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FORGETTING THE RIGHT TO BE FORGOTTEN: THE EVERLASTING NEGATIVE IMPLICATIONS OF A RIGHT TO BE DEREFERENCED ON GLOBAL FREEDOM IN THE WAKE OF *GOOGLE V. CNIL*

Hunter Criscione*

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I. BACKGROUND

"[Public] libraries should be open to all–except the censor."[1]
-John F. Kennedy

A. The Internet: The New Public Library

The internet is the center of global communication, culture, and education. As of January 2019, Western Europe is second only to North America and Northern Europe in internet penetration (a statistic that measures the availability of internet in a given geographical place), with data reporting that 94 percent of Western Europeans have access to the internet.[2] The same study reported that 50 percent of the global population now has internet access, which is a staggering 49.5 percent increase from the recorded estimate in 1990 of just half a percent.[3] From the development of the first computer, to the role of Facebook in the Arab Spring,[4] and now the mass global social media culture, human beings are moving ever more towards life on the web. For those who use it daily, the internet has become the epitome of global civilization.

The internet has become the new idea marketplace, in which the exchange of ideas, knowledge, values, and cultures freely move from source to source. As such, the internet can be a foundation upon which revolutions and world events emanate out of, such as the Arab Spring of 2010. However, inherent in

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[1] John F. Kennedy, *The Candidates and the Arts*, SATURDAY REV., Oct. 29, 1960, at 44.

[2] J. Clement, *Global internet penetration rate as of January 2019, by region*, STATISTA (Sept. 6, 2019), https://www.statista.com/statistics/269329/penetration-rate-of-the-internet-by-region/.

[3] Max Roser, Hannah Ritchie & Esteban Ortiz-Ospina, *Internet*, OUR WORLD DATA (2019), https://ourworldindata.org/internet.

[4] *See* John Liolos, *Erecting New Constitutional Cultures: The Problems and Promise of Constitutionalism Post-Arab Spring*, 36 B.C. INT'L & COMP. L. REV. 219, 221 (2013) (stating that Arab Spring was "organic movements comprised of frustrated citizens demonstrating against their tyrannical governments for freedom, greater representation, and economic opportunity."); *see generally* Jared Malsin & Hassan Morajea, *Unrest Rises Again in Birthplace of Arab Spring,* WALL ST. J. (Jan. 24, 2018, 5:30 AM), https://www.wsj.com/articles/unrest-returns-to-tunisia-birthplace-of-the-arab-spring-1516789801 (explaining the origins of the Arab Spring as a movement for freedom and liberty in the Middle East).

this ever-evolving worldwide information source is the risk and danger of personal data falling into the hands of criminals, and/or the constant threat of private information remaining on the internet forever.[5] This issue is not relegated to hackers or criminals, as large companies like Google and Facebook have fallen under fire for their misuse and failure to protect an individual's data.[6] Yet, data breaches and misuse are not the only dangers associated with the internet. Unwanted personal data can remain on the internet when it is no longer desired, creating a "permanent stigmatization"[7] of one's reputation. This stigmatization can impact employment hopes and create negative impacts in social circles. A combination of these three threats has created the problem of data privacy and the modern remedy of the right to be forgotten.[8]

B. Solutions for Data Protection

The roots of data privacy and protection reform in the European Union (hereinafter "EU") can be traced to the enactment of Directive 95/46/EC in 1995 (hereinafter "Directive"),[9] and its successor, the General Data Protection Regulation (hereinafter "GDPR") in 2016.[10] The Directive stipulated that personal data, i.e. all the information related to

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[5] *See, e.g.*, Paul M. Schwartz & Karl-Nikolaus Peifer, *Transatlantic Data Privacy Law*, 106 GEO. L. J. 115, 115–17 (2017) (noting that there are inherent dangers in the exchange of data across the world, particularly in the transatlantic trade forum).

[6] *See* Mike Isaac & Sheera Frenkel, *Facebook Security Breach Exposes Accounts of 50 Million Users*, N.Y. TIMES (Sept. 28, 2018) (stating that "hackers also tried to harvest people's private information, including name, sex and hometown, from Facebook's systems").

[7] Michael L. Rustad & Sanna Kulevska, *Reconceptualizing the Right to Be Forgotten to Enable Transatlantic Data Flow*, 28 HARV. J. L. & TECH. 349, 353 (2015).

[8] *Id.*

[9] 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, art. 25, 1995 O.J. (L 281) 31 [hereinafter The Directive].

[10] 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, and Repealing Directive 95/46/EC (General Data Protection Regulation), 2016 O.J. (L 119) 1 [hereinafter GDPR].

a person that can be used to directly or indirectly identify them,[11] should only be

> "collected [only] for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes"; that the processing of data be "adequate, relevant and not excessive in relation to the purposes for which they are collected"; that personal data be maintained accurately and "kept up to date"; and that personal data be "kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected."[12]

Included in the Directive was the empowerment of individuals to remove or block data which violated the prescribed methods of data storage or usage.[13] The ability to block or remove data later became known as the right to be delisted or dereferenced—commonly referred to as the "right to be forgotten."[14]

However, the year 1995 was hardly the beginning for the right to be forgotten. Data protection was recognized as a means of the larger right to privacy, as well as "dignity, personality, and self-determination."[15] The foundations of data protection rights date back to World War II, when the evils of fascism and the ideology of Adolf Hitler impressed upon Europe the need to recognize the dignity of human beings and the enumeration of liberties.[16] This movement created a more established post-war identity for Europe in the global arena and led to the enactment of the Charter of Fundamental Rights (hereinafter "Charter") and the European Convention of Human Rights (hereinafter "Convention").[17] It is important to note however, that the

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[11] *See id.* art. 4.

[12] *See* Robert C. Post, *Data Privacy and Dignitary Privacy: Google Spain, the Right to be Forgotten, and the Construction of the Public Sphere*, 67 DUKE L.J. 981, 984–85 (2018) (discussing and citing to The Directive).

[13] *Id.* at 985.

[14] *See generally* The Directive, *supra* note 9 (describing the general dereferencing provisions of the right to be forgotten).

[15] Schwartz & Peifer, *supra* note 5, at 123.

[16] *See id.* (discussing the origin of Europe's interest in data protection).

[17] *See id.* at 124 (noting the roots of the enactment of the European Convention of Human Rights, and the Charter of Fundamental Rights).

Charter is interpreted by the EU and by the European Court of Justice—the highest court in the EU—while the Convention is recognized as international law, and is interpreted by the European Court of Human Rights.[18] Thus, the Convention is binding only as a body of international law, meaning that it interprets the Convention to the extent that it coincides with "general principles of the Union's law."[19] There is no need to fret under this scheme of statutory interpretation in light of data protection; however, as the right to privacy is a fundamental right and "general principles of the Union's Law;" but the presence of two major bodies of law and their respective courts of interpretation evidences the great protection that human rights and data protection own.[20]

From the mid-1990s thereon, data protection remained a mainstay of the protections afforded to EU citizens. The right to be forgotten, as a remedy for data protection failures, stemmed from a recognized ability that every person in everyday conversations has: to have their actions forgotten or discarded; a new start.[21] It is worth noting that there is an inherent risk involved when conveying information to a third-party—speaking out loud in public, for example—because other third parties will share and remember that information. However, human beings possess a capability that does not exist on the internet—the ability, rather than surety, to forget information. The ability to forget information allows for an opportunity for a fresh start.[22]

Such is the cognitive capability of human beings to forget, which "is useful because it enables humans to adjust and reconstruct memories, to generalize, and to construct abstract thoughts."[23] The ability to forget enables individuals to achieve a fresh start independent from their past actions, which can act as a vehicle to maintain dignity and privacy. With the

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[18] *Id.* at 124–25.

[19] *Id.* at 125 (citing Consolidated Version of the Treaty on European Union, 2012 O.J. C 326/13, art. 6).

[20] *Id.*

[21] *See* Rustad & Kulevska, *supra* note 7, at 352 (discussing humans' critical ability to forget).

[22] *See id.* (discussing selective memory as a way to enable us to shed the past and start fresh).

[23] *Id.*

introduction and explosion of the internet and social media, this ability has been effectively lost in the flow of history, allowing people to recall matters and events that might not have been remembered pre-internet.[24] In effect, the internet has become a "cruel historian," allowing individuals' personal information to be exposed and shared throughout the world in a matter of seconds.[25] In this view, the internet and social media dampen individual freedoms and makes individuals bound to their personal data that finds its way on the internet.[26] This argument is a major justification for the existence of a broader right to be forgotten.

The right to be forgotten faced its first major threat in 2014 on the precipice of the enactment of the GDPR when a Spanish man sought to have his insolvency removed from Google's search listings in *Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos, Mario Costeja González* (hereinafter "*Google Spain*").[27] By ruling in favor of Mario Casteja González, the European Court of Justice solidified the right to be forgotten and propelled the right to an international stage because Google could be required to delist or remove information and data from their web databases.[28] Two years later, in 2016, the EU enacted the GDPR, which incorporated a more established right to be forgotten and applied those rights to member states. The GDPR allows a number of specific actions to EU citizens whereby:

> [p]rivate persons will have the right to delete links to their own postings and repostings by third parties. They will have a right to delete links to postings created by third parties upon proof that the information serves no legitimate purpose other than to

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[24] *See id.* ("[T]he Internet is a treasure trove of immutable memories and data subjects [which one] must take extraordinary steps in order to forget.").

[25] DANIEL J. SOLOVE, THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET 11 (2007).

[26] *See id.* at 17 (arguing that the Internet makes us "less free," forcing people to be victims to data on the internet); *see generally* Chris Conley, *The Right To Delete*, 2010 AAAI SPRING SYMPOSIUM: INTELLIGENT INFORMATION PRIVACY MANAGEMENT, Mar. 23, 2010, at 53 https://www.aaai.org/ocs/index.php/SSS/SSS10/paper/view/1158/1482 (finding that individuals can be bound by their actions that were taken on the internet).

[27] Case C-131/12, Google Spain SL v. Agencia Española de Protección de Datos (AEPD), 2014 EUR-Lex CELEX LEXIS 62012CJ0131 (May 13, 2014).

[28] *Id.*; Rustad & Kulevska, *supra* note 7, at 353–54, 374.

