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# ARTICLES

## THE RIGHT TO BE FORGOTTEN: FORCED AMNESIA IN A TECHNOLOGICAL AGE

ROBERT LEE BOLTON III\*

### INTRODUCTION

In the modern era, the connection between technology and one's personal life has increased the number of moments recorded for posterity. While in many circumstances this is an ideal opportunity for fond recollection, it has the downside of displaying for others our less flattering moments. Because the Internet has such a wide scope, once something has entered its domain, it is virtually impossible to permanently remove.<sup>1</sup> With a public increasingly perceiving this winnowing of privacy as a negative tendency,<sup>2</sup> legislators both at home and abroad have made proposals that attempt to place restrictions on what content social media is allowed to permanently retain.<sup>3</sup> In the United States, while there may be a significant economic interest in websites assuring their users that their data will be deleted upon request,<sup>4</sup> currently there is

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1. Omar Tene & Jules Polonetsky, *Big Data for All: Privacy and User Control in the Age of Analytics*, 11 NW. J. TECH. & INTELL. PROP. 239, 252 (2013).

2. John Hendel, *Why Journalists Shouldn't Fear Europe's 'Right to Be Forgotten'*, ATLANTIC (Jan. 25, 2012, 11:15 AM), <http://www.theatlantic.com/technology/archive/2012/01/why-journalists-shouldnt-fear-europes-right-to-be-forgotten/251955/>.

3. *Id.*

4. Felix Gillette, *Snapchat and the Erasable Future of Social Media*, BUSINESSWEEK (Feb. 7, 2013), available at <http://www.businessweek.com/articles/2013-02-07/snapchat-and-the-erasable-future-of-social-media>.

largely no federal mandate to do so. As a result, most efforts have been initiated at the state level. The purpose of this paper is to provide an overview of foreign approaches to data retention by private parties, compare these to American efforts to regulate a subsection within the broader concept, and ultimately outline the positive and negative prospects such a reform movement would entail.

### THE LAW ABROAD

In Europe, the right to have one's digital footprint removed is commonly referred to as *le droit à l'oubli*. ("the right to be forgotten").<sup>5</sup> This "right to be forgotten" has taken on a myriad of forms, but generally has two common elements: the use of fines against corporate entities who aid in distribution of prohibited materials, and the creation of a private tort action for wronged parties. Up until recent decades, most laws operated at the level of individual countries and were stated as a general principle only to be used in exceptional circumstances, rather than an active right. Looking first at France, the nation's law requires the retention of personal data for only a limited time suitable to the purpose for which it was originally acquired.<sup>6</sup> As a practical matter, this retention has become virtually indefinite because of the low standard for a justifiable excuse. Until the material becomes irrelevant, however, the law only requires removal of information that has become outdated, is false or misleading, or whose acquisition was prohibited by some other statute.<sup>7</sup> Therefore, an adult who would post an unflattering picture of themselves or others on a social media site, so long as it accurately depicted what they were doing, could not be removed. The right to be forgotten in France is quite a different privilege from the right to not be observed.<sup>8</sup>

Finland, on the other hand, has embraced a much more expansive view of the right and the behavioral obligations it carries for others.<sup>9</sup> Rather than embrace a restrictive and potentially unenforceable burden on information providers, the country's parliament empowered the data protection ombudsman in 2001 to enforce laws forbidding potential or current employers from using digital means to acquire information on

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5. Jeffrey Rosen, *The Right to Be Forgotten*, 64 STAN. L. REV. ONLINE 88-89 (2012).

6. *Online Privacy Law: France*, LIBRARY OF CONGRESS (Nov. 03, 2014), <http://www.loc.gov/law/help/online-privacy-law/france.php>.

7. Rolf Weber, *The Right to Be Forgotten: More Than a Pandora's Box?*, 2 JIPITEC 120, 122 (2011).

8. *Id.* at 124.

9. William McGeeveran, *Finnish Employers Cannot Google Applicants*, INFO., L., & L. INFO. (Nov. 15, 2006), *available at* <https://blogs.law.harvard.edu/infolaw/2006/11/15/finnish-employers-cannot-google-applicants/>.

an employee, absent their notification and consent.<sup>10</sup> This includes everything from viewing their social media to monitoring browser history and workplace emails and even conducting drug screening.<sup>11</sup> There is little to prevent the curious HR representative from scanning Google from the security of his home, but the risk of stiff penalties, if discovered, and the law's application in more real-world matters have led to a relatively strong separation in the conception of an individual's personal and professional lives.

