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Breaking Through the "Tower of Babel": A "Right to be Forgotten" and How Trans-Systemic Thinking Can Help Re-Conceptualize Privacy Harm in the Age of Analytics

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Breaking Through the “Tower of Babel”: A “Right to be Forgotten”¹ and How Trans-Systemic² Thinking Can Help Re- Conceptualize Privacy Harm in the Age of Analytics

Karen Eltis*

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¹ See generally Nathalie Mallet-Poujol, Université de Montréal, Le droit à l’oubli numérique [The Right to Digital Oblivion] (Feb. 8, 2011), http://www.chairelrwilson.ca/videos/conf_droit_oubli.mp4 (Can.) (arguing the need for “a right to be forgotten” in the context of the age of blogging and social networking, and ways of ensuring such a right); see also Natasha Singer, *Just Give Me the Right to Be Forgotten*, N.Y. TIMES, Aug. 21, 2011, at BU3, available at <http://www.nytimes.com/2011/08/21/business/in-personal-data-a-fight-for-the-right-to-be-forgotten.html>.

² The term was coined by the McGill Faculty of Law, in Montreal, Canada. See Lysanne Larose, *Transsystemic Legal Education*, MCGILL LAW: QUEBEC RES. CTR. OF PRIVATE & COMPARATIVE LAW, <http://www.mcgill.ca/crdpcq/transsystemic/> (last visited Oct. 25, 2011).

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“Nothing fixes a thing so intensely in the memory as the wish to forget it.” — MICHEL DE MONTAIGNE

“That the individual shall have full protection in person and in property is a principle as old as the common law; *but it has been found necessary from time to time to define anew the exact nature and extent of such protection.*” — SAMUEL D. WARREN and LOUIS D. BRANDEIS³

INTRODUCTION

This is a time of remarkable opportunity for innovation and strategic information management, but also one of tremendous confusion. We are on the one hand hearing from Facebook’s Mark Zuckerberg and others that privacy is outdated, shut out by evolving social norms,⁴ while on the other hand hearing from the FTC’s David Vladeck that privacy should be understood as housing a dignity interest.⁵ These disparate views have sparked some degree of bewilderment in United States lawyers and invite much-needed reflection on the very meaning of the term “privacy.”

Behavioral and data mining technologies are advancing at a rapid pace.⁶ As these technologies continue to advance, American companies—perhaps even those with the most established privacy protocols—are hounded in Europe for not doing enough to protect the information that these technologies gather.⁷ What is more, the

³ Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890) (emphasis added).

⁴ See, e.g., Mashall Kirkpatrick, *Facebook’s Zuckerberg Says the Age of Privacy is Over*, READWRITEWEB (Jan. 9, 2010, 9:25 PM), http://www.readwriteweb.com/archives/facebook_zuckerberg_says_the_age_of_privacy_is_ov.php.

⁵ Stephanie Clifford, *Fresh Views at Agency Overseeing Online Ads*, N.Y. TIMES, Aug. 4, 2009, at B1, available at http://www.nytimes.com/2009/08/05/business/media/05ftc.html?_r=1.

⁶ See generally *id.* (addressing data mining technologies used by Sears, which resulted in a recent lawsuit settled by the FTC).

⁷ See, e.g., John Hooper, *Google Executives Convicted in Italy over Abuse Video*, GUARDIAN, Feb. 24, 2010, at p1, available at <http://www.guardian.co.uk/technology/2010/feb/24/google-video-italy-privacy-convictions> (discussing the prosecution and conviction of Google’s privacy officer, Peter Fleischer, in Italy); *German Minister Takes on Google StreetView*, SPIEGEL ONLINE (Feb. 8, 2010), <http://www.spiegel.de/>

conflicting messages regarding the definition of privacy—along with the significant divergences between the respective approaches of the United States and Continental Europe to data privacy and the inherent commercial obstacles those differences pose⁸—prompt us to *revisit* the conventional construction of such foundational concepts as privacy and personal information. Specifically, these distinctions prompt us to ask the question: what is the proper balance to be struck between the need to respect fundamental human rights and the demands of an ever-expanding digital economy?⁹ Questions like this are particularly relevant due to the advent of the “Internet of Things,”¹⁰ transcending the computer and creeping into everyday objects.¹¹

Out of this tension, and the relative legal vacuum

international/germany/0,1518,676616,00.html.

⁸ Businesses in the European Economic Area (“EEA”) are generally prohibited from sharing personal data with any company in the United States, even with a parent company in the United States, unless they take certain affirmative compliance steps to ensure an adequate level of data protection. *See generally* Regulation 45/2001, of the European Parliament and of the Council of 18 December 2000 on the Protection of Individuals with Regard to the Processing of Personal Data by the Community Institutions and Bodies and on the Free Movement of Such Data, 2001 O.J. (L 8), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:008:0001:0022:en:PDF>; Lisa J. Sotto, Aaron P. Simpson, & Boris Segalis, *Law Firms Face Risks in Handling Personal Information*, HUNTON & WILLIAMS LLP, [http://www.cnapro.com/pdf/LawFirmsFaceRisksHandlingPersonalInformation%20\(Hunt onWilliams\).pdf](http://www.cnapro.com/pdf/LawFirmsFaceRisksHandlingPersonalInformation%20(Hunt%20onWilliams).pdf) (last visited Oct. 25, 2011).

⁹ The international community has struggled to resolve challenges regarding the protection of intellectual property and right to privacy. *See, e.g.*, Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, *Rep. of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, Human Rights Council, U.N. Doc. A/HRC/17/27 (May 16, 2011) (by Frank La Rue), available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf.

¹⁰ The term “Internet of Things” refers generally to linking of physical and virtual objects by means of radio frequency identification (RFID) and other capabilities. This idea presumes the existence of highly autonomous data capture by computers, which would enable the tracking of things (even people) in real time. This has significant implications for current notions of privacy and autonomy. *See, e.g.*, IAN KERR, *ON THE IDENTITY TRAIL: UNDERSTANDING THE IMPORTANCE AND IMPACT OF ANONYMITY AND AUTHENTICATION IN A NETWORKED SOCIETY* 335 (Oxford Univ. Press 2009).

¹¹ *See, e.g.*, Brian X. Chen, *iPhone’s Location-Data Collection Can’t Be Turned Off*, WIRED (Apr. 25, 2011), <http://www.wired.com/gadgetlab/2011/04/iphone-location-opt-out/>.

characterizing *modern* privacy law, the controversial idea of a legal “right to be forgotten”¹² has emerged and is increasingly gaining traction in Europe, particularly in France and in Switzerland.¹³ However, enshrining a so-called “right to be forgotten”, which empowers an individual in some instances to “erase” certain online footprints in order to “repair” reputational harms, clashes head-on with cherished legal values in America—foremost, the freedom of expression.¹⁴ Given the borderless nature of e-commerce, by virtue of which American companies must contend with European regulation, the novel concept of a right to be forgotten—and perhaps more importantly the legal lacuna that birthed it—must be further explored through the lens of comparative inquiry.

It stands to reason that the impetuses for that divisive proposal¹⁵—namely, enshrining a right to be forgotten—are the

¹² Such a right has been proposed by the European Union. *See, e.g.*, Elizabeth Flock, *Should We Have a Right to be Forgotten Online?*, WASH. POST (Apr. 20, 2011, 12:23 PM), http://www.washingtonpost.com/blogs/blogpost/post/should-we-have-a-right-to-be-forgotten-online/2011/04/20/AF2iOPCE_blog.html; Matt Warman, *EU Proposes Online Right ‘To Be Forgotten’*, TELEGRAPH (Nov. 5, 2010, 12:55 PM), <http://www.telegraph.co.uk/technology/internet/8112702/EU-proposes-online-right-to-be-forgotten.html>.