> embarrass or extort payment from the data subject. Public officials and public figures will have a right to remove links to their own postings and repostings by third parties, but not postings about them by third parties, unless the third party was acting with actual malice and the posting does not implicate the public's right to know. In addition, all right to be forgotten requests will be subject to a general exemption for the public's right to know.[29]

The GDPR ensures that individuals have the ability to remove their data from the internet, in order to facilitate the rights of individual dignity and privacy.[30]

C. Danger of Extraterritorial Expansion

In 2016, the right to be forgotten encountered the possibility of global expansion in *Google Inc. v. Commission nationale de l'informatique et des libertés* (hereinafter "*Google v. CNIL*"), where there was a challenge of fines instituted against Google for the failure to remove personal data existing outside of the EU by the French data protection authority, known as the Commission Nationale de L'informatique et des Libertés (hereinafter "CNIL").[31] The CNIL "requested that Google delist search results subject to a successful request for erasure from all domains worldwide" and asserted that the EU's right to be forgotten can only be enforced by requiring a data controller like Google to remove data beyond the EU's geographical and jurisdictional limits.[32] CNIL further argued that "the information can still be accessed through other domains or by using circumvention methods such as a virtual private network

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[29] Rustad & Kulevska, *supra* note 7, at 354.

[30] *See id.* at 354, 359 (showing that in Europe there is a right to privacy and that the GDPR can be utilized to help promote privacy).

[31] *See* Case C-507/17, Google Inc. v. Commission nationale de l'informatique et des libertés (CNIL), 2017 EUR-Lex CELEX LEXIS 62017CN0507 (Aug. 21, 2017) (requesting that the precedent of the "right to de-referencing" be expanded "so that the links at issue no longer appear, irrespective of the place from where the search initiated on the basis of the requester's name is conducted, and even if it is conducted from a place outside the territorial scope of Directive [95/46/EC] of 24 October 1995[.]").

[32] Michèle Finck, *Google v CNIL: Defining the Territorial Scope of European Data Protection Law*, OXFORD BUS. L. BLOG (Nov. 16, 2018), https://www.law.ox.ac.uk/business-law-blog/blog/2018/11/google-v-cnil-defining-territorial-scope-european-data-protection-law.

(VPN)."[33] Google maintained that such an expansion would unjustly swell the jurisdiction of the EU, importing power it lacks on subjects around the world, some of which would inevitably derive from nations which valued free expression and privacy variably.[34]

The action was brought before the Conseil d'Etat, or the Council of State, France, whom in turn stayed the proceedings and referred several questions of interpretation to the CJEU.[35] The main question presented was "whether the rules of EU law relating to the protection of personal data are to be interpreted as meaning that, where a search engine operator grants a request for de-referencing, that operator is required to carry out that de-referencing on all versions of its search engine."[36] The argument on this issue was heard before the CJEU in the summer of 2018.[37]

The expansion of the right to be forgotten raised concerns regarding free expression globally; including that inherent within dereferencing is the "cannibaliz[ation of] free expression[;]" as free thought, free expression, and free speech can all be restricted by the removal of information from the marketplace.[38] It was also widely recognized that the right to be forgotten enabled the EU to limit the effectuation of these freedoms in exchange for another, the right of privacy, and in turn, censor free expression and freedom of the press.[39] What's more, was the possibility that the right to be forgotten could have been enforced against those not ordinarily subject to the EU's authority. Such enforcement would impose EU ideals in an ideological imperialism campaign; resulting in a major impact

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[33] *Id.*

[34] *Id.*

[35] Court of Justice of the European Union Press Release No. 112/19, The Operator of a Search Engine is not Required to Carry out a De-Referencing on all Versions of its Search Engine, (Sept. 24, 2019).

[36] *Id.*

[37] Case C-507/17, Google LLC v. Commission nationale de l'informatique et des libertés (CNIL), 2019 EUR-Lex CELEX LEXIS 62017CJ0507 (Sept. 24, 2019).

[38] *See* Rustad & Kulevska, *supra* note 7, at 354 (discussing removal of information and its effects on the freedom of speech, expression, and thought).

[39] *Id.*

on global free expression and speech.

The Advocate General of the EU issued a preliminary opinion on January 10, 2019, stating that the right to be forgotten can only be enforced within the EU via "geo-blocking."[40] The Advocate General stated:

> [T]here is a danger that the Union will prevent people in third countries from accessing information. If an authority within the Union could order a global deference, a fatal signal would be sent to third countries, which could also order a dereferencing under their own laws . . . . There is a real risk of reducing freedom of expression to the lowest common denominator across Europe and the world.[41]

The preliminary opinion further stated that the GDPR cannot apply to nations outside of the EU, because asserting the EU law over other nations poses a risk of ranking one the right to privacy as more important than the right to free expression; instead, the opinion stated a geo-blocking system should be put in place which limits removal of data only in the EU, and not in other countries.[42] It is important to note that the CJEU was not required to follow this preliminary opinion because under EU law, the opinions issued by the Advocate General are not binding on the court.[43]

The CJEU rendered its decision thereafter on September 24, 2019, holding that the GDPR does not explicitly require data

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[40] Court of Justice of the European Union Press Release No. 2/19, Advocate General Szpunar proposes that the Court should limit the scope of the de-referencing that search engine operators are required to carry out to the EU (Jan. 10, 2019).

[41] Monckton Chambers, *Google v CNIL: Advocate General agrees global "right to be forgotten" orders pose risk to freedom of expression*, MONCKTON CHAMBERS (Jan. 11, 2019), https://www.monckton.com/google-v-cnil-advocate-general-agrees-global-right-to-be-forgotten-orders-pose-risk-to-freedom-of-expression/.

[42] *See generally* Case C-507/17, Google Inc. v. Commission nationale de l'informatique et des libertés (CNIL), 2019 EUR-Lex CELEX LEXIS 62017CV0507 (Jan. 10, 2019) (discussing the issues of privacy and the concept of geo-blocking).

[43] *See* Press Release No. 2/19, *supra* note 40 n.[1] ("It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible.").

controllers to execute a dereferencing request on platforms without the territorial jurisdiction of the EU.[44] In its reasoning, the court opined that "the right to the protection of personal data is not an absolute right," and as such, the right to be forgotten must be balanced with other fundamental freedoms, such as free expression.[45] If the right to be forgotten was promulgated outside the EU by requiring companies like Google to comport with the GDPR in other jurisdictions, then the court held that the EU would be infringing on the differing views of other nations' balancing of free expression and privacy.[46] Further support for this opinion was rooted in provisions within Article 85 of the GDPR and Article nine of the earlier Directive, which permits members states of the EU to enact exemptions from the right to be forgotten "for journalistic purposes or for the purpose of artistic or literary expression[, but] only if they are necessary to reconcile the right to privacy with the rules governing freedom of expression."[47] Given that both the GDPR and the Directive delegated such responsibilities to the member states, there is an implicit awareness noted in the GDPR regarding the possibility that member states value free expression differently, and nonetheless other sovereign nations because of their entirely different governmental structures and customs.[48]

Regardless of how victorious this case initially appeared for data controllers and search engine operators, the court left open the possibility that the right to be forgotten could still be enforced globally.[49] The court held that while the application of the right to be forgotten is not required to be enforced without the jurisdictional confines of the EU, such an application remains permissive if after both the privacy interests of the data subject and free expression are given proper consideration, the

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[44] Case C-507/17, Google LLC v. Commission nationale de l'informatique et des libertés (CNIL), 2019 EUR-Lex CELEX LEXIS 62017CJ0507 (Sept. 24, 2019).

[45] *Id.* ¶ 60.

[46] *Id.*

[47] *Id.* ¶ 7 (quoting The Directive, *supra* note 9 art. 9).

[48] *See id.* ¶ 27 (quoting GDPR, *supra* note 10 art. 85).

[49] *See id.* ¶ 73 (stating that a search engine operator granting request to de-referencing "is not required to carry out that de-referencing on all versions of its search engine, but on the versions of that search engine corresponding to all the Member States").

interest of privacy is best served.[50] Therefore, what was thought to be defined in *Google v. CNIL*, the territorial confines of the right to be forgotten, remains unanswered and the implementation of such right can still occur throughout the world, leaving the legal basis for doing so unexplained.[51]

In light of the instability provided by the CJEU's decision in Google v. CNIL, this article will provide further insight into the relationship between the right to be forgotten and free expression that can continue to exist when applied globally. Moreover, this article pursues an exposition on the negative implications that a right to be forgotten may proffer on global freedom of expression.

II. RESTRICTING FREEDOM BY FORGETTING

A. Google Spain v. AEPD: The Prevailing Rule

The main motivation behind the drafting and eventual enactment of the Directive was to protect individual human rights through the enactment of privacy laws which limited the scope and use of private information.[52] Such motivation stemmed from the post-war period of European history and led to the enactment of the first privacy statute in Germany on September 30, 1970.[53] This led to the enactment of privacy statutes in Sweden in 1973, and Austria, Denmark, and Norway in 1978.[54] There was widespread consensus that the policies made during this period would be centered around "Fair Information Practices" in the global exchange of information,

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[50] Adam Satariano, *'Right to Be Forgotten' Privacy Rule Is Limited by Europe's Top Court*, N.Y. TIMES (Sept. 24, 2019), https://www.nytimes.com/2019/09/24/technology/europe-google-right-to-be-forgotten.html.

[51] Dan Shefet, *Extraterritoriality, the internet and the right to be forgotten*, ABA J. (Oct. 10, 2019, 9:52 AM), http://www.abajournal.com/voice/article/extraterritoriality-and-the-internet (noting that the EUCJ "did not follow the advocate general's Jan. 10, 2019, recommendation entirely" and in doing so "the court wished to promulgate that as a general principle extraterritoriality was not unlawful.").

[52] Paul M. Schwartz, *The EU-U.S. Privacy Collision: A Turn to Institutions and Procedures*, 126 HARV. L. REV. 1966, 1971–72 (2013).

[53] *Id.* at 1969.