The laws for the rest of Western Europe vary in degree, but mostly are within the middle range of France and Finland's policies. For instance, Spain has adopted a temperate approach.<sup>12</sup> One recent court case expressed skepticism that the right existed, but if it did, it was only applicable to natural persons.<sup>13</sup> Thus, while courts can force search engines to delete links to embarrassing news articles, which are legal under Spanish law about living citizens, the business that receives a bad review of its food or has a record of safety violations will be unable to have the information deleted.<sup>14</sup> For Germany, the high court has elevated the concept to the level of a constitutional right.<sup>15</sup> In one prominent case involving a pair of murderers later released from prison, Wikipedia was required to make it clear they were no longer incarcerated, but it did not have to remove the details of the crimes they committed.<sup>16</sup> In the United Kingdom, in contrast to its civil law counterparts, there is no recognized right to be forgotten *per se*, but there are strong defamation laws, permitting the removal of some content.<sup>17</sup> However, the United Kingdom's upper parliamentary body, the House of Lords, issued a report in early 2014 that strongly criticized the concept of a right to be forgotten, and it remains to be seen to what degree the country will pat-

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10. Laki yksityisyyden suojasta työelämässä [Act on the Protection of Privacy in Working Life], 759/2004, FINLEX (2004), translated at <http://www.finlex.fi/en/laki/kaannokset/2004/en20040759.pdf> (Fin.).

11. *Id.* at ch. 3 § 9.

12. Pere Simon Castellano, *The Right to Be Forgotten Under European Law: A Constitutional Debate*, 16.1 LEX ELECTRONICA, Winter 2012, at 21, available at [http://www.lex-electronica.org/docs/articles\\_300.pdf](http://www.lex-electronica.org/docs/articles_300.pdf).

13. Sonya Diehn, *Spanish Firm Loses 'Right to Be Forgotten' Case*, DEUTSCHE WELLE (Feb. 28, 2012), available at <http://www.dw.de/spanish-firm-loses-right-to-be-forgotten-case/a-15774283-1>.

14. Peter Fleischer, *The Right to Be Forgotten, or How to Edit Your History*, PETER FLEISCHER: PRIVACY...? (Jan. 29, 2012), <http://peterfleischer.blogspot.com/2012/01/right-to-be-forgotten-or-how-to-edit.html>.

15. Meg Leta Ambrose, *It's About Time: Privacy, Information Lifecycles, and the Right to Be Forgotten*, 16 STAN. TECH. L. REV. 369, 381 n.77 (2013).

16. John Schwartz, *Two German Killers Demanding Anonymity Sue Wikipedia's Parent*, N.Y. TIMES, Nov. 12, 2009, at A13.

17. Defamation Act, 2013, c.23, § 13 (Eng.).

tern itself after continental Europe.<sup>18</sup>

In recent years, however, there has been a trend towards much more aggressive enforcement of privacy rights. This endeavor has moved beyond the national level and is now being advocated by the European Union. One case, recently decided in May of 2014, involved a Spanish citizen who sued a subsidiary of Google within his country.<sup>19</sup> He requested that personal data relating to him be removed from its search results.<sup>20</sup> The Spanish court referred the case to the European Court of Justice, inquiring in part whether a European directive applied to Google as its data processing server was located in North America and if a person had the right to request removal. In its verdict, the European Court of Justice found, because Google had a subsidiary within the continent, that European laws were applicable and there was a right to be forgotten when the information is inaccurate, excessive, irrelevant, unnecessary, or inadequate.<sup>21</sup> However, such a right is not an absolute and must be settled on a case-by-case basis and weighed against other fundamental rights, such as freedom of speech.

One initiative undertaken at the beginning of 2012 had the European Commissioner for Justice, Fundamental Rights, and Citizenship introduce sweeping new proposed measures, noting in part, “If an individual no longer wants his personal data to be processed or stored by a data controller, and if there is no legitimate reason for keeping it, the data should be removed from their system.”<sup>22</sup> This would encompass both public and private data controllers.<sup>23</sup> For the social media sites mentioned in the earlier hypothetical, each offense could produce a fine of up to €1,000,000 or two percent of the company’s annual revenue.<sup>24</sup> Responses to the proposal ranged from mildly positive, as a remedial measure for youthful mistakes, to extremely negative by risking a

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18. See generally, EUROPEAN UNION COMMITTEE, EU DATA PROTECTION LAW: A “RIGHT TO BE FORGOTTEN,” 2014-15, H.L. 40 (U.K.) available at <http://www.publications.parliament.uk/pa/ld201415/ldselect/ldeucom/40/40.pdf>.