¹³ *See Communication from the Commission to the European Parliament, The Council, The Economic and Social Committee and The Committee of the Regions: A Comprehensive Approach on Personal Data Protection in the European Union*, at 2, COM (2010) 609 final (Nov. 4, 2010). *See also generally*, Mallet-Poujol, *supra* note 1; Emma Barnett, *Sarkozy Prioritizes Internet Regulation at G8 Summit*, TELEGRAPH (May 24, 2011, 7:00 AM), <http://www.telegraph.co.uk/technology/news/8531274/Sarkozy-prioritises-internet-regulation-at-g8-summit.html>; Chloé Woitier, *Nicolas Sarkozy souhaite faire de la régulation d’Internet un enjeu du G8* [Nicolas Sarkozy Wants to Make an Issue Out of Internet Regulation G8], LE MONDE.FR, (Jan. 11, 2011, 4 :04 PM), http://www.lemonde.fr/technologies/article/2011/01/11/nicolas-sarkozy-souhaite-faire-de-la-regulation-d-internet-un-enjeu-du-g8_1464149_651865.html. *See also* Franz Werro, *The Right to be Informed v. the Right to be Forgotten : A TransAtlantic Clash*, in HAFTUNGSRECHT IM DRITTEN MILLENIUM—LIABILITY IN THE THIRD MILLENNIUM 285–300 (Aurelia Colombi Ciacchi, Christine Godt, Peter Rott & Leslie Jane Smith eds., 2009).

¹⁴ *See, e.g.*, Manuel Baigorri & Emma Ross-Thomas, *Google Challenges Five Privacy Orders by Regulator at Spanish Appeal Court*, BLOOMBERG (Jan. 19, 2011, 6:32 AM), <http://www.bloomberg.com/news/2011-01-19/google-challenges-five-privacy-orders-by-regulator-at-spanish-appeal-court.html>; John Hendel, *In Europe, a Right to Be Forgotten Trumps the Memory of the Internet*, ATLANTIC (Feb. 3, 2011, 11:16 AM), <http://www.theatlantic.com/technology/archive/2011/02/in-europe-a-right-to-be-forgotten-trumps-the-memory-of-the-internet/70643/>.

¹⁵ *See infra* notes 64–79 and accompanying text.

very shortcomings of the prevailing privacy framework, or indeed frameworks. The relevant norms are anachronistically sectoral in the U.S.,¹⁶ and are universally cumbersome, regardless of whether their provenance is public, as with government laws, or private, as in the case of Facebook's privacy statement.¹⁷ As such, these norms fail to shield users from the sorts of harm not easily remedied on an Internet of infinite memory. And with respect to the burgeoning technologies of greatest relevance, such as analytics, the pertinent norms are also increasingly ineffective.¹⁸ The rules are paradoxically too few or too many and range from what is arguably becoming a compliance, securities-style framework in the United States to a quasi-blanket prohibition on analytics in Germany.¹⁹

On the Internet more is generally *not* better, and, in its complexity, the existing patchwork of privacy norms is rapidly falling into desuetude.²⁰ Convoluted and dense privacy norms quickly undermine their very *raison d'être*.²¹ The current attempts at regulation are, for the most part, predicated on an impoverished

¹⁶ See, e.g., Lisa J. Sotto, *PRIVACY & DATA SECURITY LAW DESKBOOK* (Aspen Publishers 2011) (using the United States' legal framework as one such example).

¹⁷ According to the New York Times, Facebook's privacy policy is more than 5,000 words—longer than the United States Constitution. Nick Bilton, *Price of Facebook Privacy? Start Clicking*, N. Y. TIMES, May 12, 2010, at B8, available at <http://www.nytimes.com/2010/05/13/technology/personaltech/13basics.html>.

¹⁸ See, e.g., *Best Practices*, SEARCHDEX.COM, http://www.searchdex.com/best_practices.shtml (last visited Sept. 11, 2011) (noting that one of its guiding principles is to help clients ensure compliance with search engines' guidelines).

¹⁹ See Tracy, *Google Analytics Banned in Germany*, UPVERY (Jan. 14, 2011), <http://www.upvery.com/38606-google-analytics-banned-in-germany.html>; see also Robin Wauters, *Achtung! Google Analytics is Illegal, Say German Government Officials*, TECHCRUNCH EUROPE (Nov. 24, 2009), <http://eu.techcrunch.com/2009/11/24/google-analytics-illegal-germany/>.

²⁰ See, e.g., Bilton, *supra* note 17, at B8.

²¹ See generally *Chaire en Droit de la Sécurité et des Affaires Electroniques* [Chair in Security Law and E-Business], BLOGUE JURIDIQUE: GAUTRAIS.COM, <http://www.gautrais.com/-Blogue-juridique> (last visited Oct. 25, 2011) (Can.) (posting various French publications indicating that less is more online). See also Bilton, *supra* note 18, at B8. Regarding disclosures, David Vladeck remarked to the New York Times, "I don't believe that most consumers either read them, or, if they read them, really understand it." The Editors, *An Interview with David Vladeck of the FTC*, N.Y. TIMES: MEDIA DECODER BLOG (Aug. 5, 2009, 2:24 PM), <http://mediadecoder.blogs.nytimes.com/2009/08/05/an-interview-with-david-vladeck-of-the-ftc/>.

conception of privacy and “personal information,” the latter being both over-and under-inclusive.²²

Why do concepts matter? Before we can go any further in crafting a meaningful, interoperable privacy harm-prevention policy, what we mean by privacy (and even “personal information”) needs to be rethought, paying particular attention to definitions across borders. The global governance of data invites a cosmopolitan understanding of privacy law.²³ “Trans-systemic thought,”²⁴ defined as the ability “to identify points of interface between systems” and harness them towards effective policy-making and the creation of interoperable definitions of foundational concepts, is therefore of the essence.

Concepts have very practical ramifications; they are the intellectual hooks used to put in place normative foundations which allow businesses to interact with regulators and clients on a global scale.²⁵ Concepts can eventually help us posit an understanding of privacy that helps to reconcile diverging visions. They can also lead to effective global practices capable, for example, of distinguishing between counterproductive data mining and data mining that stimulates innovation without undermining the user trust upon which the digital economy ultimately depends.²⁶

²² See, e.g., Bilton, *supra* note 18, at B8 (suggesting that Facebook’s privacy policy is both over-and under-inclusive in terms of the personal information it protects—under-inclusive in that the “community pages” feature “automatically links personal data, like hometown or university, to topic pages for that town or university,” and over-inclusive in that the only way to be removed from those pages is to delete the personal data from Facebook altogether).

²³ Transsystemia is a concept articulated by McGill Law School in its explanation of its “transsystemic legal education,” a unique model based on the world of borderless human interactions we live in today. For a further explanation of transsystemia and the need for a cosmopolitan understanding of the law, see *Transsystemic Legal Education*, MCGILL LAW: QUEBEC RESEARCH CENTRE OF PRIVATE AND COMPARATIVE LAW, <http://www.mcgill.ca/crdpcq/transsystemic/> (last visited Oct. 25, 2011).

²⁴ *Id.*

²⁵ See, e.g., W. Park, *Rules and Standards in Private International Law*, 73 ARBITRATION 441, 444–45 (2007).

²⁶ See generally Usama Fayyad, Gregory Piatetsky-Shapiro & Padhraic Smyth, *From Data Mining to Knowledge Discovery in Databases*, 17 AI MAG. 37 (1996), available at <http://www.aaai.org/ojs/index.php/aimagazine/article/view/1230/1131>. Data mining refers to the identification of patterns in data through clustering and classifying

Accordingly, recognizing and bridging the cultural gap in policies and practices is crucial. What we mean by these key concepts needs to be more clearly enunciated. Otherwise, Americans and others (including Continental Europeans, those living in APEC Countries, and many more) will find themselves speaking *at* each other using the same word ("privacy") with entirely different connotations. The result is a technological "tower of Babel" with frustrating hurdles²⁷ that ultimately prompts policy makers to conceive of "privacy" and "access" as hopelessly and inevitably adversarial terms.

Conceptual uncertainty can also readily produce significant gaffes with unintended consequences. Thus, for instance, when Oracle's CEO suggested that "privacy is an illusion"²⁸ or when Sun System's Scott McNealy told us to "get over" having no privacy,²⁹ they—as Americans steeped in a privacy of expectation and seclusion³⁰—were presumably referring to what this paper labels an outdated notion of the concept, rather than one defined by control over personhood or freedom from reputational and related harms.