[54] *Id.*

agreed upon by Western Europe and the United States (hereinafter "U.S.").[55] Two additional privacy policies also went into effect during this period: the "Privacy Guidelines of the Organization for Economic Co-operation and Development (hereinafter "OECD") and the Convention on Privacy of the Council of Europe."[56] The Convention on Privacy of the Council of Europe was the first Europe-wide agreement which established harmonious privacy policies and provided the foundation for the Directive's enactment in 1995.[57]

The Directive provided regulations and conditions for companies attempting to store or use personal data, including consent and a duty to protect such data.[58] The Directive had two main goals: "to facilitate the free flow of personal data within the EU" and "to ensure an equally high level of protection within all countries in the EU for 'the fundamental rights and freedoms of natural persons, and in particular their right to privacy.'"[59] As mentioned above, this Directive included the right to be forgotten, or to have personal data delisted from those companies or servicers storing personal data, which was viewed as a proper means to effectuate data privacy.[60] In addition to this remedy, "data subjects," which are those who have data located online, also "have the right to obtain copies of information collected and the right to correct or delete personal data."[61] Companies or data controllers would then be held liable for holding such data against the wishes of the "data subject," facing fines for non-compliance.[62]

In 2014, the right to be forgotten intersected with free expression in *Google Spain v. Agencia Española de Protección de Datos* (hereinafter "*Google Spain v. AEPD*"). Mario Costeja González, a Spanish citizen, sought to remove newspaper

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55 *Id.*
56 *Id.*
57 *Id.* at 1970.
58 Schwartz, *supra* note 52, at 1972.
59 *Id.*
60 *Id.*
61 Rustad & Kulevska, *supra* note 7, at 361.
62 *Id.*

articles regarding the auction of his home following his financial difficulties.[63] González petitioned the newspaper publisher to remove the articles and for Google to remove the search listings for these articles, his reasoning was that the articles were an invasion into his privacy because they harmed his reputation and were no longer relevant.[64] The newspaper refused to remove the articles, stating that the Ministry of Labour and Social Affairs had required them to be published in the first place, and Google refused to remove the links on the basis that search listings are considered free expression, and should not be removed.[65] The AEPD relied on the Directive's requirement of "data controllers" to remove information that was "inadequate, irrelevant or no longer relevant, or excessive,"[66] and ordered Google to remove the search listings that led users to the articles concerning González.[67]

Google then appealed the order and brought this case before the National High Court of Spain, who in turn referred the matter to the Court of Justice of the European Union (CJEU).[68] The applicability of the Directive became a major dispute upon appeal as Google tried to argue that as a search engine, they merely provided data online, and as a result could not be considered a "data controller."[69] The CJEU denied this argument and ruled that Google was indexing data online which provided data to its users, placing the company into the category of "data controllers;" and as such, the Directive applied.[70] In this landmark ruling, the CJEU created precedent which establishes a broad right to have information delisted, thereby requiring positive government intervention to protect such right for

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[63] Case C-131/12, Google Spain SL v. Agencia Española de Protección de Datos (AEPD), 2014 EUR-Lex CELEX LEXIS 62012CJ0131 (May 13, 2014).

[64] Rustad & Kulevska, *supra* note 7, at 363–64.

[65] *Id.*

[66] Catherine Baksi, *Right to be forgotten 'must go', Lords committee says,* GAZETTE (July 30, 2014), http://directories.lawgazette.co.uk/law/right-to-be-forgotten-must-go-lords-committee-says/5042439.article.

[67] *Google Spain SL v. Agencia Espanola de Proteccion de Datos*, GLOBAL. FREEDOM EXPRESSION (Nov. 16, 2018), https://globalfreedomofexpression.columbia.edu/cases/google-spain-sl-v-agencia-espanola-de-proteccion-de-datos-aepd/.

[68] Rustad & Kulevska, *supra* note 7, at 364.

[69] *Id.*

[70] *Id.*

information that an individual shows to be "inadequate, irrelevant, or no longer relevant, or excessive."[71] In effect, this precedent restricts free expression by allowing individuals to alter the availability of information on the Internet, which censors the original creator and prevents the free flow of information.[72] The GDPR as enacted in 2018, further strengthens this precedent by expanding its reach to all source websites and data controllers, regardless of whether or not they are located within the EU.[73]

The GDPR and the right to be forgotten therein was geared to fulfill the following three concepts: "(1) the right to have information deleted after a preset period; (2) the right to have a clean slate; and (3) the right to be connected to current information and delinked from outdated . . . ."[74] The procedure for exercising this right is as follows: the data subject may have information removed that is no longer necessary in relation to the purposes for which it was collected or otherwise processed, where data subjects have withdrawn their consent for processing or where they object to the processing of personal data concerning them or where the processing of their personal data otherwise does not comply with this Regulation.[75]

Under the GDPR, the data controller bears the burden in these situations to consider and adjudicate the issue of the existence of the above factors.[76] This poses an inherent burden on data controllers being that they must process and make a determination on each request, which can detract from business operations or even significantly harm a smaller business.[77] Additionally, it is worth noting that the information need not be

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[71] Baksi, *supra* note 66.

[72] Rustad & Kulevska, *supra* note 7, at 365.

[73] GDPR, *supra* note 10, art. 17.

[74] Rustad & Kulevska, *supra* note 7, at 367; *see* Bert-Jaap Koops, *Forgetting Footprints, Shunning Shadows. A Critical Analysis of the "Right to be Forgotten" in Big Data Practice*, 8 SCRIPTED 229, 232–33 (2011) (noting that the right to be forgotten can be conceptualized in the same three manners).

[75] GDPR, *supra* note 10, art. 17.

[76] *Id.*

[77] *See* Baksi, *supra* note 66 (noting Google's European sites already dealing with over 70,000 data removal requests, and smaller companies' unlikelihood of having the resources to process the removal requests).

even prejudicial to the data subject; the data must only fall within the threshold of "no longer relevant" or the two other enumerated justifications.[78]

To address the free expression confliction that *Google Spain v. AEPD* posed, the GDPR included statutory exemptions for:

> (a) . . . exercising the right of freedom of expression in accordance with Article 80; (b) for reasons of public interest in the area of public health in accordance with Article 81; (c) for historical, statistical and scientific research purposes in accordance with Article 83; (d) for compliance with a legal obligation to retain the personal data by Union or Member State law to which the controller is subject; Member State laws shall meet an objective of public interest, respect the essence of the right to the protection of personal data and be proportionate to the legitimate aim pursued.[79]

At first glance this may seem to rectify concerns posed by critics; however, upon closer look, the articles referenced and other EU law do not provide a "bright line standard," which leaves data controllers to subjectively determine what is and what is not freedom of expression.[80] In order to assist in deciphering what constitutes "expression" pursuant to the above exemptions as to adequately process a request to remove or delist information from the internet, Google has formed an advisory council which lacks any sort of transparency or public exposure as to their methodology for approaching such requests.[81] This fact illustrates the larger issue within the promulgation of the right to be forgotten; in allowing data controllers to make a determination as to what constitutes "free

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[78] Case C-131/12, Google Spain SL v. Agencia Española de Protección de Datos (AEPD), 2014 EUR-Lex CELEX LEXIS 62012CJ0131 (May 13, 2014).

[79] *Id.*

[80] *See* Rustad & Kulevska, *supra* note 7, at 371–72 (noting that free expression in the EU is a qualified right, that cedes to national security, defamation, crime prevention, protection of health and morals, confidential information and the impartiality of the judiciary).

[81] Julia Powles & Enrique Chaparro, *How Google determined our right to be forgotten*, GUARDIAN (Feb. 18, 2015, 2:30 AM), https://www.theguardian.com/technology/2015/feb/18/the-right-be-forgotten-google-search.

expression" within a given request without any transparency, free expression itself is thereby diluted and left without a clear precedent to abide by.[82] Data controllers and their advisory councils are thereby left to make a subjective determination of what constitutes free expression in that situation. To this point, there have been numerous accounts of newspaper articles, news reports, and other public documents that can be considered to be the free expression of the author, which have been delisted through this process.[83]

It is also said that free expression in the EU is weaker than its American counterpart,[84] which is protected against vague and overbroad restrictions, while free expression in the EU is not.[85] There is great ambiguity in what free expression is and what it is not in the EU. This ambiguity can lead to varying results and an overall lack of protection for this fundamental right. Thus, a large threat exists in the implementation of the right to be forgotten given the broad authority it promulgates, or in other words, the original intention of the Right, which was to remove unwanted personal data, now extends to censorship. As Robert G. Larson states, "[s]uch imprecision when delimiting the bounds of permissible speech invites overzealous censorship[—]by the data subject as well as by third parties and Web sites that host user content[—]has long been known to have a chilling effect on speech . . . ."[86]

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[82] *See* David Mitchell, *The right to be forgotten will turn the internet into a work of fiction*, GUARDIAN (July 5, 2014, 7:05 PM), http://www.theguardian.com/commentisfree/2014/jul/06/right-to-be-forgotten-internet-work-of-fiction-david-mitchell-eu-google (arguing that comments or actions made on the internet are never forgotten).

[83] *See id.* (listing examples of articles or documents that have been delisted).

[84] Robert G. Larson III, *Forgetting the First Amendment: How Obscurity-Based Privacy and a Right to be Forgotten are Incompatible with Free Speech*, 18 COMM. L. & POL'Y 91, 107 (2013).

[85] *See* Bd. of Airport Comm'rs of Los Angeles v. Jews for Jesus, 482 U.S. 569, 574–75 (1987) (finding a resolution that restricts First Amendment activities unconstitutional "because no conceivable governmental interest would justify such an absolute prohibition of speech.").

[86] Larson III, *supra* note 84, at 108.

B. Google v. CNIL: The Ironic Anticlimax

Google Spain v. AEPD gave birth to a paradox of privacy and free expression, forcing corporations and other online entities to remove information from the internet and the digital public market.[87] International corporations categorized as data controllers, like Google, thereafter faced thousands if not hundreds of thousands of requests to delist or remove information.[88] Given the massive quantity of these requests, corporations became inundated with those asking to remove information from their websites, and when these corporations failed to remove the information, they faced great fines.[89] Since 2014, Google has received over 3.3 million requests and has granted approximately 45 percent of these requests, some of which were located on websites and domains[90] outside of the EU's territorial reach.[91]

Of the requests that Google satisfied, it did not remove all information or listings located on domains in the U.S., or those outside the EU.[92] The French data protection agency, the Commission nationale de l'informatique et des libertés or the "CNIL," believed that Google's actions were in direct contravention of the Directive and instituted significant fines.[93]

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[87] *See* Alan Travis & Charles Arthur, *EU court backs 'right to be forgotten': Google must amend results on request*, GUARDIAN (May 13, 2014, 9:06 AM), https://www.theguardian.com/technology/2014/may/13/right-to-be-forgotten-eu-court-google-search-results (discussing the European court decision backing the "right to be forgotten"); Mitchell, *supra* note 82 (explaining the ruling in Google Spain v. AEPD).

[88] James Doubek, *Google Has Received 650,000 'Right to Be Forgotten' Requests Since 2014*, NAT'L PUB. RADIO (Feb. 28, 2018, 5:44 AM), https://www.npr.org/sections/thetwo-way/2018/02/28/589411543/google-received-650-000-right-to-be-forgotten-requests-since-2014.

[89] *See* Finck, *supra* note 32 (discussing the effects of the holding in Google LLC v. CNIL).

[90] *See* P. Christensson, *Domain Name Definition*, TECHTERMS, (Sept. 14, 2012), https://techterms.com/definition/domain_name (explaining that a domain is the unique name which identifies a website and can have a country code associated with it to identify the location the domain is registered in).

[91] Finck, *supra* note 32; Satariano, *supra* note 50.

[92] Finck, *supra* note 32.

