Resolved: The “right to be forgotten” from Internet searches ought to be a civil right.
By Tom Evnen

Our November/December topic is nothing if not timely. Indeed, a decided earlier this year by the European Court of Justice has made the right to be forgotten one of the central issues in legal and political debates about how best to navigate the often fraught intersection of contemporary technological developments with the right to privacy. Here is Jeffrey Toobin’s summary, written in the New Yorker, of the facts and findings of the case in question:

In 1998, a Spanish newspaper called La Vanguardia published two small notices stating that certain property owned by a lawyer named Mario Costeja González was going to be auctioned to pay off his debts. Costeja cleared up the financial difficulties, but the newspaper records continued to surface whenever anyone Googled his name. In 2010, Costeja went to Spanish authorities to demand that the newspaper remove the items from its Web site and that Google remove the links from searches for his name. The Spanish Data Protection Agency…denied the claim against La Vanguardia but granted the claim against Google. This spring, the European Court of Justice, which operates as a kind of Supreme Court for the twenty-eight members of the European Union, affirmed the Spanish agency’s decisions. La Vanguardia could leave the Costeja items up on its Web site, but Google was prohibited from linking to them on any searches relating to Costeja’s name. The Court went on to say, in a broadly worded directive, that all individuals in the countries within its jurisdiction had the right to prohibit Google from linking to items that were “inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes for which they were processed and in the light of the time that has elapsed.”

In the wake of this decision, we are faced with the question of whether what has come to be known as the “right to be forgotten” provides an appropriate and fruitful legal framework for addressing concerns about privacy and liberty in the internet age. In reflecting on this question, we are confronted with the task of negotiating the tensions between—among other things—our conception of privacy and our conception of free expression, our rights over our own identity and the human and technological reality of our social interconnectedness, and, ultimately, between the public sphere and the private.

1 Jeffrey Toobin, “The Solace of Oblivion: In Europe, the right to be forgotten trumps the Internet,” New Yorker, Sept. 29, 2014.
By way of introduction to the topic, I will begin with a few points of resolutonal analysis, and then I will outline what I take to be some of the core arguments in favor of the affirmative and negative.

The Resolutonal Question
The wording of the resolution raises several crucial interpretive questions that debaters will need to resolve.

The first and most obvious interpretive question to be resolved is what sorts of claims are covered by the “right to be forgotten.” We have quite a bit of background information to draw on in order to answer this question, as the “right to be forgotten” is a term of art contextualized by the topic literature, and, at least in the European Union, there is an existing (or, anyway, in the process of coming into existence) legal framework in place that attempts to codify this right. Both sources provide a solid foundation for identifying what a right to be forgotten would look like. Still, at least on the margins, there remains debate about what sorts of claims should and should not be covered. I will not attempt to parse the nuances of that debate here (I will leave it to the references included below to bring you up to speed on those finer points), but a few key features of the right are worth highlighting up front.

First, the primary type of case that the right to be forgotten is meant to address is one in which the information at issue was (at least initially) legitimately and legally made public. Consider the European Union case summarized above by Toobin. There, the dispute was about the continued availability of news coverage of a public court proceeding. Few would dispute that information about court proceedings should be publicly available, and, given that, few would dispute that news organizations should report on those proceedings to the extent that they are of public interest. Both the Spanish Data Protection Agency and the European Court of Justice affirmed this assessment: they denied Mario Costeja González’s claim that the Spanish newspaper La Vanguardia should be forced to remove its articles, and held only that Google must remove links to those articles from its search results. Moreover, even González himself never claimed that La Vanguardia should not have published the articles about him; he claimed only that the passage of time and the contemporary irrelevance of the information warrants their removal now. There is some dispute in the topic literature about whether the right to be forgotten does or should include a right to demand the deletion or “unpublication” of information (as opposed to the demand that third party references or links to that information be suppressed), but what is commonly agreed upon—and this agreement is reflected in the European Court of Justice ruling—is that the right to be forgotten is not founded upon a claim that, at the time the information in question was gathered and made public, its gathering and publication was illegitimate. Instead, the right to be forgotten is a claim against the continued public availability of the information. The reason that all of this is significant for our assessment of the right to be forgotten is that it makes it more difficult for the affirmative to straightforwardly claim that we need the right to be forgotten in order prevent the harms of illegally disclosed and publicized information. For, one could, without any fear of self-contradiction, maintain both that: a) there ought to be robust legal remedies for those who are victimized by illegal disclosures of information about them, and b) we ought
not recognize the right to be forgotten, which is to say that legally publicized information should not be subject to claims to be “forgotten.”

