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## Reforming the Law of Reputation

Frank Pasquale

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# Reforming the Law of Reputation

*Frank Pasquale\**

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## I. INTRODUCTION

Search engines can democratize the Internet by empowering users and enabling websites to reach users around the world. Search engines can also become kingmakers online, dominating the impressions that users develop of fellow citizens.<sup>1</sup> Search engine results associated with one's name may influence future employers, creditors, insurers, and many other important decision makers.

In other work, I have called for important decision makers to be regulated in several ways—for example, to reveal what digital sources they are consulting to the persons they investigate, and to be prohibited from using certain types of information (such as health data) in certain decision-making contexts absent bona fide rationales for doing so.<sup>2</sup>

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\* Professor of Law, University of Maryland. Many thanks to Alexander Tsesis for organizing an excellent conference panel on issues of digital memory and law, and to Woodrow Hartzog, Evan Selinger, Stefan Kulk, Frederik Borgesius, Julia Powles, and Jathan Sadowski for insightful comments.

1. Frank Pasquale, *Dominant Search Engines: An Essential Cultural & Political Facility*, in THE NEXT DIGITAL DECADE 401, 402 (Berin Szoka & Adam Thierer eds., 2010), [http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=2363&context=fac\\_pubs](http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=2363&context=fac_pubs).

2. See, e.g., Danielle Keats Citron & Frank Pasquale, *The Scored Society: Due Process for Automated Predictions*, 89 WASH. L. REV. 1 (2014); Frank Pasquale, *Restoring Transparency to*

That framework is a good primary focus for regulation regarding reputational integrity. But the regulation of end users of data will always be imperfectly enforced, if it comes at all. Those concerned about reputational integrity should also propose and attempt to enact legislation governing controllers and processors of data.

Such regulation already affects consumer reporting agencies, but must be revitalized or expanded. The law must be modernized, or it will fail to respond to the exact situations it was written to address. In the United States, new threats to reputation have seriously undermined the efficacy of health privacy law, credit reporting, and expungement. The common thread is automated, algorithmic arrangements of information, which could render a data point removed or obscured in one records system, and highly visible or dominant in other, more important ones. To take only one example: it is not much good for an ex-convict to expunge his juvenile record, if the fact of his conviction is the top Google result for searches on his name for the rest of his life. Nor is the removal of a bankruptcy judgment from a credit report of much use to an individual if it influences lead generators' or social networks' assessments of creditworthiness, and would-be lenders are in some way privy to those or similar reputational reports.<sup>3</sup>

At present, legislative gridlock at the federal level means that Congress is unlikely to address this and similar problems. However, states are beginning to do so.<sup>4</sup> As they do, they should consult European deliberations on what is now called the "right to be forgotten."<sup>5</sup> Thanks to the ruling in the *Google Spain* case issued by the

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*Automated Authority*, 9 J. ON TELECOMM. & HIGH TECH. L. 235 (2011).

3. Astra Taylor & Jathan Sadowski, *How Companies Turn Your Facebook Activity Into a Credit Score*, NATION (May 27, 2015), <http://www.thenation.com/article/how-companies-turn-your-facebook-activity-credit-score/>.

4. See CAL. BUS. & PROF. CODE § 22580 (West 2015). Some commentators opine that the burdens imposed by diverse states' privacy regulations on Internet firms may render such regulations vulnerable to constitutional challenge. James Lee, Note, *SB 568: Does California's Online Eraser Button Protect the Privacy of Minors?*, 48 U.C. DAVIS L. REV. 1173 (2015) (noting possible challenges to the "Eraser Law" under the dormant commerce clause). However, work in this vein fails to take into account the vast amount of information available to leading Internet firms about their users. Those firms can almost certainly determine the location of most users by state, and adapt information availability accordingly.

5. The name of the right is misleading. It might be better understood as the "right not to have one damaging incident or characterization dominate important reports about oneself," or a "right for certain content to be delisted on certain important intermediaries." But to the extent I use the better or more capacious term, I risk my Essay not showing up in searches for legal materials on the right to be forgotten (or Westlaw searches like "ATLEAST6("right to be forgotten)"). Yes, a skilled searcher could use other keywords. But *most* searchers probably will not. And it is this very power of interface design, dominant databases, and routinized or habitual search that is the

Court of Justice of the European Union (“CJEU”), some data subjects can now remove from search results information that is “inadequate, irrelevant, no longer relevant or excessive,” unless there is a greater public interest in being able to find the information via a search on the name of the data subject.<sup>6</sup> Such removals are a middle ground between info-anarchy and censorship. They neither disappear information from the Internet (it can be found at the original source), nor allow it to dominate the impression of the aggrieved individual.<sup>7</sup> They are a kind of obscurity, which Evan Selinger and Woodrow Hartzog have described as an important way of ensuring reputational justice.<sup>8</sup>

This Essay explores the possible shape of three versions of a right to be forgotten that might be implemented in the United States, either at the state or federal level. Health privacy law, credit reporting, and criminal conviction expungement (each discussed in Part IV) need to be modernized for the digital age to reflect the power of aggregating intermediaries, like search engines, and to maintain the saliency and potency of information long after legal processes have determined it to be irrelevant or unfair. In brief, each sector needs to grant data subjects the right to force delisting of their names from reports of data processing performed by certain important intermediaries. But before addressing each of these potential instantiations of the laudable principles behind a right to be forgotten in potential expansions of extant delisting prerogatives in the United States, I will dispense with some background issues in Part II (the range of disputes over salience of information on search engine result pages generated in response to queries of names) and Part III (the strength of intermediaries’ claim that delisting of certain information or links violates the First Amendment).

## II. DISPUTES OVER SALIENCE IN SEARCH RESULTS

To understand the stakes of the right to be forgotten discussion, it is helpful to compare two case studies on a controversial topic: media coverage of homosexuality. In the United States, the politics of search emerged as a national issue in 2012 thanks to a spat between

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core topic of this piece.

6. Case C-131/12, *Google Spain SL v. Agencia Española de Protección de Datos (AEPD)*, (May 13, 2014), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=152065&doclang=EN> [<http://perma.cc/ED5L-DZRK>].

7. Note: a right of erasure would eliminate the information altogether, and should be conceptually distinguished from the right to be forgotten discussed in this piece.

8. Evan Selinger & Woodrow Hartzog, *Obscurity and Privacy* (May 21, 2014) (unpublished manuscript), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2439866](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2439866).

Republican presidential candidate Rick Santorum and sex advice blogger Dan Savage. Santorum supporters were upset by Savage's persistent, and oft-successful, efforts to link the first result for "Santorum" on Google's first search engine results page ("SERP") to a term related to sex.<sup>9</sup> But Google has no legal obligation to change its results in response to Santorum's complaints.<sup>10</sup> Nor does there seem to be a strong ethical case for an obligation to change the results here, either: Santorum was clearly a public figure at the time, and remains one at the time this Article is being published.<sup>11</sup>

In 2015, another controversy involving shifting perceptions of privacy and publicity emerged, with almost diametrically opposed responses from attorneys and media ethicists. The blog *Gawker* decided to publish a compromising series of texts between a male media executive married to a woman and a gay male escort with whom he allegedly tried to arrange a tryst.<sup>12</sup> In order to avoid exacerbating the problems of salience this Essay is about to address, I will call this man "John Doe."

Numerous media commentators condemned the publication.<sup>13</sup> And some legal experts stated that John Doe, the outed subject of the post, might be able to sue *Gawker* under a theory of "public disclosure of private facts" (if the story were true) or defamation (if the story were

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9. After Santorum compared gay marriage to bestiality, Savage led an outraged network of bloggers to retaliate by linking to a site associating the word "Santorum" with sex. The anti-Santorum campaign soon assured that the site was the first result for most of those searching for the term "Santorum" on Google. However, searches for "Rick Santorum" tended to go to the candidate's Wikipedia page or campaign home page. Santorum supporters complained to Google, but to no avail. Only after he made a surprisingly strong showing in three GOP primaries in early 2012 did the anal sex association fade from the very top of search results.

10. See generally Steve Peoples, *Santorum Talks About Longtime Google Problem*, ROLL CALL (Feb. 16, 2011, 12:00 AM), [http://www.rollcall.com/issues/56\\_84/203455-1.html?pg=2&dczone=politics](http://www.rollcall.com/issues/56_84/203455-1.html?pg=2&dczone=politics) (detailing how Santorum's staffers have found that there was "little they could do" in terms of changing the search results).

11. For example, Santorum is currently running for the 2016 Republican presidential nomination and frequently appears on television and in news articles. See, e.g., Jeremy Diamond, *Rick Santorum Runs for White House Again*, CNN (May 27, 2015, 5:55 PM), <http://www.cnn.com/2015/05/27/politics/rick-santorum-2016-presidential-announcement/>.