[93] *See* Tony Romm, *France fines Google nearly $57 million for first major violation of new European privacy regime*, WASH. POST (Jan. 21, 2019, 12:54 PM), https://www.washingtonpost.com/world/europe/france-fines-google-nearly-57-million-for-first-major-violation-of-new-european-privacy-

The CNIL brought suit against Google, believing that the only way to give full effect to the right to be forgotten was to extend its reach to domains found outside the EU.[94] Google disagreed and contended that to extend authority outside the EU would unjustly expand the EU's governmental powers, contravening the local law of that sovereign.[95]

The case was referred to the CJEU, known as *Google LLC v. CNIL*, and was thought of as the case to determine the territorial scope of the right to be forgotten.[96] Google's position aptly illustrates the dangers of a global expansion of the EU's privacy laws, which is that of an act of "data imperialism" and a violation of free expression.[97] Data imperialism is the theory that by placing the implication of the EU's data ethics in the hands of corporations abroad, the EU seeks to impart its own values on other countries in the world.[98] Inherent in this right to be forgotten legal scheme is the danger that other countries do not share the same value of privacy that the EU has enumerated, which presents a conflict for both the citizens and government of that country.[99] Professor Cedric Ryngaert—a professor of public international law—has noted that such conflict can then "strike a different balance between data protection and other societal imperatives," which casts doubt on

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regime/2019/01/21/89e7ee08-1d8f-11e9-a759-2b8541bbbe20_story.html?noredirect=on&utm_term=.623fc9fa52cc (French regulators fined Google for "violating Europe's tough new data-privacy rules"); *see also* Mark Scott, *Google Fined by French Privacy Regulator*, N.Y. TIMES (Mar. 24, 2016), https://www.nytimes.com/2016/03/25/technology/google-fined-by-french-privacy-regulator.html (Google "was fined $112,000 . . . by France's data protection watchdog for failing to comply with demands to extend a European privacy ruling across its global domains").

[94] *See* Case C-507/17, Google LLC v. Commission nationale de l'informatique et des libertés (CNIL), 2019 EUR-Lex CELEX LEXIS 62017CJ0507 (Sept. 24, 2019) (focusing on the regulation to Member States).

[95] Finck, *supra* note 32.

[96] *See* Case C-507/17, Google LLC v. Commission nationale de l'informatique et des libertés (CNIL), 2019 EUR-Lex CELEX LEXIS 62017CJ0507 (Sept. 24, 2019); Finck, *supra* note 31.

[97] Finck, *supra* note 32.

[98] *See* Cedric Ryngaert, *Symposium Issue on Extraterritoriality and EU Data Protection*, 5 INT'L DATA PRIVACY L. 221, 224 (2015) (discussing the difference between territorial and extraterritorial jurisdiction).

[99] *Id.* at 223.

relations with other countries and civil relationships.[100] It is difficult to imagine a situation for example, where an order by the CNIL to remove information from the internet would likewise be valid under applicable U.S. law. Public information is well protected in the U.S. under the First Amendment and free speech restrictions are constitutionally protected for overbreadth, which may apply to an otherwise broad right to be forgotten.[101]

In its September 24, 2019 decision, the CJEU held that under the GDPR, the right to be forgotten is not required to be enforced globally.[102] It reasoned that no-where in the text of the Article 17(1) of the GDPR is an explicit requirement that data controllers be mandated to remove any information that is subject to removal under the provisions therein, regardless of location.[103] The CJEU acknowledged that there was validity to CNIL's position that the only manner in which to completely effectuate the legislative intent of providing for the ultimate privacy of EU subjects is to remove information, wherever it may exist.[104] The court explicitly stated that although the statement was true and would meet the goal of ensuring privacy in full, to affirm this point would unjustly favor privacy and inure great prejudice to objects of free expression, including free access to information and freedom of the press.[105] Therefore, the court held that when considering a request to remove information, member states are required to evaluate the free expression considerations within the then current facts, but are not bound by the GDPR to mandate that the data be removed globally.[106]

Paragraph 72 of the decision, however, further muddied the

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[100] *Id.* at 225.

[101] *See* Bd. of Airport Comm'rs of Los Angeles v. Jews for Jesus, 482 U.S. 569, 575 (finding a resolution that restricts First Amendment activities unconstitutional "because no conceivable governmental interest would justify such an absolute prohibition of speech.").

[102] *See generally* Case C-507/17, Google LLC v. Commission nationale de l'informatique et des libertés (CNIL), 2019 EUR-Lex CELEX LEXIS 62017CJ0507 (Sept. 24, 2019).

[103] *Id.* ¶¶ 3, 65.

[104] *Id.* ¶ 55.

[105] *Id.* ¶ 60.

[106] *Id.* ¶ 72.

future of the extent of the right to be forgotten, which stated "[l]astly, it should be emphasised that, while, as noted in paragraph 64 above, EU law does not currently require that the de-referencing granted concern all versions of the search engine in question, it also does not prohibit such a practice."[107] The court failed to offer a legal basis or pathway for the execution of such practice and instead referred the implementation thereof to the member states.[108] Thus, territorial boundaries of the right to be forgotten are far from defined.

C. Current Framework

As a precursor to data removal, the data subject must establish that the information is private, and then it is the obligation of the data controller to either remove the information or refuse to do so.[109] The CJEU held in *Google Spain* that an individual would be able to request that search engines or those who engage in the "processing of data"[110] remove links with personal information, pursuant to the Directive and now current, GDPR. Generally, only those considered to be a data controller within the meaning of Article 4 of the GDPR could be mandated to remove requested information.[111] Generally, a controller is defined as a company which "determines the purposes and means of the processing of personal data."[112]

Google Spain added a crucial implication to the application of the right to be forgotten in holding that search engine operators (hereinafter "SEOs") are controllers within the meaning of Article 4 of the GDPR.[113] It was previously established that data controllers, those who possess and store data, had differing responsibilities and duties under the GDPR than data "processors," who merely provide access to

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[107] *Id.*

[108] Satariano, *supra* note 50.

[109] Case C-507/17, (Sept. 24, 2019), ¶ 16.

[110] Case C-131/12, Google Spain SL v. Agencia Española de Protección de Datos (AEPD), 2014 EUR-Lex CELEX LEXIS 62012CJ0131 (May 13, 2014).

[111] Daphne Keller, *The Right Tools: Europe's Intermediary Liability Laws and the EU 2016 General Data Protection Regulation*, 33 BERKELEY TECH. L.J. 287, 323 (2018).

[112] GDPR, *supra* note 10, art. 4.

[113] Case C-131/12, (May 13, 2014), ¶ 47.

information and data; data "controllers" were subject to the dereferencing obligations of the right to be forgotten, whereas the data processors were not.[114] In this respect, SEOs were thought of as data processors, given that they merely provided access to websites and databases via links.[115] *Google Spain* held otherwise for reasons stated hereinabove and mandated that SEOs comply with the dereferencing obligations within the then current Directive, as replaced by the GDPR.[116]

Data which is subject to the dereferencing protections of the right to be forgotten includes that which is inaccurate, inadequate, irrelevant, or excessive.[117] *Google Spain* held that if an individual asserts that information found online falls into any of the above categories, such persons can request that their information be removed, thus forcing the data controller to remove such information or allowing the individual to bring a lawsuit.[118] If a lawsuit is brought alleging enforcement of the GDPR, then the data provider has the burden to show that the data subject's information should not be removed.[119] The court will make its determination on a case by case basis.

This process also applies in other jurisdictions under the CJEU holding that stated that "even if the physical server of a company processing data is located outside Europe, EU rules apply to search engine operators if they have a branch or a subsidiary in a Member State".[120] In *Google Spain*, the CJEU opined that given the global nature of search engines and data providers, the only way to effectuate the EU's interest in protecting the fundamental human right to privacy is to hold these entities accountable extrajudicially.[121] The CJEU further

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[114] Keller, *supra* note 111, at 307.

[115] *Id.* at 311.

[116] Case C-131/12, (May 13, 2014), ¶ 6.

[117] *Id.* at ¶ 92.

[118] *Id.* at ¶ 94.

[119] EUROPEAN COMM'N, Factsheet on the "Right to Be Forgotten" Ruling (C-131/12) 1, 3 (2018), https://www.inforights.im/media/1186/cl_eu_commission_factsheet_right_to_be-forgotten.pdf.

[120] OFFICIAL (ISC) GUIDE TO THE CISSP CBK 220 (Adam Gordon 4th ed. 2015).

[121] Case C-131/12, (May 13, 2014), ¶ 3.

dictated that "[s]earch engines are controllers of personal data[, and therefore,] Google can . . . not escape its responsibilities before European law when handling personal data by saying it is a search engine."[122] Under *Google Spain*, EU jurisdiction extends to wherever a citizen of the EU has data he or she wants to be removed or dereferenced.[123] As noted herein, this extraterritorial aspect of the right to be forgotten still exists under *Google LLC v. CNIL*. The only clarification that *Google LLC v. CNIL* provided was that the member states are required to consider the effect on free expression around the world when determining the application of the right to be forgotten.[124] It is also important to note that the CJEU left open the possibility that the right to be forgotten could be applied globally without delineating a specific legal basis for doing so.[125] Therefore, *Google Spain* remains binding precedent and its shockwaves continue to permeate the promulgation of the right to be forgotten onto other nations.

D. Global Outlook

Therefore, there remains two major issues that can cause a loss of liberties on the part of citizens and countries around the world, as the possibility remains that the right to be forgotten can be applied on other nations. First, being that the right to be forgotten creates a hindrance on the availability and free flow of information across the world, freedom of expression can be weakened.[126] Such implementation can also censor news outlets and limit free press,[127] resulting in a global exhibition of Plato's allegory of the cave; a situation in which individuals are only as informed to the extent of the information that they are exposed to.[128] Second, the territorial reach can negatively impact

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[122] EUROPEAN COMM'N, *supra* note 119.

[123] *Id.*

[124] *See generally* Case C-507/17, Google LLC v. Commission nationale de l'informatique et des libertés (CNIL), 2019 EUR-Lex CELEX LEXIS 62017CJ0507 (Sept. 24, 2019).

[125] Shefet, *supra* note 51.

[126] Keller, *supra* note 111, at 363.

[127] *Id.* at 297–98.

[128] *See generally* PLATO, THE REPUBLIC (Benjamin Jowett trans., Project Gutenberg 2016) (380 B.C.) (stating the allegory of the cave describes a theory in which individuals' knowledge is limited only to what they see, which can be influenced by the limiting of free access to information).

interactions amongst nations and deprive individuals of differing freedoms extended to them by their respective counties, such as the U.S., a place in which the right to be forgotten would be inconsistent with its constitution.[129] If the right to be forgotten is not sufficiently tailored to fit the needs of free expression, movements like the Arab Spring and the free flow of information will be significantly dampened.

III. IMPACTS OF A GLOBAL RIGHT TO BE FORGOTTEN

A. Free Access to Information: The Arab Spring and Social Media Hosts

A major unanswered question of interpretation is whether social media platforms, also known as "hosts," such as Facebook and Twitter can be held to be data controllers. If so, they would be subject to the right to be forgotten.[130] Applying the definition of data controllers as those entities that determine the purpose and means of processing personal data, critics have reasoned that hosts cannot be found to be data controllers because they merely provide access to information that is very often published by the author who themselves possess the right to post or remove such data.[131] If hosts are held to be data controllers, there is no telling what their obligations may be under the right to be forgotten.[132] Hosts could be forced to remove a post entirely or delist the post from its own search results on its website.[133] With regard to the possibility that hosts could be required to comport with the right to be forgotten, there is a risk that a user's free expression could be severely hindered, thereby reducing the availability and free access to information around the world.

