THE EMERGING CONFLICT BETWEEN NEWSWORTHINESS AND THE RIGHT TO BE FORGOTTEN

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I. INTRODUCTION

In late 2010, Harvey Purtz filed a small claims lawsuit against Rajesh Srinivasan. The filing of a small claims suit would normally be insignificant, but Purtz's reason for doing so makes the case interesting. Purtz claimed that Srinivasan had subjected him and his wife to intentional infliction of emotional distress by refusing to remove articles about Purtz's son from the *Daily Californian* newspaper's online archives.[1] The newspaper articles, more than four years old at the time, detailed Chris Purtz's drunken confrontation with the staff at a San Francisco strip club. Purtz was suspended from the UC Berkeley football team after the incident. He finally left the team in February 2007 for personal reasons,[2] and died in June 2010.

A month after Chris' death, Harvey Purtz contacted Srinivasan, the then editor-in-chief of the *Daily Californian*, and requested that the articles about his son be removed from the online archive. Srinivasan declined, citing company policy that content only be removed if it qualifies for a retraction.[3] Purtz subsequently filed a lawsuit seeking $7,500 in damages. In his opinion ruling in favor of Srinivasan, the small claims judge noted that he was sympathetic to the pain Purtz had endured from the loss of his child.[4] However, this gave Purtz neither the standing nor the basis for a claim against Srinivasan.[5]

The Purtz claim is interesting in that it appears to fly in the face of all traditional jurisprudence with respect to privacy and free expression. Although not specifically stating as much, Purtz was asserting a right to have information about his son, particularly negative information about his son, forgotten, erased from online archives. If allowed, an individual would be able to claim that the information about them contained in online newspaper archives was no longer

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1. Dan Reimold, *Judge Rules in Favor of Daily Californian Editor in Lawsuit College Media Matters*, COLLEGEMEDIAMATTERS.COM (Jan. 28, 2011), http://collegemediamatters.com/2011/01/28/judges-rules-in-favor-of-daily-californian-editor-in-lawsuit/ (last visited Feb 24, 2012).
2. *Id*.
3. *Id*.
4. Purtz v. Srinivasan, No. 10CESC02211 (Fresno Co. Small Cl. Ct. Jan.11,2011), *available at* http://banweb.co.fresno.ca.us/cprodsnp/ck_public_qry_doct.cp_dktrpt_frames?backto=P&case_id=10CESC02211&begin_date=&end_date= (text of the Statement of Decision, including the judge's personal comments, can be found in the docket entry listed for Jan. 11, 2011).
5. *Id*.

necessary, and should therefore be removed. Such a right would conflict with the tradition of allowing the public to have access to information, and for news organizations to publish information of a public concern, including arrests and court cases.

Such a right is not unfamiliar to a few of the countries in the European Union; some have used privacy-related legislation to allow an individual to stop unwanted retention of personal information. In 2009, for instance, a German man sent Wikipedia a cease and desist letter claiming that the online encyclopedia must remove information about him.[6] The man, Wolfgang Werlè, who was tried and convicted of killing his former associate, Walter Sedlmayr, used a German law quite like American common law misappropriation, which protects an individual's name and likeness from unwarranted publicity.[7] In early 2010, France also began considering a "right to forget," which would allow an individual to demand that online organizations delete information about them.[8]

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

This paper analyzes the emerging conflict that recognizing a right to be forgotten online would have with American jurisprudence regarding the role of the press, both traditional and online, as a watchdog for the public as well as with traditional U.S. privacy policy. Section II attempts to examine the boundaries of the right to be forgotten from both theoretical and EU perspectives. Section III considers traditional U.S privacy law and some of the contours of that law, including protections for newsworthy information. Section IV analyzes the right to be forgotten with respect to the protections for free expression detailed in Section III. This paper concludes with a consideration of how the right to be forgotten would not fit with traditional U.S. privacy jurisprudence.

II. THE RIGHT TO BE FORGOTTEN

The right to be forgotten is an idea based in a Westinian conception of privacy: that people and organizations should be permitted "to determine for

6. *See* Jennifer Granick, *Convicted Murdered to Wikipedia: Shhh!*, ELECTRONIC FRONTIER FOUNDATION ELECTRONIC FRONTIER FOUNDATION: DEEPLINKS BLOG (Nov. 10, 2009), http://www.eff.org/deeplinks/2009/11/murderer-wikipedia-shhh (last visited Mar 21, 2011).

7. *Id.*

8. *See* David Reid, *France Ponders Right-to-Forget Law,* BBC NEWS (Jan. 8, 2010 11:26 GMT), http://news.bbc.co.uk/2/hi/programmes/click_online/8447742.stm (last visited Feb 24, 2012).

themselves when, how, and to what extent information about them is communicated to others."[9] Yet, even with such a recognized foundation, what, exactly, the right to be forgotten entails has not been adequately defined. A few authors have arrived at similar but slightly different ideas of what the theory involves; the most general idea of which is the right to have certain information erased.