12. Erik Wemple, *Conde Nast Exec Story: Gawker Is Keeping Its Sleaze Game In Shape*, WASH. POST (July 17, 2015), <https://www.washingtonpost.com/blogs/erik-wemple/wp/2015/07/17/conde-nast-exec-story-gawker-is-keeping-its-sleaze-game-in-shape/>.

13. Glenn Greenwald, *Max Read's Moralizing Justification for Gawker's Vile Article*, INTERCEPT (July 17, 2015, 11:29 AM), <https://firstlook.org/theintercept/2015/07/17/max-reads-justification-gawkers-incomparably-vile-article/> ("The article's 1,000+ comments from Gawker's own readers overwhelmingly expressed disgust, and as *The New Republic's* Jeet Heer observed, the "debacle" is "uniting people from all across the political & cultural spectrum . . . in shared revulsion." (alteration in original)).

false).<sup>14</sup>

Were the story, and its aftermath, to dog the outed man as the top Google results on his name for five or ten years, there would probably be sympathy, but far less opportunity for redress, at least in the United States. Google's selection and arrangement of stories resulting from the query "John Doe" will, almost certainly, continue to prominently include links to stories that include the gay escort allegations, even if not to the original article (which was taken down within twenty-four hours of its appearance).<sup>15</sup>

Defenders of the status quo may argue that there is a fundamental difference between publishers and aggregators, which justifies the differing obligations of *Gawker* and Google. But an ethical distinction between publication and aggregation does not really stand when we critically interrogate both the political economy of media and the ways in which reputations are created via a complex interplay of computerized and user-generated content. And for that reason, we should question expansive interpretations of the First Amendment that would reinforce outdated legal distinctions between those scenarios, as well. For *Gawker's* CEO, the reason to share salacious stories, however controversial, was simple:

Whatever information we have, whatever insight we have, whatever knowledge we have, our impulse is to share it as quickly as possible, and sometimes with as little thought as possible. . . . Before you can

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14. Blake Neff, *Gawker's Nasty Article Could Cost Gawker a Lot of Money*, DAILY CALLER (July 17, 2015, 3:42 PM), <http://dailycaller.com/2015/07/17/gawkers-nasty-article-could-cost-them-a-lot-of-money/> ("Eugene Volokh, a professor at UCLA, told *The Daily Caller News Foundation* that even if the story is 100 percent true, [John Doe] could potentially sue *Gawker* for publishing private facts that served no public purpose. 'The theory is, if there's certain information that has to do with a person's private life that would generally be seen as offensive to have revealed, and that is not newsworthy, that can't be published,' Volokh said. This tort doesn't exist in every state, and Volokh said suits of this nature are typically restricted to where the plaintiff lives. If the state [John Doe] lives in allows such suits, Volokh indicated he would have a chance of prevailing.").

15. Nick Denton, *Taking a Post Down*, NICK DENTON (July 17, 2015, 2:30 PM), <http://nick.kinja.com/taking-a-post-down-1718581684> ("[John Doe's] embarrassment will not be eased. But this decision will establish a clear standard for future stories. It is not enough for them simply to be true. They have to reveal something meaningful. They have to be true and interesting. These texts were interesting, but not enough, in my view." (emphasis omitted)). In December of 2015, the top ten search results on the name of the outed man related to this nearly half-year-old story, at least in venues where I tried the search from a Google interface that was not logged in to a particular account. Given his otherwise low Internet profile, this story may dominate the first page of results on his name for the rest of his life—and even that of his wife, who was named in some stories.

think about it too much, just put it out there, just share it out there. I think that's the essence of who we are.<sup>16</sup>

This accelerationist ethic, of instant release of information, reflects a troubling social theory that privileges the rapidity and automaticity of machine communication over human values, democratic will formation, and due process.<sup>17</sup> It is also strikingly similar to Silicon Valley's own ideals about "frictionless sharing."<sup>18</sup> For platforms like Facebook or Spotify, users' likes and actions should be able to be instantly posted to their friends, and perhaps to the public at large if the user has (intentionally or unintentionally) allowed such publicity. For Google, speedy search results are part of the company's DNA: its leaders have repeatedly insisted on automating as much of search as possible consistent with *searchers'* experience of quality.<sup>19</sup> The company has tried to refuse to take into account the interests of the *searched* (here, those whose names are queried—but very often trademark owners or others with an interest in terms), when challenged about results.

What is clear from the *Gawker* case, though, is that such automation, such frictionlessness in algorithmic arrangement of information, effectively undoes whatever injunctive relief someone like John Doe might get, against *Gawker*, if he were indeed to sue. The story itself would persist as a virtual scarlet letter atop search queries on his name. We could simply reconcile ourselves to such a result, assuming it a necessary cost of robust protections of free expression. Or we could look to other nations' approaches to the balance between privacy and free speech.<sup>20</sup>

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16. Jonathan Mahler, *Gawker's Moment of Truth*, N.Y. TIMES (June 12, 2015), <http://www.nytimes.com/2015/06/14/business/media/gawker-nick-denton-moment-of-truth.html>.

17. The accelerationist ethic is articulated well by Nick Land, Alex Williams, and Nick Srnicek. See, e.g., Alex Williams & Nick Srnicek, #ACCELERATE MANIFESTO for an Accelerationist Politics, CRITICAL LEGAL THINKING (May 14, 2013), <http://criticallegalthinking.com/2013/05/14/accelerate-manifesto-for-an-accelerationist-politics/> ("We want to accelerate the process of technological evolution.").

18. Frictionless sharing is critiqued in several law review articles. See, e.g., William McGeveran, *The Law of Friction*, 2013 U. CHI. LEGAL F. 15, 17 (analyzing "the benefits and drawbacks of frictionless sharing" on the web); Neil M. Richards, *The Perils of Social Reading*, 101 GEO. L.J. 689 (2013); Margot Kaminski, *Reading Over Your Shoulder*, WAKE FOREST L. REV. COMMON LAW (Mar. 9 2015), <http://wakeforestlawreview.com/2012/03/reading-over-your-shoulder-social-readers-and-privacy-law/>.

19. Kaminski, *supra* note 18.

20. See, e.g., Stefan Kulk & Frederik Zuiderveen Borgesius, *Freedom of Expression and 'Right to Be Forgotten' Cases in the Netherlands After Google Spain*, 2 EUR. DATA PROTECTION L. REV. 113, 115 (2015) ("[T]he right to freedom of expression is not absolute, and must be balanced against other rights, such as privacy and data protection rights. The European Court of Human Rights says in the context of press publications about freedom of expression and privacy:

High-ranking results about a certain searched term can sometimes be harmful from either a societal perspective<sup>21</sup> or from the perspective of an entity with a stake in the search term.<sup>22</sup> For example, consider Google's "autocomplete" associations regarding a former first lady of Germany, Jane Doe.<sup>23</sup> Users typing "Jane Doe" into the search engine in 2012 would be likely to see the suggested searches "Jane Doe prostituierte" and "Jane Doe escort" underneath their search box.<sup>24</sup> The suggestions reflect numerous rumors about Jane Doe, who obtained over thirty cease-and-desist orders in Germany against bloggers and journalists who raised the possibility of sex work in her past.<sup>25</sup> Jane Doe feared that all those legal victories could be for naught if users interpreted the autocomplete suggestions as a judgment on her character, rather than an artifact of repeated legal battles.

For Google, the problem of the autocomplete suggestions is more a problem of user education. But Google itself is continually trying to educate searchers, and it seems strange that it would suddenly forswear that mission when very simple responses could greatly help someone unfairly impugned, smeared, or exposed.<sup>26</sup> It will correct the spelling of commonly misspelled terms, or put in more common spellings. Even something as basic as a spelling suggestion depends on a series of human judgments. Should the results default to the "standard" spelling, or should users simply be warned that their spelling may be off? In a presentation on search quality at an academic conference, one of Google's top engineers emphasized that there is a painstaking, iterative interplay between computer science experts and beta testers who report

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'as a matter of principle these rights deserve equal respect.'").

21. Oren Bracha & Frank Pasquale, *Federal Search Commission? Access, Fairness, and Accountability in the Law of Search*, 93 CORNELL L. REV. 1149 (2008).

22. Frank Pasquale, *Rankings, Reductionism, and Responsibility*, 54 CLEV. ST. L. REV. 115, 135–36 (2006).

23. Again, I am using a pseudonym to avoid reinforcing the data subject's problem.

24. See Kadhim Shubber, *Japanese Court Orders Google to Censor Autocomplete, Pay Damages*, WIRED (Apr. 16, 2013), <http://www.wired.co.uk/news/archive/2013-04/16/google-japan-ruling>; Ted Rall, *Opinion, Why Censoring Search Engines Is a Good Idea*, JAPAN TIMES (May 20, 2014), <http://www.japantimes.co.jp/opinion/2014/05/20/commentary/world-commentary/censoring-search-engines-good-idea/>.

