

The Right to Be Forgotten in the Digital Era

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I. Introduction

A society devoid of memory may experience monumental disasters. In addition to its historical value, however, memory can also serve a social and legal purpose as reflected in Greek mythology where the Erinyes, the goddesses of vengeance, persecuted wrongdoers, denying them their right to rebirth. Today's society, in contrast to that of the Greek goddesses, is one of absolute digital memory: almost everything — from our credit card transactions, court records, university grades, and personal Internet communications — is recorded and follows us throughout our lives, whether we desire this or not. Indeed, particular concern has been raised by the Internet's enhancement of memory, along with the danger posed by the data collection that takes place on the Internet, which is often undisclosed and imperceptible to the average citizen.¹ For example, an unfortunate moment in our lives, such as a sexually provocative photograph of oneself sent to an ex-partner or posted on Facebook, or an adolescent crime committed decades ago, or another dark page of our lives, may be recorded on the Internet for others to see. Painful parts of our past that we wish to forget may resurface and impact our reputations for years. This concern regarding the extremely sizeable memory of the Internet, as well as the negative consequences that come with having each and every of our acts, transactions, and communications recorded, was 'heard' by the European Parliament Regulation Proposal and 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) which, in turn, effectively reaffirmed the preexisting right to be forgotten.²

¹ See *Zoe Kardasiadou*, Στον απόηχο της Οδηγίας 95/46/ΕΚ (In the aftermath of Directive 95/46/EC), *ΕυρΠολ* (Europeans' Politeia) 2/2011 (issue dedicated on the topic of personal data protection), p. 209 et seq. (213).

² See the Proposals for a Regulation of the European Parliament and of the European Council on the protection of individuals regarding the processing of personal data and on the free movement of such data (General Data Protection Regulation), available at http://ec.europa.eu/justice/data-protection/document/review2012/com_2012_11_el.pdf, 25 January, last accessed on: 1 May 2012.

II. The origins of the right to be forgotten

A. Legal foundation

The right to be forgotten (the right to oblivion, *droit à l'oubli*, *diritto all'oblio*) was not a novelty introduced by the European Parliament's Regulation Proposal, but rather a simple reaffirmation of a preexisting right that had not always been referred to as the right to be forgotten as such, but which is nonetheless a corollary to the wider freedom of developing one's own personality. The right to be forgotten is applicable to individuals convicted of crimes who have served their sentences. Indeed, convicted persons' reintegration into society is an extremely arduous process, as they must not only rebuild their lives but must cope with society's disdain and continuing rejection.

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a. The European Convention on Human Rights (ECHR)

On a European level, the right to be forgotten is guaranteed through the right to respect for private and family life (article 8 ECHR). As recognized by the Council of Europe in Recommendation (2003) 13 (principle 18), the right to protection of privacy includes the right to protect the identity of persons in connection with their prior offences after they complete their prison sentences. An exception to this protection is only in the event when an individual has consented to the disclosure of their identity or in cases where these persons and their prior offence remain of public concern (e.g., sexual predators) or have become of public concern anew.

b. Greece's Constitution

The right to be forgotten is guaranteed in the Greek Constitution primarily via the wider entitlement to freely develop one's personality (article 5§1), in conjunction with the guarantee of human dignity (article 2§1), and also through the protection of the right to private life (article 9) and the protection of personal data and of a person's

³ See *Lilian Mitrou*, *Η δημοσιότητα της κύρωσης ή η κύρωση της δημοσιότητας* (The publicity of sanctioning or the sanctioning of publicity), Sakkoulas Press, Athens-Thessaloniki 2012, pp. 156-157.

informational self-determination (article 9A), intended to be construed as the right of every person not to become the object of journalistic interest pertaining to painful or unpleasant events of a person's past.⁴

c. Law No. 2472/1997 on the protection of personal data

Greek legislation on data protection does not expressly state the right to be forgotten; it does, however, confirm this in articles 4§1(d) and 4§2 of Law No. 2472/1997 via the provision for the erasure of data that are no longer necessary for the fulfilment of a processing purpose. The right to be forgotten also serves the right to object, granted to individuals under article 13 of Law No. 2472/1997, in that it is the right of the data subject to put forward objections in relation to the processing of information concerning him/her.

d. Criminal Procedure Code

Accordingly, Article 576§3 of the Code of Criminal Procedure provides for the non-registration on copies of one's criminal record intended for general use, the content of all criminal records that state: a) monetary penalties or imprisonment sentences of up to six months, after a 3-year period; b) a sentence of imprisonment of more than six months or a sentence of incarceration in a psychiatric ward, after an 8-month post sentencing date; and c) imprisonment, after a 20-year post prison release date. Therefore, the law provides for the erasing of a criminal record after a certain period of time has lapsed, thus granting both the individual, as well as those around him, the chance to forget this past whilst offering the opportunity to reconstruct one's life.

e. Presidential decree 77/2003

In the same direction of recognising the existence of the right to be forgotten, we also find Article 11§3 of Greek Presidential Decree 77/2003, according to which "the conviction of a person with respect to a particular crime should not be referred to after