A. Defining the Right

According to Koops, the right to be forgotten takes three forms in the literature: the right to have information deleted after a certain time, the right to have a "clean slate," and the right to be connected only to present information.[10] The first conception of the right centers on the idea that individuals should have to opportunity to require other individuals and organizations in possession of information about them to erase it. The assertion of this right would arise when individuals upload information themselves, as well as when another person has placed information about the individual online.[11] Difficulties arise with enforcement of such a right because multiple parties exist that might be in possession of the personal information, as well as the possibility that some possessors of information might be required to retain information under the law.[12] To this end, some scholars have suggested that individuals should be able to set expiration dates for their information, thereby requiring that great consideration be given regarding what information can be made available for collection by others.[13]

The second and third theories of the right to be forgotten, the clean slate and the right to only be connected to current information, are similar. Both center on the idea that individuals can grow and change, and should not, therefore, be forever connected to information from the past that could be damaging. Analogous rights are provided in bankruptcy cases and the sealing of juvenile criminal records.[14] In these cases, individuals, for the most part, do not have the specter of past ills or bad decisions available for others to use to judge them. The right to be forgotten would then allow people to "shape their own lives," instead of having the memories of others do so for them.[15] To this end, Murata and Orito offer this definition of the right: "An individual has the right to be free

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9. Alan Westin, PRIVACY AND FREEDOM 7 (1967).

10. Bert-Jaap Koops, *Forgetting footprints, shunning shadows: A critical analysis of the 'right to be forgotten' in big data practice*, 8 SCRIPTED 229, 236 (2012).

11. *Id.* at 237.

12. *Id.* at 238–39.

13. Victor Mayer-Shönberger, DELETE: THE VIRTUE OF FORGETTING IN THE DIGITAL AGE, 171-95 (2009).

14. Koops, *supra* note 9, at 250.

15. *Id.* at 251.

from any use of information concerning him/her which causes harmful effects on him/her."[16]

This definition of the right to be forgotten, as well as others like it, places the right in conflict with other traditionally protected rights. In his conceptualization of "the right to delete," Conley embraces a legal right of individuals to choose what information to retain or delete.[17] At the same time, he notes that such a right may come into conflict with competing interests like freedom of expression, contract, preservation of information, etc. With respect to freedom of expression, Conley offers a partial solution for limiting the right to delete to non-expressive content.[18] Further, Conley asserts that perhaps the right should include an exception for information deemed "newsworthy," but notes that defining newsworthiness is difficult.[19] The difficulty in defining what the right to be forgotten entails, as well as the creation of exceptions for this right, make defining its boundaries problematic. It might, therefore, be instructive to examine how one government is implementing this right.

B. The European Perspective

In October 2010, the European Commission began circulating a draft strategy aimed at improving data protection.[20] The proposal noted that changes in technology necessitated a revamped strategy and improvement to the EU Data Protection Directive. According to Zwick and Dholakia, the 1995 European Union Privacy Directive makes an individual the "inalienable possessor of his or her own personal data."[21] The Directive broadly defines personal data, and requires that those in possession of personal data meet certain obligations intended to prevent the misuse of such data.[22]

The draft proposal includes strategies for standardizing privacy notices, strengthening consent rules, and new rules for what constitutes sensitive data. Also included in the draft proposal was the creation of a "right to be forgotten." This right to be forgotten would give individuals the right to not have their data retained and expressly deleted when the data is no longer needed for a legitimate purpose. Under the draft strategy, a data subject, or the person who may assert the right, is defined as any identified person or person who could be identified using "reference to an identification number, location data, online identifier or to

16. Kiyoshi Murata & Yohko Orito, *The Right to Forget/be Forgotten*, ETHICS IN INTERDISCIPLINARY AND INTERCULTURAL RELATIONS 192, 199 (2011).

17. C. Conley, *The Right to Delete*, 2010 AAAI SPRING SYMPOSIUM SERIES, 54 (2010).

18. *Id.* at 56.

19. *Id.* at 256.

20. Matt Warman, *EU Proposes Online Right "To Be Forgotten"*, THE TELEGRAPH (Nov. 5, 2010 12:55 PM), http://www.telegraph.co.uk/technology/internet/8112702/EU-proposes-online-right-to-be-forgotten.html (last visited Feb 24, 2012).

21. *Contrasting European and American Approaches to Privacy in Electronic Markets: Property Right versus Civil Right*, 11 ELECT. MARK. 116, 118 (2001).

22. *Id.*

one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that person."[23] Personal data, then, is any information by which a data subject could be identified.[24] This definition of personal data is quite broad, and could reasonably include any information collected by journalists.

The right to be forgotten is a right to erasure of information in the possession of other parties.[25] Under the proposed Article 17, individuals could assert this right in situations where they no longer consent to a second party using their information.[26] The General Data Protection Regulation provides four grounds for allowing a data subject to seek the erasure of information: (1) the information is no longer necessary for the purposes for which it was originally collected, (2) the data subject no longer consents to the retention of the information or the consent has expired, (3) the data subject objects to the processing of the information, and (4) the processing of the data does not comply with other sections of the Regulation.[27] In compliance with the Regulation, the controller must erase the personal data immediately.[28]