25. Konrad Lischka, *Blaming the Algorithm: Defamation Case Highlights Google's Double Standard*, DER SPIEGEL INT'L (Sept. 10, 2012, 4:00 PM), [http://www.spiegel.de/international/germany/defamation-case-by-\[Jane\]-\[Doe\]-highlights—double-standard-at-google-a-854914.html](http://www.spiegel.de/international/germany/defamation-case-by-[Jane]-[Doe]-highlights—double-standard-at-google-a-854914.html).

26. For background on the many functions of search results, see Conor Friedersdorf, *Should Google Always Tell the Truth?*, ATLANTIC (July 4, 2014), <http://www.theatlantic.com/technology/archive/2015/07/should-google-always-tell-the-truth/397697/>.



on their satisfaction with various results configurations.<sup>27</sup> Ranking of search results is not a simple technological “product” here; rather, it is a social process that at many points could be informed by social values.

Nevertheless, while the policy for alternative spellings could be applied generally once the beta testing was over, each situation like Jane Doe’s would require independent judgment anew. Google fears that reputational micromanagers will overwhelm it with requests like hers. But is it really so hard for the search engine to, say, turn off the autocomplete function for some names? The company has never offered a hard estimate of the costs of responding to these types of claims.<sup>28</sup> Given its vast resources, it is hard to imagine such a duty denting its profits significantly or adversely affecting its mission or employees.

Requests to downrank results on a certain name (and that name alone) might also lead to more constructive responses. For example, the firm could simply hire individuals to respond to a justified complainant if a problematic site has appeared in name search results. Both Lilly Irani and Adrian Chen have described the manual “disappearing” of pornography or violent or disturbing images from platforms like Facebook, by paid workers in the Philippines and Morocco.<sup>29</sup> Given the extraordinary profitability of the dominant search engines, this is a task they could take on with respect to ongoing preservation of certain delistings.

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27. This assertion was made at a conference sponsored by Google at George Mason University, on search and competition. For more details on the conference series, see Tom Hamburger and Matea Gold, *Google, Once Disdainful of Lobbying, Now a Master of Washington Influence*, WASH. POST (Apr. 12, 2014), [https://www.washingtonpost.com/politics/how-google-is-transforming-power-and-politicsgoogle-once-disdainful-of-lobbying-now-a-master-of-washington-influence/2014/04/12/51648b92-b4d3-11e3-8cb6-284052554d74\\_story.html](https://www.washingtonpost.com/politics/how-google-is-transforming-power-and-politicsgoogle-once-disdainful-of-lobbying-now-a-master-of-washington-influence/2014/04/12/51648b92-b4d3-11e3-8cb6-284052554d74_story.html) (“The keynote address was by Google engineer Mark Paskin, who delivered a lunchtime speech titled ‘Engineering Search.’”); and Matea Gold and Tom Hamburger, *How Google Worked Behind the Scenes to Invite Federal Regulators to Conferences*, WASH. POST (Apr. 12, 2014), <https://www.washingtonpost.com/news/politics/wp/2014/04/12/how-google-worked-behind-the-scenes-to-invite-federal-regulators-to-conferences/>. Lilly Irani has also observed the person-machine interface here. Lilly Irani, *Justice for “Data Janitors,”* PUB. BOOKS (Jan. 15, 2015), <http://www.publicbooks.org/nonfiction/justice-for-data-janitors> (“The emergence of the digital microwork industry to tend artificial intelligence shows how labor displacement generates new kinds of work.”).

28. See Rall, *supra* note 24 (“Would it really be so terrible for Google to hire 10,000 American workers to process link deletion requests? . . . Onerous? Google has a space program. It is mapping every curb and bump on America’s 6 million km of roads. They’re smart. They can figure this out.”).

29. Adrian Chen, *The Laborers Who Keep Dick Pics and Beheadings Out of Your Facebook Feed*, WIRED (Oct. 23, 2014, 6:30 AM), <http://www.wired.com/2014/10/content-moderation/>; Irani, *supra* note 27.

Another possible pattern of response would be to outsource the determination to a nonprofit entity. In my article *Beyond Innovation and Competition*, I described symbiotic relationships between Google and the Berkman Center at Harvard (regarding malware infected sites).<sup>30</sup> The Federal Trade Commission (“FTC”) and nonprofits have also collaborated to streamline the enforcement of false advertising law.<sup>31</sup> No internet firm can credibly say a link monitoring and deletion obligation is too onerous if they fail to take advantage of the robust civil society organizations willing to capably assist in this duty.<sup>32</sup>

In a 2006 article, I proposed that individuals unfairly or inaccurately portrayed on a dominant search engine’s result pages should, in some circumstances, have the right to place an asterisk linking to their own reply to the troubling depiction(s).<sup>33</sup> Critics have claimed that the proposal would either be unworkable or a troubling instance of “forced speech”<sup>34</sup> or “censored search.”<sup>35</sup> I responded to their concerns in

30. Frank Pasquale, *Beyond Innovation and Competition: The Need for Qualified Transparency in Internet Intermediaries*, 104 NW. U. L. REV. 105 (2010).

31. *Id.* In the case of FTC investigations into false advertising, 95% of problematic situations are quickly resolved in a self-regulatory fashion, by nongovernmental entities. *Id.* This is not a recipe for the litigation nightmares industry advocates so frequently invoke. See also *Children’s Advertising Review Unit*, BETTER BUS. BUREAU’, <https://www.bbb.org/council/the-national-partner-program/national-advertising-review-services/childrens-advertising-review-unit/> (last visited Nov. 17, 2015) (“CARU is the children’s arm of the advertising industry’s self-regulation system and evaluates child-directed advertising and promotional material in all media to advance truthfulness, accuracy and consistency with its Self-Regulatory Program for Children’s Advertising and relevant laws.” (emphasis omitted)).

32. Trebor Scholz, *Platform Cooperativism vs. the Sharing Economy*, MEDIUM (Dec. 5, 2014), <https://medium.com/@trebors/platform-cooperativism-vs-the-sharing-economy-2ea737f1b5ad#.csrtvbgch> (describing the self-organization of civil society organizations to address pressing social problems).

33. Pasquale, *supra* note 22, at 135–36.

34. For a compelling current argument against this being forced speech, see Jennifer A. Chandler, *A Right to Reach an Audience: An Approach to Intermediary Bias on the Internet*, 35 HOFSTRA L. REV. 1095, 1129 (2007).

A prohibition against blocking access to websites or refusing to include them in a search engine index would prima facie be an interference with the selection intermediary’s selection freedom. However, the factors outlined above suggest that such a rule would not raise the concerns typically associated with compelled speech. This is because such a rule is content neutral, it would not curtail the selection intermediary’s ability to speak, the selection intermediary would not be understood to endorse the website (or it could post disclaimers) and the selection intermediary would not be forced to modify its own speech to respond or to avoid triggering the rule.

*Id.*

35. See, e.g., James Grimmelman, *Don’t Censor Search*, 117 YALE L.J. POCKET PART 48, 51 (2007). Grimmelman contends that the asterisk requirement would “hinder users’ ability to choose among diverse search engines,” because it “might inhibit the development of better, more helpful responses—such as personalized search based on the recommendations of one’s friends,

2008.<sup>36</sup> Our differences ultimately may not be amenable to reason, but I believe the dialogue at least illuminates the divergent strands in First Amendment doctrine here.

It is not impossible to keep the search record of figures like John Doe or Jane Doe free of scurrilous or excessively and inappropriately compromising material. To say otherwise is to succumb to technological reification—a misleading assertion that the way the search engine ranks and presents entities now is the one and only way it can be done. When Wall Street investors, or a critical mass of advertisers, demand that Google change with the times, it does. A critical mass of voters and policymakers should have similar prerogatives, given dominant search engines' status as an information utility, as critical to our time as the railroads were to the late nineteenth and early twentieth centuries. Given the vast changes in search experience over time, it is clear that both user experience and much of the underlying code is flexible.<sup>37</sup>

### III. FIRST AMENDMENT OPPORTUNISM

Admittedly, Google has won several lawsuits challenging its placement of links to websites in search results, on First Amendment grounds. None of these cases, however, were at the appellate level. The judges involved tended to opine beyond the legal principles necessary to dispose of the cases. Marginal plaintiffs launched the cases, with nowhere near the resources that Google itself (or even a reputable public interest law firm) could provide. And most troublingly, none of the cases considered the First Amendment opportunism at the core of Google's defense: its simultaneous self-characterization as a *speaker* when it wanted to avoid lawsuits about search results, and as a *mere conduit* when defending against claims of indirect intellectual property infringement and defamation.

For example, in *Langdon v. Google*,<sup>38</sup> the plaintiff, Christopher Langdon, claimed Google had a duty to carry his advertisements, which included messages like "China is Evil."<sup>39</sup> A federal district court

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or semantic analyses that can automatically put Web pages in a broader context."

36. Frank Pasquale, *Asterisk Revisited*, 3 J. BUS. & TECH. L. 61 (2008).

37. For instance, Google has itself offered a "right of reply" feature on some Google News stories. See Brad Stone, *Names in the News Get a Way to Respond*, N.Y. TIMES (Aug. 13, 2007).