⁴ See *Charalambos Anthopoulos*, Ελευθερία της πολιτικής συζήτησης και προστασία της τιμής των πολιτικών προσώπων. Οι αποφάσεις 467/10.10.2006 και 51/30.1.2007 του ΕΣΡ υπό το φως της νομολογίας του ΕΔΔΑ (The freedom to political discourse and the protection of the honor of political figures: Decisions Nos. 467/10.10.2006 and 51/30.1.2007 of the Greek National Council for Radio and Television), ΕφημΔΔ (Administrative Law Reports) 2009, p. 234 (245 et seq.)

this person's sentence has been served, unless this is in the public interest." This public interest clause leaves open the opportunity for relativising the right to be forgotten in cases where the public has a legitimate interest to be informed (e.g., in the case of sexual offenders or violent repeat offenders), in accordance with Article 367§2 of the Criminal Code. A legitimate interest in information on behalf of the public can be said to exist in instances where crimes remain fresh in the public's mind, provided that references to these crimes do not connect the past to the present and that the private lives of convicted persons who have served their sentences is respected.⁵

In view of the above, along with the right to be forgotten, the reproduction of outdated news that is disparaging for its subject and which had been lawfully made be public in the past, although it is no longer relevant to the public's current informational needs, is seen as undue.

⁵ See *Charalambos Anthopoulos*, *ibid.*, p. 246 et seq.

B. The case law approach

a. Recognition of the right to be forgotten

aa. France

France's National Commission of Informatics and Freedom (CNIL),⁶ the authority in charge of protecting personal data and the private lives of its citizens, on numerous occasions, has pointed out violations of the right to be forgotten⁷, stressing that digital freedom cannot exist in any other way. Indeed, the CNIL recently issued a seminal decision in relation to the dissemination of personal data and the violation of the right to be forgotten.⁸ The decision comments on the practice of a webpage that published court decisions available to the public online. The decisions were published exactly as they had been issued publicly including the names of the parties involved in the court cases (witnesses, accused persons and those convicted), contrary to the CNIL's well-established position for the anonymization of court decisions.⁹

Notwithstanding the CNIL's references to the fundamental importance of the right to be forgotten, French legislation does not recognize this as a free-standing right. In the course of the debate that has commenced in France with regard to establishing the express protection of the right to be forgotten, the CNIL's position is clear: In an online environment where the collection and disclosure of readily accessible personal data to the public domain is constantly increasing, the protection of the freedom of opinion and expression must go hand-in-hand with the right of changing one's mind

⁶ The Commission nationale de l'informatique et des libertés (CNIL) is responsible for ensuring that information technology remains at the service of citizens and that it does not jeopardize human identity or breach human rights, privacy or individual or public liberties. The Commission fulfils its duties in pursuance of the law of January 6, 1978 as amended on August 6, 2004.

⁷ Recommendation No. 1988-052 regarding the compatibility of laws 78-17 of 6 January 1978 on computers, files and freedoms and 79-18 of 3 January 1979, Schedule No. 9 Articles 99 - 27 on the automated processing of personal data that concerns the lending of books and audiovisual and artistic works, Decision No. 2010-028 of 4 February 2010 allowing French banks to amend the conditions of processing of the central registry of withdrawals of "CB" bank cards.

⁸ See Decision No. 2011-238 (LEXEEK).

⁹ See Decision No. 2001-057, containing recommendations on the dissemination of personal data from legal databases.

about one's beliefs, as well as with the choice of revealing specific aspects of one's private life.¹⁰

ab. Germany

In 1973, the German Federal Constitutional Court had to decide whether the personal rights of a convicted criminal should supersede the general interest of the public good. The suspect had been involved in the notorious "soldier murders of *Lebach*," whereby four German soldiers were killed during the armed robbery of an ammunition dump in 1969.¹¹ The two primary perpetrators were friends of the petitioner, and the relationship had a homosexual element. During the planning of the attack, the petitioner repeatedly expressed reluctance in carrying out the deed, and he did not take part in the attack. The two primary perpetrators were convicted in 1970 and received life sentences, whereas the petitioner was given a sentence of six years for aiding and abetting the crime.² In 1972, the state-owned German television channel ZDF planned to broadcast a television drama about the *Lebach* murders. In an introduction to the drama, the broadcasters had planned to broadcast the names and photographs of those involved in the crime. Moreover, ZDF had arranged to air a docudrama in which actors would reconstruct the crime. The petitioner wanted to prevent the airing of the docudrama insofar as he (or his name) would be represented in it. The German Federal Constitutional Court was required to decide which of two constitutional values would take priority: the freedom of the media under Article 5 of the Basic Law or the personality rights of the convicted criminal under Article 2. The court ruled that the petitioner's constitutional rights merited priority because the right to freely develop one's personality and the protection of one's dignity guarantees every individual an autonomous space in which to develop and protect one's individualism. The court noted that every person should determine independently and for oneself whether and to what extent one's life and image can be publicized. The

¹⁰ See <http://www.cnil.fr/la-cnil/actualite/article/article/pas-de-liberte-sans-droit-a-loubli-dans-la-societe-numerique/>, last accessed on: 1 May 2012.