19. See Case C-131/12, Google Spain S.L. & Google Inc. v. Agencia Española de Protección de Datos, \_\_\_\_\_ E.C.R. \_\_\_\_\_ (2014), available at <http://curia.europa.eu/juris/liste.jsf?num=C-131/12>.

20. *Id.* at ¶ 21.

21. *Id.*

22. Viviane Reding, Vice President of the Eur. Comm’n, The EU Data Protection Reform 2012: Making Europe the Standard Setter for Modern Data Protection Rules in the Digital Age 5 (Jan. 22, 2012), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/12/26&format=PDF>.

23. Rosen, *supra* note 5, at 90-91.

24. Commission Proposal for a Regulation of the European Parliament and of the Council, at 93, COM (2012) 11 final (Jan. 25, 2012), available at [http://ec.europa.eu/justice/data-protection/document/review2012/com\\_2012\\_11\\_en.pdf](http://ec.europa.eu/justice/data-protection/document/review2012/com_2012_11_en.pdf).

chilling effect on free speech.<sup>25</sup> Although this particular proposal was ultimately rejected,<sup>26</sup> it does illustrate that the European Union, as a whole, is beginning to take a hard look at the nature of privacy with the arrival of new technology. It also demonstrates that the exact nature of such a right continues to see a nation-by-nation difference in approach while operating within a body seeking uniformity,<sup>27</sup> and while still using the same terminology.

#### THE LAW AT HOME

Across the Atlantic, however, the United States has always possessed a much more limited concept of privacy.<sup>28</sup> Although the Fourth Amendment recognizes a right to privacy (or at least sanctuary of the home) through its requirement of obtaining a warrant for searches & seizures,<sup>29</sup> the restrictions of the Constitution have repeatedly been held inapplicable to private parties absent government cooperation.<sup>30</sup> Furthermore, it was not until the mid-1960s that privacy was recognized among the penumbra of civil rights protected under the Ninth Amendment.<sup>31</sup> Interestingly, the article that originally spurred a revision of constitutional law on the matter concerned itself with tort actions. Chastened by their own prior experiences with the press, Louis Brandeis and Samuel Warren's article "The Right to Privacy"<sup>32</sup> noted in the article's first paragraph, "That the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection."<sup>33</sup> They then proceeded to call for the creation of a tort action for wrongs like, amongst other

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25. Matt Warman, *EU Fights 'Fierce Lobbying' to Devise Data Privacy Law*, TELEGRAPH (Feb. 9, 2012), available at <http://www.telegraph.co.uk/technology/internet/9069933/EU-fights-fierce-lobbying-to-devise-data-privacy-law.html>.

26. PETER DRUSCHEL ET AL., THE RIGHT TO BE FORGOTTEN – BETWEEN EXPECTATIONS AND PRACTICE, EUR. NETWORK & INFO. SEC. AGENCY (Nov. 20, 2012), available at <https://www.enisa.europa.eu/activities/identity-and-trust/library/deliverables/the-right-to-be-forgotten/>.

27. Roman Kwiecien, *The Primacy of European Union Law Over National Law Under the Constitutional Treaty*, 6 GER. L.J. 1479, 1484-85 (2005).

28. DAVID SEIPP, THE RIGHT TO PRIVACY IN AMERICAN HISTORY (Harv. Univ., Program on Info. Resources Pol., 1978) available at [http://pirp.harvard.edu/pubs\\_pdf/seipp/seipp-p78-3.pdf](http://pirp.harvard.edu/pubs_pdf/seipp/seipp-p78-3.pdf).

29. See U.S. Const. amend. IV.

30. *Rendall-Baker v. Kohn*, 457 U.S. 830 (1982).

31. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

32. Samuel Warren and Louis Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890).

33. *Id.*

things, the circulation of unauthorized pictures of private persons.<sup>34</sup>

Interestingly, the article also recognized that movement on this issue would likely march in step with free speech on the torts of defamation and emotional damage.<sup>35</sup> Since that time, American courts have recognized that a plaintiff must prove the falsity of a claim,<sup>36</sup> but have placed limitations on the disclosure of private facts.<sup>37</sup> They also allow for states to establish their own standards of liability for defamatory statements, subject to the limits of prior Supreme Court precedent.<sup>38</sup> This deference to the states in regulating tort actions as part of our country's federalism scheme has resulted in a broad array of approaches comparable to the right to be forgotten. While some state<sup>39</sup> and federal<sup>40</sup> courts have gone so far as to describe the idea as "Orwellian,"<sup>41</sup> others like the state of California have readily embraced the notion.

California has presented the most comprehensive version by far of these laws at the state level.<sup>42</sup> This is perhaps not entirely surprising as it is one of a relatively small number of states to recognize a right to publicity, and has significant parts of the technology industry located in Silicon Valley.<sup>43</sup> In 2013, two bills were passed in the state legislature that sought to ameliorate the perceived problem of "revenge porn."<sup>44</sup> While one punished the distribution of sexually explicit images without permission, the other, less-noticed bill gave juveniles the right to delete data provided by them.<sup>45</sup> Unlike the European approach, however, these bills used the threat of criminal sanctions as the main method of deterrence.<sup>46</sup> To disobey either law qualifies as a misdemeanor.<sup>47</sup>

This second law, which takes effect at the beginning of 2015, is the

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34. *Id.* at 195.

35. *Id.* at 197.

36. Adam Liptak, *Internet Battle Raises Questions About Privacy and the First Amendment*, N.Y. Times, June 2, 2003, at A13.

37. *Time, Inc. v. Hill*, 385 U.S. 374 (1967).

38. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974).

39. *E.g.*, *G.D. v. Kenny*, 15 A.3d 300, 316 (N.J. 2011).

40. *E.g.*, *Martin v. Hearst Corp.*, No. 3:12cv1023 (MPS), 2013 WL 5310165, 5 (D. Conn. 2013).

41. Consider the memory hole of George Orwell's *1984* in which any record proving party leaders as fallible or dislikable, despite being true, is incinerated. GEORGE ORWELL, *NINETEEN EIGHTY-FOUR* (1949).

42. See CAL. PENAL CODE § 647 (2014); CAL. BUS. & PROF. CODE § 22581(b) (2014).

43. Mark Bartholomew, *A Right is Born: Celebrity, Property, and Postmodern Law-making*, 44 CONN. L. REV. 301, 355 (2011).

44. Erica Goode, *Once Scorned, but on Revenge Sites, Twice Hurt*, N.Y. TIMES, Sept. 24, 2013, at A11.

45. *Id.*

46. CAL. PENAL CODE § 647 (2014).

47. Goode, *supra* note 44.

one that most closely mirrored the right to be forgotten.<sup>48</sup> It is subject to five limitations: 1) the information cannot be subject to a federal or a state law which requires the maintenance of the content; 2) the content was stored on or posted by a third party, including any content or information posted by the minor that was stored, republished, or reposted by the third party; 3) the operator anonymizes the content or information posted by the minor in such a way that the one who posted it cannot be individually identified; 4) the minor does not follow the instructions provided by the operator on how to erase or require deletion of the information or content; or 5) the minor has received financial compensation or other consideration for providing the content.<sup>49</sup> Part of the reason these exceptions were passed was to avoid potential free speech or federalism hurdles when the law is challenged.<sup>50</sup>

Although California was among the first states to adopt such a law,<sup>51</sup> there are signs that other states<sup>52</sup> and the federal government may be moving closer towards embracing similar measures.<sup>53</sup> The first criminal prosecution in the country occurred in New York and was dismissed in February of 2014 because, as the trial court pointed out, there was no statute on which a criminal sanction could be based.<sup>54</sup> While the prosecutors' efforts failed in this particular instance, it does illustrate that states are willing to exercise their authority to address what communities see as a growing problem. However, the states will likely remain limited in whom they may prosecute. Because the Communications Decency Act provides immunity from suit to Internet providers who host third-party content, so long as the content does not violate federal copyright or criminal law,<sup>55</sup> any efforts by the states will have a limited effect absent a federal statute. There have, however, been recent

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48. Compare CAL. BUS. & PROF. CODE § 22581(b) (2014), with *Online Privacy Law: France*, LIBRARY OF CONGRESS (Nov. 03, 2014), <http://www.loc.gov/law/help/online-privacy-law/france.php>.