38. *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622 (D. Del. 2007).

39. *Id.* at 626; see, e.g., Chris Langdon, *Communist China Has Murdered Millions: Boycott China*, COMMUNIST CHINA IS EVIL, <http://soc.culture.irish.narkive.com/mvcyFwgl/for-paul-the-rabid-rabbit-communist-china-has-murdered-millions-boycott-china>; see also Frank Pasquale,

dismissed the claim, as it obviously should have: Langdon had no constitutional right to balance, and there was no relevant “must-carry” statute.<sup>40</sup> But the court went well beyond that determination in its opinion. Likely in order to quickly dispose of a scattershot array of business torts also alleged by Langdon, it directly analogized Google to a newspaper, invoking First Amendment requirements in order to dismiss all Langdon’s claims en masse (the jurisprudential equivalent of using a tank to destroy a small swarm of flies). Once this logical leap was made, the Supreme Court’s decision in *Miami Herald Publishing Co. v. Tornillo* seemed to clearly settle the case.<sup>41</sup> In *Tornillo*, Florida’s “right of reply” statute (giving political candidates who had been criticized in a newspaper a chance to have their own replies printed in the same newspaper) was rejected by the Court as a violation of the First Amendment.<sup>42</sup> The *Langdon* court thought the plaintiff’s proposed remedies were at least as disruptive of Google’s “message” as a right of reply would have been to the *Miami Herald*.<sup>43</sup>

One immediate question arises: why didn’t the court analogize Google with the broadcasters at issue in *Red Lion Broadcasting v. FCC*,<sup>44</sup> or the cable companies in *Turner Broadcasting Systems, Inc. v. FCC*?<sup>45</sup> In *Red Lion*, the Court resoundingly affirmed (by a 7–0 vote) the FCC’s prerogative to impose a fairness doctrine on broadcasters.<sup>46</sup> In *Turner*, the Court upheld must-carry provisions for a cable network as constitutional, reasoning that they “further important governmental interests” and “do not burden substantially more speech than necessary

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*Shaming Search Engines*, CONCURRING OPINIONS (Nov. 6, 2007, 4:57 PM), [http://www.concurringopinions.com/archives/2007/11/shaming\\_search.html](http://www.concurringopinions.com/archives/2007/11/shaming_search.html) (recapping the congressional concern over search engines’ complicity in the Chinese government’s campaign against dissent, as it was expressed in 2006 with the proposal of the Global Online Freedom Act).

40. *Langdon*, 474 F. Supp. 2d at 634–35.

41. *Miami Herald Publ’g Co., v. Tornillo*, 418 U.S. 241, 256 (1974).

42. *Id.* at 258 (“It has yet to be demonstrated how governmental regulation of this crucial [editorial] process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.”).

43. *Langdon*, 474 F. Supp. 2d at 630 (“Defendants are correct in their position that the injunctive relief sought by Plaintiff contravenes Defendants’ First Amendment rights.” (citing *Tornillo*, 418 U.S. at 256)); *see also* *Jian Zhang v. Baidu.com*, 10 F. Supp. 3d 433 (S.D.N.Y. 2014) (involving Chinese critics of Baidu or Google and holding that Baidu’s search engine results were protected by the First Amendment).

44. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969).

45. *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 185 (1997).

46. The Supreme Court allowed extensive government regulation of the airwaves in *Red Lion*, reasoning that broadcasters deserve less protection because of the scarcity of the airwaves, and a history of governmental regulation in the area. 395 U.S. at 401.

to further those interests.”<sup>47</sup> At the time of *Langdon*, the search engine market in the United States was much closer to that of the three major broadcasters, or oligopolistic cable giants, than it was to the diverse and fragmented newspaper market addressed by *Tornillo*. This is even truer today, as Google continues to entrench a self-reinforcing dominance in the United States, and in many other national markets.<sup>48</sup>

Eric Goldman has argued that cases like *Red Lion* and *Turner* are inapplicable here, because the Supreme Court has also found (in *Reno v. ACLU*<sup>49</sup>) that “the Internet” hosts “vast[,] democratic forums” that lack the scarcity characteristic of broadcast media.<sup>50</sup> But it takes some interpretive work to apply *ACLU* to a potential must-carry or other similar rule. For Goldman, *ACLU*’s Internet includes every particular firm operating primarily on the net. But the Court’s rapid, *ipse dixit* setting aside of *Red Lion* and *Turner* suggests another, more plausible explanation: the *ACLU* majority was opining on regulation applicable to the *Internet as a whole*, not regulation applicable to any one dominant firm (or set of firms) on it. Moreover, the *ACLU* Court was dealing with a far different phenomenon: the Internet of the mid-1990s did not have nearly the influence that today’s Internet has. Finally, the *ACLU* majority failed to engage in the type of rigorous analysis of the function, economics, and social meaning of online life that would be necessary to a legitimate immunization of *all internet-based* firms from regulation of the consumer-facing results of their data processing.

Top search results are, by nature, scarce. At the time of *Red Lion*, there were three large broadcast networks of roughly equal quality. Presently, Google is far and away the best search engine, and as I have

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47. *Turner*, 520 U.S. at 185. Carrying three mandatory channels was a small burden to a cable company, and the burden was outweighed by the furthering of government interests in “(1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming.” *Id.* at 189.

48. *Top 15 Most Popular Search Engines October 2015*, EBIZMBA, <http://www.ebizmba.com/articles/search-engines> [<http://perma.cc/9D4L-TAZ2>] (last visited Nov. 17, 2015) (showing Google as having over three times as many unique monthly visitors as its nearest competitor, worldwide).

49. *Reno v. ACLU*, 521 U.S. 844 (1997).

50. Eric Goldman, “*Must Carry*” *Lawsuit Against Search Engines—Langdon v. Google*, TECH. & MARKETING L. BLOG (June 8, 2006, 12:46 P.M.), [http://blog.ericgoldman.org/archives/2006/06/must\\_carry\\_laws.htm](http://blog.ericgoldman.org/archives/2006/06/must_carry_laws.htm) (“Recall that from *Miami Herald v. Tornillo*, a statutory must-carry rule applied to newspapers violated the constitutional freedom of the press. Given the very specific justifications for tighter regulation of broadcasting, and that those bases have been held inapplicable to the Internet (see, e.g., *Reno v. ACLU*), I think (for these purposes) that search engines are more appropriately analogized to newspapers instead of broadcasters. Accordingly, I can’t see how any judge could constitutionally order ‘must carry’ relief here.”).

described in other work, its advantage is self-reinforcing: the better it is, the more searchers use it, and the more searchers use it, the more data it has for improving itself.<sup>51</sup> Its sole serious rival in the United States, Microsoft's Bing, has been losing hundreds of millions of dollars for years.<sup>52</sup> There are even jokes about the importance of Google results, whether on desktop or mobile devices (where Android provides a whole other point of leverage to persistent dominance).<sup>53</sup> If there is any place where *Red Lion's* scarcity rationale is applicable today, it is in search.<sup>54</sup>

#### IV. A REFORM AGENDA FOR REPUTATION LAW

The CJEU's right to be forgotten judgment has led to a number of important decisions, largely by Google, about the proper scope of such a right. Julia Powles has compiled some of these decisions, contrasting successful and rejected delisting requests.<sup>55</sup> One particular example of a successful request for delisting, "[I]inks to 'revenge porn'—nude pictures put online by an ex-boyfriend," is particularly relevant in the United States.<sup>56</sup> Thanks to the work of experts like Danielle Keats Citron and Mary Anne Franks, the issue is frequently on states' legislative agenda.<sup>57</sup> Moreover, Google itself has decided to provide a form in the United States to enable victims of revenge porn to have it removed from search results on their name.<sup>58</sup>

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51. FRANK PASQUALE, *THE BLACK BOX SOCIETY* 73 (2015).

52. See Frank Pasquale, *Privacy, Antitrust, and Power*, 20 GEO. MASON L. REV. 1009 (2013), for this fact and a general skepticism regarding search rivalries.

53. As one goes: "Where's the best place to hide a dead body? On the second page of Google search results."

54. See generally DAWN NUNZIATO, *VIRTUAL FREEDOM: NET NEUTRALITY AND FREE SPEECH IN THE INTERNET AGE* (2009) (for more on *Red Lion*); Chandler, *supra* note 34, at 1095–97.

55. Julia Powles, *Results May Vary: Border Disputes on the Frontlines of the "Right to be Forgotten"*, SLATE (Feb. 25, 2015, 10:38 AM), [http://www.slate.com/articles/technology/future\\_tense/2015/02/google\\_and\\_the\\_right\\_to\\_be\\_forgotten\\_should\\_delisting\\_be\\_global\\_or\\_local.html](http://www.slate.com/articles/technology/future_tense/2015/02/google_and_the_right_to_be_forgotten_should_delisting_be_global_or_local.html). One example of a successful delisting was "[a] victim of physical assault [who] asked for results describing the assault to be removed for queries against her name." *Id.* A converse example (of a denied delisting request) was a "[r]equest by a pedophile who wanted links to articles about his conviction removed." *Id.* Powles offers fifteen examples of approved delisting requests, and sixteen rejected ones. Her excellent work demonstrates how careful application of legal and ethical principles can lead to nuanced, contextual judgments that do reputational justice to victims of unfairly salient results while respecting the public's right to easy access to important facts about public figures or those otherwise in a position of trust.

