

PRIVACY, PRESS, AND THE RIGHT TO BE FORGOTTEN IN THE UNITED STATES

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Abstract: When the European Court of Justice in effect accepted a Right to Be Forgotten in 2014, ruling that a man had a right to privacy in his past economic troubles, many suggested that a similar right would be neither welcomed nor constitutional in the United States given the Right’s impact on First Amendment-related freedoms. Even so, a number of state and federal courts have recently used language that embraces in a normative sense the appropriateness of such a Right. These court decisions protect an individual’s personal history in a press-relevant way: they balance individual privacy rights against the public value of older truthful information and decide at times that privacy should win out. In other words, they recognize that an individual whose embarrassing past has been revealed by another can sue for invasion of privacy in the United States, even when the historic information was once public. This Article explores Right to Be Forgotten-sensibilities in United States jurisprudence and suggests that such a Right has a foundation in historical case law and present-day statutes. It argues that the legal conception of privacy in one’s past may have some limited practical and important purposes but warns that any Right to Be Forgotten must be cabined effectively by presuming newsworthiness—a word defined similarly in law and journalism—in order to protect significant and competing First Amendment interests at a time when people in high places have vowed to curb press freedoms.

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INTRODUCTION

In 2015, a man in Pennsylvania filed an emergency request for an injunction against two websites.¹ The websites had suggested both that the man had a criminal record and that he was a participant in the federal witness protection program.² In response, a state trial court ordered that the websites be “immediately take[n] down, disable[d], and remove[d]” from the internet.³

A few months later, after the defendant publisher appealed the order as an unconstitutional restraint, the court decided that the websites could remain online as long as the publisher removed any mention of the plaintiff’s involvement in witness protection and any mention of his criminal history.⁴ Revelations about the plaintiff’s criminal past and his alleged participation in any protection program were so strongly invasive of personal privacy, the court suggested, that the First Amendment presumption against prior restraints did not apply: “[t]he United States Supreme Court,” the judge hearing the case wrote, “has long held that freedom of speech, as guaranteed by the First Amendment, does not include all modes of communication of ideas” but must be balanced against other interests, including the privacy protection of individuals.⁵

Moreover, the court reasoned, under Pennsylvania law, the disclosure of certain once-public information could be punished and prohibited when

1. *Hartzell v. Cummings*, No. 150103764, 2015 WL 7301962, at *1 (Pa. Ct. Com. Pl. Nov. 4, 2015).

2. *Id.* at *4.

3. *Id.* at *1.

4. *Id.*

5. *Id.* at *3.

a person’s “personal security” was at issue.⁶ The long-ago crime, the court wrote, did not make the plaintiff a present public figure: the plaintiff did not live his current life in the limelight of politics or celebrity, “and the details about his past [were] likely not newsworthy twenty-five years after the fact.”⁷ Similarly, the information about the plaintiff’s alleged assignment in years past to a witness protection program had “no relation to any public concern” and any relevant revelation was “personal, private, and illegal.”⁸ The court then ordered that any information regarding the man’s past be wiped off the websites.⁹

Just a few months later, a federal trial court in Washington, D.C. kept information regarding a former prosecutor’s alleged misconduct out of public hands, expressing similar concerns that the present release of past information could harm the individual.¹⁰ In that case, however, the potential danger seemed limited to the individual’s career: “without question,” the court wrote, the former prosecutor “has a strong interest in avoiding decades-old disclosures”¹¹ and, in contrast, the public “has only a negligible need to know about a largely unremarkable, decades-old disciplinary proceeding” involving a man who was a public servant at the time of the underlying investigation.¹²

Both of these recent decisions and others like them suggest that at least some modern courts believe that individuals in the United States should be able to keep their past histories private under certain conditions. In short, they suggest that a Right to Be Forgotten—the notion that one should have some right to privacy in one’s past and have some legal remedy should that past be revealed—exists in modern United States jurisprudence, a troubling notion given the First Amendment and press freedoms.

This Article warns that these recent decisions are not anomalies and that a Right to Be Forgotten effectively has been a part of United States law since at least the dawn of privacy—from an 1890 law review article titled *The Right to Privacy*¹³ and even before. The Article proceeds in

6. *Id.* at *4.

7. *Id.*

8. *Id.* at *7.

9. *Id.* It is true that the claim at issue was defamation and that, indeed, the state had issued a document that the individual was not involved in witness protection. The court’s opinion, however, seems purposefully vague and broad enough to suggest a case in which the information revealed is, in fact, truthful.

10. *Bloomgarden v. U.S. Dep’t of Justice*, No. 12-0843, 2016 WL 471251, at *1 (D.D.C. Feb. 5, 2016).

11. *Id.* at *4.

12. *Id.* at *5.

13. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

three parts. First, it explores the history of privacy in the United States and Right to Be Forgotten-like language and holdings included in older cases and legal commentary. Second, it collects a surprising number of modern cases from United States courts, including the nation's highest court, that support the idea that a Right to Be Forgotten exists on U.S. shores. This second Part also notes longstanding Right to Be Forgotten-relevant protections springing from statutory sources in state and federal law. Finally, given this seemingly strong and troubling foundation for a Right to Be Forgotten in the United States and what appears to be increasing acceptance of such a Right in modern times, including court decisions that order publishers to remove posted information, it argues that the Right must be cabined by presuming newsworthiness, a word defined in journalism's ethics codes in a way that parallels at least in some part the legal standard. Without such limitation, any Right to Be Forgotten will significantly erode freedom of the press.

I. A HISTORY OF PRIVACY AND THE RIGHT TO BE FORGOTTEN IN THE UNITED STATES

In 2014, the European Court of Justice decided that a man in Spain had the right to wipe his long-ago financial woes off the internet.¹⁴ The plaintiff, Mario Costeja González, complained that the continuing online existence of a newspaper article about his debt proceedings ten years earlier limited his ability to turn his life around after getting out of debt.¹⁵ The court sided with González finding that he had the right to the removal of pieces of information about his past that were “inadequate, irrelevant or no longer relevant, or excessive in relation to th[e] purposes [for which they were processed] and in the light of the time that has elapsed.”¹⁶

In other words, the man had what some have called a Right to Be Forgotten or, less succinctly put, a right to put one's embarrassing and hurtful history behind him, at least with regard to a Google search. Scholars now suggest that the European court's decision created a “Right

14. Case C-131/12, *Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos*, 2014 EUR-Lex CELEX 62012CJ0131 21 (May 13, 2014), <http://eur-lex.europa.eu/legal-content/EN/TEXT/PDF/?uri=CELEX:62012CJ0131> [<https://perma.cc/4DA4-DFA4>].

15. *Id.* at 6.

16. *Id.* at 19.

to Erasure”¹⁷ or a “Right to Delisting”¹⁸ in Europe, which had already protected privacy in the past and had punished privacy-invading revelations.¹⁹

The precise definitions for each of those phrases is less important than what the court embraced: the right to have one’s past wiped away because of who the person has become. Ultimately, then, a Right to Be Forgotten at least in some sense is what the court’s decision recognizes. It suggests that an individual’s past history may indeed not be relevant to the person of today; that past information may inadequately describe the person an individual has become; and that an embarrassing history could be relied upon to excess by someone who once knew an individual’s present persona alone. The right of a past individual to be forgotten by people in the present seems precisely what the European court suggested was needed and appropriate.

After the decision, news media in the United States immediately suggested that a similar outcome would not be possible here. A *New York Times* article that year reflects what many suggested:

Ever since Europe’s highest court made the privacy ruling in May, Google has fought to limit the impact of the decision to its European operations, where an individual’s right to privacy is often on par with freedom of expression. The opposite is true in the United States.²⁰

The suggestion that a Right to Be Forgotten was incompatible with United States jurisprudence was put even more clearly by the *Philadelphia Inquirer*:

17. See, e.g., Alexander Tsesis, *The Right to Erasure: Privacy, Data Brokers, and the Indefinite Retention of Data*, 49 WAKE FOREST L. REV. 433, 435 (2014) (arguing that “protecting privacy interests of data subjects requires regulation on the length of time and purposes for which businesses can retain electronic information”).

18. See, e.g., W. Gregory Voss & Céline Castets-Renard, *Proposal for an International Taxonomy on the Various Forms of the “Right to be Forgotten”*: A Study on the Convergence of Norms, 14 COLO. TECH. L.J. 281, 298 (2016).

19. A more expansive Right to Be Forgotten exists in Europe beyond erasure and delisting. The European Convention on Human Rights Article 8, a provision titled “Right to respect for private and family life,” necessarily embraces privacy in the past beyond internet erasure and delisting. European Convention on Human Rights art. 8, Sept. 3, 1953, 213 U.N.T.S. 221. “Moreover,” the European Court of Human Rights wrote in 2000, “public information can fall within the scope of private life where it is systematically collected and stored in files held by the authorities. That is all the truer where such information concerns a person’s distant past.” *Rotaru v. Romania*, 2000-V Eur. Ct. H.R. 111, 128.

20. Mark Scott, *French Official Campaigns to Make ‘Right to be Forgotten’ Global*, N.Y. TIMES: BITS (Dec. 3, 2014, 3:20 PM), <https://bits.blogs.nytimes.com/2014/12/03/french-official-campaigns-to-make-right-to-be-forgotten-global/> [<https://perma.cc/VJ9Y-QMYN>].

Do we have a “right to be forgotten”? Nope.

They do now in Europe. But will this “right” cross the Atlantic?

Not likely.²¹

The United States does, after all, have the First Amendment and its promise of press freedom.²² And yet this Article provides evidence that the essential elements of a Right to Be Forgotten have been a part of both U.S. common law and statutory law for decades, in spite of constitutional protections for the publication of truthful information.

The Right to Be Forgotten, then, has no need to cross the Atlantic; in some ways, it has been on U.S. shores for centuries. In a surprising number of cases, past and present courts have weighed privacy interests against press interests and have decided that privacy wins out.

It is worth noting here that the birthdate of privacy law is a matter of some dispute. Many believe that privacy law began in 1890 when Samuel Warren and Louis Brandeis published *The Right to Privacy*,²³ a Harvard Law Review article that criticized the press of the day for publishing embarrassing tidbits about individuals and suggested that most individuals should have the right to be “let alone.”²⁴

But privacy sensibilities, and, notably here, a Right to be Forgotten type of privacy, had existed even before 1890 in U.S. law.²⁵

The “Publicity Given to Private Life” section in the Restatement (Second) of Torts provides evidence of these longstanding sensibilities.²⁶ It suggests that liability is appropriate if a publisher reveals secrets about another’s private life as long as the revelation “would be highly offensive to a reasonable person” and “is not of legitimate concern to the public.”²⁷ In other words, the Restatement suggests that the publication of truthful

21. John Timpane, *Can the Internet Learn to Forget?*, PHILA. INQUIRER, June 28, 2014, at A3.

22. There is disagreement over the expansiveness of the First Amendment, of course. Compare Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People From Speaking About You*, 52 STAN. L. REV. 1049, 1051 (2000) (arguing that “broader information privacy rules are not easily defensible under existing free speech law”), with Neil Richards, *Reconciling Data Privacy and the First Amendment*, 52 UCLA L. REV. 1149, 1151 (2005) (positing that arguments such as Volokh’s “overstate the First Amendment issues at stake in the context of most database regulation proposals, because such proposals are not regulation of anything within the ‘freedom of speech’ protected by the First Amendment”).

23. Warren & Brandeis, *supra* note 13.

24. *Id.* at 195.

25. A few of these cases are highlighted later in this section. See also Amy Gajda, *Privacy Before the Right to Privacy: Truthful Libel and the Earliest Underpinnings of Privacy in the United States* (unpublished manuscript) (on file with author).

26. RESTATEMENT (SECOND) OF TORTS § 652D (AM. LAW INST. 1977).

27. *Id.*

information can be punished as long as the information would be highly offensive and not “newsworthy” to an average member of the public with decent standards.²⁸ Analogous to any Right to be Forgotten, the Restatement states that individuals have some right to privacy in their past. “Every individual has some phases of his life . . . and some facts about himself that he does not expose to the public eye,” the Second Restatement reads in its definition for private life.²⁹

More specifically, the authors note that such private information can include “some of his past history that he would rather forget.”³⁰

Later, after suggesting that a lapse of time is something to be considered in determining whether an individual has a privacy action against an entity or a person who reveals information in an older public record³¹—a publication that in the authors’ opinion may well satisfy the elements of the publication-of-private-facts tort—the Second Restatement offers a surprising example springing from *Les Misérables*:

Jean Valjean, an ex-convict who was convicted and served a sentence for robbery, has changed his name, concealed his identity, and for twenty years has led an obscure, respectable and useful life in another city far removed. B Newspaper, with the help of Police Inspector Javert, ferrets out Jean Valjean’s past history and publishes it, revealing his present identity to the community. As a result, Jean Valjean’s life and career are ruined. This *may be* but is not definitely an invasion of privacy of Jean Valjean.³²

Such a revelation of a criminal past, the Restatement authors explain, raises a “quite different problem” from *current* news coverage of crime.³³ The former reveals the current identity and present location of an individual who has changed his criminal ways and who might, therefore, be more deserving of his privacy in order to facilitate rehabilitation.³⁴ Importantly, this seems to include privacy in information that was once public.

Like the *Google Spain* court, the Restatement thus suggests that important privacy interests arise when older public records are published about someone who has “resumed the private, lawful and unexciting life

28. *Id.*

29. *Id.* at cmt. b.

30. *Id.*

31. *Id.* at cmt. k.

32. *Id.* at illus. 26 (emphasis added).

33. *Id.* at cmt. k.

34. *Id.*

led by the great bulk of the community.”³⁵ Moreover, it seems, the Restatement authors believed that additional information regarding the individual’s “present location and identity” should strengthen privacy claims.³⁶ “[H]is new life is utterly ruined by revelation of a past that he has put behind him,” the Restatement reads in its suggestion that rehabilitated criminals, very likely a class with greater notoriety than those who faced bankruptcy, deserve privacy protection.³⁷ Perhaps the Restatement authors did not realize that Jean Valjean in *Les Misérables* had become a mayor and, therefore, was a public official to boot; perhaps they did.

This Right to Be Forgotten-like language in the Second Restatement, an important part of the current foundation of privacy law in the United States, was not created out of thin air. In fact, it is likely that the Second Restatement authors acknowledged the potential importance of such a Right because it had existed in U.S. law for decades.³⁸

Even before 1890, when Samuel Warren and Louis Brandeis published *The Right to Privacy*,³⁹ some courts had held that individuals have a right to privacy in embarrassing past information and, accordingly, that those who publish it can be held accountable.

Consider a case from Louisiana decided in 1884.⁴⁰ There, the defendant had published a pamphlet suggesting that a priest had had numerous affairs with nuns, students, and others over the course of twenty-five years.⁴¹ The Louisiana Supreme Court upheld the defendant publisher’s conviction for publishing that information, finding that even if the information were true, jurors could well find that the information had been published for less than “good motives and justifiable ends.”⁴² Using language that literally included the word “forgotten,” the court noted specifically that past acts—including criminal acts—should be cloaked in

35. *Id.*

36. *Id.*

37. *Id.*

38. Note here that the authors rely on common law in their formulation of the Restatement provisions.

39. Warren & Brandeis, *supra* note 23.

40. *State v. Bienvenu*, 36 La. Ann. 378 (La. 1884).

41. *Id.* at 378–79 (author translation). The pamphlet stated:

[F]or over twenty-five years, the Rev. Cyprien Venissat, by indecent and notorious acts and other prurient acts attested to by eyewitnesses, has violated his vows of chastity and has become a subject of shame, scorn and scandal . . . We hereby declare that [he] is guilty of touching, caressing, embracing and indecently kissing the students and nuns of his convent and other women. He is also guilty of seduction and adultery.

42. *Id.* at 382 (author translation).

privacy, even in a case involving a priest presumably well known to the community:

Indeed, that would be a barbarous doctrine which would grant to the evil-disposed the liberty of ransacking the lives of others to drag forth and *expose follies, faults or crimes long since forgotten*, and perhaps expiated by years of remorse and sincere reform, with no other motive than to gratify hatred or ill-will by blasting the character and reputation of their victims. Such is not the law of Louisiana.⁴³

In doing so, the court rejected the defendant’s constitutional arguments based upon its freedom to publish truthful information as “utterly unfounded.”⁴⁴ It affirmed the judgment against the publisher and refused a rehearing.⁴⁵

Earlier cases have similar sentiments. In 1803, the Pennsylvania Supreme Court found a newspaper liable for publishing information that suggested that a clergyman had had a past dalliance with a parishioner.⁴⁶ In finding for the clergyman, the court lamented that many misunderstood “liberty of the press” to mean that the press could publish what it wanted.⁴⁷ Here, the court found specifically that the matter concerning the clergyman’s past was “improper for public examination” and ruled against the newspaper.⁴⁸ The basis for the court’s decision was not that the information was untruthful and defamatory, but that it was out of bounds and essentially unfair. In 1808, Massachusetts’s high court similarly suggested that the publication of a critical history of a man’s dealings with another was inappropriate and explained that “if the publication be true, the tendency of it to inflame the passions, and to excite revenge . . . may sometimes be strengthened.”⁴⁹

The United States Supreme Court expressed a related sentiment in 1845 in a case involving a letter critical of a public servant’s past work. There, the Court wrote, publications that harm a man’s “sympathetic and social” nature could rightly be the subjects of litigation.⁵⁰ Using that reasoning, therefore, even someone who was a candidate for public office would arguably have had a cause of action against the publisher of truthful

43. *Id.* (emphasis added) (author translation).

44. *Id.* (author translation).

45. *Id.* at 383.

46. *Runkle v. Meyer*, 3 Yeates 518 (Pa. 1803).

47. *Id.* at 519.

48. *Id.*

49. *Commonwealth v. Clap*, 4 Mass. 163, 168 (1808).

