practices"—it was not freedom of speech, but the right to know.¹²⁴ The right to know is an argument that citizens, or in Google's case, customers, "should have full access to information so they can make informed decisions."¹²⁵ Historians Gerald Markowitz and David Rosner argue that this right is a "tenet of democracy."¹²⁶ However, the term "right to know" was not in common usage until 1945.¹²⁷ Kent Cooper, a former executive director of the Associated Press, used the term when he made the following statement: "The citizen is entitled to have access to news, fully and accurately presented. There cannot be political freedom in one country, or in the world, without respect for 'the right to know.'"¹²⁸

However, as Professor Michael Schudson notes, one would assume that the right to know would come with a "vibrant democracy," yet, in reality, "it has not always been accepted, let alone applauded."¹²⁹ Schudson argues that the "institutional apparatus" for the right to know originated in the Federal Elections

122. See Warren & Brandeis, *supra* note 39.

123. HANNAH ARENDT, *THE HUMAN CONDITION* 237 (1958).

124. See Evgeny Morozov, *Google Says We Have a "Right to Know," but Really Just Wants the Right to Profit from Your Personal Information*, *NEW REPUBLIC* (May 21, 2014), <https://newrepublic.com/article/117844/googles-right-know-vs-europes-right-be-forgotten> [<https://perma.cc/EX83-P9NS>].

125. GERALD MARKOWITZ & DAVID ROSNER, *DECEIT AND DENIAL: THE DEADLY POLITICS OF INDUSTRIAL POLLUTION* 3 (2013).

126. *Id.*

127. See MICHAEL SCHUDSON, *THE RISE OF THE RIGHT TO KNOW: POLITICS AND THE CULTURE OF TRANSPARENCY, 1945–1975* 6 (2016).

128. Editorial, *The Right to Know*, *N.Y. TIMES*, Jan. 23, 1945, at 18.

129. SCHUDSON, *supra* note 127, at 7.

Campaign Acts of 1971 and 1974 and later became a key part of the rhetoric of democratic reform in areas such as the Freedom of Information Act and in the truth of packaging of supermarket goods.¹³⁰ These ideas “were not born with the First Amendment” or “dreamed up by Thomas Jefferson or James Madison.”¹³¹ Yet today, the right is a part of our institutions.

Since the institutionalization of the right, courts have employed the right to know to protect speech and inhibit censorship. For example, in *New York Times Co. v. United States*, the Supreme Court held that newspapers such as *The New York Times* and *The Washington Post* could not be restrained and censored—even during wartime—from publishing documents that were top secret and obtained without authorization.¹³² Since *New York Times Co.*, several other cases have followed the Supreme Court’s lead,¹³³ cementing the right to know in American culture.

Therefore, it should come as no surprise that we see responses to the right to be forgotten like Emma Llansó’s from the Center for Democracy and Technology, when she argued that “[w]hen we’re talking about a broadly scoped right to be forgotten that’s about altering the historical record or making information that was lawfully public no longer accessible to people, I don’t see a way to square that with a fundamental right to access to information.”¹³⁴ *The New Republic*’s Dawinder Sidhu not only believes that the right to be forgotten is censorship, but argues that in America we typically “allow the relative significance of a piece of information to be debated in the marketplace of ideas, not removed from public consideration altogether.”¹³⁵

Yet, despite Schmidt, Llansó, and Sidhu’s views, it is not clear that the right to know is *predominately* about free speech—if it is a free speech issue at all. As Chief Justice Burger stated in his dissent in *New York Times Co.*, the newspapers made a “derivative claim under the First Amendment; they denominate[d] this right as the public ‘right to know.’”¹³⁶ Burger noted, “by implication, the Times assert[ed] a sole trusteeship of that right by virtue of its journalistic ‘scoop.’”¹³⁷ “[I]n its capacity as trustee of the public’s ‘right to know,’” *The New York Times* delayed publication of the top-secret documents until it considered proper, which thereby delayed public knowledge.¹³⁸ Based on this fact, Burger makes a fine yet subtle distinction between the right to know and free speech. In Burger’s view, the *Times* was asserting that the public only had a right to know this information when it deemed it appropriate.

130. *See id.* at 7–18.

131. *Id.* at 14.

132. *See* 403 U.S. 713, 714 (1971) (per curiam).

133. *See, e.g.,* Florida Star v. B.J.F., 491 U.S. 524 (1989); Oklahoma Publ’g Co. v. District Court, 430 U.S. 308 (1977); Cox Broad. Corp. v. Cohn, 420 U.S. 469 (1975).

134. Manjoo, *supra* note 29.

135. Sidhu, *supra* note 30.

136. *New York Times Co.*, 403 U.S. at 749 (Burger, C.J., dissenting).

137. *Id.*

138. *See id.* at 750.

Conversely, if the public had learned that the *Times* sat on this information prior to its publication, it is unlikely that the public could compel the *Times*—at least legally—to release the information.

