THE RIGHT TO BE FORGOTTEN: Memory holes as the default?

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Abstract

The right to be forgotten has become a hotly debated topic on both sides of the Atlantic. Some see it as a threat to free speech, while others question whether it is a right to erasure or another version of the French droit à l' oubli. Many scholars relate it to subject's control over her data and some see it as a right to identity. Unable to figure out whether it is about forgetting or being forgotten, some authors have even accused the European legislator of "foggy thinking". Given our modern digital lives, during which everything can be posted online, one could argue that exercising such a right would be problematic. This paper balances the right to be forgotten with the fundamental right to freedom of expression and freedom to conduct a business. Furthermore, it examines controversies between the European right to erasure and the First Amendment theoretical framework. However, it observes that certain versions of the right to erasure do exist in US laws. In addition, it provides some statistics with regard to requests addressed by individuals after the famous Google decision. Finally, it studies arguments for and against the right to erasure to draw attention to the need for re-shaping the concept of privacy in today's information societies.

Keywords: right to erasure – right to be forgotten – freedom of expression – data protection – privacy

1. Introduction

Under Article 17 of GDPR[1] the data subject shall have the right to obtain from the controller the erasure of personal data concerning him or her without undue

[1] See Article 17(1, 3) of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, repealing the Directive 95/46/EC, *infra* referred to as GDPR (for General Data Protection Regulation): "[…] *The data subject shall have the right to obtain from the controller the erasure of personal data concerning him or her without undue delay and the controller shall have the obligation to erase personal data without undue*

delay and the controller shall have the obligation to erase personal data without undue delay under specific conditions. While GDPR proposes it as a right (to erasure or 'to be forgotten'), some authors see it as an interest[2], while others frame it as an ethical or social value[3]. Obligations to delete personal data are also provided under Data Protection Directive[4], however, after the famous Google decision[5],

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delay where one of the following grounds applies: (a) the personal data are no longer necessary in relation to the purposes for which they were collected or otherwise processed; (b) the data subject withdraws consent on which the processing is based according to point (a) of Article 6(1), or point (a) of Article 9(2), and where there is no other legal ground for the processing; (c) the data subject objects to the processing pursuant to Article 21(1) and there are no overriding legitimate grounds for the processing, or the data subject objects to the processing pursuant to Article 21(2); (d) the personal data have been unlawfully processed; (e) the personal data have to be erased for compliance with a legal obligation in Union or Member State law to which the controller is subject; (f) the personal data have been collected in relation to the offer of information society services referred to in Article 8(1). […] *3. Paragraphs 1 and 2 shall not apply to the extent that processing is necessary: (a) for exercising the right of freedom of expression and information; (b) for compliance with a legal obligation which requires processing by Union or Member State law to which the controller is subject or for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller; (c) for reasons of public interest in the area of public health in accordance with points (h) and (i) of Article 9(2) as well as Article 9(3); (d) for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with Article 89(1) in so far as the right referred to in paragraph 1 is likely to render impossible or seriously impair the achievement of the objectives of that processing; or (e) for the establishment, exercise or defence of legal claims.* […]".

[2] "[…] *intérêt légitime à oublier et à se faire oublié* […]". See *Antoinette Rouvroy*, Réinventer l' art d' oublier et de se faire oublier dans la société de l' information? Version augmentée, 2008, p. 25, available at https://works.bepress.com/antoinette_rouvroy/5. See also *Martha Garcia-Murillo, Ian MacInnes*, Così fan tutte: A better approach than the right to be forgotten, Telecommunications Policy, 2017, https://doi.org/10.1016/j.telpol.2017.12.003 (referencing *Pound R.*, Interests of Personality (Vol. XXVIII), 1915, Harvard University Press, who classifies individual interests into three groups: (a) interests of personality, relating to person's physical and spiritual existence; (b) domestic interests, relating to the ability of people to conduct their lives without any impediment and; (c) interests of substance, relating to the ability to engage in economic activities).

[3] See *Jean-François Blanchette and Deborah G Johnson*, Data Retention and the Panoptic Society: The Social Benefits of Forgetfulness, The Information Society, 18:33–45, 2002, Taylor & Francis. Available at https://pdfs.semanticscholar.org/f17f/fed4d7cd491796e7384f66204a11010ab0b0.pdf.

[4] See e.g. Articles 6(1)(e) and 12(b) of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data

[5] See Judgment of the Court (Grand Chamber), 13 May 2014, (Personal data | Protection of individuals with regard to the processing of such data | Directive 95/46/EC | Articles 2, 4, 12 and 14 | Material and territorial scope | Internet search engines | Processing of data contained on websites | Searching for, indexing and storage of such data | Responsibility of the operator of the search engine | Establishment on the territory of a Member State | Extent of that operator's

which has been described as the decision that invented the right to be forgotten[6], a lot of interest and, indeed, controversy has been aroused.

