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The Chance “to Melt into the Shadows of Obscurity”: Developing a Right to be Forgotten in the United States

Patrick O’Callaghan

Abstract This chapter argues that there is some (limited) evidence of a right to be forgotten in the jurisprudence of U.S. courts. For the purposes of this argument, the right exists whenever interests in being forgotten and/or forgetting are understood as weighty enough to impose a duty on government and/or fellow citizens to respect those interests. Most of the relevant cases belong to the pre-digital era but nevertheless provide some doctrinal support for a right to be forgotten in the digital era. In particular, the chapter pays close attention to the privacy challenges associated with search engines and argues that it may be possible to implement a *Google Spain*-inspired right to be forgotten (in the sense of delisting or deindexing search results) in the United States.

1 Introduction

This chapter pursues what may seem like a controversial argument: it argues that there is some (albeit limited) evidence of a right to be forgotten in U.S. jurisprudence.¹ For the purposes of this argument, a “right to be forgotten” exists whenever interests in being forgotten and/or in forgetting are understood as weighty enough to impose a duty on government and/or fellow citizens to respect those interests.² Though most of the relevant cases belong to the pre-digital era, they nonetheless provide some doctrinal support for a right to be forgotten in the digital era.

In Sect. 11.2, we will tease out some conceptual issues relating to the right and, in doing so, draw on court decisions to illustrate the arguments. In Sect. 11.3, we will pay close attention to the ways in which search engines can impact privacy. The chapter will argue that it may be possible to implement a *Google Spain*-inspired right to be forgotten (in the sense of delisting or deindexing search results) in the United States.³

2 The Dual Nature of the Right to be Forgotten

Perhaps two of the most prominent conceptions of privacy are the control-based and the dignitarian. Some scholars have criticized such classically liberal theories of privacy as either being too reductive or otherwise inadequate in that they fail to grapple with the socially-constructed, dynamic and relational nature of the self (Cohen 2013). But even these critics would concede, as Cohen does, that “[l]iberal selfhood has an important role to play within privacy theory” (Ibid., 1910). This is because there are “attractive” features of liberal theories that “are essential tools for identifying and

¹ Interest in the right to be forgotten is growing in the United States. The most important work in the U.S. context is Meg Leta Jones’ comprehensive monograph (2016). For a thought-provoking analysis of European developments and potential ways of “bridging the Transatlantic gap” on this issue, see K. O’Hara & N. Shadbolt (2015).

² This formulation of words is inspired by Raz (1984).

³ Case C-131/12 *Google Spain SL v. AEPD* (ECLI:EU317, 2014). See also the text of the Article 17 of the new General Data Protection Regulation (2016/679).

pursuing the material and political conditions for self-fulfillment and more broadly for human flourishing” (Ibid., 1911). It is in this sense that the control-based and dignitarian understandings of privacy are important, precisely because they help us *identify* and *pursue* the conditions for human flourishing.

Control-based understandings of privacy emphasize that the individual should be able to decide on the parameters of her private life. Fried, for example, famously remarked that “privacy is not simply an absence of information about us in the minds of others; rather it is the control we have over information about ourselves” (1968, 482). The dignitarian account suggests that an absence of privacy is potentially degrading. Bloustein, for instance, argued that “[t]he man who is compelled to live every minute of his life among others and whose every need, thought, desire, fancy or gratification is subject to public scrutiny, has been deprived of his individuality and human dignity” (1964, 1003).

Both the control-based and dignitarian accounts of privacy underlie the right to be forgotten (de Mars and O’Callaghan, 2016). The right has a dual nature, something that has already been recognized in the French and German equivalents, the *droit à l’oubli* and the *Recht auf Vergessen*. They suggest that the individual has interests in being forgotten by others *as well as* interests in forgetting things from her own past.⁴ While there is some conceptual overlap between the two, *interests in being forgotten* give expression to a control-based account of privacy, and *interests in forgetting* speak to a dignitarian account. Before we reflect on what the dual nature of the right entails, it is important to emphasize two general points about the nature and scope of the right.

Firstly, those who advocate a right to be forgotten are routinely met with concerns that they are attempting to “erase the past.” Such charges are often overstated, but we should have serious concerns about any proposals seeking to erase information from what we might broadly call “the public record” (we should include here, amongst other things, information in official public records (e.g. court records) and media archives). Where the information was lawfully obtained and recorded to begin with, this chapter contends that erasure of such information from the public record can never be justified no matter how outdated this information has become.⁵ While *amending* information in the public record may be justified on rare occasions, total *erasure* of such information, however well-intentioned, is a step too far.⁶

Secondly, it is important to understand the scope of the right to be forgotten. In particular, it ought to be emphasized that both the descriptive claim that law can somehow make us forget and the normative claim that the law should require us to forget are untenable. On the *descriptive claim*, it is not actually possible to use law to make people forget. For one thing, forgetting is not a voluntary process. In fact, experiments demonstrate that we remember, better and more frequently, things we are told to forget (Wegner and Schneider 2003). Moreover, memories cannot be controlled and can flood back, often when we least expect them. But even if it were somehow possible that law could make us forget, there is another reason why, as a matter of description, it would not be possible to ensure total forgetting. The right to be forgotten is most often invoked in the online context. Information on the internet, especially when it goes “viral,” can be picked up by diverse websites, from those of respectable media outlets to those of shady operators in the dark web. Even for the very rich, it is virtually

⁴ On this distinction see further Koops (2011).

