

BALANCING A RIGHT TO BE FORGOTTEN WITH A RIGHT TO
FREEDOM OF EXPRESSION IN THE WAKE OF *GOOGLE SPAIN V.*
AEPD

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I. INTRODUCTION

Courts in the European Union (EU) have long held that the individual rights to privacy and data protection are fundamental rights.¹ Nonetheless, recent cases before the Court of Justice of the European Union (CJEU) and the national courts of some member states presented questions of exactly how far these rights may extend.² In *Google Spain SL v. Agencia Española de Protección de Datos*, the CJEU held for the first time that EU citizens have a right to be forgotten.³ Scholars have generally defined the right to be forgotten as an individual's right to remove or restrict the public's access to that individual's personal information on the internet.⁴ With this decision, the CJEU imposed a duty upon search engine operators to protect EU citizens' personal information. Those operators must now honor requests to remove information from the list of results displayed when an individual's name is entered into the search engine.⁵ Such a decision has far-reaching implications for other fundamental rights recognized by the CJEU, notably the right to freedom of expression.⁶

In the days following the CJEU's decision, business executives and legal scholars alike were in an uproar over its potential ramifications. Some

¹ Steven C. Bennett, *The "Right To Be Forgotten": Reconciling EU and US Perspectives*, 30 BERKELEY J. INT'L L. 161, 168 (2012).

² See, e.g., Case C-101/01, Sweden v. Bodil Lindqvist, 2003 E.C.R. I-12992, I-13004-06 (Nov. 6, 2003) [hereinafter *Bodil Lindqvist*], available at <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=48382&pageIndex=0&doclang=en&mode=1st&dir=&occ=first&part=1&cid=361596> (referring the following question to the CJEU: "Can the provisions of [Directive 95/46], in a case such as the above, be regarded as bringing about a restriction which conflicts with the general principles of freedom of expression or other freedoms or rights. . . ."); Case C-524/06, Huber v. Germany, 2008 ECR I-09705, ¶ 40 (Dec. 16, 2008), available at <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62006CJ0524&qid=1457040534205&from=EN> (referring the following question to the CJEU: "Is the general processing of personal data of foreign citizens of the Union in a central register of foreign nationals compatible with . . . the requirement of necessity under Article 7(e) of Directive 95/46?").

³ Case C-131/12, *Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos (AEDP)*, Mario Costeja González, 2014 ECLI:EU:C:2014:317, ¶ 100(3) (May 13, 2014) [hereinafter *Google Spain*], <http://curia.europa.eu/juris/document/document.jsf?text=&docid=152065&pageIndex=0&doclang=en&mode=1st&dir=&occ=first&part=1&cid=356089>.

⁴ David Lindsay, *The 'Right To Be Forgotten' in European Data Protection Law*, in EMERGING CHALLENGES IN PRIVACY LAW 290, 313 (Normann Witzleb et al. eds., 2014).

⁵ *Google Spain*, Case C-131/12, ¶ 100(3).

⁶ See generally David Drummond, Op-Ed., *We Need to Talk About the Right To Be Forgotten*, THE GUARDIAN (July 10, 2014), <http://www.theguardian.com/commentisfree/2014/jul/10/right-to-be-forgotten-european-ruling-google-debate>.

argued that *Google Spain* was a blow to the freedom of expression and the right of the public to access information—both of which are expressly protected under Article 11 of the Charter of Fundamental Rights of the European Union (Charter).⁷ This Note addresses that criticism as well as the tension which exists between the right to be forgotten and the freedom of expression.

Exploration of the scope of the right to be forgotten and its implications for internet search engine providers is critically important. Despite the unprecedented nature of the case, the CJEU provided little guidance as to how to practically implement the right to be forgotten, and failed to clearly specify what kinds of companies would be affected.⁸ An analysis of the tension between the rights at issue is crucial to achieving greater clarity in EU law. Courts, claimants, and the defendants of those claims will benefit from having more guidance about the parameters of the right to be forgotten and the grounds upon which such a claim can be raised.⁹

This Note addresses the questions raised by *Google Spain*, and argues that a right to be forgotten can exist alongside the freedom of expression. Additionally, this Note argues that any balance between these two principles should be formulated in a way that provides clear legal guidance to those affected by the *Google Spain* decision. Part I discusses the state of European privacy and data protection law leading up to the *Google Spain* decision. Part II then examines the tension between the right to be forgotten and the freedom of expression in comparison to similar tensions in EU law. Lastly, Part III identifies the kind of data protection schemes that would resolve the questions raised by *Google Spain*, demonstrates that the right to be forgotten

⁷ See, e.g., Roy Greenslade, *Article 19's Call to Google Over 'Right To Be Forgotten' Ruling*, THE GUARDIAN (Oct. 16, 2014), <http://www.theguardian.com/media/greenslade/2014/oct/16/freedom-of-speech-google> (discussing an advocacy group's plea to Google to protect the freedom of expression despite the court's decision in *Google Spain*); see also Drummond, *supra* note 6. See generally Charter of Fundamental Rights of the European Union, art. 11, 2012 O.J. (C 326) 391, 398 [hereinafter Charter].

⁸ For example, some scholars and legal analysts have questioned whether companies like Facebook that have a search feature will be captured by the *Google Spain* decision. See, e.g., Jeffrey Toobin, *The Solace of Oblivion*, NEW YORKER, Sept. 29, 2014, at 26, available at <http://www.newyorker.com/magazine/2014/09/29/solace-oblivion>.

⁹ The CJEU failed to delineate what kinds of information individuals can have removed and whether the right would apply differently to public figures, leaving companies to adopt their own standards for when to grant a request. See, e.g., Alistair Barr & Rolfe Winkler, *Google Offers 'Right To Be Forgotten' Form in Europe*, WALL ST. J., May 30, 2014, <http://www.wsj.com/articles/google-committee-of-experts-to-deal-with-right-to-be-forgotten-1401426748>.

can exist alongside the freedom of expression in EU law, and provides useful guidance to those whose task it is to give effect to this right.

II. HISTORY OF PRIVACY AND DATA PROTECTION RIGHTS IN THE EUROPEAN UNION AND ITS MEMBER STATES

The CJEU's recognition of a right to be forgotten is unprecedented, but momentum towards this kind of privacy right was present well before the CJEU considered *Google Spain*.¹⁰ Exploration of the roots of data protection rights provides an important basis for understanding the complexity of and rationale behind a right to be forgotten. In fact, developments in EU law and the law of its member states laid the foundation for the right to be forgotten as recognized in *Google Spain*.¹¹

A. Data Protection Laws Before 1995 and the EU's Data Protection Directive

In the years following World War II, European societies developed an interest in the protection of privacy rights.¹² European governments responded to this increased interest by proposing and enacting privacy laws within their countries.¹³ As inconsistencies between the various state laws arose, government officials and scholars called for harmonization across Europe.¹⁴

The Council of Europe made an early attempt to harmonize the region's privacy and data protection laws by enacting the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data.¹⁵ This was the first legally binding data protection treaty to come into

¹⁰ Lindsay, *supra* note 4, at 302–06 (describing the history of relevant privacy rights in EU member states).

¹¹ See *infra* Part II.A–B (describing the history and development of EU and member state privacy and data protection law).