Is this right the biggest threat to free speech[7]? Is it a right to erasure, in relation to information that an individual has passively disclosed, or is it based upon the French *droit à l' oubli* (right of oblivion)[8]? Is it about control over data, an aspect of the protection of personal data and a right guaranteed under Article 8 of the Charter of Fundamental Rights of the European Union, or is it an aspect of the right to privacy[9]? Should it be conceptualized as a human right[10], as an expression of the broader right to privacy, or is it a right to identity[11]? Is it about forgetting, a natural function of human brain, or is it about being forgotten[12]?

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obligations and of the data subject's rights | Charter of Fundamental Rights of the European Union | Articles 7 and 8), in Case C‑131/12, ECLI:EU:C:2014:317, *Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos (AEPD), Mario Costeja González*. See also *Anna Bunn*, The curious case of the right to be forgotten, Computer Law & Security Review 31, 2015, pp. 336-350, at pp. 348-349, who observes that as of 25 September 2014 Google had received more than 135,000 erasure request each of which was to be reviewed individually. As Bunn aptly put it, "[…] *For Mr. Gonzalez the decision has resulted in something of a curious irony: his bid not to be indefinitely linked through Google search to information concerning his debts was successful, but as a result of that success he is likely to be linked to the information he wished forgotten for a long time to come* […]".

[6] See *Simon Breheny*, The Right to be Forgotten Online Sets a Dangerous Precedent, The Age, July 16, 2014, available at https://www.theage.com.au/opinion/the-right-to-be-forgotten-online-sets-a-dangerous-precedent-for-freedom-of-speech-20140715-zt7w7.html.

[7] *Jeffrey Rosen*, The Right to be Forgotten, 2012, Stanford Law Review Online, Vol. 64, pp. 88-92, at p. 88, available at https://www.stanfordlawreview.org/online/privacy-paradox-the-right-to-be-forgotten/?em_x=22.

[8] *Meg Leta Ambrose, Jef Ausloos*, The Right to be Forgotten Across the Pond', 2013, Journal of Information Policy, Vol. 3, pp. 1-23, at pp. 14-15. Available at https://lirias.kuleuven.be/bitstream/123456789/389521/1/119-421-1-PB.pdf&sa=U&ei=YvtQU9C_JMGxyASUoIK4Bw&ved=0CCcQFjAC&usg=AFQjCNGUTJenIFAovDP3VINz_Ne1aq8czg.

[9] *Hans Graux, Jef Ausloos, Peggy Valcke*, The Right to be Forgotten in the Internet Era, ICRI Working Paper 11/2012, at p. 5. Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2174896.

[10] *Napoleon Xanthoulis*, The Right to Oblivion in the Information Age: A human-rights based approach, 2013, US-China Law Review, Vol. 10, at p. 84.

[11] See *Noberto Nuno Gomes de Andrade*, Oblivion: The Right to be Different … from Oneself. Reproposing the Right to be Forgotten, VII International Conference on Internet, Law & Politics. Net Neutrality and other challenges for the future of the Internet, IDP. Revista de Internet, Derecho y Política. No. 13, pp. 122-137. UOC, 2012, available at https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2033155.

[12] *Bert-Jaap Koops*, Forgetting Footprints, Shunning Shadows: A Critical Analysis of the 'Right to Be Forgotten' in Big Data Practice, 2011, SCRIPTed, Vol. 8, No. 3, Tilburg Law School Research Paper No. 08/2012, pp. 229-256. Available at https://script-ed.org/article/forgetting-footprints-shunning-shadows/#_ftn44.

Should the European legislator be "*accused of foggy thinking*"[13]? Will this right produce a bureaucratic nightmare[14] that will interfere with business demands for data[15], or even create a property right in information[16]? Could this lead us towards a default model of –proposed by some[17]– expiry dates on data?

The Internet is ubiquitous. It has not only created global communication channels but also broadened the marketplace. More data is created about natural persons than by natural persons and our digital shadows seem to have outgrown our digital footprint[18]. Our lives are on our mobile devices and, in many cases, information requested to be deleted may have been posted by the very individual[19]. Thus, some speak of a European misguided and unrealistic right[20], while others find it problematic[21].

A major debate is going on between the two sides of the Atlantic and the controversies between the European and the American approaches are innumerous. This paper examines the right to be forgotten in relation to fundamental right to freedom of expression and freedom to conduct a business. Moreover, it studies controversies between the European right to erasure and the First Amendment

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[13] *Peter Fleischer*, Foggy Thinking About The Right To Oblivion, Mar. 9, 2011, available at http://peterfleischer.blogspot.gr/2011/03/foggy-thinking-about-right-to-oblivion.html.

[14] *Greg Sterling*, Google Confront Spain's "Right To Be Forgotten", Mar. 8, 2011. Available at https://searchengineland.com/google-confronting-spains-right-to-be-forgotten-67440.

[15] Financial Mirror, Internet Privacy And The "Right To Be Forgotten", Mar. 19, 2011. Available at https://www.thefreelibrary.com/Internet+privacy+and+the+%22right+to+be+forgotten%22.-a0251824741.

[16] *Larry Downes*, Europe Reimagines Orwell's Memory Hole, Nov. 16, 2010. Available at https://techliberation.com/2010/11/16/europe-reimagines-orwells-memory-hole/.