In this vein, comparative inquiry can have important practical benefits. It can recognize those underlying assumptions that generate conceptual obstacles to protecting privacy in the digital age, and it can eventually aid scholars and lawmakers in formulating more coherent policy in this area. To best illustrate this point, this paper adopts the following structure. Part I provides a succinct overview of the rationale animating privacy

information, a process primarily used in analyzing collections of observations of behavior. *See generally id.*

²⁷ *See, e.g.,* Mike Swift, *Battle Brewing over Control of Personal Data Online*, PHYSORG.COM (June 29, 2011), <http://www.physorg.com/news/2011-06-brewing-personal-online.html>. Any information relating to an identifiable individual is considered "personal data." *Id.* This data may be contained in paper files, computer files, e-mails, film, etc. *Id.* Privacy concerns have been growing in both Washington and Europe over the voluminous personal data being collected online. *Id.*

²⁸ NDouglas, *Larry Ellison's Privacy is Largely an Illusion*, GAWKER (Feb 2, 2006, 7:51 AM), <http://valleywag.gawker.com/152187/larry-ellisons-privacy-is-largely-an-illusion>.

²⁹ *Private Lives? Not Ours!*, PC WORLD (April 18, 2000), http://www.pcworld.com/article/16331/private_lives_not_ours.html.

³⁰ *See infra* Part I.

protections in Common Law jurisdictions, with particular emphasis on the United States. It will highlight the “growing disconnect between people’s perception of privacy and the rapid growth of various forms of surveillance.”³¹ Further, it will examine the challenges that the digital economy poses to an expectation-driven and spatially-defined standard of privacy. Part II provides a brief survey of the increasingly fashionable “right to be forgotten” and the factors driving this initiative in Europe. It suggests that the recognition of such a right comes in response to an outdated and ineffective designation of privacy,³² which sparked a backlash of sorts in the face of our increasing inability to freely control the development of our “digital” personhood transnationally. Whatever ultimately becomes of this “right to be forgotten,” it is argued that this nascent European proposition’s significance lies in its distinctive underlying vision of privacy, inviting us to consider an outcome-related, consumer-responsibility alternative to identity management in the age of predictive technologies. Finally and relatedly, Part III proceeds to highlight the potential contribution of civilian thinking³³ to refashioning the conceptual foundations of privacy policy. More specifically, it suggests that privacy be reconceptualized as the right to mold one’s identity autonomously along with the corollary duty not to compromise one’s personal information unnecessarily in a digital age of infinite memory.³⁴

³¹ See David Lyon, *Globalizing Surveillance: Comparative and Sociological Perspectives*, 19 *INT’L SOC.* 135, 149 (2004) (discussing Canadians’ penchant for acquiescing to surveillance from a sociological perspective). Lyon’s study interestingly reveals that while Canadians do not seem to attach a very high value to their privacy, Quebecers (governed by the civil law tradition) do. *Id.* While that in itself by no means definitively points to the legal tradition’s determinative influence on public perception of privacy, it does raise questions as to the law’s impact on culture and vice versa.

³² The right has been increasingly criticized in the United States for this reason. See, e.g., Gordon Crovitz, Op-Ed., *The Right to Privacy from Brandeis to Flickr*, WALL ST. J., July 25, 2011, at A11, available at <http://online.wsj.com/article/SB10001424053111903554904576461990729880756.html>.

³³ Specifically, this section relies on abstract views of the French and German models of civilian thinking.

³⁴ This approach is arguably reflected (however subtly) in the *Cour de Cassation*’s recent privacy case, *Bruno B. vs. Giraud et Migot*. See *Cour de cassation* [Cass.] [Supreme Court for Judicial Matters] Paris, soc., Dec. 15, 2009, Bull. civ. V, No. 2651 (Fr.), available at http://www.juritel.com/Ldj_html-1485.html. For an English analysis of the case, see Trevor Jefferies & Alvin F. Lindsay, *New French Case Removes*

I. THE COMMON LAW APPROACH

In the United States and in the common law world generally, "[p]rivacy is best treated as a property right. Property grants an owner the exclusive right to dispose of what he owns. Privacy is the exclusive right to dispose of access to one's proper (private) domain."³⁵

Not surprisingly therefore, "[i]n the United States, judicial protection of privacy depends on whether an individual has a reasonable expectation that the information in question will remain private. Stated another way, the question is whether society recognizes the individual's claimed expectation of privacy as reasonable."³⁶ Arguably this approach discounts context. Indeed, the tendency to associate privacy externally or spatially with property, instead of as dignity inherent in personality, may not lend

Automatic Privacy Shield From Employee E-Mails, Making Them More Amenable to US Discovery, HOGAN LOVELLS CHRONICLE OF DATA PROTECTION (Feb. 18, 2010), <http://www.hldataprotection.com//2010/02/articles/litigation/new-french-case-removes-automatic-privacy-shield-from-employee-emails-making-them-more-amenable-to-us-discovery/>. For purposes of interoperability, this approach—not unlike the German court's fresh characterization of privacy as "informational self-determination"—can in turn be reconciled with a modernized common law notion of privacy as Liberty. See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Dec. 15, 1983, 65 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 1 (Ger.); Press Release, German Federal Constitutional Court, Provisions in the North-Rhine Westphalia Constitution Protection Act (Verfassungsschutzgesetz Nordrhein-Westfalen) on Online Searches and on the Reconnaissance of the Internet Null and Void (Feb. 27, 2008), available at <http://www.bundesverfassungsgericht.de/en/press/bvg08-022en.html> (reiterating the right to informational self-determination: "the manifestations of the general right of personality previously developed in the case-law of the Federal Constitutional Court, do not adequately take account of the need for protection arising as a consequence of the development of information technology."). See also Grundgesetz für die Bundesrepublik Deutschland [Grundgesetz] [GG] [Basic Law], May 23, 1949, BGBl. I, arts. 2, 10, 13 (Ger.) (highlighting that Dignity (article 2) is the only right read in conjunction with other rights); Edward J. Eberle, *Human Dignity, Privacy, and Personality in German and American Constitutional Law*, 1997 UTAH L. REV. 963 (1997); Eric Mitnick, *Procedural Due Process and Reputational Harm: Liberty as Self-Invention*, 43 U.C. DAVIS L. REV. 79, 79, available at http://lawreview.law.ucdavis.edu/issues/43-1_Mitnick.pdf (arguing that liberty needs be understood as "comprising individual self-invention").

³⁵ Ernest van den Haag, *On Privacy*, in NOMOS XIII: PRIVACY 149, 150–51 (J. Roland Pennock & John W. Chapman eds., 1971).

³⁶ Shaun B. Spencer, *Reasonable Expectations and the Erosion of Privacy*, 39 SAN DIEGO L. REV. 843, 847 (2002).

itself as well to realms outside the physical world, like cyberspace.³⁷

Although the rationales justifying the treatment of privacy as property may have found legitimacy in the past, today they are the object of increasing scrutiny and critique.³⁸ This property-based or spatially-based construction which unconsciously, if not otherwise, continues to animate modern American privacy law is awkward in the information technology context. For instance, this antiquated rationale would dictate that an individual has few or no privacy rights in the public realm—or indeed in most of cyberspace, which now includes the Internet of things³⁹—where it would be unreasonable to expect to be left alone.⁴⁰

Thus, North American scholars tend to embark on discussions of privacy with the origins of the invasion of privacy tort, born of a seminal article titled “The Right to Privacy”. Though seldom addressed, the historical roots of that right in common-law England are particularly instructive. Under the English common law, the right to privacy was first recognized by virtue of its intricate link to personal property. This is best evidenced by the now infamous saying, “[T]he house of every one is his castle,” first coined by the House of Lords in

³⁷ Karen Eltis, *The Judicial System in the Digital Age: Revisiting the Relationship Between Privacy and Accessibility in the Cyber Context*, 56 MCGILL L.J. 289, 313 (2011). See also Eberle, *supra* note 34 at 974; James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1181 (2004) (discussing dignity in the civilian culture as it pertains to privacy).

³⁸ See generally Eltis, *supra* note 37.

³⁹ See *id.* at 24–26.