¹² JACQUELINE KLOSEK, *THE WAR ON PRIVACY* 78 (2007) (“In the years following World War II, in light of the horrors raised by the holocaust, governments were sensitive to the importance of respecting their citizens’ right to maintain the privacy of certain personal information.”).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, Council of Europe, pmbl., *opened for signature*, Jan. 28, 1981, C.E.T.S. No. 108 [hereinafter Convention].

force in Europe.¹⁶ It guarantees an individual's right to access any of his or her stored personal information.¹⁷ However, the Convention also includes a number of exceptions to that right.¹⁸ For example, it expressly states that a member state may derogate from certain treaty provisions when "such derogation is provided for by the law of the Party and constitutes a necessary measure," or when personal data is used for statistics or scientific research with no risk of infringement on privacy.¹⁹ With its focus on the protection of individual privacy rights, the Convention paved the way for more extensive data protection initiatives, the most important being the EU's 1995 Data Protection Directive.²⁰

Since the Convention entered into force, EU law has moved toward "put[ting] individuals in control of their own data and reinforc[ing] legal and practical certainty for economic operators and public authorities."²¹ Improvements upon existing technological capabilities and the development of an "information society" led to the enactment of the EU's Directive on the Protection of Individuals with regard to the Processing of Personal Data and on the Free Movement of Such Data (Data Protection Directive) in 1995.²² Using the Convention as a starting point, the EU moved toward even greater harmonization and consistency between the data protection laws of its member states.²³

¹⁶ COUNCIL OF EUROPE, *Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data: Summary*, <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/108>.

¹⁷ Convention, *supra* note 15, art. 8

¹⁸ *Id.* art. 9.

¹⁹ *Id.*

²⁰ Lindsay, *supra* note 4, at 308.

²¹ *Proposal for a Regulation of the European Parliament and of the Council on the Protection of Individuals with regard to the Processing of Personal Data and on the Free Movement of Such Data (General Data Protection Regulation)*, at 2, COM (2012) 11 final (Jan. 25, 2012) [hereinafter *General Data Protection Regulation*], available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52012PC0011&from=en>.

²² 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, 1995 O.J. (L 281) 31, 31–32 [hereinafter *Data Protection Directive*], available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31995L0046&qid=1456693976267&from=EN>.

²³ Peter Hustinx, *The Reform of EU Data Protection: Towards More Effective and More Consistent Data Protection Across the EU*, in EMERGING CHALLENGES IN PRIVACY LAW 64 (Normann Witzleb et al. eds., 2014) (noting that the European Commission was pushed to adopt the Data Protection Directive because of the need for greater harmonization and consistency among national laws than the Convention would facilitate).

In the Data Protection Directive, the European Commission (Commission), the EU's independent executive body responsible for proposing and enforcing European legislation, announced two reasons for expanding the Union's data protection framework. First, it stated that the lack of harmony between European data protection laws would create obstacles for data transfers between countries.²⁴ Second, the Commission noted that increased data protection was necessary to safeguard "fundamental rights and freedoms."²⁵ The Data Protection Directive sets forth standards that all states must meet and—within the confines of the Directive—provides states "considerable leeway" as to how those norms may be implemented.²⁶

While a right to be forgotten is not expressly mentioned in the Data Protection Directive, Articles 6, 12, and 14 all suggest that individuals have control over their personal information, and a general right to "erase" said information. For example, Article 6(1) unequivocally provides that personal information may not be kept for any longer than necessary to fulfill the purpose for which the information was originally collected.²⁷ This statement suggests companies may not treat an individual's personal information like an ordinary consumer good—i.e., because the information relates to an individual, it may not be used indefinitely. The Data Protection Directive's prohibition on retaining information after a certain period of time also introduces the idea of *collectors* (such as search engine companies) engaging in data erasure, even if that is not the only means of complying with the law.²⁸

Article 12 of the Data Protection Directive makes a more direct reference to the erasure of data.²⁹ This provision not only grants individuals the right to block the processing of any information that does not comply with the Directive's requirements,³⁰ but also provides the right to *apply* to have such

²⁴ Data Protection Directive, *supra* note 22, pmbl. 8.

²⁵ *Id.* pmbl. 10.

²⁶ *Id.* art. 5; CHRISTOPHER KUNER, EUROPEAN DATA PRIVACY LAW AND ONLINE BUSINESS 29 (2003).

²⁷ Data Protection Directive, *supra* note 22, art. 6(1)(e).

²⁸ Lindsay, *supra* note 4, at 309 (noting the Data Protection Directive provides for the erasure of data in three distinct provisions, including one prohibiting the retention of collected data for no longer than necessary to achieve the purpose of a data collection initiative).

²⁹ Data Protection Directive, *supra* note 22, art. 12.

³⁰ *Id.* art. (a) ("Member States shall guarantee every data subject the right to obtain from the controller . . . as appropriate the . . . erasure or blocking of data the processing of which does not comply with the provisions of this Directive, in particular because of the incomplete or inaccurate nature of the data.").

information erased.³¹ Article 12 thus represents a crucial step toward conferring individuals an express right to have their information erased.

Lastly, Article 14 grants EU citizens the right to object to data processing and requires the controller to comply with valid objections.³² The Directive's requirement that controllers cease processing data upon receiving successful objections is important because such language implies a qualified right of erasure.³³ Thus, these provisions within the Data Protection Directive represent the precursor to the EU's official recognition of a right to be forgotten.

In 2012, the Commission proposed a major reform of the 1995 Data Protection Directive.³⁴ In adopting this proposal—known as the General Data Protection Regulation or GDPR—the Commission noted that the Data Protection Directive, while sound in its objectives and principles, allowed for inconsistent implementation across member states.³⁵ The 2012 GDPR was therefore touted as an opportunity for the EU to create a stronger and more cohesive data protection law.³⁶

Arguably, the most controversial reform in the GDPR was set forth in Article 17, which provides that individuals “shall have the right to obtain from the controller the erasure of personal data relating to them” provided that the individual can meet one of four grounds for erasure.³⁷ The four grounds for erasure are: (1) “the data are no longer necessary in relation to the purposes for which they were collected,” (2) a person withdraws the consent that the processing was based on or the storage period consented to expired, (3) a person objects to the data processing pursuant to Article 19,

³¹ *Id.* (stating individuals have the right to obtain from the data collector the “rectification, erasure or blocking of data” when appropriate). This suggests that individuals may petition for the removal of data and said petition will be reviewed by the appropriate authority.

³² *Id.* art. 14(a) (“Where there is a justified objection, the processing instigated by the controller may no longer involve those data.”).

³³ Lindsay, *supra* note 4, at 309–10. See also Bert-Jaap Koops, *Forgetting Footprints, Shunning Shadows: A Critical Analysis of the “Right to Be Forgotten” in Big Data Practice*, SCRIPTED, Dec. 2011, at 229, 240, available at <http://script-ed.org/wp-content/uploads/2011/12/koops.pdf> (noting that Article 14 of the Data Protection Directive allows individuals to invoke the right to be forgotten when the retention of the data would be harmful to the individual).

³⁴ Press Release, Eur. Comm'n, Commission Proposes a Comprehensive Reform of Data Protection Rules to Increase Users' Control of Their Data and the Cut Costs for Business (Jan. 25, 2012), available at http://Europa.eu/rapid/press-release_IP-12-46_en.htm?locale=en.

³⁵ *General Data Protection Regulation*, *supra* note 21, at 2.

