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# The Right to be Forgotten Essay

## Introduction

The right to privacy is one of the most fundamental of our liberties. In the Declaration of Independence the "inalienable rights" include life, liberty and the pursuit of happiness. Happiness encompasses the right to privacy and its derivatives, which should include the Right to be Forgotten. Our Constitution in its Bill of Rights fleshes out the various rights to privacy. The First Amendment provides for freedom of religion, speech, press, peaceful assembly, and the right to petition the government. The Third Amendment guarantees the sanctity of the household. The people's security for their "persons, houses, papers, and effects against unreasonable search and seizures" is ensured by the Fourth Amendment. It is stated in the Fifth Amendment that no one shall be forced to be a witness against himself or herself, thereby granting the protection of personal information. Through the Ninth Amendment, non-enumerated but inherent rights of the people are retained. Finally, the Fourteenth Amendment asserts the personal liberty and restrictions upon actions of the state. The rights of privacy and the necessity not to abridge the freedom of speech or of the press have recently come into collision with each other and thus have created a need to discuss a possible Right to be Forgotten.

## Should the Right to be Forgotten Exist in the U.S.?

Supreme Court Justice Louis Brandeis stated in the first half of the twentieth century, "... the right to be left alone by the government [is]... the right most valued by civilized man...". Both the right of privacy and the right to free expression have slowly been redefined and expanded

over the course of many years. Some of the most noted cases that have shaped these fundamental rights include Griswold v. Connecticut, a case that redefined where we draw the line of marital privacy, i.e. the use of contraceptives. In this instance, Justice Douglas found many references in the Bill of Rights, guaranteeing the creation of a “zone of privacy”. Roe vs. Wade, the famous decision allowing some abortion to take place, was decided by the Supreme Court largely on the basis of personal liberty. In the case of Sidis vs. F-R Publishing Corporation, the plaintiff, a former child prodigy who had been acclaimed throughout the land, argued as an adult that his privacy was violated and maintained that he should have the right to have the information about him removed on the grounds of invasion of privacy. The article about him had been part of a New Yorker Magazine expose on formerly famous child prodigies under the title “Where are they now?”, which he perceived as ridicule. The Second Circuit Court of Appeals held that there was no invasion of privacy because he had been a public figure of interest. However, four years later, New Yorker Magazine made a monetary settlement with Sidis. Many issues of involving someone’s concept of the right to privacy remain to be resolved, including: the right to die; the rights of digital privacy, i.e. NSA mass surveillance; protection against identity theft; and the Right to be Forgotten.

Just what is the Right to be Forgotten? People do not want to be forever or occasionally “stigmatized as a consequence of a specific action” in their past. Before the advent of the digital domain, the Right to be Forgotten was unnecessary because most information about ordinary people was soon forgotten anyhow. The internet with its dramatic appearance in the mid 1990’s created a domain in which information could live on indefinitely. This informational immortality created a web of instantly available data that we would not properly learn how to sift through for years to come. Yet in our modern day, we have troves of unnecessary data and even more false

information. Through social media or other channels, almost every person in this world has some personal information published about them on the internet; due to its longevity, this can lead to unintended consequences. To alleviate this problem, the European Union implemented a law in 2010 that allows for its citizens to be forgotten in relation to the public availability of certain information classified by a court as “inaccurate, inadequate, irrelevant or excessive”. This law was created following the complaint of a Spanish citizen against Google Inc in regard to his repossessed home and its appearance in search engine results. Ownership of his home was later reinstated, which allowed the information to be classified as “inaccurate”. According to the logic and information provided in the European Union Factsheet concerning the Right to be Forgotten, it could also apply to the citizens of the United States of America.