56. *Id.*

57. See generally DANIELLE KEATS CITRON, *HATE CRIMES IN CYBERSPACE* (2014); Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345 (2014).

58. Amit Singhal, "*Revenge Porn*" and Search, GOOGLE: PUB. POL'Y BLOG (June 19, 2015),

As search engines adapt to the right to be forgotten in Europe, they will develop labor workflows and other processes capable of implementing the “mass justice” entailed by similar legislation elsewhere. The following three sections of this Part explain potential implications for health data, credit data, and certain criminal convictions now covered by expungement laws.

*A. Toward a Medical Right to be Forgotten in the United States*

Internet regulation must recognize the power of certain dominant firms to shape impressions of individuals.<sup>59</sup> Their reputational impact can be extraordinarily misleading and malicious, and the potential for harm is only growing as hacking becomes more widespread.<sup>60</sup> Consider the following possibility: what if a massive theft of medical records occurs, the records are made public, and then shared virally among different websites? Are the critics of the right to be forgotten really willing to just shrug and say, “Well, they’re true facts and the later-publishing websites weren’t in on the hack, so leave them up?”<sup>61</sup> If so, any patient is just one hack (and a few opportunistic republications) away from having her medical history instantly available to future business partners, counterparties, and other important decision makers.

This problem may sound far-fetched. But there are already shady markets developing in individuals’ “full medical histories” (via stolen life insurance applications).<sup>62</sup> HealthCare.gov is a prime target for hackers, given the integration of health, medical, and citizenship records its proper functioning contemplates.<sup>63</sup> Admittedly, if a state in the

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<http://googlepublicpolicy.blogspot.com/2015/06/revenge-porn-and-search.html>.

59. See PASQUALE, *supra* note 51.

60. Frank Pasquale, *Reputation Regulation*, CONCURRING OPINIONS (Aug. 6, 2008), [http://concurringopinions.com/archives/2008/08/reputation\\_regu\\_1.html](http://concurringopinions.com/archives/2008/08/reputation_regu_1.html).

61. Consider another matter of intimate bodily, if not health, concern: in the case of future intimate photo hacks, do we simply let republishing firms keep the photos available in perpetuity? Respected legal commentators have addressed this issue as well. Woodrow Hartzog, *Keep Nude Photos Offline? Here’s a Better Idea*, CNN (Sept. 4, 2014, 2:37 PM), <http://www.cnn.com/2014/09/04/opinion/hartzog-online-protection-private/index.html>; Lilian Edwards, *Revenge Porn: Why the Right to be Forgotten is the Right Remedy*, GUARDIAN (July 29, 2014, 12:07 PM), <http://www.theguardian.com/technology/2014/jul/29/revenge-porn-right-to-be-forgotten-house-of-lords>.

62. Brian Krebs, *Medical Records for Sale in Underground Stolen from Texas Life Insurance Firm*, KREBS ON SECURITY (Sept. 18, 2014), <http://krebsonsecurity.com/2014/09/medical-records-for-sale-in-underground-stolen-from-texas-life-insurance-firm/>.

63. Cristina Marcos, *Bill Would Allow People to Delete Profiles on HealthCare.gov*, HILL: FLOOR ACTION (Sept. 23, 2014, 12:16 PM), <http://thehill.com/blogs/floor-action/house/218627-bill-would-allow-people-to-delete-profiles-on-healthcaregov>.

United States tried to make the republication of such records illegal, it might run into the First Amendment strictures of *Bartnicki v. Vopper*,<sup>64</sup> which allows the publication of some illegally intercepted communications by those who did not actually complete the illegal interception. On the other hand, as Danielle Citron explains in *Hate Crimes in Cyberspace*, *Vopper* is not a First Amendment absolutist opinion:

As the Court suggested [in *Vopper*], the state interest in protecting the privacy of communications may be “strong enough to justify” regulation if the communications involve “purely private” matters. Built into the Court’s decision was an exception: a lower level of First Amendment scrutiny applies to the nonconsensual publication of “domestic gossip or other information of purely private concern.” Relying on that language, appellate courts have affirmed the constitutionality of civil penalties under the wiretapping statute for the unwanted disclosures of private communications involving “purely private matters.”

Along similar lines, lower courts have upheld claims for public disclosure of private fact in cases involving the nonconsensual publication of sex videos.<sup>65</sup>

Perhaps critics of the right to be forgotten want to sweep away these penalties, too.<sup>66</sup> But if they succeed, there will be real human costs. Consider this story from a Stanford data breach:

[DD], of Santa Clara, Calif., said her “jaw dropped” on Saturday when she intercepted the letter from Ms. Meyer addressed to her 21-year-old son, who she said had received emergency psychiatric treatment at Stanford in 2009. Ms. [D] said it could have been disastrous if her son, who lives at home, had learned that his name was linked to a

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

65. CITRON, *supra* note 57, at 209 (footnotes omitted).

66. Some might also argue that *Florida Star v. B.J.F.*, 491 U.S. 524 (1989), is relevant, because health data breaches might lead to analysis or inference based on the breached records, and that analysis or inference would be legal (unlike the breach itself). In *Florida Star*, the Court ruled that a newspaper had the right to publish “truthful information about a matter of public significance,” even though the information should not have been released. *Id.* at 533. *Florida Star* was a major victory for media defendants, and might protect some of the republishers mentioned above. However, to the extent search engines constantly disclaim responsibilities as publishers with respect to intellectual property complaints, their opportunistic efforts to shoehorn themselves into this category should be treated with skepticism. Moreover, *Florida Star* also emphasized the “public significance” of the information involved—something not immediately apparent in any private person’s medical record. *See also* Frank Pasquale, *Redescribing Health Privacy: The Importance of Information Policy*, 14 HOUS. J. HEALTH L. & POL’Y 95, 103 (2014) (describing the need for health privacy policy to move beyond merely guarding sensitive information, to more aggressively address the improper use and dissemination of breached data).



mental health diagnosis. “My son, I can tell you, is fragile and confused enough that this would have sent him over the edge,” Ms. [D] said, saying she decided to speak publicly now because of her frustration with the breach. “Everyone with an electronic medical record is at risk, and that means everyone.”<sup>67</sup>

Internet firms can be held legally responsible to prevent endless republication of this man’s psychiatric record. It is a purely private matter. Delisting is therefore congruent with venerable protections like those available to consumers pursuant to the Fair Credit Reporting Act (“FCRA”). The elevation of such listings in search results on a person’s name is a matter of algorithmic data processing, not personal (or even corporate) expression.<sup>68</sup> It is time to stop treating the right to be forgotten as some bizarre European dirigisme, and recognize instead its pivotal role in guaranteeing a digital future where our reputations are not at the mercy of malicious hackers and careless search engines.<sup>69</sup>

### B. Revitalizing FCRA

The FCRA requires that bankruptcies be removed from consumers’ credit reports one decade after they occur.<sup>70</sup> When the FCRA was passed, credit reports were the primary reputational source for the decision makers covered by the FCRA, including banks, employers, and landlords.<sup>71</sup> Given the devastating impact a bankruptcy can have on an individual’s reputation and credit history, this element of the FCRA was a particularly important advance in giving individuals a fresh start. Legislators wisely observed that a “fresh start,” a core rationale for

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67. Kevin Sack, *Patient Data Posted Online in Major Breach of Privacy*, N.Y. TIMES (Sept. 8, 2011), [http://www.nytimes.com/2011/09/09/us/09breach.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2011/09/09/us/09breach.html?pagewanted=all&_r=0).

68. Tim Wu, *Machine Speech*, 161 U. PA. L. REV. 1495, 1498 (2013) (“Too much protection would threaten to constitutionalize many areas of commerce and private concern without promoting the values of the First Amendment.”). *But see* Stuart Minor Benjamin, *Algorithms and Speech*, 161 U. PA. L. REV. 1445 (2013) (disputing Wu’s approach to algorithms and speech). I have tried to find a middle ground between Wu’s and Benjamin’s positions, which is reflected in this piece: Frank Pasquale, *Automated Arrangement of Information: Speech, Conduct, and Power*, CONCURRING OPINIONS (June 25, 2012), <http://concurringopinions.com/archives/2012/06/automated-arrangement-of-information-speech-conduct-and-power.html>.

69. See VIKTOR MAYER-SCHÖNBERGER, *DELETE: THE VIRTUE OF FORGETTING IN THE DIGITAL AGE* (2009).

70. 15 U.S.C. § 1681c(a)(1) (2012) (“[N]o consumer reporting agency may make any consumer report containing . . . [bankruptcies that] antedate the report by more than 10 years.”).