There are, however, exceptions to forced erasure, including an exemption for personal data that is necessary for "exercising the right to freedom of expression."[29] Article 80 of the Regulation requires EU countries to create such exemptions for journalistic purposes, and to report said exemptions to the EU Commission on Human Rights immediately.[30] What such exemptions for freedom of expression will look like remains to be seen. Werro, in his 2009 work examining the right to be forgotten, hypothesized that in the conflict between the right to be forgotten and press freedom, a European court would rule that privacy outweighed freedom of expression in certain instances.[31] Werro arrived at this conclusion after an examination of Swiss legal cases, in which Swiss courts ruled that an individual's right to rehabilitate his name trumped the right of the press to report on that individual's criminal record.[32]

To examine how exactly an EU member state would enforce the right to be forgotten, it might be useful to consider Spain's recent assertion of the right against Google. Mario Gianni Masiá, the owner of Los Alfaques campground in

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23. PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON THE PROTECTION OF INDIVIDUALS WITH REGARD TO THE PROCESSING OF PERSONAL DATA AND ON THE FREE MOVEMENT OF SUCH DATA (GENERAL DATA PROTECTION REGULATION), 41 (2012).

24. *Id.* at 41.

25. 72 EUR. COMM'N H.R. (2012)

26. General Data Protection Regulation, *supra* note 23, at 51.

27. *Id.*

28. *Id.*

29. *Id.* at 52.

30. *Id*. at 94-95.

31. Franz Werro, *The Right to Inform v. The Right to be Forgotten: A Transatlantic Clash*, LIABILITY IN THE THIRD MILLENNIUM, 289 (2009).

32. *Id*. at 290-91.

Spain, recently sued Google's Spanish subsidiary in local court.[33] Masiá sued over Google search results for the campground that led to news information, photos, and a Wikipedia page detailing a more than 30-year old disaster there, in which more than 200 people were burned to death.[34] Spain allows its citizens to sue to force companies to erase information held about them under the Spanish Data Protection Authority.[35] Masiá lost his case because he failed to sue Google directly.[36] For its part, the Audiencia Nacional, Spain's highest court, sent a request to the European Court of Justice (ECJ) inquiring whether EU citizens can demand that Google delete information about them.[37] The ECJ's answer should prove instructive as to the boundaries of the right to be forgotten, especially with respect to search engines like Google, whose search results include news articles. It might also indicate how the EU will apply the right to organizations, like Google, which are headquartered in countries with more exemptions for information dissemination vis-à-vis invasion of privacy.

III. PRIVACY IN THE U.S.

The bedrock of tortious invasion of privacy in the United States is an 1890 Harvard Law Review article by future U.S. Supreme Court Justice Louis Brandeis and Samuel Warren.[38] *The Right to Privacy*, as the article was entitled, called for the recognition of a "right to be let alone."[39] Some say that this article was motivated by harassment, as an East Coast press corps went so far as to crash the wedding reception that one of the authors held for his daughter. Whatever the case may be, Warren and Brandeis conceptualized a new tort, akin to defamation; but instead of punishing false information, this tort would allow an injured party to recover for the disclosure of truthful information that was unprivileged and non-public. Of particular interest to Warren and Brandeis was

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33. Nate Anderson, *Spain asks: If Google search results make your business look bad, can you sue?,* ARS TECHNICA (2012), http://arstechnica.com/tech-policy/news/2012/02/spain-asks-if-google-search-results-make-your-business-look-bad-can-you-sue.ars (last visited Mar 10, 2012).

34. *Id*; Nate Anderson, "*Algorithms can have errors": One man's quest to purge horrific pictures from his Google results ars technica* (2012), http://arstechnica.com/tech-policy/news/2012/03/algorithms-can-have-errors-one-mans-quest-to-purge-horrific-pictures-from-his-google-results.ars?clicked=related_right (last visited Mar 10, 2012).

35. Anderson, *supra* note 33.

36. *Id.* at 31.

37. Claire Davenport, *Spain refers Google privacy complaints to EU's top court Reuters* (2012), http://www.reuters.com/article/2012/03/02/us-eu-google-idUSTRE8211DP20120302 (last visited Mar 10, 2012); David Meyer, *Spain sends right-to-be-forgotten Google case to ECJ ZDNet UK* (2012), http://www.zdnet.co.uk/blogs/communication-breakdown-10000030/spain-sends-right-to-be-forgotten-google-case-to-ecj-10025551/ (last visited Mar 10, 2012).

38. *See* Alpheeus Mason, BRANDEIS: A FREE MAN'S LIFE, 70 (1946) (quoting Roscoe Pound); Harry Kalven Jr., *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 L. & Contemp. Probs. 326 (1966).

39. 4 Harv. L. Rev. 193 (1890) (Warren and Brandeis were not the first to ponder the right to be let alone. The authors recognize Judge Thomas Cooley as having written about it previously); *Id.* (citing Thomas C. Cooley, Law of Torts, 29 (2d ed. 1888)).

the ability of a person to be free from harassment, especially by the press who had "overstepp[ed] in every direction the obvious bounds of propriety and decency," filling their pages with "idle gossip."[40] Legislatures and courts began recognizing privacy torts soon after the article's publication.[41]

Although Warren and Brandeis's article was innovative, it was not until seventy years later, with the publication of another law review article that the idea of a common law right to privacy took hold. In his 1960 *California Law Review* article, Dean Prosser fleshed out the idea of an invasion of privacy tort, dividing it into four separate causes of action.[42] In evaluating the privacy cases that had arisen after Warren and Brandeis published their article, Prosser found that "[t]he law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff . . .." These causes of action include appropriation, intrusion, false light and public disclosure, the action most similar to that thought of by Warren and Brandeis.[43] It is important to note that Prosser theorized divisions in a privacy tort, because he later authored the invasion of privacy section in the *Restatement of Torts*. This section, detailing common law actions for privacy invasions, was subsequently followed by many state courts, and used as model law for many state legislatures.