⁵ Indeed, limitations on the right to be forgotten of this sort are expressly recognised in Articles 17(3) and 85 of the General Data Protection Regulation (2016/679).

⁶ Consider cases concerning gender recognition where the applicant seeks to amend a birth certificate. See, for example, *Goodwin v. United Kingdom* (35 EHRR 447, 2002).

impossible to delete information from all corners of the web once that information has gone viral.⁷ As for the *normative claim*, that law should require people to forget, such coercion is, in principle, plainly incompatible with democracies founded on the rule of law and human rights. Indeed, it is the sort of thing we might expect of totalitarian regimes, e.g. the Khmer Rouge's attempts to start afresh from "year zero." Erasing information from the public record would be immensely damaging as it would undermine community cohesion, our political and economic systems, and the rule of law. Moreover, any law requiring people to forget would in itself constitute an invasion of the constitutional right to privacy since it would represent government "intrusion into a person's mind and thought processes" (McCarthy 2015, 5.57).⁸

For all of these reasons, rather than think about the right in terms of coercion, the better way to understand the right to be forgotten is that it provides "breathing room" for the individual to forget and to be forgotten (Cohen 2012). This does not mean she will forget or she will be forgotten, but it does mean, at the very least, that law (a) creates a chance for this to happen and (b) has a symbolic function signaling that interests in forgetting/being forgotten are of fundamental value. We now turn to consider the dual aspects of the right to be forgotten.

2.1 Interests in Being Forgotten

It is well-established that identity-formation is strongly affected by social forces (Mead 1934; Schilpp 1957; Cohen 2012). Yet, notwithstanding this dynamic, we all aspire to exercise some degree of control over the information flows that shape our identity. For Giddens, we ought to have the "capacity to keep a particular narrative going" (1991, 54). Goffman famously argued that we do this when we play "information games." The "information game" is a fundamental part of human interaction, "a potentially infinite cycle of concealment, discovery, false revelation, and rediscovery" (1959, 20). In playing these games, Goffman argued that we engage in "audience segregation": we display different "fronts" or we "play different parts" depending on the particular interaction (Ibid., 57). Later, Westin developed similar ideas, writing that we live behind masks and pointing out that the "first etymological meaning of the word 'person' was 'mask'" (1967, 33).

Clearly, it would not be possible to play information games in a dystopian world without privacy such as in Thomas More's *Utopia* where everyone lives "in full view of all" (2002, 59). We are not quite at that juncture yet. But it is certainly the case that it was easier to play information games in the past than it is today. As Mayer-Schönberger reminds us:

For centuries, moving from one community to another permitted people to restart their lives with a clean slate, as information about them stayed local. Crossing the Atlantic from Europe to the newly founded United States . . . let people start from scratch, not just in economic terms, but more importantly in terms of knowledge others had of them. Even moving from one neighbourhood to another in a large city might achieve a similar result. In a sense, such moves were akin to declaring information bankruptcy; one could restart again in control of one's personal information (2009, 99).

⁷ Consider Max Mosley's long running saga to remove a video from the web.

⁸ Consider, in this context, *Engel v. Vitale* (370 U.S. 421, 1962) and *Stanley v. Georgia* (394 U.S. 557, 1969).

Despite (or perhaps because of) technological development, our need to engage in information games continues unabated.⁹ Information games help explain many activities in the digital environment and make us doubt Mark Zuckerberg's remarks that privacy is no longer a social norm (Johnson 2010). In particular, they help us understand why the average internet user has several profiles when using the internet, e.g. one for leaving comments on a news site, another for social media, another still for a dating website, and so on. Some such profiles may feature the user's real name, or part of it, or simply a pseudonym. Moreover, users routinely lie about basic personal details when registering on websites. The technical term for such activities is "obfuscation."¹⁰

If we look closely at the jurisprudence of U.S. courts, we find four types of cases concerning interests in being forgotten by others or the ability to engage in information games.