Second, the resolution claims not only that we ought to recognize a right to be forgotten from internet searches, but also that we ought to recognize this right in a specific way: by recognizing it as a civil right. Depending on one's view of what civil rights are, this may turn out to be either a fairly important aspect of the resolution or a fairly insignificant one. There are an enormous number of different accounts of what counts as a specifically civil right (many of which differ from each other only in very minor ways), but most of the differences in those accounts need not concern us here. The important question for our purposes is whether classifying a right as a civil right means thinking of the right as tethered to the specific legal framework of a nation state. To see the significance of this, consider a potential contrast case: human rights. Human rights are frequently thought of as transcending the bounds of national sovereignty. For example, a person may have an internationally recognized human right to free assembly even if some nation states recognize this right, others do not, and still others actively interfere with it. In contrast, on at least some accounts, one has a civil right if and only if this right is recognized and enforced by the state that has legal jurisdiction over the potential right holder. Of course, even on such accounts, it is possible to say that persons ought to have a particular civil right, even though they do not live in a state that currently recognizes this right. What this would mean on this account of civil rights, however, is that the nation state that has legal jurisdiction over them ought to legally recognize and enforce this right. So, that is the first of our two common accounts of what counts as a civil right. The second reasonably common account essentially treats civil rights as a subset of human rights. This account thus removes the central feature of the first account by making it irrelevant whether a civil right has any necessary connection to the legal institutions of a given nation state. The reason this contrast between the two accounts of civil rights is particularly significant in the context of the current resolution is that there is a dispute in the literature on the topic about whether a right to be forgotten can be effective if it is implemented on a state-by-state basis through domestic law, or whether instead the right to be forgotten could only be effective if it is codified in an internationally recognized legal framework. That is, is it manageable to regulate the global information flows made possible by the internet primarily through domestic legal frameworks?

Finally, in addition to the evaluative term (ought) the resolution includes two terms that implicitly contain normative evaluations: “right to be forgotten” and “civil right.” To call something a right is generally to claim that it is an entitlement of some kind, and that we ought to treat it as such. But, what is the relationship between these two uses of the word “right” in the resolution? I think there are three answers to this question worth considering. The first is that the resolution is making the background assumption that individuals possess (ought to possess) a right to be forgotten from internet searches, and the resolution then raises the question of whether this right should be a civil right, or instead some other kind of right. On this reading, the resolution does not ask us to debate whether there ought to be a right to be forgotten, but only whether what we are assuming is a proper right to be forgotten ought to be a civil right. The second possible answer is that the resolution is implicitly raising two
questions: 1) "ought there be a right to be forgotten?"; and, 2) "ought this right to be forgotten be considered a civil right?". On this reading, it is not taken as a background assumption that there should be a right to be forgotten. Instead, whether there ought to be a right to be forgotten forms one half of the pair of questions that the resolution asks us to debate. A final possible answer would begin from the premise that it is more or less trivially true that, if there ought to be a right to be forgotten, then this right ought to be a civil right. Accordingly, this last interpretation works most easily with a fairly broad and generic definition of civil rights, such that it would be obvious that a purported right to be forgotten would be a civil right if indeed it is a right at all. On this reading, the inclusion of "civil right" as a term in the resolution is largely irrelevant, and the only question the resolution is really asking is whether there ought to be a right to be forgotten. For my part, I tend to think that the second candidate interpretation of the resolution (the interpretation on which the resolution is raising two questions) is the most plausible and interesting one. One reason I think this is that it opens up broader ground for debate. Another reason for my view is that I think the resolution’s use of quotation marks around "right to be forgotten" is plausibly read as marking off this phrase as a term of art, so that one could read the resolution as saying something (significantly less elegant, but more transparent) like, "What is commonly referred to in the literature as "the right to be forgotten" from Internet searches ought to be a civil right." On the other hand, this interpretation does raise a question that would need to be resolved about the fairness of the resolution burdens: can the affirmative win the debate only by proving both that there ought to be a right to be forgotten and that this right ought to be a civil right, while the negative can win by disproving either of these claims?