The *Restatement*, in sum, defines the tort for publication of private facts as the publication of private truthful information about an individual that is highly offensive to a reasonable person.[44] Like many torts that deal with punishing speech, it would seem that this tort might offend the First Amendment. There have been successful prosecutions for public disclosure of private facts, especially for disclosure of illnesses or hospitalization information; one such case was *Barber v. Time, Inc.*[45] In *Barbe*r, a woman suffered from a disease that made her lose weight in spite of the amount of food she consumed.[46] A reporter from *Time* entered her hospital room, and in spite of her protests, took her picture.[47] The magazine ran the picture in an article calling Ms. Barber the "Starving Glutton."[48] The Missouri state courts found for the plaintiff in this case, and held the newspaper liable for invading the woman's privacy.[49]

Public disclosure of private facts uses a reasonableness expectation, asking whether a defendant's publication of private information about the plaintiff was highly offensive to a reasonable person.[50] This highly offensive requirement

40. *Id.* at 196.
41. *See, e.g.,* N.Y. Civ. Rights Act § 51; *See also,* Pavesich v. New England Life Ins. Co., 50 S.E. 68 (Ga. 1905).
42. *See* William Prosser, PRIVACY, 48 Cal. L. Rev. 383 (1960).
43. *Id*. at 389.
44. Rest. (2d) Tort § 652D.
45. 159 SW.2d 291 (Mo. 1942).
46. *Id*. at 293.
47. *Id*. at 296.
48. *Id.* at 292.
49. *Id.* at 296.
50. Rest. (2d) Tort § 652D at comment (c).

weighs societal views of offensiveness. It is, for example, highly offensive to a reasonable person to publish a photograph of a woman whose dress has accidentally blown up above her head in public,[51] or to report that someone suffers from a rare disease.[52] At the same time it is *not* highly offensive to publish a picture of a young couple kissing at a restaurant,[53] or of a young woman exposing her breasts at a rock concert.[54]

A. Newsworthiness

In addition, the law of public disclosure of private facts precludes recovery where the published private information is not of "legitimate public concern."[55] However, the Restatement offers that the publication *is* subject to First Amendment protection if the defendant can show that the information is of public concern.[56] Although "of public concern" would obviously anticipate news, it also includes entertainment, film, books, and most anything that stops short of a morbid fascination.[57]

Although the U.S. Supreme Court has yet to make any definitive statement about the limits of newsworthiness with respect to personal privacy, the lower federal and state courts have developed a few tests that set boundaries on free speech, especially with respect to the tort of invasion of privacy by public disclosure of private facts. Geoff Dendy, in his 1997 *Kentucky Law Review* student article, noted four different approaches to newsworthiness.[58] In a *San Diego Law Review* student article published two years later, John Jurata identified five different approaches to newsworthiness.[59] The discrepancy in the number of approaches enumerated by Dendy and Jurata can be explained by the fact that Dendy theorizes that two of the approaches are so similar as to be thought of as only one approach. This paper considers Jurata's approach.

First, Jurata recognized the *Restatement*'s approach to newsworthiness, which privileges the publication of information that is of public concern, is not highly offensive to a reasonable person, and stops short of a morbid fascination.[60] An example of this is *Virgil v. Time*, in which a then-famous surfer sued *Sports Illustrated* for public disclosure of private facts.[61] A Sports

51. *See* Daily Times Democrat v. Graham, 162 So. 2d 474 (Ala. 1964).
52. *See* Barber v. Time, Inc., 159 S.W.2d 291 (Mo. 1942).
53. *See* Gill v. Hearst Publishing Co., 253 P.2d 441 (Cal. 1953).
54. Mayhall v. Dennis Stuff, Inc., 31 MEDIA L. RPTR. 1567 (2002).
55. Rest. (2d) Tort § at comment (h).
56. *Id.*
57. *Id.*
58. Geoff Dendy, *The Newsworthiness Defense to the Public Disclosure Tort*, 85 KY. L.J. 147 (1997).
59. John A. Jurata, Jr., *The Tort That Refuses to Go Away: The Subtle Reemergence of Public Disclosure of Private Facts*, 36 SAN DIEGO L. REV. 489, 490 (1999).
60. *Id.* at 496.
61. Virgil v. Time, 424 F. Supp. 1286 (S.D. Cal. 1976).

Illustrated reporter wrote an article detailing Virgil's weird habits of using his mouth to put out cigarettes, drug use, and diving down flights of stairs to impress women.[62] The court ruled that the details of Virgil's life were sufficiently newsworthy.[63] Because the *Restatement* approach places particular emphasis on community standards,[64] it is suspected that most of these cases would be decided by a jury, and not by summary judgment.