The first group of cases concerns once-famous plaintiffs who claim that the passage of time means that a "veil of privacy" drops over them so that they can no longer be considered public figures. There is some difficulty, however, in classifying these as true right to be forgotten cases. This is because when one reads these cases one gets the distinct impression that the issues at stake are procedural rather than substantive. To explain: in these cases, the plaintiff is normally trying to pursue a tort action for damages against a defendant. So, in defamation cases once-famous plaintiffs have tried to argue that they escape the constraints of the *New York Times v. Sullivan* (376 U.S. 254, 1964) rule because they are no longer public figures.¹¹ Similarly, in privacy cases, plaintiffs argue that they are entitled to claim for invasion of privacy because they are no longer in the public eye.¹²

Perhaps a better example is the group of cases concerning ex-offenders and their interests in rehabilitation. The difficulty for the ex-offender is that full details of the criminal conviction, including personal details, are most often a matter of public record and thus can be accessed by anyone entitled to do so. The vast majority of authorities hold that the public's right to know outweighs any interest the ex-offender may have in being forgotten. There are some notable exceptions, cases where the ex-offender is allowed "to melt into the shadows of obscurity," but these cases are outliers.¹³ Indeed, in *Cox Broadcasting Corp. v. Cohn* (420 U.S. 469, 1975) the U.S. Supreme Court confirmed that states are not permitted to impose any sanctions on the publication of truthful information lawfully obtained from court records.¹⁴ It might be thought that a different approach would manifest itself in cases involving juvenile offenders. But even here, the general trend, at least in recent decades, seems to be in favor of the media's

⁹ For an important study of the sorts of privacy-enhancing information games played by teenagers online see boyd (2014).

¹⁰ Obfuscation is defined by Brunton and Nissenbaum as the "deliberate addition of ambiguous, confusing, or misleading information to interfere with surveillance and data collection" (2015, 1).

¹¹ See also *Street v. National Broadcasting* (645 F.2d 1227 6th Cir., 1981) and *Time Inc. v. Johnston* (448 F.2d 378 4th Cir., 1971).

¹² For example: *Sidis v. F.R. Pub. Corp.* (311 U.S. 711 61 S. Ct. 393 85 L. Ed. U.S. 462, 1940); *Estill v. Hearst Publishing Co.* (186 F.2d 1017 7th Cir., 1951); *Dresbach v. Doubleday* (518 F. Supp. 1285 D.D.C., 1981).

¹³ *Briscoe v. Reader's Digest Association* (4 Cal 3d 529 483 P.2d 34, 1971). *Briscoe* was overturned in *Gates v. Discovery Communications, Inc.* (106 Cal. App. 4th 677 Cal. Ct. App., 2003). See also *Melvin v. Reid* (112 Cal. App. 285 Cal. Ct. App., 1931) where the court stressed the importance of rehabilitation of offenders holding that the respondents' actions constituted a "direct invasion of [the appellant's] inalienable right . . . to pursue and obtain happiness," as guaranteed by the Californian Constitution.

¹⁴ See also *Florida Star v. B.J.F.* (491 U.S. 524, 1989).

right to report the information.¹⁵ *Smith v. Daily Mail* is an interesting case not because of its outcome (which is in line with this general trend) but because of the language used by Justice Rehnquist in his concurring judgment. In his view, the state's interest in protecting the identity of a juvenile was one of "highest order" and "far outweighs any minimal interference with freedom of the press that a ban on publication of the youth's name entails." Justice Rehnquist, citing *In Re Gault*, explained that "[t]his insistence on confidentiality is born of a tender concern for the welfare of the child, to hide his youthful errors and 'bury them in the graveyard of the forgotten past'" (*Smith v. Daily Mail*, 443 U.S. 97, 107, 1979).

An interesting contrast to the ex-offender cases are those involving bankruptcy proceedings. More often than not, these cases concern the proper construction of the Bankruptcy Code. What is especially interesting about these cases is that recognition of the importance of interests in being forgotten is more marked than in the ex-offender cases. Courts show concern for the "honest but unfortunate debtor" (*Grogan v. Garner*, 498 U.S. 279, 284, 1991) who should be afforded "a new opportunity in life and a clear field for future effort" (*Local Loan Co. v. Hunt*, 292 U. S. 234, 244, 1934).¹⁶ Like the rehabilitation of ex-offenders, there is also a broader societal interest in allowing debtors to move on with their lives. The difference in treatment between the two types of cases is mostly likely related to the different social stigma attached to ex-offenders than that attached to those who have suffered bankruptcy.

The fourth group of cases concerns the effects of pardons. Early cases following the Civil War suggested that a pardon "blots out the offense" and gives the offender "a new credit and capacity" (*Knote v. United States* 95 U.S. 149, 1877). Later Supreme Court decisions took a different view, holding that implicit in a pardon is an "imputation of guilt" (*Burdick v. United States* 236 U.S. 79, 1915). Thus, when one accepts a pardon, one admits guilt. Understood in this way, while a pardon is "an act of grace," exempting the offender from punishment, it does not seek to rewrite the past (*Ibid.*).

It is important to emphasize that in those few cases where the courts have recognized interests in being forgotten, the information intended to be forgotten is never erased. Notice the language used by Justice Rehnquist in the *Smith* case. He uses the verbs "hide" and "bury" rather than "destroy," "erase," or "delete." "Forgotten" information continues to exist, usually as a matter of public record. Rather, when the interests in being forgotten are understood as sufficiently weighty, the net result is that the individual is given some "breathing room" to allow him a chance to engage in information games.