⁴⁰ Take, for instance, the example of wiretapping in the United States. Strikingly symptomatic of the emergent tendency to anticipate, expect, and even acquiesce to privacy intrusions once considered untenable, recent polls indicate that most Americans deem warrantless wiretapping of their private phone conversations and email “reasonable.” *Many Americans Accept NSA Surveillance*, ANGUS REID (Mar. 12, 2006), http://www.angus-reid.com/polls/11692/many_americans_accept_nsa_surveillance. According to the Angus Reid report, “Many adults in the United States see nothing wrong with the domestic electronic surveillance program initiated by their federal government, according to a poll by TNS released by the Washington Post and ABC News. [Fifty-four] percent of respondents think wiretapping telephone calls and emails without court approval is an acceptable way to investigate terrorism.” *Id.*

Semayne's Case (now colloquially known as "a man's home is his castle"). This alluded to the conception that a person's right to privacy fundamentally derives from his property rights. In view of that, the right to privacy was initially recognized in relation to trespass, thus confirming what was, for many years, the reigning conception of privacy as rooted in ownership. This brief historical aperçu at the very least elucidates the understanding of privacy as the right to be left alone in given spaces, defined externally rather than inherently to personhood.⁴¹

This historical review similarly sheds light on the narrow conception of and repeated references to seclusion offered in contemporary tort law discourse.⁴² But what role might the notion of seclusion play when, to paraphrase the Supreme Court of Canada in *Wise*, "many, if not the majority, of our activities are inevitably carried out in the plain view of other persons."⁴³ The Common Law-based theory, featuring seclusion-oriented, expectation-driven overarching principles, fuels most if not all current privacy regulations. However, as basic assumptions about privacy evolve, this theory no longer lends itself to the meaningful development of a coherent legal framework for protecting digital identity.⁴⁴

The seclusion-centered approach is particularly insufficient when it comes to managing the global flow of data. In the

⁴¹ Eltis, *supra* note 37, at 312 (internal citations omitted).

⁴² See generally Morton J. Horwitz, *THE TRANSFORMATION OF AMERICAN LAW 1780–1860* (Harvard Univ. Press 1977) (observing how the conception of property changed from an eighteenth-century view that dominion over land conferred the power to prevent others' interference to the nineteenth-century assumption that the essential attribute of property ownership was the power to develop it irrespective of the consequences to others); Jordan E. Segall, Note, *Google Street View: Walking the Line of Privacy-Intrusion Upon Seclusion and Publicity Given to Private Facts in the Digital Age*, 10 U. PITT. J. TECH. L. & POL'Y 1 (2010) (discussing tort claims of intrusion upon seclusion).

⁴³ *R. v. Wise*, [1992] 1 S. C. R. 527, 564–65 (Can.), available at <http://scc.lexum.umontreal.ca/en/1992/1992rcs1-527/1992rcs1-527.html>.

⁴⁴ See Eltis, *supra* note 37, at 312 (explaining that the digital identity requires privacy rights attached to "persons rather than property, irrespective of property or special constraints").

information age, the “reasonable expectation” standard tends to *reinforce* social tolerance of intrusions once deemed unreasonable in other contexts.⁴⁵ Paradoxically, the more we are watched, the less privacy we expect; the less we are personally bothered, the more we expect others to share in our complacency. Therefore, if privacy continues to be defined by reference to reasonable expectations and seclusion, the sphere in which one can reasonably claim “solitude” will contract.⁴⁶

Perhaps this is why civil law and other jurisdictions in Asia for instance, are shifting towards a “legitimate” rather than “reasonable” expectation model, and focusing instead on personhood and moral autonomy in this context.⁴⁷ The privacy framework offered by the Asia-Pacific Economic Cooperation, for example, illustrates the civilian approach in a broader sense and focuses specifically on *harm*.⁴⁸ Others, as further discussed, have gone even further in embracing the personal autonomy approach to privacy by proposing a legally enshrined “right to be forgotten.”⁴⁹

⁴⁵ See Spencer, *supra* note 36, at 844 (“We find imprecision embedded in the expectation-driven conception of privacy because of the inevitable gray area between what society clearly expects to be protected (that is, private), and what it clearly understands to be unprotected. Effective encroachment occurs through incremental incursions into this gray area of unsettled expectations. Moreover, individuals internalize each incremental step of encroachment, and thereby lose any sense that privacy was once possible in the encroached upon area. Because of this internalization, the expectation-driven privacy test cannot account for the cumulative effect of successive encroachments. Instead, its focus on the current level of expectations facilitates the incremental erosion of privacy.”).

⁴⁶ See generally Eltis, *supra* note 37.

⁴⁷ See *id.* at 314.

⁴⁸ See Paula J. Bruening, APEC Roundup: Update on Accountability Agents in Implementation Of the APEC Framework, Development of Pathfinder Projects, Privacy & Security L. Rep. No. 9PVL1444 (Oct. 18, 2010), available at http://www.hunton.com/files/Publication/1fd96285-2d28-4c2a-a4dd-d71f60777315/Presentation/PublicationAttachment/aa33f70e-9f45-49d1-a76c-fab3b481f0e1/Bruening_APEC_BNA_Oct-2010.pdf.

⁴⁹ See *infra* Part III; see also Bruno Waterfield, ‘Right to be Forgotten’ Proposed by European Commission, TELEGRAPH (Nov. 5, 2010, 1:38 AM), <http://www.telegraph.co.uk/technology/news/8111866/Right-to-be-forgotten-proposed-by-European-Commission.html>.

II. THE "RIGHT TO BE FORGOTTEN": A BACKLASH?

While the civil law approach to privacy does offer significant benefits in the digital world, current governance of privacy—including even the novel “right to be forgotten” theory—presents some difficulties. Taking a somewhat reductionist view, there are three potential ways to address the conceptual difficulties that stem from the privacy paradigm. The first is to overregulate the area in an effort to keep up with the changing technologies. The second is to take a more case-specific approach to alleged misuses of personal information. Finally, the third approach, which this article posits is necessary to prevent the emergence of faddish proposals, like the “right to be forgotten,” takes a more principled approach, while not overregulating.

The first view attempts to correct the shortcomings of the current, lamentably anachronistic (common law) understanding of privacy by piling on the regulation. This type of response is exemplified in a different context by the Sarbanes-Oxley Act of 2002.⁵⁰ While it is certainly beyond the scope of this endeavor to offer any in-depth discussion on point, suffice it to note that the regulation-intensive Sarbanes-Oxley Act was enacted in response to a wave of large-scale corporate accounting scandals.⁵¹ But a knee-jerk, “Sarbanes-Oxley” approach to data protection, however well-intentioned, tends to be informed by panic;⁵² in the privacy

⁵⁰ Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of title 15 of the United States Code).

⁵¹ See Michael A. Thomason, *Auditing the PCAOB: A Test to the Accountability of the Uniquely Structured Regulator of Accountants*, 62 VAND. L. REV. 1953, 1954–55 (2009); Omar Ochoa, Note, *Accounting for FASB: Why Administrative Law Should Apply to the Financial Accounting Standards Board*, 15 TEX. REV. L. & POL. 489, 492–93 (2011). The SEC has relaxed the regulations somewhat since the passage of Sarbanes-Oxley, in an effort to lure back foreign companies to list in the United States. Seven Davidoff, *With Facebook, Debate Renews over I.P.O. Regulation*, N.Y. TIMES: DEAL BOOK (Jan. 11, 2011, 7:09 PM), <http://dealbook.nytimes.com/2011/01/11/with-facebook-debate-renews-over-i-p-o-regulation/>.