## What Would Be Consequences of the Right to be Forgotten?

If the Right to be Forgotten were instated in the United States, the public would have a less accurate picture of the people they elect and trust to advocate for them; it would also give individuals the ability to manipulate their public image in a powerful way. The manipulation of a person’s public image would make it more difficult to effectively assess a candidate’s competency for public office or some other employment. This issue makes it necessary to set limits for how far the Right to be Forgotten can reach. When should persons lose their right to have particular information about themselves removed from search engines’ databases? Once information becomes of economic, political, military or national security concern to the vast majority of the citizens in the United States of America, then it should remain accessible to the public and not be affected by the Right to be Forgotten. This would include any information about adults with a criminal record, candidates seeking public office as well as those already in public office. The Right to be Forgotten should be reinstated on a case by case basis to those who

leave the economic, political, military or national security arena as far as their private lives from that point on are concerned. Each application for this right to be used should be evaluated and approved by a specialized court.

## Conclusion

The Right to be Forgotten should be incorporated into the body of law of the United States of America. However, we cannot just cut and paste the European Union's "Right to be Forgotten" into our laws due to our unique set of values and morals as well as to the ever-progressing nature of our nation. This process of incorporation will not be easy since the institution of the Right to be Forgotten will surely be accompanied by many stresses to the body politic, the economic balance and therefore to our country as a whole. Change is never easy, yet the rewards from the Right to be Forgotten in the long term will far outweigh the initial discomforts it might cause.

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## I. Introduction

*When we speak of privacy, particularly as a right, we focus on the individual. The individual must be shielded from the prying curiosity of others and from prejudice and discrimination. The individual's autonomy and control over his or her person must be preserved. The individual must be protected from intimidation and coercion by government.* -George Orwell

Unfortunately, Orwell's concerns regarding privacy are still with us today. New technologies, specifically the internet, have made privacy issues even more pervasive. The right to privacy is defined by Merriam-Webster Dictionary as, "the qualified legal right of a person to have reasonable privacy in not having his/her private affairs made known or his likeness exhibited to the public having regard to his habits, mode of living, and occupation" (*Merriam-Webster Dictionary*). After an examination of the right to privacy; a discussion of the costs and benefits to the right to be forgotten; and an analysis of the New Mexico Constitution, it will be clear that we should have a right to privacy, along with the right to be forgotten.

## II. Right to privacy

The right to privacy is not clearly stated as a right in the United States Constitution, but has been inferred to be by many. Justices in the Supreme Court such as, Justice Louis Brandeis, have believed so as well. Justice Brandeis commended "a right to be left alone" in 1890, thus allowing for protection of one's personal privacy (*Cornell University Law School*). This right has extended into a form of personal autonomy which is protected by the 14th Amendment along with the 1st, 3rd, 4th, and 5th Amendments. Also, the right to privacy has developed into a

restriction of others gathering personal information out of respect to personal privacy. The internet has provided an information gathering tool that the founding fathers never could have predicted. So, as technology develops, so must privacy safeguards.

**III. Whether a "right to be forgotten" should exist in the United States**

United States citizens have never been clearly given a specific "right to be forgotten." Is it legitimate for an employer to look into an old social media account from when the person was younger, that is still accessible when their name is searched in google because they did not have the right to be forgotten? When looking at case law such as *Melvin v. Reid* when an ex-prostitute was charged with murder and then acquitted; she subsequently tried to assume a quiet and anonymous place in society. However, the 1925 film *The Red Kimona* revealed her history, and she sued the producer. The court reasoned that, "any person living a life of rectitude has that right to happiness which includes a freedom from unnecessary attacks on his character, social standing or reputation" (*National Paralegal*). Courts have ruled in favor of having the right to be forgotten yet nothing has been passed through the legislature. Upon examination of the case *Sidis v. F-R Publishing Corp,* it is important to note, "any person living a life of rectitude has that right to happiness which includes a freedom from unnecessary attacks on his character, social standing or reputation." The F-R Publishing Corp made unnecessary attacks on Sidis's character such as "an insignificant clerk who would not need to employ unusual mathematical talents" (*The New York Times*). The court ruled in favor of the defendant, F-R Publishing Corp, due to the fact that Sidis was a public icon at one point and his personal life was not entitled to immunity from the press due to this. At the time Sidis was under the spotlight in the media he was only a minor, and had no control of his autonomous legal decisions.