Considerations on the Affirmative

Privacy

At the core of the argument in favor of recognizing a right to be forgotten from internet search results is a view that we ought to value and protect individuals’ right to privacy, and that the sweeping technological changes that have ushered in the digital age have significantly eroded the potency of this right, as well as the viability of existing legal frameworks as a means to ensure its protection. Before the dawn of the internet age, the legal regime of privacy protection operated largely against a backdrop in which large swaths of information about most of our individual lives was private by default, and the efficacy of this legal regime in no small part depended on this backdrop. Of course, there were always cases in which private individuals were thrust against their will into the public spotlight, or in which already public individuals had unwanted public attention focused on details of their lives that they wished could remain private. Nevertheless, for most people most of the time, privacy was protected through obscurity; the vast majority of our daily activities were observed only by people in our immediate physical and temporal proximity. This is not to say (obviously) that this was a magical time before people did embarrassing things in public, but mostly what “in public” in these cases meant was something like: in view of other people with whom I either had some specific personal relationship, or to whom I was an anonymous stranger never to be seen again. Even in cases where a person's activities were publicly noted (for instance, in cases
where these activities were a matter of public record, recorded, perhaps, in a newspaper, or at least in publicly available documents), mostly they were noted in a way that ensured that they would, in relatively short order, again slip into obscurity, at least for those not in our social proximity. In principle, matters of public record were, well, public and recorded, which meant that they could rise to the surface again. But, the process of bringing this information to the surface after a time largely involved unglamorous and rarely engaged in activities like sifting through newspaper microfilm in dusty library basements for mention of someone’s name. For obvious reasons, this was not the sort of thing that, for instance, prospective employers would do as a matter of course. This was thus a social world in which it could seem possible, for example, to move to another town in order to start over, and in doing so have reasonable confidence that this would allow one to escape the reach of others’ memories about one’s past.

All of this provides some context for what I mean when I say that the bulk of our lives were private by default. Against this backdrop, the task of legally enforcing a right to privacy was relatively localized: it involved policing illicit deviations from the norm of privacy and obscurity—illegitimate public intrusions into otherwise private lives—, and it was reasonable to think of such deviations as local exceptions, rather than large scale social challenges. In other words, we had legal framework for managing the right to privacy that was designed to be workable in a context in which legal enforcement could benefit from swimming with the current of privacy by default, rather than against it. In contrast, we now live in a culture marked by a much different technological landscape, one that has overturned the norm of “privacy by default.” Our daily activities are now inextricably linked to our online presence. We communicate online, we research online, we bank, purchase and entertain ourselves online. Even those of our activities that are not immediately linked to internet connectivity are often undertaken “in full view” of the internet, so to speak, as so much of our activity is photographed, tagged, and commented on on social media networks. Everyone knows the tremendous social and economic benefits that these technological developments have brought with them, but we now realize that they come at the cost of information about enormous swathes of our private lives being tracked, stored, and made permanently and easily available to all.

In other words, we have transitioned out of a world in which most of our lives are private by default into a world where much of our lives are lived publicly by default. Accordingly, the right to privacy has undergone a significant shift in emphasis. It is no longer particularly useful to think of the legal framework of privacy protection as primarily being in place to act as a bulwark against localized intrusions into our otherwise private lives. Our privacy concerns today regard not localized intrusions, but rather the routine production, preservation, and presentation of information about our private lives. This shift in the reality of the threats to privacy in turn calls for a shift in the way we think about the legal framework designed to protect us from these threats.