¹¹ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 5, 1973, 35 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 202 (204) (F.R.G.), available at: <http://www.utexas.edu/law/academics/centers/transnational/work/german-cases/casesbverg.shtml?05jun1973>, [hereinafter referred to as the *Lebach Case*].

court also pointed out, however, that it was not the entire spectrum of one's private life that fell under the protection of personality rights. If, as a member of society at large, an individual enters into communications with others or impacts them through one's presence or behaviour, and therefore impacts the private sphere of others, the individual limits this privacy of life. Where such social interactions are present, the state may take certain measures to protect the public good.

The court emphasized that, *in most cases*, freedom of information should receive constitutional priority over the personality rights of a convicted criminal. Nevertheless, the court held that the encroachment on the convicted criminal's personality rights should not go any further than required to satisfy what was necessary to serve the public interest and, furthermore, that the disadvantages for the convicted criminal should be weighed against the severity of the crime committed. Using these criteria, the court found that the planned ZDF broadcast violated the petitioner's personality rights because of the way in which it named, pictured, and represented him.

The court noted that the broadcast represented the petitioner, who was recognizable through the facts of the story even though his name and face were not shown, in a negative and unsympathetic manner. Moreover, the petitioner was represented in the planned TV docudrama as a primary perpetrator, when in actuality he had simply aided and abetted the crime. Additionally, the docudrama placed more emphasis on the homosexual element of the relationships between the perpetrators than what the outcome of the trial warranted. The court also found it relevant that, as a general rule, television had a much stronger impact on privacy than a written or verbal report in a newspaper or radio show. Finally, the court indicated it was important that the ZDF broadcast's misstatements were a significant reason for its decision.

Applying these factors, the court found that the ZDF report could prevent the resocialization of the complainant in violation of his rights under Articles 1 and 2(1) of the Basic Law. The inviolability of human dignity required that a former convict receive the opportunity to re-enter society once the prison term was served and dues were paid to society. In this case, the convicted criminal's resocialization was put at risk where a television broadcast would reenact the crimes of a perpetrator close to or

after the time of his release from prison. Moreover, ZDF's stated goal of informing the public about the effectiveness of the prosecution and the security measures taken by the German military since the attacks could be reached without identifying the petitioner in the manner that had been planned.

ac. The Greek Data Protection Authority

The Greek Data Protection Authority has repeatedly commented on the risks posed by the Internet, particularly with reference to data that are true, lawful but also non-flattering for their subjects, such as one's failure in an exam for instance. A characteristic example can be seen in decision No. 62/2004¹², where the Authority recommended that the Greek Supreme Council for Civil Personnel Selection (ASEP) should only publish online the names of successful candidates who are awaiting appointment and not the details of those who have failed the exam. According to the Authority, the publishing of all such data on the Internet would be in excess of the requirements needed to ensure transparency, given access to these data would become available to the public who may or may not have an interest in this information. More specifically, the court held that it would be disproportionate to the aim of transparency to publish data related to exam failings, thus enabling any third party to become privy to such information even by complete chance.¹³

In view of the above, the Authority has stressed the need to place a time restriction on the publication of unfavorable administrative acts (demotions, suspensions, employee dismissals) on the Internet¹⁴ in the recommendations of Opinion No. 1/2010¹⁵,

¹² See Greek Data Protection Authority Decision No. 62/2004, available at: www.dpa.gr (Decisions), last visited on: 1 May 2012.

¹³ See Greek Data Protection Authority Decision No. 38/2001, available at: www.dpa.gr (Decisions), last accessed on: 1 May 2012.

¹⁴ In relation to the wide publicization of non-favorable acts (but not on the Internet), cf. Recommendation No. 2/2011 of the Greek Data Protection Authority, available at: www.dpa.gr (Decisions), last accessed on: 1 May 2012, concerning the compatibility of Bar Associations' publicizing, in their capacity as controllers, of lawyers' disciplinary penalties vis-à-vis the provisions on the protection of subjects from the processing of personal data. The Authority held, in a majority vote, that the posting decisions ordering final disbarments of lawyers on the walls of Bar Associations is lawful. On the other hand, the posting of such decisions in courthouses and at the office of the Secretaries of the local Public Prosecutors of courts of First Instance, where any citizen could have access to them, is unlawful. Most importantly, it was deemed unlawful to post decisions enforcing a temporary suspension of lawyers at Bar Associations' offices, in courtrooms and at the office of the Secretaries of the local Public Prosecutors of courts of First Instance.

effectively positioning this as an essential corollary of the principle of proportionality.¹⁶ The Authority also stressed the necessity of placing a time restriction on the publishing of unfavorable information in the case of TEIRESIAS S.A., where it set categories and corresponding time limits for the maintenance of adverse financial data on the Internet.¹⁷

