2017-05-01

The Right to Be Forgotten: Analyzing Conflicts Between Free Expression and Privacy Rights

Mindy Weston
Brigham Young University

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Mindy Weston

A thesis submitted to the faculty of
Brigham Young University
in partial fulfillment of the requirements for the degree of

Master of Arts

Edward L. Carter, Chair
Tom Robinson
L. Clark Callahan

School of Communications

Brigham Young University

ABSTRACT

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Mindy Weston
School of Communications, BYU
Master of Arts

As modern technology continues to affect civilization, the issue of electronic rights grows in a global conversation. The right to be forgotten is a data protection regulation specific to the European Union but its consequences are creating an international stir in the fields of mass communication and law. Freedom of expression and privacy rights are both founding values of the United States which are protected by constitutional amendments written before the internet also changed those fields. In a study that analyzes the legal process of when these two fundamental values collide, this research offers insight into both personal and judicial views of informational priority. This thesis conducts a legal analysis of cases that cite the infamous precedents of *Melvin v. Reid* and *Sidis v. F-R Pub. Corp*., to examine the factors on which U.S. courts of law determine whether freedom or privacy rules.

Keywords: freedom of expression, privacy rights, right to be forgotten, General Data Protection Regulation, electronic data control, data controllers, data processors, personal data control

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Introduction

Scholars have concluded that focusing on and achieving goals requires selective or directed forgetting.[1] They have also found that remembering and forgetting are accomplished through the same mechanism in the brain and are equally essential to normal functioning.[2] "The human memory is infuriating. Not having control over which memories are stored and how they are recalled is an upsetting cognitive limitation. It's as if our subconscious mind is writing our own personal history in spite of us."[3] Social science can also explain that accomplishments are dependent on more than brain function as individuals are affected by myriad variables including media. It sees further effect in the manner of and levels of exposure as well as the environment in which exposure takes place. If those effects contribute to belief formation and human mentality evolves, then opinions are transient—they exist in a particular place at a particular time—and arriving at those opinions is dependent on the nature of human beings who are completely dependent on their social environment.[4]

With the advent of the internet, that environment has reached another level of impact. A tool of self-preservation is found in motivated forgetting where autobiographical memories are normally crafted into an ever-evolving and empowering life story.[5] That story is what self-aware humans have an interest in managing and it could be considered normal to want self-presentation, however public, to be a reflection of how individual character is self-defined. The issues around electronic rights arose from individual desires to determine the development of their life in an autonomous way without being perpetually or periodically stigmatized as a

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[1] Edward L. Carter, *Practical Obscurity and "Free Expression in the U.S.A.,"* (forthcoming 2017).
[2] *Id*.
[3] George Dvorsky, *Is a perfect memory a blessing or a curse?* at http://www.sentientdevelopments.com/2008/05/is-perfect-memory-blessing-or-curse.html
[4] John Locke, Some Thoughts Concerning Education (1824).
[5] Dvorsky, *supra* note 3.

consequence of a specific action performed in the past.[6] The right to be forgotten is an emerging legal concept which opens the lines of communication about individuals having control over their online identities by demanding that internet search engines remove certain results.[7]

Central to this issue is privacy which fugitive Edward Snowden says is the foundation of all other rights. He posits that "privacy is the right to the self, the right to a free mind and that freedom of speech doesn't mean very much…if you can't try out in a safe space, among friends, without the judgement of external society, what it is that you actually think…unless you have that protected space."[8] Snowden also finds that "privacy is not intended for the majority, that's not where it derives its value; politicians don't need privacy, they're already powerful, they can already defend themselves. Minorities. Vulnerable populations. People who are a little bit different and little bit unusual, people who don't fit in even in small ways—if you disagree with the majority opinion—you are the one who privacy is for."[9]

While the media offers an arena for all genres of dialogue, people can easily forget the humanity of each other based on what they see on and learn from the internet. If the essential mechanism of balanced remembering and forgetting is unbalanced by one or the other being stronger, it follows that normal functioning in social environments might be impaired or at least interrupted. If humans are tied to aspects that force disproportion, such as private data that refuses to be removed from a public setting, it opens the discussion of whether rights are being

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[6] Alessandro Montelero, *The EU Proposal for a General Data Protection Regulation and the Roots of the 'Right to Be Forgotten'*. Computer Law & Security Review, 229-235.
[7] Edward L. Carter, *The Right to Be Forgotten*, Oxford Research Encyclopedia of Communication (November 2016) at http://communication.oxfordre.com/view/10.1093/acrefore/9780190228613.001.0001/acrefore-9780190228613-e-189
[8] Edward Snowden, YouTube*, Snowden Live: Snowden Q&A on how US election affects your privacy, his pardon.* November 10, 2016.
[9] *Id.*

violated. For that reason, the European Union introduced its General Data Protection Regulation and specifically included the right to be forgotten.

Identified as a problem in America today is that the technology which is supposed to bring us together is actually isolating us into echo chambers and driving us further apart.[10] In consideration of fallible human nature and progressing by learning from experience, the idea of an internet safety net where individuals have the right to protect themselves from their past mistakes and from risks of being socially engaged for the purpose of achieving goals, is something to consider.

This thesis will accomplish that by looking at free expression and privacy rights from a legally conflicted perspective of value. Both are fundamentally protected by the constitution but situations arise where they clash and invoke judicial process. The purpose of this study is to examine that process, determine influential factors that weigh on court decisions, and comparatively analyze the idea of a right to be forgotten under U.S. law. Beginning with a background that defines the elements in play, considering examples set by other nations, reviewing existing scholarship, then conducting legal analysis, this study will offer an explanation of what happens when free expression and privacy rights confront each other for priority.

Background

Freedom of Expression

The First Amendment to the Constitution of the United States says, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or

[10] Trent Lapinski, Dear democrats, read this if you do not understand why Trump won, at https://medium.com/@trentlapinski/dear-democrats-read-this-if-you-do-not-understand-why-trump-won

abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[11]

Free speech lies at the center of the First Amendment and it has been argued that the primary reason for its protection is to advance democratic self-governance.[12] It has also been argued that all the protections in the First Amendment are not independent rights but are deeply interrelated and overlapping, making it impossible to understand how they function in that vision without considering their interrelationship.[13] The early great debates were entirely focused on press freedom with free speech as a derivative and that regard has given rise to the recent broad debates[14] which now include the internet factor.

Free speech imposes itself as the unique and real cornerstone of democracy and the First Amendment has been construed so the internet is fully within its safeguards.[15] Nevertheless, researchers still wonder what rules should be set up for the internet and what the goals of those rules might be.[16]

Media boundaries were debatable until a 1964 precedent was set in a landmark case where the Supreme Court ruled in favor of press freedom.[17] The lasting impact of *New York Times Co. v. Sullivan* stems from the rule of actual malice wherein news media can criticize public officials without fear of liability because only defamatory errors that are knowingly or recklessly false can support a libel verdict.[18]

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[11] U.S. CONST. amend. I.
[12] Ashutosh Bhagwat, *The Democratic First Amendment*, 110 Nw. U. L. Rev. 5 (2016).
[13] *Id.*
[14] *Id.*
[15] Giovana De Minico, *Towards an Internet Bill of Rights,* 37 Loy. L.A. Int'l & Comp. L. Rev. 1 (2015).
[16] *Id.*
[17] The New York Times Co. v. Sullivan, 376 U.S. 254 (1964).
[18] David G. Savage, *In New York Times Co. v. Sullivan, the Supreme Court Got it Right—Then and Now*, 48 Ga. L. Rev. 865 (2014).

The Public Safety Commissioner in Montgomery, Alabama, found inaccurate criticisms of police actions as published in the New York Times to be defamatory.[19] Interestingly, his name was not specifically mentioned and for this reason, the Times refused to publish a retraction.[20] The paper told L. B. Sullivan it was puzzled as to how the statements were a reflection of him and that he was more than welcome to explain but instead his response was a lawsuit.[21] Justice Brennan wrote in a majority opinion for the Supreme Court that erroneous statements are inevitable in free debate and must be protected if freedoms of expression are to have the breathing space they need to survive.[22]

The New York Times published an editorial on the 50th anniversary of the revolutionary ruling to celebrate the court rejecting virtually any attempt to squelch even false criticism of public officials as being antithetical to the central meaning of the First Amendment.[23] Our current understanding of press freedom is largely due to the core observations and unchallenged principles of this case.[24] However, the internet has turned everyone into a worldwide publisher—capable of calling public officials instantly to account for their actions, and also of ruining reputations with the click of a mouse.[25]

Practical Obscurity

At present, one alternative that Americans have to the European right to be forgotten is the concept of practical obscurity. Considered a landmark case in advocacy for data privacy is *U.S. Department of Justice v. Reporters Committee for Freedom of the Press*, a Freedom of

[19] *Sullivan*, 376 U.S. 254.
[20] *Id.*
[21] *Id.*
[22] Savage, *supra* note 18.
[23] The Editorial Board of the New York Times, New York, *The Uninhibited Press: 50 years later*, (March 9, 2014).
[24] *Id.*
[25] *Id.*

Information Act case which addressed issues related to the privacy interests in public records.[26] The Reporters Committee wanted the rap sheet of an alleged mobster but the Department of Justice denied the request based on both common law and literal understandings of privacy as individual control of information concerning his or her person.[27] The Supreme Court cited Webster's Dictionary to define that private information is intended for or restricted to the use of a particular person or group or class of persons and not freely available to the public.[28] Reasoning that practical obscurity is information not easily accessible even though it may be public such as arrest records,[29] the court further distinguished between scattered disclosure of public information pieces found by searching various courthouses and the summary from a single database.[30] The difference is substantial because a computer can accumulate and store information that would otherwise be forgotten long before a person turns age 80 when any FBI rap sheets are discarded.[31]

The relevance of this case was not in the level of public interest for the information which the court admitted existed, noting that public records found independently have no privacy claim against media, but it was the simple judicial finding that the media could not use the Freedom of Information Act to obtain the information.[32] So while the United States has not adopted the right to be forgotten, there is legal precedent for the idea that some public information should nonetheless not be made too easily accessible.[33]

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[26] Ashley Messenger, *What Would a 'Right to Be Forgotten' Mean for Media in the United States?* 29-JUN Comm. Law. 29 (2012).
[27] U.S. Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989).
[28] Messenger, *supra* note 26.
[29] Hannah Bergman, *Out of Sight, Out of Bounds*, at http://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-spring-2009/out-sight-out-bounds
[30] Messenger, *supra* note 26.
[31] *Id.*
[32] *Id.*
[33] Carter, *supra* note 1.

Contemporary U.S. Approach

In 2010, Lorraine Martin was arrested and charged with various drug-related offenses.[34] Three local newspapers, all owned by the same corporation, published online accounts of the story including that police suspected a drug ring was operating from the home based on tips her sons sold marijuana, and that law enforcement confiscated 12 grams of cannabis, scales, and trace amounts of cocaine. While Martin conceded the facts were true at the time of publication, the state of Connecticut did not pursue charges and the case was dismissed so her claim was that the reports became false and defamatory. Based on the local erasure statute, Martin asked all three publications to remove the accounts of her arrest from their websites. When they refused, she filed several causes of action including libel and invasion of privacy. The district court ruled in favor of press freedom finding that erasure laws cannot alter historical facts. On appeal, Martin reiterated her argument that after her case was nolled, the articles became untrue. The higher court still found no merit in that argument because Martin did not dispute the fact that she was arrested. The judge could only offer that reasonable readers will understand how some people get arrested when they are not guilty.[35] This case is an example that the U.S. prizes the right to free expression above many fundamental human rights, including privacy.[36]

When the European Union adopted a definition of the right to be forgotten in 2015, legal researchers dove into analysis.[37] Their interpretations range from strongly encouraging the deletion of challenged content even if legally groundless,[38] to opining the law-making process

[34] Martin v. Hearst Corporation, 777 F.3d 546 (2d Cir. 2015).
[35] *Id.*
[36] Julia Kerr, *What is a Search Engine? The Simple Question the Court of Justice of the European Union Forgot to Ask and What it Means for the Future of the Right to Be Forgotten*, Chicago Journal of International Law, 17(1) 2016.
[37] Daphne Keller, *The Final Draft of Europe's 'Right to Be Forgotten' Law*, 2015 at http://cyberlaw.stanford.edu/blog/2015/12/final-draft-europes-right-be-forgotten-law
[38] *Id.*

fell short and the ambiguous regulation will keep lawyers and the public discourse indefinitely busy.[39] The United States has advocates on either side of the issue with those who argue that granting the ability to meddle with speech is inconsistent with principles of free expression, and those who argue that perpetually confounding a person's present with their past is inconsistent with basic fairness.[40]