2.2 Interests in Forgetting

A latent aspect of the right to be forgotten is the individual's interests in doing her own forgetting. The argument here, in short, is that being constantly confronted with the past can undermine human dignity. At first glance, recognizing "interests" of this sort might appear like an overly-paternalistic response to some of the inconveniences of the digital age. But in what follows, we will consider why these interests are important.

In the digital era, we can access old emails and correspondence on social networking websites in an instant and often by accident. Functions such as Facebook's

¹⁵ See Jacobs, *Children and the Law*, § 8.49 cited by McCarthy, above n. 8. See *Smith v. Daily Mail* (443 U.S. 97, 1979); *Oklahoma Publishing Co. v. District Court* (430 U.S. 308, 1977). See also *In Re Gault* (387 U.S. 1, 24, 1967) questioning whether the confidentiality of juvenile records is "rhetoric" or "reality."

¹⁶ See also *United States v. Ashburn* (20 F.3d 1336, 1343 5th Cir., 1994).

Timeline allow users to review past activities in the sort of precise detail that we could never achieve if relying on our own powers of recollection.¹⁷ While there are many positive aspects to digital technology's capacity to serve up the past to us in this way, there are clearly drawbacks too, chief among them the feeling of being overwhelmed when faced with too many memories at once (Mayer-Schönberger 2009, 123).

The cyber-theorist, Franco Berardi, has provided an explanation for this feeling, arguing that mass panic is the psychopathology of "the first connective generation" (2009, 179). Cyberspace continues to expand, but our personal capacities to process this information stay the same or barely change. The panic we experience has its roots in "the Infosphere's excess," which causes "hyperstimulation" and "endless cognitive stress" (Ibid., 102). The Infosphere overwhelms, but we cannot escape it because no matter where we turn it confronts us.

For Berardi, the psychopathology of our social milieu is antithetical to that described by Freud (1930/2002). This is because, for Freud, psychopathology had its roots in repression of memories whereas today's psychopathology is characterized by excess – especially the "excess of visibility" (Berardi 2009, 179). So, the psychopathologies of today must be considered within a "technological and anthropological context" of "hyper-expressivity" (Ibid., 179). The defining feature of our times is not repression but the pathology of the "*just do it*" (Ibid., 180).

While Berardi's arguments will not be to everyone's liking, there are some important insights here. The peer-pressure to "just do it" leads to hyper-expressivity. We feel compelled to share even the most intimate personal information online and to document each step in our lives. But storing these memories in an easily accessible format, whether it is in Gmail, Twitter, or in Facebook's Timeline, represents excess – an excess of remembering. Might this contribute to the feeling of being overwhelmed described by Berardi? Memories are not forgotten or even repressed in the Freudian sense because of this excessive remembering. It is more difficult to talk about things being "buried" in the past, a metaphorical use of language which tells us a great deal about the values that are important to us (Lakoff and Johnson 1980). Rather, memories are available at the click of a button. Being constantly confronted (whether actually or potentially) with our past in this way inhibits human flourishing. This is because, as Kundera writes, our capacity to forget is "part of the essence of man" (2000/2002, 123).

Despite the importance of forgetting for human flourishing, we find only limited evidence in the jurisprudence of the courts that interests in forgetting merit protection. There are at least two explanations for this. Firstly, it is only relatively recently that excessive remembering has emerged as a distinct problem, and legal doctrine has not yet evolved in such a way to cater for it. Secondly, courts are generally reluctant to award remedies for mental distress on its own. But consider *Mau v. Rio Grande Oil, Inc.* (28 F. Supp. 845 N.D. Cal., 1939) as an example of a case where interests in forgetting were recognized. In this case the plaintiff, while working as a chauffeur, was shot by a robber. Some months later the defendant broadcasted a dramatization of the incident, featuring the plaintiff's name. On hearing the broadcast, the plaintiff received a number of calls from friends who wished to "rehash" the "near tragedy" with him, despite this being something he "wished to forget." Overwhelmed by all of this remembering, while at work the following day, the plaintiff was unable to drive the car and was dismissed by his employer. The court found that the plaintiff's right to be let alone was violated and thus he could recover damages. *Mau* demonstrates that interests

¹⁷ Jones argues that "Facebook's Timeline is an example of easier access to old information that disrupts the expected information flow and causes the unsettling effect of a privacy violation" (Jones 2016, 90).

in forgetting can be recognized in law, but it will take a shift in thinking among lawyers to understand such interests as important enough to be protected. In the next part of this chapter, we explore how this shift might take place.

3. The Right to be Forgotten in the Digital Age

In the above, we have reflected on what interests in being forgotten and in forgetting entail. In doing so, we have drawn on some (albeit very limited) evidence from the jurisprudence of U.S. courts. Most of the cases mentioned above, however, were from the pre-digital era. Interests in being forgotten and forgetting take on added significance in the digital age and have the potential to transform our thinking about the privacy challenges of the twenty-first century.