⁵² Henry N. Butler & Larry Rubenstein, *THE SARBANES-OXLEY DEBACLE: HOW TO FIX IT AND WHAT WE’VE LEARNED 1* (2006), available at http://www.aei.org/docLib/20060308_ButlerRibsteinSOXDraft313.pdf.

context, this panic takes the form of “technology must keep up”.⁵³ Such a regulation-heavy approach tends to be ineffective and indeed risks inadvertently punishing innovation while doing little to protect the global consumer.⁵⁴ Like the much maligned U.S.-security framework, onerous rules ill-adapted to a global digital economy place privacy in an antagonistic relationship with progress.⁵⁵ This in turn paradoxically encourages companies to shift their focus to creatively sidestepping these rules in order to avoid their chilling effects, rather than on meaningful privacy protection.⁵⁶

It bears repeating: the law cannot keep chasing after technology; it will inevitably (by its very nature) be outpaced, often before the proverbial ink dries. As Eric Schmidt once observed “High tech runs three times faster than normal business. And the government runs three times slower than normal businesses. So we have a nine-times gap.”⁵⁷ To account for this inevitable outpacing, a second approach was developed which attempts to reconcile privacy and innovation. This second

⁵³ Milo Tiannopoulos, *The Law Must Learn to Keep Up with Technology*, TELEGRAPH (Nov. 12, 2010 9:16 AM), <http://www.telegraph.co.uk/technology/twitter/8128252/The-law-must-learn-to-keep-up-with-technology.html>.

⁵⁴ See, e.g., Vincent Gautrais, *L'encadrement Juridique du Cyberconsommateur Québécois* [The Lawful Supervision of the Quebec Cyberconsumer], in DROIT DU COMMERCE ÉLECTRONIQUE 261 (Thémis 2002); Marc Lacoursière & Charlaïne Bouchard, Les Enjeux du Contrat de Consommation en Ligne [The Challenges of Online Consumer Contract], 33 REVUE GÉNÉRALE DE DROIT 373, 395 (2004) (observing that complicated online policies make an overly informed consumer more like an uninformed consumer); see also generally Jean Michel Bruguière, La protection du cyber-consommateur dans la loi pour la confiance dans l'économie numérique, DROIT DE L'IMMATÉRIEL (2005) (similarly arguing that too much information paradoxically leaves the consumer uninformed).

⁵⁵ See, e.g., *How Speed Traders are Changing Wall Street*, CBS NEWS (Oct. 11, 2010 1:20 PM), <http://www.cbsnews.com/stories/2010/10/07/60minutes/main6936075.shtml> (discussing the algorithm-commanded trading occurring at the New York Stock Exchange).

⁵⁶ Nigel Kendall, *Privacy Matters: How Can Firms Make the Most of the Opportunities in Online Personal Data While Retaining Individuals' Right to Privacy?*, WALL ST. J. (June 29, 2011), available at <http://online.wsj.com/article/SB1000144052702303714704576382892280173266.html>.

⁵⁷ Gordon L. Crovitz, *Google Speaks Truth to Power*, WALL ST. J., Oct. 24, 2011, at A13, available at <http://online.wsj.com/article/SB10001424052970204618704576645353164833940.html>.

approach, critics argue, is embodied in the recent McCain-Kerry proposal.⁵⁸ The proposal, now known as the Commercial Privacy Bill of Rights Act of 2011,⁵⁹ may very well fall under this second category.⁶⁰ But in the race against implacable technology, the end result of such efforts is often counter-productive. Thus, for example, many privacy advocates argue that the McCain-Kerry framework's broad and arguably circular definition of "necessary" (for data collection purposes) ties regulators' hands.⁶¹ They further posit that this definition effectively serves to undermine even meager pre-existing protections by gifting an easy defense to over-collectors of personal information.⁶² This defense, in turn, incentivizes the crafting of (even more) cumbersome policies that would define most such data as "necessary."⁶³

⁵⁸ See generally Edward A. Morse, *From Private to Public Ordering: An Expanding Federal Role for Regulating Privacy and Data Security*, 2011 BUS. LAW TODAY 1 (2011), available at <http://apps.americanbar.org/buslaw/blt/content/2011/07/article-morse.shtml>.

⁵⁹ S. 799, 112th Cong. §§ 3(6), 202(b), 501(a) (2011) [hereinafter Commercial Privacy Act], available at http://epic.org/privacy/consumer/Commercial_Privacy_Bill_of_Rights_Text.pdf; Press Release, Sen. John Kerry, Kerry, McCain Introduce Commercial Privacy: Bi-Partisan Legislation Would Enhance Protection and Control of Personal Information (Apr. 12, 2011), <http://kerry.senate.gov/press/release/?id=59a56001-5430-4b6d-b476-460040de027b> [hereinafter Kerry, Press Release].

⁶⁰ Kerry, Press Release, *supra* note 59.

⁶¹ See Dan Tynan, *Five Big Problems with That New Privacy Bill of Rights*, IT WORLD (Apr. 13, 2011, 2:25 PM), <http://www.itworld.com/security/155667/five-big-problems-new-privacy-bill-rights>. The Commercial Privacy Act exempts from the definition of "unauthorized use" any "use that is necessary for the improvement of transaction or service delivery through research, testing analysis, and development" and any "use that is necessary for internal operations, including . . . information collected by an Internet website about the visits to such website and the click-through rates at such website—to improve website navigation and performance. . ." Commercial Privacy Act, *supra* note 59, at § 3(8)(B)(vii)–(viii)(II).

⁶² See Tynan, *supra* note 61.

⁶³ See, e.g., Grant Gross, *Kerry, McCain Introduced Online Privacy Bill*, PC WORLD (April 12, 2011, 4:20 PM), http://www.pcworld.com/businesscenter/article/224969/kerry_mccain_introduced_online_privacy_bill.html ("The loopholes in the bill 'could leave consumers feeling that they're far more protected than they are,' said John Simpson, consumer advocate at Consumer Watchdog. The bill may limit the FTC from charging online businesses with unfair or deceptive practices in privacy cases, Simpson added. If the bill was law, the FTC may not have been able to enter into a March settlement with Google over privacy complaints about its social-media Buzz product, he said."); see also Jeremy Byellin, *Senators Kerry, McCain Introduce "Privacy Bill of Rights" Bill*, WESTLAW INSIDER (April 18, 2011), <http://westlawinsider.com/top-legal-news/senators-kerry-mccain-introduce-privacy-bill-of-rights-bill/>.

The failure of the first and second approaches to privacy, therefore, invites a third option—an option which should be a principled rather than pigeonholed approach to privacy. The absence, however, of such an option (at the national, let alone transnational level) creates a vacuum out of which faddish proposals, such as the “right to be forgotten,” emerge.

A. *The “Faddish” Proposal and its Impetus*

Presumably as a backlash to what are, not unreasonably, perceived as thoroughly ineffective, cumbersome, or simply outpaced practices and initiatives on this side of the Atlantic, the E.U., French Senate members⁶⁴ and other European figures and institutions⁶⁵ have begun advocating for the recognition of a legal “right to be forgotten.” Simply put, the argument is that if we cannot find a way to protect privacy *ab initio*, then we must correct matters *after the fact* by bestowing a right upon individuals to retroactively “erase” that which might harm them.⁶⁶ That which, this article submits, might otherwise have disappeared from public view in time, if not for the Internet age’s unprecedented infinite memory. The counterargument to the right to be forgotten movement emphasizes its countervailing values—namely, freedom of expression, access to information and the integrity of the public record.⁶⁷

Not surprisingly then, recurring questions in the debate over *ab initio* or *post facto* privacy protection focus on how the Internet differs from past or similar mediums (such as the printed press, where no such right exists) and why the explosion of the Internet

⁶⁴ See Senators Yves Détraigne & Anne-Marie Escoffier, *La vie privée à l’heure des mémoires numériques. Pour une confiance renforcée entre citoyens et société de l’information* [Privacy in the Era of Digital Memories. For Increased Confidence Between Citizens and the Information Society], Information Report No. 441 (2008–09), on behalf of the Commission of Laws, filed May 27, 2009.

⁶⁵ Most notably and inter alia is Spain’s Privacy Commissioner. See David Roman, *Google Contests Spain’s Privacy Laws*, WALL ST. J. (Jan. 18, 2011), available at <http://online.wsj.com/article/SB10001424052748703396604576087573944344348.html>.

⁶⁶ See, e.g., Mallet-Poujol, *supra* note 1.