Origins of a European Right to Be Forgotten in Spain

The case of *A & B v. Ediciones El Pais SL*. involved a newspaper that refused to honor plaintiff requests to stop processing personal data on its website.[41] The plaintiffs were convicted of drug-smuggling in the 1980's and after their release were re-assimilated in society and found personal and professional success. In 2007, the newspaper opened access to its website which lacked any code to block or instruct search engines so when the plaintiff names were searched, they appeared in the top results along with information of their conviction, incarceration, and drug treatment.[42] In 2009, the plaintiffs unsuccessfully applied to have the newspaper take necessary technical measures to ensure the pages containing story details were delisted. In 2011, the plaintiffs filed claim against the newspaper for violation of honor and privacy and sought an order to cease processing their data. They won in the trial court which granted their request along with awards for damages finding that economic interest cannot prevail over personal privacy or data protection rights. The court ordered the newspaper to enter a "no index" instruction on the

[39] *Id.*
[40] Caitlin Dewey, *How the 'Right to Be Forgotten' Could Take Over the American Internet, Too* at https://www.washingtonpost.com/news/the-intersect/wp/2015/08/04/how-the-right-to-be-forgotten-could-take-over-the-american-internet-too/?utm_term=.9f172e5cae5c
[41] Hugh Tomlinson, *Case Law, Spain: A and B v Ediciones El Pais, Newspaper Archive to be Hidden from Internet Searches But No "Re-Writing of History*," at https://inforrm.wordpress.com/2015/11/19/case-law-spain-a-and-b-v-ediciones-el-pais-newspaper-archive-to-be-hidden-from-internet-searches-but-no-re-writing-of-history-hugh-tomlinson-qc/
[42] *Id.*

web pages to remove their appearance on search engines but could remain in the newspaper data. The newspaper appealed until the Supreme Court of Spain determined the following:

- It is necessary to perform a balancing of the rights and legal interests at stake in order to decide whether the processing of personal data is lawful.
- Not involving public figures and 20 year-old story facts lacking historical interest, the general and permanent advertising of involvement constitutes a disproportionate interference with individual honor.
- The conditions for legitimate processing of applicant information were not met.
- The newspaper refusal to prevent search engines from processing applicant personal data was a breach of their data protection rights.
- The lower courts were correct to require the newspaper to adopt technical measures so the data in question would not appear on search engines.
- Judicial authorities cannot be involved in rewriting history—the internal website search ability where the pages were originally published are not comparable to search engines.

The plaintiffs' offenses were not completely erased from history but they were mandated to their appropriate resting place.[43]

In Belgium

In 1994, a Belgian newspaper published an article containing details of a drunk driving accident that killed two people.[44] The responsible party was a medical doctor who was convicted and ordered to rehabilitation. In 2008, the newspaper opened its online archives and a Google search of the doctor's name produced a link to his drunk driving story. In 2010, the doctor asked

[43] *Id*.
[44] Hugh Tomlinson, *Case Law: Belgium: Olivier G v Le Soir. "Right to be forgotten" Requires Anonymization of Online Newspaper Archive* at https://inforrm.wordpress.com/2016/07/19/case-law-belgium-olivier-g-v-le-soir-right-to-be-forgotten-requires-anonymisation-of-online-newspaper-archive-hugh-tomlinson-qc/

the newspaper to anonymize the article and when it was refused, he asked the court. The newspaper was ordered to replace the name of the doctor with an "X" and the appeals court reaffirmed the decision for the following:

- The rights of the respective parties, freedom and privacy, are of equal value but the right to be forgotten is a fundamental part of respect for private life.
- The applicant had no public function and the public had no interest in the identity of someone responsible for a car accident 20 years prior.
- Removing the applicant name had no impact on the context of the accident which was alcohol-related.
- The plea was to anonymize the electronic version and not change printed history.

The newspaper insisted on appealing to the Belgium Supreme Court who maintained that online access to the article so long after the event took place caused disproportionate damage in comparison to the benefits of respecting absolute freedom of expression. Considering a balance between the right to be forgotten and press freedom to facilitate public consultation of historical truth, this situation benefits from the right to be forgotten. This was the first case where the electronic version of the article was ordered anonymized (by replacing the name with X) instead of the newspaper being required to delist the data from search engine indexes.[45]

In Argentina

Free speech advocates have raised concerns that Argentina is leading a growing movement for a broad right to be forgotten that could shut down access to previously public information.[46] Much litigation, for allegations of improper association between internet searches and results, has been brought in Argentine courts, and the conflict between free speech and

[45] *Id*.
[46] Edward L. Carter, *Argentina's Right to Be Forgotten*, 27 Emory Int'L L. Rev. 223 (2013).

privacy has attracted global attention. As evidenced by her social media accounts, Virginia Da Cunha is a recognized Argentine pop-star and media personality. She posts images of her active reality including modeling bikinis and other apparel consistent with her youth and her unrestricted style. She filed a lawsuit against Google and Yahoo! because her name and photographs appeared in search results relating to pornography, escorting, and sex-trafficking. Da Cunha sought damages claiming these connections were made without her permission, were hurting her professional work, and were inconsistent with her personal beliefs and professional activities.[47]

The search engines responded by saying that Da Cunha had not alleged wrongdoing on their part and if she had, there wouldn't be a causal link. Nevertheless, a judge ruled in favor of Da Cunha on the following grounds:

- Search engines can filter the references in question from results as requested.
- Yahoo! has a specific adult-only filter and can specify what to exclude from results.
- Neither search engine indexes all pages of the internet for various reasons.
- While individual rights of privacy control are not directly protected by the Argentine Constitution, it is mentioned in the American Declaration of Rights, among other places.

Seeing the conflict between free expression and individual rights to control the use of her image, the court acknowledged that data control is a right of personhood which includes copyrights from unauthorized use. Specifically, it was determined that the law should protect the image that conforms to the one created by the subject and that it may change over time.[48] Accordingly, Da Cunha won her case albeit temporarily.

[47] *Id.*
[48] *Id.*

However, the appellate court overturned the judgment and ruled in favor of press freedom. Two of three judges ruled search engines are not responsible for any harm third-party internet users cause Da Cunha by posting her image to sex-related websites. The third judge offered an opinion in favor of Da Cunha saying that search engines are not passive carriers of information but are active participants in drawing attention to certain pieces of data while disregarding others. He was clear that there is indeed harm caused to people whose personal information is found within search results but one of three was not sufficient and the link prohibition was revoked.[49]

In France

At the 2011 summit for G8 leaders, President Nicolas Sarkozy claimed self-regulation would provide the cure for all the ills of the internet.[50] The notions of personal honor and integrity have solid history in France and the concept of limited public information is incorporated into both its civil and criminal law.[51] The French Data Protection Agency, CNIL, became the first regulatory agency to require Google to extend removal requests to global databases.[52] They maintain if Google search results violate rights under French law, then Google must prevent users everywhere in the world from seeing them in order to provide effective and complete protections. [53] Google resisted the mandate on grounds that no one country should have the authority to control what content someone in a second country can access.[54] It also warned a global application of the right to be forgotten would trigger a race to the bottom where the

[49] *Id*.
[50] De Minico, *supra* note 15.
[51] Michael J. Kelly and David Satola, *The Right to Be Forgotten,* U. Ill. L. Rev. 1 (2017).
[52] *Id.*
[53] Daphne Keller, *Global right to be forgotten delisting, why CNIL is wrong*, 2016 at http://cyberlaw.stanford.edu/blog/2016/11/global-right-be-forgotten-delisting-why-cnil-wrong
[54] Kelly & Satola, *supra* note 51.

internet would only be as free as the least free nation in the world. [55] CNIL rejected the Google appeal and reaffirmed its decision to enforce the mandate.[56] This is one aspect of the new General Data Protection Regulation (GDPR) that is designed with diversity of laws respective to country so as to accept divergent outcomes within the range of permissible national approaches to the balance between free expression and privacy rights.[57]

European Union Directive

In 1995, the European Union enacted the Data Protection Directive to protect privacy.[58] With an emphasis on personal autonomy and an eye toward rapid technological evolution, the directive established legal standards for data processing that ensured individuals could maintain a degree of control over their data and reputation.[59] While this directive set the grounds for data subjects and/or their information to have a right to be delisted, a landmark case set the precedent for a data subject and/or their information to be deleted, thus establishing the right to be forgotten.[60] In 2010, Mario Costeja Gonzales filed a complaint requesting his name and personal information be concealed or removed arguing that the proceeding had been resolved and was no longer relevant.[61] A Google search of him listed two links to newspaper pages announcing a foreclosure auction on his home.[62] Under the court decision, Google was labeled a data controller and responsible for removing search results regarding the plaintiff.[63] Google appealed to the Spanish high court asking for a preliminary ruling to interpret the directive which held that

[55] *Id.*
[56] *Id.*
[57] Keller, *supra* note 53.
[58] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 [the Directive].
[59] Kerr, *supra* note 36.
[60] Elder Habar*, Privatization of the Judiciary*, 40 Seattle U. L. Rev. 115 (Fall 2016).
[61] Google Spain SL v. Agencia Espanola de Proteccion de Datos, Case C - 131/12 (2014).
[62] *Id.*
[63] Habar, *supra* note 60.

search engines are responsible for processing personal data that is published on their web pages by third parties.[64] Thus, search engines must exclude results where they appear to be excessive, inadequate, irrelevant or no longer relevant in relation to their purposes and in light of the time that has lapsed except where justified by the preponderant interest of the general public in having access to the information.[65]

Much has happened since the *Costeja* ruling, some of which will be covered in the Literature Review, including the potential global ramifications of search engines being made adjudicators of fundamental rights and liberties.[66]

Article 17 of the new General Data Protection Regulation (GDPR) gives the data subject the right to obtain from the controller the erasure of personal data concerning him or her without undue delay and the controller shall have the obligation to erase personal data without undue delay.[67] Such erasure can occur based on any of the following grounds:

- the personal data are no longer necessary in relation to the purposes for which they were collected or processed,
- the data subject withdraws consent or where there is no legal ground for processing,
- the data subject objects to the processing and there are no overriding legitimate grounds or where personal data are processed for direct marketing purposes and the data subject objects to the processing of his data,
- the data has been unlawfully processed,

[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] Regulation on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95, Official Journal of the European Union. Article 17. April 27, 2016.

- for compliance with a legal obligation under EU or Member State law to which the controller is subject,
- and for collection and/or processing of personal data belonging to a child below the age of sixteen.[68]

Upon meeting these criteria, the European Union will grant its citizens a right to delete information from the internet with the exception of one of five reasons also found in Article 17:

- if for exercising the rights of freedom of expression and information,
- if for compliance with a legal obligation which requires processing of personal data under EU or Member State law to which the controller is subject for the performance of a task carried out in the public interest, or in the exercise of official authority vested in the controller,
- if for reasons of public interest in the area of public health,
- if for archiving purposes in the public interest, scientific or historical research purposes, or statistical purposes,
- or if for the establishment, exercise, or defense of legal claims.[69]

Precedents in Publicity v. Privacy

Melvin v. Reid

Considered the high-water mark for a United States approach to the right to be forgotten,[70] this case tells the story of Gabrielle Darley who in 1918 had been a prostitute and who was also tried for murder.[71] After her acquittal, she abandoned street life and settled down into marital domesticity becoming completely rehabilitated. Mrs. Melvin continued on a

[68] *Id*.
[69] *Id.*
[70] R. George Right, *The Right to Be Forgotten: Issuing a Voluntary Recall*, 7 Drexel L. Rev. 401 (Spring 2015).
[71] Melvin v. Reid, 112 Cal. App. 285; 297 P. 91; 1931 Cal. App. LEXIS 981.

righteous path and earned a respectable place in society where she made many new friends who were unaware of her checkered past. In 1925 and without her knowledge or consent, the defendants released a silent motion picture called *The Red Kimono* which used Melvin's real maiden name and her previous likeness. Upon publicity of and release of the movie, Melvin's friends learned about the unsavory incidents of her previous activities which she claimed caused them to abandon and scorn her, exposing her to ridicule and contempt and giving her grievous mental and physical distress.[72]

Privacy laws were fairly new at the time and the court was limited in similar considerations for reference. However, the right of privacy was recognized as the right to live one's life in seclusion, without being subjected to unwarranted and undesired publicity, in short it is the right to be let alone.[73] However, the definition also elaborates to include this caveat: there are times when one, whether willingly or not, becomes an actor in an occurrence of public or general interest. When this takes place, he emerges from his seclusion, and it is not an invasion of his right of privacy to publish his photograph with an account of such occurrence. The trial court dismissed the case but Melvin appealed. This court found through well-considered decisions by other jurisdictions who recognize the right to privacy, general principles of how that law works and summarized it as follows:

1. The right of privacy was unknown to ancient common law.
2. It is an incident of person and not of property for which a right of recovery is granted.
3. It is purely a personal action and does not survive but dies with the person.
4. It does not exist where the person has published the matter complained of or consented thereto.