³⁶ *Id.*

³⁷ *Id.* at 51.

and (4) the processing does not comply with the GDPR.³⁸ In its explanatory memorandum on the GDPR, the Commission clarified that Article 17 affirmatively provides EU citizens with a right to be forgotten and a right to erasure.³⁹ The 2012 proposal is the first time the EU formally recognized the right of individuals to be “forgotten.”⁴⁰

Though some scholars viewed the GDPR as a welcome and necessary change, Article 17’s recognition of a right to be forgotten was highly controversial.⁴¹ Some argued that this right was an unprecedented form of online censorship, with others going so far as to claim that it represented the biggest threat to freedom of speech in recent years.⁴² Despite those critiques, the history of data protection laws in Europe represents the level of transnational interest in according greater privacy rights to personal information that makes its way onto the internet.

B. Data Protection Laws Within European Nations

Recognition of a right to be forgotten also gained support from within the domestic laws of its member states.⁴³ Many countries developed expansive

³⁸ *Id.*

³⁹ *Id.* at 9.

⁴⁰ *Id.*

⁴¹ For an example of support for the GDPR and the right to be forgotten, see John Hendel, *Why Journalists Shouldn’t Fear Europe’s ‘Right to Be Forgotten,’* THE ATLANTIC (Jan. 25, 2012), <http://www.theatlantic.com/technology/archive/2012/01/why-journalists-shouldnt-fear-europes-right-to-be-forgotten/251955/2/>.

⁴² See Jeffrey Rosen, *The Right to Be Forgotten*, 64 STAN. L. REV. ONLINE 88, 88 (2012) (arguing that the right to be forgotten is “the biggest threat to free speech in the coming decade”); Jane Yakowitz, *More Crap from the E.U.*, INFO/LAW BLOG (Jan. 25, 2012), <http://blogs.law.harvard.edu/infolaw/2012/01/25/more-crap-from-the-e-u/> (opining that the EU is engaging in “a misguided attack on the information economy”). For a more recent expression of this argument, see Olivia Solon, *EU ‘Right To Be Forgotten’ Ruling Paves Way for Censorship*, WIRED.CO.UK (May 13, 2014), <http://www.wired.co.uk/news/archive/2014-05/13/right-to-be-forgotten-blog>.

⁴³ See GLORIA GONZÁLEZ FUSTER, *The Surfacing of National Norms on Data Processing in Europe*, in THE EMERGENCE OF PERSONAL DATA AS A FUNDAMENTAL RIGHT OF THE EU 245–47 (2014). In some countries, the concept of a right to be forgotten emerged as a general right to data protection. The French government conceived of this concept as a right to oblivion or *droit à l’oubli numérique* (right to digital forgetfulness). Similarly, the Spanish government referred to this concept as a right to forget, or *derecho al olvido*. In Italy, the right to be forgotten is most closely related to the right to oblivion, or *dirritto all’ oblio*. Lindsay, *supra* note 4, at 302.

bodies of law around privacy rights and a right to be forgotten.⁴⁴ In particular, this Note will focus on the efforts that took place in Germany and France⁴⁵—both of which used a strong tradition of personality and privacy rights as the foundation for the development of the right to be forgotten.⁴⁶ The legal developments within these member states, along with developments in EU law, make plain the recognition of the right to be forgotten prior to the ECJ's decision in *Google Spain*.

1. Data Protection Laws in Germany Prior to Google Spain

Germany recognized an individual's right to privacy and control over his or her personal information long before the *Google Spain* decision. In 1973, the German Federal Constitutional Court expressly recognized that individuals have a fundamental right to determine how their personal information is used.⁴⁷ Similarly, in 2003, Germany implemented legislation granting an implicit right to erase personal data processed in both the public and private sector.⁴⁸ These steps toward broader personal privacy rights provide evidence of the recognition of the right to be forgotten at the national level.

In *Lebach I*, the complainant argued the defendant television company infringed upon his right of personality when the company sought to broadcast a documentary about his conviction for robbery.⁴⁹ Significantly, the documentary included the complainant's name, photograph, and references to his sexual orientation.⁵⁰ In overturning the lower court's

⁴⁴ FUSTER, *supra* note 43, at 55–70 (noting the development of data protection and privacy laws in Germany, Sweden, France, Denmark, Norway, Luxembourg, Portugal, Austria, and Spain in the 1970s and 1980s).

⁴⁵ I consider the efforts in Germany and France to be most relevant since those countries are two of the most influential members of the EU.

⁴⁶ Lindsay, *supra* note 4, at 302 (outlining the emergence of the right to be forgotten in France as originating from “three related, but conceptually and historically distinguished rights”).

⁴⁷ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 1973, 35 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 202 (Ger.), translated in DONALD P. KOMMERS & RUSSELL A. MILLER, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 479–83 (3d ed. 2012) [hereinafter *Lebach I*].

⁴⁸ Bundesdatenschutzgesetz [BDSG] [Federal Data Protection Act], 14 Jan. 2003, Bundesgesetzblatt [BGBl] at 66, § 1(1) (Ger.) [hereinafter Federal Data Protection Act], available at <http://www.iuscomp.org/gla/statutes/BDSG.htm>.

⁴⁹ *Lebach I*, *supra* note 47, at 479–80.

⁵⁰ *Id.* at 480.

decision to allow the documentary to air, the Federal Constitutional Court noted, “[i]n principle, everyone has the right to determine for him- or herself whether and to what extent others may make public an account of either certain like incidents or one’s entire life story.”⁵¹ With that statement, the court acknowledged that individuals have a right to control their personal information, and thus have a right to exclude others from access to said information.

The Federal Constitutional Court went on to explicitly establish limits on the right of self-determination.⁵² The court reasoned that since both a right to self-determination and a right to access information were included in German constitutional law, neither held precedence over the other.⁵³ However, the court acknowledged that under certain circumstances the right to privacy trumps any public information rights.⁵⁴ Nevertheless, the fact that the documentary’s subject matter was no longer current information and that it could have the effect of limiting the complainant’s reintegration into society persuaded the court to rule in the complainant’s favor.⁵⁵

Germany’s legislative branch took up the crusade toward greater privacy rights as well. Recognition of an individual’s right to control personal data was reinforced by the national government’s passage of the *Act on Protection against Misuse of Personal Data in Data Processing* (Federal Data Protection Act).⁵⁶ The Act—which focused on data processing in both the public and private sector—noted that its purpose was “to protect the individual against his right to privacy being impaired through the handling of his personal data.”⁵⁷ The 1997 version of the Federal Data Protection Act stipulated that the processing of personal data was forbidden unless authorized by another provision in the Act, or consented to by the individual whose data was being processed.⁵⁸ As these examples show, the German legal system has given individuals an express right to control their information, and an implicit right to erase personal information by withdrawing consent to its collection.

⁵¹ *Id.*

⁵² *Id.* at 480–81 (explaining the scope of limits on that right for private individuals).

⁵³ *Id.* at 481.

⁵⁴ *Id.* at 481–82.

⁵⁵ *Id.* at 483.

⁵⁶ Federal Data Protection Act, *supra* note 48.

⁵⁷ *Id.*

⁵⁸ FUSTER, *supra* note 43, at 60.

2. *Data Protection Laws in France Prior to Google Spain*

Lawmakers in France also used legislative acts to recognize data protection rights. In 1978, the National Assembly (Assemblée Nationale) adopted the *Act on Information Technology, Data Files and Civil Liberties*.⁵⁹ The law included, among other provisions, a right to refuse the processing of data.⁶⁰ Under this law, individuals who provided proof of identity could request that the data controller “rectify, complete, update, block, or *delete*” any personal information that was inaccurate or expired.⁶¹ The French government’s assertion that individuals can request the deletion of personal information in certain circumstances suggests that it supports the right of erasure.