[17] *Viktor Mayer-Schönberger*, Delete: The Virtue of Forgetting in the Digital Age, Princeton University Press, 2009, at. pp. 171-195.

[18] *John Gantz and David Reinsel*, The Digital Universe Decade – Are You Ready?, May 2010, IDC, p. 9. Available at https://www.emc.com/collateral/analyst-reports/idc-digital-universe-are-you-ready.pdf.

[19] *Martha Garcia-Murillo, Ian MacInnes*, Così fan tutte: A better approach than the right to be forgotten, id.

[20] *Kristie Byrum*, The European right to be forgotten: A challenge to the United States Constitution's First Amendment and to professional public relations ethics, Public Relations Review, Volume 43, Issue 1, March 2017, https://doi.org/10.1016/j.pubrev.2016.10.010, pp. 102-111; *McKay Cunningham*, Privacy Law That Does Not Protect Privacy, Forgetting the Right to Be Forgotten, 65 Buffalo Law Review 495 (2017), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2933634; *Antoon De Baets*, A historian's view on the right to be forgotten, International Review of Law, Computers & Technology, Volume 30, 2016, Issue 1-2, pp. 57-66, available at http://www.tandfonline.com/doi/full/10.1080/13600869.2015.1125155.

[21] *Martha Garcia-Murillo, Ian MacInnes*, Così fan tutte: A better approach than the right to be forgotten, id.

theoretical framework, albeit, it argues that some limited versions of this right do exist in current US laws. Furthermore, it offers some numbers concerning requests, which individuals have addressed –since the Google decision– to search engines, to conclude that the right to erasure (as been explained by the court) has been exercised, not by criminals but, by normal citizens who have wished their information to be deleted. Finally, it examines several arguments for and against the right to erasure to highlight the need to re-shape the concept of privacy in contemporary information societies.

2. The Right to Be Forgotten v. Freedom of expression and Freedom to conduct a business

The right to the protection of personal data is not an absolute right and it must be considered in relation to its function in society and be balanced against other fundamental rights[22]. Indeed, GDPR respects all fundamental rights, including –amongst others– freedom of expression and information[23] and freedom to conduct a business[24]. The former is essential to a functioning democracy and indispensable for progress of arts, science, law and politics, while the latter is essential to free market ideas, which underpin present-day economic models[25]. As scholars argue, there is no formal hierarchy between fundamental rights, since the world of rights is two-dimensional, and they all lie on the same straight line[26]. Hence, one has to strike a fair balance[27] between the above fundamental rights[28].

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[22] See Recital 4 of GDPR.

[23] Under Article 11 of the Charter of Fundamental Rights of the European Union everyone has the right to freedom of expression, which includes freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This right is not an absolute right; "[…] *The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary* […]", see Article 10(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

[24] Under Article 16 of the Charter of Fundamental Rights of the European Union "[…] *The freedom to conduct a business in accordance with Union law and national laws and practices is recognised* […]".

[25] *Tobias Mahler*, A critical analysis of the EU right to erasure as it applies to internet search engine results, University of Oslo, 2014, p. 20.

[26] *House of Lords European Union Committee*, 2nd Report of Session 2014-15, EU Data Protection law: a 'right to be forgotten'?, Authority of the House of Lords, p. 6 par. 4 (referencing

As some have aptly put it, performing a search online is one of the most important ways to exercise the right to receive information[29]. Search engines are crucial, since they enable users to peruse an –otherwise unmanageable– number of websites[30]. Hence, let us mention some examples that may make things clearer.

Assume that Stella, twenty five years old, was found guilty of robbery. She became the "front page story" of multiple "digital newspapers" and her data (name and surname) was easy to find while users performed online search. She spent some months in prison and, now, after five years, her data is still online. Stella, now thirty years old, may exercise her right to erasure and, hence, escape from records of

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Luciano Floridi). Available at https://publications.parliament.uk/pa/ld201415/ldselect/ldeucom/40/40.pdf.

[27] See also *Simon Wechsler*, The Right to Remember: The European Convention on Human Rights and the Right to Be Forgotten, Columbia Journal of Law and Social Problems, Vol. 49, No. 1, 2015, pp. 135-165. Available at http://jlsp.law.columbia.edu/wp-content/uploads/sites/8/2017/03/49-Wechsler.pdf.

[28] See *Council of the European Union*, Council Conclusions On The Communication From The Commission To The European Parliament And The Council – A Comprehensive Approach On Personal Data Protection In The European Union, Feb. 24-25, 2011, p. 2, par. 8, http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/jha/119461.pdf (where it is mentioned that other relevant fundamental rights, including the right to freedom of expression and information must be "*fully taken into account while ensuring the fundamental right to the protection of personal data*"); Opinion 5/2009 Online Social Networking at p. 6, June 12, 2009, Available at http://194.242.234.211/documents/10160/10704/WP+163.+Opinion+5+2009+on+online+social+networking.pdf (noting that balance needs to be struck between freedom of expression and the right to privacy); Judgment of the Court (Grand Chamber), 29 January 2008 (Information society | Obligations of providers of services | Retention and disclosure of certain traffic data | Obligation of disclosure | Limits | Protection of the confidentiality of electronic communications | Compatibility with the protection of copyright and related rights | Right to effective protection of intellectual property) in Case C‑275/06, *Productores de Música de España v. Telefónico de España SAU* (ECLI:EU:C:2008:54), par. 68 (noting that member states must consider "*fair balance*" between fundamental rights).