71. Fair Credit Reporting Act of 1970, Pub. L. No. 91-508, § 602(a)(3)–(4), 84 Stat. 1127, 1128 (“Consumer reporting agencies have assumed a vital role in assembling and evaluating consumer credit and other information on consumers. There is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer’s right to privacy.”).

bankruptcy protections themselves, would be a hollow victory if bankruptcy ended up a reputational albatross on the necks of former debtors, almost certainly preventing them from participating in the credit economy on terms that reflected their *post-bankruptcy* behavior.

Over the past decade, a new reputational intermediary has become, in many contexts, at least as powerful as the consumer reporting agencies that were the main targets of FCRA. General-purpose search engines (and people-search sites in particular) enable the nosy to ferret out all manner of information attached to a person's name. Some might be important, but there are bound to be, for many job applicants, loan applicants, and others, bits of scurrilous information of dubious provenance as well.

In other work, I have discussed ways of regulating end users of this information, in order to make employment and credit processes more transparent.<sup>72</sup> But it is important for regulators to take a comprehensive, multi-pronged approach. And that is where the key CJEU case on the right to be forgotten, *Google Spain*, is directly on point.<sup>73</sup> In that case, a Barcelona newspaper digitized its archives, making available to search engines like Google official announcements published in the paper in 1998 of the auctioning of properties for repayment of debts.<sup>74</sup> Mario Costeja González was a co-owner of one of the properties, and his name was listed.<sup>75</sup> According to uncontested accounts of the case, the debt was rectified, and by 2009 at the latest, Costeja González had no delinquent obligations outstanding.<sup>76</sup> Costeja González asked the newspaper to remove the announcement, and it refused.<sup>77</sup> He then asked Google Spain (a subsidiary of Google Inc., which actually runs the search engine) to stop returning the digitized newspaper page in response to queries on his name.<sup>78</sup> It referred the matter to Google Inc., based in the United States, which also refused.<sup>79</sup>

Costeja González then filed a complaint with the Agencia Española

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72. PASQUALE, *supra* note 51, at ch. 5.

73. Case C-131/12, *Google Spain SL v. Agencia Española de Protección de Datos (AEPD)*, (May 13, 2014), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=152065&doclang=EN> [<http://perma.cc/ED5L-DZRK>].

74. Lee A. Bygrave, *A Right to be Forgotten?*, COMM. ACM, Jan. 2015, at 35–36.

75. *Id.*

76. *Google Spain SL*, Case C-131/12, ¶ 15 (“Mr Costeja González stated in this context that the attachment proceedings concerning him had been fully resolved for a number of years and that reference to them was now entirely irrelevant.”).

77. Bygrave, *supra* note 74, at 36.

78. *Id.*

79. *Id.*

de Protección de Datos (“AEPD”), which ruled in his favor with respect to Google.<sup>80</sup> Given that Costeja González was not a public figure, and there was not a public interest in perpetual dissemination of this particular website in close connection with his name by a data controller, the AEPD ordered Google to stop doing so.<sup>81</sup> Google appealed to Spain’s National High Court (the “Audencia Nacional”), and the case eventually was heard by the CJEU.<sup>82</sup>

The CJEU made several determinations about Google’s search results on Costeja González’s name, pursuant to authorities including the Charter of Fundamental Rights of the European Union,<sup>83</sup> and Directive 95/46/EC (the “EU Data Protection Directive”).<sup>84</sup> It decided that Google’s operations in Spain granted the AEPD and CJEU jurisdiction.<sup>85</sup> It then found that Google was a *controller* of data.<sup>86</sup> With those foundations in place, the CJEU ruled that Europeans have, under certain conditions, the right to have search results for their name delisted.<sup>87</sup>

The rationale for the CJEU’s action reflected a good faith effort to balance the rights of the data subject, the search engine, and those of the

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80. Agencia Española de Protección de Datos [AEPD], Resolución No. R/01680/2010, July 30, 2010 (Spain), [http://www.agpd.es/portalwebAGPD/resoluciones/tutela\\_derechos/tutela\\_derechos\\_2010/common/pdfs/TD-00650-2010\\_Resolucion-de-fecha-30-07-2010\\_Art-ii-culo-16-LOPD\\_Recurrida.pdf](http://www.agpd.es/portalwebAGPD/resoluciones/tutela_derechos/tutela_derechos_2010/common/pdfs/TD-00650-2010_Resolucion-de-fecha-30-07-2010_Art-ii-culo-16-LOPD_Recurrida.pdf). Many also forget that, in the Spanish case, the newspaper that published the notice about the plaintiff’s debt delinquency was not ordered to change anything about its files. So anyone who took the trouble to search that newspaper could find out about the record at issue. In that sense, the decision was less about erasing history than it was about managing the arbitrary or unfair creation of reputations by important data processors and controllers.

81. *Google Spain SL*, Case C-131/12, ¶¶ 14, 17.

82. See generally *id.*

83. Charter of Fundamental Rights of the European Union, art. 8, 2000 O.J. (C 364) 10.

84. Council Directive 95/46, 1995 O.J. (L 281) 31 (EC).

85. *Google Spain SL*, Case C-131/12, ¶ 1.

86. *Id.* ¶ 33; see also Herke Kranenborg, Case Note, *Google and the Right to be Forgotten*, 1 EUR. DATA PROTECTION L. REV. 70, 76 (“The Court does not accept that the role of Google, as the provider of a search engine, is only a passive one.”).

87. *Google Spain SL*, Case C-131/12, ¶ 100. The court framed the issue as to whether the operator of a search engine is obliged to remove from the list of results displayed following a search made on the basis of a person’s name links to web pages, published by third parties and containing information relating to that person, also in a case where that name or information is not erased beforehand or simultaneously from those web pages, and even, as the case may be, when its publication in itself on those pages is lawful.

*Id.* ¶ 62.

Data subjects’ rights pursuant to Articles 7 and 8 of the Charter were key to the decision. *Id.* ¶74. Note that the CJEU cannot actually decide the case; instead, its role is to answer questions asked by national courts about how EU law should be interpreted.

public. Data controllers' links of names to data that is "inadequate, irrelevant or no longer relevant, or excessive" could be challenged.<sup>88</sup> But the success of challenges should hinge "on the nature of the information in question and its sensitivity for the data subject's private life and on the interest of the public in having that information, an interest which may vary, in particular, according to the role played by the data subject in public life."<sup>89</sup> In other words, whereas public figures or newsworthy events should have links preserved, private ones of interest to only a few should not. And recent data has confirmed that the right to be forgotten has indeed been invoked mainly by those it was intended to help: data subjects worried about the impact of erroneous, misleading, unfair, excessive, or unrepresentative search results.<sup>90</sup>

In the U.S. context, the FCRA could be amended to reflect similar concerns, or a new Fair Reputation Reporting Act ("FRRRA") could be enacted.<sup>91</sup> To the extent Google or other general-purpose search engines are being used for the same purposes as the consumer reporting agencies are, it does a data subject little good to have a bankruptcy wiped off a credit report if it can easily be found via a Google search on the data subject's name. A modernized FCRA would also require search engines (above a certain size threshold<sup>92</sup>) to eliminate such

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88. *Id.* ¶ 93 ("It follows from those requirements, laid down in Article 6(1)(c) to (e) of Directive 95/46, that even initially lawful processing of accurate data may, in the course of time, become incompatible with the directive where those data are no longer necessary in the light of the purposes for which they were collected or processed. That is so in particular where they appear to be inadequate, irrelevant or no longer relevant, or excessive in relation to those purposes and in the light of the time that has elapsed.").

89. *Id.* ¶ 81. Note, too, that the CJEU stated that the "data subject's rights . . . also override, as a general rule, that interest of internet users." *Id.* Miquel Peguera has argued that the balance has not been properly struck. Miquel Peguera, *The Shaky Ground of the Right to Be Delisted*, 18 VAND. J. OF ENT. & TECH. L. (forthcoming 2016), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2641876](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2641876).

90. Sylvia Tippman & Julia Powles, *Google Accidentally Reveals Data on 'Right to be Forgotten' Requests*, GUARDIAN (July 14, 2015, 9:28 AM) ("Data shows 95% of Google privacy requests are from citizens out to protect personal and private information—not criminals, politicians and public figures.").

91. Frank Pasquale, *Reputation Regulation: Disclosure and the Challenge of Clandestinely Commensurating Computing*, in THE OFFENSIVE INTERNET: PRIVACY, SPEECH, AND REPUTATION (Saul Levmore & Martha C. Nussbaum eds., 2010) (first mention of a FRRRA).