The French and German experiences evidence the recognition of personality rights in the collection, storage, and (in some cases) erasure of data at the national level. Moreover, these experiences illustrate that member states have not only contemplated the tension between privacy rights and the freedom of expression, but have concluded that these rights can coexist. This conclusion, in conjunction with the previously outlined examples of Community-wide legislation, set the stage for the CJEU’s recognition of the right to be forgotten in *Google Spain*.

C. *Google Spain SL v. Agencia Española de Protección de Datos*

In *Google Spain*, the CJEU held that search engine operators must remove links to webpages displayed following the search of an individual’s name that are “inadequate, irrelevant, or no longer relevant, or excessive in relation to the purposes of the processing at issue.”⁶² This remains true even when the information has been published lawfully and is factually correct.⁶³ Although the CJEU’s decision was unprecedented, it was not wholly unexpected. No EU law formally extended a right to be forgotten, however, the culmination of legal developments that had resulted since the passage of

⁵⁹ Loi 78-17 du 6 janvier 1978 relative à l’informatique, aux fichiers et aux libertés [Law 78-17 of January 6, 1978 on Information Technology, Data Files, and Civil Liberties], Commission Nationale de L’informatique et des Libertés [CNIL] [National Commission on Informatics and Liberty], Aug. 6, 2004 [hereinafter French Data Protection Law], available at <http://www.legislationline.org/documents/id/744>.

⁶⁰ *Id.* arts. 38, 40.

⁶¹ *Id.* art. 40 (emphasis added).

⁶² *Google Spain*, Case C-131/12, ¶ 94.

⁶³ *Id.*

the Convention certainly signaled the evolution of the right. Moreover, the increasing number of complaints against search engine companies and calls for an official recognition of a right to be forgotten illustrate this point.⁶⁴

On March 5, 2010, Mr. Costeja-González filed a complaint with the Spanish Data Protection Agency over search results related to a repossession of his home in 1998.⁶⁵ Prior to filing a complaint, Mr. Costeja-González attempted to have Google remove the information, arguing that the news stories were outdated because the debt owed on the home had been paid and the home sold.⁶⁶ When Google's formal complaint process failed to provide a remedy, Costeja-González filed his complaint with Spanish authorities.⁶⁷ He requested, among other things, that Google Spain or Google, Inc. be required to remove or conceal the news stories so that they no longer appeared in search results.⁶⁸ The Spanish Data Protection Agency honored Costeja-González's request.⁶⁹ Google Spain and Google, Inc. appealed the Agency's decision to the Spanish National High Court, the Audiencia Nacional, and that court referred the decision to the CJEU.⁷⁰

To determine whether Mr. Costeja-González had a right to remove the links, the CJEU evaluated the scope of the 1995 Data Protection Directive.⁷¹ Ultimately, the CJEU reached three important conclusions regarding Google's duty to erase personal information and the right to be forgotten. First, the CJEU found that search engines engage in the processing of personal data, and are therefore "controllers" within the meaning of Article 2(b) and (d).⁷² Next, the CJEU concluded that Articles 12(b) and 14 should be interpreted to mean that search engine operators, such as Google, are required to remove links to web pages that are displayed following a search of an individual's name at the request of that individual.⁷³ Finally, the CJEU held that the right to have personal information removed is limited⁷⁴—a

⁶⁴ See generally Kashmir Hill, *Plastic Surgeon's Legal Quest to Facelift Google Search Results*, FORBES, Mar. 7, 2011, <http://www.forbes.com/sites/kashmirhill/2011/03/07/plastic-surgeons-legal-quest-to-facelift-google-search-results/>.

⁶⁵ *Google Spain*, Case C-131/12, ¶ 14.

⁶⁶ *The Man Who Sued Google to Be Forgotten*, NEWSWEEK, May 30, 2014, available at <http://www.newsweek.com/man-who-sued-google-be-forgotten-252854>.

⁶⁷ *Id.*

⁶⁸ *Google Spain*, Case C-131/12, ¶ 15.

⁶⁹ *Id.* ¶ 17.

⁷⁰ *Id.* ¶¶ 18, 20.

⁷¹ *Id.* ¶ 20 (describing the legal issues the CJEU address in this case).

⁷² *Id.* ¶ 100(1).

⁷³ *Id.* ¶ 100(3).

⁷⁴ *Id.* ¶ 100(4).

complainant must establish that he or she has a right to have the information removed, and demonstrate that there is not a “preponderant interest of the general public” in accessing the information.⁷⁵ Though the court briefly addressed the scope of this newly defined right, it left room for further discussion and interpretation regarding how the right would fit into the greater context of EU law.⁷⁶

III. TENSION BETWEEN A RIGHT TO BE FORGOTTEN AND FREEDOM OF EXPRESSION

Generally, both the CJEU and scholars agree that balance is needed between the right to be forgotten and the freedom of expression.⁷⁷ What is undecided is how much weight one right should carry in relation to the other, and who should conduct the balancing. This section addresses those lingering questions following the CJEU’s *Google Spain* decision. It begins by first defining the freedom of expression. Next, this section clarifies exactly where the points of tension between the freedom of expression and the right to be forgotten lie. Lastly, this section offers an analysis of the varying ways the CJEU can strike a balance between the rights at issue. In so doing, it offers a critique of each method, and ultimately points out the kinds of questions the CJEU should be weary of as it interprets the rule set out in *Google Spain* in the future.

A. Defining the Freedom of Expression

Despite its strict adherence to notions of individual privacy rights, the EU has expressly recognized that individuals have a fundamental right to free expression.⁷⁸ According to the CJEU, the freedom of expression includes the expression of opinions and the freedom to receive and impart information.⁷⁹ Additionally, the court has cited with approval decisions from the European Court of Human Rights holding that the freedom of expression is applicable

⁷⁵ *Id.*

⁷⁶ See *supra* note 8 (describing one question left open by the *Google Spain* decision).

⁷⁷ See, e.g., *Google Spain*, Case C-131/12, ¶ 85 (discussing the conflict between an individual’s right to privacy, a journalist or publisher’s freedom of expression, and how Article 9 of the Data Protection Directive balances that conflict).

⁷⁸ Charter, art. 11, 2012 O.J. (C 326) 391, 398.

⁷⁹ Case C-73/07, *Tietosuojavaltuutettu v. Satakunnan Markkinapörssi Oy*, 2008 E.C.R. I-9831, ¶ 39 (May 8, 2008) [hereinafter *Satakunnan Markkinapörssi*], available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62007CJ0073>.

to both information that offends or shocks the state, and information that is favorably received.⁸⁰ As the newer rule, tradition dictates that the right to be forgotten should be altered as necessary to fit into the previously established framework of Community law with respect to the freedom of expression.⁸¹

B. Points of Tension Between Freedom of Expression and the Right to Be Forgotten

Some scholars and business executives have opposed the recognition of a right to be forgotten, claiming it is an imposition into free expression rights and amounts to censorship.⁸² To place these criticisms in perspective, it is necessary to examine the specific points at which the right to be forgotten creates tension with the freedom of expression.

1. Tension Between Public Access to Information and Individual Privacy Rights

The language used in *Google Spain* illuminates the first point of tension between the rights at issue—the tension between public access to information versus individual privacy.⁸³ The CJEU specifically noted that a right to be forgotten cannot exist without balancing other relevant interests like the freedom of expression.⁸⁴ In other words, neither right takes absolute precedence over the other.

