Do You Have the “Right” to be Forgotten?

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“In the walls of the cubicle there were three orifices. To the right of the speakwrite, a small pneumatic tube for written messages, to the left, a larger one for newspapers; and in the side wall, within easy reach of Winston’s arm, a large oblong slit protected by a wire grating. This last was for the disposal of waste paper. Similar slits existed in thousands or tens of thousands throughout the building, not only in every room but at short intervals in every corridor. For some reason they were nicknamed memory holes. When one knew that any document was due for destruction, or even when one saw a scrap of waste paper lying about, it was an automatic action to life the flap of the nearest memory hole and drop it in, whereupon it would be whirled away on a current of warm air to the enormous furnaces which were hidden somewhere in the recesses of the building.”

– George Orwell’s *1984*

There has always existed a natural tension between the free press and individual privacy. Back in 1995, Dr. Gini Scott argued that there ought to be a balance amongst those who cherish the publication of true information on the one hand, but who also value confidential information on the other. As long as individuals appreciate that whatever is intended to remain private remains as such, alongside championing for the public’s insistence on transparency, then an understanding can be reached that relies not so much on ridiculous legalistic “balancing” tests, but rather, a disciplined market sifting of what is private data versus the public’s domain through the price system.

No advocate of liberty can be taken seriously if they tolerate evils that oppress both the free press and individual privacy, such as censorship and indiscriminate surveillance, respectively. The freedom of the press and the right to privacy are both libertarian values that respect negative liberty; that is, the absence of coercion. These values seldom conflict with each other unless there is a dispute about whether the information in question was intended or appropriate for dissemination, or not.

In recent years, there has been a marginally successful political movement of sorts, which has argued that people ought to enjoy their "right to be forgotten." Originally stemming from the modern French concept of *le droit á l'oubli* (the "right of oblivion"), this idea asserts that individuals deserve to not have their futures dictated by their past actions, especially for those who are convicted felons, have embarrassing youthful indiscretions, or incurred large debts, any of which could disqualify them from meaningfully participating in such actions as successful rehabilitation, gainful employment, or even approval for mortgages. According to Wikipedia, this "right" to be forgotten is distinguished from the right to privacy thusly:

> *"The right to be forgotten is distinct from the right to privacy, due to the distinction that the right to privacy constitutes information that is not publicly known, whereas the right to be forgotten involves removing information that was publicly known at a certain time and not allowing third parties to access the information."*

In other words, the right to privacy is uniquely focused on keeping private information confidential, whereas the "right" to be forgotten wants public information to be reverted back to being private. What these advocates of the "right" to be forgotten conveniently, well, *forget*, is that privacy is a one-way street; private data can remain as such, or it can "go public" through disclosure, leaking, and whistle-blowing, **but** public information *cannot* become private again retroactively.

Put another way, once the cat is let out of the bag, it stays out; there is no way to put the genie back in the bottle (not to mix metaphors!).

Yet, it would seem to be the case that the European Union's judiciary disagrees with libertarianism. In the 2014 *Google Spain v. AEPD & González* case, the EU's Court of Justice ruled that the plaintiff did indeed have a limited "right to be forgotten," particularly as it applied to his grievance that he deserved to have Google permanently remove the search result indices that revealed he was a credit risk for a mortgage due to a foreclosure from years past. This decision was adjudicated primarily on the basis of Directive 95/46/EC, whose Article 12(b) said that:

> *"Member States shall guarantee every data subject the right to obtain from the controller: as appropriate the rectification,* ***erasure or blocking of data*** *the processing of which does not comply with the provisions of this Directive, in particular because of the* ***incomplete or inaccurate nature of the data****…" [emphasis added]*

What is awfully peculiar about the Court's decision in this case is that González's bankruptcy and foreclosure was all *true* – none of it was libel or defamation upon his character or reputation. Regardless of the truthfulness of González's past, the Court explained that:

> *"According to Mr. Costeja González and the Spanish and Italian Governments, the data subject may*

> *oppose the indexing by a search engine of personal data relating to him where their dissemination through the search engine is prejudicial to him and his fundamental rights to the protection of those data and to privacy – which encompass the 'right to be forgotten' – override the legitimate interests of the operator of the search engine and the general interest in freedom of information."*

So, it would appear that the fix was in to interpret the Directive beyond its enumerated limits regarding the "erasure or blocking of data" when such data is of an "incomplete or inaccurate nature." It also didn't matter that this EU court's own advocate general was dead set against this proposed "right" to be forgotten , for they ignored him anyway. Much like the United States Supreme Court's "doctrine of incorporation" via the Fourteenth Amendment, the black robed men can rationalize *anything*, so long as the special interest agenda of the moment is justified as a "fundamental right."