⁶⁷ See Mallet-Poujol, *supra* note 1. See generally Werro, *supra* note 13.

prompts revisiting or even re-interpreting existing norms.⁶⁸

In a world with an Internet of infinite memory,⁶⁹ like ours, it stands to reason that many of us have quite possibly and irrefutably lost control over our identity—how we are perceived when our “portrait” is amateurishly assembled in the aggregate online—and possibly even our existence.⁷⁰ Consider the example of the Spanish plastic surgeon, Hugo Guidotti Russo, which spearheads the legal battle over the “right to be forgotten” in Europe.⁷¹ This particular surgeon’s fight with Google over his reputation may change the meaning of accuracy of information and freedom of expression in the digital age.⁷²

Over twenty years ago, Russo had a widely covered dispute with one of his patients over an allegedly botched breast surgery.⁷³ Since the incident, Russo has ostensibly practiced successfully or at least without incident. However, the mere mention of his name online produces a myriad of results all linked to the supposedly bungled and very gruesome procedure.⁷⁴ The results discussing the alleged twenty-year old mishap appear at the top of the results list and dramatically overshadow—even overwhelm—any and all other presumably relevant, and more recent information relating to his practice. Accordingly, Russo’s professional persona—and indeed identity (online and off)—has been forever tainted and possibly reduced to what he contends is an isolated incident, which

⁶⁸ See Lyria Bennett Moses, *Why Have a Theory of Law and Technological Change?*, 8 MINN. J. L. SCI. & TECH. 589, 595 (2007).

⁶⁹ Jeffrey Rosen, *The Web Means the End of Forgetting*, N.Y. TIMES MAG., July 25, 2010, at MM30, available at <http://www.nytimes.com/2010/07/25/magazine/25privacy-t2.html>.

⁷⁰ See, e.g., Zick Rubin, *How the Internet Tried to Kill Me*, N. Y. TIMES, Mar. 13, 2011, at WK11, available at http://www.nytimes.com/2011/03/13/opinion/13rubin.html?_r=2.

⁷¹ Flock, *supra* note 12.

⁷² Russo is one of ninety Spanish citizens who successfully lobbied Spain’s Data Protection Agency toward adopting a “right to be forgotten” mindset online. *See id.*

⁷³ Paul Sonne, Max Colchester & David Roman, *Plastic Surgeon and Net’s Memory Figure in Google Face-Off in Spain*, WALL ST. J., Mar.7, 2011, at B1, available at <http://online.wsj.com/article/SB10001424052748703921504576094130793996412.html#ixzz1Htm1hM8q>.

⁷⁴ See Flock, *supra* note 12.

was settled over twenty years ago.⁷⁵

The Internet, being the first go-to destination for people when confronted with a query, is posing significant difficulties for Russo. Many of Russo's patients and potential clients, colleagues or business associates use Internet search databases as their first destination for information and the gruesome reports presumably dissuade all but the rare, most dedicated and meticulous searchers who would take pains to go beyond these headlines. The cyber search at the very least provides a decontextualized and fragmented version of Russo's career and professional identity—the very difficulty the right to be forgotten, drawing on the Statute of Limitations rationale, purports to remedy. Such a version is due to the hierarchical nature of search engine results and their order, which, as far as is known due to trade secret issues, takes little account of chronology or other pertinent factors. Perhaps giving greater weight to time in search result ranking would serve to alleviate some of the distortions caused by dated information overshadowing more current data in the online context and therefore should be considered by informational intermediaries as they prepare to contend with cases like Russo's. If Russo succeeds in his campaign against Google and Spain successfully sends his case to the European Court of Justice,⁷⁶ it could lead to a major European ruling on online personal data and on the so-called right to be forgotten on the Internet.⁷⁷

As illustrated, eternally enshrined falsehoods—or even decontextualized truths—online boast an aura of accuracy and are not easily remedied by truths or offline context. The difficulty of proving an otherwise irrefutable fact online is amusingly illustrated by a piece in the New York Times written by Zick Rubin, aptly titled “How the Internet Tried to Kill Me.”⁷⁸ Rubin chronicles his own painful struggle with search engines and numerous fruitless attempts to prove that he was still alive after a clerical error listed

⁷⁵ See Sonne, Clochester & Roman, *supra* note 73, at B1.

⁷⁶ See e.g., Josh Halliday, *Europe's Highest Court to Rule on Google Privacy Battle in Spain*, GUARDIAN, (Mar. 1, 2011), <http://www.guardian.co.uk/technology/2011/mar/01/google-spain-privacy-court-case>.

⁷⁷ Sonne, Clochester & Roman, *supra* note 73, at B1.

⁷⁸ Rubin, *supra* note 65.

him as deceased. In reality, Rubin had merely changed professions.⁷⁹

Businesses face similar difficulties, particularly in terms of the decontextualized and fragmented nature of information online. For example, consider a popular restaurant's fate on a commonly visited review site. While majority of user reviews of New York City's Tapeo 29 are positive, culminating in an overall review of 3.5 stars, eight reviews paint a dreadful picture of the restaurant.⁸⁰ While these eight reviews comprise only six percent of the total customer reviews, they presumably may be enough to discourage future patrons from visiting the establishment. Luckily for Tapeo, these negative reviews are dispersed throughout pages of reviews potentially minimizing the negative impact, but not all restaurants are so lucky. One reviewer of Tart, a Los Angeles restaurant, posted on the review site complaining about the restaurant's turkey meatloaf.⁸¹ Tart's owner complained to the website, mainly because Tart does not serve turkey meatloaf, but the website refused to remove the one-star review.⁸² These damaging, potentially false, reviews are frequent occurrences for businesses, often leaving them with no choice but to hire consultants who

⁷⁹ *Id.* ("When I Googled myself last month, I was alarmed to find the following item, from a Wikia.com site on psychology, ranked fourth among the results: 'Zick Rubin (1944-1997) was an American social psychologist.' This was a little disconcerting. I really was born in 1944 and I really was an American social psychologist. Before I entered law school in midlife, I was a professor of psychology at Harvard and Brandeis and had written books in the field. But, to the very best of my knowledge, I wasn't dead. . . . When I complained to Wikia.com, I got a prompt and friendly reply from its co-founder, Angela Beesley, sending me her 'kind regards' and telling me that she had corrected the article. But when I checked a week later, the '1944-1997' had returned. So I e-mailed her again (subject line: 'inaccurate report that I am dead'), and got the following explanation: My change to the page was reverted on the grounds that the info included in this article was sourced from Reber and Reber's the Dictionary of Psychology, third edition, 2001. Is it possible the page is talking about a different Zick Rubin? The article is about a social psychologist.' I didn't doubt that the Dictionary of Psychology was a highly authoritative source, and yet I persisted in wondering why Reber—or, for that matter, Reber—would know more than I would about whether I was alive or dead.")

⁸⁰ See *Reviews for Tapeo 29*, YELP.COM, <http://www.yelp.com/biz/tapeo-29-new-york> (last visited Sept. 11, 2011).

⁸¹ Claire Cain Miller, *The Review Site Yelp Draws Some Outcries of its Own*, N.Y. TIMES, Mar. 3, 2009, at B1, available at http://www.nytimes.com/2009/03/03/technology/start-ups/03yelp.html?_r=1.

⁸² See *id.*

flood the net with (sometimes false) information, meant to distract from the negative or unwanted data.

It bears emphasis that the *harm* complained of in these cases is not in the mere fact of being observed, as many individuals and businesses actively *seek out* digital notoriety and arguably benefit from personalized consumerism or targeted ads. Rather, the concern lies in being—perhaps perpetually—misabeled within a web of *infinite memory*. Furthermore, the web now extends to the offline world, through for example the Internet of things, and leaves one powerless to assert or develop an image or identity independently of the online content, which now spills into—and offline reality. Plainly put, this powerlessness flies in the face of the American ideal of reinventing oneself and likely has consequences yet unknown. One obvious result might of course be to chill online speech, as individuals and indeed corporations grow increasingly weary of having voluntarily posted data irreparably manipulated or inadvertently distorted.