In some cases, the CJEU has determined that it is reasonable to allow free access to information.⁸⁵ This is especially true when the information is used for journalistic purposes.⁸⁶ However, acceptance of this form of expression conflicts with the CJEU's proposition that an individual's interest in removing personal data outweighs the public's interest in accessing his or her information; even if said information has been lawfully published and is

⁸⁰ *Id.*

⁸¹ Miguel Pojares Maduro, *Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism*, 1 EUR. J. LEGAL STUD. 138, 146 (2007) (describing the CJEU's adherence to a "precedent oriented" approach that defers to a well-established line of case law).

⁸² Rosen, *supra* note 42; Yakowitz, *supra* note 42.

⁸³ *Google Spain*, Case C-131/12, § 14.

⁸⁴ *Id.*

⁸⁵ *Id.* ¶ 97.

⁸⁶ *See id.* ¶ 85.

true.⁸⁷ Accordingly, personal data included in internet search results that falls within the provisions of the Data Protection Directive provides an individual with a prevailing right of removal.⁸⁸

The CJEU's convicting recognition of these counter vailing positions leads to the conclusion that the relevant compelling interest—public or private—depends on the facts of given case. There is arguably some social utility in allowing one right to trump the other in cases where access to information is justified by a compelling public interest, or where the interests of the individual prevail. Nevertheless, since one right cannot always trump the other, these competing justifications necessarily result in tension between the right to be forgotten and the right to freedom of expression.

2. Tension Between Access to Information for Research and Government Authority to Regulate Access

A second point of tension results from the conflict between data collection for journalistic and public research purposes, and the state's right to regulate data collection for the protection of individuals. In *Google Spain*, the CJEU concluded the Data Protection Directive required search engine operators to remove unwanted links to sites with information relating to a person that appear after a search of their name.⁸⁹ Moreover, the court further held that in cases where a legitimate right to removal is found, that right overrides “the interest of the general public in finding that information upon a search relating to the [individual's] name.”⁹⁰

Such language is in obvious tension with the right to freedom of expression granted in Article 11 of the Charter.⁹¹ Although the Charter also protects an individual's personal data, it does not do so at the expense of the freedom of expression, and does not purport to hold one right in greater importance over the other.⁹² Since the decision of the CJEU upholds the right to be forgotten at the expense of—in some cases—the freedom of

⁸⁷ See *id.* ¶¶ 94, 97.

⁸⁸ *Id.*

⁸⁹ *Id.* ¶ 100(3).

⁹⁰ *Id.* ¶ 97.

⁹¹ *Id.* (indicating that there are situations, like when a public figure is involved, when the interest of the public will outweigh the right of erasure).

⁹² Charter, art. 8(1), 2012 O.J. (C 326) 391, 397 (“Everyone has the right to the protection of personal data concerning him or her.”).

expression and information, it is in tension with the plain language of the Charter.⁹³

C. Addressing the Tension Between Privacy Rights and Freedom of Expression

Despite the tension between the right to be forgotten and the freedom of expression, it is possible for these rights to coexist within the EU's body of law. Perhaps the easiest way to demonstrate how these rights can coexist is with a few hypothetical scenarios. First, imagine a news article about a prominent politician's former membership in an unpopular social group surfaces in an internet search of his name. The politician faces public backlash for his prior membership in the group, and seeks to invoke the right to be forgotten under *Google Spain*.

Second, imagine photographs of a university student consuming alcohol at a social event are posted on the internet. Years later, when the student is applying for work, she finds that a link to the photographs is one of the first results displayed upon a Google search of her name.

Lastly, imagine that a private restaurant owner finds that negative reviews of his business are displayed when his name is entered into Google's search bar. Would the *Google Spain* decision require links to this personal information be removed? This section attempts to answer this question using the balancing tests suggested by prior ECJ case law and EU scholars.

1. ECJ Case Law and Proposals for Balancing: Reasoning by Analogy

One approach to easing the clash between the right to be forgotten and the freedom of expression is to look to tensions between similar rights and the way in which the CJEU has resolved them. The CJEU has analyzed conflicts between individual privacy rights and the right of the public to access information on many occasions. Exploring those decisions may aid in understanding how the rights at issue in *Google Spain* can coexist.

For example, in previous cases the CJEU attempted to set guidelines for balancing privacy and free expression rights.⁹⁴ In *Bodil Lindqvist*, the CJEU

⁹³ Google's Chief Legal Officer, David Drummond, appeared to share this view when he commented that Google's decisions on what links to remove are based on the international community's understanding that everyone has a right to freedom of expression. Drummond, *supra* note 6.

⁹⁴ See *Bodil Lindqvist*, Case-101/01; *Satakunnan Markkinaporssi*, Case C-73/07.

noted that standards for balancing competing interests are contained in the Data Protection Directive.⁹⁵ In particular, the Directive provides rules for when the processing of personal information is allowed, and requires safeguards be implemented to protect the public.⁹⁶ Specifically, Article 9 includes a derogation clause that allows states to impose exceptions to some provisions of the Directive when the processing of personal information is carried out for journalistic, artistic, or literary purposes, and only when derogation is necessary to reconcile a right to privacy with the freedom of expression.⁹⁷ Similarly, Article 13 provides that states may adopt legislation to restrict the scope of some of the Directive's provisions when doing so is necessary for "the protection of the data subject or the rights and freedoms of others."⁹⁸ In addition, the CJEU also offered its own guidelines for balancing privacy and freedom of expression rights. It held that while the member states have some autonomy to weigh personal privacy rights against the freedom of expression, they should be diligent in ensuring the balance comports with "the fundamental rights protected by the Community legal order or with the other general principles of Community law."⁹⁹

The same logic can be applied to the right to be forgotten. Turning to the hypothetical cases, the political figure would face some difficulty in removing search results about his former membership in an unpopular group because Google would argue those results were included for journalistic purposes. The politician is a public figure, and as such, the public has a greater interest in his personal life. The balance of interests in this case would thus likely fall in favor of the search engine because the public interest would outweigh the politician's right to privacy. In contrast, the university student might have more luck under the standard set forth in *Bodil Lindqvist*, because the inclusion of links to otherwise social photographs does not appear to fulfill a journalistic, artistic, or literary purpose.

By adding a provision to derogate under circumstances similar to those recognized in Articles 9 and 13 of the Data Protection Directive, the CJEU would create a space wherein member states could make their own decisions regarding which right should carry more weight. For reasons discussed below, that may not be the best solution. However, adherence to the CJEU's additional requirement that any balancing comport with the EU's

⁹⁵ *Bodil Lindqvist*, Case C-101/01, ¶ 82.

⁹⁶ *Id.* ¶¶ 82–90.

⁹⁷ Data Protection Directive, *supra* note 22, art. 9.

⁹⁸ *Id.* art. 13(1)(g).

⁹⁹ *Bodil Lindqvist*, Case C-101/01, ¶ 87.

fundamental rights would make it clear that one right will not always take precedence over the other, and that they can coexist.

In *Tietosuojavaltuutettu v. Satakunnan Markkinapörssi Oy*, the court also suggested guidelines for balancing fundamental interests.¹⁰⁰ There, the CJEU noted that both individual privacy rights and the freedom of expression can be restricted, provided that any imposed limitations are laid down by law, meet the aims of protection of fundamental rights, and are necessary for a democratic society.¹⁰¹ As was the case with the standard set forth in *Bodil Lindqvist*, the outcome of the hypothetical complainants' cases might vary depending on where the case was brought, and that member state's interpretation of each of the aforementioned factors.