It is at this point that many advocates for the right to be forgotten begin their case. They maintain that recognizing the right to be forgotten from internet search results would (perhaps in conjunction with a package of other legal reforms) act as an effective counter-balancing
weight against what they see as the damage to our privacy that the internet’s routine recording and publication of data about our private lives can (and often does) bring with it. On this view, our previous legal framework is simply inadequate to address the new reality that our lowest or most embarrassing moments could well be preserved online indefinitely. In this context, the right to be forgotten might be thought of as striking a reasonable balance between the right to free expression and the public’s right to know, on the one hand, and our changing privacy needs on the other. On the one hand, there comes a point where the social good of the publicity of a given piece of information has eroded significantly: there has already been sufficient time for it (and commentary on it) to be freely expressed by those who choose to do so, the information is no longer timely and so no longer particularly important for the public’s right to know, and so on. On the other hand, the continued publicity of the information continues to impose costs on the individual who is the subject of that information, as the embarrassment and economic and social costs of that publicity are revisited upon that individual every time someone (new acquaintances, prospective employers, etc.) googles their name. And so, according to proponents of the right to be forgotten, when we come to a point where the social utility of information is low enough, and the costs to the individual are high enough, we ought to allow people to request that this information be excluded from internet search results. This is how the European Court of Justice conceived of the issue when it said (as quoted above) that Google could be prohibited from maintaining search links to information that has become, “inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes for which they were processed and in the light of the time that has elapsed.”

At this point, one final aspect of the privacy justification for the right to be forgotten bears mentioning. Up until now I have been speaking generically of a “right to privacy” as if all advocates for the right to be forgotten conceive of the right to privacy in a uniform way. However, as you will see if you read some of the references included below, advocates for the right to be forgotten conceive of the right to privacy and the justifications for it in several different ways. I will briefly outline three such conceptions (two in the present section and one in the next) and say a bit about how the differences between the conceptions affect the proposed justifications for the right to be forgotten.

The first conception of privacy rests on the thought that we have a property interest in information about ourselves. This idea seems fairly unintuitive if it is taken as a maximally broad account of the interest we have in information about ourselves. Consider an example. If I want to go on a casual bike ride with a friend, and I borrow your bicycle in order to do so, then most people readily say that your property interests are implicated in what I am doing. You own the bicycle. If I want to borrow it, then I need your permission, and you are within your rights to deny me permission. Alternatively, if you want to charge me a fee to rent the bicycle from me, then you have every right to make that proposal. Now consider an alternative version of the story wherein what I want to do is not borrow your bicycle, but make use of information about you. Suppose that I want to have a casual conversation about you with a friend. About this case, few people would say that I need your permission to have this conversation, or that you would be within your rights to propose to charge me for having the conversation. Of course, as a matter of courtesy and good taste, depending on the content of
the conversation, it might be considered polite for me to seek your permission to have the conversation. That probably does give a hint that some kind of interest of yours might be implicated in the conversation, but that interest does not appear to be anything like a legally enforceable property interest. So, the property interest model of privacy seems like a stretch in at least some cases involving information about ourselves. However, the model becomes at least more plausible when we consider the characteristic uses of internet data. For example, as I engage in internet activity, all sorts of data about my activity is collected and logged. This data is then sold, as a matter of course, to advertisers. In this context, it seems at least plausible to suggest that I should share in the profits generated by those sales. So, you might well think, by extension, that the use of data about me in the internet context does often implicate my property interests. If this is right, then it would fund a claim that I have some property right over the way information about me is used on the internet. The right to be forgotten would then be an extension of that property interest: it would be the analogue of my right to refuse you the use of my bicycle. If I prefer that a search engine not use information about me online in order to conduct its business, then I should be able to opt out of this arrangement, and the right to be forgotten is one form that my opting out could take. Of course, the fact that I have a property right need not entail that this right is absolute. There may be other interests implicated in the use of information about me. Probably most importantly, there are rights to free expression and the public’s right to have access to public information. Perhaps the protection of these interests would need to be balanced against the protection of my property interest. As I mentioned a few paragraphs back, the right to be forgotten has just such a balancing component built into it.