[29] Opinion of Advocate General *Jääskinen*, delivered on 25 June 2013, Case C‑131/12, *Google Spain SL Google Inc. v. Agencia Española de Protección de Datos (AEPD) Mario Costeja González* (World Wide Web | Personal data | Internet search engine | Data Protection Directive 95/46 | Interpretation of Articles 2(b) and 2(d), 4(1)(a) and 4(1)(c), 12(b) and 14(a) | Territorial scope of application | Concept of an establishment on the territory of a Member State | Scope of application ratione materiae | Concept of processing of personal data | Concept of a controller of processing of personal data | Right to erasure and blocking of data | 'Right to be forgotten' | Charter of Fundamental Rights of the European Union | Articles 7, 8, 11 and 16), par. 131. Available at http://curia.europa.eu/juris/document/document.jsf?docid=138782&doclang=EN.

[30] As some have argued "*Google is the Internet*". *Stuart Allyson*, Google Search Results: Buried if not Forgotten, North Carolina Journal of Law & Technology, Spring 2014, Vol. 15, No. 3, pp. 463-518, at p. 471. Available at http://scholarship.law.unc.edu/cgi/viewcontent.cgi?article=1249&context=ncjolt.

crime and distance herself from past errors[31]. One could argue that this young woman's rehabilitation is more important than people's need and right to receive the information that she was convicted. Moreover, digital firms' freedom to conduct a business would probably not be harmed (by just erasing relevant five years old personal data) and, thus, could be regarded as "less fundamental" than Stella's right and interest to obtain rehabilitation.

Now, Maria, a twenty years old student, goes to a party and gets drunk. She has a fight with her boyfriend –for no reason– and the next day she regrets. Multiple pictures, showing her drinking and fighting, circulate in social networks. Here, again, one could fairly claim that Maria should exercise her right to erasure. If she does not, she might forever recall her error and, thus, her digital memory would probably reject her capacity to learn from it, to grow and to evolve[32]. Indeed, Maria's development of self and identity[33] could be considered to be more crucial than people's right to access to her personal pictures. Besides, social networks' freedom to conduct a business and process the young girl's photographs could be seen as less important.

In the above scenarios, one could argue that without a right to be forgotten, natural persons would think and act differently for fear of persistence of their information and may, hence, hesitate to act or speak authentically, which might, then, impact upon the evolution of democratic citizens and, in the long run, of democratic societies[34].

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[31] As some authors argue, people have a legitimate moral interest in distancing themselves from commonplace misfortunes and errors. See *Anita L. Allen*, Dredging up the Past: Lifelogging, Memory and Surveillance, The University of Chicago Law Review, 2008, Vol. 75, Iss. 1, pp. 47-74, at p. 57. Available at https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?referer=https://www.google.gr/&httpsredir=1&article=5648&context=uclrev.

[32] Some scholars argue that by recalling forever each of our errors and transgressions, digital memory rejects our capacity to learn from them, to grow and to evolve. See *Viktor Mayer-Schönberger*, Delete: The Virtue of Forgetting in the Digital Age, id, p. 125.

[33] As some authors believe, forgetfulness is seen as fundamental to the development of self and identity. See *Noberto Nuno Gomes de Andrade*, Oblivion: The Right to be Different … from Oneself. Reproposing the Right to be Forgotten, id, at p. 126; *Karen Eltis*, Breaking through the "Tower of Babel": A "Right to be Forgotten" and How Trans-Systemic Thinking Can Help Reconceptualize Privacy Harm in the Age of Analytics, 2011, Fordham Intellectual Property, Media & Entertainment Law Review, Volume 22, Issue 1, pp. 69-95, at p. 88. Available at https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?referer=https://www.google.gr/&httpsredir=1&article=1597&context=iplj. Others claim that forgetfulness is needed to make effective decisions. See *Viktor Mayer-Schönberger*, id, p. 117.

[34] See *Jean-François Blanchette*, *Deborah G Johnson*, Data Retention and the Panoptic Society: The Social Benefits of Forgetfulness, id, at p. 36.

Now, in a different scenario, assume that Nick, a thirty years old pedophile, was found guilty of multiple rapes of twenty minors. He does spend his time in prison and after many years he tries to exercise his right to obtain rehabilitation. He finds a job and a place to stay. However, data, concerning his crimes, is still online. Thus, his neighbors know his past. Should Nick request erasure of his data? Is his right more important than the right of others to know such facts and, thus, protect their minors from Nick's potential recidivism? Is it the firms' right to conduct a business or the protection of other minors that matters most here?

One can conclude that scenarios are innumerous and, hence, each case should be treated separately. So let us now move to the other side of the Atlantic and examine some other opinions on the right to be forgotten.