**IV. What the cost of such a right would be**

Although I believe that a right to be forgotten should exist in the United States, the disadvantages should be evaluated. To "be forgotten" one must go through the courts, which in turn may burden the court system. The courts have many cases pouring through their doors every day and allowing for the right to be forgotten would only add more. But, special courts may be created to deal with this setback as seen with the NSA to solve the possible overload of cases (Marcus).

Another concern to be met with is that of safety. Molesters, rapists, and other criminals can currently be searched for online. When a citizen moves into a new neighborhood, neighbors may search for them to see if they have a criminal history to make sure their family is safe. Yet, even with a right to be forgotten, these systems will still be in place. Since courts make decisions in what is best in the eyes of the law, which is set up to be the best for the people, courts would probably not grant the right to be forgotten to a criminal with a severe history. Also, other methods of obtaining a criminal history will exist. For instance, employers will still be able to access background checks if the employer has the information required to obtain one on a future or current employee. Safety will not be a cost if this right is given.

Justice Goldberg wrote when discussing *Griswold v. Connecticut,* "I agree fully with the Court that, applying these tests, the right of privacy is a fundamental personal right, emanating 'from the totality of the constitutional scheme under which we live." In the case of Griswold v. Connecticut, which went to the Supreme Court, the court did not uphold Connecticut's law that married couples could not use birth control. The Supreme Court believed it violated marital privacy which is protected by the First Amendment, thus violating personal privacy and autonomy. (*Cornell University Law School).*

**V. Whether that right exists under the New Mexico State Constitution**

The New Mexico Constitution does not directly give the right to privacy as a whole nor the right to be forgotten. Although, Section 17 of New Mexico's Constitution states:

> Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true and was published with good motives and for justifiable ends, the party shall be acquitted (*New Mexico State Constitution*).

So, every New Mexico citizen has a right to have information posted that is false be "forgotten" from the internet or any other publication.

When examining New Mexico State case law, it is shown that the court has acted in favor of the right to privacy before. In the case of *Andrews v. Shelling* the court wrote:

> Plaintiffs allege that beginning the second year Andrews was on the Village Council, Defendants, "with reckless disregard and malice, published false, unfair and inaccurate accounts of public proceedings, more particularly with respect to the meetings of the Ruidoso Village Council, which accounts have contained repeated claims or innuendo of malfeasance of office on the part of plaintiff, Ronald E. Andrews, all with the intent to injure the good standing of said plaintiff." Plaintiffs further allege that Defendants "negligently, recklessly, and maliciously published defamatory statements relating to plaintiffs Jill Andrews and Golden Aspen Rally, Inc., which statements were understood to be defamatory, but which were false." Defendants' allegedly defamatory statements deal generally with the authors' opinions regarding the operation of the Village of

Ruidoso and the use of Andrews' elected governmental position to promote the Motorcycle Rally (Myers, *Peacock Law).*

The court upheld Section 17 of the New Mexico Constitution in this case by upholding the fact that the defendant had published false statements against the plaintiffs and that the plaintiffs have the right to be protected from it. The New Mexico Constitution and the case law provided support the fact support the fact that these rights should be guaranteed.

**VI. Conclusion**

While the right to privacy is not specifically an enumerated Constitutional right, it has become as sacrosanct as any other right. The right to be forgotten is merely an extension of this right. American legal scholar Daniel J. Solove wrote:

> We’re heading toward a world where an extensive trail of information fragments about us will be forever preserved on the Internet, displayed instantly in a Google search. We will be forced to live with a detailed record beginning with childhood that will stay with us for life wherever we go, searchable and accessible from anywhere in the world. This data can often be of dubious reliability; it can be false and defamatory; or it can be true but deeply humiliating or discrediting. . . . Ironically, the unconstrained flow of information on the Internet might impede our freedom” (*Solove*).

In life, everyone makes mistakes, but citizens should have the chance to redeem themselves after enduring the consequences. I stand firm in the belief that we, as American citizens, have the right to privacy and should have the right to be forgotten.