As it currently exists, the GDPR provides an exception to the right to be forgotten for freedom of expression and information that would be publicly available.[134] However, as

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[129] John W. Dowdell, *An American Right to be Forgotten*, 52 TULSA L. REV. 311, 322, 332 (2017).

[130] Keller, *supra* note 111, at 334–49.

[131] *Id.* at 322.

[132] *Id.* at 325.

[133] *See id.* at 326 (discussing the implications of the European Union's landmark decision in Google Spain).

[134] GDPR, *supra* note 10, art. 17.

noted above, this exception is seen as illusory by critics, as the exception fails to provide a standard for interpretation to be used by the companies processing requests under the GDPR.[135] The reasoning behind this position is that if one lacks the proper parameters to form a decision, that decision is vulnerable to mistakes, impreciseness, and integrity.[136] Those who decide what information becomes delisted or not also decide larger questions of what is to be considered free expression.[137] It is no secret that social media posts constitute a great number of requests involved in the right to be forgotten. Many young adults seek to remove embarrassing personal content from Facebook which left online would be damaging to their reputation.[138] On one hand, deleting or delisting one's personal content can be viewed as an act in furtherance of data protection, but given that there remains the possibility that social media platforms could incur dereferencing obligations under the right to be forgotten, a broad right to remove other individual's post that contains a requesting data subject's information on social media can cause a reduction in the availability of information to people around the world.[139] The most serious result could be the silencing of cries for democracy and freedom from oppression.[140]

The Arab Spring—a period of time in which the Middle East saw rapid governmental and social change—is illustrative of the role that social media and the internet as a whole has in relation to the free flow of, and access to, information.[141] Facebook

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[135] *See generally* Larson, *supra* note 84, at 107 (discussing the exception to the GDPR).

[136] *Id.* at 108.

[137] *Id.*

[138] *See* Rustad & Kulevska, *supra* note 7, at 389 (noting that the right to delete one's own social media posts is increasingly provided by social media platforms as a sufficient means of data protection).

[139] *Id.* at 365; *see also* Dowdell, *supra* note 129, at 324 (identifying that delisting information could have the same effect as deleting the information altogether).

[140] *See* Keller, *supra* note 111, at 364 (stating that under the right to be forgotten "[b]loggers documenting misuse of power can be silenced").

[141] Rebecca J. Rosen, *So, Was Facebook Responsible for the Arab Spring After All?*, ATLANTIC (Sept. 3, 2011), https://www.theatlantic.com/technology/archive/2011/09/so-was-facebook-responsible-for-the-arab-spring-after-all/244314/ (noting that "[e]ven though . . . other tools played their parts, Facebook was on a plane of its own.").

specifically became a platform for participants to share their experiences which were then spread across the world.[142] The Arab Spring began in 2010 when Mohamed Bouazizi's produce stand was seized by the Tunisian government after he refused to pay officials bribes.[143] Bouazizi then poured paint thinner on his body and set himself on fire, protesting the harsh Tunisian regime.[144] In Egypt, a short time earlier, the killing of Khaled Said went viral across social media platforms, after police had beat him to death over evidence he had obtained of police corruption.[145] These events sparked many other protests, which were then filmed or photographed and shared all over social media platforms including Facebook, Twitter, and YouTube.[146] Individuals across the Middle East viewed common experiences on social media, increasing the awareness of the harsh realities of oppressive governments.[147] One eyewitness stated, "[w]e were online every day . . . and on the streets pretty much every day, collecting information, collecting videos, organizing protests, [and] getting into protests[,]" calling Facebook "the GPS for this revolution."[148] Protests spread to Egypt, Libya, and Syria, causing these governments to try to censor the protests on social media by cutting off internet access to their citizens.[149] Although these protests were not as successful in ending oppressive regimes, they did end in the overthrow of Muammar Al Qaddafi in Libya[150] an improvement for human rights in Tunisia.[151]

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[142] *Id.*

[143] Robin Wright, *Assessing the Arab Spring Uprisings After Four Years*, WALL ST. J. (Dec. 17, 2014, 9:25 AM), https://blogs.wsj.com/washwire/2014/12/17/assessing-the-arab-spring-uprisings-after-four-years/.

[144] *Id.*

[145] Jennifer Preston, *Movement Began With Outrage and a Facebook Page That Gave It an Outlet*, N.Y. TIMES (Feb. 5, 2011), https://www.nytimes.com/2011/02/06/world/middleeast/06face.html.

[146] Rosen, *supra* note 141.

[147] *Id.*

[148] *Id.*

[149] David Wolman, *Facebook, Twitter Help the Arab Spring Blossom*, WIRED (Apr. 16, 2013, 6:30 AM), https://www.wired.com/2013/04/arabspring/.

[150] AFP, *Libya in chaos since 2011 overthrow of Muammar Gaddafi*, TIMESLIVE (Nov. 10, 2018, 9:51 AM), https://www.timeslive.co.za/news/africa/2018-11-10-libya-in-chaos-since-2011-overthrow-of-muammar-gaddafi/.

[151] *See generally The Arab Spring: A Year of Revolution*, NAT'L PUB. RADIO (Dec. 17, 2011, 6:02 PM), https://www.npr.org/2011/12/17/143897126/the-arab-

Social media facilitated the spread of information, albeit eyewitness accounts, and played "a vital role in the Arab Spring['s]" existence.[152]

Should hosts be required to comport with the right to be forgotten, the removal or delisting of information on social media platforms could prevent events like the Arab Spring from happening in the future either in the EU or abroad. The posts by protestors on Facebook, Twitter, and YouTube regarding the Arab Spring could have been removed or delisted had a social media post contained information regarding an EU citizen under the current scheme enacted by the GDPR and the recent decision in *Google v. CNIL*.[153] Paragraph 72 of that decision left open the possibility that the right to be forgotten could apply globally, if after a consideration of free expression and privacy effects, such global application was necessary to fulfill the legislative objective of data protection and privacy.[154] Thereafter, an EU citizen would need only show that the post or information concerning them was "inadequate, irrelevant or excessive in relation to the purposes of the processing . . . .[155] In effect, the right to be forgotten could "rewrite history," altering the ability of free information to flow from one individual to the next by allowing an individual to remove even the most trivial of information from the internet.[156]

The importance of the free exchange of ideas and information is grounded in the theories of self-fulfillment and marketplace of ideas—that individuals are in a better position to understand what is best for them when they have unlimited

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spring-a-year-of-revolution (describing the events of the Arab Spring).

[152] Ira Steven Nathenson, *Super-Intermediaries, Code, Human Rights,* 8 INTERCULTURAL HUM. RTS. L. REV. 19, 23 (2013).

[153] Keller, *supra* note 111, at 325–26.

[154] Case C-507/17, Google LLC v. Comm'n Nationale de l'Informatique et des Libertés (CNIL), 2019 CURIA (Sept. 24, 2019).

[155] Case C-131/12, Google Spain SL v. Agencia Española de Protección de Datos (AEDP), 2014 CURIA (May 13, 2014); *see also* Case C-18/18, Eva Glawischnig-Piesczek v. Facebook Ireland Limited, 2019 CURIA (Oct. 3, 2019) (holding that a defamatory Facebook post concerning an Austrian citizen was required to be removed by the social media platform in Ireland).

[156] *See* Larson, *supra* note 84, at 119 (discussing how the creation of a right that would allow a person to prohibit speech about himself would be at odds with the general functions of free speech).

access to information to aid in formulating opinions and ideas.[157] One fundamental principle of the self-fulfillment theory states that "the purpose of society . . . is to promote the welfare of the individual . . . [and] that every individual is entitled to equal opportunity to share in decisions which affect him."[158] "[T]he marketplace of ideas theory holds that unencumbered free speech is a public good because it enables members of society to evaluate and compare their ideas, beliefs, and assumptions."[159] Under this theory, democratic participation is also achieved, as those engaged in the uprisings in the Arab Spring had utilized information on social media to form the basis of their movements.[160]

Thus, in removing or delisting information from the internet, individuals are denied the full ability to better their minds and standing in the world, the opposite of which occurred during the Arab Spring.[161] Protestors collected information on social media concerning protests in other areas, which allowed them to formulate a plan and organize the protests.[162] Therefore, it is axiomatic that providing a means of removing or delisting such information to EU citizens can hinder such events from occurring in the EU. However, this risk could be exacerbated under *Google v. CNIL* as data can be required to be removed in another country.[163]

Consider two hypothetical situations which could result in the hindrance of free access to information in the aftermath of *Google v. CNIL*. Joe, an EU citizen, requested that a news article[164] regarding a protest against the Tunisian government

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[157] *Id.* at 110, 112–13.

[158] Thomas I. Emerson, *Toward a General Theory of the First Amendment,* 72 YALE L. J. 877, 880 (1963).

[159] Larson, *supra* note 84, at 112.

[160] *See* Keller, *supra* note 111, at 364 (noting that a balance between privacy and information rights "is necessary to support both individual and collective rights to liberty and democratic participation.").

[161] Larson, *supra* note 84, at 120.

[162] Wolman, *supra* note 149; *see also* Keller, *supra* note 111 at 364 (stating that under the GDPR and the right to be forgotten, "[b]loggers documenting misuse of power can be silenced").

[163] *See* Finck, *supra* note 32 (highlighting the incompatibility between data laws in different countries).

[164] *See e.g.,* Mitchell, *supra* note 82 (noting that although there is an

that he had participated in years ago be delisted or dereferenced from its listing on Facebook. The article can also be found in Tunisia and Joe has met the requirements to have the information dereferenced. The news outlet then removes the article and the information therein is now so less accessible that it is essentially rendered deleted.[165] Consider a simpler situation in which a citizen of Country X, a member state of the EU, participates in a protest and posts criticisms of past actions of the current leader on Facebook. The leader, also a citizen of Country X, requests that the post or data be removed from Facebook.[166] If Facebook removes or delists said post, information in the user's post is withdrawn from the market and the experiences shared therein become irrelevant. Both hypotheticals illustrate how the availability of information to individuals can be limited by the right to be forgotten, a situation which stands in direct contradiction to two theories of free expression: the self-fulfillment theory and the marketplace of ideas theory.[167] This danger has intensified in the aftermath of *Google v. CNIL*, as the reduction of information from the market can take place on a global level.[168]

B. Free Speech by a Free Press: A Chilling Effect

American news programs, such as the Washington Post, have reported on various privacy concerns including instances in which conversations that are recorded by Amazon's Alexa have potentially been used to aid prosecutors in a murder investigation in the U.S.[169] These news programs have also

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exception to the right to be forgotten for public information and free expression news articles about individuals have still been removed from the internet).