[72] *Id.*
[73] *Id.*

5. It does not exist where a person has become so prominent that by his very prominence has dedicated his life to the public and thereby waived his right to privacy. There can be no privacy in that which is already public.
6. It does not exist in the dissemination of news and news events, nor in the discussion of events of the life of a person in whom the public has a rightful interest, nor where the information would be of public benefit as in the case of a candidate for public office.
7. The right of privacy can only be violated by printings, writings, pictures, or other permanent publications or reproductions, and not by word of mouth.
8. The right of action accrues when the publication is made for gain or profit.[74]

In deciding this case, the court recognized that incidents appearing in the records of a murder trial would consequently be open to the public and rightfully perused by all. If the defendants stopped at using only the incidents from the life of the plaintiff, there would have been no cause of action but they did not extend any courtesy. The court explained that under California law by way of the Constitution, all men have the right to pursue and obtain happiness without improper infringements thereon by others as a guaranteed fundamental law of the state. Applying that right to *Melvin v. Reid*, the court determined that:

> The use of appellant's true name in connection with the incidents of her former life in the plot and advertisements was unnecessary and indelicate and a willful and wanton disregard of that charity which should actuate us in our social intercourse and which should keep us from unnecessarily holding another up to the scorn and contempt of upright members of society.[75]

The court further declared that:

> One of the major objectives of society as it is now constituted, and of the administration of our penal system, is the rehabilitation of the fallen and the reformation of the criminal. Under these theories of sociology it is our object to lift up and sustain the unfortunate rather than tear him down. Where a person has

[74] *Id.*
[75] *Id.* *292

> by his own efforts rehabilitated himself, we, as right-thinking members of society, should permit him to continue in the path of rectitude rather than throw him back into a life of shame or crime. Even the thief on the cross was permitted to repent during the hours of his final agony.[76]

In *Melvin v. Reid*, it was the belief of the court that:

> The defendant's publication was not justified by any standard of morals or ethics known and was a direct invasion of her inalienable right…to pursue and obtain happiness. Whether we call this a right of privacy or any other name is immaterial because it is a right guaranteed by our Constitution that must not be ruthlessly and needlessly invaded by others.[77]

The court ruled in favor of the plaintiff and all petitions for rehearing were denied.

Sidis v. F-R Publishing Company

William James Sidis was a famous child prodigy in 1910.[78] His name and prowess were well known to news readers of the period. At age eleven, he lectured to distinguished mathematicians and at sixteen, he graduated from Harvard College amid considerable public attention. Since then, he sought to live as unobtrusively as possible and his name appeared in the press only sporadically. In 1937, New Yorker weekly magazine announced Sidis would be the subject of an upcoming article and then printed the brief biography with a cartoon accompaniment. The article was subtitled "April Fool" partly because Sidis was quoted saying he was born on April Fool's day but also because he didn't live up to the prodigious expectations of his mathematical genius. The article was merciless in its dissection of intimate personal details including elaborate accounts of Sidis' passion for privacy and his pitiable efforts to avoid public scrutiny.[79] The court acknowledged reader interest for the amusing and instructive article but

[76] *Id.*
[77] *Id.* *297
[78] Sidis v. F-R Pub. Corp., 113 F.2d 806, U.S. App. LEXIS 3463 (1940).
[79] *Id.*

described it as a ruthless exposure of a once public character, who has since sought and has now been deprived of the seclusion of private life.

In consideration of privacy rights, the court pulled from the seminal legal analysis written by Warren and Brandeis who discuss the evolving development of civil laws.[80] In general they found the press was overstepping the obvious bounds of propriety and decency by taking gossip from an idle and vicious resource to an arrogant industrial trade. They illustrate life in an advancing civilization as being intense and complex which creates a human need to retreat from the world. The authors claim the sensitivity of this need grows with cultural refinement and people increasingly require solitude but enterprising invasions of privacy cause more mental distress than physical injury. The authors concede some, such as public officials, must sacrifice their privacy and expose at least part of their lives to scrutiny as a price of public power but still they maintain even those figures should not be stripped bare.[81] Under the strict standards of the Warren and Brandeis analysis, the court opined that:

> [Sidis] was at one point, a public figure who excited admiration and curiosity with his uncommon achievements and personality which made the attention permissible. Great deeds were expected of him and the court observed public concern for his subsequent history became dominant over his desire for privacy. Not that newsworthiness would always constitute a complete defense but news focused on public characters and truthful comments of their dress, speech, habits, and other ordinary aspects of personality, will usually not transgress this line. It is when victim revelations are intimate enough and sufficiently unwarranted to outrage the community sense of decency that the court can intervene.[82]

In this cause of action, Sidis charged the publication with actual malice and the court could not agree with him finding no intentional invasion of his mental and emotional tranquility.

[80] Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890).
[81] *Id.*
[82] Sidis, 113 F .2d 806.

However real that interest was to individuals, it was not one protected by the law at the time and so the court ruled in favor of press freedom.

Included in the discussion of analytical results will be exploring a better understanding of how and why these two cases with such similar elements ended up with opposite outcomes.

Literature Review

This section examines the right to be forgotten within the existing body of scholarship. After the 2014 ruling in *Google v. Costeja*, much academic research and legal review has been produced on this increasingly relevant topic. This section will look at the common issues that have been emphasized across the perspectives and identify how U.S. legal researchers consider the right to be forgotten as a law. The review of literature will also offer insight into the academic criticisms and opinions of how this regulation affects mass communication of the internet medium. Lastly, this section will provide an overview of how the right to be forgotten creates a polarization between free expression and the right to privacy.

Data Controllers and Processors

Until the GDPR goes into effect in 2018, the 1995 Directive is still the governing privacy law in the European Union.[83] Even though the Directive was made before the advent of the internet, its language has been interpreted to include it.[84] Recognized by the landmark decision in *Costeja*, Europe ruled the right to be forgotten applies to the internet.[85] However, when the ruling failed to define what a search engine is, it created problems of limitations.[86] The possibilities for who could be considered a data controller, the potential administrative costs, and the effectiveness of public information resources are all things that will have an impact on

[83] Directive 95/46/EC, *supra* note 58.
[84] May Crockett, *The Internet (Never) Forgets*, 19 SMU Sci. & Tech. L. Rev. 151 (2016).
[85] *Id*.
[86] Kerr, *supra* note 36.

implementation.[87] The Directive defines a data controller as a person, public authority, agency, or other body that determines the purpose and means of the processing of personal data and a processor is that which processes data on behalf of the controller.[88] It does not mention search engines directly but the ruling in the *Costeja* case noted that search engines are controllers.[89]

As defined in the Directive, processing personal data is any operation or set of operations which is performed upon personal data including collecting, recording, organization, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction.[90] For this reason, it is important to note that while the ruling defined search engine operators like Google, Microsoft (Bing), and Yahoo! as data controllers because of their respective web search tools, it is possible that in the future other internet entities, like Facebook, could also fall into the category of data controllers and be subject to similar rules.[91] This has the potential to forcefully transform the role of these internet companies from hosts to censors.[92] Critics say this change defeats the purpose of social media sites which are economically incentivized to commoditize personal data through socially normalizing publicity and accessibility.[93] Facebook founder and CEO Mark Zuckerberg believes that the rise of social media indicates people no longer have an expectation of privacy.[94]

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[87] *Id.*
[88] Directive 95/46/EC, *supra* note 58.
[89] Ravi Antani, *The Resistance of Memory: Could the European Union's Right to Be Forgotten Exist in the United States?* 30 Berkeley Tech. L.J. 1173 (2015).
[90] Crockett, *supra* note 84.
[91] *Id.*
[92] Emily Adams Shoor, *Narrowing the Right to Be Forgotten: Why the European Union Needs to Amend the Proposed Data Protection Regulation*, 39 Brook. J. Int'l L. 487 (2014).
[93] Michael L. Rustad and Sanna Kulevska, *Reconceptualizing the Right to Be Forgotten to Enable Transatlantic Data Flow,* 28 Harv. J.L. & Tech. 349 (Spring 2015).
[94] *Id.*

Search engine companies being defined as data controllers has redrawn their legal obligations and is something that was not part of their plan.[95] General Counsel for Google, Kent Walker, clarified that Google regards itself as a newsstand or a card catalogue and not as authors or publishers because it does not create information but it simply makes it accessible. With the *Costeja* decision, Google is forced to decide what goes in the card catalogue and Walker asserts that is a role that the company does not want.[96] Google European Communications Director, Peter Barron, echoed the same sentiment that Google never wanted or expected to make these complicated decisions which have been examined by courts in the past but are now in the hands of the legal team at Google.[97] However, theoretical proponents of the right to be forgotten explain there is no oddity in viewing Google as an administrative agency due to its bureaucratic organization[98] and because specialists agree with characterizing search engines as controllers based on the interaction with algorithms that spider data and sculpt results.[99]

General Data Protection Regulation

As technology expands, so must the law.[100] The GDPR is scheduled to take the place of the Directive and significantly expands its scope by applying equally to private persons, public officials, and public figures with few exceptions.[101] One of the objectives of the GDPR is to give control back to citizens over their personal data and strengthen the right to be forgotten by requiring the data controller to prove that they need to keep the data, rather than the data subject

[95] Kelly & Satola, *supra* note 51.
[96] *Id.*
[97] Edward Lee, *Recognizing Rights in Real Time: The Role of Google in the EU Right to Be Forgotten*, 49 U.C. Davis L. Rev. 1017 (2016).
[98] *Id.*
[99] Kelly & Satola, *supra* note 51.
[100] Ashley Stenning, *Gone But Not Forgotten: Recognizing the Right to Be Forgotten in the U.S. to Lessen the Impact of Data Breaches,* 18 San Diego Int'l L.J. 129 (2016).
[101] *Id.*

having to prove that keeping their personal data is unnecessary.[102] This European value of privacy rights over speech freedom can be explained by looking at the socio-political traditions of aristocracy, honor, and autonomy that make the right to be forgotten fit within the EU framework.[103] However, some analyses show a threat of overreach because it will lead to a substantial amount of content being removed when or if controllers fail to apply the exceptions provided.[104] The potential for controllers to face massive fines for noncompliance provides less incentive than to legitimately analyze requests for those that fall within an exception. The effect is a chill on free speech and expression and a reduction in the marketplace of ideas.[105]

With the worldwide applicability of European privacy law, the GPDR imparts to its residents power to delete data from the global public and invites unilateral censorship that bypasses the sovereignty of other states.[106] The founder of Wikipedia called this approach "completely insane" and claims there is no defensible right to censor what people say or to use the law to prevent the publication of truthful information.[107] Still, others laud the global application, given the borderless flow of digital data, and view the right to be forgotten as integral to regaining individual autonomy over connected devices and the personal data those devices collect.[108]

Free Speech Effects

European citizens support the right to be forgotten and the power to delete personal information on demand.[109] In the virtual tug of war between free speech and the right to privacy,

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[102] *Id.*
[103] Shoor*, supra* note 92.
[104] *Id.*
[105] *Id.*
[106] McKay Cunningham*, Free Expression, Privacy, and Diminishing Sovereignty in the Information Age: The Internationalization of Censorship*, 69 Ark. L. Rev. 71 (2016).
[107] *Id.*
[108] *Id.*
[109] Messenger, *supra* note 26.

Europeans favor privacy, whereas Americans place higher value on free speech.[110] The American public could assert their First Amendment rights are infringed by the right to be forgotten because it restricts their ability to access publicly available information based on the theory that once information is lawfully in the public domain, the government cannot restrict access to it.[111] Although the underlying data is still online, the ability to find or access it through a search engine is denied.[112] It is important to note that the Supreme Court of the United States has a tendency to avoid First Amendment controversies in terms of a right to access the public domain or public records.[113] There is no constitutional right to obtain all the information provided by freedom of information laws.[114]

> In Europe, the freedom of speech is qualified by an article protecting human rights:
>
> > The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.[115]
>
> Nevertheless, Europe also recognizes the limitations of privacy rights:
>
> > There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.[116]

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[110] Lyndsay Cook, *The Right to Be Forgotten: A Step in the Right Direction for Cyberspace Law and Policy,* 6 Case W. Reserve J.L. Tech. & Internet 121, (Fall 2014 – Spring 2015).
[111] Edward Lee, *The Right to Be Forgotten v. Free Speech*, 12 I/S: J. L. & Pol'y for Info. Soc'y 85 (2015).
[112] *Id.*
[113] *Id.*
[114] McBurney v. Young, 133 S. Ct. 1709, 1718 (2013).
[115] European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 10, opened for signature Nov. 4, 1950, 213 U.N.T.S. 221.
[116] *Id.* Article 8.