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## I. Background

The technological face of human rights changed the 13th of May, 2014, when the Courts of Justice of the European Union declared that individuals had the "right to be forgotten." In 2010 Mario Costeja González, a Spanish citizen, filed a complaint against La Vanguardia Ediciones (a publisher of a large daily newspaper) with the Agencia Española de Protección de Datos (Spanish Data Protection Agency, the AEPD), and against Google Spain and Google Inc. When searching Mr. Costeja's name in a search engines, such as Google, the results displayed links to two pages of La Vanguardia's newspaper, one from January and one from March of 1998. Those pages in particular contained an announcement for a real-estate auction organized following attachment proceedings for the recovery of social security debts owed by Mr. Costeja González. Mr. Costeja requested that Google be mandated to remove or conceal the personal data relating to him; Mr. Costeja González stated that the attachment proceedings concerning him had been fully resolved and were now entirely irrelevant. The Courts of Justice of the European Union (EU) moved that in instances where an individual's personal information was "inaccurate, inadequate, irrelevant or excessive" for the purpose of data processing and accessible on the web, the accessibility to that information was a violation of that person's personal privacy and therefore should no longer be accessible to the general public.

The EU has long been more concerned about personal privacy relative to the United States (Fisher). Europe's roots behind their rights in comparison to the United States are startlingly different - while ours is one focused around freedom of speech and press, Europe's

history is one full of Nazism and Communism that propelled it into the direction of privacy (Toobin, “Freedom of Speech and Freedom of Press”). Europe’s historical adventure towards the right to privacy began in 1953, when the European Convention on Human Rights adopted the right to “respect for privacy and family and life” (Fisher). After the fall of Communism in 1989, Europe rewrote their laws preventing similar abuses to the Communist totalitarian surveillance system; laws made to protect privacy. The fear of accessible personal information also stems from the history of Nazis’ invasion of Holland in 1940, when the Nazis used the Dutch government’s comprehensive registry of names, addresses and religion of all citizens to track down Jews and Gypsies (Toobin). The decision’s oldest roots lies in the French concept of droit à l’oubli - the right to oblivion (Fisher). In post-war history, post-Wall Europe concerns about privacy have become even more relevant in the advanced technological era (Toobin).

## II. The “Right” to be Forgotten

The EU’s decision treats search engines, such as Google, like publishers - as though search engines are responsible for what is available on the internet; although technically the EU was enforcing the 1995 directive on privacy that treats search engines as data “collectors” subject to regulation (Fisher). The decision, however, actually violates an individual's right to be forgotten, because while removing the link from Google’s results, the newspapers are not forced to remove any material, letting the material that actually violates an individual’s “right to be forgotten” to remain on the internet (Newman). While La Vanguardia enjoys the freedom of press, google is now being treated as though they are the press but without the freedoms; if La Vanguardia is allowed to publish it, Google should be allowed to link to it. (Bader). Furthermore, the ruling gives a vague definition of removing a link, which leaves search engine giants to interpret this on their own (Newman). What criteria determines that information to become “no

longer relevant”? Jules Poloetsky, executive director of the Future of Privacy Forum, said “requiring Google to be a court of philosopher kings shows a real lack of understanding about how this will play out in reality” (Toobin).

Wikipedia founder Jimmy Wales, says the new requirements of the EU are a “technologically incompetent violation of human rights.” As Wales reported to the Associated Press, he believes this is a form of censorship, and believes it will be scrapped. (“Google 'Right To Be Forgotten' Ruling Unlikely to Repeat in U.S.”). Censoring the internet will give the powerful and rich the ability to delete the negative information about them - government officials running for re-election could erase their past behaviors to have a clean slate, a convicted child sex offender could erase their criminal past, bank investors and CEOs can hide their past money laundering and fraudulent activities (“Google Is Being Forced To Censor The History Of Merrill Lynch — And That Should Terrify You”).

However, the EU has almost committed international political suicide, by creating a special set of rules that only apply to itself, which has effectively began carving the path towards cutting itself off from the global community (Newman).