A second approach to newsworthiness involves rejection of the publication of private facts tort outright.[65] States may reject publication of private facts through judicial opinion or by statutory creation of the state legislature, thereby expressly exempting publication of private facts as a viable action. However, even though this approach is an option, it is not adopted by many jurisdictions. Yet, in those jurisdictions that have rejected publication of private facts as a cause of action, it is implied that every publication of truthful information is newsworthy.[66] This explicitly gives the First Amendment priority over personal privacy.[67]

A third approach is the "leave-it-to-the-press-model."[68] This test for newsworthiness expresses courts' unwillingness to meddle in the editorial process of the press. So named by Professor Diane Zimmerman in her 1983 *Cornell Law Review* article, "Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort,"[69] this approach reflects courts' hesitance to question what is considered news fit to print, especially after *Miami Herald v. Tornillo*.[70] Although the case did not involve publication of private facts, in *Tornillo* the U.S. Supreme Court decided that it was not the province of a court to decide what a newspaper must print.

A fourth approach, which I will call the California approach, is similar to that of the Restatement. This test for newsworthiness, as created by the California Supreme Court uses the Restatement conception of newsworthiness, but has an added prong that deals with the intent of the publisher.[71] The California courts do not recognize newsworthiness as a defense to a publication of private facts claim if the publisher is found to have published the information recklessly.[72] The California test was first delineated in *Kapellas v. Koffman*, in which the adult children of a candidate for public office claimed that they were injured, under a theory of publication of private facts, when news was published

62. *Id.* at 1289.
63. *Id.* at 1290.
64. Rest. (2d) Tort § 652D at comment (h).
65. Jurata, *supra* note 59, at 503.
66. *Id.* at 504.
67. *Id.*
68. *Id*. at 505.
69. 68 CORNELL L. REV. 291(1983).
70. 418 U.S. 241 (1974).
71. Jurata, *supra* note 59, at 506.
72. *Id.*

about their juvenile criminal records.[73] The court in *Kapellas* found for the publisher because the information was not published recklessly.

The last approach to newsworthiness is the logical nexus test.[74] According to Jurata, the logical nexus test is used mostly by the U.S. Courts of Appeals for the Tenth and Fifth Circuits, and is steadily gaining popularity.[75] This test considers information newsworthy if that information has a logical relationship to an issue of public concern. This approach was most famously used in *Campbell v. Seabury Press*, in which the former sister-in-law of a civil rights leader sued a publisher over a book that detailed embarrassing information about her first marriage.[76] Campbell lost her case because the Fifth Circuit determined that the information published about her first marriage formed a logical nexus with the life of the civil rights leader, the issue of public concern. Critics of this approach say that it sweeps too broadly, as most people are involved in some activity of public concern.[77] Therefore, this test would seemingly allow no recovery for publication of private facts.

All of these approaches seem to offer great First Amendment protection for the publication of truthful, yet private, information. Although the approaches differ, one can see how application of each of the different tests might produce the same result using, for example, the *Virgil* case. Under the *Restatement* and California approaches, a court would look at whether the information goes beyond the bounds of good taste to morbid fascination. The approaches would also look to the standards of the community to decide the case. The court found that the information published about Virgil was newsworthy because it dealt with the antics of someone in the public. The California approach would also force the court to decide whether the information was published recklessly; in this case, the court could find that there was no recklessness because Virgil knew he was being reported on by journalists and still engaged in his behavior. In those jurisdictions that reject publication of private facts, Virgil would not have a claim against the press at all. In a jurisdiction following the leave-it-to-the-press approach Virgil would also, mostly likely, not succeed in his claim for invasion of privacy because the courts would not question the editorial judgment of Sports Illustrated to publish the information. Finally, the courts could find a logical nexus between a matter of public interest, or Virgil's status as a star surfer, and the information printed about Virgil's drug use, stair diving, and cigarette eating.

Further, the public interest in certain information does not necessarily degrade over time. This is perhaps the concept in American privacy law that is most at odds with a right to be forgotten. The classic case for this is *Sidis v. F-R*

73. 459 P.2d 912, 915 (Cal. 1969).
74. Jurata, *supra* note 59, at 507.
75. *Id.*
76. 614 F.2d 395 (5th Cir. 1980).
77. Jurata, *supra* note 59, at 508.

Publishing Corp. in which the U.S. Court of Appeals for the Second Circuit ruled that a man who had received great media attention for his intellect as a child was still considered newsworthy over twenty years later.[78] Similarly, an allegedly abusive ex-husband who had since reformed was deemed newsworthy, even after a significant lapse of time.[79] Plaintiffs have only been awarded damages for invasion of privacy in very few cases based on information published long after the events took place. In *Melvin v. Reid*, for example, a former prostitute, who had been tried and acquitted of murder, sued a filmmaker who made a film based on her life.[80] The California appellate court awarded damages to Gabrielle Darley, who by that time had married and turned away from her former life, based on the filmmaker's infringement, not of Gabrielle's right to privacy, but of the right "to pursue and obtain safety and happiness."[81] The California court refused, however, to recognize a property right in Darley's name and the facts about her life.[82]