The second conception of privacy understands privacy to be an extension of our right to determine our self-identity for ourselves. This conception of privacy rests on three basic premises. The first is that I am entitled to be respected as an autonomous, freely choosing agent: persons have a right to self-determination, and this right makes it incumbent upon you not to interfere with my freedom of choice. The second is that my freedom of choice is involved in my decisions about how I shape my self-identity. That is, we are involved in an exercise of our freedom as agents when we make choices about what kind of person we want to be. The final premise is that our freedom to determine what kind of person we are is interfered with when others control the presentation of information about us. This may be the least intuitive premise of the three, so I’ll say a bit more about it. The idea here is that our self-identity—our conception of ourselves—is not something that we can shape in isolation from a social world, but is instead something made possible and shaped by our interaction with others and our larger social context. We develop a conception of ourselves in part by fitting ourselves into culturally available categories and norms that spell out the kinds of person that we can intelligibly be. These norms are obviously not something over which we have full control; they arise out of a much larger social context, and they have as much to do with what others think about us as they do with what we think about ourselves. On the basis of these three premises, one might come to the following conclusion. If everyone else’s idea of who we are is shaped by embarrassing, inaccurate, and/or outdated information about us, then our ability to determine our own identity may be interfered with. After all, few of us are able to stably maintain a view of ourselves that is strongly out of sync with the way everyone else views us. For, we routinely
look to others in order to confirm our view of ourselves, and if no one else sees me in a way similar to the way that I see myself, then I am likely to lose confidence in my self-conception. The right to privacy, then, might be thought of as a right that I have to some control over information about me, particularly in cases where this information might implicate my ability to freely develop a conception of who I am as a person. The right to be forgotten would then be understood to be a way for me to regain control over my own process of identity formation by preventing the spread of damaging information about me. Here too my interest here would need to be balanced against the interests of others, but, again, the right to be forgotten endeavors to strike just such a balance.

Rehabilitation

The final conception of the right to privacy understands privacy to be a component of a wider perspective on which we value the ability of individuals to rehabilitate and improve themselves after they have done something that they regret. On this view, the purpose of the right to privacy is that it allows us to carve out a personal space in which we have the freedom to transcend current or past versions of ourselves so that we may “recreate” ourselves and change who we are. The process of revising and reshaping the self requires that we have room to experiment, make mistakes, and privately stumble as we attempt to undertake the difficult work of changing ourselves. The right to privacy helps ensure that we have this room. If a past version of ourselves follows us indefinitely online, then our ability to move on from the former version of ourselves and to get others to recognize who we now are will be significantly hampered. (At this point, many of the same considerations mentioned in relation to the second conception of privacy apply, and I won’t reiterate them here). Hence, the right to be forgotten could be a way for us to confront the problem of the lingering online presence of our past selves, so that we can maintain the freedom for self-creation and re-creation.

There are also more straightforward and immediately tangible aspects to this rehabilitative view of privacy. For example, a person who acted irresponsibly in their youth may now find it difficult to get a job if stories about this irresponsibility show up whenever prospective employers google their name. In such a case, this person’s inability to move on from the mistakes of their youth manifests itself in a very concrete, material way. For example, it is well-documented in the United States that people who have committed a felony and served their time have tremendous difficulty finding gainful employment after their release. Especially in the case of young people, courts often agree to expunge the record of first time offenders once time has been served for the offense (or on various other conditions, e.g. a clean record for a certain number of years after the sentence has been served). We do this in recognition of the fact that people ought to be able to move on from their mistakes. However, expungements are inert, practically speaking, if anyone can find public reporting on your past crime simply by googling your name. If we think it is a good for individuals to be able to grow up and move on from past mistakes and youthful indiscretions, then recognizing a right to be forgotten might be an effective way to allow individuals to do that. It may also be worth adding here that even those who favor a broadly retributivist, rather than rehabilitative, perspective on legal and social policy may find it objectionable that the easy availability of information online makes it difficult for past offenders to move on with their lives. The basis for this
thought would be that, on a retributivist model, after a person has undergone the punishment they deserve for their criminal act, they should no longer continue to be punished for it, as such further punishment would be disproportionate. So, even the most hardcore retributivist may end up favoring a right to be forgotten for many of the same reasons that this right may be favored by those who emphasize rehabilitative approaches.