50. *White v. Nicholls*, 44 U.S. 266, 285 (1845).

information as long as that information was “calculated to make [an individual] infamous, or odious, or ridiculous.”⁵¹ The publisher of such matter, the Court wrote, would properly face liability because the article had impaired personal happiness and social order.⁵²

Therefore, when a Texas court wrote in 1878 that it was a well-established doctrine that it would be tortious to suggest that another was “notoriously of bad or infamous character” even though such information were true,⁵³ enough common law history supported such an assessment. Courts had suggested as much for at least seventy-five years.⁵⁴

Twelve years after the Texas court’s decision, Warren and Brandeis expressed similar sentiments in *The Right to Privacy*.⁵⁵ The article argued for a privacy right that would give most individuals a legal claim against an entity that had published their “private affairs” about personal and family life,⁵⁶ an argument that was, of course, broad enough to include liability for the publication of information about one’s past life.

Language in the article that more clearly supports a Right to Be Forgotten is found in the authors’ references to European commenters and court decisions. For example, when discussing an individual’s privacy rights in general, Warren and Brandeis quoted French law, suggesting that it supported the notion that “the wholesale investigations into the *past* of [even] prominent public men” is a privacy invasion and that “all the details of private life . . . shall not be laid bare for inspection.”⁵⁷ Warren and Brandeis concluded that “[s]ome things all men alike are entitled to keep from popular curiosity.”⁵⁸ The authors also highlighted a British case in which the court suggests that older letters from a deceased individual should be protected “in after life” for privacy reasons.⁵⁹

By 1931, then, when a California appeals court heard a case involving a former prostitute who had long since changed her ways to live an “exemplary, virtuous, honorable, and righteous life,”⁶⁰ it was clear who would win the invasion-of-privacy claim she had brought against the filmmaker who had outed her. Had the publisher’s story of the once-

51. Suggesting that such information, therefore, would not be in the public interest. *Id.* at 290–91.

52. *Id.* at 291.

53. *Morton v. State*, 3 Tex. App. 510, 518 (1878).

54. *See* Gajda, *supra* note 25.

55. It is not clear why the authors do not rely on these older cases, as noted later in this Part.

56. Warren & Brandeis, *supra* note 23, at 213.

57. *Id.* at 216 n.1 (emphasis added).

58. *Id.* at 216.

59. *Id.* at 201 n.1.

60. *Melvin v. Reid*, 297 P. 91, 91 (Cal. Dist. Ct. App. 1931).

prostitute stopped with the exploration of the incidents in the woman's past life without more, the court wrote, there would be no possible cause of action.⁶¹ Instead, the filmmakers "went further, and in the formation of the plot used [her] true maiden name . . . in connection with the true incidents from her life . . ."⁶² Therefore, the court found, the once-prostitute had a viable cause of action; the publishers had wrongly revealed the current identity of one with a past, someone who had rehabilitated her life:

This change having occurred . . . she should have been permitted to continue its course without having her reputation and social standing destroyed by the publication of the story of her former depravity with no other excuse than the expectation of private gain by the publishers.⁶³

The California case involving the former prostitute's Right to Be Forgotten-like right to privacy became a part of William Prosser's *Privacy*,⁶⁴ the law review article published in 1960 that collected and analyzed prior privacy-relevant case law and one that, like the 1890's *The Right to Privacy* before it, became a cornerstone of privacy law in the United States. In the article, Prosser highlighted the case as one that stood for the principle that an individual's past public life can indeed again become private.⁶⁵ Initially calling the lapse of time's effect on a privacy claim a "difficult question," Prosser suggested that "[t]he answer may be that the existence of a public record is a factor of a good deal of importance, which will normally prevent the matter from being private, but that under some special circumstances[,] [even that] is not necessarily conclusive."⁶⁶

Later in the article, Prosser noted that liability for such publication regarding an individual's embarrassing past was a "troublesome question" which had not yet been uniformly resolved.⁶⁷ Past history is important, he wrote, and "[t]here can be no doubt that . . . the revival of past events that

61. *Id.*

62. *Id.* at 93.

63. *Id.* See also *Mau v. Rio Grande Oil, Inc.*, 28 F. Supp. 845 (N.D. Cal. 1939) (criminal reenactment from year before created valid invasion of privacy claim).

64. William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960).

65. *Id.* at 392, 396, 419.

66. *Id.* at 396.

67. *Id.* at 418. This seems to reflect in part the holding of *Sidis v. F-R Publ'g Corp.*, 113 F.2d 806 (2d Cir. 1940), a case in which the court found that a recluse's past life as a child prodigy made him properly the subject of current interest.

once were news[] can properly be a matter of present public interest,”⁶⁸ but he also noted that there seemed to be some limitation in U.S. law on such exploration and revelation.⁶⁹ “All that can be said,” Prosser wrote, “is that there appear to be situations in which ancient history *cannot* safely be revived.”⁷⁰

In 1971, eleven years after Prosser’s assessment of Right to Be Forgotten-like privacy interests in the United States, California became even more specific with regard to the privacy in one’s criminal past. In *Briscoe v. Reader’s Digest*,⁷¹ the state’s highest court held that rehabilitated individuals had some right to privacy in their past crimes. In the case, *Reader’s Digest* had published a mention of a carjacking that had occurred eleven years before, naming the man who police arrested and describing his crime.⁷² Certain family members and friends, unfamiliar with Marvin Briscoe’s criminal past, abandoned him when they learned the truth.⁷³ He then sued *Reader’s Digest* on privacy grounds.⁷⁴ The court sided with Briscoe. “Unless the individual has reattracted the public eye to himself in some independent fashion,” the court wrote with regard to the balance between the newsworthiness of the underlying information of the long-ago crime and the once-criminal’s right to privacy, “the only public ‘interest’ that would usually be served is that of curiosity.”⁷⁵ It suggested that the rehabilitation of those with criminal records was more important than the republication of a crime that had occurred many years before.⁷⁶

In 1977, six years after *Briscoe* was decided, when Prosser was a Reporter for the Second Restatement, he and his co-authors included the language in the Restatement quoted earlier in this section, suggesting that people in the United States have privacy in some “past history that [they]

68. Prosser, *supra* note 64, at 418.

69. *Id.*

70. *Id.* at 419 (emphasis added). Prosser may have been influenced by *Miller v. NBC*, 157 F. Supp. 240 (D. Del. 1957), as well. In that case, the plaintiff sued after a television program reenacted his bank robbery victimization. *Id.* at 241. The court suggested that liability could well have ensued had the program named the plaintiff. *Id.* at 243. Here, it “did not identify plaintiff in his present setting with that incident out of [the] past.” *Id.* The court noted specifically that its opinion “should not be interpreted as sanctioning the unbridled appropriation of an individual’s intimate history merely because it has once been exposed to public view.” *Id.*

71. 483 P.2d 34 (Cal. 1971).

72. *Id.* at 36.

73. *Id.*

74. *Id.*

75. *Id.* at 40.

76. *Id.*

would rather forget,”⁷⁷ including the potential for a right to privacy in past crimes, and offering the Jean Valjean outing example as a potentially viable claim for publication of private facts.⁷⁸ After all, since at least the early 1800s, several courts, including California’s highest court, had suggested as much: there was a Right to Be Forgotten-like right to privacy in one’s past and that the Right included even information that was once decidedly public.⁷⁹

II. A MORE MODERN RIGHT TO BE FORGOTTEN

A. *The Supreme Court and a Right to Be Forgotten*

It is of some consequence that in 2004, the Supreme Court of California effectively reversed its decision in *Briscoe v. Reader’s Digest*. The 2004 decision, *Gates v. Discovery Communications*,⁸⁰ involved a television documentary about a murder for hire that had occurred twelve years before. There, the court reviewed United States Supreme Court precedent and suggested that a line of Supreme Court cases, including *Cox Broadcasting v. Cohn*⁸¹ and *Bartnicki v. Vopper*,⁸² “fatally undermined” *Briscoe*’s holding.⁸³ “[T]he [United States Supreme Court] has never suggested . . . that the fact the public record of a criminal proceeding may have come into existence years previously affects the absolute right of the press to report its contents,” the court wrote.⁸⁴ The California court ruled in favor of the television program producers and against the man whose criminal past had been broadcast as a part of the program.⁸⁵

77. RESTATEMENT (SECOND) OF TORTS § 652D cmt. b (AM. LAW INST. 1977).

78. *Id.* at cmt. k, illus. 26.

79. *See also* *Bernstein v. NBC*, 129 F. Supp. 817 (D.D.C. 1955). There, the court rejected a plaintiff’s claim for invasion of privacy based upon a televised depiction of his past crimes. *Id.* at 819. In doing so, however, the court noted that the once-criminal had not been named. *Id.* at 819–20. After quoting from several successful invasion-of-privacy cases in which the plaintiffs had won, the court suggested that those plaintiffs had been identified by name. *Id.* at 828–29. It wrote:

This court agrees that we are not so uncivilized that the law permits, in the name of public interest, the unlimited and unwarranted revival by publication of a rehabilitated wrongdoer’s past mistakes in a manner as to identify him in his private setting with the old crime and hold him up to public scorn.

Id. at 828.

80. 101 P.3d 552 (Cal. 2004).

81. 420 U.S. 469 (1975).

82. 532 U.S. 514 (2001).

83. *Gates*, 101 P.3d at 559.

84. *Id.* at 560.

85. *Id.* at 563.

A review of those landmark U.S. Supreme Court opinions—*Cox Broadcasting* and *Bartnicki*—and the similarly archetypally pro-media *Florida Star v. B.J.F.*,⁸⁶ however, suggests that there is some flexibility among the Justices with regard to a Right to Be Forgotten. In other words, the California Supreme Court’s language in *Gates* describing Supreme Court precedent in the negative—that the Court had never suggested that the press has no right to publish one’s criminal past—may have been the strongest synthesis of Supreme Court cases it could muster. The Supreme Court has also never held explicitly that no Right to Be Forgotten exists.

I. *Cox Broadcasting and Its Progeny*

While many read Supreme Court cases that address the clash between privacy rights and press rights as decidedly favoring the press, the language within them is not so simple. Consider *Cox Broadcasting v. Cohn*,⁸⁷ for example. That case concerned a 17-year-old rape victim who had been murdered.⁸⁸ The defendant in the case was a television station that had reported her identity after learning of it through indictment papers made available in court.⁸⁹ A Georgia statute at the time made the identification of a rape victim a misdemeanor.⁹⁰ The journalist-defendants argued that the statute was unconstitutional; they maintained that news media should never be liable civilly or criminally for publishing accurate information, even when that information is damaging to “individual sensibilities.”⁹¹ But the Court refused to grant media such a broad waiver. Instead, it held only that when publication is based upon “judicial records which are maintained in connection with a public prosecution and which themselves are open to public inspection,”⁹² there would usually be no liability.

“[A]scertaining and publishing the contents of public records are simply not within the reach” of a tort action for invasion of privacy based upon publication of private facts, the Court wrote.⁹³ Moreover, it noted, “[p]ublic records by their very nature are of interest to those concerned

86. 491 U.S. 524 (1989).

87. 420 U.S. 469 (1975).

88. *Id.* at 471.

89. *Id.* at 472–73.

90. *Id.* at 471–72.

91. *Id.* at 489.

92. *Id.* at 491. Throughout, the Court very much focuses on the public nature of the record. *See id.* at 494.

93. *Id.* at 494–95.

with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media,”⁹⁴ suggesting that the Justices would not want to punish or prevent the publication of information made generally available to the media by the government itself.⁹⁵

The ultimate holding in *Cox Broadcasting* is therefore quite limited: “the First and Fourteenth Amendments will not allow exposing the press to liability for truthfully publishing information released to the public in official court records,”⁹⁶ the Court wrote, and “[o]nce true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it.”⁹⁷ The Court also maintained that its decision was a narrow one, pointedly refusing to extend the reach of *Cox Broadcasting* beyond the facts in front of it.⁹⁸ In the end, therefore, the case held only that the publication of truthful information recently released to the public by the government through official public records cannot be sanctioned.⁹⁹

Moreover, and of special significance here, language in *Cox Broadcasting* at the same time embraces privacy. Consider the following passage in light of the Court’s ultimate conclusion that media cannot be punished for publishing information made available to the public by the government. Consider too its pointed nod to the 1890 Warren and Brandeis article:

[T]here *is* a zone of privacy surrounding every individual, a zone within which the State may protect him from intrusion by the press, with all its attendant publicity. Indeed, the central thesis of the root article by Warren and Brandeis was that the press was overstepping its prerogatives by publishing essentially private information and that there should be a remedy for the alleged abuses.¹⁰⁰

And this:

94. *Id.* at 495.

95. *Id.* at 496.

96. *Id.*

97. *Id.*

98. *Id.* at 491. The Court wrote that rather than addressing broader questions, it was “appropriate to focus on the narrower interface between press and privacy that this case presents, namely, whether the State may impose sanctions on the accurate publication of the name of a rape victim obtained from public records.” *Id.*

99. *See id.* at 496 n.26, 497 n.27.

100. *Id.* at 487 (citation omitted) (noting too that “[m]ore compellingly, the century has experienced a strong tide running in favor of the so-called right of privacy”).

In this sphere of collision between claims of privacy and those of the free press, the interests on both sides are plainly rooted in the traditions and significant concerns of our society.¹⁰¹

In other words, it seems that *Cox Broadcasting* itself recognizes that sometimes the press will overstep its bounds by reporting truthful but private information and that in those cases, media liability can be appropriate and presumably constitutional—and, finally, that well-rooted “tradition” dictates as much.

A decade later in *Florida Star v. B.J.F.*,¹⁰² the Court was similarly non-committal with regard to overarching press protections. In that case, a rape victim sued the *Florida Star* newspaper after it published her name.¹⁰³ Again, a statute was in place that punished the publication of such a victim’s identity.¹⁰⁴ And again the Court refused to hold media liable under the circumstances, those in which the newspaper had obtained the victim’s name from an official report placed in the open-access pressroom.¹⁰⁵

Noting specifically once again that its holding was “limited,”¹⁰⁶ the Justices wrote that “only that where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order”¹⁰⁷ and that under the circumstances of the case—one in which the government itself had released the victim’s name to the media in a publicly accessible location despite its power not to¹⁰⁸—liability against the newspaper was inappropriate.¹⁰⁹

Notably, the Court again specifically refused to grant the media’s request for broader protections for the publication of all truthful

101. *Id.* at 491.

102. 491 U.S. 524 (1989).

103. *Id.* at 526.

104. *Id.*

105. *Id.*

106. *Id.* at 540.

107. *Id.* at 541. For an explanation of narrow tailoring, see *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395 (1992). In *R.A.V.*, a case involving a statute that prohibited cross burning, the Court focused on the statute’s purpose of allowing those who have been discriminated against to live in peace and suggested that the First Amendment did not allow “special hostility” toward even reprehensible particular speech. *Id.* at 396. “The ‘danger of censorship’ presented by a facially content-based statute,” the Court wrote in that case, “requires that that weapon be employed only where it is ‘necessary to serve the asserted compelling interest.’” *Id.* at 395.

108. *Florida Star*, 491 U.S. at 535.

109. *Id.* at 541.

information,¹¹⁰ including the Court’s surprising specific rejection of protection for media in cases with similar facts.¹¹¹ In doing so, the Court once again reinforced the importance of an individual’s privacy rights:

We do not hold that truthful publication is automatically constitutionally protected, or that there is no zone of personal privacy within which the State may protect the individual from intrusion by the press, or even that a State may never punish publication of the name of a victim of a sexual offense.¹¹²

Indeed, the Justices wrote unequivocally that “[w]e . . . do not rule out the possibility that, in a proper case, imposing civil sanctions for publication of the name of a rape victim might be so overwhelmingly necessary to advance [government] interests” that liability would be constitutional.¹¹³ Here, however, the Court was concerned in some part with the negligence per se standard in the statute—a standard that the Justices suggested would cause liability to flow directly from publication no matter the important factual nuances at issue, including whether the victim’s identity was currently known by many in the community.¹¹⁴ The Court was also troubled that the statute also punished only publication by “mass communication” and not individual gossip, suggesting that the consequences of the latter may be even more devastating.¹¹⁵

In other words, *Florida Star* suggests that there could well be times in which liability even for the publication of the name of a rape victim would be appropriate and constitutional.¹¹⁶ The decision, described in the Court’s own language, does not stand for the principle that all publication of truthful information is protected.

Finally, in *Bartnicki v. Vopper*,¹¹⁷ a 2001 case pitting privacy interests against press interests, the Court again found in favor of media but also again refused to grant the press the freedom to publish any truthful information that had been made available to it.¹¹⁸ In *Bartnicki*, the radio

110. *Id.* at 532.

111. *Id.* at 541.

112. *Id.*

113. *Id.* at 537.

114. *Id.* at 539.

115. *Id.* at 540.

116. I have argued this in past law review and news media articles. See also Michael J. Kelly & David Satola, *The Right to Be Forgotten*, 2017 U. ILL. L. REV. 1, 33 (discussing *Cox Broadcasting* and *B.J.F. v. Florida Star* and noting that “[t]he Supreme Court has not broadly decided either to always protect privacy or always protect the First Amendment without restriction in the case of publicizing the identity of a victim of sexual assault”).

117. 532 U.S. 514 (2001).

118. *Id.* at 534.

station defendant had played on air a surreptitiously recorded telephone conversation it had received in the mail anonymously.¹¹⁹ A voice on the tape suggested that violence would be in order to help influence a contentious teachers' union negotiation.¹²⁰ Based in part upon those facts, the Supreme Court consciously framed the issue in front of it very narrowly: "[w]here the punished publisher of [newsworthy] information has obtained the information in question in a manner lawful in itself but from a source who has obtained it unlawfully, may the government punish the ensuing publication of that information based on the defect in a chain?"¹²¹

In *Bartnicki*, the answer was no: there would be no liability on the part of this particular radio station publisher.¹²² First, the information itself, the Court decided, was newsworthy.¹²³ In deciding as much, however, the Justices suggested that not all truthful information would be of similar designation, noting that an individual's privacy interests could well justify punishment for publication of "domestic gossip or other information of purely private concern."¹²⁴ The case at bar, in contrast, involved the publication of information that proved that someone had suggested violence would be appropriate in teachers' union negotiations—a matter of "unquestionabl[e]"¹²⁵ "public importance"¹²⁶ in which public interest concerns clearly weighed more strongly in the balance than privacy interests.¹²⁷

Second, the Court noted that the radio station's hands were clean. It was, instead, "a stranger's illegal conduct"¹²⁸ in recording a private cell phone conversation that had created the tape. The station, in contrast, merely published something newsworthy it had received anonymously.¹²⁹

Moreover, in rejecting liability for the radio station, the Justices noted that they had "repeated[ly] refus[ed]" a broader holding that would allow the press the right to publish anything truthful that it wished.¹³⁰ The

119. *Id.* at 517–18.