Where European courts require proportionality, U.S. courts by contrast have no guidance from the text of the Constitution on how to resolve potential conflicts among constitutional rights, and, arguably, may have greater discretion in resolving a potential conflict between two rights such as speech and privacy.[117] There are, however, numerous legislative proposals that demonstrate a right to be forgotten is not impossible in the United States and could be tailored to conform to existing laws.[118]

Implementation Problems

While the European Union has taken a firm stand in favor of privacy for its citizens and the GDPR is a major step in protecting those rights, the current method of implementation creates substantial obstacles and potential privacy vulnerability.[119] Within two weeks of the *Costeja* decision and in 25 languages[120] for hearing and deciding claims, Google created an online form allowing European citizens to request the removal of webpages that contain personal data relating to them.[121] Besides no specific timeframe to complete requests,[122] there are cumbersome requirements to exercise this right which create undue burdens, namely: requests can only be made online (processing via fax, letter or email is on an ad hoc basis[123]), to each individual data controller, which may result in jurisdictional conflicts, and create opportunities for private companies and therefore additional privacy risks.[124] As of September 2016, Google had received over a million requests and granted about 40%.[125] If Google or other search engines

[117] Lee, *supra* note 111.
[118] Stenning, *supra* note 100.
[119] Bunny Sandefur, *The Best Practice of Forgetting,* 30 Emory Int'l L. Rev. 85 (2015).
[120] Lee, *supra* note 97.
[121] Simon Wechsler, *The Right to Remember: The European Convention on Human Rights and the Right to Be Forgotten,* 49 Colum. J.L. & Soc. Probs. 135 (Fall 2015).
[122] Erin Cooper, *Following in the European Union's Footsteps: Why the United States Should Adopt Its Own Right to Be Forgotten for Crime Victims*, 32 J. Marshall J. Info. Tech. & Privacy L. 185 (2016).
[123] Lee, *supra* note 111.
[124] Sandefur, *supra* note 119.
[125] Wechsler, *supra* note 121.

deny a request, the person making the request can appeal through a data protection agency, which were created in accordance with the directive and exist to enforce it, or through a court of law by filing a lawsuit against the search engine.[126] Google itself offers no way for an individual to request reconsideration or an appeal once it has reached its decision.[127] It is unclear if there is any appellate process for those harmed by a granted request such as the information-seeking public or content distributor.[128] Examples of this kind of harm are politicians hiding information which would influence voters, doctors hiding claims of malpractice which could alter patient decisions, or bankers hiding fraudulent activity.[129] Critics claim this issue is approaching critical as improper censorship can outweigh an individual interest in a right to privacy.[130]

Benefits

Some legal researchers find the right to be forgotten is a step in the right direction because it represents a positive shift in cyberspace law and policy by increasing individual control over personal information and restoring the balance between free speech and privacy in the digital world.[131] A damaged or mischaracterized virtual identity can have long-lasting consequences for social status and future employment.[132] Certain benefits have been identified such as the promotion of autonomy as individuals would have the right to exert some modicum of control over their electronic environment.[133] The right to be forgotten also provides a remedy for victims of cyber harassment as defamatory material is subject to deletion.[134] In the same

[126] *Id.*
[127] Lee, *supra* note 97.
[128] Wechsler, *supra* note 121.
[129] *Id.*
[130] *Id.*
[131] Cook, *supra* note 110.
[132] Aidan Forde, *Implications of the Right to Be Forgotten,* 18 Tul. J. Tech. & Intell. Prop. 83 (Fall 2015).
[133] Cook*, supra* note 110.
[134] *Id.*

ideology, this regulation prevents discriminatory employment practices by encouraging hiring based on objective criteria.[135]

The overall policy behind the right to be forgotten recognizes individuals can distance themselves from past negative situations ensuring their future is not tainted. It allows for correction of false information and grants the opportunity to start anew which can help accomplish important regular tasks such as obtaining financing.[136] For victims, it allows them to distance themselves from the crimes committed against them while encouraging them to report which Congress recognized as imperative to the function of the criminal justice system and the health of society.[137]

As critically important to consciousness as the ability to recall is equally the ability to forget because it allows the human brain to adjust and reconstruct memories, to generalize, and to think abstractly.[138] If the human brain retained all of the information that is processed through its hundred billion neurons, its network of synapses would be inundated.[139] Selective memory is adaptive and allows us to shed the past and start fresh by forgiving and forgetting.[140]

First Amendment Protection

The free speech prohibition of the First Amendment was written to restrict government and not private actors until a court rules as such.[141] When there is a potential violation, the court requires a compelling government interest in order to carry out an action.[142] Google argues that its search results are protected by the First Amendment as free speech and has won several cases

[135] *Id.*
[136] Cooper, *supra* note 122.
[137] *Id.*
[138] Rustad & Kulevska, *supra* note 93.
[139] *Id.*
[140] *Id.*
[141] NYT, *supra* note 17.
[142] Antani, *supra* note 89.

on that basis.[143] However, there are certain categories of speech that are less scrutinized and less protected including fighting words (inciting hatred or violence), obscenity, and defamation.[144] Despite the U.S. recognition of privacy rights, it has left the internet fairly unregulated creating problems that need to be solved through legislation.[145] Americans generally decry the elevation of privacy over free expression but there are contexts in which the right to be forgotten resonates.[146] An 18-year-old girl died in a decapitating car accident and after gruesome photographs taken and emailed to friends by highway patrolmen surfaced on social media, the girl's father began a futile crusade to have the images removed which increased the family's despair.[147]

Privacy rights embedded in the Constitution are not explicit but there are myriad laws from various authorities that characterize a sectoral approach to fragmented, cross-governmental, and industry-specific regulation.[148] Different acts and bills regulate and/or restrict use and dissemination of private financial information, the disclosure of protected health information, credit reporting, etc.[149] Then further variations among state privacy laws are numerous and growing with a cross-current of self-regulation and promotion of best practices.[150] This patchwork quilt of privacy protection often leads to uncertainty and confusion among the citizens regarding what rights they may enjoy and under what conditions they may act upon such

[143] Cooper, *supra* note 122.
[144] Antani, *supra* note 89.
[145] Cooper, *supra* note 122.
[146] Cunningham, *supra* note 106.
[147] *Id.*
[148] *Id.*
[149] *Id.*
[150] *Id.*

rights.[151] Given that and the historical preference for the elevation of free expression over the right of privacy, it is unlikely a U.S. court would have granted relief in *Costeja*.[152]

Without a doubt, the growth of the internet and the modern search engine presents a challenge in terms of protecting these rights, especially in countries like the United States.[153] As privacy law in the U.S. has not adapted fast enough to address the growing concerns associated with modern technology, individual rights to privacy and autonomy are rapidly deteriorating.[154] Consequently, some believe, the United States should follow the lead of the European Union and adopt the policy because the right to be forgotten: (1) promotes privacy and autonomy; (2) provides much-needed remedy to victims of cyber harassment; and (3) prevents discriminatory hiring practices based upon irrelevant information.[155]

Human Bias

Social science often suggests humans are self-serving if not self-deluded in their attitudes and a desire to erase negative elements are more understandable than justified.[156] Narcissism can minimize personal responsibility and reinforce attribution bias where credit is taken for positive events and blame is placed for negative ones as a type of superficial self-forgiveness.[157] A deeper, more valuable self-forgiveness rooted in appropriate responsibility requires acceptance that should not only encompass the unfavorable event but also the public record of the event as well as relevant self-conduct after the fact.[158] Of course, experts conclude it is easier to expect

[151] Rustad & Kulevska, *supra* note 93. *173
[152] *Id.*
[153] Cook, *supra* note 110.
[154] *Id.*
[155] *Id.*
[156] Right, *supra* note 70.
[157] *Id.*
[158] *Id.*

this responsibility from others while denying its need for the self which brings into question the good faith judgment of those persons who are motivated to seek a deletion or delinking.[159]

Purpose for Research

The data collected thus far shows how the internet has changed the field of mass communication and how it has impacted and has the potential to further impact both free expression and privacy rights. European values manifested by this research demonstrate their citizens and their laws place privacy above free expression. However, this review of information reveals the United States does not share an identical attitude as the protected freedoms of the First Amendment have no apparent hierarchal order. The remainder of this research will examine what takes place in a legal context when there is a conflict between free expression and privacy rights and how the field of mass communication can react to that analysis.

Methodology

This research will take the approach of a traditional method of judicial analysis and compare precedents set in pre-internet claims of privacy invasion with the rhetoric of contemporary judicial discussion on data control. The analysis will be based on the two U.S. cases summarized in the Publicity v. Privacy section which both claimed violations, faced defenses of free expression but resulted in opposite outcomes. Recalling *Melvin v. Reid,* where the plaintiff's past was made into the plot-line of a movie and the court ruled for her, and *Sidis v. F-R Pub. Corp.,* where the plaintiff's past was the subject of a magazine article and the court ruled against him. The discussion will include brief explanations of how the respective outcomes were reached and provide foundational analysis for the extent to which a right to be forgotten exists in the United States.

[159] *Id.*

The data for analysis was gathered in legal databases accessible through lib.byu.edu. At LexisNexis Academic, finding these legal cases started with using the "search by parties" option and entering "Melvin" and "Reid" which produced hundreds of cases in 67 courts that have cited this precedent. By selecting California Courts of Appeal cases, the search produced the original case of *Melvin v. Reid*. Selecting that case then using the Shepardize® function resulted in 129 decisions which cite this precedent. To further narrow the data, the "restricting" function limited the search to include only those cases which also cited S*idis v. F-R Pub. Corp.* and the list resulted in 36 cases for analysis. That number is a sufficient and convenient study sample.

To see if U.S. courts literally regard the right to be forgotten, a Westlaw search for the exact term was run and resulted in four cases within the entire state and federal system. This suggests the foreign terminology is not presently being adopted here but given the dates of those cases, it demonstrates the idea is fairly novel. That search result was:

- Rahul Manchanda v. Google, Yahoo!, and Microsoft Bing (New York, 2016)
- John DOE, No. 380316 v. Sex Offender Registry Board (Massachusetts, 2015)
- John DOE, No. 7083 v. Sex Offender Registry Board (Massachusetts, 2015)
- Cindy Lee Garcia v. Google, Inc., a Delaware Corporation; YouTube, LLC (2014)

Within the 36 cases produced by the Lexis Nexis search, each was read then examined and summarized for the action being taken and pleas made to the court, the basis of argument for both claimant and defendant, and the final rulings including the legal weight factors on which the judges made their decisions. Through analysis of judicial discussion, this research will be able to explain from a United States perspective, how the idea of a right to be forgotten is regarded under its constitution. Notes were made of any inclusions and special considerations where the uniqueness of the internet and/or the relevancy of technological advances were a factor. Finally,

the analysis will determine what U.S. courts use to strike a judicial balance between off-set freedom of expression and privacy rights as accomplished or not in the comparative cases. Subsequently, the analysis will also indicate the subjective process for individuals who present a claim of privacy invasion when seeking legal intervention and resolution.

Following a summary format, significant statements were extrapolated from these case arguments and marked decisions by courts application of respective laws to specific issues in each case. Given that the right to be forgotten terminology is specific to Europe, analysis was made of U.S. cases with regard to privacy rights and privacy invasion/intrusion. The defending parties in all these cases claim qualified privilege under freedom of expression and/or of the press found in the First Amendment. That freedom is not unlimited and the analysis reveals the instances of and what constitutes overreach. To organize, the data was filtered into relatively narrow categories to conclude in each case:

- Overview of the case and claims made by Plaintiff and Defendant
- How the court applied the laws relating to Freedom of Expression and Right to Privacy
- The issues that required balance by the court
- The court process of decision and appeal
- How the court viewed each specific case as it relates to privacy rights
- The factor that tipped the scale to give more weight to press freedom or privacy rights

Legal Definitions

The following legal definitions are common and could be helpful to interpreting the meaning of judicial language.

Action: a judicial proceeding brought by one party against another

Amend: the court allows modification to a motion for refiling

Claim: the statement of ownership over a property

Defendant: the person accused of violation

Demurrer: a legal pleading that objects to a filing or challenges a filing by the opposing party

Libel: to publish in print, including pictures, through broadcast an untruth about an individual that will do harm to that person or their reputation by tending to bring harm, ridicule, or scorn.

Plaintiff: the person who starts the action

Remand: when the appellate court sends the case back to the lower court for further action

After reading each case and condensing them into the synopses found in the appendix, the data was analyzed for overall patterns, observations, and themes that provide evidence for demonstrating if a right to be forgotten has been achieved in the United States.

Results of Analysis

As previously discussed in the Methodology section, the study resulted in 36 cases for analysis. Each case was read and reviewed to determine an overview of arguments presented, how the laws in question applied specifically to the case, the issues which required judicial balance, the final outcome of the case, and the determining factor which demonstrated whether Freedom of Expression won or the Right of Privacy won referred to as the scale. A synopsis of each case is provided in the appendix and this section will provide an in-depth analysis of if, how, and when a conceptual right to be forgotten exists under U.S. law.

Effectively, this data can firstly be divided into two sections of cases that ruled in favor of privacy rights and those that ruled in favor of free expression (see Figure 1). From that perspective, the statistics are 24:12 for freedom which demonstrates both the difficulty in proving an invasion claim and that free expression carries considerable weight under U.S. law.