B. Express denial of the right to be forgotten – the U.S.A.

The U.S. Supreme Court has taken the opposite approach in holding that states cannot pass laws restricting the media from disseminating truthful but embarrassing information—such as the name of a rape victim—as long as the information has been legally acquired.¹⁸ Therefore, American legal thought reflects an extreme form of non-recognition of the right to be forgotten, based on the reasoning that the disclosure of criminal records is protected by the First Amendment of the American Constitution that guarantees freedom of speech.¹⁹ The publication of someone’s criminal history is protected by the First Amendment, which led Wikipedia to resist the efforts by two Germans convicted of murdering a famous actor to remove their criminal history from the actor’s Wikipedia page.²⁰ The German case of *Lebach*, discussed above, highlights the differences between the American and the European legal tradition regarding the right to be forgotten and the right to free speech. This case highlights the importance of human dignity and, in general, of one’s personality in German law. On the other hand, in American legal theory, the application of the right to be forgotten is seen as a case of judicial activism, in the sense that the court appears to be

¹⁵ See Greek Data Protection Authority Opinion No. 1/2010, Posting of legislation, regulatory and personal acts on the Internet, available at: www.dpa.gr (Decisions) last accessed on: 1 May 2012.

¹⁶ See also *Fereniki Panagopoulou-Koutnazi*, Η Δι@ύγεια στη δημόσια διοίκηση υπό το πρίσμα της προστασίας δεδομένων προσωπικού χαρακτήρα (Tr@nsparency in public administration under the light of personal data protection), ΔτΑ (Human Rights Journal) 2012 (forthcoming publication).

¹⁷ See Greek Data Protection Authority Decision No. 523/19.10.1999, available at: www.dpa.gr (Decisions), last accessed on: 1 May 2012, and the analysis by *Eugenia Alexandropoulou-Aigiptiadou*, Προσωπικά δεδομένα (Personal Data), Ant. N. Sakkoulas Press, Athens-Komotini 2007, p. 53.

¹⁸ See *Florida Star v. B.J.F.*, 491 U.S. 524 (1989).

¹⁹ “The Congress cannot enact legislation on the establishment of religion or the prohibition of the freedom of worship, just as it cannot pass laws that restrict the freedom of speech or of the press or the citizens’ right to peaceful assembly and calling the Government to amend its ideas”: See *Kostas Mavrias/Antonis M. Pantelis*, Συνταγματικά Κείμενα, Ελληνικά και Ξένα (Constitutional Texts, Greek and Foreign), 3rd edition, Ant. N. Sakkoulas Press, Athens-Komotini 1996, p. 554.

²⁰ John Schwartz, *Two German Killers Demanding Anonymity Sue Wikipedia’s Parent*, N.Y. TIMES, Nov. 12, 2009, at A13; see also *Walter Sedlmayr*, WIKIPEDIA, available at: http://en.wikipedia.org/wiki/Walter_Sedlmayr, last accessed on: 1 May 2012), .

“discovering” an enumeration of rights to personality that overshadow the right to expression that has been expressly guaranteed.²¹

A characteristic example of the non-recognition of the right to be forgotten can be seen in the case of *Stacy Snyder*, a young American university student who was about to graduate from the faculty of education when her employer, a state school, discovered her comment on her MySpace (Internet) page criticizing her supervising teacher; the MySpace page also contained a picture of herself wearing a pirate’s hat and holding a plastic cup with the words “drunk pirate” written on it.²² Because of this posted material, the school claimed that she had behaved in a nonprofessional manner, one that effectively promoted the consumption of alcohol by minors. Consequently, they barred her from concluding her training, preventing her from earning a bachelor’s degree in education, but allowed her to receive a degree in English literature. Her claim was that, on the basis of her right to freedom of speech as guaranteed by the First Amendment of the American Constitution, she had a right to post the picture on MySpace. The federal judge, however, rejected her claim, arguing that she was a civil servant and thus the ground she had raised was not in reference to an issue that was in the public interest. As *Jeffrey Rosen* aptly remarked,²³ had this incident taken place in Europe *Stacy Snyder* would have invoked her right to be forgotten and she would have requested that Google and Yahoo remove all references to said picture. Indeed, this is precisely where the vast difference between the two continents lies: in America people want to be remembered, whereas in Europe, influenced by Sartre’s French intellect, people wish to be forgotten.²⁴ After all, this different treatment of the right to be forgotten between the two continents can also be seen in the relevant literature. In the United States, *Nestor A. Braunstein* talks about forgetting a crime as a crime of forgettance,²⁵ while *Lilian Mitrou* in Europe has written a monograph entitled “the publicity of sanctioning or the sanctioning of

²¹ See *Edward J. Eberle*, Human Dignity, Privacy, and Personality in German and American Constitutional Law, 1997 Utah Law Review, p. 963 et seq. (p. 1021).

²² See *Snyder v. Millersville Univ.*, 2008 U.S. Dist. (E.D. Pa., Dec. 3, 2008).

²³ See *Jeffrey Rosen*, Information Privacy: Free Speech, Privacy, and the web that never forgets, 9 Journal on Telecommunications & High Technology Law (2011), p. 345 et seq. (346).

²⁴ See *Jeffrey Rosen*, *ibid.*, p. 346.

²⁵ *Nestor A. Braunstein*, Oblivion of Crime as Crime of Oblivion, 24 Cardozo Law Review (2003), p. 2255 et seq.

publicity”.²⁶ Whereas *Nestor A. Braunstein* treats oblivion as a crime, *Lilian Mitrou* considers memory as being a sanction.