120. *Id.* at 518–19.

121. *Id.* at 528.

122. *Id.* at 534.

123. *Id.* at 533.

124. *Id.*

125. *Id.* at 535.

126. *Id.* at 534.

127. *Id.* at 532.

128. *Id.* at 535.

129. *Id.* at 519.

130. *Id.* at 529.

majority quoted language from *Florida Star* to explain that such repeated refusals and narrow holdings in this line of cases were necessary because of the “sensitivity and significance of the interests presented in clashes between the First Amendment and privacy rights.”¹³¹

In fact, the Court raised what it called a “still-open question,” one that suggested the possibility for media liability in cases in which media’s hands were not so clean: “whether, in cases where information has been acquired *unlawfully* by a newspaper . . . government may ever punish not only the unlawful acquisition, but the ensuing publication as well.”¹³² Ultimately, the Court decided only that “a stranger’s illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern.”¹³³

Justice Breyer, in concurrence, put it even more strongly with regard to the radio station’s decision to air the tape of the callers’ conversation: “[h]ere, the speakers’ legitimate privacy expectations [were] unusually low, and the public interest in defeating those expectations [was] unusually high [Therefore,] the statutes’ enforcement would disproportionately harm media freedom.”¹³⁴

He suggested also that “the Constitution permits legislatures to respond flexibly to the challenges future technology may pose to the individual’s interest in basic personal privacy.”¹³⁵ In other words, in Justice Breyer’s assessment, too, media’s choice to publish private facts about an individual would not always win constitutionally.

It is true, then, as the *Gates* court noted, that “the high court has never suggested . . . that the fact the public record of a criminal proceeding may have come into existence years previously affects the absolute right of the press to report its contents.”¹³⁶ Consider the corollary, however, as seen in *Cox Broadcasting*, *Florida Star*, and *Bartnicki*. The high court has also never expressly suggested that publishers do in fact always have the right to reveal truthful information, including information about one’s past, no matter how far back it goes. In fact, as the 2004 California decision in *Gates* notes, the United States Supreme Court “did not expressly overrule *Briscoe*” in *Cox Broadcasting*, even though the Court mentioned the

131. *Id.*

132. *Id.* at 528 (internal quotation marks omitted). A question that a federal appeals court would later answer in the affirmative, in a case explored in a later Part. See *infra* section II.D.

133. *Bartnicki*, 532 U.S. at 535.

134. *Id.* at 540 (Breyer, J., concurring).

135. *Id.* at 541.

136. *Gates v. Discovery Commc’ns, Inc.*, 101 P.3d 552, 560 (Cal. 2004).

Briscoe case in its decision and effectively could have.¹³⁷ In fact, the Court cites *Briscoe* only once, and in a way that aligns well at least in part with *Cox Broadcasting*'s own holding: writing that *Briscoe* stands for the proposition that "the rights guaranteed by the First Amendment do not require total abrogation of the right to privacy."¹³⁸

Moreover, in *Cox Broadcasting*, the Court specifically noted that a case involving other types of less accessible government records, such as juvenile criminal records, could well raise different constitutional questions. "We mean to imply nothing about any constitutional questions which might arise from a state policy not allowing access by the public and press to various kinds of official records," the Court wrote, "such as records of juvenile-court proceedings."¹³⁹

If it is a still open question, then, as the Court suggested, whether courts can punish media for publishing truthful information acquired *illegally*, then the question standing alone suggests that some information may have greater privacy significance, and that such information could include government records kept out of public circulation. Juvenile criminal records, it seems, deserved at least special mention with regard to privacy interests, key here because they contain truthful information about the past and are traditionally kept private.¹⁴⁰

Of additional note, California's high court itself limited its holding in *Gates*, the opinion that overruled *Briscoe*, thereby suggesting that there is still at least some potential privacy in one's past in California. The court wrote only that, in its estimation, privacy lawsuits could neither be based upon "facts obtained from *public* official court records"¹⁴¹ nor upon information "from *public* official records of a *criminal* proceeding."¹⁴² The use of the decidedly limiting words "public" and "criminal" here is of some note. Even *Gates*, therefore, leaves open the question of whether one has a Right to Be Forgotten-like right of privacy in one's older, *non-public*—perhaps juvenile or expunged—criminal records. It also leaves open the question of whether non-public, *civil* records could be the basis for a claim. Finally, it does not address whether one might have a similar

137. *Id.* at 560 n.5.

138. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 474 (1975).

139. *Id.* at 496 n.26.

140. When the United States Supreme Court wrote in a different context in *Snyder v. Phelps* that matters of public concern meant information that is the "subject of legitimate news interest . . . and of value and concern to the public," its definitional language was limited in line with its prior holdings: "legitimate" news that is of "value" to the public and that which raises some matter of public "concern." 562 U.S. 443, 453 (2011). In doing so, it again rejected a sweeping definition that would include all truthful matters that publishers themselves had decided were of interest to the public.

141. *Gates*, 101 P.3d at 560 (emphasis added).

142. *Id.* at 562 (emphasis added).

right in historic embarrassing or deeply private information about one's life not found in any official government record at all.

By the time of the *Gates* decision in 2004, in fact, the United States Supreme Court had also effectively recognized the importance of similar types of privacy in cases outside the context of publication. Beyond *Cox Broadcasting*, *Florida Star*, and *Bartnicki*, there is language from the Supreme Court that quite specifically recognizes the value of a right to privacy in one's past.

2. *The Freedom of Information Act Cases*

Although similar sentiments appear elsewhere in Supreme Court jurisprudence, it is in the Freedom of Information Act (FOIA)¹⁴³ cases that the Court has used its strongest language that supports at least in part a Right to Be Forgotten.¹⁴⁴ Two key decisions, *United States Department of Justice v. Reporters Committee for Freedom of the Press*,¹⁴⁵ decided in 1989, and *National Archives v. Favish*,¹⁴⁶ decided in 2004, concern access to government documents, though not later publication. Both decide that it would be painful for some to revisit the past, and hold that protection against such harm is an important part of privacy considerations in the United States. In both, moreover, worries about the present impact of information about a past crime is at some issue.

In *Reporters Committee*, journalists had asked for so-called “rap sheets” of four organized crime suspects who allegedly had had dealings with at least one member of Congress.¹⁴⁷ The government refused to release the rap sheets—reports containing the individuals’ separate criminal histories—and the Justices agreed that the information should not be released.¹⁴⁸

The Court quoted with approval the trial court’s assertion that there was no need to “balanc[e] [the] privacy interest against the public interest in

143. FOIA is the federal statute that gives public access to government documents and other information. 5 U.S.C. § 552 (2012). It does, however, contain several exemptions that keep multiple documents out of public hands. One of special note here is the provision that exempts “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy” from disclosure. *Id.* § 552(b)(6).

144. See, e.g., Steven C. Bennett, *The “Right to Be Forgotten”: Reconciling EU and US Perspectives*, 30 BERKELEY J. INT’L L. 161, 171 (2012) (discussing cases regarding public records and the Freedom of Information Act and suggesting that “[o]utside the context of newsworthy stories, U.S. courts have been less inclined to insist on unrestrained access to information”).

145. 489 U.S. 749 (1989).

146. 541 U.S. 157 (2004).

147. *Reporters Comm.*, 489 U.S. at 757–58.

148. Justices Blackmun and Brennan concurred in the judgment.

disclosure,” as “the invasion of privacy was ‘clearly unwarranted.’”¹⁴⁹ “It seems highly unlikely that information about offenses which may have occurred *30 or 40 years ago* . . . would have *any* relevance or public interest,” the Court noted, again quoting the trial court.¹⁵⁰

The Supreme Court’s own language was similarly strong. It rejected the journalists’ argument that crimes detailed in a rap sheet could not be private because they had once been public, calling such a notion a “cramped notion of personal privacy.”¹⁵¹ The Justices then cited Warren and Brandeis’s 1890 article *The Right to Privacy* for the proposition that “the passage of time” can in fact render something that was once public, private again.¹⁵² They also suggested that the Freedom of Information Act’s privacy provisions, including the provisions that protect certain information from revelation, reflected Congress’s understanding that “significant privacy interests” were at stake in information that would include the compilation of public criminal records.¹⁵³

Important here, the Justices in *Reporters Committee* also rejected the proposition that there would be some news value or proper public interest in an individual’s criminal past, noting instead that “rap sheets reveal *only the dry, chronological, personal history* of individuals who have had brushes with the law, and tell us nothing about matters . . . that are *properly* the subject of public concern.”¹⁵⁴ Such protection for one’s criminal history is especially necessary in the computer age, the Court suggested, because the substantial privacy interests in a rap sheet become even more critical when technology “can accumulate and store information *that would otherwise have surely been forgotten* long before.”¹⁵⁵

In what Justice Blackmun in his concurrence called a “bright line”¹⁵⁶ approach by the Court in *Reporters Committee*, then, the Justices protected rap sheets quite categorically. After noting that “[t]he privacy interest in maintaining the practical obscurity of rap-sheet information will *always* be high,” with privacy at its apex and public interest at its lowest when the subject is a “private citizen,” the Court wrote:¹⁵⁷

149. *Reporters Comm.*, 489 U.S. at 758.

150. *Id.* at 758 n.11 (emphasis added).

151. *Id.* at 763.

152. *Id.*

153. *Id.* at 766.

154. *Id.* at 766 n.18 (emphasis added).

155. *Id.* at 771.

156. *Id.* at 780.

157. *Id.* (Blackmun, J., concurring) (emphasis added).

Accordingly, we hold as a categorical matter that a third party’s request for law enforcement records or information about a private citizen can reasonably be expected to invade that citizen’s privacy, and that when the request seeks no “official information” about a Government agency, but merely [seeks] records that the Government happens to be storing, the invasion of privacy is “unwarranted.”¹⁵⁸

Two years later, in *Favish*, a unanimous decision that refused a FOIA request for death scene records and one in which the Court recognized a family’s privacy in death photographs, the Justices again suggested that historic facts could be protected because of present privacy concerns. In doing so, they quoted with approval an 1895 decision that respected the “well-established cultural tradition acknowledging a family’s control over the body and death images of the deceased,” one that, in the Justices’ opinion, reflected the common law more generally.¹⁵⁹

It is the right of privacy of the living which it is sought to enforce here. That right may in some cases be itself violated by *improperly interfering with the character or memory* of a deceased relative, but it is the right of the living, and not that of the dead, which is recognized. A privilege may be given the surviving relatives of a deceased person to protect his memory, but the privilege exists for the benefit of the living, to protect their feelings, and to prevent a violation of their own rights in the character and *memory of the deceased*.¹⁶⁰

Here too is the suggestion that a decedent’s survivors have a privacy-based right to effectively curate the past by suppressing some painful elements to preserve others. “Family members,” the Court wrote, “have a personal stake in honoring and mourning their dead and objecting to unwarranted public exploitation that, by intruding upon their own grief, tends to degrade the rites and respect they seek to accord to the deceased person who was once their own.”¹⁶¹

And here too the Court specifically mentioned its worries that technology could extend the longevity of information, making the past more accessible in the present and impacting privacy by doing so.¹⁶² Family members, the Court explained, “seek to be shielded . . . to secure

158. *Id.*

159. *National Archives v. Favish*, 541 U.S. 157, 168 (2003).

160. *Id.* at 168–69 (emphasis added) (citing *Schuyler v. Curtis*, 42 N.E. 22, 25 (N.Y. 1895)).

161. *Id.* at 168.

162. *Id.* at 167.

their own refuge from a sensation-seeking culture for their own peace of mind and tranquility.”¹⁶³

Moreover, the Court in dicta seemingly extended the right to privacy to situations involving the publication of such images, citing with approval a case in which a mother had had a successful claim for privacy in the publication of a photograph of her dead child¹⁶⁴ and an example from the Restatement that validates a publication-of-private-facts cause of action when a newspaper publishes a photograph of a dead infant.¹⁶⁵

There are similar sentiments in *Department of the Air Force v. Rose*,¹⁶⁶ a case in which the Court refused to automatically release older information identifying once-cadets’ ethics and honor code violations even though the information had years before been released more publicly at the Air Force Academy.¹⁶⁷ The Court again worried about the damage this dated information could cause. “[T]he risk to the privacy interests of a former cadet, particularly one who has remained in the military,” the Court wrote, “cannot be rejected as trivial.”¹⁶⁸ Here, the Court noted specifically, those who once had the knowledge could well have “forgotten” about the cadet’s disciplinary encounter with school administrators.¹⁶⁹ Therefore, it decided, information from the past could in some cases be protected on privacy grounds.¹⁷⁰

3. *Other Right to Be Forgotten-Relevant Supreme Court Cases*

There are additional examples of Right to Be Forgotten sensibilities at the Court: outcomes and language in cases involving once-public figures turned private individuals, involving school disciplinary records of young

163. *Id.* at 166.

164. *Id.* at 169 (citing *Bazemore v. Savannah Gen. Hosp.*, 155 S.E. 194 (Ga. 1930)).

165. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 652D (AM. LAW INST. 1977)).

166. 425 U.S. 352 (1976); *see also* RESTATEMENT (SECOND) OF TORTS § 652D, cmt. a, illus. 7 (AM. LAW INST. 1977) (“A gives birth to a child with two heads, which immediately dies. A reporter from B Newspaper asks A’s permission to photograph the body of the child, which is refused. The reporter then bribes hospital attendants to permit him, against A’s orders, to take the photograph, which is published in B Newspaper with an account of the facts, naming A. B has invaded A’s privacy.”).

167. *Id.* at 381.

168. *Rose*, 425 U.S. at 379.

169. *Id.* at 380–81 (“Despite the summaries’ distribution within the Academy, many of this group with earlier access to summaries may never have identified a particular cadet, or may have wholly forgotten his encounter with Academy discipline.”).

170. In the end the Court upheld the appropriateness of an *in camera* review of the files that balanced public interest against those privacy interests. *Id.* at 381.

people, and involving the rights of the press to publish historically correct but privacy-invading information.

In *Time v. Firestone*,¹⁷¹ decided the same year as *Rose*, the Court held that a woman who had once been married to the “scion” of a very public family—namely, the Firestones of tire fame—could presently be considered a private person despite very strong media interest in her in the past.¹⁷² The underlying defamation case decided by the Court, one springing from the publication of incorrect sordid details of Mary Alice Firestone’s divorce after a short marriage, held that she was not a public figure and that her divorce was not a public controversy.¹⁷³ She “did not assume any role of especial prominence in the affairs of society,” the Court wrote, and “did not thrust herself to the forefront of any particular public controversy in order to influence the resolution of issues involved in it.”¹⁷⁴

The holding arguably shares sensibilities with a Right to Be Forgotten in some sense. Mary Alice Firestone had been the subject of strong newspaper coverage from the time of her wedding in 1961, the pinnacle of interest in her as an individual, to the time of her filing for divorce in 1964, a time of more waning public interest.¹⁷⁵ Her wedding to Russell Firestone was covered by *The New York Times*¹⁷⁶ and dozens of large and small newspapers across the United States.¹⁷⁷ A significant number of those newspapers had included photographs of the couple, a sign of the story’s newsworthiness and of her own public prominence through marriage.¹⁷⁸ The reported theft of her \$250,000 wedding ring some months later again thrust her into the news as an individual.¹⁷⁹ Still later, more local coverage focused on a car crash in which she was injured¹⁸⁰ and the hearing in which she was adjudicated incompetent to care for her

171. 424 U.S. 448 (1976).

172. *Id.* at 457.

173. *Id.* at 454.

174. *Id.* at 453.

175. *Id.* at 454.

176. *Russell Firestone Jr. Weds Mary Sullivan*, N.Y. TIMES, Aug. 2, 1961, at L33.

177. This information is the result of searches on Newspapers.com, ProQuest Newspapers, and America’s Historical Imprints. Because the databases are incomplete, there was likely significant additional coverage in newspapers that are not included in these databases.

178. See, e.g., *Rubber Heir Weds*, IND. GAZETTE, Aug. 3, 1961, at 12. The photograph’s cutline indicates that it was sent out over the Associated Press wire, a further indication of the newsworthiness of the story.

179. See, e.g., *Hunt Gang in Theft of \$250,000 Diamond*, CHI. TRIB., July 3, 1963, at 39.

180. *Mrs. Firestone’s Condition Poor*, PALM BEACH POST, Feb. 8, 1964, at 2.

personal interests because of alleged mental health problems.¹⁸¹ This coverage indicates some continuing media interest in her in the years between her marriage and the time in which she filed for divorce.

Yet, the Court in *Time v. Firestone* decided that Firestone's high-profile divorce did not cause her to suddenly become a public figure again.¹⁸² In other words, despite significant earlier media interest in her as an individual during her marriage, by the time of the actual divorce proceedings in 1967, she was again a private figure in the eyes of the Court. Arguably, therefore, there was some privacy right to her past even though she was once well known publicly; private figures have greater privacy rights than do public figures and she had seemingly become private again given the passage of time.