Possibly the most terrifying part of this ruling is the chilling question “Is the information recent?” (“It's Becoming Clear Just How Vast The Censorship Of Google Is Going To Be”). As the rulings in the Discovery v. Gates case, the United States Supreme Court ruled that the passage of time could not reduce the “newsworthiness” of information in a public record (“Publication of Old Court Records Cannot Prompt Privacy Suit”). This uncovers another problem with the “right to be forgotten”.  The individuals that will truly benefit from this new law, are exactly those who should not have their past forgotten (Bowcott). For example, there are 20 senior politicians and government officials in Britain who are currently under investigation

for their alleged links to a ring of child abusers in the 1980s and 1990s ("It's Becoming Clear Just How Vast the Censorship of Google Is Going To be"). Does the victims' plight have a right to be forgotten?

## III. Should the "Right" to be Forgotten Exist in the United States

If a particular website commits an illegal action - such as breaking a law or violating a copyright - that should be stopped. Images illegally published have been removed from Google results, as seen before ("Google and Microsoft Agree Steps to Block Abuse Images"). A big reason that the European ruling of the "right to be forgotten" would not work in the United States is the deletion of information suppresses other people's right to free speech and right to information (Bader). An editorial in the New York Times said that the right to be forgotten "could undermine press freedoms and freedom of speech" (Toobin).

The idea of the "right to be forgotten" directly conflicts with U.S. law (Fisher). Not only does the freedom of speech protect a willing speaker's right to write whatever they wish, but also the freedom of speech protects the right to receive information from a willing speaker (Bader). The First Amendment protects the free flow of information - which the "right to be forgotten" completely demolishes - proven in court rulings such as Martin v. Struthers and Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council (Bader, Fisher). This freedom of speech guarantees the Costeja judgment would never pass under U.S. law; the records were public - which the Supreme Court ruled said reporting information obtained from public records is not an invasion of privacy (Toobin, "Publication of Old Court Records Cannot Prompt Privacy Suit"). While Costeja's annoyance is certainly understandable, that is not an adequate reason to abridge freedoms of others (Bader). The information was accurate, obtained lawfully and thus the press had a complete right to publish the information (Toobin). The "right to be forgotten"

directly infringes on Google users to receive relevant and potentially useful information, and infringes upon the freedom of the press (Bader).

## IV. The Cost of the Right to be Forgotten

Europeans may see the "right to be forgotten," but Americans see George Orwell's memory holes; the "right to forget" blends directly into Big Brother's destruction of information to make sure people forget ("Google, Merrill Lynch And The Right To Be Forgotten," "It's Becoming Clear Just How Vast The Censorship Of Google Is Going To Be"). The decision could be abused by "aggrieved individuals... to hide or suppress information of public importance" (Toobin).

The "right to be forgotten" suppresses other people's freedom of speech (as the Gates v. Discovery ruling proved) and right to information; an individual should not restrict access to information based on private interest (Bader). Justice Kathryn Mickle Werdegar when commenting on forbidding public records from publication, wrote "such a rule would make it difficult for the media to inform citizens… and yet stay within the law. The rule would invite self-censorship and very likely lead to the suppression of information that would otherwise be published and that should be made available to the public" ("Publication of Old Court Records Cannot Prompt Privacy Suit").

Quite possibly the most terrifying, however, is that with the censorship and deletion of easily accessibility of information - with the "right to be forgotten" we will have no idea what the truth is ("Google, Merrill Lynch and the Right to Be Forgotten"). Power to choose the information others are permitted to view, is censorship - is this creating yet another version of China-censorship? Where individuals prevent users and citizens from knowing too much? (Fisher).

## V. Conclusion

Many Americans have realized that the Internet is a wide-open space. As a nation, Americans also value Freedom of Speech, Press and Information more than the Freedom of Privacy, however it is the opposite on the other side of the Atlantic Ocean. Considering Europe's past, it is no surprise that Europeans consider privacy an ideal to be protected and considered above the Freedom of Speech.

The United States is forced to deal with the protection of its citizen's privacy by protecting America's freedom of speech and freedom of information. As Jennifer Granick, the director of civil liberties at the Stanford Center for Internet and Society, said "When it comes to privacy, the United States' approach has been to provide protection for certain categories of information that are deemed sensitive…" and yet, at the same time, as Justice Werdegar wrote that forbidding the publication of public information would make it difficult for the media to inform American citizens and stay within the law (Toobin, "Publication of Old Court Records Cannot Prompt Privacy Suit").

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