49. CAL. BUS. & PROF. CODE § 22581(b) (2014).

50. Goode, *supra* note 44.

51. Somewhat disturbingly, only a single member of the Senate body voted against the proposed law, expressing concern over vagueness and potential restrictions on free speech. Samantha Tata, *Calif. Lawmakers Pass "Revenge Porn" Bill*, NBC LOS ANGELES (Sep. 13, 2013, 6:10AM), <http://www.nbclosangeles.com/news/local/Cyber-Revenge-Porn-California-Law-Gov-Jerry-Brown-223549611.html>.

52. Todd Richmond, *Bill Banning 'Revenge Porn' Passes Wisconsin Assembly Overwhelmingly*, CHI. SUN-TIMES (Nov. 12, 2013), available at <http://www.suntimes.com/news/nation/23719333-418/bill-banning-revenge-porn-passes-wisconsin-assembly-overwhelmingly.html>.

53. Pam Greenberg, *State 'Revenge Porn' Legislation*, NAT'L CONF. OF ST. LEGIS. (Nov. 19, 2014), <http://www.ncsl.org/research/telecommunications-and-information-technology/state-revenge-porn-legislation.aspx>.

54. *People v. Barber*, 2013 NY059761, N.Y. L.J. 1202644738008, at \*1 (N.Y. Crim. Ct., decided Feb. 18, 2014).

55. 47 U.S.C. § 230(e)(3) (2014).



efforts at moving a bill through Congress that would embrace standards similar to those of California's law.<sup>56</sup> Although concerned primarily with digital sexual content, it is not difficult to imagine a more systematic approach could be forthcoming.

#### IS THE LAW GOOD POLICY?

With an increasingly prominent debate in American society over the proper scope of government in the regulation of privacy rights, now would be the proper time to hold a discussion on whether this country wants to embrace the European approach. At first glance, the laws certainly have significant appeal.<sup>57</sup> Virtually everyone can imagine an instance of youthful indiscretion that they would be aghast to see displayed for the world forty years later. Likewise, the European approach has not shut down the vibrant discussion that frequently occurs on the Internet.

Perhaps the most glaringly obvious contrast is that the United States is not Europe in its legal ideas.<sup>58</sup> While each European nation has entered a post-industrial era, the United States has remained economically vibrant in part because corporations seek to operate in locations where they will face fewer restrictions. It might send a negative message to data-driven businesses if they know they will face similar impediments here as they would in Europe. The Federal Trade Commission has already spoken positively about European standards through reciprocity agreements,<sup>59</sup> and these efforts have attracted substantial attention as a potential indicator of future efforts.<sup>60</sup>

Furthermore, there is the question of a coherent policy. One of the reasons why the most recent proposals in Europe failed was because they were held to be impractical. The European agency tasked with en-

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56. Steven Nelson, *New Federal Legislation Could Take a Nip Out of 'Revenge Porn,'* U.S. NEWS & WORLD REP. (Nov. 21, 2013), <http://www.usnews.com/news/articles/2013/11/21/new-federal-legislation-could-take-a-nip-out-of-revenge-porn>.

57. See generally, Danielle Citron, *Civil Rights in the Digital Age*, in THE OFFENSIVE INTERNET: SPEECH, PRIVACY, AND REPUTATION (Saul Levmore & Martha C. Nussbaum eds., 2010), available at [https://www.suffolk.edu/documents/jhtl\\_book\\_reviews/Patel11.pdf](https://www.suffolk.edu/documents/jhtl_book_reviews/Patel11.pdf).

58. James Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 Yale L. J. 1151, 1156 (2004).

59. F.T.C., PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE: RECOMMENDATIONS FOR BUSINESSES AND POLICYMAKERS, F.T.C. REP. 10 (Mar. 26, 2010), available at <http://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-report-protecting-consumer-privacy-era-rapid-change-recommendations/120326privacyreport.pdf>.