3. The right to erasure in the United States

Contrary to the European notion of privacy, which relates to the concepts of dignity, honor, and personal respect[35], in the United States of America privacy relies on the notions of liberty and protection from state intervention[36]. Indeed, under the US Bill of Rights, the free flow of information is considered to be a fundamental principle to protect free speech and prevent the abridgement of freedom of the press[37]. Thus, some scholars argue that the right to be forgotten might threaten the First Amendment theoretical framework, namely the

[35] The very notion of privacy is difficult to define. Whereas an analytical examination of the rationale for privacy protection falls outside the purposes of this paper, to put it simply, privacy serves a range of interests, including personal autonomy, integrity and dignity, which, in turn, have a broader societal significance. See *Lee A. Bygrave*, Data Privacy Law, an International Perspective, Oxford University Press, Oxford, 2014, pp. 1-266, at pp. 119-120.

[36] *James Q. Whitman*, The Two Western Cultures of Privacy: Dignity versus Liberty, The Yale Law Journal, Vol. 113, 2004, pp. 1151-1221. Available at http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1647&context=fss_papers. See also: *Jack M. Balkin*, Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society, New York University Law Review, Vol. 79, No 1, April 2004. Available at http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1239&context=fss_papers.

[37] See also PRSA (Public Relations Society of America) Code of Ethics, where disclosure of information is treated as a fundamental principle. Available at https://www.prsa.org/ethics/code-of-ethics/. See also IABC (International Association of Business Communicators) Code of Ethics, where it is mentioned that the ideals of free speech, freedom of assembly, and access to an open marketplace of ideas should be supported. Available at https://www.iabc.com/about-us/governance/code-of-ethics/.

Marketplace of Ideas Theory[38], the Meiklejohnian Theory[39] and the Absolutist Theory[40].

In accordance with the Marketplace of Ideas Theory[41], "*the ultimate good desired is better reached by free trade in ideas*"[42]. Hence, a right to be forgotten would not only threaten people's right to participate in the Marketplace but also disrupt communication procedures.

Furthermore, the Meiklejohnian Theory sees freedom of expression as a tool to receive information and make informed decisions and as a means to successful self-government, a fundamental aspect of democracy[43]. In this context, a right to be forgotten would limit availability of information and, thus, threaten the above democracy's fundamental aspect[44].

Moreover, under the Absolutist Theory, government shall make no laws to abridge freedom of expression[45] and, hence, there should be no government intervention into free flow of information. Thus, a right to be forgotten would be incompatible with such absolute propositions.

Indeed, the European right to erasure does not comply with the American regime, under which freedom of expression and access to information are

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[38] *Joseph Blocher*, Institutions in the Marketplace of Ideas, Duke Law Journal, Volume 57, Feb. 2008, No. 4, pp. 821-889. Available at https://scholarship.law.duke.edu/cgi/viewcontent.cgi?referer=https://www.google.gr/&httpsredir=1&article=1346&context=dlj.

[39] *Robert Post*, Reconciling Theory and Doctrine in First Amendment Jurisprudence, in Eternally Vigilant: Free Speech in the Modern Era, *Lee C. Bollinger, Geoffrey R. Stone* (eds), The University of Chicago Press, 2002, pp. 153-174.

[40] *Kent R. Middleton, William E. Lee, Daxton Stewart*, The Law of Public Communication: 2017 Update, Update to the 9th Edition, 2017, Taylor & Francis, p. 33. See also *Ronald K.L. Collins*, Foreword, Exceptional Freedom - The Roberts Court, The First Amendment, and The New Absolutism, Albany Law Review, Vol. 76.1, 2013, pp. 409-466. Available at http://www.albanylawreview.org/Articles/Vol76_1/76.1.0409%20Collins.pdf.

[41] See also *Irene M. Ten Cate*, Speech, Truth, and Freedom: An Examination of John Stuart Mill's and Justice Oliver Wendell Holmes's Free Speech Defenses, Yale Journal of Law & the Humanities: Vol. 22: Iss. 1, Article 2, 2010, pp. 35-81. Available at http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1354&context=yjlh.

[42] *Abrams v. United States*, 250 U.S. 616, 624-31 (1919) (*Holmes, J.*, dissenting). Available at https://www.law.cornell.edu/supremecourt/text/250/616.

[43] See *Don R. Pember*, Mass Media Law, W.C. Brown, 1990, Indiana University.

[44] Robert *G. Larson*, Forgetting the First Amendment: How Obscurity-Based Privacy and a Right to Be Forgotten Are Incompatible with Free Speech, Communication Law and Policy, Volume 18, 2013 - Issue 1, pp. 91-120.

[45] *Adam Winkler*, Free Speech Federalism, Michigan Law Review, Vol. 108, 2009, pp. 153-188, at p. 156. Available at https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1303&context=mlr.

traditionally emphasized over privacy[46]. Besides, US privacy jurisprudence states that information that has been made public cannot become private again[47].