As mentioned earlier, the right to be forgotten is treated with great suspicion in the United States. Nonetheless, technological solutions are suggested for dealing with the problem of great memory, such as the utilization of Facebook applications for example, which allow users to choose whether they want a photograph on their Facebook page, for example, to stay there permanently or for a specified period of time.²⁷ A similar possibility is offered by Google when users send messages late on a Saturday night.²⁸ Practical solutions are also offered in addition to technological applications, such as the use of pseudonyms on social networking sites, as is mainly the case in Japan.²⁹ Another proposed practical solution is the possibility to change one’s name after graduation from school.³⁰

c. The vortex of oblivion and memory - Argentina

The case of Argentine pop star Virginia Da Cunha focuses on a series of racy photographs she had posed for when she was young. She subsequently sued Google and Yahoo after a number of years had passed, requesting that they be taken off various websites, arguing that they violated her right to be forgotten. Google asserted that it could not comply technologically with the court’s broad legal injunction to remove all of the pictures, while Yahoo stated that the only way they could comply would be to block all sites referring to Da Cunha that originated from its Yahoo search engines. Nevertheless, an Argentine judge sided with Da Cunha and after fining Google and Yahoo, he ordered them to remove all sites containing sexual images that contained her name. The decision was overturned on appeal, on the

²⁶ See *Lilian Mitrou*, footnote 3 above.

²⁷ See *Viktor Mayer-Schonberger*, *Delete: The Virtue of Forgetting in the Digital Age*, Princeton University Press, Princeton 2009, p. 15.

²⁸ See *Jon Perlow*, *New in Labs: Stop Sending Mail You Later Regret*, Gmail Official Blog, 6 October 2008, available at: <http://gmailblog.blogspot.com/2008/10/new-in-labs-stop-sending-mail-you-later.html>, last accessed on: 1 May 2012.

²⁹ See *Hiroko Tabuchi*, *Facebook Wins Relatively Few Friends in Japan*, N.Y. Times, 10 January 2011, p. B1, presenting the outcome of research conducted of a sample of 2,130 Japanese citizens, 89% of whom were reluctant to reveal their true name on the Internet.

³⁰ See *Holman W. Jenkins, Jr.*, *Google and the Search for the Future*, Wall St. J., 14 August 2010, p. A9.

grounds that Google and Yahoo could only be held liable if it could be shown that they knew that the content was defamatory and had thus negligently failed to remove it. But there are at least 130 similar cases pending in Argentine courts demanding the removal of photos and user-generated content, mostly brought by entertainers and models. The plaintiffs include the *Sports Illustrated* swimsuit model Yesica Toscanini who won her case; indeed, when a user of Yahoo Argentina plugs her name into the Yahoo search engine, the result is a blank page.³¹

III. The Proposal to Regulate the Protection of Personal Data

The recognition of the right to be forgotten in the form of an express confirmation appears to be an imminent need in this era of absolute digital memory. Consequently, a key consideration is the adjustment of legislation in view of new technology that supplies vast stores of data, which is precisely the aim that the Proposal for a Regulation and a Directive Regarding Personal Data seek to serve.

Article 17 grants the data subject's right to be forgotten and the correlating right to erasure of personal data. It further elaborates and specifies the right of erasure provided for in Article 12(b) of Directive 95/46/EC and outlines the conditions of the right to be forgotten, including the obligation of the controller who has made the personal data public to inform third parties on the data subject's request to erase any links, or copy or replication of that personal data. It also integrates the right to have the processing restricted in certain cases, avoiding the ambiguous terminology "blocking".

Article 17 states:

1. The data subject shall have the right to obtain from the controller the erasure of personal data relating to them and the abstention from further dissemination of such data, especially in relation to personal data made available by the data subject while he or she was a child, where one of the following grounds applies:

(a) the data are no longer necessary in relation to the purposes for which they were collected or otherwise processed;

³¹ Vinod Sreeharsha, *Google and Yahoo Win Appeal in Argentine Case*, N.Y. TIMES, Aug. 20, 2010, at B4.

(b) the data subject withdraws consent on which the processing is based according to point (a) of Article 6(1), or when the storage period consented to has expired, and where there is no other legal ground for the processing of the data;

(c) the data subject objects to the processing of personal data pursuant to Article 19;

(d) the processing of the data does not comply with this Regulation for other reasons.

2. Where the controller referred to in paragraph 1 has made the personal data public, it shall take all reasonable steps, including technical measures, in relation to data for the publication of which the controller is responsible, to inform third parties that are processing such data, that a data subject requests them to erase any links to, or copy or replication of that personal data. Where the controller has authorised third party publication of personal data, the controller shall be considered responsible for that publication.

The controller shall carry out the erasure without delay, except to the extent that the retention of the personal data is necessary:

(a) for exercising the right of freedom of expression in accordance with Article 80;

(b) for reasons of public interest in the area of public health in accordance with Article 81;

(c) for historical, statistical and scientific research purposes in accordance with Article 83;

(d) for compliance with a legal obligation to retain the personal data by [European?] Union or Member State law to which the controller is subject; Member State laws shall meet an objective of public interest, respect the essence of the right to the protection of personal data and be proportionate to the legitimate aim pursued;

(e) in the cases referred to in paragraph 4.