**Concerns About Free Speech and the Public's Right to Know**

Some of what I have said has already anticipated one of the main concerns about the right to be forgotten: that it interferes with the free speech rights of others and with the public's right to know information that is salient to them. See, in particular, what I have said about the right to be forgotten as a way of striking a balance between competing concerns about privacy, free expression, and the right to know. However, this response will not be satisfying to those who are free speech absolutists, i.e. to those who think of freedom of speech as an absolute right, rather than one that should be legitimately balanced with other competing concerns and interests. I want to close the affirmative considerations by mentioning two reasons that one might not be particularly concerned about the threat that the right to be forgotten poses to free expression, even if one is a free speech absolutist. First, it is not obvious that even an absolute right to free expression entails a right to have speech preserved for an indefinitely long period of time. If the value of free speech comes primarily from its being a form of self expression—a form of communicating a part of yourself and what you believe to others—then the longevity of any given forum in which this speech is preserved seems incidental to it. Second, does an absolute right to free expression require that access to a record of the speech be maximally easy? Consider: prior to the internet age nobody thought it a scandal, a slap in the face to free expression, that old newspaper reports or opinion pages, say, were somewhat hard to come by. It could, I think, be plausibly argued that having public institutions dedicated to preserving past acts of free expression is a public good. For example, it seems a public good to have a well functioning library system. However, is anyone really entitled to have their writings linked to in google search results? The right to be forgotten does not disallow anyone from speaking, nor does it force the removal of content from the internet. What it does is force the removal of links to content from the results of searches, thereby making the process of seeking out this content somewhat more laborious. That in and of itself, however, may not be incompatible with unrestricted free expression. Arguably, then, the right to be forgotten does not violate the right to free expression, even on a fairly robust conception of that right.

**Considerations on the Negative**

**Free Expression and the Public's Right to Know**

If the case in favor of recognizing a right to be forgotten has core motivation in concerns about privacy, then the case against recognizing this right has its own core motivation in concerns about free expression and the public's right to know. The negative can advance these concerns about free expression along a number of lines.
First, we should begin by thinking about the value of free expression and about why it is a right worth protecting. We can make a start with this by considering what we value about human freedom in general. Human beings possess a rational capacity to freely choose what to do and think. We have the distinctive dignity of being capable of making up their own minds. If you have a certain level of physical power over me, then you may be able to force me to say something, but you cannot force me to believe what I say. Likewise, you may be able to force me to do something, but you cannot force me to believe it is the right thing to do. This is because thought—the use of our rational capacities—is an inevitably free endeavor. We cannot help but make up our own minds because making up your mind requires that you assess the reasons that you have for doing or thinking one thing or another. A reason is not something that can be forced upon you because to see something as a reason is just to recognize it as being justified, and what you recognize as being justified is something you cannot help but decide for yourself. All of this provides us with some insight about why we think it is important to respect the freedom of persons. If we infringe upon a person's freedom—if we attempt to dictate to her what to do or think—then we treat her as something other than what she is: a free person with the capacity to make up her mind for herself. Accordingly, we ought not interfere with a person's exercise of this freedom. From this perspective, we can see the value of free expression as being an extension of the value of our rational agency. In communicating my views to others, I tell them what I think, and my reasons for thinking it, and I attempt to convince them that they ought to be persuaded by these reasons to come to share in my thinking. That is, free expression is the way that free, rational persons engage with the free, rational thinking of other persons. We thus place a high value on free expression because it is one of the primary modes in which rational persons carry on with each other in a way that befits them as rational persons. (Note that this is related to another component of the value of free expression that I have not yet said anything about: that it is required in order to serve the right of the public to hear the expression of others. I will turn to treating this issue in a moment).