92. See, e.g., *The Employer Shared Responsibility Payment*, HEALTHCARE.GOV, <https://www.healthcare.gov/small-businesses/what-is-the-employer-shared-responsibility-payment/> (last visited Nov. 17, 2015) (explaining that the Affordable Care Act employer mandate is limited to employers with more than fifty employees). Size of entity matters in search engine regulation. Some tiny upstart should not be subject to all of the scrutiny that a dominant company like Google is. We see this type of differentiation in law all the time: different employers are subject to different types of rules in all types of contexts, depending on their size.

results in response to name searches, or at the very least to deprioritize them.<sup>93</sup> As in *Google Spain*, such a rule would not disappear the information entirely—searchers could still consult court records or other databases unaffected by the legislation. But it would bring some obscurity to records that, at present, threaten to unfairly and permanently define persons on the basis of a single mistake or issue.

Some critics will say that it should be up to data controllers or furnishers or reporting agencies to make good faith decisions about how long to maintain information. However, it is now almost always the case that it is more advantageous, and cheaper, to keep data than to delete it. Even firms that *say* they expunge damning data after a certain period of time often fail to abide by such promises.<sup>94</sup> Legislation like a FRRA would enable citizens to be more secure in the knowledge that they have some say in the rapid, algorithmically generated data dossiers that now have so much influence on reputation and opportunity. And recent FCRA cases involving Spokeo and LinkedIn indicate that there is growing pressure to modernize regulatory treatment of digital dossiers.<sup>95</sup>

### C. Realizing the Aims of Expungement and Sealed Juvenile Records in a Digital Age

The United States faces a massive problem of excessive incarceration.<sup>96</sup> And once incarceration ends, collateral consequences pile up for ex-convicts.<sup>97</sup> These consequences include hiring practices

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93. For more on the impact of deprioritization as downranking, see Allyson Haynes Stuart, *Google Search Results: Buried If Not Forgotten*, 15 N.C. J.L. & TECH. 463 (2014).

94. Elizabeth A. Harris, *Tackling the Tenant Blacklist with New Legislation*, N.Y. TIMES (Apr. 9, 2010), <http://www.nytimes.com/2010/04/11/realestate/11posting.html> (“Names are meant to be expunged after seven years, she said, but some companies are not careful about purging their records.”); Julie Satow, *On the List, and Not in a Good Way*, N.Y. TIMES (Oct. 16, 2014), <http://www.nytimes.com/2014/10/19/nyregion/a-tenant-blacklist-culled-from-tedium.html>. These may be consumer reports covered by FCRA; see Dalie Jimenez (@daliejimenez), TWITTER (July 19, 2015, 11:28 AM), <https://twitter.com/daliejimenez/status/622835360167514112>.

95. *Robins v. Spokeo, Inc.*, 742 F.3d 409 (9th Cir. 2014), *cert. granted*, 135 S. Ct. 1892 (2015) (suit under FCRA alleging website contained false information about plaintiff); *In Re LinkedIn User Privacy Litig.*, 932 F. Supp. 2d 1089 (N.D. Cal. 2013) (class action tort suit alleging that LinkedIn had failed to protect the privacy of its users).

96. BERNARD E. HARCOURT, *THE ILLUSION OF FREE MARKETS* 40–44 (2011) (describing neoliberal penalty); James B. Jacobs, *Mass Incarceration and the Proliferation of Criminal Records*, 3 U. ST. THOMAS L.J. 387 (2006); James Jacobs & Tamara Crepet, *The Expanding Scope, Use, and Availability of Criminal Records*, 11 N.Y.U. J. LEGIS. & PUB. POL’Y 177 (2008); Jenny Roberts, *Expunging America’s Rap Sheet in the Information Age*, 2015 WIS. L. REV. 322, 323.

97. Michael Pinard, *Criminal Records, Race and Redemption*, 16 N.Y.U. J. LEGIS. & PUB.

biased against hiring ex-convicts (and sometimes even those who have merely been arrested). The problem is especially acute for juvenile offenders, who risk having their entire work life checkered by a single conviction when young. Though juvenile records are sealed, news accounts or other reports may spread word of youthful transgressions.<sup>98</sup>

Expungement has been an important way of eliminating the stigma resulting from some arrests and convictions.<sup>99</sup> Some enterprising law students and attorneys have developed apps to accelerate the expungement process.<sup>100</sup> But in an age when newspapers or blogs may be reporting arrests, there is no guarantee that merely removing one's name from an *official* database will render one's reputation untarnished by news of an arrest.<sup>101</sup> The official sources of such data may even be selling it to private data brokers.<sup>102</sup> Given these digital sources of data, new ways of thinking are necessary to realize the goals of expungement law.<sup>103</sup>

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POL'Y 963 (2013); Lahny R. Silva, *Clean Slate: Expanding Expungements and Pardons for Non-Violent Federal Offenders*, 79 U. CIN. L. REV. 155 (2010); Margaret Colgate Love, *Paying Their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act*, 54 HOW. L.J. 753 (2011); Margaret Colgate Love, *The Debt That Can Never Be Paid: A Report Card on the Collateral Consequences of Conviction*, CRIM. JUST., Fall 2006, at 16.

98. Michael H. Jagunic, *The Unified "Sealed" Theory: Updating Ohio's Record-Sealing Statute for the Twenty-First Century*, 59 CLEV. ST. L. REV. 161 (2011).

99. See Amy Shlosberg et al., *Expungement and Post-Exoneration Offending*, 104 J. CRIM. L. & CRIMINOLOGY 353 (2014) (discussing a fifty-state survey on the varieties of expungement laws.) Five states and the federal government have no expungement options; the states with expungement regimes differ in what offenses are eligible for expungement, whether convictions or arrest records are eligible, and the burden the petitioner must meet.

100. Jason Tashea & Jon Tippens, *Helping Expunge an Inaccurate Criminal Record*, HUFFINGTON POST, [http://www.huffingtonpost.com/jason-tashea/helping-expunge-inaccurate-criminal-record\\_b\\_6988750.html](http://www.huffingtonpost.com/jason-tashea/helping-expunge-inaccurate-criminal-record_b_6988750.html) (last updated June 1, 2015, 5:50 AM) (co-founders of the National Expungement Project describe their work in creating ExpungeMaryland.org, an accurate online resource for those who need criminal records expunged).

101. Clay Calvert & Jerry Bruno, *When Cleansing Criminal History Clashes With the First Amendment and Online Journalism: Are Expungement Statutes Irrelevant in the Digital Age?*, 19 COMMLAW CONSPPECTUS 123 (2010); Amy Shlosberg, Even Mandery & Valerie West, *The Expungement Myth*, 75 ALB. L. REV. 1229 (2011-2012).

102. NAT'L CONSORTIUM FOR JUSTICE INFO. & STATISTICS, REPORT OF THE NATIONAL TASK FORCE ON THE COMMERCIAL SALE OF CRIMINAL JUSTICE RECORD INFORMATION (2005), <http://www.search.org/files/pdf/RNTFCSCJRI.pdf>; Logan Danielle Wayne, *The Data-Broker Threat: Proposing Federal Legislation to Protect Post-Expungement Privacy*, 102 J. CRIM. L. & CRIMINOLOGY 253 (2012); see also Chris Jay Hoofnagle, *Big Brother's Little Helpers: How ChoicePoint and Other Commercial Data Brokers Collect and Package Your Data for Law Enforcement*, 29 N.C. J. INT'L L. & COM. REG. 595 (2004) (describing reverse information flow); Danielle Keats Citron & Frank Pasquale, *Network Accountability for the Domestic Intelligence Apparatus*, 62 HASTINGS L.J. 1441 (2011).

103. Meg Leta Ambrose, Nicole Friess & Jill Van Matre, *Seeking Digital Redemption: The*

Data-use laws have focused on initiatives like “ban the box,” which prohibit employers from asking about applicants’ prior convictions at the initial application stage.<sup>104</sup> But at present, extant, weak law regulating background checks is not well enforced.<sup>105</sup> This means that a real solution to the problem of excessively stigmatic encounters with the criminal justice system will need to be addressed by looking to the source of data and intermediaries that increase its salience.

Some might argue that, given well-litigated First Amendment cases regarding media defendants who published stories on criminal records, the battle to expunge some criminal histories from results generated by large search engines will inevitably run into constitutional limits. However, search engines themselves, in case after case, have disclaimed an identity as a publisher—they style their work as that of a conduit, not a producer of content. This is the foundation of their immunities under the Digital Millennium Copyright Act (“DMCA”) and the Communications Decency Act. Firms should not be able to opportunistically claim non-media status in one group of cases, only to wave media status as a talisman in others. Indeed, in DMCA cases, intermediaries do have an obligation to take down certain materials upon notice of infringing activity. Given the already well-developed legal regime of notice and take down in the DMCA context, large intermediaries cannot credibly allege that it is impracticable to manage requests for delisting of certain material.

Fortunately, Google itself is beginning to recognize such responsibilities. Mug shot extortion sites have tried to shake down anyone with an arrest record and a booking photo by publishing their photos and name and demanding money to take the record down.<sup>106</sup> When these sites appeared high in the “image results” for name searches,

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*Future of Forgiveness in the Internet Age*, 29 SANTA CLARA COMPUTER & HIGH TECH. L.J. 99 (2012); Michael D. Mayfield, *Revisiting Expungement: Concealing Information in the Information Age*, 1997 UTAH L. REV. 1057.