However, one can detect some limited versions of this right in US laws. For instance, the notion of data minimization, as a form of the right to erasure, has been an important feature of some fair information practices under some US laws[48] and some argue that it could be expanded[49]. Moreover, the very idea of 'forget and forgive' relates to a fundamental human value[50] and, thus, US laws, indeed, recognize some features of the right to erasure[51]. In US case-law, courts have held that unnecessary use of personal information may inhibit one's right to obtain

[46] *Steven C. Bennett*, The "Right to Be Forgotten": Reconciling EU and US Perspectives, 2012, Berkeley J. Int'l Law, Vol. 30:1, pp. 161-195, at p. 169 (with further references). Available at http://scholarship.law.berkeley.edu/bjil/vol30/iss1/4.

[47] *Martha Garcia-Murillo, Ian MacInnes,* Così fan tutte: A better approach than the right to be forgotten, id, with reference to *McNealy, J. E.*, The emerging conflict between newsworthiness and the right to be forgotten, 2012, Northern Kentucky Law Review, 39, pp. 119–135.

[48] For instance, the Fair Credit Reporting Act provides some kind of regulation to minimize use of inaccurate information. See Fair Credit Reporting Act, 15 U.S.C. § 1681. Available at https://www.ftc.gov/system/files/fcra_2016.pdf. See also DHS Privacy Office, Guide to Implementing Privacy, Version 1.0, June 2010, Department of Homeland Security, at p. 7 ("[…] *DHS should only collect PII* [personal identifiable information] *that is directly relevant and necessary to accomplish the specified purpose(s) and only retain PII for as long as is necessary to fulfill the specified purpose(s)* […]"). Available at https://www.dhs.gov/xlibrary/assets/privacy/dhsprivacyoffice-guidetoimplementingprivacy.pdf.

[49] *CDT*, Protecting Privacy in Online Identity: A Review of the Letter and Spirit of the Fair Credit Reporting Act's Application to Identity Providers, Comments of the Center for Democracy & Technology In regards to the FTC Consumer Privacy Roundtable, Privacy Roundtables – Comment, Project No. P095416, February 26, 2010, p. 1 (noting that "[…] *The Fair Credit Reporting Act is one source of some of the necessary protections and may already apply to entities providing or using identity-related services* […]"). Available at https://www.cdt.org/files/pdfs/CDT%203rd%20Privacy%20Roundtable%20Comments%20-%20Protecting%20Privacy%20in%20Online%20Identity.pdf.

[50] *Seaton Daly*, Le Droit a l' Oubli – Can We Achieve "Oblivion" on the Internet? The Emerging Business Advocate, Where Technology and the Law Meet, March 15, 2011, where it is mentioned that "[…] *The debate over privacy has more to do with the universal right to control our image than anything else* […]". Available at https://emergingbusinessadvocate.wordpress.com/2011/03/15/le-doit-a-loubli-can-we-achieve-oblivion-on-the-internet/.

[51] *CDT*, Comments of the Center for Democracy & Technology to the European Commission in the Matter of Consultation on the Commission's Comprehensive Approach on Personal Data Protection in the European Union, January 15, 2011, p. 10 (mentioning that "[…] *In the context of passive data sharing, the "right to be forgotten" is to some extent already recognized in the U.S.* […]"). Available at https://cdt.org/files/pdfs/CDT_DPD_Comments.pdf. See also *Jean-François Blanchette, Deborah G Johnson,* Data Retention and the Panoptic Society: The Social Benefits of Forgetfulness, id, at. p. 35 ("[…] *the United States has traditionally understood itself to be a place where individuals could get a "second chance"* […]).

rehabilitation[52] and have recognized the privacy interest in keeping personal facts away from the public eye[53]. Furthermore, the state of California has already enacted the right to erasure in a different and more limited form; under the "eraser law"[54], minors, who are registered users of the operator's Internet Web site, online service, online application, or mobile application, are permitted to remove or to request and obtain removal of content or information posted on the operator's Internet Web site, online service, online application, or mobile application.

So one can observe that, in spite of First Amendment theoretical framework, there are laws and cases, where features of the European right to erasure are, in fact, being applied. But could we move towards a harmonization of international data protection laws, the tool for maintaining the health of the world's Internet-based economy[55]? Before dealing with observations and conclusions with regard to the right to erasure, let us provide some actual numbers.

4. European statistics since the Google decision

In its May 2014 ruling[56], the Court of Justice of the European Union held that European users have the right to ask search engines to remove certain results for queries, which include personal information (subject's name). To qualify, the results provided would need to be inadequate, irrelevant, no longer relevant or excessive.

More precisely, search engines examine each case/request separately. When they "rule" that results should not be delisted and, thus, reject a person's request, the individual may address her request to the relevant national Data Protection

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[52] See *Melvin v. Reid,* 297 P. 91 (Cal. Ct. App. 1931), available at https://www.courtlistener.com/opinion/3289931/melvin-v-reid/. See also *Briscoe v. Reader's Digest Association, Inc.*, 483 P.2d 34 (Cal. 1971). Available at https://law.justia.com/cases/california/supreme-court/3d/4/529.html.