B. Statutory Privacy and the First Amendment

Although public disclosure of private facts is a common law privacy tort that has been codified by the majority of the states, there exist other similar statutory privacy actions individuals may assert. Like public disclosure, these statutory claims have run into conflict with freedom of speech. A line of U.S. Supreme Court cases deals specifically with this conflict. One of the first Supreme Court decisions in this line of cases was *Cox Broadcasting Corp. v. Cohn*.[83] In *Cox Broadcasting*, the father of a teenage rape and murder victim sued the owner of a news station after a reporter broadcast the name of the victim.[84] A Georgia statue made it illegal to publish the name of a rape victim, and the father claimed that Cox had invaded his privacy under the Georgia statute by broadcasting his daughter's name during a news segment.[85]

The Court ruled that the Georgia statute directly conflicted with the First Amendment.[86] The majority focused on the narrow issue of whether a state can punish the publication of the name of a rape victim if the name is obtained from public records.[87] The Court decided that the state could not punish the

78. 113 F. 2d 806 (2d Cir. 1940).
79. Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222 (7th Cir. 1993).
80. Melvin v. Reid, 297 P. 91 (Cal. 1931).
81. *Id.* at 93.
82. *Id.* at 93-94.
83. 420 U.S. 469 (1975).
84. *Id.* at 474.
85. *Id.* The Georgia statute made it "unlawful for any news media or any other person to print and publish, broadcast, televise or disseminate through any other medium of public dissemination or cause to be printed…in this State or though any radio or television broadcast originating in the State the name or identity of any female who may have been raped or upon whom an assault with intent to commit rape may have been made." *Id.* at 471 (citing GA. CODE ANN. § 26-9901 (1972)).
86. 420 U.S. at 489.
87. *Id.* at 491.

publication,[88] and found that the press has a responsibility to report on the actions of government, including judicial proceedings and information that is part of the public record.[89] The Court further held that the Georgia statute sanctioned pure expression and not a combination of speech and action.[90] The justices declined, however, to decide the larger question of whether publication of truthful information could ever be punished.[91]

The Court's decision in *Oklahoma Publishing Co. v. District Court for Oklahoma County*[92] picked up where *Cox Broadcasting* left off. In *Oklahoma Publishing*, reporters attended a detention hearing and learned the name of a boy accused of fatally shooting a railroad switchman. One reporter took a picture of the boy as he was taken from the courthouse.[93] Later, at a closed arraignment, the judge entered a pretrial order enjoining publication of the boy's name and picture.[94] The journalists' motion to quash the order was denied.[95]

The U.S. Supreme Court reversed the trial judge's decision and based its ruling on *Cox Broadcasting* and *Nebraska Press Association v. Stuart*,[96] which, according to the Court, reaffirmed *Cox Broadcasting*: "the press may not be prohibited from 'truthfully publishing information released to the public in official court records.'"[97] The Court cited the fact that the juvenile hearing, whether actually closed by the judge or not, was actually attended by the journalists with the judge's knowledge.[98] There was, therefore, no evidence that the reporters acquired the information unlawfully or without approval.[99]

The issue of acquiring and publishing information from closed hearings resurfaced a year later in *Landmark Communications, Inc. v. Virginia*.[100] The Commonwealth of Virginia had a law which made proceedings and documents of its Judicial Inquiry and Review Commission confidential.[101] Any disclosure of the information from the proceedings was considered a misdemeanor.[102]

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88. *Id.* at 496.

89. *Id.* at 492. "Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally. With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice." *Id.*

90. *Id.* at 495.

91. *Id.* at 491.

92. 430 U.S. 308 (1977).

93. *Id* at 309.

94. *Id.*

95. *Id.*

96. 427 U.S. 539 (1976) (holding that a court order prohibiting the publication, by the press, of certain trial information unconstitutional).

97. *Oklahoma Publ'g*, 430 U.S. 310 (quoting *Cox*, 420 U.S. at 496).

98. 430 U.S. at 311.

99. *Id.*

100. 435 U.S. 829 (1978).

101. *Id.* at 830 (citing VA. CONST. ART. 6 § 10; VA. CODE § 2.1-37.13 (1973)).

102. *Id.* "Any person who shall divulge information in violation of the provisions of this section shall be guilty of a misdemeanor."

In 1975, the *Virginia Pilot*, a newspaper published by Landmark Communications, published an article identifying a judge involved in a then pending Commission investigation.[103] The newspaper was indicted and found guilty of violating the Virginia statute.[104] The U.S. Supreme Court reversed the conviction, finding the statute unconstitutional as applied to Landmark and the press.[105] As it had ruled in *Cox Broadcasting*, the Court found that court proceedings and the conduct of judges were matters of public concern.[106]

In *Landmark,* the Court again expressly declined to answer the question of whether the truthful publication of information could ever be punished.[107] Instead, the Court decided to answer the narrow question of whether a third party could be punished for publishing confidential information concerning proceedings of the Judicial Commission.[108] Further the Court stated that it was not concerned, in this instance, with the individual who "secures the information by illegal means and thereafter divulges it."[109] The Court concluded that the speech that the statute sought to suppress was at the very core of First Amendment protection.[110]