4. Instead of erasure, the controller shall restrict processing of personal data where:

(a) their accuracy is contested by the data subject, for a period enabling the controller to verify the accuracy of the data;

(b) the controller no longer needs the personal data for the accomplishment of its task but have to be maintained for purposes of proof;

(c) the processing is unlawful and the data subject opposes their erasure and requests the restriction of their use instead;

(d) the data subject requests to transmit the personal data into another automated processing system in accordance with Article 18(2).

5. Personal data referred to in paragraph 4 may, with the exception of storage, be processed only for purposes of proof, or with the data subject's consent, or for the protection of the rights of another natural or legal person or for an objective of public interest.
6. Where processing of personal data is restricted pursuant to paragraph 4, the controller shall inform the data subject before lifting the restriction on processing.
7. The controller shall implement mechanisms to ensure that the time limits established for the erasure of personal data and/or for a periodic review of the need for the storage of the data are observed.
8. Where the erasure is carried out, the controller shall not otherwise process such personal data.
9. The Commission shall be empowered to adopt delegated acts in accordance with Article 86 for the purpose of further specifying:
 - (a) the criteria and requirements for the application of paragraph 1 for specific sectors and in specific data processing situations;
 - (b) the conditions for deleting links, copies or replications of personal data from publicly available communication services as referred to in paragraph 2;
 - (c) the criteria and conditions for restricting the processing of personal data referred to in paragraph 4.

IV. Reflections on the Regulation Proposal

The express confirmation of a right to be forgotten comes at a time when use of the Internet is virtually unrestrained and individuals (private and public figures alike) feel helpless in terms of controlling, or even monitoring information about themselves that is disseminated on the Internet. The aim of the Regulation is to put the brakes on the endless flow of often damaging and unwanted personal information published on the Internet that can follow and stigmatize individuals in perpetuity. Nonetheless, an objection could be raised if the confirmation of a guaranteed right to be forgotten would lead to an effective violation of the freedom of speech³² or, in more general

³² The opinion that the right to be forgotten violates the freedom of speech is advocated by Jeffrey Rosen, *The Right to Be Forgotten*, 64 *Stanford Law Review* (2012), p. 88 et seq. (92), in fact mentioning quite poignantly that Europeans have a long-standing tradition of recognizing abstract rules of privacy that they fail to apply in actual practice. Indeed, in one of his previously mentioned articles,

terms, if it would bring about an excessive restriction of the freedom of journalistic information and of citizens' right to information.

At this point, it must be noted that the Regulation Proposal refers to data that have been publicized *by the subjects of the data themselves* when they were children: in other words, the Regulation focuses on the uploading of photographs or provocative text that the subjects of the data have placed on the Internet, information (data) that relate to their childhood when they did not possess the cognitive and emotional maturity to consider that such posts could or would follow them in perpetuity, for instance, they may not realize that potential employers could access this information, or that their teenage Facebook posts could be accessed and assessed by university admissions officials. This was precisely the reasoning presented by the Vice President of the European Commission, *Viviane Reding*, when she announced the proposed right to be forgotten, making a special note on the particular danger faced by adolescents who may reveal personal data that they later may come to regret.³³ The Regulation Proposal refers to the posting of data “especially” by children. This choice of wording is indicative of the special sensitivity shown towards the protection of childhood, whilst still leaving a window of opportunity for the protection of adults as well in cases of a thoughtless posts that they may have made. The term “especially” does not solely refer to children, but also to all subjects who post data about themselves, thus leaving open the possibility for seeking the erasure of data that may have been copied and re-uploaded by others on the Internet or, simply, data involving an individual that has been uploaded by a third party. On this point, it is worth highlighting that the interpretation of the right to be forgotten that had initially been adopted before the finalizing of the Regulation Proposal's text, suggested that only references which have been made by others should fall under the scope of application of the right to be forgotten.³⁴ The final Regulation Proposal, however, appears to be very broad in relation to the right to be forgotten, as it recognizes that all information

see footnote 23 above, p. 345, *Jeffrey Rosen* emphatically states that he would prefer the freedom of speech over the protection of privacy.

³³ See *Viviane Reding*, *The EU Data Protection Reform 2012: Making Europe the Standard Setter for Modern Data Protection Rules in the Digital Age* 5, 22 January 2012, available at: <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/12/26&format=PDF>, last accessed on: 1 May 2012.

³⁴ See *John Hendel*, *Why Journalists Shouldn't Fear Europe's 'Right to Be Forgotten'*, *Atlantic*, 25 January 2012, available at <http://www.theatlantic.com/technology/archive/2012/01/why-journalists-shouldnt-fear-europes-right-to-be-forgotten/251955/>, last accessed on 1 May 2012.

that relates to a data subject will actually fall under its scope. As a result, the right to be forgotten in the Regulation Proposal concerns: a) Internet posts that have been made by the data subject; b) Internet posts concerning the data subject that have been copied by others and re-uploaded on the Internet; and, lastly, c) posts made by others concerning the data subject, if these are not covered by the right to the freedom of expression and art.