[53] See *US Dep't of Justice v. Reporters Comm. for Freedom of the Press,* 489 U.S. 749 (1989), holding that "[…] *We have also recognized the privacy interest in keeping personal facts away from the public eye* […]". Available at https://supreme.justia.com/cases/federal/us/489/749/case.html.

[54] *Jongwon Lee*, What the Right to Be Forgotten Means to Companies: Threat or Opportunity? Procedia Computer Science 91, 2016, Information Technology and Quantitative Management (ITQM 2016) 542–546, at pp. 542-543. The Act is available at https://leginfo.legislature.ca.gov/faces/billCompareClient.xhtml?bill_id=201320140SB568.

[55] *Steven C. Bennett*, The "Right to Be Forgotten": Reconciling EU and US Perspectives, id, at p. 174 (with further references).

[56] See Judgment of the Court (Grand Chamber), 13 May 2014, in Case C‑131/12, ECLI:EU:C:2014:317, *Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos (AEPD), Mario Costeja González*, id.

Authority (DPA)[57]. For example, in accordance with French DPA's (CNIL's) 36th Activity Report[58], in 2015 four hundred fifty (450) complaints followed a reject from a search engine of a delisting request, while this number fell to four hundred ten (410) in 2016[59].

With regard to Google, the latter delists URLs from all European Google Search domains (e.g. google.fr, google.gr etc) and uses geolocation signals to restrict access to the URL from the country of the person, who requests the removal on all domains[60]. Interestingly, on 25th of May 2014, couple of weeks after the court's ruling, Google received 27,529 requests. Moreover, during the period from 29 May 2014 to 20 January 2015 the firm had to deal with 202,538 requests, with regard to 733,195 URLs, forty (40) per cent of which were removed[61].

In accordance with Google's report[62], during the three-month period from July (1st) 2015 to October (1st) 2015, the main factor involved in a decision not to delist a page was relevant to profession (24.84%)[63]. Indeed, this was the case for most European countries[64], while –concerning other Member States[65]– URLs were not delisted due to insufficient information (22.58%). Other reasons –involved in a decision not to delist– included duplicate URL by same individual (13.45%), self-authored content (10.18%), same name and different person in page content (4.15%), journalistic or high quality content (3.92%), political speech (3.68%), pertains to corporate entity (3.16%), government documents or public records (2.90%), past crimes (2.16%), public figure (1.69%), non-European country (1.63%), and URL not in search index (0.13%). In total, since 28 May 2014 Google

57 https://ec.europa.eu/info/law/law-topic/data-protection/reform/what-are-data-protection-authorities-dpas_en.

58 See Commission Nationale de l' Informatique et des Libertés, 36th Activity Report 2015, To Protect Data, Support Innovation, Preserve Individual Liberties. Available at https://www.cnil.fr/en/home.

59 See Commission Nationale de l' Informatique et des Libertés, 2017, The CNIL in a nutshell. Available at https://www.cnil.fr/en/home.

60 See https://transparencyreport.google.com/eu-privacy/overview?hl=en_GB.

61 See CPDP Conference, January, 21st-23rd 2015 (Chuo University and Tilburg University), Data Protection on the Move.

62 See https://storage.googleapis.com/transparencyreport/faqs/eu-privacy/Google_EU_privacy_data_nov2015.pdf.

63 Google's dataset included data prior to the firm's implementation of efforts to improve tracking, which began in Q3 2015.

64 France, Germany, United Kingdom, Austria, Bulgaria, Switzerland, Spain, Denmark, Estonia, Czech Republic, Hungary, Lithuania, Luxembourg, the Netherlands, Poland, and Portugal.

65 Belgium, Cyprus, Croatia, Ireland, Iceland, Italy, Latvia, Malta, Romania, Sweden, Slovenia, and Slovakia.

has removed 898,333 URLs (43.3%), while 1,177,528 (56.7%) URLs have not been delisted.

To sum up, by scrutinizing Google's transparent policies and examples[66], one may observe that the right to erasure has been exercised in the European Union, not by criminals, who -as some would fear- would wish their crimes to be kept secret, but, by normal citizens, who have wished their information to be "forgotten".

5. Conclusion

As some authors argue, societies can change in relatively short periods of time. For instance, according to the Pew Research Center, with regard to same-sex marriage, there was a change in the US from majority rejection (54%) to majority acceptance (62%) in only ten years (2007-2017), while smoking marijuana went from 67% disapproval in 2006 to 57% approval in 2016[67].