Smith v. Daily Mail Publishing Co.,[111] decided a year after *Landmark*, synthesized *Cox Broadcasting*, *Oklahoma Publishing*, and *Landmark*, and ruled that the cases "suggest strongly that if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order."[112] *Daily Mail* involved facts similar to both *Landmark* and *Oklahoma Publishing*. West Virginia had a statute criminalizing the publication of the name of a juvenile in connection with judicial proceedings, without a written order from the court.[113] Reporters for *The Daily Mail* newspaper printed the name of a juvenile murder suspect[114] after interviewing witnesses to a junior high school shooting, which the reporters learned of while listening to a police scanner.[115]

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103. Landmark Commc'ns Inc. v. Virginia, 435 U.S. at 831.
104. *Id.* (see Landmark Comm. Inc. v. Virginia, 233 S.E.2d 120, 122 (Va. 1977)).
105. *Landmark,* 435 U.S. at 838.
106. *Id.* at 839.
107. *Id.* at 840.
108. *Id.* at 837.
109. *Id.* The Court stated that there was not a constitutional challenge to Virginia's power to keep Commission proceedings confidential or to punish Commission participants for breaching that confidentiality.
110. *Id.* at 838.
111. 443 U.S. 97 (1979).
112. *Id.* at 103.
113. *Id.* at 108-09 (citing W.VA. CODE § 49-7-3 (1976)).
114. *Daily Mail*, 443 U.S. at 99-100. The newspaper printed the name a day after another newspaper and three radio stations published the juvenile's name
115. *Id.* at 99.

A grand jury indicted *The Daily Mail* for knowingly violating the state statute.[116] Affirming the decision of the West Virginia Supreme Court, the U.S. Supreme Court held that the indictment was an unconstitutional prior restraint.[117] The Court emphasized that its holding was narrow.[118] It defined the issue as whether a state had the power to punish the "truthful publication of an alleged juvenile delinquent's name lawfully obtained by a newspaper."[119] In doing so, the Court again avoided the question of whether the truthful publication of information could ever be punished.[120]

Florida Star v. B.J.F.[121] involved a statutory prohibition on printing the name of a sexual assault victim.[122] *The Florida Star* newspaper printed a police brief describing a reported sexual assault and using the assault victim's name.[123] A reporter-trainee obtained the information for the brief by copying a police report, which had been made available in the police department's pressroom.[124]

In reversing B.J.F.'s jury award, the Court found that the name of the rape victim was lawfully obtained and that information was publicly available.[125] The Court particularly noted that one of the important reservations it had with the Florida statute was that it was "facial[ly] underinclusive."[126] Instead of prohibiting anyone to disclose the sexual assault victim's name, the statute actually limited the prohibition to "instrument[s] of mass communication."[127] As such, an individual disclosing the name of a rape victim would not be punished. The Court concluded that, "[w]hen a State attempts the extraordinary measure of punishing truthful publication in the name of privacy, it must demonstrate its commitment to advancing this interest by applying its prohibition evenhandedly, to the smalltime disseminator as well as the media giant."[128]

These cases demonstrate that even when privacy is protected by statute, the individual bringing the claim has to demonstrate a high level interest before a court will enforce a sanction against the press. The use of strict scrutiny in statutory privacy cases creates an almost impossible hurdle for plaintiffs to overcome. This line of cases establishes that the publication of truthful, lawfully

116. Daily Mail Publ'g Co.v. Smith, 248 S.E.2d 269, 270 (W.Va. 1978) (The newspaper filed for and received a writ of prohibition from the West Virginia Supreme Court).

117. *Daily Mail,* 443 U.S. at 106.

118. *Id.* at 105.

119. *Id.* at 105-06.

120. *Id.* at 105. "There is no issue before us of unlawful press access to confidential judicial proceedings."

121. 491 U.S. 524 (1989).

122. *Id.* at 526. The Florida statute made it unlawful to "print, publish, or broadcast in any instrument of mass communication…the name…of the victim of any sexual offense. FLA. STAT. § 794.03 (1987).

123. *Florida Star,* 491 U.S. at 527.

124. *Id.*

125. *Id.* at 536-39.

126. *Id.* at 540.

127. *Id.* (The statute did not define "instrument of mass communication").

128. *Id.*

acquired information receives a high level of First Amendment protection. It remains to be seen whether the same standard would be used in cases dealing with the right to be forgotten.

IV. ANALYZING THE CONFLICT

It is important to reiterate that no such right to be forgotten exists in the U.S. Yet, the *Purtz* case and other much older cases demonstrate that individuals have asserted, and continue to assert, claims of a similar right. It may be instructive, then, to consider *Purtz* from a right to be forgotten perspective. Within this perspective, it is also necessary to hypothesize how U.S. courts would apply the exception for newsworthiness, as well as the strict scrutiny test, and what might be the outcome of these restraints on privacy.