104. Christina O’Connell, Note, *Ban the Box: A Call to the Federal Government to Recognize a New Form of Employment Discrimination*, 83 FORDHAM L. REV. 2801 (2015); Michael Pinard, Opinion, *Ban the Box in Baltimore: Allowing People to Delay Disclosure of Criminal Records Gives Them a Chance to Make a Case for Employment*, BALT. SUN (Jan. 7, 2014), [http://articles.baltimoresun.com/2014-01-07/news/bs-ed-box-ban-20140107\\_1\\_criminal-records-employment-application](http://articles.baltimoresun.com/2014-01-07/news/bs-ed-box-ban-20140107_1_criminal-records-employment-application).

105. CTR. FOR CMTY. CHANGE & NAT’L EMP’T LAW PROJECT, THE “WILD WEST” OF EMPLOYMENT BACKGROUND CHECKS: A REFORM AGENDA TO LIMIT CONVICTION AND ARREST HISTORY ABUSES IN THE DIGITAL AGE (2014), <http://www.nelp.org/page/-/SCLP/2014/Wild-West-Employment-Background-Checks-Reform-Agenda.pdf?nocdn=1>.

106. Jane E. Bobet, Note, *Mug Shots and the FOIA: Weighing the Public’s Interest in Disclosure Against the Individual’s Right to Privacy*, 99 CORNELL L. REV. 633 (2014).

many with records on them were bullied into paying.<sup>107</sup> But Google itself has altered its search algorithms to reduce such sites' salience.<sup>108</sup> That is a commendable action. But its logic needs to be extended to cover a wider array of persons unfairly stigmatized by the rapid growth of carceral systems in the United States.

#### IV. CONCLUSION

Some U.S. commentators' views are rapidly congealing toward a reflexively rejectionist position when it comes to regulation of search engine results—despite the FCRA's extensive regulation of consumer reporting agencies in very similar situations.<sup>109</sup> Jeffrey Toobin's recent article mentions some of these positions.<sup>110</sup> For example, one U.S. critic complains “[t]he [*Google Spain*] decision will go down in history as one of the most significant mistakes that [the CJEU] has ever made.”<sup>111</sup> I disagree, and I think the opposite result would itself have been far more troubling. Combine search results with incipient technologies of algorithmic scoring, “Google Glass” interfaces, and face recognition, and we could soon be in a world where each person one encounters can be instantly categorized as friend or threat, competent or pathetic, by software. To declare such technologies of reputation beyond the bounds of regulation is to consign myriad innocent individuals to stigma, unfairly denied opportunities, and worse.

The United States has long tried to balance privacy and free-speech concerns—neither free expression, nor reputational integrity, are absolute values. The FCRA, for example, balances credit reporting agencies' rights to process and report data about consumers' pasts, with the public interest in ensuring that the reports are accurate, and also consumers' interests in removing certain other items once a defined amount of time has elapsed. *Google Spain*, which led to the CJEU's seminal decision on the right to be forgotten, involved the reporting of a

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107. *Id.* at 634–35.

108. Barry Schwartz, *Google Launches Fix to Stop Mugshot Site from Ranking: Google's MugShot Algorithm*, SEARCH ENGINE LAND (Oct. 7, 2013, 9:36 AM), <http://searchengineland.com/google-launches-fix-to-stop-mugshot-sites-from-ranking-googles-mugshot-algorithm-173672>.

109. Lilian Edwards, *Three Myths that Need Nailed About the Right to be Forgotten (and One Question)*, POGOWASRIGHT.ORG (Aug. 8, 2014), <http://www.pogowasright.org/three-myths-that-need-nailed-about-the-right-to-be-forgotten-and-one-question/>.

110. Jeffrey Toobin, *The Solace of Oblivion: In Europe, the Right to be Forgotten Trumps the Internet*, NEW YORKER (Sept. 29, 2014), <http://www.newyorker.com/magazine/2014/09/29/solace-oblivion>.

111. *Id.*



credit problem that persisted for over ten years. A decade is the cut-off for a bankruptcy report to appear on a U.S. credit report.<sup>112</sup> So the EU and U.S. approaches to balancing privacy and free expression are not necessarily that divergent.

The most important step toward legal reform in the United States now is for agencies to realize the full scope of laws like the FCRA, and legislators to expand their reach to the information-creating firms who are now defeating the purposes of the FCRA.<sup>113</sup> If employers, insurers, educational institutions, and banks are using Google results in the same way as they use credit reports, Congress needs to expand the scope of the FCRA to achieve its original function and purpose. Moreover, a fully developed right to obscurity would not only protect data subjects against the use of search results that are high ranking and thus easily found by a person. It would also defend them against search results that are buried and obscured—and probably should be forgotten—but are accessible by a web crawler or algorithmic aggregator. Such silent, subtle, and secret assessments of reputation can be just as important as publicly accessible search results.<sup>114</sup>

Some techno-libertarians naively assume that such laws undermine the possibility of a truly universal library of all history being built by Silicon Valley firms.<sup>115</sup> They stipulate Google's index to be a record of everything, and castigate Europeans for capriciously deleting aspects of a historical record that Google, unregulated, would deliver in whole if only it weren't for meddling governments. But Google gives no assurance of such an archiving policy, and no one should presume that Google, unregulated, will present some absolutely accurate and

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112. See 15 U.S.C. § 1601 (2012) (stating the congressional purpose in enacting FCRA: "economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit").

113. The CFPB is leading the way in exploring the full scope of FCRA coverage. See CONSUMER FIN. PROT. BUREAU, LIST OF CONSUMER REPORTING AGENCIES (2015), [http://files.consumerfinance.gov/f/201501\\_cfpb\\_list-consumer-reporting-agencies.pdf](http://files.consumerfinance.gov/f/201501_cfpb_list-consumer-reporting-agencies.pdf).

114. Moreover, a regulatory regime focused only on those results salient to persons may end up privileging robotic means of processing information. See, e.g., James Grimmelman, *Copyright for Literate Robots*, 101 IOWA L. REV. (forthcoming 2016), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2606731](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2606731) (describing copyright law's inadvertent privileging of robotic reading).

115. Paul Bernal expertly critiques this assumption. Paul Bernal, *Wikipedia and the Right to be Forgotten*, PAUL BERNAL'S BLOG (Aug. 24, 2014), <https://paulbernal.wordpress.com/2014/08/24/wikipedia-and-the-right-to-be-forgotten/> ("What the internet isn't, is a perfect archive of truth, set in stone as a record of perfect accuracy. To evoke otherwise . . . is simply false.")

complete record of the past.<sup>116</sup> Only independently verifiable and transparent algorithmic processing of information could do that—if we wanted it done at all.<sup>117</sup>

Search results pages are not the pristine reflection of some pre-existing digital reality. They are dynamic, influenced by search engine optimizers, engineers within Google, paid ads, human reviewers of proposed algorithm changes, and many other factors. No one should assume that these results necessarily amount to an expression of truth, a human opinion, some company stance, or some other aspect of expression that garners robust First Amendment protections. If the aims of privacy, antidiscrimination, and fair data practices law are to be realized in a digital age, search engines' status as data processors and controllers—their own dominant self-characterization—must take precedence over the “media defendant” status they opportunistically invoke. Algorithmic arrangements of information should be subject to contestation based on societal standards of fairness and accuracy.

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116. As legal scholar Dawn Nunziato observes, “Google, in its capacity both as the dominant Internet search engine and as the operator of its popular news aggregation site, has engaged in various acts of censorship.” NUNZIATO, *supra* note 54, at 12; *accord* European Commission Press Release MEMO/15/4781, Antitrust: Commission Sends Statement of Objections to Google on Comparison Shopping Service (Apr. 15, 2015) (“Google systematically positions and prominently displays its comparison shopping service in its general search results pages, irrespective of its merits. . . . Google’s conduct has a negative impact on consumers and innovation.”). In her book, *Virtual Freedom*, Nunziato mentions suspect decisions at Google News, Google AdWords, and the search engine generally. *See generally* NUNZIATO, *supra* 54.

117. Kate Crawford, *Can an Algorithm be Agonistic? Ten Scenes from Life in Calculated Publics*, 41 SCI. TECH. HUM. VALUES (forthcoming 2015) (manuscript at 10–11) (“When the logic of algorithms is understood as autocratic, this poses serious problems when we wish to intervene in their process of governance. If algorithms adopt deliberative democratic paradigms, it assumes an Internet of equal agents, rational debate, and emerging consensus positions. This is not the Internet that many of us would recognize.”). And just as we can ask “whether it is desirable or even ethical to persistently map every square inch of global terrain and make it available for electronic processing,” we should also question whether a perpetual dossier on each individual is desirable. DAVID GOLUBIA, *THE CULTURE OF COMPUTATION* 149 (2009); *see also* MAYER-SCHÖNBERGER, *supra* note 69.