Consider too *Doe v. McMillan*,¹⁸³ a case involving a report drafted by Congress in the 1970s that contained disparaging personal information about public school students, including individual students' absences, test results, and disciplinary problems.¹⁸⁴ Justice White's lead opinion echoed the plaintiffs' concerns about the impact the revelation of such information would have on their future careers.¹⁸⁵ But it was Justice Douglas's concurrence that more firmly noted the distinct, later privacy interests in these childhood records, warning of the "potentially devastating effects" to the individuals should such information about the past be revealed later in life:

[M]isdeeds or indiscretions may be devastating to a person in later years when he has outgrown youthful indiscretions and is trying to launch a professional career or move into a position where steadfastness is required.¹⁸⁶

Indeed, the Court specifically noted that the appellate court had refused to enjoin the publication of such privacy-invading information contained in the congressional report only because "no republication or further distribution of the report was contemplated,"¹⁸⁷ suggesting that it would

181. *Appointed as Guardian*, PALM BEACH POST, Nov. 18, 1964, at 2 (photograph and cutline).

182. *Time v. Firestone*, 424 U.S. 448, 454 (1976).

183. 412 U.S. 306 (1972).

184. *Id.* at 308.

185. *Id.* at 309.

186. *Id.* at 329 (Douglas, J., concurring).

187. *Id.* at 310 n.5 (majority opinion); see also *United States v. Sells Eng'g*, 463 U.S. 418 (1983). In *Sells Engineering*, the Court suggests that even though information has been revealed publicly, privacy arguments are not moot and privacy should be protected. "We cannot restore the secrecy that has already been lost," the Court wrote, "but we can grant partial relief by preventing further disclosure." *Id.* at 423 n.6 (quoting the appeals court decision, 642 F.2d 1184, 1187-88 (9th Cir. 1981)).

have otherwise enjoined the publication. Here, too, then, the Court embraced the right to privacy in past information in at least some sense.

It is true that in 1971, the Court decided in a defamation-related case that information concerning the alleged criminal past—“no matter how remote in time or place”—of a candidate for public office “can never be irrelevant” to a candidate’s fitness for office.¹⁸⁸ A candidate who runs on family values or a sterling reputation, the Court suggested, “cannot convincingly cry ‘Foul!’ when . . . an industrious reporter attempts to demonstrate the contrary.”¹⁸⁹ But even in such a case involving a politician, the Court suggested, line-drawing is difficult and the question whether there might be some information that would be off limits was an open one.¹⁹⁰

Even when the Court protected the press after publication of information regarding juvenile offenders in *Oklahoma Publishing v. District Court of Oklahoma*¹⁹¹ and *Smith v. Daily Mail*,¹⁹² its holdings were purposefully limited. In the former, members of the press had learned the identity of a juvenile criminal defendant because they had been allowed into the courtroom by the judge.¹⁹³ Given that the state itself had given the media the information without restriction, the later publication would be protected by the First Amendment.¹⁹⁴ In *Daily Mail*, media had learned similar information from a police radio broadcast and from eyewitness interviews, and the Court held similarly that the newspaper had the right to publish on those grounds.¹⁹⁵ “[T]here is no issue of privacy” or “unlawful press access to confidential judicial proceedings” on the facts, the Court wrote, noting again specifically that its holding was “narrow.”¹⁹⁶

By 2001, then, when the Court decided *Bartnicki* in a way that once again left open the possibility for a valid invasion-of-privacy claim based upon the publication of truthful information that was sufficiently private and not newsworthy, there was some basis on which to conclude that that piece of “private” information could in fact include something that had happened in one’s past—and that that information could have once been

188. *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 277 (1971).

189. *Id.* at 274.

190. *Id.* at 275.

191. 430 U.S. 308 (1977).

192. 443 U.S. 97 (1979).

193. *Oklahoma Publ’g*, 430 U.S. at 309.

194. *Id.* at 312.

195. *Daily Mail*, 443 U.S. at 105.

196. *Id.*

known publicly at least in some sense.¹⁹⁷ Through dicta and otherwise, language from the Court is strong enough and the threads are seemingly pervasive enough to suggest some foundation for a Right to Be Forgotten even at the nation's highest court.

B. Right to Be Forgotten-Like Sentiments in Lower Courts

As indicated at the start of this Article, modern lower courts have also held or have at least suggested that individuals have some privacy interests in once-public matters that have faded from the spotlight. Recall the Pennsylvania man with the court-described non-newsworthy criminal record and the Justice Department official who earlier had been under some sort of investigation, both individuals whose pasts were protected on privacy grounds in Right to Be Forgotten-relevant decisions.

Consider as another example a well-known privacy case from 1983 that very nearly precisely describes the Right.¹⁹⁸ There, Toni Diaz, the female president of a California community college's student body, sued the Oakland Tribune for revealing that she had had gender affirming surgery and that her birth certificate had identified her as a male.¹⁹⁹ The California appeals court in *Diaz v. Oakland Tribune*²⁰⁰ reversed the judgment in favor of Diaz because of faulty jury instructions.²⁰¹ In doing so, however, the court decidedly favored the plaintiff and, in effect, a Right to Be Forgotten.

First, the court decided that Diaz's birth certificate identifying her as a male thirty-six years before, and her arrest record approximately eight years before in which police identified her as a man, did not make her on-paper once-male gender a public fact.²⁰² Instead, the court found that her state-imposed identity as a male could remain private because, in part, she had kept it a secret ever since her gender affirming surgery several years

197. See *Bartnicki v. Vopper*, 532 U.S. 514 (2001).

198. *Diaz v. Oakland Tribune*, 139 Cal. App. 3d 118 (1983). Admittedly, the appellate court decided *Diaz* before the California Supreme Court's holding in *Gates v. Discovery Communications*, 101 P.3d 552 (Cal. 2004), a case discussed in section II.A, but the facts are only marginally parallel, and the *Gates* court does not mention the *Diaz* case in its decision at all.

199. *Diaz*, 139 Cal. App. at 124.

200. 139 Cal. App. 3d 118 (1983).

201. *Id.* at 131.

202. *Id.* at 132.

before,²⁰³ even though some of her life had been spent as a male at least in some sense.²⁰⁴

Second, the court held that a jury could indeed find that her gender affirming surgery—the fact that she had been identified as a male who then became a female in body when she was thirty-three years old—was not newsworthy.²⁰⁵ “Defendants enjoy the right to publish information in which the public has a *legitimate interest*,” the *Diaz* court wrote.²⁰⁶ Here, even though Diaz was a college leader, her gender reassignment surgery did not reflect anything about “her honesty or judgment,”²⁰⁷ the court noted, suggesting that only that sort of information regarding a student body president would be newsworthy.²⁰⁸

Finally, the court decided that the \$775,000 verdict handed down by the jury against the newspaper (approximately \$2,320,000 in today’s dollars²⁰⁹) was not excessive.²¹⁰ “The evidence of Diaz’s emotional distress and suffering” and her “emotional trauma,” the court wrote, “was uncontradicted.” It found that such a damages award would be appropriate under those circumstances,²¹¹ even though the defense had argued in response to the verdict that Diaz had spent only \$800 on related medical care.²¹²

In its decision, the court distinguished *Cox Broadcasting*, finding it of “little guidance.”²¹³ “Importantly,” the court wrote, *Cox Broadcasting* “expressly refused to address the broader question of whether the truthful publication of facts obtained from public records can *ever* be subjected to civil or criminal liability.”²¹⁴ Here, even though the information used by the newspaper to out Toni Diaz was contained within a public birth certificate and a public arrest record, the court found that the revelation of

203. *Id.*

204. *Id.* at 123. Diaz testified that she always knew that she was female, however, even in early childhood.

205. *Id.* at 134.

206. *Id.* at 127 (emphasis in original) (citations omitted). The court cited two cases, including *Briscoe*, and the Restatement of Torts as supporting that conclusion.

207. *Id.* at 134.

208. *Id.*

209. US INFLATION CALCULATOR, <http://www.usinflationcalculator.com/>.

210. *Diaz*, 139 Cal. App. 3d at 137.

211. *Id.*

212. *Id.*

213. *Id.* at 131.

214. *Id.* (emphasis added).

such long-ago facts could indeed be the “ever” moment to which the Supreme Court referred.

Put another way, in some sense, Antonio Diaz, born 36 years before, had been given the Right to be Forgotten by the court. She had become Toni Diaz, and she had been given the right to sue the entity that had revealed a deeply personal secret from the past.

Consider also *Haynes v. Knopf, Inc.*,²¹⁵ a case decided ten years after *Diaz*.²¹⁶ There, the Seventh Circuit suggested that memoirs about the past containing information that a plaintiff “would rather forget”²¹⁷ could spark a successful publication-of-private-facts lawsuit; some historically accurate but embarrassing information would be too deeply private, painful, and shocking if revealed in another’s memoir, including “titillating glimpe[s] of tabooed activities,”²¹⁸ “intimate physical details,”²¹⁹ “intimate medical procedure[s]”²²⁰ and graphic information about another’s sex life.²²¹

While fact patterns in additional cases vary, perhaps most striking and surprising is Right to Be Forgotten-like sensibilities found in cases involving the images captured by authorities when individuals are arrested. In these freedom-of-information cases, an individual’s mugshot, routinely published by some news outlets in 2018, is protected on privacy grounds because of the potential for later harm. These courts suggest, as did the *Diaz* court, that there is some privacy worthy of protection even in criminal records because of the potential for abuse by those who may reveal it in the future.²²²

Consider the 1999 decision by a federal district court in Louisiana withholding a public figure’s arrest photograph.²²³ “[M]ug shots generally disclose unflattering facial expressions,” the court suggested, and “preserve[] in [their] unique and visually powerful way, the subject’s

215. 8 F.3d 1222 (7th Cir. 1993).

216. *Id.*

217. *Id.* at 1233.

218. *Id.*

219. *Id.* at 1234.

220. *Id.* at 1232.

221. *See id.* at 1232.

222. *See* Sarah E. Lageson, *Crime Data, the Internet, and Free Speech: An Evolving Legal Consciousness*, 51 LAW & SOC’Y REV. 8, 9 (2017) (examining the legality of such databases and online repositories of criminal information and arguing that “the unfettered public distribution of criminal justice data reinforces structural inequalities already present in criminal justice institutions, reifying relationships of power and patterns of punishment—of which understanding of law plays a key role”).

223. *Times Picayune Publ’g v. U.S. Dep’t of Justice*, 37 F. Supp. 2d 472 (E.D. La. 1999).

brush with the law *for posterity*.”²²⁴ Just because such a photograph may be in government files, and was at one time routinely released by government officials, the court reasoned, does not mean that the individual loses privacy interests in it.²²⁵

Moreover, and decidedly relevant here, the court found that a public figure’s mug shot—the booking photograph at issue was that of the owner of the San Francisco 49ers who had plead guilty to limited involvement in a government corruption case—may be even more deserving of protection because of the potential for later misuse by rivals in business. Each new publication in the future, the court worried, would cause his renewed embarrassment or discomfort about his past indiscretions.²²⁶

That same year, the Eleventh Circuit wrote quite broadly in a related decision that “individuals have a substantial privacy interest in their criminal histories.”²²⁷

Those cases are not outliers. In 2012, the Tenth Circuit held that criminal detainees’ mug shots should be protected because of the potential for future revelations.²²⁸ There, the court repeated its worries about the future use of past images: “a mug shot’s stigmatizing effect can last *well beyond* the actual criminal proceedings,” it wrote.²²⁹ It then upheld the trial court’s decision that suggested that “[c]ommon sense dictates that individuals desire to *control dissemination* of any visual depictions of themselves and consider such visual depictions ‘personal matters.’”²³⁰

In that 2012 decision, the Tenth Circuit noted that only one federal appellate circuit—the Sixth—had concluded the opposite: that no privacy rights exist in mug shots because the public interest in criminal matters outweighed the individual’s privacy.²³¹ In late 2015, Sixth Circuit judges, recognizing a groundswell, however, voted to hear en banc a case in which U.S. marshals had refused a media request for the booking photographs of four Michigan police officers.²³² “Individuals do not forfeit their interest in maintaining control over information that has been made public in some form,” the Sixth Circuit panel had written earlier in suggesting

224. *Id.* at 477 (emphasis added).

225. *Id.*

226. *Id.* at 479.

227. *O’Kane v. U.S. Customs Serv.*, 169 F.3d 1308, 1310 (11th Cir. 1999).

228. *World Publ’g Co. v. U.S. Dep’t of Justice*, 672 F.3d 825 (10th Cir. 2012).

229. *Id.* at 828 (quoting *Times Picayune Publ’g*, 37 F. Supp. 2d at 477 (emphasis added)).

230. 2011 U.S. Dist. LEXIS 32594, at *40 (N.D. Okla. Mar. 28, 2011) (emphasis added).

231. *Id.* at 828 (citing *Detroit Free Press v. U.S. Dep’t of Justice*, 73 F.3d 93 (6th Cir. 1996)).

232. *Detroit Free Press v. U.S. Dep’t of Justice*, No. 14-1670, 2015 U.S. App. LEXIS 20224 (6th Cir. Nov. 20, 2015).

that the court's nearly two decades-old decision deserved en banc review.²³³

Once again, the court's worries had special relevance to a Right to Be Forgotten. The en banc court specifically noted that "booking photographs often remain publicly available on the Internet long after a case ends,"²³⁴ writing specifically that the court's earlier 1996 outlying decision favoring the release of mug shots was made pre-Google, when the court had likely failed to "account[] for Internet search and storage capabilities."²³⁵

Not surprisingly, given that language and those worries about the future impact of today's information, the Sixth Circuit in 2016 joined other federal courts and decided that mug shots could be kept out of public hands when privacy interests outweigh public interests.²³⁶ Using words and ideas that suggested the court's concern that "forgotten"²³⁷ information that had "disappeared"²³⁸ would be revived to "haunt"²³⁹ an individual for "decades,"²⁴⁰ it sent the case back to the trial court to balance the private and public interests at stake.²⁴¹ Such word choice suggested strong protection for most mug shots, put best in a Right to Be Forgotten-like context by a concurring judge:

Twenty years ago, we thought that the disclosure of booking photographs, in ongoing criminal proceedings, would do no harm. But time has taught us otherwise. The internet and social media have worked unpredictable changes in the way photographs are stored and shared. Photographs no longer have a shelf life, and they can be instantaneously disseminated for malevolent purposes. Mugshots now present an acute problem in the digital age: these images preserve the indignity of a deprivation of liberty, often at the (literal) expense of the most vulnerable among us. Look no further than the online mugshot-extortion business. In my view, [the Sixth Circuit's 1996 decision] . . . has become

233. *Detroit Free Press v. U.S. Dep't of Justice*, 796 F.3d 649, 652 (6th Cir. 2015) (en banc).

234. *Id.*

235. *Id.* at 652 n.1.

236. *Detroit Free Press v. U.S. Dep't of Justice*, 829 F.3d 478 (6th Cir. 2016).

237. *Id.* at 482 (citing *U.S. Dep't of Justice v. Reporters Comm.*, 489 U.S. 749, 771 (1989)).

238. *Id.*

239. *Id.* at 485.

240. *Id.*

241. *Id.*

“inconsistent with the sense of justice.” These evolving circumstances permit the court to change course.²⁴²

Even the dissenting judges in the case, distressed at how the majority opinion had overturned longstanding case law and concerned that it had “deprive[d] the public of vital information about how its government works and [did] little to safeguard privacy,”²⁴³ suggested that a “sensible balance” might be achieved between “reputational concerns and the free flow of public information.”²⁴⁴ They then cited to two Right to Be Forgotten-like law-based considerations: one a proposed Georgia statute that would have required website owners to remove acquitted individuals’ mugshots from webpages and, the second, a Pennsylvania decision that suggested the false light tort—a privacy tort similar to defamation but with a focus on the offensiveness of the incorrect information rather than on its harm to reputation—would be appropriate should a mugshot of an individual whose criminal record had been expunged be published on the website *bustedmugshots.com*.²⁴⁵ In effect, then, the dissenting opinion in the Sixth Circuit en banc opinion, signed by seven federal appellate court judges, also makes a case for a Right to Be Forgotten.

There are additional examples of Right to Be Forgotten-like outcomes within a criminal context in very recent decisions. The 2015 Pennsylvania case involving the man with a criminal record alleged to have been a part of the federal witness protection program is one.²⁴⁶ There, with regard to decades-old information about the man’s criminal past, the court suggested that the publication of such information had been done to harass the plaintiff and that it, therefore, was not protected.²⁴⁷ “Although courts justifiably fear that restrictions on publication may have a chilling effect on the disclosure of future information,” the court wrote, “the present case does not present a scenario in which the right to freedom of information is threatened.”²⁴⁸ Such information about one’s past was, instead, to the court’s mind, “personal, private, and illegal information that ha[d] no relation to any public concern.”²⁴⁹ The court ordered the information

242. *Id.* at 486 (Cole, J., concurring) (citation omitted).

243. *Id.* at 494 (Boggs, J., dissenting).

244. *Id.*

245. *Id.*

246. *Hartzell v. Cummings*, No. 150103764, 2015 WL 7301962, at *1 (Pa. Ct. Com. Pl. Nov. 4, 2015).

247. *Id.* at *18.

248. *Id.* at *17–18.

249. *Id.* at *18.

removed from websites, finding its relevance less important than the man's interests in privacy.

The year before, in the false light case noted by the Sixth Circuit dissent in the mugshots case,²⁵⁰ a Pennsylvania federal court had decided that a man whose mug shot was published on *bustedmugshots.com* and *mugshotsonline.com* had a potentially valid claim for false light even though he had in fact been arrested years before—an arrest that had been expunged.²⁵¹ The website had argued in part that the accuracy of the mug shot and its release by authorities years earlier after the man's arrest had made a false light claim impossible—after all, he had indeed been arrested and the mug shot was indeed that of the plaintiff—but the judge disagreed.²⁵² “The questions here are questions of fact,” the court wrote, “and [the plaintiff's claim for false light] . . . is not implausible.”²⁵³

Outside the criminal context, recall the 2016 case that suggested that the investigation into a federal prosecutor's alleged misconduct could be kept out of public hands.²⁵⁴ In that Freedom of Information Act case, the court specifically wrote that the former prosecutor “without question . . . has a strong interest in avoiding *decades-old* disclosures that would likely cause him professional embarrassment.”²⁵⁵ The passage of time, the court noted specifically, did not materially diminish the man's substantial privacy interests.²⁵⁶

In *Toffoloni v. LFB Publishing Group*,²⁵⁷ a case decided by the Eleventh Circuit in 2009, the court similarly gave support to principles underlying a Right to Be Forgotten. There, the court found a valid right-of-publicity claim in old nude photographs of a female professional wrestler that had been published in *Hustler* magazine after her murder.²⁵⁸ In doing so, the court specifically noted the importance of protecting present privacy interests in older truthful information about an individual:

250. *Detroit Free Press v. U.S. Dep't of Justice*, 829 F.3d 478, 494 (6th Cir. 2016) (Boggs, J., dissenting).