The balancing methods employed by the CJEU in these prior cases provide member states with some guidance, but lack clear direction with respect to application. Although the CJEU believes a lack of specificity is necessary,¹⁰² some consistency in the standard used to conduct a balancing test would likely accommodate the EU's repeated concern regarding the harmonization of data protection laws throughout the Community.¹⁰³ Moreover, the ambiguity surrounding the CJEU's decisions interpreting the guidelines set forth in the Data Protection Directive allows member states to make their own value judgments about which right—the right to be forgotten or the freedom of expression—should be prioritized. As a result, decisions regarding what is necessary for a democratic society, or needed for journalistic, artistic, or literary purposes could vary widely across member states. Thus, under the aforementioned hypothetical cases, one state might decide that links to the news article about the politician are not necessary for journalistic purposes, while another might reach the opposite conclusion. Such flexibility invites unnecessary confusion into the law, and therefore does not fully resolve the problem resulting from *Google Spain*.¹⁰⁴

¹⁰⁰ *Satakunnan Markkinapörssi*, Case C-73/07, ¶¶ 55–56.

¹⁰¹ *Id.* The language used by the court here is similar to the limiting language placed on the right to privacy found in Article 8(2) of the European Convention on the Protection of Human Rights and Fundamental Freedoms. See Convention, *supra* note 15, art. 8(2).

¹⁰² *Bodil Lindqvist*, Case C-101/01, ¶ 83 (“As regards Directive 95/46 itself, its provisions are necessarily relatively general since it has to be applied to a large number of very different situations.”).

¹⁰³ See, e.g., Data Protection Directive, *supra* note 22, pmb1. 1 (listing “common action” and the “elimination of barriers” as objectives of the EU); *Bodil Lindqvist*, Case C-101/01, ¶ 79.

¹⁰⁴ Allowing member states to use general guidelines in making the ultimate decision regarding balancing of such fundamental rights is unlikely to lead to greater harmony in data protection laws across the EU. In fact, it was a lack of harmony in data protection and privacy

2. *Allowing the Member States to Strike a Balance*

The CJEU has said that it is up to the member states to resolve tensions between fundamental rights when the Data Protection Directive fails to provide clear guidance. In *Institut professionnel des agents immobiliers (IPI) v. Englebert*, the court held that Article 13 of the Data Protection Directive grants member states the freedom to decide what legislative measures they will take to address limits to a private individual's right to information.¹⁰⁵ In other words, the court held that the EU Parliament intended for the member states to exercise discretion over limits to the individual right to control data.

The CJEU also endorsed state execution of a balancing test in early cases like *Bodil Lindqvist* and *Satakunnan Markkinapörssi*. In *Bodil Lindqvist*, the CJEU held that mechanisms for balancing the rights at issue are derived from the "adoption, by the Member States, of national provisions implementing that directive."¹⁰⁶ That rule was upheld some five years later in *Satakunnan Markkinapörssi*, where the CJEU stated that when striking a balance between rights, member states should be accorded broad discretion to apply their own traditions and social values.¹⁰⁷ Based on the information available, member state balancing appears to be an appropriate solution to the dilemma

laws that prompted the EU to not only adopt the Data Protective Directive, but also consider amendments to that agreement:

The current framework remains sound as far as its objectives and principles are concerned, but it has not prevented fragmentation in the way personal data protection is implemented across the Union, legal uncertainty and a widespread public perception that there are significant risks associated notably with online activity. This is why it is time to build a stronger and more coherent data protection framework in the EU, backed by strong enforcement that will allow the digital economy to develop across the internal market, put individuals in control of their own data and reinforce legal and practical certainty for economic operators and public authorities.

General Data Protection Regulation, *supra* note 21, at 2.

¹⁰⁵ Case C-473/12, *Institut professionnel de agents immobiliers (IPI) v. Englebert* ¶ 42 (Nov. 7, 2013), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=144217&pageIndex=0&doclang=en&mode=1st&dir=&dir=&occ=first&part=1&cid=383795> ("[Article 13] does not oblige the Member States to lay down in their national law exceptions for the purposes listed in Article 13(1)(a) to (g) but, on the contrary, the legislature intended to give them the freedom to decide whether, and if so for what purposes, they wish to take legislative measures aimed at limiting, inter alia, the extent of the obligations to inform the [individual whose data was collected].").

¹⁰⁶ *Bodil Lindqvist*, Case C-101/01, ¶ 82.

¹⁰⁷ *Satakunnan Markkinapörssi*, Case C-73/07, ¶ 53.

presented by the right to be forgotten. Nonetheless, the benefits of adopting this option are outweighed by the problems it presents.

While a member state balancing approach has the benefit of simplicity, it comes at the expense of consistency. The hypothetical case about the restaurant owner illustrates the problem. A country like Germany—which has traditionally upheld the right of individuals to make decisions regarding their personality—might find that the restaurant owner has a right to have the undesirable links removed because he is not a public figure, and therefore has the right to make decisions about how his image is used.¹⁰⁸ Under French law, however, the same restaurant owner might not be afforded the same protection since French courts have held that an individual can request that data processing cease only in certain circumstances, like when the information is inaccurate or expired.¹⁰⁹

Like the Directive-based method, allowing member states to take control of balancing the competing rights will not lead to the harmonization in law that the EU prefers.¹¹⁰ The uncertainty such a standard presents is particularly harmful for those search engine companies that operate within multiple member states. Those companies would likely have a difficult time adjusting to different standards with respect to data protection laws.¹¹¹ Conversely, consistency in the data protection laws of each member state would better facilitate the sharing of information across state lines. Search engine operators would not have to look to dozens of different rules before providing links to information published online. The CJEU has previously concluded that allowing member states to engage in the balancing of rights did not create issues of “predictability” or consistency,¹¹² however, the lack of clear standards for broader harmonization of data protection laws among individual member states renders it nearly impossible to avoid such uncertainty.

Although the balancing tests employed by the CJEU in previous data protection cases have their shortcomings, they are illustrative of the kinds of considerations the court should apply to the right to be forgotten in the future. For example, from the Directive-based method, search engine

¹⁰⁸ See *Lebach I*, *supra* note 47, at 479–80.

¹⁰⁹ French Data Protection Law, *supra* note 59, art. 40.

¹¹⁰ See *supra* notes 103, 105 and accompanying text.

¹¹¹ *General Data Protection Regulation*, *supra* note 21, at 1–2 (noting the lack of a comprehensive approach to personal data protection in the EU “risks slowing down the development of innovative uses of new technologies”).

¹¹² *Bodil Lindqvist*, Case C-101/01, ¶ 84.

companies and courts learn the kind of factors for balancing that exist under EU law. Similarly, from the individual application method, courts and companies learn that questions of balancing may require consideration of the policies of each member state. These considerations provide a basic foundation upon which the CJEU might build a more expansive or applicable test for the right to be forgotten.

3. *Scholarly Opinions on Balancing the Rights at Issue*

Scholarly opinions provide another source for balancing the right to be forgotten and the freedom of expression. For example, Advocate General Niilo Jääskinen believes that “the fundamental right to information merits particular protection in EU law.”¹¹³ He then cautions against any method that places a duty to balance competing private and public interests in the hands of internet search engines.¹¹⁴ Jääskinen argues that allowing search engine companies to create an applicable test would likely lead to the companies being inundated with removal requests, the automatic withdrawal of any objected content, and the disregard of the interests of the original publishers of the information.¹¹⁵ Moreover, he also argues that this method would inevitably result in censorship by the search engine operators.¹¹⁶ Notably, however, the Advocate General does not mention who should shoulder the burden of creating and applying a test for balancing the competing interests.