Though none of these cases involved the internet medium directly, there is recognition for how the technological advances of modern civilization change the course of humanity. In 1952, *Gill v. Curtis* was brought before the court to settle the publication of a photograph taken without consent. At issue was whether the context was public and newsworthy because the picture was taken at a place of business. Captured surreptitiously and showing the business-owner couple in an amorous moment, the court found there was a reasonable expectation of privacy. Because no prior permission was given, along with the manner of news-gathering, the action was ruled a violation and the plaintiff's distress was valid.[160] The court explained:

> One of the principal arguments advanced in support of the doctrine of privacy by its original exponents is that the increased complexity and intensity of modern civilization and the development of man's spiritual sensibilities have rendered man more sensitive to publicity and have increased his need of privacy, while the great technological improvements in the means of communication have more and more subjected the intimacies of his private life to exploitation by those who pander to commercialism and to prurient and idle curiosity. A legally enforceable right of privacy is deemed to be a proper protection against this type of encroachment upon the personality of the individual. [161]

Twelve claims were decided with a completely positive view of privacy invasion (see Appendix Case Nos. 1, 3, 4, 14, 20, 23, 26, 29, 30, 31, 32, 36), two cases had split decisions where the court found tortious action relating to the published content but not for privacy invasion so those count for free expression (see Appendix Case Nos. 2, 21), and the remaining 22 cases concluded with negative outcomes of plaintiff claims of privacy violation.

This issue establishes a sub-section in the data patterned by the extent of privilege which was brought into question in 15 of the 36 cases (see Figure 2). In all 12 of the cases that ruled in favor of privacy rights, the courts determined the privilege of free expression or press freedom had exceeded its legally defined boundaries to the point there was tortious action.

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[160] Gill v. The Curtis Publishing Company, 38 Cal. 2d 273; 239 P.2d 630; 1952 Cal. LEXIS 171.
[161] *Id.*

In *Barber v. Time*, the plaintiff did not give consent and even protested to being interviewed and having her picture taken by reporters while hospitalized. The defendants claimed the subject matter was of public interest and newsworthy. While the court held that argument may have been legitimate, it was not necessary for the defendant's purpose to single-out the plaintiff and because she did not consent, the court ruled her privacy had been invaded.[162] The judicial opinion explained that:

> Establishing conditions of liability for invasion of the right of privacy is a matter of harmonizing individual rights with community and social interests…on a reasonable basis…recognizing the one without abridging the other. The determination of what is a matter of public concern is similar in principle to qualified privilege in libel. It is for the court to say first whether the occasion or incident is one of proper public interest. If the court decides that the matter is outside the scope of proper public interest and that there is substantial evidence tending to show a serious, unreasonable, unwarranted and offensive interference with another's private affairs, then the case is consideration actionable. This rule does not interfere with the freedom of the press or its effective exercise, but only limits its abuse and does not violate [the] Constitution.[163]

In cases where excess of privilege was applicable but the court ruled for free expression, the sub-section is patterned by whether the plaintiff could be classified as a public figure if the circumstances surrounding the publications were of sufficient public interest. When that category is established, Freedom of the Press has qualified privilege and the burden of proof falls on the plaintiff to prove libel, that is to show the disclosure was made maliciously or with reckless disregard for the truth or whether the disclosed information would be offensive to a reasonable person (see Appendix Case Nos. 6, 8, 16, 35).

Illustrated by *Cantrell v. Forest City,* the plaintiff's husband died in a bridge collapse which made nation-wide front-page news. Nine months later, reporters doing a follow-up story went to the plaintiff's home where only her minor children were present. The reporters took

[162] Barber v. Time, Inc. 348 Mo. 1199; 159 S.W.2d 291; 1942 Mo. LEXIS 470; 1 Media L. Rep. 1779.
[163] *Id.*

pictures and interviewed her children then published a story angled to feature the devastating consequences of the incident. The plaintiff objected to the pictures of an unkempt home which she claimed depicted her family in a false light and to the article for a number of factual inaccuracies.[164] Since the court determined the prior publicity rendered the article newsworthy, the plaintiff was burdened to show malicious intent to cause damage and to the reporters having reckless disregard for the truth. Neither of which are seemingly possible to prove nor was she able to despite the reporters having been incentivized by an offer to be paid for a story if they found one, so her claim was unsuccessful. The court acknowledged the plaintiff would likely have a proper action for trespassing but since that was not the matter brought to jury there was no way to rule on it.[165] Arguably, a compound fracture to the already tough break of the plaintiff's losses but nothing the court could relieve under the protected constitutional freedoms mentioned.

Another sub-section is patterned by the issue of requisite consent and whether it was given or required for the respective publications. Fifteen of the 36 cases were viewed with complaint and consideration for this factor and of the same 12 cases that had positive outcomes for privacy invasion, the scale in each case was weighted likewise because the plaintiff did not give consent where legal publicity would require it (see Appendix Case Nos. 1, 3, 4, 14, 20, 23, 26, 29, 30, 31, 32, 36). What can be observed about circumstances of requisite consent is when the court declared there was a reasonable expectation of privacy which was violated.

An example of this circumstance is *Diaz v. Oakland Tribune* where the first female president of a community college was elected. She consented to an interview with the local paper having understood she was being recognized for the gender accomplishment. However, when the article was published, the reporter disclosed the female was actually a transsexual along with

[164] Cantrell v. Forest City Publishers, Inc., 484 F.2d 150; 1973 U.S. App. LEXIS 7973.
[165] *Id.*

other intimate facts which albeit accurate, were not discussed in the interview and of which the plaintiff did not intend to publicize.[166] The court ruled that there was no compelling need for the public to be aware of the private facts disclosed and because the plaintiff did not share those in the interview and did not consent for them to be published, her privacy was violated.[167]

Of the 22 cases with overall negative outcomes for privacy violation, a small pattern emerges where consent is considered but places the burden of malice on private individuals. While public individuals are subject to the scrutiny and criticisms of a free press, private persons are much less so but can still find themselves publicized without their consent. Three cases from this sub-section of involuntary publicity show the reasons for which the outcome leaned toward free expression and how the private actions of these plaintiffs became matters of public interest (see Appendix Case Nos. 5, 13, 18).

In *Johnson v. Harcourt*, the plaintiff's choice to return $250,000 cash that he had found, resulted in a $10,000 reward and an article of recognition in a magazine.[168] However, when the same story was later republished in a college textbook and the plaintiff objected, his claim of privacy intrusion was seen with a negative view because his original decision injected him into the vortex of publicity.[169] As much as immoral activity can result in a loss of privacy, this instance demonstrates that overtly moral activity can do the same.

The second in this pattern is *Jenkins v. Dell*, where the plaintiffs were heirs of a homicide victim and claimed invasion of privacy when their picture was published without their consent.[170] In the majority of criminal cases, however, the court regards criminal activity and

[166] Diaz v. Oakland Tribune, 139 Cal. App. 3d 118; 188 Cal. Rptr. 762; 1983 Cal. App. LEXIS 1314.
[167] *Id.*
[168] Johnson v. Harcourt, Brace, Jovanovich Inc., 43 Cal. App. 3d 880; 118 Cal. Rptr. 370; 1974 Cal. App. LEXIS 1364.
[169] *Id.*
[170] Jenkins v. Dell Publishing Co., 251 F.2d 447; 1958 U.S. App. LEXIS 3573.

crime as a matter of public interest and a normal news item so the publication was not tortious.[171] Though the heirs were not directly involved in the situation, the court decided their familial association created sufficient privilege to justify their involuntary publicity.

Thirdly, in *Berg v. Minneapolis*, the plaintiff was first to reveal the private facts he objected to the press publicly disclosing.[172] In his divorce decree, which are public record, the plaintiff revealed the intimate and scandalous details of his domestic life so when the defendant published a picture of him without his consent and he could not prove malicious intent, the court ruled in favor of free expression.[173]

The remaining 19 cases which were viewed with an overall negative outcome of privacy intrusion are in a sub-section patterned by public interest. Each was faced with the question of whether the information disclosed was legitimately public or not. Because it was respectively determined the publications were within legal limits, none of these plaintiffs were able to demonstrate their right to privacy could outweigh the protection of free expression (see Appendix Case Nos. 6, 7, 8, 9, 10, 11, 12, 15, 16, 17, 19, 22, 24, 25, 27, 28, 33, 34, 35).

Two of the cases attempted the use of time-lapse to further their argument for privacy rights but the U.S. courts would still not rule for the plaintiffs (see Appendix Case Nos. 25, 28). Nine years after the last individual was sentenced to whipping as punishment, a public official campaigned to revive this type of sentence and published an article identifying the former convict and his story.[174] The plaintiff argued he had reacquired his right to privacy by leading a reformed life during the interim. However, he was told a lapse in time did not reinstate his right

[171] *Id.*
[172] Berg v. Minneapolis Star & Tribune 79 F. Supp. 957; 1948 U.S. Dist. LEXIS 2407.
[173] *Id.*
[174] Barberi v. News-Journal Co., 56 Del. 67; 189 A.2d 773; 1963 Del. LEXIS 140.

to privacy and the court affirmed a free press includes the right to republish unpleasant facts that are still a matter of public interest or concern.[175]

In *Rawlins v. Hutchinson* the same argument was made and the court view was also negative, however, the decision was based on the plaintiff being a public official which required proof of malice that could not be shown.[176] Again, the court determined that time-lapse, ten years in this case, was not sufficient to preclude public interest.[177]

From these two cases it can be observed that both criminals and public officials in the United States relinquish a similar level of privacy rights and that both categories of individuals, however different their activities, carry the same burden for proving malice when requisite consent is lost over matters of public interest. Despite the passage of time being a valid erasure criteria in the European right to be forgotten, it can be stated based on U. S. judicial opinion that a mere passage of time is not alone sufficient to warrant privatization of publicly disclosed information.

When a matter of privacy is before the court, the definition of what that looks like is explained in *Schulman v. Group*. This opinions states:

> The court asks first whether defendants intentionally intruded, physically or otherwise, upon the solitude or seclusion of another, that is, into a place or conversation private to a plaintiff…to prove actionable intrusion, the plaintiff must show the defendant penetrated some zone of physical or sensory privacy surrounding, or obtained unwanted access to data about, the plaintiff. The tort is proven only if the plaintiff had an objectively reasonable expectation of seclusion or solitude in the place, conversation or data source…as it is in the intrusion cases that invasion of privacy is most clearly seen as an affront to individual dignity.[178]

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[175] *Id.*
[176] Rawlins v. Hutchinson Publishing Co., 218 Kan. 295; 543 P.2d 988; 1975 Kan. LEXIS 547.
[177] *Id.*
[178] Schulman v. Group W. Productions, Inc., 18 Cal. 4th 200; 955 P.2d 469; 74 Cal. Rptr. 2d 843; 1998 Cal. LEXIS 3190

In these cases the court must acknowledge press freedom by considering if what published was done so with the qualified privilege protected by the Constitution. *Schulman v. Group* states:

> No mode of analyzing newsworthiness can be applied mechanically or without consideration of its proper boundaries. To observe that the newsworthiness of private facts about a person involuntarily thrust into the public eye depends, in the ordinary case, on the existence of a logical nexus between the newsworthy event or activity and the facts revealed is not to deny that the balance of free press and privacy interests may require a different conclusion when the intrusiveness of the revelation is greatly disproportionate to its relevance. Intensely personal or intimate revelations might not, in a given case, be considered newsworthy, especially where they bear only slight relevance to a topic of legitimate public concern.[179]

The court still recognizes the limits of this freedom and offers this caveat:

> All the circumstances of an intrusion, including the motives or justification of the intruder, are pertinent to the offensiveness element. Motivation or justification becomes particularly important when the intrusion is by a member of the print or broadcast press in the pursuit of news material. Although, the First Amendment does not immunize the press from liability for torts or crimes committed in an effort to gather news, the constitutional protection of the press does reflect the strong societal interest in effective and complete reporting of events, an interest that may—as a matter of tort law—justify an intrusion that would otherwise be considered offensive. While refusing to recognize a broad privilege in newsgathering against application of general laws, the United States Supreme Court observes that without some protection for seeking out the news, freedom of the press could be eviscerated.[180]

In *Schulman v. Group*, the plaintiff prevailed in her action because the court found that the press had exceeded its privilege.

> The guarantees for speech and press are not the preserve of political expression or comment on public affairs, essential as those are to healthy government. One need only pick up any newspaper or magazine to comprehend the vast range of published matter which exposes persons to public view, both private citizens and public officials. Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press. Thus, the right to keep information private was bound to clash with the

[179] *Id.*
[180] *Id.*

> right to disseminate information to the public. Despite, then, the intervening social and technological changes since 1890, the fundamental legal problems in defining a right of privacy vis-a-vis the news media have not changed—they have, if anything, intensified.[181]

A similar case to *Schulman v. Group* which ruled in favor of free expression is *Anderson v. Fisher* (see Appendix Case No. 34). Both cases involved car accidents in which the plaintiffs were injured and both cases involved commercialization of the scenes for promotion of an aspect of Emergency Medical Response. Neither of the plaintiffs was asked for consent or agreed in advance to what was published and both claimed their privacy had been invaded. The plaintiff in the former case was successful because an ambulance or hospital room is considered a private location and the court ruled Life Flight acted as an ambulance.[182] The plaintiff in the latter case was not successful because the content published from his accident took place on the road which the court deemed a public context and thus newsworthy.[183] Further, the court ruled that presentation of truthful facts which the victim would prefer to keep private, did not give rise to liability for mental distress.[184]

Only seven of the 36 cases stood with the trial court decision and were not remanded or appealed (see Appendix Case Nos. 15, 18, 19, 22, 23, 24, 31). Of those which were viewed by the court as negative for invasion of privacy (see Appendix Case Nos. 15, 18, 19, 22, 24), all of them were a result of the plaintiff's own actions, good or bad, that ultimately determined their inability to retain their privacy right.