3.1 Search Engines Results as “Digital Dossiers”

In 2004, Solove introduced the idea of the “digital dossier” in referring to records of our personal information stored in databases by public and private sector entities. Of particular concern is the capacity to *aggregate* the information, bringing together pieces of information from various sources and thereby creating a patchwork of our personal lives. In what follows, this chapter explains how search engine results can constitute digital dossiers in Solove’s sense.

It seems trite to say that we live much of our lives online now. This being so, search engines have the potential to seriously impair privacy, or put differently, our interests in forgetting/being forgotten. Much information from our personal and professional lives remains easily accessible through search engines, often with little more than a plain-name search. In an instant, the user can access employment profiles, details of involvement in clubs, societies, and charities, not to mention details of social media activity such as tweets. Most people would probably be unconcerned about these pieces of information, taken on their own, being accessed by others. But we must consider the “aggregation effect” (Solove 2004). With a few clicks, third parties can put together a “collage” of information about our present activities and our personal histories (Mayer-Schönberger 2009, 124).

Within this collage of information, of particular concern is outdated information. An online search serves up all of the information available about an individual at once. This is, as Mayer-Schönberger puts it, “information from which time has been eliminated” (Ibid., 124). This issue becomes particularly acute in cases where this information no longer represents a person’s character, e.g. an ex-offender who has long since rehabilitated herself or someone who simply regrets youthful indiscretions documented online.

It is against this background that we should pay particular attention to the so-called practical obscurity doctrine developed by the Supreme Court in *U.S. Dept of Justice v. Reporters Committee* (489 U.S. 749, 1989) as this unanimous decision supports the idea that collages of information have the potential to significantly impair privacy.¹⁸ It ought to be emphasized that the case concerned the construction of a particular statute, the Freedom of Information Act (FOIA) and involved a federal government agency (the FBI). For both of these reasons we have to be careful in extracting any points of relevance for our discussion of private entity search engines

¹⁸ For an instructive discussion about the practical obscurity doctrine, see O’Hara and Shadbolt (2015, 182-184).

operating in a largely unregulated environment. But some of the conceptual points the Supreme Court made are of use to us in thinking about search engines and privacy.

The question in the *Reporters Committee* case was whether the disclosure by the FBI of a rap sheet to a third party constituted an invasion of privacy within the meaning of the FOIA. Rap sheets document the criminal histories of individuals, detailing not just publicly available information such as convictions but also information generally unavailable to the public at large, such as descriptions of physical characteristics. In reflecting on the special nature of rap sheets and the fact that much of the information contained in them was already available to the public, Justice Stevens, who delivered the opinion of the Court, remarked that there was a “distinction, in terms of personal privacy, between scattered disclosure of the bits of information contained in a rap sheet and revelation of the rap sheet as a whole” (489 U.S. 749, 1989, 764). He went on:

Plainly there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information (Ibid., 764).¹⁹

In interpreting the FOIA, Justice Stevens found a “recognition [on the part of Congress] of the power of compilations to affect personal privacy that outstrips the combined power of the bits of information contained within” (Ibid., 749). What all of this meant was that there was a

[substantial] privacy interest in a rap sheet. The substantial character of that interest is affected by the fact that in today’s society the computer can accumulate and store information that would otherwise have surely been forgotten long before a person attains age 80, when the FBI’s rap sheets are discarded (Ibid., 771).

Though there are limitations in drawing an analogy for our purposes, the pro-privacy language of this unanimous decision is striking and much of what the court says about compilations of information maps neatly onto the discussion in this chapter. Again, as in the *Reporters Committee* case, taken on their own, the bits of information a search engine collects might not be problematic but, when this information is aggregated into a compilation or a collage, the threat to privacy becomes more serious.

It is in this context that we must understand the famous *Google Spain* decision of the European Court of Justice (ECJ), a decision that has sometimes been depicted as radical and verging on Orwellian in its potential to “rewrite the past.” Fundamentally, the decision concerns the special status of search engines in the digital age as our gateways to the world. The ECJ’s decision, interpreting the Data Protection Directive, holds that search engines are data controllers and thereby allows an individual to request a search engine to delist from its results information that is inaccurate, incomplete, outdated, or no longer relevant. Crucially, it does not follow that the information cannot be accessed in other ways. So, where information was once in the public interest, e.g. a bankruptcy notice (as was the case in *Google Spain*), this information will remain on official record and in media archives (including online archives).

¹⁹ This quote goes to the core of the practical obscurity doctrine. As O’Hara and Shadbolt explain: “The intuition here is that there is a major privacy difference between a thousand catalogues of information each of which contains one reference to an individual, and a single catalogue with all thousand references brought together” (2015, 183).