251. *Taha v. Bucks Cty.*, 9 F. Supp. 3d 490 (E.D. Pa. 2014).

252. *Id.* at 494.

253. *Id.*

254. *Bloomgarden v. U.S. Dep't of Justice*, 2016 WL 471251 (D.D.C. Feb. 5, 2016); see also *Bloomgarden v. U.S. Dep't of Justice*, 212 F. Supp. 3d 122, 125 (D.D.C. 2016), a later proceeding in which the court reiterates protection for the letter and suggests that there is negligible public interest in “decades-old agreements.”

255. *Bloomgarden*, 2016 WL 471251, at *4 (emphasis added).

256. *Id.*

257. 572 F.3d 1201 (11th Cir. 2009).

258. *Id.*

[Hustler] would have us rule that someone’s notorious death constitutes a *carte blanche* for the publication of any and all images of that person during his or her life, regardless of whether those images were intentionally kept private and regardless of whether those images are of any relation to the incident currently of public concern. We disagree.²⁵⁹

Instead, the court wrote, courts had consistently ruled that “there are *timeliness . . . boundaries* that circumscribe the breadth of public scrutiny to the incident of public interest.”²⁶⁰ In cases involving crimes, the court suggested that that might well be the period between the time the criminal is caught and when he faces justice in the courtroom.²⁶¹ In other words, the court arguably and, if so, troublingly suggested that shortly after an individual is convicted or found not guilty, the matter could well no longer be of public concern.²⁶² A reasonable timeliness boundary in the case before it, the court repeated throughout the opinion, would not include *Hustler*’s publication of photographs that “were at least twenty years old,” especially when the murder victim when alive had “sought destruction of all of those images.”²⁶³ A decision in favor of publication, the court suggested, would “open the door to [the publication of] any truthful secret” about an individual’s past or otherwise and that privacy here had greater value.²⁶⁴

“[A] person who avoids exploitation during life,” the court wrote in *Toffoloni*, quoting an earlier court, “is entitled to have his image protected against exploitation after death just as much if not more than a person who exploited his image during life.”²⁶⁵ In other words, the court suggests that those who have acted to protect their past during their lifetimes have privacy interests that continue into the present and even after death.

259. *Id.* at 1210.

260. *Id.* (emphasis added).

261. *Id.*

262. The court wrote that during the:

[P]endency and continuation of the investigation, and until such time as the perpetrator[s] of the crime may be apprehended and brought to justice under the rules of our society, the matter will continue to be one of public interest, and the dissemination of information pertaining thereto would not amount to a violation of [appellant’s] right of privacy.

Id. (emphasis omitted) (internal quotation omitted) (citing *Tucker v. News Publ’g Co.*, 397 S.E.2d 499 (Ga. Ct. App. 1990)).

263. *Id.* at 1211.

264. *Id.* at 1212 (citing *Gilbert v. Med. Econ. Co.*, 665 F.2d 305 (10th Cir. 1981)).

265. *Id.* at 1213 (emphasis omitted) (citing *Martin Luther King, Jr. Ctr. for Soc. Change v. Am. Heritage Prods.*, 296 S.E.2d 697, 706 (Ga. 1982)).

Related protection for privacy rights in the past—especially as regarding information about the long-ago death of a relative—also appear in a recent California case. In 2012, the Ninth Circuit held that parents have “a constitutionally protected right to privacy over [a] child’s death images,” when those images had been taken decades before.²⁶⁶ There, a prosecutor who had handled a child’s murder case had kept the autopsy photographs. Years later, he gave one to a journalist doing a follow-up news story about the crime.²⁶⁷ “[T]his is the first case to consider whether the common law right to non-interference with a family’s *remembrance* of a decedent is so ingrained in our traditions that it is constitutionally protected,” the court wrote.²⁶⁸ “We conclude that it is.”²⁶⁹ The United States Constitution, the court explained, “protects a parent’s right to control the physical remains, *memory and images of a deceased child* against unwarranted public exploitation”²⁷⁰ Such protections were especially important, the court noted, “given the viral nature of the Internet, where [parents] might easily stumble upon photographs of [their] dead son on news websites, blogs or social media websites.”²⁷¹ The court decided that future government officials could be liable for depriving surviving family members to their “substantive due process right to family integrity” and privacy interests should they reveal autopsy photographs, including decades-old photographs, in a similar way.²⁷²

Other relevant examples include a 2005 Washington decision in which a plaintiff had a valid privacy claim in medical information that involved in part a medical condition diagnosed when he was a child, later leaked

266. *Marsh v. Cty. of San Diego*, 680 F.3d 1148, 1159 (9th Cir. 2012).

267. *Id.* at 1152.

268. *Id.* at 1154 (emphasis added).

269. *Id.*

270. *Id.* (emphasis added).

271. *Id.* at 1155.

272. *Id.* at 1154; see also *Catsouras v. Dep’t of Cal. Highway Patrol*, 181 Cal. App. 4th 856, 864 (2010) (“[A]s cases from other jurisdictions make plain, family members have a common law privacy right in the death images of a decedent, subject to certain limitations.”). Also relevant is *Tatum v. Dallas Morning News*, 493 S.W.3d 646, 663 (Tex. Ct. App. 2015). There, the court similarly held that parents had a valid defamation claim against a journalist who had reported that their son had committed suicide, and who had noted critically that the obituary suggested instead that the death was from a car accident. *Id.* at 652–53. Even though the underlying facts as presented in the publication were basically true, albeit critical of the grieving parents, the court sided with the parents who argued that they believed the suicide had been caused by the accident and that they had wanted to honor their son’s memory by not including “morbid details” or “overly scientific information” about his death. *Id.* at 663. In other words, the court gave the parents the ability to bring a defamation claim based upon their preferred understanding of the past, one that apparently did not align with police records, and one giving them at least some apparent right to forget the police assessment of how their son died.

by his employer;²⁷³ a 2010 Texas case in which the state supreme court held that state employees' dates of birth can be protected as private information;²⁷⁴ and a 2014 Illinois decision in which the court found that students have privacy interests in the historical information in their student files.²⁷⁵

In 2011, the Washington State Supreme Court justices wrote rather succinctly en banc that they were "not persuaded that a person's right to privacy . . . should be forever lost because of media coverage."²⁷⁶ Even though identifying information involving a police officer in an "unsubstantiated allegation of sexual misconduct" had been published in the media and more broadly, the court held that revelation of his identity, even though it named him in the opinion itself, would be "highly offensive to a reasonable person."²⁷⁷

Of at least some evidence of the potentially increasing viability and breadth of a Right to Be Forgotten in the United States, consider that throughout reported case history only thirty-two courts have quoted the somewhat surprising Restatement language that suggests that there is a privacy right in one's past history that he would rather forget.²⁷⁸ Four of those cases, more than 10% of them, were decided in 2015 and later, and in each the language is not discounted but embraced as drawing a definitional line appropriate to privacy.²⁷⁹ In 2017, for example, a federal trial court in Kansas ruled against a former Wichita State vice president's privacy claim that sprang from a public announcement about his impending termination.²⁸⁰ The court wrote that such employment-related information was "not the kind of private information [traditionally] entitled to . . . privacy . . ."²⁸¹ "[F]acts that are considered suitably private," the court explained in contrast, involve sexual relations,

273. *White v. Town of Winthrop*, 128 Wash. App. 588, 116 P.3d 1034 (2005).

274. *Tex. Comptroller of Pub. Accounts v. Attorney Gen.*, 354 S.W.3d 336 (Tex. 2010).

275. *John v. Wheaton Coll.*, No. 2-13-0524, 2014 Ill. App. Lexis 1045 (Ill. Ct. App. May 20, 2014).

276. *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wash. 2d 398, 412, 259 P.3d 190, 196 (2011); *see also United States v. Smith*, 123 F.3d 140, 156 (3d Cir. 1997) (holding that sealed briefs or closed court proceedings that may have implicated grand jury material could be protected from the press, and that newspapers had no constitutional or common law right to these materials).

277. *Bainbridge Island Police Guild*, 172 Wash. 2d at 413–15, 259 P.3d at 197–98.

278. Research done in November 2017 (on file with author).

279. *Roman v. United Illuminating Co.*, CV146044689S, 2015 Conn. Super. Lexis 1096 (Conn. Super. Ct. May 12, 2015); *Jane Does v. King Cty.*, 192 Wash. App. 10, 366 P.3d 936 (2015); *Predisik v. Spokane Sch. Dist. No. 81*, 346 P.3d 737 (Wash. Ct. App. 2015).

280. *Robinson v. Wichita State Univ.*, No. 16-cv-2138-DDC-GLR, 2017 U.S. Dist. Lexis 83577 (D. Kan. May 31, 2017).

281. *Id.* at *16–17.

humiliating illnesses, and “some of [a man’s] past history that he would rather forget.”²⁸²

It is important to note that several recent courts have explicitly rejected Right to Be Forgotten-like arguments. In 2015, the Second Circuit, for example, refused to find that a woman could bring privacy-based claims against online media that continued to report her arrest that had been, in effect, nullified.²⁸³ Connecticut’s erasure statute, the court wrote, “creates legal fictions” but “does not render historically accurate news accounts of an arrest tortious merely because the defendant is later deemed as a matter of legal fiction never to have been arrested.”²⁸⁴ And a federal trial court in New York that same year opened once-sealed documents that had been part of litigation five years before.²⁸⁵ “[T]here is no implication in the caselaw or in common sense why the passage of more than three years should disable a journalist from seeking [the] unsealing” of an otherwise sealed file, the court wrote.²⁸⁶

Even so, a meaningful number of cases embrace the notion that individuals have a right to privacy in older, previously public information. Very likely, as reflected in some of the language above, the shift toward privacy in past information over publication rights is based in part upon judges’ growing worries about the longevity of information in today’s internet age.

C. *The Judicial Shift to Protect the Privacies of Life*

In 1975, in *Cox Broadcasting v. Cohn*, the Supreme Court noted that it found the “strong tide running in favor of the so-called right of privacy” compelling.²⁸⁷ Two years later, in *Whalen v. Roe*,²⁸⁸ the Court wrote that it had special privacy concerns about the computerization of information and information storage. “We are not unaware,” the Justices explained, “of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive

282. *Id.*

283. *Martin v. Hearst Corp.*, 777 F.3d 546 (2d Cir. 2015).

284. *Id.* at 551. See also *Lovejoy v. Linehan*, 20 A.3d 274 (N.H. 2011), a case involving the revelation of a sheriff candidate’s annulled assault conviction. The court concluded that the annulled record was of public concern. *Id.* at 278.

285. *In re Pineapple Antitrust Litig.*, 04 md. 1628 (RMB)(MHD), 2015 US Dist. LEXIS 122438 (S.D.N.Y. 2015).

286. *Id.* at *7.

287. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 488 (1975).

288. 429 U.S. 589 (1977).

government files.”²⁸⁹ Much of the stored information, the Justices noted specifically, is “personal in character and potentially embarrassing or harmful if disclosed.”²⁹⁰

In other words, at the nation’s highest court at the start of the computer age, there was the sense that personal privacy was becoming increasingly vulnerable. Moreover, there were concerns about older, stored, embarrassing or deeply private information and what might be done with it should someone gain access.

Forty years later, in 2014, when the Court expressed concerns about police access to the information contained in a cellular phone—calling the material stored there the “privacies of life”²⁹¹—the shift toward privacy was even clearer.

The United States Supreme Court is not alone in its worries about technology and its sensitivities regarding life’s privacies.²⁹² In recent years, there seems to be a growing sense among many courts that the mounting vulnerability of privacy posed by modern technology and information-sharing demands stronger legal protection. This has led some courts to overcome traditional deference to journalists in deciding what should be considered “newsworthy” and to hold that individual privacy should be protected, even when the counterweight is the publication of truthful—and, arguably, newsworthy—information.²⁹³

Two recent examples that show the courts’ growing confidence in deciding questions of newsworthiness involve public figures from the sports world. In both, the plaintiffs brought publication-of-private-facts lawsuits against publishers of certain medical information. In both, the public figures won the right to continue their privacy causes of action, despite defense arguments that the information at issue was newsworthy and, therefore, the cases warranted immediate dismissal.

In the first, a reporter for ESPN tweeted a report that a New York Giants football player, Jason Pierre-Paul, had needed a finger amputation

289. *Id.* at 605.

290. *Id.* The Court specifically expressed concern with “the unwarranted [intentional or unintentional] disclosure of accumulated private data.” *Id.* at 606.

291. *Riley v. California*, __ U.S. __, 134 S. Ct. 2473 (2014).

292. See Andrew Neville, *Is It a Human Right to Be Forgotten? Conceptualizing the World View*, 15 SANTA CLARA J. INT’L L. 157, 171 (2017) (arguing that the Right to be Forgotten, or at least the right to have one’s personal information delisted in search engine results, is a human right that is increasingly encroached upon due to modern technology; noting that “[t]he Internet has created a world where information is stored and shared even when international governments consider it to be irrelevant by statute”).

293. For a fuller exploration of this topic, see AMY GAJDA, *THE FIRST AMENDMENT BUBBLE: HOW PRIVACY AND PAPARAZZI THREATEN A FREE PRESS* (2015).

after an injury involving fireworks.²⁹⁴ The tweet included an image of the player's hospital medical chart that confirmed the amputation.²⁹⁵ A federal trial court in Florida in 2016 found that Pierre-Paul had a potentially valid publication-of-private-facts claim: the medical chart was not publicly available, the court decided, and medical information itself is traditionally considered private.²⁹⁶ Even though the court recognized the news value in Pierre-Paul's potentially disabling injury alone, it found that the use of a medical record to, in effect, prove the accuracy of the story could well push the information past the limits of public concern.²⁹⁷

Both "common decency" and concern about the football player's "feelings . . . and the harm that will be done to him by the exposure" were reasons the court gave for ruling as it did.²⁹⁸ Moreover, and key here, the court relied in part upon "federal and state medical privacy laws [that] signal that an individual's medical records are generally considered private."²⁹⁹

The second case involved boxer Floyd Mayweather's former girlfriend; she sued him for posting to social media the allegation that she had obtained an abortion before the couple split.³⁰⁰ A California appeals court in 2017 found that the information regarding the abortion itself was newsworthy, given that the couple was high-profile and that people would therefore be interested in the reason for their breakup.³⁰¹

Mayweather's inclusion of a sonogram photograph, however, satisfied the basis for a publication-of-private-facts claim.³⁰² "On this record," the court wrote, "publishing those images served no legitimate public purpose, even when one includes entertainment news within the zone of protection."³⁰³ Such a publication was, instead, "morbid and sensational prying into her private life" and therefore could be the basis for a

294. *Pierre-Paul v. ESPN*, No. 16-21155-Civ-COOKE/TORRES, 2016 U.S. Dist. Lexis 119597 (S.D. Fla. Aug. 29, 2016).

295. *Id.* at *3.

296. *Id.*

297. *Id.*

298. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 652D cmt. h (AM. LAW INST. 1977)).

299. *Id.* See also *Swendrak v. Urode*, B275175, 2017 Cal. App. Unpub. Lexis 4010 (Cal. Ct. App. June 12, 2017) (upholding an \$825,000 verdict in favor of man whose landlord had revealed to other tenants that police had placed him on a "psychiatric hold").

300. *Jackson v. Mayweather*, 217 Cal. Rptr. 3d 324 (Cal. Ct. App. 2017).

301. *Id.* at 249.

302. *Id.* at 250.

303. *Id.*

successful publication-of-private-facts claim.³⁰⁴ The court held that Mayweather’s repeated posts would support in part an intentional-infliction-of-emotional-distress claim as well.³⁰⁵

These, then, are not courts that are single-mindedly focused on First Amendment-related publication rights. Instead, both courts sided with the privacy interests of public figures in cases involving what even the courts considered newsworthy information and favored at least initially those interests over the publication of truthful information.

A similar sensibility exists in court decisions around the nation. In 2016, a federal court in New York, for example, rejected a request for certain information about prison inmates in a different case, suggesting that the requestor wrongly wanted “a piece of [the inmates’] criminal history.”³⁰⁶ “[C]onfidentiality interests cannot be waived through prior public disclosure or the passage of time,” the court advised.³⁰⁷ Courts in Hawaii and New York similarly ruled in favor of plaintiffs in their privacy lawsuits that referenced at least in part information from the past known to others.³⁰⁸

A similarly inclined privacy-protective Ninth Circuit wrote in 2017 that no *per se* rule exists that suggests that “one cannot have a reasonable expectation of privacy in a conversation just because it occurs in public.”³⁰⁹ “The take-home message,” the court explained, “is that privacy

304. *Id.* at 251 (quoting *Catsouras v. Dep’t of Cal. Highway Patrol*, 104 Cal. Rptr. 3d 352, 366 (Cal. Ct. App. 2010)).

305. *Id.* at 257–58.

306. *Davis v. U.S. Dep’t of Homeland Sec.*, No. 11 Civ. 203 (ARR) (VMS), 2016 U.S. Dist. LEXIS 46455 at *8 (E.D.N.Y. Apr. 6, 2016).

307. *Id.* at *10 (citing *Halpern v. FBI*, 181 F.3d 279, 297 (2d Cir. 1999)); *see also Muchnick v. U.S. Dep’t of Homeland Sec.*, 225 F. Supp. 3d 1069, 1076 (N.D. Cal. 2016) (holding that FOIA protects forgotten criminal history “even if scattered bits and pieces are in the public domain”).