Predictably, the 2014 *González* case resulted in an ironic demonstration of the Streisand effect in motion, which you would presume would fully discredit the very foundation undergirding the "right" to be forgotten in the minds of those who originally supported its implementation, but you would be wrong for doing so. An administrative agency known as the Federal Trade Commission (FTC) is involved in trying to gauge how practical it would be to import this "right" to be forgotten from Europe. Julie Brill, then-FTC Commissioner, made the following statements a few months after the *González* case:

> *"The ECJ's Google decision, in my view, was not about a 'right to be forgotten.' Instead, as some commentators on my side of the Atlantic observed, it is about a 'right of relevancy' or a 'right to preserve obscurity.' The case stems from a Spanish citizen, Mario Costeja González, who complained that searches for his name on Google returned information about attachment proceeds relating to social security debts that he owed."*

During April of 2015, Brill told the *Christian Science Monitor* that:

> *"I think we need to expand obscurity protections here in the US, through enactments of legislation that would require data brokers to provide greater protections to consumers, and through more comprehensive privacy legislation…I am optimistic that we can infuse a workable right of obscurity into our privacy framework here in the United States…However, I don't believe a broad EU-style right to be forgotten will be included in these discussions, because the further reaches of a broad right to be forgotten modeled on the CJEU's decision would raise serious questions under the First Amendment here in the US…I have long called for consumers to be given tools to enhance their obscurity in other appropriate circumstances."*

Apparently, just as long as the "right" to be forgotten is semantically relabeled the "right" to obscurity, then I guess

everything's just fine, isn't it? Despite Brill's hesitation about *fully* importing the "right" to be forgotten due to its infringement upon the free press, a 2014 survey by Software Advice revealed that 61% of Americans favor some version of the "right" to be forgotten as being regrettably necessary, and a whopping 39% who want the European-styled "right" to be forgotten with absolutely no restrictions whatsoever.

Why does there seem to be this callous disregard for the remnants of the free press, particularly the alternative media? Franz Werro elucidated in his 2009 white paper that the key difference may very well lie in dissimilar cultural values on each side of the Atlantic:

> *"[J.Q.] Whitman explains this disconnect between the two western cultures as it exists today by referring to the differing socio-political contexts in which the two bodies of law developed. In his view, the American law is the product of a tradition wary of centralized power, while European law is heavily influenced by French ideas of aristocratic honor and Germanic ideas of autonomy and self-determination. The American distrust of centralized power, therefore, is embodied by the Fourth Amendment's prohibition against unreasonable searches and seizures, which contemplates the home as the primary defense and the government as the primary enemy of privacy."*

This does seem to mesh with much of what Alexis de Tocqueville had to say regarding the Great Experiment. Werro continues:

> *"One way to look at this divide is in terms of the cultural loci of trust; the Europeans' trust in the government and distrust of the market, while Americans take precisely the opposite view. In general, that is, Americans feel that increasing the flow of information to the government is more likely to result in abuse than tangible benefit and Europeans share a similar skepticism with respect to the market; protecting 'privacy' is the vocabulary of both thus demands a shutting off of the flow of information to the institution that the respective society trusts the least…American faith in the private sector comes through in a general preference for market self-regulation and a cautious yet noticeable subscription to the idea that increasing the availability of consumer information will pay dividends in the form of products more closely tailored to consumer preferences. In this sense, the American system embraces not only a firm belief in a free press, but in free enterprise as well, the first being arguably also an essential tool for the second."*

Oh, those pesky Americans with their free markets and Fourth Amendment! How dare they remain skeptical of central planning and the police state! Why, if Americans were more like Europeans, the entire planet would be that much closer to the utopia of authoritarian global governance! All kidding aside, if Werro is right, then that would explain quite a lot about the "right" to be forgotten, wouldn't it?

Thankfully, there are other scholars who aren't completely blind about the difficult reality it would be to import the "right" to be forgotten to this side of the pond, given the historical value shown to the free press within the common law. Dr. Jasmine McNealy's 2012 white paper admitted that:

> *"Although EU member states hail the creation of this right to be forgotten as improving individual privacy rights, such a right creates a problem for U.S. online news organizations. Not only does such law come into direct conflict with protections found in the First Amendment, but it also conflicts with traditional privacy jurisprudence, which states that information made public cannot become private again."*

Alessandro Mantelero's 2013 white paper made the astute observation that:

> *"In both cases the historical figure of the journalist is absent. The journalist defines the boundaries of the right of oblivion in specific cases, by his professional ability to distinguish between individual acts that are no longer relevant and facts that are still relevant or related to other present events of public interest."*

In a similar vein, Emily Shoor wrote in her 2014 white paper that:

> *"Consistent respect from journalists and individuals could help 'construct zones of privacy.' Furthermore, social norms of usage among users that embody this respect could help strengthen users' privacy. For example, an overwhelming number of people in Japan use pseudonyms on social networking sites. A survey conducted in Japan noted that 89% of users of social media were reluctant to use their real name publicly on the Internet."*

Despite this concession, Shoor appears to still advocate for the "right" to be forgotten:

> *"The Right to Be Forgotten is intended to grant control of one's personal data back to the individual… [p]rotection against **reputational harm** is important for job hunting, but another benefit of the proposed Regulation is one's ability to take down content that is not only harmful, but simply undesirable. The Right to Be Forgotten would allow people to delete content they regret posting, not just content causing them harm…[t]he Right to Be Forgotten establishes a **universal right** of privacy for all citizens of the EU, and provides a significant amount of autonomy over one's online identity and reputation. While this concept receives a significant amount of backlash, **the Right to Be Forgotten is derived from existing European privacy laws**. Privacy is **a fundamental right granted** under the European Convention for Human Rights and has long been honored by various European*

> *countries…[t]he Right to Be Forgotten allows people to live life without their past interfering with their future." [emphasis added]*

This is one more reason I don't like "positive" liberty, because there is this assumption that *civil* rights are *granted* to you by an *authority*, usually a government.

Speaking of "positive" liberty, the expectation of an obligation upon someone else to do something for you without compensation is **slavery**, pure and simple. The fundamental problem with the "right" to be forgotten is that it unilaterally imposes an obligation upon individuals to destroy their own records upon arbitrary demand. Market feedback depends upon information being freely available, whether that takes the form of product reviews or credit reports.

What is little understood by authoritarians is that the free press can disincentivize (and even punish) bad behavior through the publication of truthful information about specific individuals and their provable actions, all of which is done peacefully. Any such blacklisting of individuals will be impossible to enforce through ostracism if this "right" to be forgotten can exercised on a mere whim. In effect, the "right" to be forgotten strips the market's capability of spontaneous order in reinforcing social norms by trying to relocate that function away from the invisible hand straight into the iron fist of the State.

If the "right" to be forgotten were implemented in any serious way on this continent, then what would the ramifications look like? Would I, as a blogger, be forced by individuals like Mark Dice or George Hemminger to remove anything I've ever written about either of them, simply because they managed to convince a black robed man to determine that I have violated their "right" to be forgotten? What if other third parties wanted my articles that mentioned Ron Paul to be cast into the memory hole? Jimmy Wales, co-founder of Wikipedia, was quoted in *The Telegraph* as commenting on the "right" to be forgotten by saying:

> *"History is a human right and **one of the worst things that a person can do is attempt to use force to silence another**. I've been in the public eye for quite some time; some people say good things and some people say bad things. That's history and **I would never ever use any kind of legal process like this to try to suppress the truth. I think that's deeply immoral**." [emphasis added]*

Historical revisionism is one thing, but outright censorship of the historical record *itself* is beyond the pail. Ultimately, that is the slippery slope that the so-called right to be forgotten leads to – "an amoral, empty, vacuous, soulless, post-modern **hell** of *nothing* and *no one* but the *power* and the *lie* of the moment."

Echoing ex-FTC commish Julie Brills, John Simpson issued a letter to Google five months after the *González* case, where he said, in part:

> *"Here is what the Right to be Forgotten is about in practical terms: Before the Internet if I did something foolish when I was young and foolish – and I probably did – there might well be a public*

> *record of what happened. Over time, as I aged, people tended to forget whatever embarrassing things I did in my youth. I would be judged mostly based on my current circumstances, not on information no longer relevant. If someone was highly motivated, they could go back into paper files and folders and dig up my past. Usually this required effort and motivation. As a reporter, for instance, this sort of deep digging was routine for me with, say, candidates for public office. This reality that our youthful indiscretions and embarrassments and other matters no longer relevant slipped from the general public's consciousness is 'Privacy by Obscurity.' The Digital Age has ended that. Everything – all my* ***digital footprints*** *– is instantly available with a few clicks on the computer or taps on a mobile device. Now, the Right to be Forgotten is simply restoring the balance in Europe that is provided with Privacy by Obscurity."*

Ah, the ubiquitous digital footprint! In what is essentially the digital version of a paper-trail, data traces are those bits of information about you that are created, stored, and potentially analyzed for later use, whether that use be for targeted marketing campaigns or government manhunts with you as the fugitive. Although there are security culture techniques for mitigating your digital shadow, the fact of the matter is that this "right" to be forgotten is not a solution to the problem of Big Brother, by a long shot.