Key here is what the passage of time does to information.²⁰ Information can become outdated or no longer relevant though it may have once been in the public interest. Of course, just because the information is deemed outdated or irrelevant at a particular point in time does not mean it will remain so forever. So, for example, drawing on our bankruptcy notice example, if an individual were to stand for political office in the future, then such information might once again become relevant.²¹ The *Google Spain* remedy allows for such ebbs and flows in relevance since information will normally remain accessible in ways other than through a plain name search in a search engine. If the information once again re-attracts the public limelight, e.g. by featuring in a media report, then this information will once again be picked up by the search engine's crawlers and will re-feature in the search engine's results.

Google Spain is important because the decision recognizes that, in assessing the scope of the right to privacy, the passage of time matters. Jones argues that “[t]ime does not have the same impact on the public interest in the U.S. as it does in some European countries (2016, 60). This appears to be true of the bulk of authorities concerning tort actions for defamation and invasion of privacy. Nonetheless, we find some evidence in U.S. Supreme Court judgments that the passage of time may change the nature of the public interest.²² This dicta may eventually play a part in providing doctrinal support for a right to be forgotten in the U.S.

3.2 Regulating Search Engines

This chapter has argued that search engines pose particular challenges for privacy in the way they can provide collages of information about us and, especially, in the way outdated information features in these collages. But there is scope in the U.S. for a *Google Spain*-type approach to this problem. Jones makes an important point when she writes: “[t]o say that Americans do not remove information from the Internet would be disingenuous” (2016, 57). In the area of copyright infringements, for example, website operators are generally quick to take down the infringing material. But what this chapter proposes is not nearly as extreme as this sort of solution. Because of the special protection of speech in the U.S, we cannot advocate a solution that involves erasing information from the internet. Again, a *Google Spain*-inspired solution for the U.S. would focus on the search engine as gatekeeper and require, when justified, delisting of links to personal information. But this information would remain otherwise accessible online and/or offline.

This approach is attractive because it coheres to a large extent with practices in the pre-digital era. By this, the chapter does not mean to suggest that practices in that era were generally better than now. The internet has allowed us to make great strides in how we access information and, to some extent, in how we hold government and

²⁰ For a fascinating analysis of the role of time for the right to be forgotten see Sartor (2016).

²¹ U.S. jurisprudence holds that information relating to those standing for public office will always be in the public interest notwithstanding any passage of time (*Monitor Patriot Co. et al. v. Roy, Executrix* 401 U.S. 265, 1971).

²² In *Wolston v. Reader's Digest* (443 U.S. 157, 171, 1979), Justice Blackmun, joined by Justice Marshall, concurring in the result, concluded that the passage of time was sufficient to “erase whatever public figure attributes petitioner once may have possessed.” Thus, for the purposes of the case, the petitioner was no longer a public figure but a private one. Also of interest is Justice Brennan’s (albeit obiter) remarks in *Rosenblatt v. Baer* (383 U.S. 75, 1966). Justice Brennan, who delivered the opinion of the Court, commented: “To be sure, there may be cases where a person is so far removed from a former position of authority that comment on the manner in which he performed his responsibilities no longer has the interest necessary to justify the *New York Times* rule.”

corporations to account. But take the example of a youthful indiscretion in the pre-digital era. Mistakes were made and people moved on. Where an indiscretion was serious enough to merit reporting by a newspaper, in most cases such information also had a limited shelf-life. As the California Supreme Court put it in *Briscoe v. Readers Digest Association*, “[h]uman forgetfulness over time puts today’s “hot” news in tomorrow’s dusty archives.” While there were of course events (and protagonists) that affected the collective consciousness in such a way that they continued to be remembered, e.g. particularly heinous crimes or political scandals (*Briscoe*), much “hot” news was eventually forgotten, perhaps too even by those who were the subjects of these news reports. If one accepts the theory that metaphors reflect deeper values in society, then there are important reasons why, when it comes to some types of information, we use language such as “buried in the past” or “dusty archives.” The easy and instant accessibility of information through search engines makes such phrases almost obsolete today. In short, the individual has much less “breathing room” for privacy today than she did in the pre-digital era.

That being said, the question as to whether search engines in the U.S. should be regulated is hugely controversial and has generated many pages of academic comment. We do not have the space here to engage with this literature in any detailed way; rather, we will consider some general points that are particularly important.

There are two important arguments against regulating search engines to give effect to a right to be forgotten. One argument is that search engines are the wrong target for regulation. Jones, for instance, sees merit in the right to be forgotten but thinks that regulating search engines is not the best way to bring about what she calls “digital redemption.” Rather than requiring “a completely detached party” such as a search engine, “to make decisions about the importance, relevance, and adequacy of information it did not produce or preserve,” she constructs a compelling argument that the better approach is for operators of the source website to evaluate right to be forgotten requests (2016, 151-152). In this way, a website operator does not need to erase the information from the website but simply needs to use a robots.txt file to ensure that search engine crawlers do not pick up the information. While there are definite concerns about entrusting search engines with the power to make decisions about the importance, relevance, and adequacy of information, there are two reasons why “going directly to the source,” as Jones puts it, is not necessarily the better approach. First, much embarrassing information, e.g. information of a sexually explicit nature, will find its way on to websites that are not operated in an ethical way. If a website operator cannot be traced or refuses to cooperate then the search engine must step in, as the ultimate safety net, and determine what can and cannot be accessed. Second, leaving the decisions to source website operators rather than search engines would result in a lack of uniformity in how the right to be forgotten is implemented, resulting in what Tennyson termed a “wilderness of single instances.” If we as a society can agree that there are certain types of information that should be forgotten, then the better approach is to ensure that a handful of search engines delist links to this information rather than relying on millions of source websites to take action.