Burger's dissent illustrates that the right to know is not explicitly a freedom of speech issue. Restraining, or increasing, the barrier to access information is not a restraint or censor of speech—especially given that the Internet, through social media, blogs, and discussion boards, has expanded access to information. Instead, the right to be forgotten places a restraint on the right to know, a restraint on how widespread information can disseminate. Thus, the right to be forgotten does not prevent people from obtaining information outright, it simply makes it more difficult.¹³⁹ The information being forgotten is not about individuals of public interest. Rather, it is about individuals who have made mistakes in their past that have gained brief public attention, but who are often irrelevant to current or historical public discourse.

Take *Google Spain* as an example. There were no barriers preventing the speech—the publication of the newspaper article—from occurring. The ECJ specifically held that the Spanish newspaper did not need to retract the article, nor did it need to change its archiving practices.¹⁴⁰ Instead, the ECJ targeted Google, stating that they had to remove the search results that listed that particular Spanish news article,¹⁴¹ which is entirely consistent with the American practice of requiring search engines to delist copyright infringement under the Digital Millennium Copyright Act.¹⁴² Furthermore, nothing prohibits an individual from going to the Spanish newspaper's website and pulling and reading the article on Mr. Gonzalez.¹⁴³ The right to be forgotten simply makes research more challenging, but “it will not deter people who are extremely interested” in obtaining that information—most notably, journalists.¹⁴⁴ Scholars appear to be conflating free speech with the right to know, arguing that Google's algorithmic search results deserve to be protected as free speech.¹⁴⁵

Moreover, there are several existing legal doctrines that interfere with the public's right to know. For starters, there is the Fifth Amendment's right against

139. See Transcript, *supra* note 28, at 20–21 (statement of Eric Posner).

140. See EUROPEAN COMM'N, FACTSHEET ON THE “RIGHT TO BE FORGOTTEN” RULING (C-131/12), http://ec.europa.eu/justice/data-protection/files/factsheets/factsheet_data_protection_en.pdf [https://perma.cc/FRQ4-38BG].

141. See Case C-131/12, *Google Spain SL v. Agencia Española de Protección de Datos (AEPD)*, 2014 E.C.R. 317 ¶ 98.

142. For a discussion of the Digital Millennium Copyright Act and its relation to the right to be forgotten, see *infra* Section III.B.

143. See *Subhasta d'Immables*, *supra* note 119.

144. See Transcript, *supra* note 28, at 20–21 (statement of Eric Posner) (noting that individuals such as journalists who are interested in seeking out information could still find it even if we were to recognize a right to be forgotten).

145. See generally Oren Bracha & Frank Pasquale, *Federal Search Commission? Access, Fairness, and Accountability in the Law of Search*, 93 CORNELL L. REV. 1149 (2008) (arguing that search engine results are not entitled to full free speech protections, without distinguishing between the free speech defense and the defense based on the public's right to know); Eugene Volokh & Donald M. Falk, *Google: First Amendment Protection for Search Engine Results*, 8 J.L. ECON & POL'Y 883, 884 (2012) (arguing that search engine search results are protected by the First Amendment).

self-incrimination, which prevents criminal defendants from being compelled to be a witness against themselves.¹⁴⁶ There is also the attorney-client privilege, which, as the Supreme Court held in *Swidler & Berlin v. United States*, persists in perpetuity even after the client dies, even in matters of great public interest.¹⁴⁷ In *Seattle Times Co. v. Rhinehart*, the Supreme Court held that a protective order restraining a newspaper—that was a party to the litigation—from publishing information obtained through the discovery process did not violate the newspaper’s First Amendment right to report the news.¹⁴⁸ In most states, litigating parties have the right to keep settlement terms secret—even when the settlement conceals important health and safety issues.¹⁴⁹

A more nuanced balance between the right to know and the right to privacy’s derivative claim of the right to be forgotten is shown in *Florida Star’s* dissent. The dissenters—Chief Justice Rehnquist, Justice White, and Justice O’Connor—conceded that the right to privacy “inevitably conflicts with the public’s right to know about matters of general concern” and noted that “sometimes, the latter must trump the former.”¹⁵⁰ Yet the dissent disparaged the majority for not striking “an appropriate balance between the two” rights.¹⁵¹ The dissent looked to the Ninth Circuit’s Judge Merrill to strike the balance differently:

Does the spirit of the Bill of Rights require that individuals be free to pry into the unnewsworthy private affairs of their fellowmen? In our view it does not. In our view, fairly defined areas of privacy must have the protection of law if the quality of life is to continue to be reasonably acceptable. The public’s right to know is, then, subject to reasonable limitations so far as concerns the private facts of its individual members.¹⁵²

Judge Merrill’s statement reveals the thrust of the argument for the right to be forgotten over the right to know. The right does not seek to limit speech; it seeks to respect past private facts of individuals, and it also gives them the opportunity to move forward with their lives so they are not forever shackled to their pasts. This is important to remember because over 70% of takedown requests “have nothing to do with [the] public interest.”¹⁵³ Therefore, concerns that the

146. See U.S. CONST. amend. V.

147. See 524 U.S. 399, 410 (1998).

148. See 467 U.S. 20, 36–37 (1994).

149. See generally Christopher R. Drahozal & Laura J. Hines, *Secret Settlement Restrictions and Unintended Consequences*, 54 KAN. L. REV. 1457 (2006) (arguing that secret settlements may reduce rather than expand the amount of information available to the public about alleged hazards to public health and safety).