[165] Keller, *supra* note 111, at 324–25.

[166] *See generally* Case C-18/18, Eva Glawischnig-Piesczek v. Facebook Ireland Limited, 2019 CURIA (Oct. 3, 2019) (illustrating a similar situation in which Facebook Ireland was ordered to remove a defamatory post. The CJEU relied on a separate provision of the GDPR, but a similar fact pattern is not unthinkable to occur within the confines of the right to be forgotten).

[167] *See generally* Emerson, *supra* note 158 (discussing the theories of a "free market place of ideas" and self-fulfillment as a result of self-expression).

[168] Case C-507/17, Google LLC v. Comm'n Nationale de l'Informatique et des Libertés (CNIL), 2019 CURIA (Sept. 24, 2019) (discussing the need for balancing the rights to privacy and information in deciding orders of "de-referencing").

[169] Meagan Flynn, *Police think Alexa may have witnessed a New Hampshire double slaying homicide. Now they want Amazon to turn her over.,*

reported on the 2018 Facebook data breach that left the personal information of 29 million people worldwide in the hands of computer hackers.[170] These ongoing reports issued by various media outlets on growing privacy have become commonplace. Yet, in an ironic turn, one of the major effects of the enforcement of the right to be forgotten has been the censoring of news outlets on a global level who report information about individuals, and therefore can become subject to dereferencing obligations.[171] Protecting the freedom of the press was intended to be a mainstay of the GDPR, including enacting exceptions[172] for public information that is "necessary for reasons of substantial public interest . . . ."[173] However, news articles have been removed about individuals and media outlets in Europe have experienced removal of their content online. It is important to note that public court documents are not immune from the reach of the right to be forgotten.[174]

The general consensus for critics against the right to be forgotten is that acts of dereferencing conflicts with free speech by censoring news outlets and free press and thus hinders the ability of media outlets to provide information to individuals.[175] This criticism is not to specifically categorize the idea of a free

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WASH. POST, (Nov. 14, 2018, 7:28 AM), https://www.washingtonpost.com/nation/2018/11/14/police-think-alexa-may-have-witnessed-new-hampshire-double-slaying-now-they-want-amazon-turn-her-over/?noredirect=on&utm_term=.70ca5d976bb9.

170 Munsif Vengattil & Paresh Dave, *Facebook now says data breach affected 29 million users, details impact,* REUTERS, (Oct. 12, 2018, 12:52 PM), https://www.reuters.com/article/us-facebook-cyber/facebook-says-attackers-stole-details-from-29-million-users-idUSKCN1MM297.

171 Michael J. Oghia, *Information Not Found: The "Right to Be Forgotten" as an Emerging Threat to Media Freedom in the Digital Age,* CTR. INT'L MEDIA ASSISTANCE (Jan. 9, 2018), https://www.cima.ned.org/publication/right-to-be-forgotten-threat-press-freedom-digital-age/.

172 *See* 2016 O.J. (L 119/2) 2016/679 (detailing exceptions from the right to erasure).

173 *Id.* art. 9(2)(g).

174 Oghia, *supra*, note 171; Jeff Cox, *Inside the Implications of GDPR & CCPA on Public Records,* LEGALTECH NEWS (Feb. 15, 2019, 12:00 PM), https://www.law.com/legaltechnews/2019/02/15/inside-the-implications-of-gdpr-ccpa-on-public-records/.

175 *See generally* Edward Lee, *The Right to Be Forgotten v. Free Speech*, 12 J.L. & POL'Y FOR INFO. SOC'Y 85, 98 (2015) (noting that there is great concern over the effects that the right to be forgotten had impacted free speech and censorship).

press as inferior to the press' free speech rights, but to illustrate the interplay of those freedoms that contribute to the larger umbrella of free expression.[176] Critics that support greater free speech rights maintain that by providing means to remove information from the internet, individuals censor organizations and other individuals that expressed that information.[177] Critics that support greater free press rights argue that media outlets' ability to report news is severely hindered when articles and similar postings can be removed from the internet.[178] It is the free speech rights of a press that facilitates the ability of media outlets to practice their function as a free press by providing information to the masses, and removing that right creates a major concern for media outlets around the world.[179]

In the face of a threat to free access of information through media outlets and internet sources, the CJEA took action.[180] The CJEU held in *Google Spain* that the right to be forgotten is not absolute, which was solidified in the public information exception of the GDPR; however, it intended the ruling to be more narrowly drawn in consideration of other rights they considered to be fundamental to garner attention.[181] In doing so, the court recognized that the right to be forgotten places a great deal of power in the hands of data subjects and controllers alike by allowing individuals to remove information that may be considered to be in the public domain.[182] The motivation for such an exception may be compelling and in line with the original aspirations of the 1950 Convention.[183] The Convention's goals

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[176] *Id.*

[177] Statement on The Reporters Committee for Freedom of the Press at ¶ 4, Case C-507/17, Google, LLC. v. Comm'n nationale de l'informatique et des libertés (CNIL), https://www.rcfp.org/sites/default/files/2017-11-29-Googe-v-CNIL.pdf [hereinafter RCFP Statement].

[178] Oghia, *supra*, note 171.

[179] See RCFP Statement, *supra* note 177 (discussing how free speech rights in the context of free press is worrisome).

[180] *See generally* Case C-131/12, Google Spain SL v. Agencia Española de Protección de Datos (AEDP), 2014 CURIA (May 13, 2014) (discussing how the court balanced individual interests and public interests).

[181] Jeffrey Rosen, *The Right to be Forgotten*, 64 STAN. L. REV. 88, 90–92 (2012).

[182] *See* Cox, *supra* note 174 (discussing the Bujaldon case in an effort to exemplify removal of information from the public domain).

[183] European Convention on Human Rights, art. 9, *opened for signature*

were to protect privacy interests as well as solidify other fundamental rights such as the freedom of speech and expression. While enforcing a right to be forgotten can further these goals, it can be seen as favoring the right to privacy as opposed to free expression as more significant in allowing public information to be removed as it currently is.[184] This is due to the fact that the free expression exception is left to the interpretation and guidance of the member states, which can be imprecise and may conflict with other nations' valuation of both free speech and free press.[185] Allowing for member states to consider free expression on a case by case basis creates a chilling effect on the same.[186]

A true free press allows for the widespread flow of information to individuals.[187] The United Nations Educational, Scientific and Cultural Organization (hereinafter "UNESCO") stated, "Freedom of Information and Freedom of Expression work against the concentration of information within the hands of a few. Of course, all information is subject to interpretation. For this reason, the clearinghouse function of an open and pluralistic media sector is critical to a better understanding of any issue".[188]

However, in the enforcement of the right to be forgotten, newspapers, magazines, and a broad variety of information sources are forced to delist information from public access.[189] At

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Nov. 4th, 1950, ETS No. 005 [hereinafter ECHR].

[184] *See* Rosen, *supra* note 181 (discussing how more weight given to the right to privacy might adversely affect the importance of freedom of expression).

[185] Larson, *supra* note 84, at 107.

[186] *See id.* at 107–08 (interpreting the statement, "allowing each Member State to create its own definitions grants a heckler's veto to the state with the most limited speech protections, and forces Web sites and Internet users into a morass of inconsistent international law.").

[187] *See id.* at 106 (quoting "the terms 'freedom of expression,' 'journalistic purposes,' and 'artistic or literary expression' are not defined, item 121 of the recitals").

[188] *Access to Information,* UNESCO, http://www.unesco.org/new/en/unesco/events/prizes-and-celebrations/celebrations/international-days/world-press-freedom-day/previous-celebrations/worldpressfreedomday2009001/themes/access-to-information/ (last visited Nov. 5, 2019) [hereinafter UNESCO].

[189] *See generally* The Directive, *supra* note 9 (interpreting the Right of Access Section under Article 12).

the very center of *Google Spain* was the request for the removal of information regarding González in various newspaper articles.[190] The right to be forgotten leaves any source that publishes an EU citizen's information on the internet vulnerable to be ordered to delist that information. This creates a broad application of a right which has been deemed a "foundation of justice and peace in the world".[191] Therefore, it is difficult to sever the relationship that the enforcement and promulgation of the right to be forgotten has with free speech and free press. The newspaper that published the information containing González's likeness was exercising the same freedom that would be afforded to any other individual that speaks of another person in conversation. This is the precis argument of news outlets and the RCFP that contend that the right restricts media outlet's efficacy and ability to reach their audiences because it materially weakens free speech.[192]

The RCFP is a U.S. based organization with a mission "to keep government accountable by ensuring access to public records, meetings and courtrooms; and to preserve the principles of free speech . . . ."[193] On behalf of organizations such as Dow Jones & Company; Hearst Corporation; The New York Times; and Thomson Reuters Markets, LLC, the RCFP filed the equivalent of an amicus brief with the European Court of Justice in the proceedings for *Google v. CNIL*.[194] This brief offers points of contention to the right to be forgotten and its implications concerning free speech.

The specific argument of the organization is twofold; first, delisting on a search engine limits the effectiveness of the press worldwide; and second, different countries compare the importance of the right to be forgotten and the right of free speech in various ways.[195] The implication of the first point is

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[190] Case C-131/12, Google Spain SL v. Agencia Española de Protección de Datos (AEDP), 2014 CURIA (May 13, 2014).

[191] ECHR, *supra* note 183, at 5.

[192] RCFP Statement, *supra* note 177, ¶ 20.

[193] Mission, *Reporters Committee for Freedom of The Press* (Nov. 9, 2018), https://www.rcfp.org/about/mission/ [http://web.archive.org/web/20170803020417/https://www.rcfp.org/about/mission].

[194] RCFP Statement, *supra* note 177, at 1.

[195] *Id.* ¶¶ 6–7

that by allowing any public information to be removed from the internet around the world, including news articles, hinders the reach of media outlets.[196] The RCFP states, "any single state's attempt to limit worldwide access to public information represents an existential threat to journalistic freedom and the fundamental rights of the people to receive information through any media . . . ."[197]

The second point emphasizes the fact that countries across the world have differing customs, and thus the enforcement of the right to be forgotten is not promulgated "in a vacuum."[198] For example: it is a crime in Germany to deny the Holocaust; this restriction would not receive much opposition, but would most likely be incompatible with American free speech ideology.[199] Furthermore, the U.S. ranks first among nations for free speech tolerance on the Free Expression Index at 5.73, as collected by the World Economic Forum.[200] Other nations are ranked variably, including Germany at 18th overall, with a score of 4.34, and Japan at 30th overall, with a score of 3.27.[201] In the midst of these differing viewpoints, the GDPR requires strict compliance and makes all other applicable laws subordinate, censoring the media outlets in countries that otherwise provide greater protection.[202] Therefore, allowing the right to be forgotten to extend outside the EU would facilitate censorship of media outlets and restrict free access to information. While free press and free speech receive different treatment worldwide,

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[196] *Id.* ¶ 7.