In *Welsh v. Island Shopper*, the plaintiff alleged that the public disclosure of his intimate affairs constituted an unwarranted invasion of his privacy, culminating in a halt to professional

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[181] Schulman v. Group
[182] *Id.*
[183] Anderson v. Fisher Broadcasting Companies, Inc., 300 Ore. 452; 712 P.2d 803; 1986 Ore. LEXIS 1116; 12 Media L. Rep. 1604.
[184] *Id.*

advancement, rebuke by friends, and an embarrassing amount of social ostracism.[185] The disclosure was a birth announcement of a baby between the plaintiff who was the Director of Training for the Department of Public Safety and a woman to whom he had never been married. At trial, the plaintiff testified that he did not acknowledge the child until sometime after the appearance of the notice.[186] Based on the plaintiff's employment, the court categorized him a public figure and ruled he had relinquished his right to privacy.

In *Berg v. Minneapolis Star & Tribune* as discussed previously, in his divorce decree, the plaintiff was first to disclose the information to which he alleged was intrusion into his private life and by making that public, the court found that he vacated his right to privacy.[187]

In *Samuel v. Curtis*, the plaintiff chose to be a good Samaritan by trying to help a woman who was considering committing suicide by jumping off the Golden Gate Bridge. In the picture, the plaintiff was hanging over the side and reaching for the desperate woman in an attempt to convince her to live. The image was something the court found to be a matter of public interest that would not offend the sensibilities of a reasonable person.[188]

The plaintiff in *Bernstein v. National Broadcasting Co*., was convicted of crimes and despite being pardoned for both of them, his affairs were considered public knowledge.[189]

In *Jones v. New Haven Register*, a case of mistaken identity was not sufficient to claim damages for privacy intrusion when the misrepresented party is a public official and subject to scrutiny.[190] The court found a timely retraction and correction was sufficient to prove there was no malice on behalf of the press.[191]

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[185] Welsh v. Island Shopper, 1974 U.S. Dist. LEXIS 5676 (D.V.I. Nov. 21, 1974).
[186] *Id.*
[187] Berg v. Minneapolis Star & Tribune
[188] Samuel v. Curtis Pub. Co. 122 F. Supp. 327, 1954 U.S. Dist. LEXIS 3353 (D. Cal. 1954).
[189] Bernstein v. National Broadcasting Co.
[190] Jones v. New Haven Register, 46 Conn. Supp. 634; 2000 Conn. Super. LEXIS 220; 763 A.2d 1097.
[191] *Id.*

Of the 25 cases that were appealed, 12 of the judgments were reversed, three of them in part. Of the nine that were reversed in full, seven were decided with a completely positive view of privacy invasion (see Appendix Case Nos. 1, 3, 4, 14, 26, 32, 36). The consistent element to those cases is consent and the judicial determinations that the situations in question would have required it from the plaintiff in order to legally disclose that which was published.

Discussion

The right to be forgotten is an emerging legal concept that gains momentum as the internet continues to create a global village. The United States has not adopted this terminology but grants fundamental freedoms of expression and privacy rights encased in the pursuit of happiness. This thesis has attempted to explain what takes place when there is a legal conflict between free expression and privacy rights.

One of the observations made from the data collected is that the cases where claims of privacy invasion were successful were those where the plaintiffs were caught off-guard and in a vulnerable situation. These claimants were publicly revealed in some way in which they had no intention of revealing themselves. Reversely, in those same situations it was found free expression exceeded its privilege. At present, the mainstream media is being accused of having operated thusly and gotten away with it for a long time. People all over the world have trust issues with information provided by news organizations. Marine Le Pen who is running for President of France was recently asked if she shared the same anti-press sentiment as President Donald J. Trump and her reply was that French people have no confidence in the media.[192] The definitely American concept of "fake news" played a major role in the 2016 Presidential Election

[192] Paul Joseph Watson, Marine Le Pen Smacks Down Reporter: No One Trusts the Media, at https://www.infowars.com/video-marine-le-pen-smacks-down-reporter-no-one-trusts-the-media/

with the main complaint being how freedom of the press impacts other freedoms by and through its influence.[193]

Another conclusion that can be drawn from this data is that the United States Constitutional freedoms are more legally and less socially protected than in the European Union. A generality could be derived when an inch of freedom was exercised and a mile of rights was taken finding a potentially unfortunate risk of living in a free country. One factor courts use in determining the legalities of publications is whether or not the material is or would be offensive to the sensibilities of a reasonable person. The plaintiffs' claims of personal offense did not factor into the baseline of those respective judicial determinations. In the same area of thought, it must be factored that news outlets are part of the free market and are driven by capitalism. So it follows that elements of sensationalism, exclusivity, and competition are factors that easily influence the direction, effect, and dynamics of their stories. How exactly the offensive baseline is established is a direction for further research as well as examining if sensibilities change as civilization develops and technology advances.

The European process for determining the right to be forgotten is a set of criteria that poses questions about the data itself. United States courts also ask questions but it appears to be more about the information-gathering process and the status of the subject. This conclusion indicates there is another baseline between freedom and privacy that if crossed, it is very difficult to go back. It seems the collateral damage that comes as a result of maintaining freedom eventually affects every citizen and it might be rare to find someone who has lived for very long without recognizing there is a price to freedom. The reverse observation is about the privilege of those who take advantage of the unaware in order to profit in some way from their vulnerability

[193] Mike Snider, Trump invokes fake news at news conference at https://www.usatoday.com/story/money/2017/01/11/trump-tackles-fake-news-press-conference/96438764/

or their blind trust in shared fundamental rights. This data shows that average citizens often lack a strong understanding of their rights until those rights are somehow infringed causing varying levels of personal damage. The woman who lost her husband in the bridge collapse would likely never guess that reporters would proceed to gather news about her situation without her involvement and the children had not likely been aware that talking to "credible" professionals who expressed interest about a horrible incident in their lives would end up entangling their family in a legal battle.

Each of these cases has two sides to the same story and each side feels entitled to its view. The courts broke down the events and made rulings on the laws that applied to each aspect of the case which explains the sometimes split rulings. Libel or a wrongful public disclosure could be found without finding a violation of privacy. Though these cases can be very complicated, this data brings to light the simplest of explanations of what U.S. courts use to determine if the line has been crossed. Besides the offensiveness of the material, this data shows in cases where the requisite consent was neither requested nor granted, the Constitution cannot protect freedoms where an excess of privilege infringes on the rights of others.

It is fairly easy to reconcile the judicial ruling in *Sidis*. The former prodigy was an unwilling subject but he spoke freely and mostly openly in his familiar life settings and he did not claim the article was false. In determining his status as a public figure and his activities as public interest, William James Sidis would have had to prove malice, for which *New Yorker* magazine had no reputable support plus the court deemed the authorship not unfriendly. *Melvin* bares a stranger complicity. The other cases that involve crime all ruled against the plaintiff claims of privacy invasion. Criminal activity is considered a newsworthy public matter so privacy rights are generally lost. There could be an inclination to consider that the medium

played a roll. Movies can be commercial investments made to generate substantial profits as well as accolades. The court may have ruled differently if a newspaper or magazine article published a simpler exposé. Melvin is also a female and there could have been biased consideration against the attempt to capitalize off a woman with such a troubled past. The privacy case does not explain *why* she was accused of murder so the acquittal could have been self-defense.

It is also important to note that both these cases were decided before *New York Times v. Sullivan* and that courts are as much a part of navigating new legal territory as they are its discovery. Sidis also took place on the East Coast and Melvin on the West Coast and the public has only been generally aware of an existing cultural rivalry since the 90's hip hop game. Slow as the progression may have been and over as it may seem, social scientists could not discount those effects, their origins, and their manifestations in human evolution.

Of course another explanation suggests that the rulings in both these cases were wrong.[194] An article found in real time of this discussion offers interesting context not seen in the legal summaries but which may have been influential to the outcomes. Stephen Bates researched beyond the case briefs to the surrounding circumstances and media coverage at the respective times. He claims both *Melvin* and *Sidis* withheld highly relevant facts and proposes that both courts misapplied the law.[195] While courts cannot be held accountable for evidence not presented, the information given by Bates illustrates the extent to which rights can be impacted by freedom.

The author found that *Melvin* failed to mention she separated from domestic life after six months and still prostituted after her murder acquittal, a trial which was highly publicized and garnered significant attention by having the entourage of an infamous attorney, a reporter, and a

[194] Stephen Bates, *The Prostitute, the Prodigy, and the Private Past*, 17 Comm. L. & Pol'y 175 (Spring 2012).
[195] *Id.*

celebrity sponsor. The press wrote Melvin was a beautiful prisoner who brought the courtroom to tears then cheers after the jury took only seven minutes. The court found that defendant Dorothy Reid expected nothing but private financial gain even though she hoped to convey a moral lesson as signaled in her other works. Reid claimed the film was not meant to besmirch any one person but to point out the pitfalls of life. Though her defense claimed public use of public records on which Melvin's maiden name is widely written, the court found the two times it appears in the film printed on real newspapers, in conjunction with her rehabilitation, was the violating factor of the state right to pursue happiness.[196]

The article on William James Sidis rehashed his entire life with information being lifted from previously published articles.[197] He was posthumously diagnosed with Asperger's and mental illness which, had he grown up with a support system that fostered his talents, should not have been a hindrance to major scientific achievements later in life. Sidis wrote many of the legal briefs on his own and the courts sympathized with him but was bound by laws. His invasion of privacy suit made no mention of the libel action which the *New Yorker* made offers to settle before litigation. The magazine also attempted to commission articles authored by Sidis on topics of his interest but refused his counter-demand of a fine every time his name was mentioned. One of those topics was the Okamakammessett Indians and their social institutions, an event at which the content for the case article was gathered by a young woman who attended without revealing her intent. The libel suit was settled for a few thousand dollars four months before Sidis died of a cranial hemorrhage. While judicial notes explained how none of the cited cases directly supported his claim, one was mentioned that gave the court pause but not enough to rule for the poor guy. That case was *Melvin v. Reid*.

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[196] *Id.*
[197] *Id.*

Bates concludes that both plaintiffs had incentive to withhold evidence for the sake of avoiding further reputable harm and had they both been fulsome, there would likely have been reverse outcomes.[198] *Melvin* quoted a biblical example to explain forgiveness for her crimes and find she had legal rights to her past. Long before any lawsuits, had Sidis been embraced by a more forgiving public, he likely could have been saved. Bates argues the respective silence about unfortunate truths resulted in injustice and may have set bad precedents in American privacy law.

The right to be forgotten is probably not in the sights of a country where free expression is precedent. If the Constitution established the standards, and the legal system is the means of preservation, then justices look to that document and its amendments to adhere to that foundation. So what has emerged from this study, is really a perspective of values which aids in understanding how those can differ individually, across states, and between nations, regardless of human norms. While there is no argument about the words that make up laws, the interpretation of those words has plenty of room for opinions which, as the introduction states, are transient. Forming an opinion is a different process for everyone but along the way, there is plenty of freedom to express it...especially on the internet.

[198] *Id.*

Figure 1.