Now, one might grant the tremendous value of free expression, but deny that the right to be forgotten interferes with it. In a moment, I will say more about why the right to be forgotten infringes on the right to free expression (specifically, I will address some of the affirmative arguments I made above about why the right to be forgotten does not conflict with free expression). On its face, however, it is intuitively obvious that one person's exercise of the right to be forgotten will interfere with the right of others to speak freely. Suppose, for example, that one of my fellow citizens, Bob, is caught committing and successfully prosecuted for medicare fraud. All of this is a matter of public record, as both the court proceeding and the police investigation are public, and it is evidently at least potentially of general public interest. Suppose that I come to know of this publicly available information, and I write an editorial about it, using Bob as an example of the problem of fraud in the medicare system. Suppose further that someone else then replies to my editorial, arguing that I am exaggerating concerns about medicare fraud, and that I am exaggerating too about the lessons we should draw from Bob's case. If in ten years Bob claims that this information is no longer relevant, that he has served his time, and so on, then this could be the foundation for a claim (an exercise of the right to be forgotten) that he has a right to have links to this pair of editorials removed from
Google search results. Our pair of editorials obviously involve discussion of Bob, so if Bob does have a right to be forgotten, then our editorials will fall under its purview. On the face of it, these editorials are core examples of the exercise of free expression in order to convince our fellow citizens of our political opinions. It thus seems that targeting the editorials in order to deliberately limit public access to them is an act of interfering with free expression. Now, one might respond that, while the editorials may at one time have been important speech to protect, they do not constitute significant speech any longer because they are out of date, or for some other reason no longer relevant. However, if, as we discussed above, the value of free expression derives from its being an exercise of our fundamental freedom to make up our own minds, then it seems reasonable to think that no person or institution has the rightful authority to decide for any of us whether a particular act of expression tells us something relevant. That is, there is something self-contradictory in the idea that I do not violate your right to make up your own mind, so long as I have come to the carefully considered conclusion that you do not need to make up your mind. Perhaps this sounds too cute, but it seems reasonable to ask: shouldn’t I be able to make up my own mind about what I need to make up my mind about?

Second, the other side of individuals’ right to free expression is the right of the public to hear this expression: the public’s right to know. The public’s access to the speech, opinions, and reporting of others is a public good. It is the way in which we become informed, test our thinking on issues, and arrive at the best conclusions about what we should think and do. Accordingly, speaking in the abstract, a harm to freedom of expression is also a harm to the public’s right to know. Moreover, this arguably remains true even if one thinks that the information and expression that is being removed from public view (or, anyway, being made less easily accessible to the public) is no longer accurate or relevant. For, if we value the public’s right to know, then this must be in large part because we think that members of the public ought to have the right to assess for themselves what they think is relevant and true. (This point can also be fleshed out in significantly more concrete terms, but I will leave that task to the sub-section below dedicated to considering “pragmatic concerns”).

Finally, there are a few ways that the negative can combat the claims I outlined at the end of the affirmative section (in the sub-section on “Concerns About Free Speech and the Public’s Right to Know”). To recap those points in brief: the affirmative might argue that the right to be forgotten does not interfere with the right to free expression because the latter right entails neither the right for speech to be preserved in perpetuity nor the right for speech to be made easily accessible. Against this claim, the negative might make two points. First, the negative could point out that their worry is not that the right to be forgotten interferes with a right to have your speech preserved indefinitely. It may well be right that I am not entitled to have my speech preserved; you do not wrong me by failing to ensure that my speech is preserved. Nevertheless, let us suppose that I make arrangements to preserve my speech in a public forum. For example, suppose I set up a website in order to publish my writings online, these writings become popular, and many of my posts are featured prominently in google search results. Now, suppose that one of my posts is subject to a link removal request made possible by the right to be forgotten. At this point, my complaint is not going to be that I am owed from someone that my speech be stored indefinitely online, be made easily accessible through google
searches, and so on. I myself have already secured this distribution of my speech through my own efforts. Instead, my complaint is going to be that you are interfering with my existing means to publicly express my opinions—means that I have secured for myself, not that I take myself to be entitled to have provided to me. In other words, the right to be forgotten infringes on my freedom of expression not because it fails to provide me with some resource that I am entitled to be given, but rather because it interferes with my exercise of a freedom to which I am entitled. Second, the negative can argue that you cannot easily separate the exercise of the freedom of expression from access to the forums through which this expression would be communicated to others. This is why, for example, so much of the free speech jurisprudence in the U.S. has been fought not over explicitly censorious laws (though there has been plenty of that as well), but over various “time, place, and manner” restrictions that have the effect of limiting access to the forums necessary to exercise first amendment rights. In short, you do not need to directly ban expression in order to stifle it; you can stifle expression by stifling the means of communicating it effectively to others. Of course, most people would claim that some “time, place, and manner” restrictions are legitimate, and there is no easy, clear-cut rule for deciding when such restrictions cross the line into censorship. Still, it would be difficult to argue that the internet—and, particularly, content accessible on the internet via search engines—is not a very significant, and perhaps the most significant, contemporary public forum for expression. So, if stifling access to the available means to expression counts as stifling expression itself, then there is a strong case to be made that restricting access to web audiences stifles speech in a significant way.