150. *Florida Star v. B.J.F.*, 491 U.S. 524, 551 (1989) (White, J., dissenting).

151. *Id.*

152. *Id.* at 552 (quoting *Virgil v. Time, Inc.*, 527 F.2d 1122, 1128 (9th Cir. 1975), *cert. denied*, 425 U.S. 998 (1976)).

153. See Transcript, *supra* note 28, at 21 (statement of Paul Nemitz). These statistics are from Google’s right to be forgotten transparency report. There is, of course, no way to verify the information without Google releasing all its raw data or the government overseeing the process.

right to be forgotten is unreasonably inhibiting the right to know—and censoring stories of well-connected elites, the wealthy, or public officials—are incorrect and misleading. Rather, the right to be forgotten gives those individuals—especially those growing up in the Digital Age—an opportunity to prevent things they did when they were young and foolish from following them into adulthood.

III. HOW AMERICAN BANKRUPTCY AND COPYRIGHT LAW SUPPORT AN AMERICAN RIGHT TO BE FORGOTTEN

Despite claims that the right to be forgotten is un-American and in constant conflict with our constitutional principles, American law has a bevy of legal mechanisms that offer individuals forgiveness. One of the most notable is the sealing of juveniles' criminal records, allowing them to move forward with their lives unencumbered from their past mistakes. Expungement is another mechanism because it “serves to protect an individual from the likely resulting hardships of an arrest record, particularly those who deserve a second chance or clean slate.”¹⁵⁴ Some states, like New York, offer adjournment in contemplation of dismissal, a form of pretrial diversion, which nullifies the defendant's arrest and prosecution once certain conditions are met.¹⁵⁵

This Note, however, focuses on bankruptcy and copyright law. Bankruptcy law is uniquely suited to develop a right to be forgotten in America because the bankruptcy code offers individuals an opportunity to restore their financial reputation, just as the right to be forgotten offers an individual the opportunity to repair her financial reputation.¹⁵⁶ This Part first discusses how the bankruptcy code already contains a particular form of the right to be forgotten, then posits a Notice and Takedown system based, in part, on the Digital Millennium Copyright Act and the ECJ's *Google Spain* decision.

A. BANKRUPTCY LAW AND THE FAIR CREDIT REPORTING ACT

American law offers forgiveness through bankruptcy, specifically financial forgiveness. As Thomas H. Jackson notes, “[t]he principal advantage bankruptcy offers an individual lies in the benefits associated with discharge.”¹⁵⁷ That is to say, “[o]ne of the primary purposes” of bankruptcy law is to provide debtors with a clean slate.¹⁵⁸ Plus, the discharging of debts “releases the debtor

154. Ambrose et al., *supra* note 76, at 141 (footnote omitted).

155. See Assigned Counsel Defender Plan, Nassau County, Adjournment in Contemplation of Dismissal Information Sheet, http://nassau18b.org/forms/adjournment_in_contemplation_of_dismissal.pdf [https://perma.cc/3XA6-UMN9].

156. See Ambrose et al., *supra* note 76, at 124 (“[Restoration] is a form of rebirth—a process that allows individuals to begin anew, unshackled by stigma and other impediments to being productive members of society.”).

157. Thomas H. Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1393, 1393 (1985).

158. *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934).

from past financial obligations.”¹⁵⁹ The Bankruptcy Code’s discharge provisions “‘were designed to assist a financially distressed debtor to receive a fresh start in life unencumbered from the financial vicissitudes of the debtor’s past.’”¹⁶⁰ The notion of a “fresh-start” policy is abundant in the Bankruptcy Code.

Frank Pasquale noted that “[g]iven the devastating impact a bankruptcy can have on an individual’s reputation . . . [l]egislators wisely observed that a ‘fresh start,’ . . . would be a hollow victory if bankruptcy ended up a reputational albatross on the necks of former debtors.”¹⁶¹ That is why the Bankruptcy Code “prohibits the government from denying employment to, terminating the employment of, or discriminating with respect to employment against a person who has declared bankruptcy.”¹⁶² Moreover, the Bankruptcy Code prevents private employers from firing on the basis of one’s bankruptcy status, and prohibits employers from engaging in discriminatory practices “in promotions, demotions, hours, pay, and so forth.”¹⁶³ Lastly, the Bankruptcy Code’s antidiscrimination provisions seek to protect “a debtor’s means of earning a living or pursuing a livelihood.”¹⁶⁴ Each provision is designed to ensure that the individual is not shackled to his past mistakes, and can move forward in life unencumbered from the negative reputational stigma of declaring bankruptcy.