Some EU scholars note that provisions in the GDPR suggest a way to accommodate the interests of private persons and the countervailing interests of the public.¹¹⁷ The GDPR—a reform proposal for the Data Protection Directive—provides that a right to be forgotten can be limited when exceptions are necessary for journalistic, artistic, or literary expression, for protecting the public interest in public health, or for historical, statistical, or scientific research purposes.¹¹⁸ The GDPR’s methods for choosing between

¹¹³ Opinion of Advocate General Jääskinen, Case C-131/12, *Google Spain SL v. Agencia Española de Protección de Datos (AEPD)* ¶ 107, 121 (May 13, 2014) [hereinafter *Opinion of Advocate General Jääskinen*], <http://curia.europa.eu/juris/document/document.jsf?docid=138782&doclang=EN>. It is important to note that the opinions of Advocate Generals are written independently of the CJEU judgments on cases and are not binding.

¹¹⁴ *Id.* ¶ 133.

¹¹⁵ *Id.* ¶¶ 133–134.

¹¹⁶ *Id.* ¶ 134.

¹¹⁷ Lindsay, *supra* note 4, at 290–91.

¹¹⁸ *General Data Protection Regulation*, *supra* note 21, at 52, art. 17(3).

competing rights differ from those employed by other EU instruments on data protection by allowing for derogation from the right to be forgotten for research purposes and public health.¹¹⁹ Other scholars suggest that the ability to derogate from a right to be forgotten should extend to all forms of expression, not just creative or journalistic expression.¹²⁰ However, such a method for balancing competing rights goes beyond anything currently endorsed by the CJEU or the Data Protection Directive.

Given these suggestions by EU scholars, how would the hypothetical cases be decided? In the case of the politician who wants to remove search links to a news article, scholarly opinions suggest that his request should not be honored. Though he has an interest in privacy under GDPR Article 52—particularly if the information is outdated—it would likely be argued that there is some journalistic purpose that warrants keeping the links. Conversely, the balance between the freedom of expression and the right to be forgotten seems to tip in the other direction in the case of the student. The journalistic, artistic, or public health purpose of the photos seems minimal, if not nonexistent. Thus, the student may have good cause for arguing that limiting free expression here is necessary in order to protect her rights and freedoms. Lastly, in the case of the restaurant owner, it might be argued that there is some journalistic purpose in allowing links to the bad reviews to continue being displayed in search results. There may even be some public health purpose for the continued display of the links if they alleged unsanitary conditions in the restaurant. In this last case, the balance shifts once more toward the right to freedom of expression and allowing the links to remain active.

The methods suggested by scholars and the above hypothetical analysis support an argument that the rights at issue can coexist within EU law. As Advocate General Jääskinen noted, the right to free expression is highly valued in the EU.¹²¹ Individual rights to privacy are also valued. In an attempt to find a balance between those rights, the drafters of the Charter on Fundamental Rights of the European Union provided a framework for

¹¹⁹ *Id.*

¹²⁰ *Committee on Civil Liberties, Justice and Home Affairs, Draft Report on the Proposal for a Regulation of the European Parliament and of the Council on the Protection of Individuals with regard to the Processing of Personal Data and on the Free Movement of Such Data*, at 51–52, COM (2012) 0011 (Dec. 17, 2012), available at http://www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/pr/922/922387/922387en.pdf.

¹²¹ Opinion of Advocate General Jääskinen, *supra* note 113.

adjudication under Article 52.¹²² Similarly, Article 9 of the Data Protection Directive offers some guidance as to how to balance the rights at issue. Thus, two separate documents have contemplated the tension between privacy rights and freedom of information. However, neither EU scholars nor the CJEU consider the tension to be so dispositive as to require that one right always be upheld over the other. The insistence of EU bodies and scholars on striking a balance between a right to be forgotten and the freedom of expression shows that these rights can coexist.

IV. WAYS A RIGHT TO BE FORGOTTEN AND FREEDOM OF EXPRESSION CAN COEXIST

The CJEU's failure to provide substantive guidelines in its *Google Spain* decision left open questions of how a right to be forgotten should be balanced against an existing freedom of expression, who should do the balancing, and on what grounds such a claim may be raised. Using the aforementioned hypothetical situations as a guide, this Note offers suggestions for how those questions may be answered.

A. Easing Tension by Stating When a State May Derogate from a Right to Be Forgotten

To ease the tension between the rights at issue, it is critical that the CJEU delineate with greater detail when a state may derogate from the right to be forgotten. Despite acknowledging the need to conduct a balancing inquiry between the rights at issue, the CJEU went on to conclude that such a balance “may however depend, in specific cases, on the nature of the information in question and its sensitivity for the data subject’s private life and on the *interest of the public* in having that information.”¹²³ Unfortunately, the court failed to adequately explain the parameters of the public interest exception. Instead, it merely noted that an individual’s role in public life would be a consideration in assessing whether the exception would apply.¹²⁴ Indeed, it would be easier to determine which right will hold more weight in a given context if the CJEU specifically stated what kinds of information fall under the broad heading of “public interest.”

¹²² Charter, art. 52, 2012 O.J. (C326) 406, 407 (detailing the process for determining how to properly interpret, apply, and prioritize the rights provided for by the Charter).

¹²³ *Google Spain*, Case C-131/12, ¶ 81 (emphasis added).

¹²⁴ *Id.* ¶ 97.

Using the language included in the Data Protection Directive would be one way the CJEU could expand upon its public interest exception. As previously stated, Article 9 allows member states to derogate from the Directive's provisions when information is processed for artistic, literary, and journalistic purposes.¹²⁵ This Article provides a means by which states can limit an individual's freedom of privacy when doing so is necessary to protect the freedom of expression.¹²⁶ The CJEU could adopt a similar position in the context of the right to be forgotten, and hold that individuals do not have a right of removal when that information exists for certain specified purposes.

For example, the CJEU could stipulate that when information is collected for journalistic reasons, a removal request would be considered under a stricter standard of review. Nevertheless, such a standard would inevitably require courts to further expand upon the true meaning "journalistic purpose"—a heavy burden in a time when it is difficult to draw a line between journalism and information simply published on a blog. Although the Data Protection Directive does not contain language defining the term, the GDPR may provide some helpful insight into how the courts could interpret what constitutes a journalistic purpose. The GDPR's Explanatory Memorandum describes journalistic purpose as those activities engaged in for "the disclosure to the public of information, opinions or ideas, irrespective of the medium which is used to transmit them."¹²⁷ Even with that description, the problem of defining journalistic purpose is a massive undertaking CJEU must face.¹²⁸

Furthermore, while the journalistic purpose standard found in the Data Protection Directive may provide one avenue for expounding upon the public interest exception, the CJEU would still have to determine if it is the best test. On the one hand, this journalistic purpose test would answer some questions left open by *Google Spain*. For example, a test of this nature may show when the right to be forgotten can be invoked, and further provide an additional standard by which both search engine companies and member states can measure whether a removal request should be honored. In addition, it differs from the public interest standard employed by the CJEU in that it takes into consideration the interest of a particular group, the

¹²⁵ Data Protection Directive, *supra* note 22, art. 9.

¹²⁶ *Id.*

¹²⁷ *General Data Protection Regulation*, *supra* note 21, at 36 ¶ 121.