First, it is necessary to review the facts of *Purtz*. The father of a former college athlete asked the editor of a college newspaper to remove articles about his son from the newspaper's online archive.[129] The editor refused to remove the articles, citing company policy not to do so unless a retraction was necessary.[130] The father sued in small claims court alleging that the articles exposed him and his wife to emotional distress and should, therefore, be removed from the online news archive.[131]

If Purtz could assert a right to be forgotten, he could claim that the articles about his son were no longer necessary because a significant amount of time had passed and the information was no longer being used for the purpose for which it was originally collected. In this case, that original collection purpose was to report on Chris Purtz's trouble at the strip club, his suspension, and subsequent departure from the football team. The father could also claim that he was a data subject, because his social or cultural identity as the father of Chris Purtz could be recognized in relation to the articles about his son.[132] As the data subject, he would have the right to request that the *Daily Californian* take the articles down, because the information about his son could lead to his identification.

If Purtz were to be able to assert the right to be forgotten he would face a major hurdle in the freedom of expression exception as expressed in the protection for newsworthy information. Because Purtz filed his claim in California, the California test for newsworthiness would be the most logical test to consider. Under this test, the court would privilege the publication of

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129. Dan Reimold, *Daily Californian Editor in Chief Sued by Father of Deceased Former UC Berkeley Football Player College Media Matters*, COLLEGEMEDIAMATTERS.COM (Jan. 18, 2011), http://collegemediamatters.com/2011/01/18/daily-californian-editor-in-chief-sued-by-father-of-deceased-former-uc-berkeley-student (last visited Feb 24, 2012); Reimold,„*supra* note 1; Purtz v. Srinivasan, No. 10CESC02211 (Fresno Co. Small Cl. Ct. Jan.11,2011), *available at* http://banweb.co.fresno.ca.us/cprodsnp/ck_public_qry_doct.cp_dktrpt_frames?backto=P&case_id=10CESC02211&begin_date=&end_date=.

130. Reimold,„*supra* note 1

131. *Id*.

132. *See* definition of "data subject" *supra* note 23 and accompanying text.

information that is of a public concern, which is not highly offensive to a reasonable person, which stops short of a morbid fascination, and which was not published with reckless intent.[133] The newspaper's archived articles would pass all four prongs of this newsworthiness test. First, the articles focused on Chris's troubles while he was a player on the football team of the school with which the newspaper was connected.[134] In the California case that first detailed the state's test for newsworthiness, even information about the juvenile arrest record of a public office candidate's children was considered to be of a public concern.[135] Information about the possibly criminal acts of a college athlete would certainly be considered information of interest to the public.

The articles would also not be highly offensive to a reasonable person because they reported on public events: Chris' altercation at the strip club and his suspension from the team. Further, the reporting of public happenings could hardly be considered prying into the Purtzes' private lives. Such information does not rise to the level of reporting on someone's rare disease, which was ruled highly offensive in *Barber*.[136] Finally, there was no evidence that the newspaper published the information recklessly. Therefore, Purtz would again fail in his claim against the newspaper if alleging a right to be forgotten. It is also important to note that Purtz would probably argue that the passage of time should diminish the newsworthiness of the information about his son. Yet, the courts have, for the most part, ruled that newsworthiness does not necessarily wane after time passes. This would certainly defeat the main rationale for asserting the right to be forgotten—that the information is no longer being used for the purposes for which it was originally collected.

As a second matter, Purtz would not be able to prove that the state had a high level interest in enforcing the right to be forgotten against the newspaper. The right to be forgotten, like the statutes and court orders in *Cox Broadcasting*, *Oklahoma Publishing*, *Landmark*, *Daily Mail*, and *Florida Star*, focuses squarely on protected expression. It would stand to reason that if the protection of the name of juveniles and rape victims did not trump the right to freedom of expression, it would be difficult for Purtz to prove that the right to be forgotten should do so.

V. CONCLUSION

The right to be forgotten is an emerging privacy-related tool for plaintiffs in order to have information about them removed from retention by organizations and availability online. The boundaries of the right to be forgotten have yet to be concretely defined, but draft legislation from the EU provides some guidance

133. *See Kapellas*, 459 P.2d at 912.
134. Reimold, *supra* note 1; Reimold, *supra* note 129.
135. *See Kapellas*, 459 P.2d at 912.
136. *See* Barber v. Time, Inc., 159 S.W.2d 291 (Mo. 1942).

as to how such a right would be codified. The law would allow an individual, claiming to be able to be identified by certain information, to demand that an organization remove that information immediately. The organization would have to comply or face possible court ordered sanctions.

Built into this right is the protection for freedom of expression. Such an exception appears, however, analogous to the protection for newsworthiness built into the law of public disclosure of private facts invasion of privacy. Under the newsworthiness exception, the publication of information would be protected so long as that information was of a public concern, was not highly offensive to a reasonable person, was not morbid or prying, and was not published with recklessness. The *Purtz* case demonstrates that conflict between the emerging right to be forgotten and the right to freedom of expression as protected under the guise of newsworthiness. When *Purtz* is considered under the right to be forgotten, with the exception for newsworthiness, the case against the newspaper editor still fails.

How the countries of the EU will apply this exception to the right is not fully understood. The decision of the ECJ with respect to Spain's question as to whether its citizens could demand that Google delete information about them under the right to be forgotten should prove instructive as to the reach of the right. Google search results certainly include links to news articles that could identify individuals. It remains to be seen whether the EU exception for freedom of expression within the right to be forgotten will protect access to the information in those articles.