308. *Boelter v. Advance Magazine Publishers Inc.*, 210 F. Supp. 3d 579 (S.D.N.Y. 2016) (deciding that the plaintiff’s claim based upon the Michigan Preservation of Personal Privacy Act was valid over Conde Nast’s arguments that if the court the publisher liable for selling and acquiring the plaintiff’s personal data, newsgathering would be affected); *Pac. Radiation Oncology, LLC v. Queen’s Med. Ctr.*, 375 P.3d 1252 (Haw. 2016) (holding that patient records including historical medical information regarding “the most confidential and sensitive inquiries” are deserving of privacy and should not be produced in a third-party lawsuit); *see also Univ. of Tex. Sys. v. Paxton*, NO. 03-14-00801-CV, 2017 Tex. App. LEXIS 3043, at *13 (Apr. 7, 2017) (noting in a privacy case involving the requested release of the identities of participants in a social science experiment that certain historical matters would be highly offensive if released and could well include “a claim for injuries from sexual assault, a claim on behalf of illegitimate children for benefits following their father’s death, a claim for pregnancy expenses resulting from failure of a contraceptive device, claims for psychiatric treatment of mental disorders following workplace injuries, claims for injuries to sexual organs, claims for injuries from an attempted suicide, and claims of disability caused by physical or mental abuse by co-workers”).

309. *Safari Club Int’l v. Rudolph*, 862 F.3d 1113, 1125 (9th Cir. 2017).

is relative and, depending on the circumstances, one can harbor an objectively reasonable expectation of privacy in a public location.”³¹⁰ It held that a man had a valid privacy claim after an associate recorded their conversation at a public restaurant and posted it to YouTube.³¹¹

That same year, a federal trial court in Massachusetts upheld the constitutionality of a state statute that prohibited secret recording, ruling against a “national media organization” that used “undercover newsgathering techniques” to secretly record and intercept communications in places “such as polling places, sidewalks, and hotel lobbies.”³¹² There too the court specifically highlighted privacy concerns in a way that echoed in part the 1890 law review article by Warren and Brandeis:

Individuals have conversations they intend to be private, in public spaces, where they may be overheard, all the time—they meet at restaurants and coffee shops, talk with co-workers on the walk to lunch, gossip with friends on the subway, and talk too loudly at holiday parties or in restaurant booths. These types of conversations are ones where one might expect to be overheard, but not recorded and broadcast. There is a significant privacy difference between overhearing a conversation in an area with no reasonable expectation of privacy and recording and replaying that conversation for all to hear.³¹³

And in the case involving the hack of Ashley Madison users’ identifying information,³¹⁴ the online dating service aimed at facilitating extramarital affairs successfully protected its customers’ personal information at trial over arguments that the information was already public because it had been posted online.³¹⁵ The court explained that the matter “highlight[ed] the need to protect the integrity of the internet and make it a safer place for business, research and casual use” and, ultimately, to protect the victims of such privacy invasions.³¹⁶

310. *Id.* at 1126.

311. *Id.*

312. *Project Veritas Action Fund v. Conley*, 244 F. Supp. 3d 256, 259 (D. Mass. 2017).

313. *Id.* at 264.

314. *In re Ashley Madison Customer Data Sec. Breach Litig.*, MDL No. 2669, 2016 U.S. Dist. Lexis 57619 (E.D. Mo. Apr. 29, 2016).

315. *Id.* at *19.

316. *Id.* at *21; *see also* Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61, 68 (2009) (arguing that regulations are needed to limit the negative impacts of “online mob” activity and thereby promote a more “vibrant online dialogue”; noting that “although much obnoxious online activity is and should be protected, limiting online mobs’ ability to silence women, people of color, and their other targets will, in fact, enhance the most important values underlying the First Amendment”).

A decade ago, the Ohio State Supreme Court similarly embraced privacy over publication.³¹⁷ “[T]he barriers to generating publicity are slight,” it wrote regarding the ease of publishing information on the internet, “and the ethical standards regarding the acceptability of certain discourse have been lowered.”³¹⁸ It then recognized the false-light privacy tort for the first time, a tort that other states had rejected as being too similar to defamation but without its protections. “As the ability to do harm has grown,” the court explained, “so must the law’s ability to protect the innocent.”³¹⁹

These interests in privacy and concern about later availability of truthful but embarrassing information online are reflected in polls that show that most people in the U.S. favor at least in part a Right to Be Forgotten. A 2014 report showed that “[s]ixty-one percent of Americans believe some version of the right to be forgotten is necessary.”³²⁰ A later poll suggested that nearly nine out of ten people wanted the ability to remove past embarrassing information online.³²¹

It is not difficult to imagine these courts and these individuals and many others like them who have embraced the importance of privacy in past years³²² favoring a plaintiff who asks for privacy against a publisher who has dredged up and published deeply private information from the past.

D. Dahlstrom and a Right to Be Forgotten

There is additional and surprising support for this judicial shift toward privacy in a 2015 decision by the Seventh Circuit, *Dahlstrom v. Sun-Times Media, LLC*.³²³ The court’s opinion in *Dahlstrom* does not address a Right to Be Forgotten by name (although the privacy of birthdates was at issue in the case in part), but decides something fundamental to such a right: that those who publish private information that they have knowingly

317. *Welling v. Weinfeld*, 113 Ohio St. 3d 464, 2007-Ohio-2451, 866 N.E.2d 1051.

318. *Id.* at 1058–59.

319. *Id.* at 1059.

320. *U.S. Attitudes Toward the ‘Right to Be Forgotten’*, SOFTWARE ADVICE (2014), <http://www.softwareadvice.com/security/industryview/right-to-be-forgotten-2014/> [<https://perma.cc/R6ND-VPCL>]. The report also suggested that “[t]hirty-nine percent want a European-style blanket right to be forgotten, without restrictions” and “[n]early half of respondents were concerned that ‘irrelevant’ search results can harm a person’s reputation.” *Id.*

321. Mario Trujillo, *Public Wants ‘Right to be Forgotten’ Online*, HILL (Mar. 19, 2015, 9:12 AM), <http://thehill.com/policy/technology/236246-poll-public-wants-right-to-be-forgotten-online> [<https://perma.cc/4S9K-FV69>].

322. See numerous cases cited in GAJDA, *supra* note 293.

323. 777 F.3d 937 (7th Cir. 2015).

obtained from privacy-protected government files can be liable for invasion of privacy despite the underlying truth of the information.

The *Dahlstrom* case, therefore, is important in two ways to any Right to Be Forgotten. First, it holds that a publisher can be liable for the truthful publication of what could well be described as innocuous personally identifiable information despite considerable First Amendment protection for more egregious publications in past Supreme Court jurisprudence.³²⁴ Second, in doing so, the decision lends strong support to the argument that those who knowingly gather and publish information sealed by statute for privacy reasons can be and arguably should be liable in a privacy-based cause of action. This would include the possibility of a successful action brought by a person whose once-secret past was revealed.

Dahlstrom concerned a *Chicago Sun-Times* news article that had criticized the inclusion of certain individual police officers in a police lineup, suggesting that investigators had chosen colleagues as ringers who would shift attention away from the politically-well-connected suspect in a death investigation.³²⁵ The article noted that the suspect—six-foot-three and 230 pounds—had looked “average-sized” compared to the larger officers who appeared in the lineup with him, even though witnesses to the fatality under investigation had described the perpetrator as the “tallest” and “biggest” person they had seen that night.³²⁶

It was the article’s inclusion of accurate personally identifying information to which the police officers objected.³²⁷ One officer was described as six-foot-three and 245 pounds; another was identified as a forty-nine-year-old; a third was described as tattooed.³²⁸ The officers alleged that the published information proved that the newspaper had violated the federal Driver’s Privacy Protection Act (DPPA)³²⁹ by knowingly obtaining and then publishing identifying characteristics from Illinois Secretary of State motor vehicle records, including “each officer’s birth date, height, weight, hair color, and eye color.”³³⁰ The DPPA makes it “unlawful for any person knowingly to obtain or disclose personal information[] from a motor vehicle record.”³³¹

324. *Id.* at 953–54.

325. Tim Novak and Chris Fusco, *Daley Nephew Biggest Guy on Scene, but Not in Lineup*, CHICAGO SUN-TIMES, Nov. 21, 2011, at 16.

326. *Id.*

327. *Dahlstrom*, 777 F.3d at 939.

328. *Id.*

329. 18 U.S.C. §§ 2721–25 (2012).

330. *Dahlstrom*, 777 F.3d at 939.

331. 18 U.S.C. § 2722(a).

After the trial court rejected the journalists' motion to dismiss, the journalists argued in part on appeal that they had the right to publish truthful information about the officers that they had obtained from a government source; in making that argument, they relied in large part on foundational Supreme Court cases that protected the publication of government-sourced truthful information.³³² The journalists argued, in effect, that *Cox Broadcasting*, *Florida Star*, and *Bartnicki* all supported them.

The Seventh Circuit, however, rejected the newspaper's First Amendment defense as had the trial court, writing in part that the newspaper had cited to "no authority for the proposition that an entity that acquires information *by breaking the law* enjoys a First Amendment right to disseminate that information."³³³ The court explained that in each Supreme Court case cited by the newspaper—*Cox Broadcasting*, *Florida Star*, *Bartnicki*—"the press's initial acquisition of sensitive information was lawful."³³⁴

Indeed, as explained earlier in this Article, the *Dahlstrom* court's refusal to follow in a rote way generally media-protective Supreme Court precedent is not at odds with language in those older cases.³³⁵ Recall how the Court repeatedly emphasized the narrowness of its privacy-versus-press decisions.³³⁶ Noting that the government had released the purportedly private information in most of these cases, the Court implied that if the press had acquired information through unlawful means, its right to publish could well diminish.³³⁷

More specifically with regard to that line of Supreme Court jurisprudence, the Seventh Circuit's unanimous opinion suggested first that the Justices had never conferred on media any expansive newsgathering right, instead noting that the Court had decided that newsgatherers must abide by generally applicable laws despite the promise of press freedoms within the First Amendment.³³⁸ Second, the *Dahlstrom* court found that the government's interests in deterring access

332. *Dahlstrom*, 777 F.3d at 950.

333. *Id.* (emphasis added).

334. *Id.*

335. See section II.A.

336. See discussion *supra* section II.A.1.

337. See *Bartnicki v. Vopper*, 532 U.S. 514 (2001), discussed *supra* in section II.A.1. There, recall that the court specifically noted that it was a "still-open question" whether media could be liable for the publication of information that it had acquired "unlawfully," in contrast with that it had acquired lawfully. *Id.* at 528.

338. *Dahlstrom*, 777 F.3d at 946–47.

to the drivers license database and in protecting the privacy of individuals were important safety-related considerations sufficiently advanced by the statute's prohibitions.³³⁹ Even though the topic of the article itself was important, the court decided, the value added by the inclusion of personal information was negligible.³⁴⁰ Therefore, this time, privacy won out over publication.

On remand, the trial court described the Seventh Circuit's *Dahlstrom* holding this way: the appeals court had decided that "the Sun-Times possessed no constitutional right, either to obtain the officers' personal information from the motor vehicle records, or to publish the unlawfully obtained information."³⁴¹

It is true that the *Dahlstrom* appeals court pointedly refused to "opine as to whether, given a scenario involving lesser privacy concerns or information of greater public significance, the delicate balance might tip in favor of disclosure."³⁴² Instead, the court wrote:

We hold only that, where members of the press *unlawfully* obtain sensitive information that, in context, is *of marginal public value*, the First Amendment does not guarantee them the right to publish that information.³⁴³

Note, however, that such a limitation is actually not so limited. Many news stories could be considered of marginal public value³⁴⁴ and unlawful behavior is not perfectly definable given the *Dahlstrom* facts in which the role the journalists played in acquiring the information is not adequately described. Moreover, note how the language in the quoted passage supports a Right to Be Forgotten. Certainly, "sensitive information" that is "of marginal public value" could well include information about an individual's past, proved private because a court or a statute had sealed it

339. *Id.* at 954.

340. *Id.* at 953.

341. *Dahlstrom v. Sun-Times Media, LLC*, Case No. 12 C 658, 2016 U.S. Dist. Lexis 134227 at *2–*3 (N.D. Ill. Sept. 29, 2016). The court held that while there remained some question about the newspaper's ability to gather the information, it granted the plaintiffs' motion for judgment on the pleadings about the publication itself. *Id.* at *9.

342. *Dahlstrom*, 777 F.3d at 954.

343. *Id.* (emphasis added).

344. Amy Gajda, *Judging Journalism: The Turn Toward Privacy and Judicial Regulation of the Press*, 97 CALIF. L. REV. 1039, 1076 n.230 (2009) (offering an example from a 2006 case in which "a federal district court was openly skeptical about journalists' news choices in a defamation case in which it compared the 'convincing' public interest topic of consumer issues with news reports of 'celebrity marriages and divorces, waterskiing squirrels, exploding whales, and national anthem singing tryouts,' refusing to accept the media defendant's broad definition for 'newsworthy'" (citing *Englert v. MacDonnell*, No. 05-1863-AA, 2006 U.S. Dist. LEXIS 29361, at *20–21 (D. Or. May 10, 2006))).

from public access on privacy grounds. If members of the press “unlawfully” obtain such information, then, in the *Dahlstrom* court’s own words, “the First Amendment does not guarantee them the right to publish that information” if it is “of marginal public value,”³⁴⁵ a determination that under the *Dahlstrom* facts appears to defy the news judgment of the journalists themselves.

Take juvenile criminal records, for example, and the laws that prohibit public access to those that are sealed or expunged. Under *Dahlstrom*, it would seem that the knowing access and publication of such information, especially years-old information, could conceivably lead to liability if the “delicate balance” between privacy and public interest at issue weighs more heavily in favor of privacy as earlier Supreme Court precedent suggests that it might.³⁴⁶ Such information may have been long since forgotten by most and the public interest in it would arguably be negligible in many cases. The individual, moreover, would likely argue that he has a strong privacy interest in his juvenile criminal record, given the economic and emotional dangers of disclosure. Compare in contrast the information published by the *Sun-Times* regarding the police officers: birthdates, physical characteristics, and other identifying information that is arguably not private at all and without any seeming potential to harm the officer’s future livelihood other than through identifiability as an officer. Nonetheless, in *Dahlstrom* it was protectable on privacy grounds because a statute mandated as much.

Any lawsuit based upon the publication of older, expunged criminal records seems a stronger argument for privacy protections—and a pro-plaintiff outcome, therefore, appears at least possible under *Dahlstrom*.

E. Right to Be Forgotten-Relevant Statutes

Given *Dahlstrom*’s reliance on a privacy-based statute to punish newsgathering and publication by journalists, Right to Be Forgotten ideals in statutory law across the United States are relevant: statutes that protect truthful, older information on privacy grounds seemingly could, post-*Dahlstrom*, become the basis for liability in privacy-focused lawsuits should the historical information be revealed by a publisher.

Consider the relevance of such statutes to the two key parts of a privacy cause of action. The first is the distinction between what is public and what is private. If once-public information has been sealed, the argument would be that such information has become private, especially if the

345. *Dahlstrom*, 777 F.3d at 954.

346. *Id.*

information is older and long forgotten. Second, if truthful information that is “morbid and sensational prying into private lives for its own sake” and of no interest to a decent person exceeds the bounds of what is appropriate news,³⁴⁷ statutes that protect certain historic information can help establish what is morbid and sensational and outside decency standards. In this way, newsworthiness is, in part, some might argue, curated by legislatures that protect certain truthful information by placing it outside the bounds of what is properly revealed. Society has spoken, the argument would go, and certain information is therefore appropriately off limits.

This is in part what occurred in the Jason Pierre-Paul case against ESPN described earlier.³⁴⁸ There, the court relied on “federal and state medical privacy laws. . . [that] signal that an individual’s medical records are generally considered private.”³⁴⁹ The Health Insurance Portability and Accountability Act, therefore, helped to establish that ESPN’s use of a medical chart was beyond the bounds of what was appropriate news.

In other words, as some courts have suggested,³⁵⁰ forbidding access to, providing for the destruction of, or providing criminal liability for someone who releases particular historical information may provide a means for laws to force society to “forget” that information. By doing so, the argument would go, they also can help establish what is appropriately newsworthy, at least in some sense.

It is clear that such statutes, of course, cannot draw the newsworthiness line in all circumstances. Consider, for example, the secrecy in years-old tax records, a subject highly relevant in 2018, given President Donald Trump’s continuing refusal to reveal his tax returns.³⁵¹ Some who work at the Internal Revenue Service have access to politicians’ and celebrities’ current and older tax returns, and many journalists and members of the public would very much like to learn what is in them.

And while news value seems absolutely clear in the situation involving President Trump, federal law mandates confidentiality of this older financial information. The Internal Revenue Code reads that no officer,

347. RESTATEMENT (SECOND) OF TORTS § 652D, cmt. H (AM. LAW INST. 1977).

348. *Pierre-Paul v. ESPN, Inc.*, Case No. 16-21156-Civ-COOKE/TORRES, 2016 U.S. Dist. LEXIS 119597 (S.D. Fla. Aug. 29, 2016).

349. *Id.* at *3; *see also Swendrak v. Urode*, B275175, 2017 Cal. App. Unpub. LEXIS 4010 (Cal. Ct. App. June 12, 2017) (upholding an \$825,000 verdict in favor of man whose landlord had revealed to other tenants that police had placed him on a “psychiatric hold”).

350. *See, e.g., Martin v. Hearst Corp.*, 777 F.3d 546 (2d Cir. 2015).

351. *See, e.g., Billy House, “Trump Will Not Release Taxes; Senior Adviser Says People Don’t Care About Tax Returns Of First Billionaire President,”* PROVIDENCE J., Jan. 23, 2017.

federal or state employee, law enforcement official, agency official, or anyone with access to tax returns “shall disclose any return or return information obtained by him in any manner.”³⁵² Under *Dahlstrom* and *Pierre-Paul*, given these longstanding statutory privacy interests, the possibility exists that a court might find the revelation of tax returns in a case not involving a politician to be sufficiently private and insufficiently newsworthy to merit free press protections.