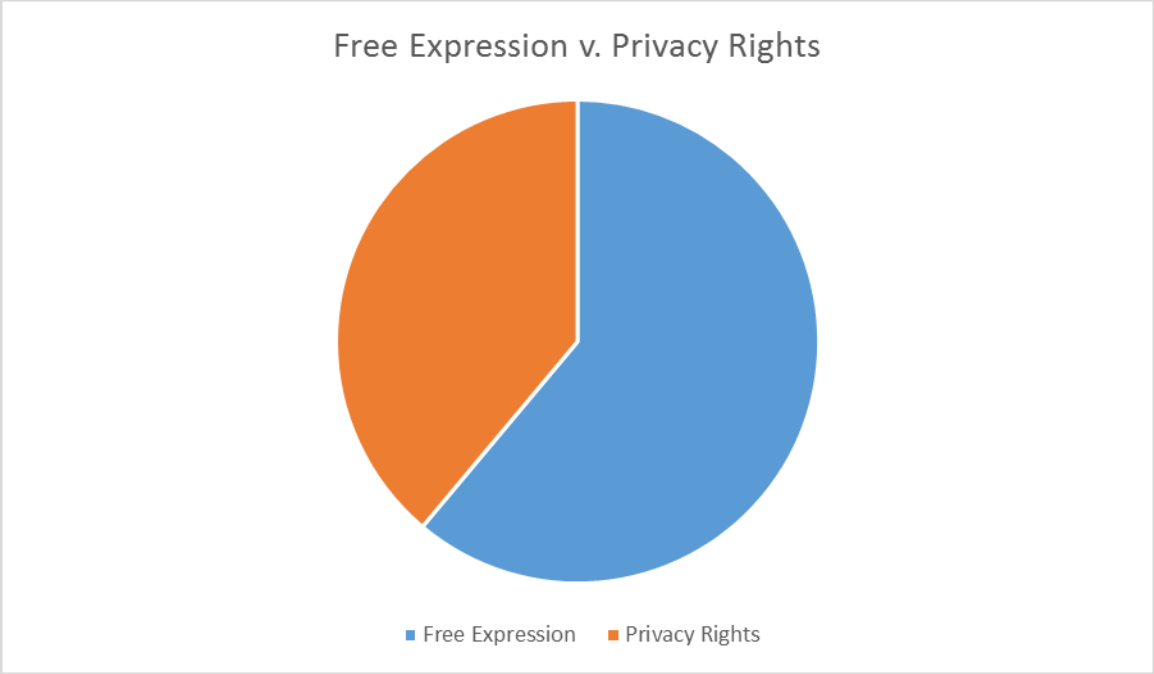
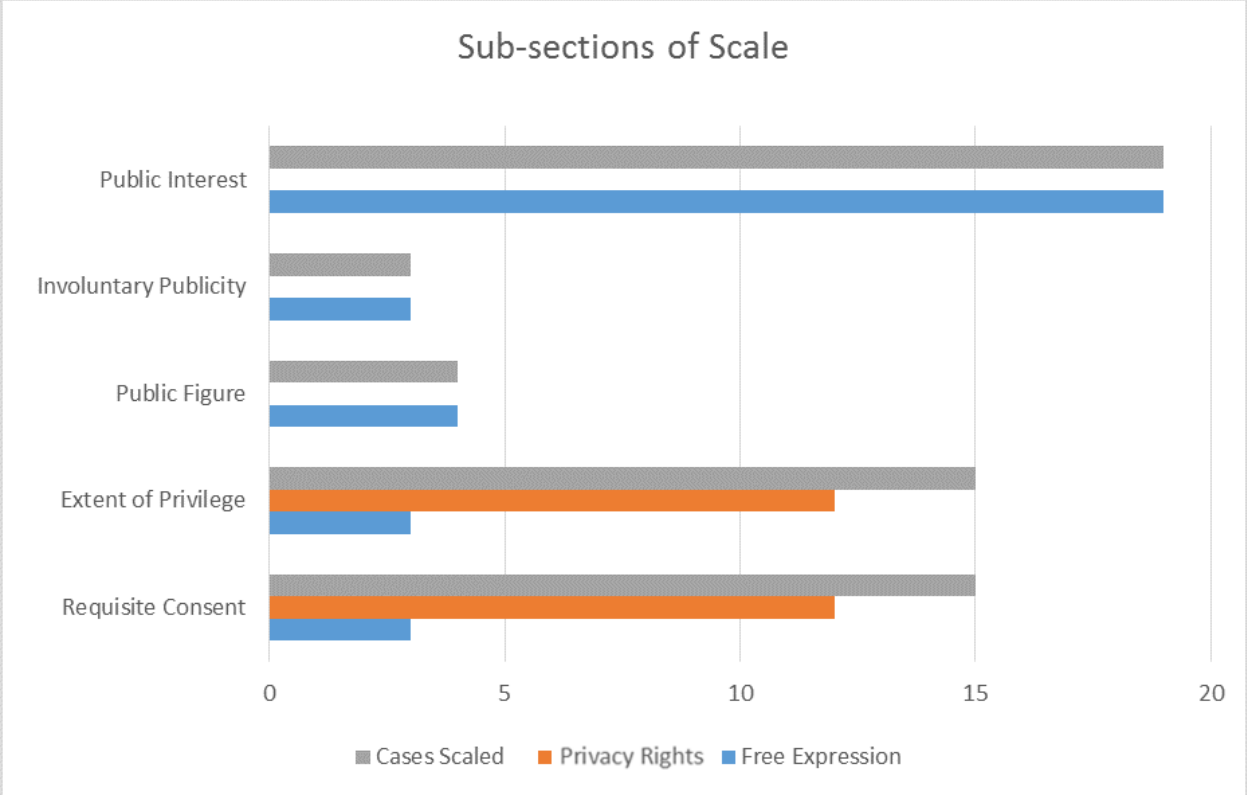


Figure 2.



Appendix

Case 1. Schulman v. Group W Productions, 1998

Overview	**Application of Law**
Plaintiffs were victims of a serious accident. The rescue was recorded and broadcast on Defendants TV documentary. Mother and son were pulled from an overturned car, put in a helicopter, and taken to the hospital. The entire rescue was recorded as emergency responders even allowed filming inside the helicopter. One of the victims became paraplegic due to the accident.	Triable issue of fact over the extent of press freedom and expectation of reasonable privacy. The court considers an automobile accident the context of commonplace.
Issues to Balance	**Court Processes**
Newsworthiness, public interest, reasonable expectation of privacy, disclosure of private facts offensive to a reasonable person, unlawful intrusion.	Trial court found for Defendants based on protected freedom of expression, appeals court reversed in part -- that which was recorded and published in the life-flight was invasion of privacy.
Final Outcome	**Scale**
Positive for publication of private facts, negative for intrusion of privacy.	California law requires consent of all parties to record conversations that would be considered private by a reasonable person, i.e. in an ambulance.

Case 2. Kapellas v. Koffman, 1969

Overview	**Application of Law**
Plaintiff is a politician and mother of six who was running for public office when Defendant locally published two editorials criticizing the mothers' parenting skills and revealing the children had been in trouble with police. Plaintiff demanded retraction/correction which was never offered. Editor intention was to influence voters away from Plaintiff.	Actionable cause of libelous material.
Issues to Balance	**Court Process**
Public interest and newsworthiness of criminal activity, invasion of privacy on minor children, extent of public figure as candidate for public office.	Trial court granted demurrer on Plaintiff's claim of invasion on matters of public interest. Appeals court affirmed that ruling but reversed on libel holding no qualified privilege.
Final Outcome	**Scale**

Positive for counts of libel, negative for invasion of privacy due to public records and public candidate.	Plaintiff met burden of adequate demand for retraction to suffice her claims of libel.

Case 3. Gill v. Curtis Publishing Co., 1952

Overview	**Application of Law**
Defendants photographed and published a picture of Plaintiffs at their place of business without their knowledge or consent. Plaintiffs were amorously engaged at the time of the photograph.	Manner of privacy violation caused mental anguish and distress.
Issues to Balance	**Court Process**
Whether the business was well-known enough to create legitimate and overriding public interest to create loss of privacy.	Trial court found for Defendants. Appeals court reversed the lower court decision saying it could reasonably be inferred that Plaintiffs suffered damages.
Final Outcome	**Scale**
Positive for violation of privacy.	Picture was surreptitiously taken and published without consent.

Case 4. Diaz v. Oakland Tribune, 1983

Overview	**Application of Law**
Plaintiff chose sex reassignment surgery and was happy with result but wanted to keep the procedure private. Defendant published an article when Plaintiff became first female president of a community college but disclosed transsexualism and other private facts that were unwarranted, malicious, and caused the Plaintiff emotional and psychological distress.	Plaintiff does not challenge accuracy but publicity is unwarranted and engenders a false public opinion.
Issues to Balance	**Court Process**
Wrongful public disclosure, burden of proving newsworthiness, jury instruction.	Trial court awarded compensatory and punitive damages to Defendant and denied a new trial. Appeals court reversed the judgement to Plaintiff.
Final Outcome	**Scale**
Positive for intrusion of privacy.	There was no compelling public need to justify such information revealed.

Case 5. Johnson v. Harcourt, Brace, Jovanovich, Inc., 1974

Overview	**Application of Law**
Plaintiff found and returned 250K and provided his family story for publication in a magazine. Defendant republished article in a college textbook without consent.	Appropriation of likeness.
Issues to Balance	**Court Process**
Facts revealed would not be considered offensive by a reasonable person.	Trial court sustained Defendant's demurrer that Plaintiff injected himself into public. Appeals court upheld lower court ruling.
Final Outcome	**Scale**
Negative for invasion of privacy.	The statute for filing a claim was limited to one year and this claim was filed seven years after publication.

Case 6. Carlisle v. Fawcett Publications, 1962

Overview	**Application of Law**
Plaintiff sued Defendant over publication of details of Plaintiff's one day marriage to actress who Plaintiff also sued.	Scope of content published.
Issues to Balance	**Court Process**
The extent to which those who are related to public persons lose their right of privacy.	Trial court granted special demurrer for Defendants. Appeals court affirmed the judgment.
Final Outcome	**Scale**
Negative for all claims.	No revelation of intimate details that would outrage public decency.

Case 7. Werner v. Times-Mirror Company, 1961

Overview	**Application of Law**
Plaintiff filed an action against Defendant over publication of an article about Plaintiff and his deceased wife.	Marriage license was obtained which made-known the names of the parties entering into public contract.
Issues to Balance	**Court Process**
Whether the information disclosed was already in the public domain.	Trial court dismissed claim in favor of Defendants. Appeals court affirmed the decision saying no cause of action.

Final Outcome	**Scale**
Negative for invasion of privacy.	Plaintiff was city attorney and therefore considered public figure.

Case 8. Stryker v. Republic Pictures Corp., 1951

Overview	**Application of Law**
Plaintiff was WWII soldier who was part of Iwo Jima invasion. Motion picture was released depicting and reenacting conditions, circumstances, and incidents Plaintiff encountered.	The extent that soldiers have a right to privacy when in service of country.
Issues to Balance	**Court Process**
Whether a cause of action exits inside of military activities being subject to public gaze.	Trial court sustained the special demurrer in favor of Defendant which asked Plaintiff to specify which incidents depicted him. Plaintiff chose not to amend.
Final Outcome	**Scale**
Negative for invasion of privacy.	Claim based on theory and not actual activities of Plaintiff.

Case 9. Rosenblum v. Metromedia, 1971

Overview	**Application of Law**
Plaintiff distributed nudist magazines and was arrested for possession of obscene literature. Defendant broadcast over radio details of arrest. Plaintiff was acquitted of charges based on truth and privilege. Plaintiff then filed suit against Defendant for libel.	Characterization of materials in question.
Issues to Balance	**Court Process**
Whether there is clear and convincing proof that the statements were uttered with knowledge of falsity.	District Court dismissed criminal obscenity charges and found for Plaintiff. Appeals court reversed that ruling on un-met burden of proof.
Final Outcome	**Scale**
Negative for libel	Plaintiff could not meet burden of proof for libel.

Case 10. Sidis v. F-R Pub. Corp., 1940

Overview	**Application of Law**
Defendant published a biographical sketch of adult Plaintiff in a weekly magazine. Plaintiff is a former child prodigy who contended his privacy had been violated after he had long-since left the public eye and sought seclusion.	A once-public figure remains public.
Issues to Balance	**Court Process**
Whether the public expectations of the Plaintiff were still of interest and newsworthy given the exposure as a child prodigy.	District court found in favor of Defendant. Appeals court affirmed the decision.
Final Outcome	**Scale**
Negative for invasion of privacy.	The Plaintiff's history remained of public concern and newsworthy.

Case 11. Hazlitt v. Fawcett Publications, Inc., 1953

Overview	**Application of Law**
Stunt-driver Plaintiff alleged libel and invasion of privacy when Defendant published an article of a fictionalized version of Plaintiff trial and conviction for second-degree murder.	Criminal activity is of public interest
Issues to Balance	**Court Process**
Whether the claim was time-barred and a matter of public interest.	Trial court granted Plaintiff's motion to dismiss libel and dismissed invasion with leave to amend.
Final Outcome	**Scale**
Negative for libel and invasion of privacy.	Stunt-driver courted publicity.

Case 12. Sidis v. F-R Pub. Corp., 1938

Overview	**Application of Law**
Plaintiff brought action against Defendant for violation of privacy for publishing Plaintiff's picture for advertising or trade purposes.	Use of picture was not under abnormal circumstances not present to Plaintiff's situation.
Issues to Balance	**Court Process**
Whether the published account was accurate.	Court granted Plaintiffs motions to dismiss.
Final Outcome	**Scale**

Negative for invasion of privacy.	Causes of action not sustainable.

Case 13. Jenkins v. Dell Publishing Co., 1958

Overview	**Application of Law**
Plaintiffs were heirs of a homicide victim and filed a claim of invasion of privacy against Defendant when they published a picture without privilege.	Crime is a normal news item.
Issues to Balance	**Court Process**
Whether the publication was tortious.	District court granted summary judgment for Defendants. Appeals court affirmed as normal news item.
Final Outcome	**Scale**
Negative for invasion of privacy.	Publication was accurate and newsworthy.