This is why scholars like Frank Pasquale¹⁶⁵ and Jonathan Zittrain¹⁶⁶ have supported implementing a form of the Fair Credit Reporting Act (FCRA) in the Digital Age. As the FCRA came into existence, credit reports were a “primary reputational source” for making decisions about hiring and a range of other financial transactions.¹⁶⁷ Indeed, Congress understood that “[c]onsumer reporting agencies have assumed a vital role in assembling and evaluating consumer credit and other information on consumers.”¹⁶⁸ Therefore, Congress wanted to ensure that “consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer’s right to privacy.”¹⁶⁹ Thus, Congress construed the FCRA to delineate the reasons when a consumer report may be used or obtained.¹⁷⁰ One such protection is the limitation on credit bureaus to keep and disseminate bankruptcy records for only ten years.¹⁷¹

159. Jackson, *supra* note 157, at 1393 & n.2 (citing 11 U.S.C.A. §§ 524–525 (West 1979 & Supp. 1985) which describes the protections offered).

160. Ambrose et al., *supra* note 76, at 125 (quoting *In re Fleet Sec., Inc. v. Vina (In re Vina)*, 283 B.R. 803, 807 (Bankr. M.D. Fla. 2002)).

161. Frank Pasquale, *Reforming the Law of Reputation*, 47 *LOY. U. CHI. L. J.* 515, 530–31 (2015).

162. Ambrose et al., *supra* note 76, at 128 (citing 11 U.S.C. § 525(a) (2011)).

163. *Id.* (citing 11 U.S.C. § 525(b) (2011)).

164. *Id.* (citing *Elsinore Shore Assocs. v. New Jersey Div. of Alcoholic Beverage Control (In re Elsinore Shore Assocs.)*, 66 B.R. 708, 720 (Bankr. D.N.J. 1986)).

165. *See generally* Pasquale, *supra* note 161.

166. *See generally* ZITTRAIN, *supra* note 32.

167. *See* Pasquale, *supra* note 161, at 530.

168. *See* Fair Credit Reporting Act of 1970, Pub L. No. 91-508, § 602(a)(3), 84 Stat. 1127, 1128.

169. *See id.* § 602(a)(4).

170. *See* 15 U.S.C. § 1681b (2012).

171. *See id.* § 1681c(a)(1).

This was critical because many individuals and institutions regard “a debtor in bankruptcy as demonstrably improvident or perhaps even deceitful.”¹⁷² Thus, because of the negative reputational stigma bankruptcy carries, institutions may refuse to work with debtors, thereby “denying the debtor not only credit, but also essential services or the chance to earn a living.”¹⁷³ The limits that the FCRA places on credit agencies to prevent these practices are rooted in the fresh-start policy.

Thomas Jackson notes that debt discharge, which gives rise to the fresh-start policy, “raises a series of critical normative questions”:¹⁷⁴

For example, why does the “honest but unfortunate debtor” enjoy a right of discharge at all? Why cannot an individual, confident in his knowledge of his own best interest, expressly waive the right when he seeks to obtain credit? . . . Why, if we assume the appropriateness of a financial fresh start, is an individual freed of only some and not all adverse consequences of exercising his right of discharge?¹⁷⁵

Jackson believes that the right to discharge is supported “by several characteristics of human behavior.”¹⁷⁶ For example, “[d]ischarge provides some protection from the ‘regret’ we experience when impulsive behavior or the flawed decision-making ‘heuristics’ that most of us naturally employ cause us to act unwisely with respect to credit.”¹⁷⁷ The discharge provisions reaffirm society’s “general commitment to individual autonomy” because “it protects others from the externalities” from the bankruptcy decision.¹⁷⁸ Moreover, there are clear parallels between bankruptcy law, the FCRA, and the right to be forgotten. The normative questions Jackson posits can apply to the right to be forgotten; for example, why does the “honest but unfortunate” individual enjoy a right to be forgotten? Why cannot an individual, confident in his knowledge of his own best interest, expressly waive the right when he posts on the Internet? Why, if we assume the appropriateness of a reputational fresh start, is an individual freed of only some and not all adverse consequences of exercising his right of discharge?

Similar to how bankruptcy law offers individuals a fresh start, the primary purpose of the right to be forgotten is to offer individuals a clean slate. Just as a discharge of debts would release the debtor from his past financial obligations, the right to be forgotten would offer individuals a chance to be released from their past mistakes. Individuals would not have to fear that decisions made in

172. Ambrose et al., *supra* note 76, at 127.

173. *Id.*

174. Jackson, *supra* note 157, at 1393.

175. *Id.* at 1393–94 (footnote omitted).

176. *See id.* at 1393.