Consider as a broader example Tennessee’s “Confidential Records” statute,³⁵³ one that suggests a right to privacy in much past historical information. The statute provides that medical records,³⁵⁴ military records,³⁵⁵ school records,³⁵⁶ children’s services records,³⁵⁷ motor vehicle records,³⁵⁸ mental health files,³⁵⁹ records that would identify those involved in executions,³⁶⁰ photographs of rape victims,³⁶¹ among multiple others, are protected. All are “treated as confidential and shall not be open for inspection by members of the public.”³⁶² Multiple additional states have similarly protective statutes.³⁶³

These statutes do not promise a Right to Be Forgotten in any direct sense; they do not offer or even suggest Right to Be Forgotten invasion-of-privacy causes of action by their language. But what they do promise is a clear level of confidentiality in certain records, up to total destruction of those records, and, given *Dahlstrom*, the very real possibility that someone could well sue on privacy grounds based upon them should such information be revealed.

1. *Right to Be Forgotten-Relevant Statutes and Children*

Perhaps the most privacy-protective of these statutes are those concerning the past lives of children, especially with regard to their criminal histories. In Tennessee and many other states, childhood criminal

352. I.R.C § 6103(a) (2012).

353. TENN. CODE ANN. § 10-7-504 (2017).

354. *Id.* § 10-7-504(a)(1).

355. *Id.* § 10-7-504 (a)(3).

356. *Id.* § 10-7-504(a)(4).

357. *Id.* § 10-7-504(a)(8).

358. *Id.* § 10-7-504(a)(12).

359. *Id.* § 10-7-504(a)(13)(A).

360. *Id.* § 10-7-504(h)(1).

361. *Id.* § 10-7-504(q)(1)(E).

362. *E.g., id.* § 10-7-504(a).

363. *See* MINN. STAT. § 626.556 Subd. 11c (2017); MONT. CODE ANN. § 41-5-216(1) (2017); N.C. GEN. STAT. § 7B-2901 (2017).

records are strongly protected.³⁶⁴ In Montana, a statute orders the physical sealing of juvenile criminal records when the individual turns eighteen,³⁶⁵ and it contemplates the complete “destruction of records” of youth court records more generally.³⁶⁶

In North Dakota, fingerprint records and photographs of an arrested child must be destroyed.³⁶⁷ After that, the statute mandates that the government act as if the record had never existed:

Upon the final destruction of a file or record, the proceeding must be treated as if it never occurred . . . [and] [u]pon inquiry in any matter the child, the court, and representatives of agencies . . . shall properly reply that no record exists with respect to the child.³⁶⁸

In Minnesota, state officials are forbidden from releasing juvenile offender records and from acknowledging that such records exist.³⁶⁹ There too juvenile records “must be destroyed” instantly or later, depending upon the case outcome and the severity of the crime.³⁷⁰ Photographs of children are to be destroyed when the children turn nineteen.³⁷¹ Relatedly, if a school in Minnesota receives a disposition order from the police, that information “must be destroyed” when the student graduates and any data about the incident must be “delete[d].”³⁷² In addition, a child’s blood samples and the child’s test results for certain disorders “must be destroyed.”³⁷³

Consider too the privacy in many states surrounding the adoption process and how it, in effect, changes historical fact to ensure that certain individuals are forgotten. In Alabama, as in many states, once a child is adopted, a new birth certificate is issued containing the names of the adoptive parents and the original birth certificate is sealed.³⁷⁴ In Kentucky, the new birth certificate may not indicate the location of the hospital or

364. *E.g.*, TENN. CODE ANN. § 10-7-504(a)(8).

365. MONT. CODE ANN. § 41-5-216(1).

366. *Id.* § 41-5-216(3).

367. N.D. CENT. CODE § 27-20-53(4) (2017).

368. *Id.* § 27-20-54(2).

369. MINN. STAT. § 299C.095 Subd. 1(b) (2017).

370. *Id.* Subd. 2 (b)–(e).

371. MINN. STAT. § 260B.171 Subd. 1(c) (2017).

372. MINN. STAT. § 121A.75 Subd. 2(e), 3(e) (2017).

373. MINN. STAT. § 144.125 Subd. 8(b) (2017).

374. ALA. CODE § 26-10A-32 (2017).

any attending medical professional and any adoption information may not be disclosed by anyone with access to those “locked” files.³⁷⁵

2. *Right to Be Forgotten-Relevant Statutes and Adults*

There are statutes that protect similarly private information regarding adults, some of which order the total destruction of information. In South Carolina, for example, all photographs, videos, electronic files, and other evidence at issue in an eavesdropping or voyeurism case “must be destroyed” in order to protect the victim’s privacy.³⁷⁶

In California, as in many states, a new birth certificate is issued when an individual requests a different name and gender; the new birth certificate must not refer in any way to any older name or gender.³⁷⁷ In 2015, the state passed a law that forces websites to remove posts by teenagers who later regret what they’ve posted,³⁷⁸ a law with strong Right to Be Forgotten implications.³⁷⁹ Another more criticized California law forced websites such as IMDb to remove anyone’s birthdate if that person requested such a removal, allowing in effect the erasure of accurate historical information.³⁸⁰ In Mississippi, abortion records are sealed and disclosure of related information is a felony.³⁸¹ In West Virginia, any information regarding certain doctors’ drug or alcohol dependency “shall be expunged from the individual’s historic record.”³⁸²

Relatedly, and in line with cases described earlier in this Article, an adult’s criminal past is also at times protected. In Connecticut, criminal records are erased and any person in control of those records “shall not disclose to anyone their existence or any information pertaining to any

375. KY. REV. STAT. ANN. § 199.570 (West 2018). A court can order disclosure, however, under very limited circumstances.

376. S.C. CODE ANN. § 16-17-470(f) (2017).

377. CAL. HEALTH & SAFETY CODE § 103430 (West 2017).

378. Privacy Rights for California Minors in the Digital World, CAL. BUS. & PROF. CODE § 22.1.22580 (West 2017).

379. *But see* Lawrence Siry, *Forget Me, Forget Me Not: Reconciling Two Different Paradigms of the Right to Be Forgotten*, 103 KY. L.J. 311, 333–34 (2014) (discussing this California legislation in relation to the Right to Be Forgotten, but noting that it is rather limited in its applications, “given that the wording of the provision only seems to cover individuals who post material *and* request its removal before they turn eighteen”).

380. CAL. CIV. CODE § 1798.83.5 (West 2017). A federal trial court later preliminarily blocked its implementation on First Amendment grounds. *Imdb.com v. Becerra*, Case No. 16-cv-06535-VC, 2017 U.S. Dist. LEXIS 30776 (N.D. Cal. Feb. 22, 2017).

381. MISS. CODE ANN. § 41-41-77 (2017). Abortion record confidentiality exists in multiple states. *See e.g.*, KAN. STAT. ANN. § 65-445 (2017); S.D. CODIFIED LAWS § 34-23A-7.1 (2017).

382. W. VA. CODE § 30-14-11a (2017).

charge” that was erased.³⁸³ There, any record of a crime later decriminalized, such as the crime of sodomy, shall be “physically destroyed.”³⁸⁴ In Massachusetts, material involving a police warrant must be destroyed after five years.³⁸⁵ In South Carolina, once a criminal record is expunged, the individual’s arrest records, bench warrants, mug shots, and fingerprints are kept under seal and then “must be destroyed and no evidence” be retained.³⁸⁶ Those who violate that law are guilty of a misdemeanor.³⁸⁷ There are similar provisions in Louisiana.³⁸⁸ In Florida, a law that will take effect in 2018 forces any websites that request payment for the removal of mugshots to remove a mugshot if the individual makes a request by certified letter.³⁸⁹

Consider too statutes that protect photographs and other graphic information obtained during autopsies. In a preliminary draft of a Florida state law, the legislature called it a “public necessity” that much autopsy information be kept confidential, lest “highly sensitive depictions or descriptions of the deceased” cause surviving family “continuous” emotional injury, including “memory of the deceased.”³⁹⁰ In Michigan, there is a prohibition on public display of autopsy photographs.³⁹¹

In Minnesota, records from license plate readers must be destroyed after 60 days; the statute’s subtitle is “Destruction of data required.”³⁹² And, in Illinois, police body camera footage must be destroyed after ninety days.³⁹³ All of this material would, of course, indicate precisely where people were in the past, their interpersonal connections, and at times even what they said—and would help prove what had happened in the past, but also deeply implicate privacy.

But perhaps the most interesting and relevant example is located in the federal statute that covers bankruptcy credit reporting. The U.S. Code mandates that no bankruptcy can appear on an individual’s credit report once a decade has passed.³⁹⁴ This means, in effect, that a credit agency is

383. CONN. GEN. STAT. § 54-142a (2017).

384. CONN. GEN. STAT. § 54-142d; *see also* MD. CODE ANN., CRIM. PROC. § 10-105 (West 2017), TENN. CODE ANN. § 40-32-101 (2017).

385. MASS. GEN. LAWS ANN. ch. 272, § 99(N)(3) (West 2017).

386. S.C. CODE ANN. § 17-1-40(b)(1) (2017).

387. *Id.* § 17-1-40(c)(4).

388. LA. CODE CRIM. PROC. ANN. art. 973 (2017).

389. S.B. 118, 2017 Leg. (Fla. 2017) (enacted June 16, 2017, to take effect in July 2018).

390. H.B. 1083, 2001 Leg. (Fla. 2001).

391. MICH. COMP. LAWS § 333.2855a (2017).

392. MINN. STAT. § 13.824 Subd. 3(a) (2017).

393. 50 ILL. COMP. STAT. 706/10-20(a)(7)(B) (2017).

394. 15 U.S.C. § 1681c(a)(1) (2012).

forced to forget about the historical fact of bankruptcy even though such information would likely be of significant interest to anyone who requested such a report. Instead, it seems, privacy protects the individual who has turned around his financially troubled life.

That, at least in some small and partial way, reflects precisely what the European Court of Justice decided in 2014 when it ruled that a man's ten-year-old debt proceedings should be wiped off Google on privacy grounds: that individuals deserve a right to redemption that is only possible through a Right to Be Forgotten-like mandate.

3. *How Privacy-Protective Statutes Interact with a Right to Be Forgotten*

Given *Dahlstrom*, any one of these statutes that protects privacy by at times literally ordering the destruction of a source of older truthful information could become the basis for a Right to Be Forgotten-like publication-of-private-facts claim against media.

Indeed, the New Hampshire Supreme Court suggested in 2016 in dicta that annulled arrests could perhaps be categorized as “files whose disclosure would constitute invasion of privacy” given Right to Be Forgotten-relevant statutory protection.³⁹⁵ And the Wisconsin Supreme Court that same year relied in part on a crime victims’ rights statute to withhold access to a training video that included the discussion of a long-ago crime; in siding with the privacy of the victims, it explained that the “exposure of [the crime victims’] identities almost a decade after [the] events occurred” would lead to emotional trauma and suffering, even though the information was once public knowledge.³⁹⁶

Finally, in 2014, in a case involving an ACLU request for prosecution data, the Court of Appeals for the District of Columbia Circuit linked statutory law and privacy rights. After citing a number of criminal history erasure statutes, it wrote: “we reject the . . . surrender of any reasonable expectation of privacy to the Internet—a surrender that would appear to result from a failure to distinguish between the mere *ability* to access information and the likelihood of actual public *focus* on that

395. *Grafton Cty. Attorney’s Office v. Canner*, 147 A.3d 410, 413 (N.H. 2016) (quoting the trial court). The court had decided that records of annulled arrests were not categorically exempt from public inspection. *Id.* “[O]ur decision today,” it wrote, “does not resolve the question of whether the records related to [the unnamed individual’s] arrest and prosecution ultimately will be available for public inspection.” *Id.*

396. *Democratic Party of Wisc. v. Wisc. Dep’t of Justice*, 888 N.W.2d 584 (Wis. 2016).

information.”³⁹⁷ In other words, the court suggested that there is indeed privacy in older public information that is otherwise available on the internet—and that the statutes help provide support for the right to privacy of the individual. In even more relevant Right to Be Forgotten language, it added:

Although the fact that such defendants were accused of criminal conduct may remain a matter of public record, they are entitled to move on with their lives without having the public reminded of their alleged but never proven transgressions.³⁹⁸

The statutes highlighted in this section, each of which help to protect truthful information from the past in some key way, help support the notion that there is some historical information that deserves some level of protection from publication. Given *Dahlstrom*'s holding that a privacy-focused statute can become the basis for an invasion-of-privacy claim even against the mainstream media, any one of these statutes could lead to a litigated Right to Be Forgotten-based clash between press rights and privacy rights.

F. *Hassell v. Bird and the Order to Remove*

Finally, there has been some suggestion in the United States that websites—even those not liable for publishing the offending information—might be forced to remove offending information from the internet. This too parallels at least in part the *Google Spain* decision.

Consider the 2016 California appeals court decision that ordered Yelp to remove defamatory reviews a user had posted. *Hassell v. Bird*³⁹⁹ involved a defamation claim filed by a law firm against a former client who had posted “factual inaccuracies and defamatory remarks” about its representation.⁴⁰⁰ The trial court judge eventually awarded the law firm nearly \$558,000 and, as a part of its decision, ordered Yelp to remove “all reviews” by the defendant “and any subsequent comments” within seven days.⁴⁰¹ Yelp argued in turn that the Communications Decency Act Section 230 protected it.⁴⁰² Section 230 mandates that “[n]o provider or user of an interactive computer service shall be treated as the publisher or

397. *Am. Civil Liberties Union v. U.S. Dep't of Justice*, 750 F.3d 927, 933 (D.C. Cir. 2014) (emphasis in original).

398. *Id.*

399. 203 Cal. Rptr. 3d 203 (Cal. Ct. App. 2016).

400. *Id.* at 209.

401. *Id.* at 211.

402. *Id.* at 224 (citing 47 U.S.C. § 230 (2012)).

speaker of any information provided by another information content provider.”⁴⁰³ Put simply, Section 230 protects websites that post information, such as comments and reviews, generated by non-affiliated others.⁴⁰⁴

But the California appeals court rejected Yelp’s argument.⁴⁰⁵ “Assuming, as Yelp has maintained, that Yelp played no role in the creation of that defamatory speech,” the court wrote, “an order directing Yelp to remove only those reviews that are covered by the injunction does not impose any liability on Yelp.”⁴⁰⁶ Here, the court reasoned, the plaintiff had not filed any claims against Yelp itself and the court had not found Yelp liable for the posts.⁴⁰⁷ Instead, it asked only that Yelp remove the defamatory information at issue: “[t]he removal order,” the court reasoned, “simply sought to control the perpetuation of judicially declared defamatory statements,” not liability for those statements, and, therefore, did not violate the CDA.⁴⁰⁸

The California Supreme Court has agreed to review the decision.⁴⁰⁹ Even if it is eventually reversed, however, it signals some judicial acceptance for removal orders despite traditionally strong CDA protection for websites. Even though the case involved defamatory speech, truthful but similarly tortious privacy-invading speech could one day become the subject of a similar court order.

Moreover, the European Court of Justice will likely soon decide another Right to Be Forgotten case that could arguably give EU courts the power to order greater removal of what they deem to be privacy-invading information.⁴¹⁰ In the case, France has argued that Google should be forced to remove links to older embarrassing information throughout the world, including searches done in non-EU countries like the United States; France has argued that one simply needs to use internet protocol address-masking software in Europe to access information that had been

403. *Id.*

404. *Id.*

405. *Id.* at 227.

406. *Id.* at 226.

407. *Id.* at 226–27.

408. *Id.* at 226–27.

409. Oral argument in the case is set for April 3, 2018. *Oral Argument Calendar Los Angeles Session April 3 and 4, 2018*, SUP. CT. CAL. (Mar. 8, 2018) <http://www.courts.ca.gov/documents/calendars/SAPR0318.PDF>. [<https://perma.cc/BR8A-6A7Q>].

410. Alex Hern, *ECJ to Rule on Whether ‘Right to Be Forgotten’ Can Stretch Beyond EU*, GUARDIAN (July 20, 2017, 5:19 AM), <https://www.theguardian.com/technology/2017/jul/20/ecj-ruling-google-right-to-be-forgotten-beyond-eu-france-data-removed> [<https://perma.cc/K4Q7-6KZK>].

ordered removed there and that such a broad power of removal is, therefore, needed.⁴¹¹

Given these arguments and this continuing level of court interest, the Right to Be Forgotten has the potential to continue to expand internationally.

III. THE RIGHT SORT OF RIGHT TO BE FORGOTTEN: A CLEARER FOCUS ON NEWSWORTHINESS

Recall that when the European Court of Justice decided that individuals have a Right to Be Forgotten by recognizing that some information about one's past should remain private and by forcing search engines like Google to remove certain links about what it considered the irrelevant past, commenters were often skeptical that such a Right could ever constitutionally exist in the United States.⁴¹² This Article warns that the Right to Be Forgotten in a normative sense has both significant historical and modern support here.

This Article also warns that Right to Be Forgotten sensibilities will become increasingly tempting to judges who find a growing need for privacy protections today—a time in which hurtful truthful information about individuals can arguably be kept forever in computerized memory and can be made available anytime with a click. For example, not long after the European Court of Justice decision, one judge opined that, that a Right to Be Forgotten in the United States could effectively work to punish the privacy-invading information that would otherwise be protected by Section 230 of the Communications Decency Act,⁴¹³ the law described in the previous section⁴¹⁴ that nearly uniformly protects internet publishers from liability for others' posts.⁴¹⁵ He may not be correct in a legal sense, given the broad nature of CDA protection, but his excitement about a workaround indicates not only a desire among some judges for lessened protection for publishers but also the sense that a Right to Be Forgotten has merit in the United States.

411. *Id.*

412. For a detailed comparative examination of notions of privacy in the U.S. and Europe, see James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 *YALE L.J.* 1151 (2004).