60. Meg Ambrose & Jef Ausloos, *The Right to Be Forgotten Across the Pond*, 3 J. Info. Pol. 1, 9 (2013).

forcing the measures presented a report outlining why they would be bad policy and gave two hypotheticals:

For instance, consider a photograph depicting Alice and Bob engaged in some activity at a given time and place. Suppose Alice wishes the photo to be forgotten, while Bob insists that it persist. Whose wishes should be respected? What if multiple people appear in a group photo? Who gets to decide if and when the photo should be forgotten? In another example, Bob incorporates part of a tweet he receives from Alice into a longer blog post of his own. When Alice later exercises her right to remove her tweet, what effect does this have on the status of Bob's blog post? Does Bob have to remove his entire blog post? Does he have to remove Alice's tweet from it and rewrite his post accordingly? What criteria should be used to decide?<sup>61</sup>

This is the problem at the center of most debates over the Internet. Because it is such an expansive domain, if even a limited number of people repost a prohibited image, it can expand exponentially until tracking down every instance of the datum is impossible.<sup>62</sup>

Although American case law is rife with similar disputes, courts generally have taken a limited view of the ability to retract information you voluntarily make available to others.<sup>63</sup> There is also something to be said for the deterrence value. If an individual presents an obnoxious or unflattering statement about himself because he is aware it can be deleted with impunity, he might remain unenlightened that his actions occasionally have consequences. However, if forced to be made aware that his behavior is unacceptable through social shaming, it might encourage people to operate with greater decorum.<sup>64</sup> Although there are instances when people have their data taken and exposed unwillingly through hacking or physical theft, the occasions when it is given to others voluntarily with foreknowledge of its potential distribution seem somewhat more difficult to defend.

The previous hypotheticals lead to perhaps the most contentious talking point over the right to be forgotten: free speech. No one disputes privacy has significant benefits.<sup>65</sup> However, in an age when newspapers frequently incorporate tweets and other public comments by prominent citizens, embracing a right to be forgotten could severely limit a journalist's ability to perform their job effectively. Indeed, in recent years the actions of public officials over digital forums have led to important de-

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61. DRUSCHEL, *supra* note 22, at 7.

62. Alex Kozinski, *The Dead Past*, 64 *Stan. L. Rev.* 117, 124 (2012).

63. *Wolf v. Regardie*, 553 A.2d 1213, 1221 (D.C. 1989) ("it is widely recognized that the interests in privacy fade when the information published already appears on the public record").

64. *Rosen*, *supra* note 5, at 90-91.

65. *See generally*, Charles Fried, *Privacy*, 77 *YALE L. J.* 475 (1968).

bates amongst the electorate that might otherwise have been prevented had such a right to be forgotten been established.<sup>66</sup> The Supreme Court has long held that information acquired legally, even if distasteful, has a right to be disseminated if true.<sup>67</sup> Some Justices, like Hugo Black, rejected altogether the notion of right to privacy or suits for defamation when distributing unflattering materials.<sup>68</sup> Even for those favoring a more moderate tone, a number of prominent First Amendment scholars have stated the current case law weighs heavily against the constitutionality of many right to be forgotten statutes.<sup>69</sup> If a statute could be crafted that is legally permissible, it could have unforeseen consequences and a chilling effect<sup>70</sup> harmful to a democratic society that places a high value on the marketplace of ideas.<sup>71</sup> If information relevant to a legitimate political or social debate is barred from being accessed by others, it limits the ability of citizens to create informed opinions.

In addition to the issues of federalism, economic harm, and threats to speech that a right to be forgotten potentially poses, there is a final problem: its lack of clarity. As one scholar admitted, “[N]obody seems to have any very clear idea what [it] is.”<sup>72</sup> While this might be expected in debating the boundaries of any right, the statement applies even to the terms for information handling. In the tech world, deletion and erasure carry two very different connotations; the former implies a limitation of access by anyone other than the data holder, while the latter means a complete removal of control even by the former data holder.<sup>73</sup> Unsurprisingly, many legislatures unfamiliar with the terminology use the former term, and thus may provide a reasonable defense to anyone charged with violating the statute. Additionally, while these laws are drafted to tackle specific problems like revenge porn, poorly worded statutes are often abused in ways never foreseen by legislators. As an alternative, it might be better to strictly enforce statutes already on the books, such as the cyberstalking provisions of the Violence Against

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66. Katie Glueck, *Anthony Weiner Concedes, Flips Off Reporter*, POLITICO (Sept. 10, 2013, 10:54 PM), <http://www.politico.com/story/2013/09/anthony-weiner-nyc-mayor-race-2013-96597.html>.