177. *Id.*

178. *See id.* at 1447.

their youth could come back to haunt them later in life as a reputational albatross. Using the right to be forgotten as a reputational discharge could free people from being terminated or discriminated against at their place of employment. Additionally, individuals would not be prohibited from employment opportunities because of youthful mistakes.

Privacy allows individuals to explore their autonomy. It gives them a chance to experiment and define who they are without the harsh glare of scrutiny or judgment. Who, when asked if they can show pictures from their childhood, has never said, “over my dead body” or “those are locked away for an eternity”? Unfortunately, as we enter a world where, as Eric Schmidt describes, everyone is “living with a historical record,” people need a way of discharging their embarrassing moments and mistakes from the records of search engines.¹⁷⁹ The right to be forgotten is that mechanism. Without it, everyone will “forever [be] tether[ed] to . . . [their] past actions” as their every move is increasingly documented in cyberspace, “making it impossible, in practice, to escape” those past actions and to grow and change.¹⁸⁰

B. THE RIGHT TO BE FORGOTTEN NOTICE AND TAKEDOWN SYSTEM

The parallels between the right to be forgotten and bankruptcy law are abundant, but the right to be forgotten also has parallels in copyright law. This section analyzes proposed procedures for implementing the right to be forgotten in American law, which entails creating a system for Internet Service Providers (ISPs) similar to the one currently being employed in Europe. Combining the criteria ISPs use for the right to be forgotten in Europe and the statutory requirements the DMCA imposes on ISPs in the United States, it is not conceptually challenging to imagine a more nuanced Notice and Takedown system for the right to be forgotten in the United States.¹⁸¹

In 1998, Congress enacted sweeping revisions to the Copyright Act of 1976—the DMCA.¹⁸² The DMCA came into existence to implement World Intellectual Property Organization (WIPO) treaties on international copy-

179. See JONES, *supra* note 5, at 25.

180. See *id.* at 6.

181. This is not to say that this would be the best system upon which to model the implementation of the right to be forgotten in America. A strong, persuasive argument can be made that the best system—that is aligned with American values—would require accountability and transparency. As it currently stands in Europe, the system appears to be working with respect to efficacy, and the Data Protection Agencies seem content with implementation, but any consequential decision about what information is publicly available is being made by search engines with no effective government oversight. See generally Edward Lee, *Recognizing Rights in Real Time: The Role of Google in the EU Right to Be Forgotten*, 49 U.C. DAVIS L. REV. 1017 (2016) (arguing for the creation of a “hybrid agency,” which would include people from both government and the private sector, and “provide greater oversight to the entire process in the EU”).

182. See U.S. COPYRIGHT OFFICE, A REPORT OF THE REGISTER OF COPYRIGHTS TO § 104 OF THE DIGITAL MILLENNIUM COPYRIGHT ACT vi, 5–19 (2001), <https://www.copyright.gov/reports/studies/dmca/sec-104-report-vol-1.pdf> [<https://perma.cc/7ZXQ-G8Z6>].

right,¹⁸³ which were designed to protect intellectual property from infringement “on a massive scale.”¹⁸⁴ ISPs like Google supply access to the Internet and provide other related services, so it was unclear to what extent it could be held liable for listing websites engaging in copyright infringement.¹⁸⁵ Therefore, as Jonathan Zittrain argues, “[w]hen Congress passed the [DMCA], it sought to enlist certain [ISPs] to help stop the unauthorized spread of copyrighted material.”¹⁸⁶

Specifically, the DMCA offered ISPs a safe harbor that limited liability in certain circumstances.¹⁸⁷ Under the DMCA, ISPs will be protected from copyright infringement “if they follow specific steps to remove the infringing material,” otherwise known as Notice and Takedown.¹⁸⁸ Section 512 defines a service provider as “an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user’s choosing, without modification to the content of the material as sent or received.”¹⁸⁹

The DMCA limits liability for ISPs for three categories of information: “1) transitory communications, 2) material coming from outside the ISP’s control and temporarily cached on the ISP’s system, and 3) material stored by one of the ISP’s users.”¹⁹⁰ The Notice and Takedown system applies to the third category of information. For this category of information, a service provider “must satisfy three requirements to claim protection from liability for storing infringing material.”¹⁹¹ The first requirement is that the ISP cannot have any “actual or constructive knowledge of the infringing activity,” and once they learn of it, they “must act expeditiously to remove the material.”¹⁹² Second, the ISP “cannot receive any financial benefit directly attributable to the infringing activity.”¹⁹³ Third, the ISP is required to remove access to the infringing content “once they receive notice of copyright infringement.”¹⁹⁴ Neil A. Benchell adds, “[t]he elements of the notice must be in the manner prescribed by the statute and sent to a designated agent of the service provider.”¹⁹⁵

183. *See id.* at vi, 5–19.

184. *See generally* David Kravets, *10 Years Later, Misunderstood DMCA Is the Law that Saved the Web*, WIRED (Oct. 27, 2008), <https://www.wired.com/2008/10/ten-years-later> [<https://perma.cc/BHA9-4W5Z>].