The claim for the erasure of the first two categories above is particularly suited to the case of social networks,³⁵ that is, when the data subject had at some point in the past, in a carefree moment or even a moment of thoughtlessness, posted information about him-/herself for which he/she subsequently regretted. In view of this, subjects of unwanted or offensive published data who wish to erase the data should not be followed by their careless or thoughtless posts forever.³⁶ In this case, the right to be forgotten constitutes a corollary to a user's right to develop his/her personality freely, while the same applies to search engines, such as Google and Yahoo.

The greatest step, however, is realized through the third category that concerns embarrassing posts about individuals that have been published by others. It is herewith noted that, in accordance with Article 17(3) of the Regulation Proposal, when a subject requests that personal data (about themselves) be erased, the controller is under an obligation to carry out the task of data erasure without delay, except to the extent that the retention of the personal data is necessary for exercising the right of freedom of expression, as defined by Member States. Moreover, according to Article 80, a further exception to the duty of erasure is recognized in cases of processing of personal data solely for journalistic purposes or purposes of artistic or literary expression. The proposed European regulation, however, treats takedown requests for truthful information posted by others identically to takedown requests for photos one may have posted about oneself that have then been copied by others: both are

³⁵ See *Fereniki Panagopoulou-Koutnatzi*, *Οι ιστότοποι Κοινωνικής Δικτύωσης ως Εθνική, Ευρωπαϊκή και Διεθνής Πρόκληση της Προστασίας της Ιδιωτικότητας (Social Networking Sites as a National, European and International Challenge of the Protection of Privacy)*, Sakkoulas Press, Athens-Thessaloniki 2010, p. 95 et seq.

³⁶ See *Lilian Mitrou*, Case-note, Decision No. 16790/2009 of the Single Member First Instance Court of Thessaloniki (Petition for Injunctions) [Concerning the publication of documents containing personal data and defamatory remarks on facebook], *Journal of Mass Media and Communications Law* 2009, p. 400 et seq. (408, et all)

included in the definition of personal data as “any information relating” to oneself, regardless of its source. For instance, an individual can demand takedown of data posted on the Internet, and the burden, once again, is on the third party to prove that it falls within the exception for journalistic, artistic, or literary expression. This could transform Google, for example, into a censor-in-chief for the European Union, rather than a neutral platform. And because this is a role Google does not want to play, it may instead produce blank pages whenever a European user types in the name of someone who has objected to a nasty blog post or a status update.

The question that arises here is whether the right to be forgotten extends as far as enabling the erasure of every part of one’s ‘dark’ past. Such a prospect would lead to a claim for the erasure of a former conviction from each and every webpage on the Internet. For example, can a lawyer who has been penalized by the bar association with a two-year suspension order on charges of corruption request that all statements referring to this event be erased from the Internet after he/she has paid the prescribed penalty? Considering the Regulation Proposal in conjunction with the rights to freedom of speech and freedom to information, leads to favor the data subject if there is no legitimate need to inform the public of a violation.

Consequently, the republication of the past actions of a person who has served a sentence can be construed as jeopardizing his/her smooth reintegration into society, and seen as an additional and unjust act of punishing him/her once again, without reason. In this case, we find a correlation with the fundamental criminal law principle of *ne bis in idem*, in the sense that the publicizing of a closed case effectively constitutes a second sentence for the same offence. The right to be forgotten allows the individual to have a second chance to rejoin society — an opportunity that is essentially similar to that of the deletion of sentences from one’s criminal record or from the service record of an employee — and is comprised by the withdrawal of information from society’s memory.³⁷

Special emphasis should be given to the fact that this right is not unlimited, particularly in cases of long-standing matters that are of public interest, such as the

³⁷ See *Lilian Mitrou*, footnote 3 above, p. 160.

unaccounted flow and use of public funds.³⁸ Therefore, a politician involved in a matter concerning the abuse of public funds, even if the relevant accusations have not been proven, is not entitled to removing this dark page of his/her political career from the public domain. What he/she can demand, instead, is the accurate inclusion of details of the outcome of any relevant court action in all publications, which is based on the right to the rectification of personal data that are inaccurate or the completion of incomplete data, in pursuance with Article 16 of the Regulation Proposal. Furthermore, it should also be noted that the right to be forgotten must, in practice, coexist harmoniously with the rights to information, freedom of speech, access to information, and the right to preserve collective and historical memory and/or with the public interest.³⁹ Accordingly, notifying the public as to the name of a convicted person for reasons falling under public interest is subject to time limitations, as well as to the principle of proportionality, in the sense that a currently relevant and objective reference that serves an informational aim will be acceptable, provided that it does not extend beyond serving the genuine interest of the public to be kept informed.⁴⁰ The time limit within which a reference to an older case would be deemed to be legitimate is advisable to coincide with the equivalent temporal limits set for the erasure of penalties from a convicted person's criminal record.⁴¹

In addition to the need to weigh the right to be forgotten against other constitutionally protected rights, we face the task of defining its precise scope: Is the right to be forgotten relevant only with regard to the press and the Internet or does it also extend to our social or workplace sphere? It is true that it is difficult to erase one's memory in relation to a criminal act conducted by a person who belongs to one's wider or immediate social circle. If, for example, we are aware of the fact that a neighbor of ours committed a crime for which he has been sentenced, it is virtually impossible to erase this knowledge from our memory. Nonetheless, and irrespective of this consideration, whether we will actually forgive this neighbor and offer him/her a second chance is entirely up to our discretion. Bearing that in mind, it follows that the right to be forgotten cannot lead to the prohibition of the public expression of social outrages or ordinary gossip that do not appear in the press or on the Internet. We

³⁸ See *Charalambos Anthopoulos*, footnote 4 above, p. 246.