[197] *Id.* ¶ 4.

[198] *See id.* ¶¶ 15–16, 31–32 (discussing how different countries have different ways of balancing the right of freedom of expression, on the one hand, and the right to privacy on the other).

[199] Yascha Mounk, *Verboten: Germany's risky law for stopping hate speech on Facebook and Twitter,* NEW REPUBLIC (Apr. 3, 2018), https://newrepublic.com/article/147364/verboten-germany-law-stopping-hate-speech-facebook-twitter.

[200] Alex Gray, *Freedom of speech: which country has the most?*, WORLD ECON. FORUM (Nov. 8, 2016), https://www.weforum.org/agenda/2016/11/freedom-of-speech-country-comparison/ (compiling the Index on a score from zero to eight, with zero being the least tolerant of free speech and eight being the most supportive).

[201] *Id.*

[202] *See* GDPR, *supra* note 10, art. 115 (discussing how laws adopted by third countries that purport to regulate citizens of Member States must be in compliance with the GDPR).

censoring media outlets hinders the spread of information, which if anything, provides an outlet for oppressed individuals. As UNESCO so aptly states, "[i]nformation is power. Freedom of Information and Freedom of Expression work against the concentration of information within the hands of a few."[203]

C. Super-Intermediaries: A Road Block for Free Information

As the use of social media surges, so do requests to delist information and disputes over data usage.[204] In most situations, users of these sites publish information on their accounts, and when they want to remove that information, the company or data controller turns toward its own internal protocols to adjudicate the request.[205] Although the CJEU has yet to issue a definitive ruling as to whether the right to be forgotten applies to social media platforms as hosts, it is important to consider the impact of potentially placing such obligations on them, as Google and other data controllers currently have.[206] The GDPR reinforced this responsibility on the part of data controllers, tasking them with the immediate effectuation of the right to be forgotten. For example, in *Google Spain* Google was ordered to remove Mr. González's information.[207]

Data controllers like Google are tasked with responding to requests for removal due to a variety of circumstances including harassment, hateful speech, and more.[208] Thus, these companies become intermediaries—acting as adjudicator of disputes between data subjects and data controllers.[209] Being that these intermediaries are controlling the influx of data on their site, they are implicitly tasked with adjudicating disputes

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[203] UNESCO, *supra* note 188.

[204] *See* Casey Newton, *Facebook is making an all-out push for regulation—on its own terms,* VERGE (Apr. 2, 2019, 6:00 AM), https://www.theverge.com/interface/2019/4/2/18291413/facebook-regulation-mark-zuckerberg-european-tour (illustrating that Facebook faces constant pressure regarding their use of personal data).

[205] *Id.*

[206] *See* Keller, *supra* note 111, at 324–26 (discussing the potential impact of placing rule to be forgotten obligation on social media platforms).

[207] Case C-131/12, Google Spain SL v. Agencia Española de Protección de Datos (AEDP), 2014 CURIA (May 13, 2014).

[208] Nathenson, *supra* note 152 at 122.

[209] *Id.* at 22–23.

concerning individual rights and privacy interests.[210] The rise of such entities as YouTube, Google, and Facebook have given way to a theory of "super-intermediaries," promulgated by Ira Steven Natheson, which dictates that certain intermediaries have a high degree of involvement, legal scrutiny, and reputation, which creates immense power when adjudicating these disputes.[211] The GDPR and the extension of the right to be forgotten across the world reaffirms the dangers of super-intermediaries and further endangers free expression.[212]

The power of the super-intermediaries to adjudicate data disputes can be a threat to the protection of privacy interests and other human rights concerns, as the super-intermediaries effectually stand in the shoes of courts.[213] This is potentially dangerous as these companies lack checks for accuracy and transparency, as a court is usually required to comply with.[214] The super-intermediaries determine if a request is worthy of removal and the terms of use of that company usually dictate the guidelines for such, which the entity itself creates.[215] As Rebecca MacKinnon notes, super-intermediaries' regulation employees "play the roles of lawmakers, judge, jury, and police all at the same time."[216] Essentially, the companies become self-regulating and use their own discretion subject to abuse; unlike courts which are subject to case precedent and state

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[210] *See id.* at 24–25 (discussing the nature of internet intermediaries' power).

[211] *See id.* at 58–60 (discussing the amount of power super-intermediaries have).

[212] *See* Adam Satariano, *'Right to be Forgotten' Privacy Rule Is Limited by Europe's Top Court*, N.Y. TIMES (Sept. 24, 2019), https://www.nytimes.com/2019/09/24/technology/europe-google-right-to-be-forgotten.html (discussing how opponents of the ruling said removing links would set a dangerous precedent and make it easier for information to be deleted from the internet).

[213] *See* Nathenson, *supra* note 152, at 156 (discussing the importance that super-intermediaries' must strive for accuracy, i.e. the finding of facts, the articulation of legal principles, and the application of facts to those principles, in order to respect digital due process).

[214] *See id.* (noting Facebook's governance system not being enforced consistently or uniformly).

[215] *See id.* at 156–60 (discussing the lack of transparency super-intermediaries demonstrate when deciding which requests are worthy of removal).

[216] *See id.* at 156.

regulation.[217] It should be noted that like a court, super-intermediaries are subject to review via a lawsuit to enforce the right to be forgotten, but the cost of bringing such a suit against an organization with mass wealth and power can be difficult.[218]

Initial disputes however become adjudicated solely in the hands of an employee, who will make the determination of whether data is removed, implicitly determining privacy interests on a daily basis.[219] If discretion is abused, it is possible that these entities can fall short of a court of law in the effectuation of the right to be forgotten. Furthermore, super-intermediaries' transparency is completely self-regulated. The degree of transparency of disputes and company policy regarding data usage is in the companies' discretion, casting doubt on the integrity of the actual policies.[220] As Nathenson notes, a high degree of transparency should be assured, as it provides confidence in the competency of companies to protect privacy interests.[221]

Adequate protection of free expression can be hindered if the right to be forgotten's global reach continues. Different countries have different standards of free expression, and as such, the right to be forgotten can require super-intermediaries to be in violation of a country's local law where data would otherwise not be removed, or vice-versa.[222] This can create inconsistencies in the effectuation of privacy in a country that is extremely friendly to free expression. Nathenson provides a clear example with the "Innocence of Muslims" video that was posted to YouTube in 2012,[223] and was not removed from the site

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[217] *See id.* at 156–57 (discussing the additional layers of internal review required by the intermediaries).

[218] *See id.* (discussing how lawsuits regarding the removal of certain speech, such as defamation of religion, present a much harder removal case).

[219] *See* Nathenson, *supra* note 152, at 118–19 (discussing how extra-legal techniques to regulate are often used such as internal self-guided regulation where employees monitor systems for wrongful conduct).

[220] *Id.* at 158.

[221] *See id.* at 157–60 (describing the importance of transparency when determining whether to grant a request for removal of speech/information).

[222] *See* RCFP Statement, *supra* note 176, ¶¶ 4, 16–17 (discussing the ability of individual states to establish their own values of free expression).

[223] DerJungeMiroslav, *Sam Bacile-The Innocence of Muslims Trailer*, YOUTUBE (May 19, 2015),

in the U.S. despite requests to do so.[224] The video condemned Islam and mocked the prophet Muhammad, creating a great deal of controversy.[225] However, YouTube refused to remove the video from their site, due to the video's compliance with YouTube "hate speech policies."[226] Notwithstanding such compliance, the protections of the First Amendment to the U.S. Constitution regarding hate speech would have allowed the video to remain on the site upon a lawsuit.[227] Thus, in this particular situation, a hateful video was allowed to remain on the internet where other countries, such as Egypt, had temporarily banned the video.[228]

While it can be argued that the freedom of expression prevailed in this scenario, inconsistencies remain—the video was removed in Egypt, but was not removed in the U.S.[229] The global reach of the right to be forgotten will exacerbate these inconsistencies and the power of super-intermediaries, such as YouTube, to adjudicate these disputes. The danger that lies within the allowance of social media companies to determine privacy interests is real, and with the uncertainty of the global reach deriving from *Google v. CNIL*, the number of disputes that these companies will determine will only increase.

IV. IDEOLOGICAL IMPERIALISM

A. Data Imperialism

A potential implication of the right to be forgotten is the assertion of EU jurisdiction onto other countries if the CJEU rules in favor of the CNIL in *Google v. CNIL*.[230] This is the concept of extraterritorial jurisdiction, which Dan Svantesson

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https://www.youtube.com/watch?v=YJBWCLeOEaM&bpctr=1554434143.

[224] Nathenson, *supra* note 152, at 28–29, 78–79.

[225] *Id.* at 29.

[226] *See id.* at 79 (stating that the video did not violate YouTube's terms of service relating to hate speech).

[227] *See* U.S. CONST. amend. I (listing the First Amendment rights to free speech, religion and expression); *see also* Nathenson, *supra* note 152, at 31 (discussing how such speech would likely be protected by the First Amendment).

[228] Nathenson, *supra* note 152, at 79.

[229] *Id.* at 28–29, 78–79.

[230] Ryngaert, *supra* note 98, at 223–24.

defines an act of such as "seek[ing] to control or otherwise directly affect the activities of an object (person, business, etc.) outside the territory of the state making the assertion."[231] Since the introduction of the Directive in 1995, the EU has become infamous for asserting its own privacy laws extraterritorially to protect its subjects in other sovereigns, in an effort to account for the wide reach of the internet.[232]

The EU's concerns have been that data controllers interact with EU citizens in other countries, which leaves such individuals subject to the data protection laws of that locale.[233] Under Article 3(2)(a) of the GDPR for example, social media sites that store information of "subjects residing in the [EU]" must be compliant with the right to be forgotten and the respective regulations under the GDPR.[234] As Svantesson notes, "an EU resident providing personal information during a holiday in New York would be protected by the EU data protection Regulation by virtue of his EU residence."[235]

An act of such extraterritorial jurisdiction can be analogized to an imperialistic campaign by the EU in the name of data privacy.[236] According to Merriam-Webster, imperialism is the "extension or imposition of power," the imposition of which has historically caused wars, famine, and a loss of freedom.[237] Imperialistic campaigns often leave the passive nation with a loss of sovereign autonomy, with the aggressive nation asserting its own jurisdiction over that passive nation.[238] In a modern

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[231] Dan Jerker B. Svantesson, *The Extraterritoriality of EU Data Privacy Law—Its Theoretical Justification and Its Practical Effect on U.S. Businesses*, 50 STAN. J. INT'L L. 53, 60 (2014).

[232] *Id.* at 62–63.