Case 14. Ettore v. Philco Television Broadcasting Corp., 1956

Overview	**Application of Law**
Professional boxer Plaintiff filed petition for deprivation of property rights when Defendant broadcast Plaintiff in television program without consent. Plaintiff had sold rights for use in a movie.	Use of boxing match footage was misappropriated.
Issues to Balance	**Court Process**
Whether movie consent meant public consent, whether there was legal injury.	Trial court granted Defendant's motion to dismiss. Appeals court reversed and remanded.
Final Outcome	**Scale**
Positive for violation of rights to property and privacy.	Each transaction requires consent of property owner.

Case 15. Welsh v. Island Shopper, 1974

Overview	**Application of Law**
Defendant published a birth announcement in its shopping guide. Plaintiff alleged invasion of privacy and public disclosure of intimate facts claiming damages to career and personal relationships because he wasn't married.	Plaintiff did not acknowledge the child until after the publication.
Issues to Balance	**Court Process**

Whether Plaintiff was public figure, whether matter was of public interest.	Trial court dismissed based on Defendant's motion.
Final Outcome	**Scale**
Negative for invasion of privacy.	Plaintiff holds position of publicity and a socially notorious job as radio DJ.

Case 16. Cantrell v. Forrest City Publishing, 1973

Overview	**Application of Law**
Plaintiffs claimed invasion of privacy after Defendants published a follow-up feature about Plaintiff family member who died nine months prior in a bridge collapse that was national, front-page news.	Publication met a standard of newsworthiness, action not for trespassing.
Issues to Balance	**Court Process**
Whether the pubic had continued interest, whether there was a finding of malice.	Trial court denied Defendant's motion for directed verdict. Appeals court reversed and found for Defendants.
Final Outcome	**Scale**
Negative for invasion of privacy.	No known reckless disregard for truth.

Case 17. Haynes v. Alfred A. Knopf, Inc., 1993

Overview	**Application of Law**
Plaintiff alleged invasion of privacy and defamation after Defendant published a book with a characterization Plaintiff felt was a misrepresentation.	The person who made the statements had personal experiences with the characterization in question.
Issues to Balance	**Court Process**
Whether the statements were defamatory.	Appeals court affirmed the decision of the district court granting summary judgment to Defendants.
Final Outcome	**Scale**
Negative for invasion of privacy and libel.	Statements in question found to be uncontested.

Case 18. Berg v. Minneapolis Star & Tribune, 1948

Overview	**Application of Law**

Plaintiff filed action against Defendant for violation of privacy after they published a picture of him without consent.	Insufficient grounds for showing a fraud.
Issues to Balance	**Court Process**
Whether right to privacy was vacated by disclosing intimate facts on public records.	Defendant's motion for summary judgement was granted.
Final Outcome	**Scale**
Negative for invasion of privacy.	Plaintiff was first to reveal his own actions on public record.

Case 19. Samuel v. Curtis Pub. Co., 1954

Overview	**Application of Law**
Plaintiff brought suit for invasion of privacy when Defendant published a picture of him attempting to persuade a woman to not commit suicide by jumping off the Golden Gate Bridge.	Picture was taken in a public setting and doesn't depict anything derogatory, caption correctly summarized event.
Issues to Balance	**Court Process**
Whether the photograph being taken and published was privileged.	Court granted Defendant's motion for summary judgment.
Final Outcome	**Scale**
Negative for invasion of privacy.	Nothing in the picture would offend the sensibilities of a reasonable person.

Case 20. Donahue v. Warner Bros. Pictures, Inc., 1952

Overview	Application of Law
Plaintiffs are heirs of a deceased vaudeville entertainer and filed action of privacy invasion after Defendants depicted deceased as the subject of a fictional movie including name and portrayal without consent.	The right to free expression requires educational, biographical, or newsworthy matters.
Issues to Balance	Court Process
Whether deceased relative's accomplishments made him public figure.	State court granted Defendant's motion for summary judgement. Federal trial court reversed.
Final Outcome	Scale
Positive for invasion of privacy.	No consent was sought or given.

Case 21. Dresback v. Doubleday & Co., 1981

Overview	**Application of Law**
Plaintiff was private individual who filed invasion of privacy action against Defendants writer and publisher who wrote/published a book about the murder of Plaintiff's parents by their son/Plaintiff's brother.	The contents published exceeded definition of newsworthy and expanded into that which the public had no legitimate interest.
Issues to Balance	**Court Process**
Whether the content was false and defamatory, whether the publisher exercised care in verifying accuracy of the story.	Publisher's defense motion for summary judgement was granted. Writer's defense motion denied and remanded.
Final Outcome	**Scale**
Negative for publisher but positive for writer.	Plaintiff failed to show discovery effort to refute publisher claims, writer invaded privacy.

Case 22. Bernstein v. National Broadcasting Co., 1955

Overview	**Application of Law**
Plaintiff was convicted of bank robbery then paroled and pardoned. Several years later Plaintiff was convicted of first-degree murder but based on new evidence was again pardoned.	Widely publicized criminal proceeding allowed for republication under reasoned privilege.
Issues to Balance	**Court Process**
Whether criminal proceedings remained of general public interest.	Court granted Defendant's motion for summary judgment.
Final Outcome	**Scale**
Negative for privacy invasion.	Plaintiff's affairs were known to public.

Case 23. Peay v. Curtis Pub. Co., 1948

Overview	**Application of Law**
Cab driver Plaintiff filed invasion of privacy when Defendants published a satiric article about D.C. cab drivers including an illustration that depicted the Plaintiff.	Remarks about a class doesn't give rise to individual complaint unless individual is identifiable.
Issues to Balance	**Court Process**

Whether the Plaintiff could be identified by the illustration, whether the comments were derogatory.	Defendant's motion to dismiss denied.
Final Outcome	**Scale**
Positive for invasion of privacy and defamation.	Plaintiff gave no consent for publication.

Case 24. Jones v. New Haven Register, Inc., 2000

Overview	**Application of Law**
Story and picture of an arrest was published by Defendant. The arrested person shared the same name as the Plaintiff. As a public figure, Plaintiff filed action despite retraction being printed.	As a general purpose public figure, Plaintiff is subject to media spotlight.
Issues to Balance	**Court Process**
Whether publication was made with reckless disregard and malice.	Court granted Defendant's motion for summary judgment.
Final Outcome	**Scale**
Negative for actions filed.	Plaintiff failed to meet burden of libel.

Case 25. Barbieri v. News-Journal Co., 1963

Overview	**Application of Law**
Plaintiff was former convict and last criminal to receive sentence of 'whipping.' Defendant published story of political campaign to remove whipping as punishment and included story of Plaintiff.	The right of the press to republish facts exists when those facts are still of legitimate public concern.
Issues to Balance	**Court Process**
Whether circumstances of the crime and punishment created a reinstatement of privacy.	Trial court dismissed action and appeals court affirmed.
Final Outcome	**Scale**
Negative for invasion of privacy.	Lapse of nine years' time didn't reinstate right to privacy.

Case 26. Cason v. Baskin, 1944

Overview	**Application of Law**

Defendant published partial biography in which Plaintiff was characterized in an arguably unflattering manner. Plaintiff filed for invasion of privacy.	Freedom of speech isn't unrestricted but must align with the sensibilities of reasonable people.
Issues to Balance	**Court Process**
Whether the content was gathered unscrupulously.	Trial court sustained Defendant demurrers, appeals court reversed and favored Plaintiff.
Final Outcome	**Scale**
Positive for invasion of privacy.	Plaintiff gave no consent for publication.

Case 27. Howard v. Des Moines Register & Tribune Co., 1979

Overview	**Application of Law**
Plaintiff was hoarder whose home was subject to county action. Defendant requested information of conditions and forced clean-up from Governor which was provided and an article was published.	Under Freedom of Information Act, information of public record is subject to release.
Issues to Balance	**Court Process**
Whether the disclosure was privileged.	Trial court found no invasion of privacy, appeals court affirmed decision.
Final Outcome	**Scale**
Negative for invasion of privacy.	Information was public.

Case 28. Rawlins v. Hutchinson Publishing Co., 1975

Overview	**Application of Law**
Ten years after Plaintiff's much publicized termination for impropriety with a woman, Defendant republished an article and Plaintiff filed action for invasion of privacy.	Public officials carry burden of proof to show actual malice in case of libel.
Issues to Balance	**Court Process**
Whether Plaintiff was considered a public official.	District court granted summary judgment in favor of Defendant. Appeal court affirmed.
Final Outcome	**Scale**
Negative for invasion of privacy.	Passage of time doesn't preclude public interest.

Case 29. Barber v. Time, Inc., 1942

Overview	**Application of Law**
Plaintiff alleged violation of privacy when Defendant published photo and article in connection with medical information and treatment at hospital location.	Freedom of the Press is limited to non-abusive privilege but Plaintiff must show malice.
Issues to Balance	**Court Process**
Whether there was unreasonable, unwarranted, and offensive interference.	District court ruled in favor of Plaintiff. Defendant appealed and court affirmed invasion but reversed award for damages.
Final Outcome	**Scale**
Positive for invasion of privacy.	Substantial evidence to show interference in private affairs without consent.

Case 30. Y. G. v. Jewish Hospital of St. Louis, 1990

Overview	**Application of Law**
Defendant hospital and network published a story about in-vitro fertilization and identified Plaintiffs without their consent thereby instigating an action for invasion of privacy.	A general Freedom of Expression doesn't translate to victim identity in particular without showing offense to reason.
Issues to Balance	**Court Process**
Whether story could have been published without identifying Plaintiff, newsworthiness.	Trial court granted Defendant's motion to dismiss. Appeals court reversed decision on issue of newsworthiness.
Final Outcome	**Scale**
Positive for invasion of privacy.	Plaintiff identity was not newsworthy or of public interest.

Case 31. Palmer v. Schonhorn Enterprises, Inc., 1967

Overview	**Application of Law**
Professional golfer Plaintiffs filed action for invasion of privacy after Defendants produced a card game with Plaintiffs names and profiles.	Publication of well-known figures not invasion but for purposes of capitalizing.
Issues to Balance	**Court Process**

Whether well-known biographical data is public.	Court granted summary judgment for Plaintiffs.
Final Outcome	**Scale**
Positive for invasion of privacy.	Plaintiffs gave no consent.

Case 32. Blount v. T D Publishing Corp., 1966

Overview	**Application of Law**
Plaintiff widow filed an action against Defendants after they published and against Defendants who distributed a magazine that restructured the events surrounding death of husband by murder.	Circumstances involved criminal activity which is a matter of public interest.
Issues to Balance	**Court Process**
Whether article contents was a matter of privilege.	Trial court granted summary judgment in favor of Defendant. Appeal court reversed.
Final Outcome	**Scale**
Positive for invasion of privacy.	Purpose of distribution was for monetary gain and no consent given.

Case 33. McCormack v. Oklahoma Publishing Co., 1980

Overview	**Application of Law**
Plaintiff claimed invasion of privacy after Defendant wrote and published an article about him. Plaintiff alleged unreasonable publicity to private facts which were malicious and painted him in a false light.	Qualified privilege exists where public interest arises and public record is made.
Issues to Balance	**Court Process**
Whether the facts were private or of public record, whether facts were of legitimate public concern.	Trial court granted Defendant's demurrer and appeals court affirmed.
Final Outcome	**Scale**
Negative for invasion of privacy.	Plaintiff failed to show cause of action.

Case 34. Anderson v. Fisher Broadcasting Cos., 1986

Overview	**Application of Law**

Plaintiff filed invasion of privacy after being injured in a car accident which was filmed and an excerpt of which was broadcast in a promotional advertisement of a new emergency dispatch system.	Presentation of truthful facts that a reasonable person would wish to keep private doesn't give rise to liability for mental distress.
Issues to Balance	**Court Process**
Whether victim's condition was newsworthy.	Trial court ruled in favor of Plaintiff and Defendant appealed. Appeals court reversed judgment.
Final Outcome	**Scale**
Negative for invasion of privacy.	No finding of malice.

Case 35. Hamilton v. Crown Life Ins. Co., 1967

Overview	**Application of Law**
Plaintiff was beneficiary of life insurance policy after her husband's death and filed invasion of privacy after insurance adjuster Defendant who, after issuing the check, called known associates of Plaintiff and disclosed benefit amount.	Manner of death was sufficiently notorious to be newsworthy and facts of circumstances didn't merit the court's attention.
Issues to Balance	**Court Process**
Whether there was intrusion, false attribution, commercial use, etc.	Trial court ruled in favor of defendant. Appeals court affirmed the judgment.
Final Outcome	**Scale**
Negative for invasion of privacy.	Allegations weren't offensive to reasonable person.

Case 36. Hinish v. Meier & Frank Co. Inc., 1941

Overview	**Application of Law**
Plaintiff alleged that Defendants signed his name to a telegram urging the governor to veto a bill. Damages included mental anguish over employment and pension being jeopardized as agents of federal government are prohibited from politics.	Complaint plainly stated a cause of action for breach of tort victim's right.
Issues to Balance	**Court Process**

Whether Defendants acted with actual malice.	Trial court sustained demurrer by Defendant. Appeal court reversed and agreed to stated cause of action.
Final Outcome	**Scale**
Positive for invasion of privacy.	No consent given.