³⁹ See *Lilian Mitrou*, footnote 3 above, p. 160.

⁴⁰ See *Lilian Mitrou*, footnote 3 above, p. 161.

⁴¹ See *Lilian Mitrou*, footnote 3 above, p. 161, et all.

simply cannot place a prohibition upon society to stop talking about an individual, be it others or ourselves.⁴² The state should give convicted persons a second chance, but we cannot demand that this be required to individuals who may not, in all probability, treat former convicts as social pariahs but who would still remain quite suspicious of them, particularly in work spheres (e.g., in terms of employing them as nannies or teachers).⁴³ In fact, hiding part of one's darker aspects of the past may potentially raise even greater suspicion for prospective employers.⁴⁴

Lastly, we must also inquire whether the right to be forgotten should be final. If one has committed a crime and has been convicted for it, does he/she have the right — after serving the sentence — to demand erasure of all references to this event in the mass media and on the Internet in order to facilitate a smooth reintegration to public life? This right is retracted if serving a wider public interest is at issue of concern, such as, for example, a danger that a publication seeks to prevent or limit through publicizing it.⁴⁵ Also, in cases where the same or a similar act is committed again by a person who has served a sentence, the right to be forgotten also appears to give way, due to the fact that the repetition of this illegal act, is of more greater significance. Nonetheless, the wording of paragraph 8 of the proposed Regulation does not allow for this kind of differentiation, as it prohibits the processing of erased personal data in any manner. Moreover, the provision related to the confinement of data processing that is recognized by paragraph 4 is particularly limiting and it does not include a category for storing data in case these may be used again if a future conviction of the same person occurs, for the same crime. This is justified, given that had the opposite been the case — if there were a provision for the maintenance of data in case these may be proven to be useful in the future — a situation of legal uncertainty would emerge in reference to the possibilities of keeping data on file, thus leading to the violation of a natural person's right to ask that his/her personal data be deleted. In instances where a person is reconvicted for the same crime, it is only natural that everyone's memory will be jogged about the event and in relation to the convicted

⁴² See *Eugene Volokh*, Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You, 52 *Stanford L. Rev.* (2000), p. 1049 (1091).

⁴³ See *Eugene Volokh*, *ibid.*, p. 1092.

⁴⁴ See *Richard A. Epstein*, Privacy, Property Rights, and Misrepresentations, 12 *Georgia L. Rev.* (1978), p. 455 (472-73).

⁴⁵ Cf. *Thrasivoulos Th. Kontaxis*, Τα ΜΜΕ και η Προβολή της Προσωπικότητας (The Mass Media and the Broadcasting of Personality), Nomiki Vivliothiki Publications, Athens 2011, p. 19 et seq.

person's past actions; however this rehashing of past events should not take place via the Internet.

Finally, it must also be pointed out that the right to be forgotten refers to the erasure or the conditional limitation of the processing of factual data about individuals who do not wish to have publicized as part of their private life. Along with the confirmation of the right to be forgotten, the Regulation Proposal also incorporates a minor provision under Article 16, namely the right to seek the rectification of personal data that are inaccurate or the completion of incomplete data.

V. In lieu of an epilogue

As history repeats itself, it is absolutely vital that society should have a sharp memory in order to avoid the repetition of mistakes of the past: after all, a society without a clear memory of the past cannot gaze toward the future. Special emphasis, however, must be applied to ensure that retaining memory will take place only for events that stir society's legitimate interest in access to information. When no such interest in access to information can be established, a person has the right, as well as the claim vis-à-vis the relevant institutions, to see that unpleasant pages of his/her past are forgotten, so as to enable a smooth reintegration to society after having served the prescribed sentence or paid the prescribed dues to society. In addition to convicted persons who have served their sentence, a stronger claim to have the past erased can be given to all those who have decided to turn a page in their lives and forget past moments that no longer represent who they are. Indeed, an even greater claim to this effect should be granted to children who, during some carefree thoughtless moment, may have posted information or photographs on the Internet without realizing that this publication may adversely affect their lives at some later point in time. Even if the Internet is the supreme collector of personal data,⁴⁶ this does not mean that a certain brake cannot be placed in the uncontrollable and unwanted collection of so much personal data. The express confirmation of an established and widely recognised right to be forgotten through the Regulation Proposal is therefore welcomed with genuine optimism in this era where every bit of personal information is being logged

⁴⁶ Cf. *Shawn C. Helms*, *Translating Privacy Values with Technology*, 7 *Boston University Journal of Science & Technology Law* (2001), p. 288 et seq. (293).

unrestrainedly, along with the hope that registered information will be managed with care and governed by reason.