[233] *Id.* at 71.

[234] GDPR, *supra* note 10, art. 3(2)(a).

[235] Svantesson, *supra* note 231, at 71.

[236] *Id.* at 94; *see also* Warren Pengilley, *United States Trade and Antitrust Laws: A Study of International Legal Imperialism from Sherman to Helms Burton*, 6 COMPETITION & CONSUMER L. J. 187, 212–13 (1998).

[237] *Imperialism*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/imperialism (last visited Nov. 5, 2019) (explaining the broad definition of imperialism).

[238] James Thuo Gathii, *Torture, Extraterritoriality, Terrorism, and International Law*, 67 ALA. L. REV. 335, 364 (2003) [hereinafter Gathii I]; *see generally* James Thuo Gathii, *Imperialism, Colonialism, and International*

context, imperialism has been used to identify the acts of the U.S. in other countries to promote its own domestic interests, such as extending extraterritorial jurisdiction over commercial activity without American borders.[239] This type of imperialism stands in direct conflict with the theory of sovereignty, a principle of international law which dictates that nations have ultimate authority to govern those within their borders.[240]

The specific imposition of power to solidify data privacy has been named "data imperialism"[241] which can cause two major negative effects. First, a potential conflict of law between the two nations may arise, undermining the integrity of the host nation by violating sovereignty and poor diplomatic relations.[242] Second, in asserting extraterritorial jurisdiction, the EU imparts the same restrictions on free expression under the right to be forgotten onto citizens of other nations.[243]

One important example of such data imperialism is demonstrated by the issuance of fines to data controllers who fail to comport with the right to be forgotten.[244] When a fine is issued, there is a great chance that in order to minimize any financial implications, the data controller will cede to the EU's regulations, thereby rendering any other nation's regulations to the contrary moot.[245] While this implication is not as easily identifiable, in essence, it is the equivalent of coercive and forcible compliance with EU law.[246]

Furthermore, as the right to be forgotten is given validity to

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Law, 54 BUFF. L. REV. 1013 (2007) (discussing imperialism and its effect on jurisdiction between nations) [hereinafter Gathii II].

239 Gathii II, *supra* note 238, at 1063.

240 *See generally* Arthur Lenhoff, *International Law and Rules on International Jurisdiction,* 50 CORNELL L. REV. 5 (1964) (discussing the conflict between imperialism and sovereignty).

241 Ryngaert, *supra* note 98, at 224.

242 *Id.* at 223.

243 *Id.*

244 Satariano, *supra* note 50.

245 *See id.* (discussing how the right to be forgotten has difficulties being enforced beyond the European Union); *see also* Keller*, supra* note 111, at 350 (discussing how privacy and information rights are enforced under European Union law).

246 Satariano, *supra* note 50.

be asserted in other nations pursuant to *Google v. CNIL*, the EU has successfully launched an imperialistic campaign asserting its own ideologies on other nations as an act that will worsen diplomatic relations abroad and weaken freedom of expression across the world.[247]

B. Extraterritorial Jurisdiction: Conflict of Laws

CNIL's argument in *Google Spain* was that the only method to adequately enforce the right to be forgotten was to allow its application in other countries where data is found and requested to be deleted by EU citizens;[248] by doing so, it exerts the EU's ideology of the paramount importance of protecting subjects from exploitation on the internet.[249] While it cannot be said that this ideology is necessarily based on anything but consideration for human rights, the application of such limits free expression and a free press as stated above.[250] Additionally, other countries may not have anything akin to the right to be forgotten, or they might apply a similar right in different manners, such as giving more deference to the companies that process data.[251] Thus, the effect of extraterritorial jurisdiction as conflicting with laws of other nations can create an unreasonable interference with the law of that nation that only benefits the nation which is seeking to impose its law on others.[252]

A paradigm of the conflicting viewpoints is the American view of privacy in relation to free speech and free press. Under the First Amendment, free speech and free press are enshrined

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[247] Bill Chappell, *'Right To Be Forgotten' Only Applies to Websites Inside EU, European Court Says*, NAT'L PUB. RADIO (Sept. 24, 2019, 2:11 PM), https://www.npr.org/2019/09/24/763857307/right-to-be-forgotten-only-applies-inside-eu-european-court-says.

[248] Case C-131/12, Google Spain SL v. Agencia Española de Protección de Datos (AEDP), 2014 CURIA (May 13, 2014).

[249] Finck, *supra* note 32.

[250] *See generally supra* Part II (discussing the ideology of restricting freedom by forgetting).

[251] *See generally* Ryngaert, *supra* note 98, at 224 (noting that conflicts can occur with nations whom have other "regulatory views or stronger connection with the data controller").

[252] Brendan Van Alsenoy & Marieke Koekkoek, *Internet and Jurisdiction after Google Spain: The Extra-Territorial Reach of the EU's Right to be Forgotten* 24 (Leuven Ctr. for Glob. Governance Studs., Working Paper No. 152, 2015).

in the U.S. Constitution.[253] While U.S. law recognizes privacy interests in so-called private information that has not yet been made public, it also protects information that has been made public while the right to be forgotten, in application, does not.[254] Public information is protected under the First Amendment, as free access to information was a major motivation of the drafters of the U.S. Constitution.[255] As Professor Dawinder Sidhu observed in a 2014 U.S. News and World Report article:

> [t]he vision of a marketplace of ideas illustrates why [American] society places a premium on free speech. As part of our DNA, we believe that, in the marketplace of ideas, the value or truth of information will spring forth from the open consideration of competing opinions, viewpoints, and perspectives. The availability and discussion of that information, when relevant to policy and policymakers, can enrich and enhance our capacity for self-governance.[256]

Such is the justification for the fact that publication of criminal history is disallowed in America, which is contrasted with the ruling in *Google Spain,* in which González was granted the ability to remove information regarding a bankruptcy proceeding.[257] Thus, privacy law in America is seen to have significant weighing checks, such as free speech and free access to information, which conflicts with the promulgation of EU privacy law.

America is not alone. The newly instituted GDPR recognizes and accounts for the many differing views on free speech and privacy from various countries.[258] The new GDPR requires the assurance of data protection in transfers made to countries that

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[253] U.S. CONST. amend I.

[254] Dowdell, *supra* note 129, at 334.

[255] Dawinder Sidhu, *Privacy Doesn't Exist in a Vacuum,* U.S. NEWS & WORLD REP. (Dec. 8, 2014, 12:45 PM), https://www.usnews.com/debate-club/should-there-be-a-right-to-be-forgotten-on-the-internet/privacy-doesnt-exist-in-a-vaccum.

[256] *Id.*

[257] Case C-131/12, Google Spain SL v. Agencia Española de Protección de Datos (AEPD), 2014 CURIA (May 13, 2014).

[258] *See* GDPR, *supra* note 10, art. 6 (providing the regulation on data processing protections).

are not ratified for their privacy laws by the EU.[259] The regulation in the GDPR only applies to transfers made within the EU,[260] which is an example of a privacy regulation that adequately ensures data privacy without acting in an extraterritorial manner. However, the EU nonetheless asserts extraterritorial jurisdiction over American citizens or other nations when the GDPR directly conflicts with the law and ideology of that nation and the provisions of same are required to be enforced.[261] This point is not made to ratify the conduct of a country who has little to no privacy regulation, but rather to illustrate that countries regulate privacy laws differently in relation to other fundamental rights. In such a situation, international conflicts can emanate from jurisdictional concerns.[262]

With different countries asserting jurisdiction in foreign territories, antitrust law has become an area of law generating great conflict.[263] Conflicts in this area derive from the contacts that certain commercial entities have within a particular country.[264] Likewise, potential conflicts can emanate asserting jurisdiction over an American company in America storing an EU citizen's data.[265] Other conflicts such as trade disputes and jurisdictional treaties are evidence of the potential presence of territorial conflicts in the area of data privacy enforcement.[266]

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[259] *See* Gray, *supra* note 200 (providing statistics on how various countries view freedom of speech); *see also* GDPR, *supra* note 10, art. 6 (providing the regulation on data processing protections).

[260] *See generally* GDPR, *supra* note 10.

[261] *See generally* Ryngaert, *supra* note 98, at 245 (discussing how extraterritoriality can create conflicts for nations).

[262] *See* Kenneth W. Dam, *Extraterritoriality and Conflicts of Jurisdiction*, 77 AM. SOC'Y. INT'L L. PROC. 370, 370 (1983) (discussing how jurisdictional concerns can lead to international conflicts).

[263] *See id.*at 372 (discussing how antitrust law has direct effects on jurisdiction).

[264] *See, e.g.,* Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915 (2011) (discussing conflicts that occurred when an American court asserted jurisdiction over a tire company for events that occurred in France).

[265] *See* C-507/17, Google LLC v. Comm'n Nationale de l'Informatique et des Libertés (CNIL), 2019 CURIA (Sept. 24, 2019) (discussing jurisdiction regarding citizen's data).

[266] Finck, *supra* note 32.

C. Data Imperialism's Impacts on Freedoms Globally: An Outlook

If the EU is vindicated in *Google v. CNIL*, the extraterritorial jurisdictional provisions of the GDPR could necessitate the introduction of an international treaty or agreement which provides consensual jurisdiction in other countries to avoid potential conflict. Regardless, a potential effect of extending the reach of the right to be forgotten is the limitation on free expression.[267] By enforcing the right to be forgotten abroad in other countries, the EU's premium on the right to remove information in furtherance of privacy interests over free expression could have a chilling effect on free speech—via removal of public information and monetary fines for violations of the GDPR.[268]

V. CONCLUSION

There is much left unanswered in the wake of *Google v. CNIL* as to the legal basis or existence of a global application of the right to be forgotten.[269] As it stands now, a global application of the right to be forgotten will significantly limit free expression, including free access to information, free speech and free press.[270] Such a dereliction of free expression can negatively impact the spread of knowledge and betterment of the world.[271] Furthermore, the right to be forgotten allows Google and other data controllers to become adjudicators of free expression, which threatens the integrity and protection of such right.[272] In allowing the right to be forgotten to exist as it does, or expand such to exist beyond the territory of the EU, the EU is allowed to engage in global data imperialism under the cloak of goodwill and the common good.[273] This imperialistic campaign can work to worsen diplomatic relations and act as a vehicle to hinder free

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[267] Larson, *supra* note 84, at 107–08.

[268] Dowdell, *supra* note 129, at 334.

[269] *See* Case C-507/17, (Sept. 24, 2019) (discussing what was not discussed in Google v. CNIL regarding the right to be forgotten).

[270] Larson, *supra* note 84.

[271] Dowdell, *supra* note 129.

[272] Nathenson, *supra* note 152.

[273] Finck, *supra* note 32.

expression abroad.[274] It is imperative, therefore, that the negative effects of the right to be forgotten are not, in essence, forgotten.

[274] Ryngaert, *supra* note 98.