Of course, some may take the position of Google's Eric Schmidt, namely “if you have something that you don't want anyone to know maybe you shouldn't be doing it in the first place.”⁸³ The difficulty in that approach lies in its erroneous assumption of choice and ostensible understanding of individuals as static over time. In fact, personal identity is dynamic (now more than ever) and while one's sixteen year-old self might indeed consciously choose to post certain information about themselves (at that particular stage of life online) her thirty and even sixty year-old self (with presumably entirely different notions of what is considered appropriate) will have to live with the consequences of that supposedly “informed” decision. While it is certainly true that we must live with the irremediable consequences of the (often foolish) choices and tragically missed opportunities of our younger selves for all eternity, the distinction brought to bear by the digital age is chiefly the following: human memory is nothing if not fallible. As the French correctly observe: “la memoire est une faculte qui oublie” or, translated, “memory is a faculty that forgets.” In other words, memory is fallible and distinctively so by

⁸³ *Inside the Mind of Google* (CNBC television broadcast Dec. 3, 2009).

design to allow us to recreate the past in a way we can live within our own minds; to move on; to forgive ourselves and others for mistakes we may not be able to correct. The Internet quite simply vitiates any such forgiveness and we have yet to find a normative—or social mechanism for that matter—capable of assuaging the difficulties created by the significant change to our social order brought on by the absence of the (often healthy and normal) process of forgetting.

Even worse, as with Zick Rubin's experience, a version of one's identity that is entirely incompatible with one's own truth—or perhaps even "*the truth*"—might become entrenched as public record. The (quintessentially American) capacity to reinvent oneself, aptly illustrated most recently in the popular TV series *Mad Men*, or even to evolve in one's views and ideas, is therefore either lost or severely compromised.⁸⁴

These concerns are made worse yet by the chief and increasingly tempting "remedy" now offered by online image consulting firms (or Internet "reputation management" firms). These firms deliberately flood the net with false data in an effort to confuse and distract from damaging existing information that cannot be removed.⁸⁵ This seems to threaten any integrity or reliability the Internet may have had—and must have—for its effective survival.

⁸⁴ See Bill Keveney, *Stars of 'Mad Men' share thoughts on their characters*, USA TODAY (July 16, 2010), http://www.usatoday.com/life/television/news/2010-07-16-madmen16_VA_N.htm (describing the characters of the show and elaborating on the development of the characters—their reinvention—throughout the seasons).

⁸⁵ See, e.g., Mark Bunting & Roy Lipski, *Drowned Out? Rethinking Corporate Reputation Management for the Internet*, 5 J. COMM'N MGMT. 170, 175–77 (2000); Loretta Chao, *China Shuttters 6,600 Websites for Manipulating Information Online*, WALL ST. J. (Aug. 29, 2011, 7:57 PM), <http://blogs.wsj.com/chinarealtime/2011/08/29/china-shuttters-6600-websites-for-manipulating-information-online/> ("The websites involved 'illegal groups which claimed to specialize in deleting online news stories and posts with negative influences or hiring other netizens to spread certain kinds of information or opinions on the Internet' for deals totaling more than 1.13 million yuan (\$177,000)."); Claire Prentice, *Online Profile Spring Cleaning*, BBC NEWS (Sept. 24, 2010), <http://www.bbc.co.uk/news/technology-11381037> ("For a fee, [online reputation managers] will monitor what is written about clients and drown out unwanted comments or photographs by creating or sourcing a barrage of positive Google-friendly content.").

III. THE CIVIL LAW VIEW

A. *The Right to be Forgotten's Underlying Rationale: Throw out the Bathwater but Consider the Baby*

As previously noted, the “right to be forgotten,” in addition to being contentious and far from entrenched in European law or practice, does not lend itself to the American context. Notwithstanding these issues, the legal thinking underlying the right to be forgotten may itself be useful in reframing the right to privacy in the digital age, even given what some jurisdictions would label the absolutist U.S. approach to freedom of expression.⁸⁶ Thus for example, concepts like “*la responsabilisation de l’individu*,” roughly translated as individual responsibility, appear in both European and American practice, and help translate the E.U.’s privacy principle into American dialect.⁸⁷ For instance, the French Senate Report addressing the Right to be Forgotten stresses a “homo numericus” or “protector of his own data” approach to privacy, allowing the individual more control over his or her personal information—granting control over the duration of data retention and facilitating easier deletion of posted information.⁸⁸

Therefore, while at first glance the European approach (in a broader sense) appears to complicate matters by emphasizing the seemingly obscure notion of dignity, it ultimately helps clarify matters by adding a “duty” component for both the individuals and the information-users to the ever-nebulous right to privacy.⁸⁹

⁸⁶ Berin Szoka, “Privacy” as Censorship: Fleischer Dismantles the EU’s “Right to Forget”, TECH. LIBERATION FRONT (Mar. 9, 2011), <http://techliberation.com/2011/03/09/privacy-as-censorship-fleischer-dismantles-the-eus-right-to-forget/>.

⁸⁷ See Deborah Collier, *Privacy Working Group Holds Panel Discussion on ‘Right to be Forgotten’*, SWINE LINE (Aug. 1, 2011), <http://swineline.org/?p=5773>; Natch Greyes, *A Right to be Forgotten*, WM. & MARY L. SCH. STUDENT INTELL. PROP. SOC’Y (June 17, 2011), <http://sips.blogs.wm.edu/2011/06/17/a-right-to-be-forgotten/>.

⁸⁸ Christian Cointat, *Proposed legislation to better guarantee the right to privacy in the digital age*, Report No. 330 (2009–2010), on behalf of the Judiciary Committee, filed Feb. 24, 2010, available at http://www.senat.fr/rap/109-330/109-330_mono.html.

⁸⁹ See, e.g., Bob Sullivan, *‘La Difference’ is Stark in EU, U.S. Privacy Laws*, MSNBC, http://msnbc.msn.com/id/15221111/ns/technology_and_science-privacy_lost/t/la-difference-stark-eu-us-privacy-laws (last updated Oct. 19, 2006, 11:19 AM) (describing the various consent requirements for information usage in many parts of Europe).

Moreover, in the German view, for instance, privacy, conceived at least in part as “informational self-determination,”⁹⁰ comprises both rights and duties. The German Constitutional Court, in its now-famous Census decision, held that the “basic right [of informational self-determination] warrants [. . .] the capacity of the individual to determine in principle the disclosure and use of his/her personal data.”⁹¹ “Rather than giving exclusive control or a property interest to the data subject, the right of informational self-determination compels the State to organize data processing so that personal autonomy will be respected. Thus, the right both limits certain actions and obliges other activities on the part of the State.”⁹²

Thus, control over personal information is the power to control a measure of one’s identity. This is indispensable to the “free unfolding of personality.”⁹³ It is also a right to a “rightful portrayal of self,”⁹⁴ crucial in the digital age, as illustrated by the case of Dr. Russo above. Russo’s own loss of control over his “portrayal of self” indeed catapulted the right to be forgotten movement in Europe to where it is today, at least in part.

Another example of the duty-driven thinking, from the French perspective this time, is the recent privacy case, *Bruno B. v. Giraud et Migot*,⁹⁵ in which the *Cour de cassation* qualified its

⁹⁰ 65 BVerfGE 1, 41–52 (1983); Paul Schwartz, *The Computer in German and American Constitutional Law: Towards an American Right of Informational Self-Determination*, 37 AM. J. COMPARATIVE L. 675, 687 (1989), available at <http://www.jstor.org/stable/pdfplus/840221.pdf?acceptTC=true>.

⁹¹ Andras Jori, DATA PROTECTION LAW: AN INTRODUCTION 3.2 (2006), <http://www.dataprotection.eu/pmwiki/pmwiki.php?n=Main.SecondGeneration>. See also Eberle, *supra* note 34, at 1009 (“A more innovative aspect of informational self-determination is that it endows individuals with the right to control the portrayal of the facts and details of their lives, even if uncomfortable or embarrassing. This right empowers persons to shield hurtful truths from public scrutiny in order to safeguard reputation or other personality interests. The right also encompasses protection of personal honor as an outgrowth of personality.”).

⁹² Schwartz, *supra* note 90, at 690.

⁹³ Eberle, *supra* note 34, at 966.

⁹⁴ Eberle, *supra* note 34, at 1014.