413. Mike Masnick, *NY Judge Laments the Lack of a 'Right to Be Forgotten'; Suggests New Law Fix That*, *TECHDIRT* (Dec. 23, 2014, 10:27 AM), <https://www.techdirt.com/articles/20141220/07184429490/ny-judge-laments-lack-right-to-be-forgotten-suggests-new-laws-fix-that.shtml> [<https://perma.cc/Y36B-W3X8>].

414. *See supra* section II.F.

415. 15 U.S.C. § 1681c (2012).

The Right is indeed tempting. Science has proved, for example, that young people's brains do not fully mature until long after most create social media accounts on which some post personal information that could later be of embarrassment; many seemingly believe that no one but friends will be interested readers.⁴¹⁶ As noted in a preceding section,⁴¹⁷ we often protect statutorily older criminal and other records through sealing or through total destruction, recognizing that preventing access to such material gives an individual the ability to right the wrongs of a past life with at least partial assurance that such information is strongly protected by the state. It may seem a strong argument that what has once been made public on the internet can no longer be private, but one need only read of the suicides of young people when privacy-intrusive videos become public⁴¹⁸ to recognize that the law must ensure that some material is never seen again.

Consider the dangers that a Right to Be Forgotten presents to freedom of the press, however. If one's long-past criminal history is in fact private, a blanket Right would arguably give a budding politician the ability to hide the past, not only by preventing access to relevant records, but by threatening a lawsuit should a publication wish to report what those records contain. If *Cox Broadcasting*, *Florida Star*, and *Bartnicki* are read broadly enough and if the information is deemed private enough, it would not matter that the publisher had acquired the information legally, as long as a court found such information to be private.

A Right to Be Forgotten without clear limits therefore, gives too much power to the individual's privacy interests over the interests of the public and the freedom of the press to report key information about the powerful.

I very strongly favor press interests over privacy interests in these clashes because I understand both that news can be emotionally painful and that ethical journalists work hard to balance effectively publication with the privacy rights of individuals. Even so, given the unfettered publishing ability of those without ethics constraints, there seems to be

416. I have previously described a teenager who freely identified herself by name and address and then proceeded to post medical and other deeply personal information on a message board for college hopefuls. When her peers suggested that she not be so open, she confidently suggested that no one else would be reading. It was only after her college counselor suggested that she leave the message board that she stopped posting. For related discussion of social media, see Elizabeth A. Kirley, *Can Digital Speech Loosen the Gordian Knot of Reputation Law?*, 32 SANTA CLARA HIGH TECH. L.J. 171 (2015) and Roberta Studwell, *The Notion and Practice of Reputation and Professional Identity in Social Networking: From K-12 Through Law School*, 25 KAN. J.L. & PUB. POL'Y 225 (2016).

417. See *supra* section II.E.

418. See, e.g., Jamie Schram, *Beauty Kills Herself After Sex Tape Goes Viral*, N.Y. POST (Sept. 15, 2016, 1:29 PM), <https://nypost.com/2016/09/15/beauty-kills-herself-after-sex-tape-goes-viral/> [<https://perma.cc/4B7H-DHR9>]; Ian Parker, *The Story of a Suicide: Two College Roommates, a Webcam, and a Tragedy*, NEW YORKER, Feb. 6, 2012, at 37.

increasing need for some level of privacy protection that recognizes and supports human dignity interests. This lends strong support for a balancing test that gives substantial and nearly all-powerful weight to press interests but still acknowledges the very real harm that can come from certain truthful revelations.

Indeed, there is some support for this sort of balance even at the highest levels of journalism. After the Right to Be Forgotten decision from the European Court of Justice, the *New York Times* editorial board suggested not that the Right be flatly rejected in the United States, but that any adoption of such a Right be tempered:

The desire to allow individuals to erase data that they no longer wish to disclose is understandable. For example, there are good reasons to let people remove embarrassing photos and posts they published on social media as children or young adults. But lawmakers should not create a right so powerful that it could limit press freedoms or allow individuals to demand that lawful information in a news archive be hidden.⁴¹⁹

The *New York Times* is correct, of course, that any Right to Be Forgotten should necessarily be limited. And its suggestion that the focus be on “lawful” information contained within a “news archive” seems to suggest that even it agrees that some illegally obtained, not newsworthy stored material should be subject to removal from the internet.

Recall how that idea at least in part parallels in a normative sense the language of the Restatement and its balance between the right to privacy and the right of the press to publish newsworthy information. Much of liability there is dependent upon when the event at issue occurred, what it involved, and who it concerned: Restatement authors suggest that when the publication becomes “morbid and sensational prying . . . for its own sake,” liability is appropriate because such information has no true news value;⁴²⁰ that some historical information, even about a past crime, has privacy protection; and that those in the public eye are less deserving of privacy.⁴²¹

In any Right to Be Forgotten analysis, then, a definition for newsworthiness that considers those when-what-who questions necessarily forces courts to balance competing interests—privacy and press—and not decide categorically that *all* long ago crimes and other

419. Editorial, *Ordering Google to Forget*, N.Y. TIMES, May 14, 2014, at A26.

420. RESTATEMENT (SECOND) OF TORTS § 652D cmt. H (AM. LAW INST. 1977).

421. *Id.*

historical information are due privacy or that *all* revelations about the past are protected because of press freedom.

Importantly, these are the same sorts of when-what-who questions frequently asked by journalists to help gauge the news value of historical information.⁴²² When did the historical incident occur? The greater the length of time between the past event and present day, usually the less newsworthy the matter.⁴²³ What did the historical incident entail? The privacy-relevant nature of the information at issue matters, given that journalism's ethics codes dictate that some things, such as graphic sexual information, are nearly universally off-limits.⁴²⁴ Who is the person involved? The status of the individual at issue can dictate the level of invasiveness of coverage, with private individuals given greater protection than public figures who are accustomed to, and at times strive for, the limelight.⁴²⁵

Consider too the Society of Professional Journalists Code of Ethics and its section titled "Minimize Harm" as additional when-what-who guidance.⁴²⁶ The section begins by encouraging journalists to weigh the "public[] need" of certain information against the "harm or discomfort" that might be brought should the information be revealed.⁴²⁷ "Weigh the consequences of publishing or broadcasting personal information," the Code later advises.⁴²⁸ It also distinguishes between those who are in the public eye and those who are not, suggesting that "private people have a greater right to control information about themselves than public figures and others who seek power, influence or attention."⁴²⁹ Perhaps most relevant here, it also suggests that journalists "[c]onsider the long-term implications of the extended reach and permanence of publication."⁴³⁰

In other words, ethical journalists, in their quest to "treat[] sources, subjects, colleagues and members of the public as human beings

422. See JAMES G. STOVALL, *JOURNALISM: WHO, WHAT, WHEN, WHERE, WHY, AND HOW* (Karon Bowers & Molly Taylor eds., 2005).

423. See *id.* at 5–6 (discussing timeliness as an important factor that determines whether a story is newsworthy).

424. See *id.* at 473–74 (discussing the journalistic ethical code regarding the privacy concerns of the individuals journalists cover).

425. See *id.* at 6 (discussing the prominence of the subject as an important factor that determines whether a story is newsworthy).

426. *SPJ Code of Ethics*, SOC'Y PROF'L JOURNALISTS (Sept. 6, 2014, 4:49 PM), <https://www.spj.org/ethicscode.asp> [<https://perma.cc/3H45-TKXV>].

427. *Id.*

428. *Id.*

429. *Id.*

430. *Id.*

deserving of respect,”⁴³¹ must balance the when, the what, and the who, not only in drafting a story, but in deciding whether to publish the story in the first place. It is only when that balance tips in favor of publication over privacy—recall the “public[] need” language in the “Minimize Harm” section⁴³²—that journalism ethics would support the story.

This is not to suggest that there is or should be or can ever be a bright-line journalism ethics test that courts should use should they begin to embrace even more clearly and strongly a Right to Be Forgotten—or even that such ethics language should ever be used by courts. Such a use would decidedly chill an already economically constricted and restricted press corps. Moreover, as I have written previously, journalism’s ethics provisions are meant to be aspirational and often times conflict, given the highly fact-dependent and malleable nature of news judgment; they certainly are not rules that force certain behaviors and they can be extremely dangerous as a limitation on press freedoms if used by a court as a basis for liability.⁴³³ But it is of at least some small interest that, in certain cases, the privacy protection suggested by the Restatement aligns nearly exactly with that suggested by journalists themselves.

It is also of some interest that the *Associated Press Stylebook*, a bible of sorts for journalists, instructs users in part that the publication-of-private-facts tort has newsworthiness considerations and then includes two examples that involve Right to Be Forgotten-like claims: one springing from *Melvin v. Reid*, the case involving the once-prostitute who had changed her ways, and a second involving a published photograph of an accident scene taken twenty months earlier and featuring a child victim.⁴³⁴ In that second example, the authors suggest the court found liability for publication because “the child was no longer ‘in the news.’”⁴³⁵

Describing the legal line of newsworthiness as “not always clear” in cases involving the use of historical material, the authors of the *Stylebook* suggest that there must be some connection between the private fact that is revealed and the news value inherent in the story in order for the journalist to escape liability:

Even in the context of a report on a plainly newsworthy topic, the disclosure of a highly embarrassing private fact may give rise to a claim for invasion of privacy if the facts are not logically related

431. *Id.*

432. *Id.*

433. Gajda, *supra* note 344.

434. ASSOCIATED PRESS, THE ASSOCIATED PRESS STYLEBOOK 2015 AND BRIEFING ON MEDIA LAW 358–59 (David Minthorn, Sally Jacobsen & Paula Froke eds., 2015).

435. *Id.*

to the matter of public concern. For example, disclosure of the intimate sexual practices of a celebrity might support a claim for invasion of privacy if it were unrelated to any newsworthy report and amounted to prying into someone's life for its own sake.⁴³⁶

The information in the *Stylebook* is meant to be a primer on media law for journalists, and is certainly not any sort of liability admission, but it is nonetheless interesting that Right to Be Forgotten-like decisions are those highlighted and chosen out of many to help guide news coverage.

But this nod from journalism toward this sort of privacy requires a strong counterbalance. A protected and therefore vigorous press promotes public knowledge and ultimately democracy through ambitious reporting;⁴³⁷ journalists need solid protection all the more in the current climate in which President Trump has condemned mainstream, highly ethical journalism as “fake news.”⁴³⁸

A newsworthiness argument that I have made previously has some value here.⁴³⁹ First, I have argued that any truthful publication—information that would be at the core of any Right to Be Forgotten-type claim—should be presumed newsworthy.⁴⁴⁰ Such a presumption would necessarily limit publishers' liability in publication-of-private-facts and similar tort cases and make it easy for them to win on an a motion to dismiss.

Liability would be possible and a jury would therefore hear only those “truly exceptional cases,” in which a judge believed that a reasonable jury could in fact find that “the degradation of human dignity caused by the disclosure [had] clearly outweighed the public's interest in the disclosure.”⁴⁴¹ Under such a test, successful privacy lawsuits would spring

436. *Id.*

437. See Robert Post, *Data Privacy and Dignitary Privacy: Google Spain, the Right to Be Forgotten, and the Construction of the Public Sphere* 73 (Apr. 15, 2017) (unpublished manuscript) (on file with the author) (providing a historical overview of the role of the press in our democracy and noting that “[e]very democratic state extends constitutional protections to the media ‘not for the benefit of the press so much as for the benefit of all of us. A broadly defined freedom of the press assures the maintenance of our political system and an open society’” (citing *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967))).

438. See, e.g., Louis Nelson, *Trump Again Attacks New York Times as ‘Fake News Joke!’*, POLITICO (June 28, 2017, 7:34 AM), <https://www.politico.com/story/2017/06/28/donald-trump-twitter-media-fake-news-240036> [<https://perma.cc/W6L9-47JU?type=image>].

439. Gajda, *supra* note 293.

440. *Id.* at 233.

441. *Id.* For other approaches to these questions, see, e.g., Sonja R. West, *The Story of Us: Resolving the Face-Off Between Autobiographical Speech and Information Privacy*, 67 WASH. & LEE L. REV. 589, 589–90 (2010) (arguing that courts should place a greater focus on the “offensiveness” element of the publication of private facts tort in determining whether speech deserves First

only from the publication of intensely private material traditionally kept private because of a strongly intimate nature or deeply personal focus—information such as graphic depictions of sexual activity, nudity, and deeply private and highly sensitive medical information, for example.⁴⁴² Language from the Seventh Circuit’s *Haynes v. Alfred A. Knopf, Inc.*⁴⁴³ decision is helpful here: privacy should protect only “those intimate physical details the publicizing of which would be not merely embarrassing and painful but deeply shocking to the average person subjected to such exposure.”⁴⁴⁴

A Right to Be Forgotten-based privacy tort claim would therefore rarely be successful under such a test, given that all truthful information—including information that is older and non-public—would be presumed newsworthy.⁴⁴⁵ It would only be in that exceptional case in which the dignity interests of the plaintiff clearly outweighed the public interest in the published material that the plaintiff would have the ability to take his Right to Be Forgotten-based claim to a jury and perhaps win.⁴⁴⁶

Moreover, this sort of pro-publication test would be nearly insurmountable for a public official, given that privacy law already allows deeper inquiry into such an individual’s private life.

There will be difficult Right to Be Forgotten-relevant cases, however. Consider, for example, the Austrian woman who is said to have sued her parents for posting on social media multiple naked images of her while

Amendment protection) and Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 DUKE L.J. 967, 975–76 (2003) (arguing that courts should draw an analogy between these questions and the law of evidence, in which some information is admissible for certain purposes but not others; thereby positing that in determining the propriety of disclosures of information, courts should examine the purpose for which the disclosure is being made).

442. Gajda, *supra* note 293. For a somewhat different take on the matter, see Ioanna Tourkochoriti, *Speech, Privacy, and Dignity in France and in the U.S.A.: A Comparative Analysis*, 38 LOY. L.A. INT’L & COMP L. REV. 217, 253 (2016) (noting the problematic nature of these determinations of what is private because “[t]he legal category of ‘highly offensive’ facts creates difficulties of interpretation concerning concepts to be determined by the judge ad hoc”).

443. 8 F.3d 1222 (7th Cir. 1993).

444. *Id.* at 1234–35.

445. Consider here the persuasive language in *Haynes v. Knopf*, that favors publication over privacy: “[p]ainful though it is for the [plaintiffs] to see a past they would rather forget brought into the public view, the public needs the information conveyed by the book [at issue in the case] in order to evaluate the profound social and political questions that the book raises.” *Id.* at 1233. That case involved the publication of somewhat mundane but otherwise not publicly known information, including alcohol use and spending practices, that the author used to illustrate in a journalistic sense what the court called the urban ghetto.

446. There are additional nuances important to the question here to be sure. Any Right to Be Forgotten would necessarily involve information that was in fact private and not publicly known or there could be no privacy claim.

she was growing up.⁴⁴⁷ In the United States, parents have posted personal and potentially harmful information about their children, including mental illness diagnoses that could affect their later employment and life plans.⁴⁴⁸ When those children become adults, should they have the ability to sue should someone reveal this once-public information? Do these now-adults, who had no control as children over the revelations by their parents, have the right to erase this truthful but potentially harmful information?⁴⁴⁹ Should they, in effect, have a Right to Be Forgotten?

While these questions and their answers may be difficult, what is clear is that there is support for some sort of a Right to Be Forgotten in privacy jurisprudence and statutory law in the United States that could conceivably help them win such a case.

Given that, a weighted balance between these important and competing interests—one that strongly supports news judgment and journalism itself by presuming the newsworthiness of truthful information but also protects privacy in exceptional cases—is one suitable answer.⁴⁵⁰

CONCLUSION

In 2015, the Ninth Circuit wrote in a copyright case that a Right to Be Forgotten “is not recognized in the United States.”⁴⁵¹ This Article has argued that that widely assumed conclusion is wrong. The Right to Be Forgotten—the right to have some level of privacy in some parts of one’s past—exists in a normative sense, if not by name, by strong implication in the United States in common law, in the Restatement, and in statutes. And it has since the early 1800s.

447. Ashley May, *18-Year-Old Sues Parents for Posting Baby Pictures on Facebook*, USA TODAY (Sept. 16, 2016, 11:11 AM), <https://www.usatoday.com/story/news/nation-now/2016/09/16/18-year-old-sues-parents-posting-baby-pictures-facebook/90479402/> [<https://perma.cc/8VG7-6JBG>].

448. Adrienne LaFrance, *The Perils of ‘Sharenting’*, ATLANTIC (Oct. 16, 2016), <https://www.theatlantic.com/technology/archive/2016/10/babies-everywhere/502757/> [<https://perma.cc/2RBV-KL6T>] (noting that “[s]omeone might blog about a child’s medical condition as a way to seek or offer support, or to raise crucial funds for health care”).

449. For a greater exploration of this issue, see Stacey B. Steinberg, *Sharenting: Children’s Privacy in the Age of Social Media*, 66 EMORY L.J. 839 (2017) (examining the inherent conflict between parents’ rights to free speech and children’s present and future interest in privacy and control of their digital identities and exploring potential legal solutions to this conflict).

450. Such a balance may value press rights too strongly for some, but consider one very troubling alternative that favors privacy too strongly. In 2016, an Italian court attempted to ensure even greater privacy in the past by ordering that news stories expire from online databases after a period of two years. Athalie Matthews, *How Italian Courts Used the Right to Be Forgotten to Put an Expiry Date on News*, GUARDIAN (Sept. 20, 2016, 4:12 AM), <https://www.theguardian.com/media/2016/sep/20/how-italian-courts-used-the-right-to-be-forgotten-to-put-an-expiry-date-on-news> [<https://perma.cc/K73C-CWZ5>].

451. *Garcia v. Google, Inc.* 786 F.3d 733 (9th Cir. 2015).

The question now is how to cabin a Right to Be Forgotten effectively in a way that strongly and nearly always supports press freedoms but also recognizes those very limited times in which exposure of the past implicates individual privacy in a significant way. A balancing test that presumes newsworthiness except in very rare cases respects the privacy and dignity of the individual, and prevents a debilitating chilling effect on journalism's truthful reporting.