185. *See* Neil A. Benchell, *The Digital Millennium Copyright Act: A Review of the Law and the Court’s Interpretation*, 21 J. MARSHALL J. COMPUTER & INFO. L. 1, 9 (2002).

186. ZITTRAIN, *supra* note 32, at 119 (footnote omitted).

187. *See* Benchell, *supra* note 185.

188. *Id.*

189. 17 U.S.C. § 512(k)(1)(A) (2012).

190. Benchell, *supra* note 185.

191. *Id.* at 10.

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.* (footnote omitted).

In response to a complaint we received under the US Digital Millennium Copyright Act, we have removed 1 result(s) from this page. If you wish, you may read the DMCA complaint that caused the removal(s) at ChillingEffects.org.



Figure 1. Google DMCA Takedown Notice.

This appears to be a management nightmare. ISPs are in a particularly precarious situation because they could easily link or direct users to infringing content, which, under the DMCA, is considered an infringing activity. However, we know that ISPs are capable of effectively running a Notice and Takedown regime. According to Google’s transparency report, Google has received more than three billion copyright removal requests.¹⁹⁶ In 2015, Google received 558 million requests to remove webpages under the DMCA, of which Google removed 98%.¹⁹⁷ However, before Google takes down a URL, they require the following information from the complainant: (1) the complainant’s contact information; (2) a description of the work that is believed to have been infringed; (3) each alleged infringing URL; (4) a statement ensuring the complainant is acting in good faith belief that the copyright usage is unauthorized, and a statement that the complainant is either the copyright owner or authorized on the owner’s behalf; and (5) the complainant’s signature.¹⁹⁸ Google will push back on these requests when the complainant fails to provide the necessary information or when Google suspects the complaint is fraudulent.¹⁹⁹ When a URL is taken down, Google displays the notice in Figure 1 at the bottom of a results page, informing the user that certain results have been removed due to a DMCA complaint.²⁰⁰ INSERT MISSING INFO HERE

In 2014, Viviane Reding, European Commissioner for Justice, Fundamental Rights, and Citizenship, said that “if search engines can handle copyright takedown requests, [they] can handle . . . ‘right to be forgotten’ requests.”²⁰¹

196. See *Requests to Remove Content Due to Copyright*, GOOGLE: TRANSPARENCY REPORT, <https://www.google.com/transparencyreport/removals/copyright> [<https://perma.cc/N4KN-3FYC>].

197. See GOOGLE, *HOW GOOGLE FIGHTS PIRACY 19* (2016), <https://drive.google.com/file/d/0BwxyRPFduTN2cI91LXJ0YjIYSjA/view> [<https://perma.cc/KUS6-GT9Z>].

198. *What is “Copyright”?*, GOOGLE: LEGAL HELP, https://support.google.com/legal/answer/3463239?hl=en&ref_topic=4558877 [<https://perma.cc/N6XF-U8UW>].

199. See *Requests to Remove Content Due to Copyright*, *supra* note 196.

200. This is the language that appears at the bottom of a Google search result if a certain link was taken down due to a DMCA claim.

201. See Rich Steeves, *EU Compares ‘Right to Be Forgotten’ to Copyright Enforcement*, INSIDECOUNSEL (June 5, 2014), <http://web1.insidecounsel.com/2014/06/05/eu-compares-right-to-be-forgotten-to-copyright-enf> [<https://perma.cc/KT5U-2R8X>].

In response to a complaint we received under the Right To Be Forgotten, we have removed 1 result(s) from this page.



Figure 2. Google Right to Be Forgotten Takedown Notice.

There is clear evidence affirming this notion. Between May 2014—when Google implemented its right to be forgotten policy in Europe—and November 2015, Google received 348,085 total requests to remove links, and approximately 42% of the links were ultimately removed.²⁰² Since May 2014, Google has removed 844,784 URLs, or approximately 43.2%, and has rejected 1,111,701 URLs or approximately 56.8%.²⁰³ Google’s criteria for deciding whether to remove a URL requires the applicant to show the URL is “irrelevant, outdated, or otherwise inappropriate.”²⁰⁴ Of course, there would have to be limitations on these criteria if they were applied to the right to be forgotten in the United States, including barring URL takedowns for politicians and public figures.²⁰⁵ In the United States, if a URL is taken down, Google could display a notice similar to the DMCA at the bottom of the results page informing the user that the result has been removed due to a right to be forgotten complaint as follows:

Traditionally, a copyright claim has been understood to involve property rights.²⁰⁶ Cases such as *Melvin* have been compared to property and copyright cases, all of which demonstrate the necessity of protecting individual privacy.²⁰⁷ Indeed, even Warren and Brandeis relied heavily on copyright norms and case law when arguing privacy was a protectable interest.²⁰⁸ As Pamela Samuelson argues, the right to control the dissemination of an individual’s work—the DMCA being the mechanism to do so in the Digital Age—“may be partly be

202. See Adi Robertson, *Google ‘Right to Be Forgotten’ Requests Keep Piling Up*, VERGE (Nov. 25, 2015, 2:49 PM), <http://www.theverge.com/2015/11/25/9801130/google-transparency-report-right-to-be-forgotten-2015> [https://perma.cc/H7MH-USSK].