⁹⁵ Cour de Cassation [Cass.] [Supreme Court for Judicial Matters] Paris, soc., Dec. 15, 2009, Bull civ. V, No. 2651.

earlier ruling in *Nikon France SA Co. v. Onof*.⁹⁶ The Court in *Bruno* opined that Bruno B.'s employer was justified in opening emails it assumed to be work related, since the employee, Bruno, failed to explicitly mark the documents as "private."⁹⁷ This decision significantly shifts the burden to enforce privacy expectations onto employees.⁹⁸ This in turn implies and indeed reiterates that under the Civilian notion of privacy, individuals—employees and arguably consumers by analogy—have not only broad rights but also *duties* to safeguard their privacy—obligations to enlighten would-be violators as to when they expect privacy by taking affirmative steps in that direction (such as marking an email "private"). The privacy duty not only empowers individuals but also appreciably reduces uncertainty by eliminating some of the guesswork related to people's expectations of privacy in the digital age and lessens the fear of unwanted intrusions.⁹⁹

B. Personality Rights and Countervailing Duties

The fact that Civilians typically regard rights as implying countervailing duties is often neglected in recurring discussions of those rights. In civilian tradition, privacy is considered to be a "personality right," but the concept of personality rights is alien to the common law.¹⁰⁰ Therefore, in civil law jurisdictions, privacy

⁹⁶ Cour de cassation [Cass.] [Supreme Court for Judicial Matters] Paris, soc., Oct. 2, 2001, Bull civ. V, No. 4164, available at http://www.courdecassation.fr/jurisprudence_2/chambre_sociale_576/arret_n_1159.html (holding (to the great dismay of U.S. firms) that personal dignity precluded employers from opening employee emails).

⁹⁷ *Bruno B.*, Cour de Cassation [Cass.] [Supreme Court for Judicial Matters] Paris, soc., Dec. 15, 2009, Bull civ. V, No. 2651.

⁹⁸ See Jeffries & Lindsey, *supra* note 34. The case, however, has been criticized and is merely a first step. See generally *id.* As the purpose of this piece is not to analyze European case law but rather to provide an overview of the underlying civilian philosophy as it pertains to reconceptualizing privacy, the significance of the Bruno B. ruling lies at a much higher level of abstraction, namely, the seldom discussed Civilian focus on duties as a corollary of rights and its application to privacy in the realm of analytics.

⁹⁹ See, e.g., Tazinia Vega, *A Call for a Federal Office to Guide Online Privacy*, N.Y. TIMES, Dec. 17, 2010, at B3, available at www.nytimes.com/2010/12/17/business/media/17privacy.html.

¹⁰⁰ See, e.g., Eberle, *supra* note 34, at 973 (with respect to German thinking in particular, observing that: "By comparison, American law has never really sought to

attaches to persons rather than property, irrespective of property or special constraints.¹⁰¹ In other words, “[p]ersonality rights focus on the *être*—the being—in contrast with the *avoir*—the having” and are significantly divorced from territory.¹⁰²

Privacy, as a personality right, is predicated on dignity.¹⁰³ For example, Article 2 of the German Constitution (*Grund Gesetz*) provides that: “everyone shall have the right to the free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or against morality.”¹⁰⁴ In the privacy context, the concept of dignity in Germany is encompassed within “the right to free unfolding of personality.”¹⁰⁵ In America, by contrast, dignity “falls under the rubric of privacy, including the zone of personal autonomy that emanates therefrom.”¹⁰⁶

While very important differences exist between the approaches discussed above, conceiving of the right to privacy as a personality right, free of territorial constraints, generally allows the civilian legal method to grasp privacy as a zone of intimacy delineated by the basic needs of personhood, rather than by space or ownership.¹⁰⁷ “Personality allows one to define oneself in relation to society” and can, therefore, be a very important “impression management” tool in the Internet age.¹⁰⁸

More specifically and returning to duties, as Popovici observes

define human dignity, nor human personhood or personality.”); Adrian Popovici, *Personality Rights—A Civil Law Concept*, 50 *LOY. L. REV.* 349, 349–51 (2004).

¹⁰¹ See Popovici, *supra* note 100, at 357.

¹⁰² *Id.* at 352.

¹⁰³ See generally Eberle, *supra* note 34.

¹⁰⁴ See Eberle, *supra* note 34, at 976.

¹⁰⁵ Eberle, *supra* note 34, at 966.

¹⁰⁶ *Id.* For a discussion of the many other differences that exist between the French and German concepts of privacy and dignity, and personality rights generally, compare Popovici, *supra* note 100, at 351 (discussing the French approach in which personality rights are private law rights first and foremost), with Eberle, *supra* note 34 at 979 (“German personality law is thus a creature of the Constitutional Court, as rights of privacy are of the Supreme Court.”).

¹⁰⁷ Eberle, *supra* note 34, at 980. (“Personality allows one to define oneself in relation to society.”).

¹⁰⁸ Erving Goffman, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* 208-12 (Anchor Books Doubleday 1959).

in the French context “personality rights, as subjective rights, comprise both an active and corresponding passive side. The active side is the ‘power’ of the right’s holder over the object of the right; the passive side is the ‘duty’ of others to respect this very same object.”¹⁰⁹ The dual emphasis is reflected in the controversial “right to be forgotten,” as well. Thus, (translated) “[a]dvocating in favor of a right to be forgotten must not lead to a ‘deresponsabilization’ of individuals. The ‘right to be forgotten’ does not mean that everyone will have the right to rewrite their personal history.”¹¹⁰

CONCLUSION

ZUCKERBERG IS RIGHT—IN A WAY. . .

The Civil law method’s conception of privacy as personality rights with their countervailing duties (rather than the ‘right to be forgotten per se’) appears commensurable with the goals of privacy management in an age of rapid technological advances. Using the personality rights paradigm, the primary harm consists of the loss of meaningful control over the integrity of information in identity management, rather than freedom from observation.¹¹¹ However, the seemingly broad and dignity-centric conception of the Civilian system is pragmatically tempered by a profound attachment to the notion of duties alongside rights and fosters empowerment and responsibility.

Perhaps, however, this glimpse into civilian thinking can eventually lead to an alternative approach to conceptualizing privacy in the digital context—namely, a cross-cultural one in which both Zuckerberg and Vladeck are (at least in part) correct.¹¹²

¹⁰⁹ Popovici, *supra* note 100, at 354.

¹¹⁰ See Détraigne & Escoffier, *supra* note 64.

¹¹¹ This is illustrated by the German example and its focus on “informational self-determination.” See Eberle, *supra* 34, at 980.

¹¹² In fact, comparative analysis of this sort, as former chief justice of the Supreme Court of Israel Aharon Barak observed, is an “important source of inspiration, one that enriches legal thinking, makes law more creative, and strengthens the democratic ties and foundations of different legal systems.” Adam Liptak, *U.S. Supreme Court’s Global Influence is Waning*, N.Y. TIMES (Sept. 17, 2008), <http://www.nytimes.com/2008/09/17/world/americas/17iht-18legal.16249317.html>.

That is to say that while the old notion of aloneness or seclusion is indeed *passé*, privacy as the inherent right and duty to control one's identity—and the harm to privacy being the loss of that autonomy—is very much alive. The thinking underlying the duty theory in turn, as per the European tradition, can be harnessed towards a clearer definition of privacy-stakeholder obligation and an easier flow of data across borders.

Accordingly, privacy is a matter of affirmative rather than negative rights, and consists of two parts. First, privacy can be conceived as the right to engage in individual self-definition and self-invention, rather than a right to be secluded or free from surveillance. Second, adopting civilian parlance, which correlates rights with duties, privacy is also the responsibility not to unnecessarily compromise one's own information in the naïve hope that the information will not be misused.

Thus, in order to eventually craft a transsystemically viable framework, it becomes critical to first clarify what privacy means. Furthermore, in light of the enduring and potentially devastating ramifications of privacy slip-ups and the difficulties associated with attempts to "repair" related damage via ad hoc solutions, not hospitable to American notions of expression, corporations dependent on consumer trust and users themselves share a profound interest in rethinking the basic concepts that populate the current privacy frameworks. If nothing else, European thinking, most notably the debate over the "right to be forgotten," can help advance that discussion significantly.