Some argue that the right to erasure puts pressure on search engines and, thus, traces of memory are eradicated[68], while memory and information holes are created. They further claim that when information is eradicated, transparency is threatened[69]. More complications may arise, since an item of information that seems irrelevant at the time may become relevant, for example, as an individual enters public life[70]. Furthermore, uncertainties could occur, given that people have families, friends, professional peers etc, meaning they are linked and, hence, data networked in such ways may belong to multiple persons[71]. Besides, the erasure model is more costly than the remembering model[72]. Finally, what is the point of

[66] See https://transparencyreport.google.com/eu-privacy/overview?hl=en_GB.
[67] *Martha Garcia-Murillo, Ian MacInnes,* Così fan tutte: A better approach than the right to be forgotten, id.
[68] *Kristie Byrum,* The European right to be forgotten: A challenge to the United States Constitution's First Amendment and to professional public relations ethics, id, at p. 107.
[69] *Kristie Byrum*, ibid.
[70] *Simon Wechsler,* The Right to Remember: The European Convention on Human Rights and the Right to Be Forgotten, id, at p. 163.
[71] *Martha Garcia-Murillo, Ian MacInnes,* Così fan tutte: A better approach than the right to be forgotten, id.
[72] *Ivan Szekely,* The right to forget, the right to be forgotten, Personal reflections on the fate of personal data in the information society, in *S. Gutwith et al.* (eds), European Data Protection: In Good Health?, Springer Science + Business Media B.V., 2012, pp. 347–363, DOI 10.1007/978-94-007-2903-2-17. Available at http://www.cps.ceu.hu/sites/default/files/publications/ivanszekelyrighttoforget.pdf, at p. 15.

deleting information, since copies are anyway retained in caches or on mirror websites[73]?

It may be true that "once online, always online". And it is certainly hard to believe that society understands what happens, when everything is available, knowable and recorded by everyone all the time[74].

Theoretical debates and controversial approaches of privacy and the protection of personal data are more than welcome. However, it is of crucial importance that we stay focused not only on theories of protection but also on appropriate application of our ideas. In present-day societies, the Internet has rendered information immortal. It would be awkward and abnormal to imagine intangible items of information being deleted and disappear forever. But, in the past, airplanes, trains and spaceships also used to be an awkward and an abnormal idea.

What if it is not about secrecy? What if, today, privacy is not about the "the right to be let alone", of which Warren and Brandeis spoke many years ago[75]?

In contemporary information societies, maybe we should treat right to privacy and the protection of personal data as a fundamental right to appropriate flow of information. Perhaps, it is not about deletion, but about contextualization of information, which will, in turn, ensure this appropriate flow[76]. It would be fair to argue that, in a job interview context, flow of data concerning an individual's marital status would probably be inappropriate, albeit flow of same data in a different context, e.g. courtship, would very likely be appropriate.

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[73] *Bert-Jaap Koops*, Forgetting Footprints, Shunning Shadows: A Critical Analysis of the 'Right to Be Forgotten' in Big Data Practice, id.

[74] *Holman W. Jenkins Jr*., Opinion, 'Google and the Search for the Future', The Wall Street Journal (online), 14 August 2010. Available at https://www.wsj.com/articles/SB10001424052748704901104575423294099527212.

[75] *S. Warren & L. Brandeis*, The Right to Privacy, Harvard Law Review vol. 4, ed. 5, 1890, pp. 193-220.

[76] *Helen Nissenbaum*, Privacy in Context, Technology, Policy, and the Integrity of Social Life, Stanford University Press, 2009, at pp. 127-230. As Nissenbaum argues, one could determine whether the information flow, in a given context or from one to another, is appropriate by applying the contextual integrity framework. This means identifying whether a specific information flow infringes an entrenched "context-relative" informational norm. Such norms (meaning prescriptive standards) are these, which are specifically concerned with the information flow in a given context. Thus, identification of norms requires identification of the context. Within the latter, informational norms depend on identification of subjects, senders and recipients, and relevant transmission principles, e.g. legal constraints. While determining the above norms it is important to detect the attributes, type and nature of the information. Depending on the context, a specific item of information may or may not be considered appropriate according to the relevant context-relative informational norms.

Setting aside such an approach, since it falls outside the purposes of this paper, and coming back to the right to erasure, as George Orwell put it many years ago, "*who controls the past controls the future. Who controls the present controls the past*"[77]. In our opinion, there are many cases, in which there is a need for deletion and this need should be examined case-by-case, after having struck a fair balance between fundamental rights. The right to erasure, or however one may name it, could be able to provide a proprietary model[78] that would render information more accurate and would strengthen individuals' control over their data.

The right to erasure has, indeed, existed since 1995, however, the European legislator's wish to "re-establish" it in the GDPR, may lead us towards a model that will not allow remembering being the default. If this is the case, a today's digital native may avoid unpleasant "tasks", when she reaches old age; with deletion model being the default, perhaps, she will not have to remember to delete all her – probably numerous– digital accounts, so as to secure her personal information after her death, or she will not have to include in her will all passwords and usernames, so that her heirs will remember to delete her accounts when she passes away. For the rest of the world, who may pass away sooner than the time deletion model becomes the default, let them remember to write all their passwords down and hope for someone's future affirmative action for the deletion of their accounts.

[77] *Orwell George*, Nineteen Eighty-Four (2003, Penguin Books), p. 284.

[78] With regard to personality, the right to property may be defined to include both physical and non-physical property. The right to incorporeal property includes reputation that results from one's good conduct, but also patents and copyrights. *Spencer Herbert*, Justice: Being Part IV. of the Principles of Ethics. New York: D. Appleton and Company, 1892. A definition of the right to property within these realms may allow us to envision privacy as a right and as a form of property.