203. See *Search Removals Under European Privacy Law*, GOOGLE: TRANSPARENCY REPORT, <https://transparencyreport.google.com/eu-privacy/overview> [https://perma.cc/QB6T-LNR3].

204. Danny Sullivan, *How Google’s New “Right to Be Forgotten” Form Works: An Explainer*, SEARCH ENGINE LAND (May 30, 2014, 2:54 AM), <http://searchengineland.com/google-right-to-be-forgotten-form-192837> [https://perma.cc/TN53-9RJY].

205. See *supra* Section II.A.

206. See Whitman, *supra* note 103, at 1208.

207. See *id.*

208. See Warren & Brandeis, *supra* note 39, at 200–02.

grounded in property rights,” but she adds, “Warren and Brandeis thought that this was not the entire explanation.”²⁰⁹ According to Samuelson, Warren and Brandeis thought, “the value of the production is found not in the right to take the profits arising from publication, but in the peace of mind or the relief afforded by the ability to prevent any publication at all.”²¹⁰

One’s reputation can be profitable too.²¹¹ Reputation resembles a property interest in that people put a lot of time and energy in developing a good reputation. There is an intrinsic value in the beliefs and/or opinions that others hold of you. Those opinions typically lead to opportunities, such as employment. That is why the Supreme Court in *Rosenblatt v. Baer* noted that “[s]ociety has a pervasive and strong interest in preventing and redressing attacks upon reputation,” which is an underlying value of defamation law.²¹² The function of defamation law is to achieve vindication for harm to one’s reputation.²¹³ Reputational damage can involve loss of esteem and personal integrity, which can result in “public embarrassment, humiliation, and mental anguish.”²¹⁴ That is why defamation law allows the plaintiff to both “set[] the record straight in a public forum” and receive monetary redress for any economic injury resulting from the defamatory statement, including the loss of a job, college opportunity, or professional contract.²¹⁵

Studies have shown that a positive reputation is valuable and increases future opportunities.²¹⁶ The right to be forgotten is simply the mechanism in the Digital Age to ensure that mistakes made in the past, especially for children, teenagers, and young adults, do not come back to haunt them later in life. Those past mistakes currently have the potential to ruin their ability to earn a living. In the absence of a right to be forgotten in America, we have seen the emergence of online reputation management services that act “to counter negative content and search results.”²¹⁷ As public information—such as court filings and mug shots—becomes more prevalent online, one’s reputation becomes more fragile as the risk of past mistakes coming to light increases. That is why the right to be

209. Pamela Samuelson, *Protecting Privacy Through Copyright Law?*, in *PRIVACY IN THE MODERN AGE: THE SEARCH FOR SOLUTIONS* 192 (Marc Rotenberg et al. eds., 2015).

210. *Id.*

211. See generally Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CALIF. L. REV. 691 (1986) (discussing different types of reputational interests protected by defamation law).

212. See 383 U.S. 75, 86 (1966).

213. See Gerald R. Smith, *Of Malice and Men: The Law of Defamation*, 27 VAL. U. L. REV. 39, 39 (1992).

214. *Id.* at 41.

215. See *id.* at 41–42.

216. See generally Thomas Pfeiffer et al., *The Value of Reputation*, 9 J. ROYAL SOC’Y INTERFACE 2791 (2012), <http://rsif.royalsocietypublishing.org/content/royinterface/9/76/2791.full.pdf> [<https://perma.cc/M89A-T2Q6>] (discussing different types of reputational interests and their effects on social cooperation).

217. JONES, *supra* note 5, at 6.

forgotten is truly “a right to be forgiven.”²¹⁸

Given the value of one’s reputation, and risks imposed on that value as public information becomes more organized and accessible, it makes sense to mimic a right to be forgotten Notice and Takedown system based on the DMCA. Infringement of one’s reputation on the Internet is analogous to copyright infringement on the Internet. Similar to how someone who infringes another’s copyrighted intellectual property assumes control of that work product without permission, someone who publishes, say, revenge porn of his or her ex, essentially assumes control of another person’s reputation without permission.²¹⁹ The consequences are also similar. With copyright infringement, the loss is monetary. In cases of harm to reputation, the loss—a harmed reputation—can also result in monetary damages.²²⁰ Warren and Brandeis believed that the value of the right to privacy is found in the ability to prevent someone from publishing information about you in the first place, which provides peace of mind.²²¹ Furthermore, as the world’s information becomes more digitized, people should be entitled to the peace of mind that they will not have to change their names to escape their “cyber past.”²²²