The other important argument against regulation of search engines (and perhaps the more obvious one) is rooted in concerns about free speech and the freedom to access information. Here scholars argue that search engines are “shielded by the First Amendment” (Volokh and Falk 2011-2012, 899). This chapter will make two observations here. Firstly, while this may seem counter-intuitive, it may well be that the right to be forgotten is necessary for free speech to thrive. In a revealing interview, given while he was CEO of Google, Eric Schmidt said that we are all living “with a

historical record and people are going to be much, much more careful about how they talk to people, how they interact with people, and in particular what they offer of themselves.”²³ If Schmidt is right then this does not bode well for free speech. It seems plausible that at least some social media users feel unable to air their true feelings online, fearing public humiliation for expressing the “wrong” views. Westin understood the importance for the personality and liberal democracy of the interdependency between privacy and speech. He explained:

[The] development of individuality is particularly important in democratic societies, since qualities of independent thought, diversity of views, and non-conformity are considered desirable traits for individuals. Such independence requires time for sheltered experimentation and testing of ideas, for preparation and practice in thought and conduct, without fear of ridicule or penalty, and for the opportunity to alter opinions before making them public (1967, 34).

Experimenting with ideas is an essential part of the development of the personality and, as Westin recognized, society benefits from this experimentation too. When we experiment with ideas we will make mistakes along the way; we will sometimes say things we will later regret. Could the knowledge that tweets, blog posts, and the like are easily accessible through search engines have a chilling effect on speech? If so, a right to be forgotten, involving the delisting of certain search results, might actually bolster free speech.

The second observation is that we should remind ourselves that there are limits on free speech in U.S. law. We do not have the space to examine this in any detail, but reflecting on some of the limitations developed in Supreme Court jurisprudence, two possible approaches to reconciling a right to be forgotten (in the form of delisting search results) with the First Amendment emerge. The first approach is to consider those U.S. Supreme Court decisions which hold that the protection of speech varies depending on the type of speech. Understood in this way we could treat “outdated” information as “low-value speech” or speech that finds itself in the “outer perimeters” of the First Amendment.²⁴ The second approach is to attempt to satisfy strict scrutiny review by arguing that a law regulating search engines is narrowly tailored to address a compelling interest. The compelling interest should be clear from the discussion above. No doubt many will be skeptical that a right to be forgotten could ever be “narrowly tailored.” But again, by a right to be forgotten, this chapter does not mean the erasure of information. This remedy, quite clearly, could never be considered “narrowly tailored.” Rather, the chapter proposes a remedy that might be regarded as the least restrictive means of addressing the compelling interest. This is the delisting of certain search results where the societal expectation is that such information should be forgotten. The information will continue to be available elsewhere. What we are doing is making this information more difficult to discover but crucially not quite as difficult as visiting a

²³ The transcript of the interview is available at: https://static.googleusercontent.com/media/www.google.gr/el/gr/press/podium/pdf/20070518_PersonalDemocracyForum.pdf. See Democracy Forum (2007).

²⁴ On “low value speech” see *Chaplinsky v. New Hampshire* (315 U.S. 568, 571-572, 1942); *United States v. Stevens* (559 U.S. 460, 468-69, 2010). On the idea of “perimeters” see *Barnes v. Glen Theatre, Inc.* (501 U.S. 560, 566, 1991). See also *United States v. O’Brien* (391 U.S. 367, 1968); *Young v. American Mini Theatres* (427 U.S. 50, 70, 1976); *Central Hudson Gas & Electric Corp. v. Public Service Commission* (447 U.S. 557, 563-566, 1980); *Metromedia, Inc. v. San Diego* (453 U.S. 490, 507, 1981); *City of Erie v. Pap’s A.M.* (529 U.S. 277, 294, 2000); *Sorrell v. IMS Health Inc.* (564 U.S. 552, 2011).

library to access the archives of a newspaper in the pre-digital era.²⁵ This chapter contends that such a solution is possible because the First Amendment does not require that all information should be easily and instantly available at the click of a button.

4 Conclusion

This chapter provided some evidence of cases in U.S. jurisprudence where interests in forgetting/being forgotten were considered weighty enough to impose a duty on government and/or fellow citizens to respect these interests. This evidence provides us with an instructive background against which we can examine the privacy challenges of the digital age.