I think the very worst of the "right" to be forgotten is the development of the *Oblivion* computer program. About a year ago, Simeonovski et. al. birthed this monstrosity:

> *"We propose a universal framework, called Oblivion, providing the foundation to support the enforcement of the right to be forgotten in a scalable and automated manner. Technically, Oblivion provides means for a user to prove her eligibility to request the removal of a link from search results based on trusted third party-issued digital credentials, such as her passport or electronic ID card. Oblivion then leverages the trust imposed by these credentials to generate eligible removal requests…[i]n Oblivion, we use state-of-the-art natural language processing (NLP) and image recognition techniques, in order to cover textual and visually identifiable information about a user, respectively."*

In other words, *Oblivion* streamlines automated takedown requests, for purposes of efficiency, of course. Nothing whatsoever to do with implementing the Hegelian Dialectic in order to better facilitate the "inconvenient disappearance" of "undesirable" people who find themselves "black-bagged" by an intelligence agency. Naturally, the designers of *Oblivion* mention how takedowns have to be requested by individuals who would then be required to provide government-issued identification documents, but are they that naïve to simply dismiss how their technology will inevitably be used to conduct black operations? Thankfully, all that *Oblivion* is proposed to do for now is simply data-mine the information and then red-flag it for analysis by a human being, but seriously, how much tweaking in the program's source code would need to be done in order to execute an automated takedown **without** an individual's personal request?

Regarding technological innovations and subversions both, it reminds me of something that the fictional Foamy the Squirrel character said in a cartoon years ago:

> *"All you humans are like monkeys with machetes. You people can't even properly utilize the technology you've created."*

When those sycophants of authoritarianism beg Leviathan to provide them with legal privileges like the "right" to be forgotten because they were irresponsible enough to not just take a photo of themselves doing something embarrassing, but also upload such a photo onto Fascistbook, it really does reinforce Foamy's observation that the improper use of technology can lead to undesirable consequences. Perhaps humanity is forever doomed to painful transitional stages whenever creative destruction occurs, yet exacerbating that pain with capricious edicts from the State only deepens the situation that much worse than it really had to be in the first place.

One such edict came from CNIL, which is a French "data protection authority," demanding last year that Google must scrub and delist requested search indices on not just the European extensions of its search engine, as ordered in the 2014 *González* ruling, but worldwide as well. This only further confirms Peter Fleischer's concern that privacy would be used to justify censorship, and that is exactly what the CNIL is actively doing; I bet the next **totalitarian tiptoe** will be when someone uses "intellectual property" and copyright law to censor whomever is politically vulnerable in the future. All of this is based on the "right" to be forgotten, which if anyone was really being honest, is really nothing more than a government-bestowed privilege.

Some might think that the "right" to be forgotten could be used to lower recidivism, especially in light of registered sexual offenders and convicted felons. Unfortunately, this approach fails to deal with the legal doctrine of *mala prohibita*, which is why there are more people than ever before whose legal status has been permanently handicapped. If the definitions for what constitutes both felonies (generally) and sex crimes (specifically) is incrementally expanded over time, then don't be surprised when you have more sex offenders and convicted felons as a result of victimless crimes.

Wouldn't it be accurate to say that the only people in today's modern "society" who truly enjoy the "right" to be forgotten are the American political prisoners? Once they go in, virtually no one continues to give a crap about them, even if they were "YouTube heroes" before going on the inside. Does that necessarily mean, though, that they are freer than they were before, or even that they enjoy better security culture? I doubt it.

Overall, I think the "right" to be forgotten is less about individual privacy and more about expanding the power of the State. It shows that the EU's judiciary is incompetent, and should not, therefore, enjoy a monopoly on adjudication. Regardless of the aforementioned legal and technical issues, I really believe that the answer to "civil" rights and "positive" liberty is **natural** rights and **negative** liberty (the mashing of the latter pair of concepts would be natural liberty itself). There is nothing libertarian at all about violating self-ownership under the paper-thin pretext of mitigating the possibility of future prejudice. Rhetoric like that are what self-important celebrities spew, and Mick Farren and John Gibb had something to say about that:

> *"As celebrities become increasingly paranoid that their cell phones are tapped and their Gulfstreams bugged, it becomes hard for the public to raise a great deal of sympathy for Paris and Michael and Liz and all the other rich-and-famous gossip victims. The prurient public may live vicariously off their antics, but Paris and her crowd are guaranteed incomes far beyond the dreams of avarice to perform those antics. Liz Hurley may have to stand on a bridge to have a private conversation, and Paris Hilton's faux-lesbian photos may hit the Internet, but we more humble mortals are, at the same time, becoming part of databases that will follow us for the rest of our lives – not only without any kind of reward, but often to our total detriment."*