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

68. *Rosenblatt v. Baer*, 383 U.S. 75, 95 (1966) (Black, J., dissenting).

69. *Zhang v. Baidu.com Inc.*, No. 11 Civ. 3388 (JMF), 2014 WL 1282730 (S.D.N.Y. 2014) (finding that search engine results are constitutionally protected speech); Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of the Right to Stop People From Speaking About You*, 52 STAN. L. REV. 1049 (2000).

70. Volokh, *supra* note 69, at 1098.

71. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

72. Judith Jarvis Thomson, *The Right to Privacy*, in PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY 272, 286 (Ferdinand David Schoeman ed., 1984).

73. Napoleon Xanthoulis, *The Right to Oblivion in the Information Age: A Human-Rights Based Approach*, 10 U.S.-CHINA L. REV. 84, 90-91 (2013).

Women Act,<sup>74</sup> or revise the Copyright Code.<sup>75</sup> Even California, which has the option of criminal sanctions at its disposal, has frequently elected to target large-scale traffickers for related criminal activities instead.<sup>76</sup> Another approach has suggested that Congress recognize a limited right “through adoption of a default contract rule where an implied covenant to delete user-submitted data upon request is read into website terms of service contracts.”<sup>77</sup> If a legislature is determined to create a new statute, an approach like Finland’s restrictions on the accessing of data in certain circumstances would be a better method than making actions like erasure compulsory.

Looking over the numerous arguments against the right to be forgotten, it is understandable why many would oppose it. If, however, our legislative bodies choose to embrace the European path, they must consider a few points. First, they must consult with technology and intellectual property experts before passing a law; if a court distinguishes between erasure (which implies complete elimination of all data) and deletion (which is mere removal of visibility), the statute loses all of its benefits by providing unsympathetic judges with a reading of the statutory language that can avoid a finding of guilt in most circumstances, while ameliorating none of its harms because it retains incoherent and overly broad language. Second, legislatures must insert a good faith effort provision. To expect an entity like Facebook or Twitter to effectively manage every one-on-one interaction is virtually impossible, and so long as they competently handle reported grievances, they should not be subject to sanctions. Third, private tort actions should be barred. Because private tort actions are often subject to abuse,<sup>78</sup> it would be better to disallow them at least until a criminal conviction. However, there is a reasonable concern over whether a private action would unfairly advantage those with substantial financial resources to intimidate others over a comparatively small harm.<sup>79</sup> Finally, even if none of the other proposals are followed, the federal government should take the lead on the creation of a right to be forgotten. As seen from the first section of this paper, there is a patchwork of approaches on the other side of the

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74. 18 U.S.C. § 2261A(2) (2014).

75. Derek Bambauer, *Exposed*, 98 MINN. L. REV. 2025, 2029 (2014).

76. Press Release, St. of Cal. Dep’t of Just., Off. of Att’y Gen., Attorney General Kamala D. Harris Announces Arrest of Revenge Porn Website Operator (Dec. 10, 2013), available at <https://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-announces-arrest-revenge-porn-website-operator>.

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

78. David Adkins, Note, *Right to Privacy?: Why the Private Facts Tort Cannot Coexist with the First Amendment*, 2 FIRST AMEND. L. REV. 325 (2004).

79. Harry Kalven, Jr., *Privacy in Tort Law - Were Warren and Brandeis Wrong?*, 31 L. & CONTEMP. PROBS. 326 (1966).

Atlantic Ocean, and the efforts of the European Union, if they had no other benefit, were a reasonable attempt to impose some semblance of uniformity. In the United States, Congress could use the Interstate Commerce Clause if it wanted to impose restrictions on data controllers; this would avoid the confusion of fifty state approaches to an act accessible anywhere.

#### CONCLUSION

In conclusion, while the European Union's attempt at uniformity in its data laws is a laudable goal, it also poses significant problems that should make the United States hesitant about embracing a similar approach. The First Amendment is not subject to the easy revision of statutes, and there are serious public policy objections to a right to be forgotten. While most people sympathize with efforts to maintain some privacy while interacting with the outside world, there are alternatives available that would prove less restrictive. Both enforcement of already existing statutes and using commercial services that allow greater consumer control are two prominent examples. Whatever the ultimate decision taken by federal and state governments, hopefully the debate over the right to be forgotten will not soon be forgotten by the public.