Whatever we think about issues of personal responsibility or the naivety that is sometimes associated with online activities, it remains the case that personal information, ranging from the mildly embarrassing to the seriously traumatizing, routinely finds its way on to the internet.

In *Configuring the Networked Self*, Julie Cohen argues for “semantic discontinuity,” which she claims is the “opposite of seamlessness” (2012, 239). Search engines can create collages of personal information that tend towards a kind of seamlessness. This hinders both our ability to engage in information games and our ability to forget. Jones puts it best, when drawing on Cohen, she argues that “[t]he right to be forgotten can be understood as the right to retroactively create gaps or boundaries to promote emergent subjectivity and the dynamic self” (2016, 93).

Finally, it is worth mentioning that Cohen is right to say that the liberal self remains an “aspiration – an idealized model of identity formation that can be approached only incompletely, if at all” (2013, 1910). We cannot, for example, ever exercise perfect control over the boundaries of our private lives. As the Supreme Court recognized in *Time v. Hill* (385 U.S. 374, 388, 1967), “[e]xposure of the self to others in varying degrees is a concomitant of life in a civilized community.”²⁶ Indeed, this chapter has sought to stress that forgetting is not something that can be enforced or manipulated. But idealized models are important because they give us something to aim for. A right to be forgotten, in the sense of allowing search results to be delisted, gives the individual the chance, if she so wishes, to “melt into the shadows of obscurity.”

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References

Berardi F (2009) *The soul at work: from alienation to autonomy*. MIT Press, Cambridge

²⁵ In her book on the right to be forgotten, Jones makes frequent references to “decreased discoverability.” She argues that “the right to be forgotten seeks to diminish the ease of discoverability of old personal information” (2016, 93-94).

²⁶ The Court is quoting from *Thornhill v. Alabama* (310 U.S. 88, 102, 1940).

Bloustein E (1964) Privacy as an aspect of human dignity: an answer to dean prosser. New York University Law Review 39:962-1007

boyd D (2014) It's complicated: the social lives of networked teens. Yale University Press, New Haven

Brunton F, Nissenbaum H (2015) Obfuscation. MIT Press, Cambridge

Cohen JE (2012) Configuring the networked self. Yale University Press, New Haven

Cohen JE (2013) What is privacy for? Harvard Law Review 126:1904-1933

De Mars S, O'Callaghan P (2016) Privacy and search engines: forgetting or contextualizing. Journal of Law and Society 43(2):257-284

Democracy Forum (2007). Interview with google ceo eric schmidt. https://static.googleusercontent.com/media/www.google.gr/el/gr/press/podium/pdf/20070518_PersonalDemocracyForum.pdf. Accessed 1 July 2017

Freud S (1930) Civilization and its discontents. IPV, Wien. English edition: Freud S (2002) Civilization and its discontents (trans. McLintock D). Penguin, London

Fried C (1968) Privacy. Yale Law Journal 77:475-493

Giddens A (1991) Modernity and self-identity. Polity, Cambridge

Goffman E (1959) The presentation of self in everyday life. Anchor Books, New York

Johnson B (2010) Privacy no longer a social norm, says facebook founder. Guardian. <http://www.theguardian.com/technology/2010/jan/11/facebook-privacy>. Accessed 1 July 2017

Jones ML (2016) Ctrl+Z: the right to be forgotten. NYU Press, New York

Koops BJ (2011) Forgetting footprints, shunning shadows. Scripted 8:229-256

Kundera M (2000) Ignorance. Editions Gallimard, Paris. Kundera M (2002) Ignorance (trans. Asher L). Faber, London

Lakoff G, Johnson M (1980) Metaphors we live by. University of Chicago Press, Chicago

Mayer-Schönberger V (2009) Delete: the virtue of forgetting in the digital age. Princeton University Press, Princeton

McCarthy JT (2015) The rights of publicity and privacy. Clark Boardman Callaghan, New York

Mead GH (1934) Mind, self, & society. Chicago University Press, Chicago

More T (2002) *Utopia*. Logan GM, Adams RM (eds) Cambridge University Press, Cambridge

O'Hara K, Shadbolt N (2015) The right to be forgotten: its potential role in a coherent privacy regime. *European Data Protection Law Review* 1(3):178-189

Raz J (1984) Legal rights. *Oxford Journal of Legal Studies* 4(1):1-21

Sartor G (2016) The right to be forgotten: balancing interests in the flux of time. *International Journal of Law and Information Technology* 24(1):72-98

Schilpp PA (1957) *The philosophy of karl jaspers*. Tudor Publishing Company, New York

Solove D (2004) *The digital person*. NYU Press, New York

Volokh E, Falk DM (2011-2012) Google first amendment protection for search engine results. *Journal of Law, Economics & Policy* 8(4):883-899

Wegner DM, Schneider DJ (2003) The white bear story. *Psychological Inquiry* 14(3/4):326-329

Westin A (1967) *Privacy and freedom*. Athenum Press, New York