¹²⁸ Due to the complexity of this issue, defining what it means for an activity to have been completed for a journalistic purpose is beyond the scope of this Note.

journalism profession. Finally, in considering whether the information was collected with a journalistic purpose, the court would be adhering to the free expression rights included in Article 11 of the Charter. If the CJEU is interested in finding a balance between the rights at issue, this journalistic purpose test—to the extent the court can overcome the definition problem noted above—would be a pivotal first step in that direction.

On the other hand, a journalistic purpose test could be subject to the same criticism as the general ‘in the public interest’ standard. In some ways, stating that the balance sways towards freedom of expression when the information was collected for journalistic purposes is just as illusory as the existing standard. Arguably, any piece of information could be said to have been collected for a journalistic purpose. Despite this fact, a journalistic purpose standard coupled with an ‘in the public interest’ standard would provide more guidance to search engine companies and the member states than either standard on its own.

Alternatively, the CJEU could adhere to the public interest standard it set out and look to prior case law to better explain what kind of information is in the public interest. Providing greater detail about what constitutes the public interest would also help to settle how to balance the right to be forgotten and the freedom of expression in certain circumstances. For example, in *Tietosuojavaltuutettu v. Satakunnan Markkinapörssi Oy*, the CJEU explained in great detail what constitutes the public interest.¹²⁹ That language could easily be applied to the right to be forgotten. In that case the court stated “public interest arises in any case where the information communicated relates to a public debate which is actually being conducted.”¹³⁰ The court further held that certain topics are by their nature matters of public interest.¹³¹ Those topics include information from public hearings, transparency of political life, and “information on the ideas and attitudes, as well as the conduct, of prominent politicians.”¹³² Lastly, the CJEU noted that certain kinds of information are not matters of public interest. Specifically, information about an individual’s private life that has no connection with the person’s public life or does not contribute to any debate of general interest to society is not within the public interest.¹³³ Ultimately, the court concluded

¹²⁹ *Satakunnan Markkinapörssi*, Case C-73/07, ¶¶ 71–74.

¹³⁰ *Id.* ¶ 73.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* ¶ 74.

the test for public interest should be whether an individual has a “legitimate expectation of respect for his or her private life.”¹³⁴

The CJEU’s explanation of what does and does not constitute the public interest—when combined with other tests—would likely provide some standard for balancing the rights at issue. That conclusion can be drawn by returning to the hypothetical cases of the politician, student, and restaurant owner. In the case of the politician, the links may not have to be removed, since they arguably include information concerning the ideas and attitudes of a prominent politician. The restaurant owner too would not fare well under this public interest test—the links to the reviews relate to his public life, and arguably contribute to a debate of general public interest. The student would likely have the best outcome under this proposed public interest standard. Even if the photos were posted for some journalistic purpose, the student is not a public person and arguably has a legitimate expectation of privacy in this context. Additionally, links to the photos do not contribute to an issue that is of general public interest.

At the very least, by adopting this standard and combining it with other tests, the court could provide individuals with more information about what constitutes the public interest. In addition EU citizens would be able to predict with greater certainty whether a search engine company is obligated to honor their request for removal. That would be an important step towards resolving the questions left open by *Google Spain*.

B. Easing Tension by Providing Clear Standards for Honoring the Right to Be Forgotten Requests

The second step towards harmonizing the right to be forgotten with the existing right of free expression would be to provide clearer standards for when companies must honor individuals’ removal requests. In the wake of *Google Spain*, search engine companies have largely been left with the task of making determinations on removal requests.¹³⁵ Throughout *Google Spain*, the court noted that information is no longer necessary when it appears “to be inadequate, irrelevant or no longer relevant, or excessive.”¹³⁶ However, the

¹³⁴ *Id.*

¹³⁵ *Factsheet on the Right to be Forgotten Ruling*, EUROPEAN COMMISSION, http://ec.europa.eu/justice/data-protection/files/factsheets/factsheet_data_protection_en.pdf (“Google will have to assess deletion requests on a case-by-case basis and apply the criteria mentioned in EU law and the European Court’s judgment.”).

¹³⁶ *Google Spain*, Case C-131/12, ¶ 93.

EU's Commissioner for Justice recognized that such standards are subjective.¹³⁷ Those seeking to invoke the right to be forgotten and the search engine companies charged with honoring their requests may have different opinions on when the adequacy, relevance, and accuracy requirements are met. As such, more uniform standards are needed to inform individuals of exactly when their rights can be invoked.

C. Easing Tension by Adopting Standards Currently Used by Data Processing Companies

In seeking to adopt more uniform standards for right to be forgotten requests, the CJEU could follow the approach Google has recently implemented. Google has set up a separate website for individuals to supply their name, photo identification, and explanation for the deletion request.¹³⁸ Of the requests it has received, the company has removed links where the information involves nude photographs uploaded to the internet against the requester's will, HIV diagnoses, and outdated political views.¹³⁹ Among those deletion requests that have been refused are those that involve information regarding sex offender convictions, reports of violent crime (even when the individual was later acquitted), and patient reviews of doctors.¹⁴⁰ From these initial removal requests, the EU can derive a standard for when requests to remove information will be honored. Turning to the hypothetical cases presented above, it becomes clear who could have their removal request honored under this last proposed test. In the case of the politician—barring the considerations about his status as a public figure and journalistic purpose—he may be able to have the links removed because they represent outdated views. The student too would be able to achieve her desired result since Google has granted similar requests.¹⁴¹ The restaurateur, however, would not be so lucky. His case is very similar to a

¹³⁷ Alex Hern, *EU Commissioner: Right to Be Forgotten is No Harder to Enforce than Copyright*, THE GUARDIAN, June 4, 2014, <http://www.theguardian.com/technology/2014/jun/04/eu-commissioner-right-to-be-forgotten-enforce-copyright-google>.

¹³⁸ Barr & Winkler, *supra* note 9.

¹³⁹ *Drawing the Line: Google Grapples with the Consequences of a Controversial Ruling on the Boundary between Privacy and Free Speech*, ECONOMIST, Oct. 4, 2014, <http://www.economist.com/news/international/21621804-google-grapples-consequences-controversial-ruling-boundary-between>.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* (noting that Google has granted requests where the information involved nude photographs uploaded to the internet against his or her will).

context where a right to be forgotten request has not been honored—patient reviews of doctors.

As a general rule, the CJEU could hold that people have a right to invoke the right to be forgotten when the information concerns solely private matters that have nothing to do with that individual's public life. Conversely, individuals would not have a right to delete links that involve matters that relate to his or her public life, or are of public concern. Of course, such a crude distinction may raise the question of what constitutes the public interest, and overlap with the analysis the CJEU would have to consider in that regard. Even so, this distinction would go a long way towards providing the public with a basic standard for understanding when their request would be honored. More than this, it would provide a clearer understanding of what exactly the right to be forgotten entails.

Any standard for clarifying the right to be forgotten and balancing that right with the existing freedom of expression will require much more analysis than provided here. This right is new, and both the CJEU and search engine companies are on a long road towards identifying what aspects of the right work and which aspects require reform. Until the CJEU moves to answer the questions left open by *Google Spain*, there will be some ambiguity in the law. This Note provides some answers to those questions by stating that the right to be forgotten can coexist with freedom of expression norms, and by offering suggestions for how the CJEU might ease the tension between those rights. Important questions of how the right to be forgotten should develop from here remain. The ability of search engine companies, courts, and the general public to function effectively depends on the answers to those questions.