**Pragmatic Concerns**

Many of the concerns about the right to be forgotten raised thus far may be amplified once we turn our attention from consideration of the abstract philosophical issues involved to the problems that arise in the legal implementation of this right.

Consider first two features of the European Union’s framework for implementing the right to be forgotten. The first is that an individual’s “right to be forgotten” claim should be assessed in relation to the question of whether the information about which the claim is made is, “inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes for which they were processed and in the light of the time that has elapsed.” Performing this assessment is important because, without it, the right to be forgotten would become a right of anyone to demand the suppression of any information about them that they find unfavorable, no matter how current, newsworthy, accurate, and public that information is. Nonetheless, it is worth asking whether anyone can claim the legitimate authority to decide for the public what information is and is not adequate and relevant for their purposes. If the public has a right to know, then one might think that this right requires that the public should be able to decide for itself what information they think is accurate and relevant to their thinking. For example, the plaintiff (Mario Costeja González) in the European Court of Justice case that played such an important role in launching the debate about the right to be forgotten was asking the court to order the removal of links to stories about his past debt troubles. Now, it doesn’t seem
unreasonable to conclude that these stories should no longer be relevant to anyone's thinking, and it may in fact be true that the González of those past stories does not give an accurate impression of González's current character or financial standing. Nevertheless, suppose that you were considering entering a major financial agreement with González in the near future. It doesn't seem unreasonable that you would want to have this knowledge about González's past financial difficulties so that you could assess what (if any) relevance this information should have for your thinking about making financial arrangements with González now. Indeed, it might be reasonable for you to want to know that information even if you ultimately conclude that it does not raise any concerns for you in relation to the financial arrangement you are currently considering. For, the point really is that everyone should have the ability to decide for themselves what information they think is relevant and informative. Even if individuals come to incorrect conclusions in making this decision, that does not necessarily mean that they did not have a right to make the decision for themselves.

This brings us to a related second feature of the European Union's framework. If determinations about the relevance and informativeness of information are going to be made, then some institution needs to be given the power to make them. The European Union has dealt with this necessity by asking Google to make these decisions. Even if you think that there are objectively correct answers to questions about how significant or informative a piece of information is, you might still think that no particular person or institution has any special ability to discern these answers. If that is true, then it would be better to decentralize rather than centralize the authority to come to these conclusions, and, ultimately, that would recommend leaving it up to individuals to decide. Moreover, even if you thought that a carefully crafted institution could make optimal decisions—about which information should be removed from search results, why would we be confident that a global technology company is in an especially good position to be that institution?

Finally, at the beginning of this topic analysis, I raised a question about what it means to recognize the right to be forgotten as a specifically civil right, as opposed to recognizing it as a right of another type. There, I mentioned that one common way to distinguish civil rights from rights of other types is to think of civil rights as rights that exist only to the extent that they are recognized and enforced by a particular state within its legal jurisdiction. On this interpretation, civil rights do not transcend national boundaries, but are instead tethered to the specific legal institutions of a particular sovereign state. If one accepts this gloss on what it means to be a civil right, then one of the questions the resolution might be taken to be asking is whether the best way to implement the right to be forgotten is by treating it as a domestic legal matter on a state-by-state basis. I do not myself know what to think about this question, but I do think it is worth considering whether it is feasible to address problems of information availability on globally interconnected internet networks on a state-by-state, domestic basis.
Recommended Readings:
All readings are publicly available, though access to a library or to library databases may be required in order to access some of them. If you have difficulty locating copies of any of these readings, please feel free to contact me at tomevnen@gmail.com

Basic/Background Readings


Jeffrey Toobin, “The Solace of Oblivion: In Europe, the right to be forgotten trumps the Internet,” New Yorker, Sept. 29, 2014.


Affirmative Readings


**Negative Readings**