CONCLUSION

The American ethos is founded on the notion of second chances and reinvention.²²³ That is why, in part, immigrants from around the world risk their lives to reach America to start over and be afforded its opportunities.²²⁴ However, second chances are becoming rare in America because the Internet preserves our past mistakes and reputations. Juvenile delinquents applying for their first job, and hoping to move past their youthful indiscretions, are often rejected because their mugshots linger on cyberspace indefinitely.²²⁵ Women who shared inti-

218. See Richard J. Peltz-Steele, *The ‘Right to Be Forgotten’ Online Is Really a Right to Be Forgiven*, WASH. POST (Nov. 21, 2014), https://www.washingtonpost.com/opinions/the-right-to-be-forgotten-online-is-really-a-right-to-be-forgiven/2014/11/21/2801845c-669a-11e4-9fdc-d43b053ecb4d_story.html [https://perma.cc/5R3M-HP74].

219. See Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 352 n.42 (2014).

220. See, e.g., SOLOVE, *supra* note 14, at 122.

221. See Samuelson, *supra* note 209.

222. See Murray Wardrop, *Young Will Have to Change Names to Escape ‘Cyber Past’ Warns Google’s Eric Schmidt*, TELEGRAPH (Aug. 18, 2010, 7:00 AM), <http://www.telegraph.co.uk/technology/google/7951269/Young-will-have-to-change-names-to-escape-cyber-past-warns-Google-Eric-Schmidt.html> [https://perma.cc/M2KV-6BA3].

223. See, e.g., Neil Eggleston, *President Obama Grants 153 Commutations and 78 Pardons to Individuals Deserving of a Second Chance*, WHITE HOUSE: BLOG (Dec. 19, 2016, 3:00 PM), <https://obamawhitehouse.archives.gov/blog/2016/12/19/president-obama-grants-153-commutations-and-78-pardons-individuals-deserving-second> [https://perma.cc/L3NZ-VJ82].

224. Cf. Azam Ahmed, *Step by Step on a Desperate Trek by Migrants Through Mexico*, N.Y. TIMES (Feb 8, 2016), <https://www.nytimes.com/2016/02/08/world/americas/mexico-migrants-central-america.html> [https://nyti.ms/2kFABHU].

225. For a discussion of how an individual’s criminal record can harm his or her job prospects, see, e.g., Alex Bender & Sarah Crowley, *Haunted by the Past: A Criminal Record Shouldn’t Ruin a Career*,

mate photos with a former lover have to live in utter fear, shame, and humiliation as their exes, seeking revenge, publish the photos with personally identifiable information on “revenge porn” sites.²²⁶ Consider the gay middle school student who has to live a life of hell because he is subjected to vicious online bullying and cannot have that material taken down.²²⁷ What are their options? Unfortunately, like the father whose daughter was killed in a car accident²²⁸ and victims of revenge porn, these people do not have any recourse to have this content removed from the Internet. This seems antithetical to our country’s values.

Forgiving and forgetting is quintessentially American. Concerns that invoking the right to be forgotten would trample on freedom of speech are unfounded because the information would still be accessible to those who are willing to pay the higher cost to obtain that information. Information twenty-years ago was not as ubiquitous as it is today. Prior to the Internet, most research was conducted in libraries. However, just because most information is ubiquitous today does not mean all information needs to be universally accessible without limitations. This concept has solid foundations in American law. Bankruptcy law, for example, offers individuals an opportunity to restore their financial reputation so that declaring bankruptcy does not become a reputational albatross. Similarly, copyright law, specifically the DMCA, provides a Notice and Takedown system that could be used as a model to implement the right to be forgotten in America. The right to be forgotten supports values that are deeply rooted in our cultural ethos. We should not immediately recoil from the thought of implementing this right in America. Rather, we should begin the discussion of how best to offer second chances in the Digital Age.

ATLANTIC (Mar. 25, 2015), <https://www.theatlantic.com/business/archive/2015/03/haunted-by-the-past-a-criminal-record-shouldnt-ruin-a-career/388138> [<https://perma.cc/3R2B-PANK>].

226. For real life stories, see *Victim’s Stories*, CYBER CIVIL RIGHTS INITIATIVE, <https://www.cybercivilrights.org/share-your-story> [<https://perma.cc/L747-92DG>].

227. See, e.g., *LGBT Bullying Statistics*, NOBULLYING.COM (Nov. 7, 2016), <https://nobullying.com/lgbt-bullying-statistics/> [<https://perma.cc/443B-JKF9>]; Ian Parker, *The Story of A Suicide: Two College Roommates, a Webcam, and a Tragedy*, NEW YORKER (Feb. 6, 2012), <https://www.newyorker.com/magazine/2012/02/06/the-story-of-a-suicide> [<https://perma.cc/E27P-TD9X>].

228. See Jessica Bennett, *One Family’s Fight Against Grisly Web Photos*, NEWSWEEK (Apr. 24, 2009, 8:00 PM), <http://www.newsweek.com/one-familys-fight-against-grisly-web-photos-77275> [<https://perma.cc/EF9X-KCL6>].