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Identity Crisis: The Right To Be Forgotten

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Abstract: This paper was written as a part of Volume 2 in the Queered Science and Technology Center [1]. The right to be forgotten is a concept that pertains to an individual's right to request the removal or deletion of their personal information from online platforms and search engine results. This right is rooted in the idea that individuals should have control over their data and that, under certain circumstances, the right to privacy should outweigh the public's interest in accessing that information. In this article, we explore the need for the right to be forgotten in the United States, how personal information is treated today, and what its implementation entails.

1. Introduction

"Your identity is your most valuable possession. Protect it". In *The Incredibles (2004)*, this is the last piece of advice Elastigirl gives her kids before fighting the enemy that awaits them. She could have chosen any other words but instead, she picked this specific message because she recognized the importance of an identity, but also the damage that the enemy could bring about by knowing their secret identities. While this is a kids' superhero movie, people in the United States also recognize the same importance of an identity. In fact, we care about our identity so much that we have codified identity theft as a federal crime, punishable with up to three years in prison. We care so much about preventing our identity from being stolen that we don't realize how much of our identity we willingly give up on our own. Personal information is a proxy for identity: it captures snapshots of who we are and how we act, becoming a form of property for each individual that is worthy of protection. Yet, we relinquish control of our information as the cost of living in a society, whether it be to the government or private businesses. We need the right to be forgotten to strengthen personhood within the United States and to reduce the chokehold that the government and businesses have over people.

2. How is Personal Information Treated Today?

Personal information has become valuable in the United States, especially in today's digital age. Both businesses and government organizations exploit this information for their gain. The government uses personal information for investigations, threat detection, situational awareness, and immigration screening, but the level of insight they gain and how they use that information have become questionable. In 2019, the Department of Homeland Security even denied a Palestinian student from studying at Harvard because of a friend's social media post [2]. While it is understandable that the government has access to personal information, it also has the power to use it punitively, making it necessary for people to have the ability to remove information about themselves.

For businesses, controlling personal information leads to profit, which is why they hold onto this data tightly. In 2012, Orbitz was caught marking up hotel prices for Mac users compared to Windows users [3]. By knowing our personal information, businesses can directly monetize our data, gain a competitive edge, and stay in control. Unfortunately, people don't always intentionally surrender their information. Businesses are required to ask before collecting personal information, but they do so in a confusing way. Their terms and conditions are deliberately long, complicated, and filled with legalese, making it difficult for the average consumer to understand. According to Kit Walsh, a staff attorney for the Electronic Frontier Foundation, every internet user would have to read terms and conditions for around two months every year [4]. Users hardly know what they

are agreeing to and companies can profit at the expense of individual privacy.

3. What is the right to be forgotten?

Before focusing on how the right to be forgotten can be implemented in the United States, we need to first define what this right entails. The right to be forgotten is a concept that pertains to an individual's right to request the removal or deletion of their personal information from online platforms and search engine results. This right is rooted in the idea that individuals should have control over their data and that, under certain circumstances, the right to privacy should outweigh the public's interest in accessing that information.

The right to be forgotten also applies on a wide spectrum. According to Peter Fleischer, the chief privacy counsel of Google, the right to be forgotten can be split into three different stages, each with increasing implications on other freedoms [5]. The first category is whether or not a user should have the ability to take down their posts. As it currently stands, this is the least controversial option. Most social media companies nowadays such as X and Meta already provide this ability to users to remove their posts at any point in time. The second category is the notion of reposting. If someone else reposts or shares a post that I make, can I request that the repost get taken down? This starts entering a gray area that social media companies currently define their guidelines on. The final category is whether a person should be able to take down a post that someone else makes on them. This is the most controversial sphere of the right to be forgotten as it directly contests an individual's right to privacy against another's right to expression.

For the definition of the actual right, we can codify it using two specific aspects: the right to erasure and the right to de-list. The right to erasure would empower users to delete all personal information related to them when leaving a service or application while the right to de-list would allow users to petition search engines to remove results from being shown when using their name [6]. The main goal of the right to be forgotten is to introduce liability to companies regarding our personal information and ensure that there is some form of accountability. This would allow for companies to have less ability to control personhood as the sovereign entity that they have come to be.

4. How is the right to be forgotten done in the EU?

The right to be forgotten is not a new concept and it has already been implemented in a few other countries. By focusing on its shortcomings and successes, we can gain insight on how to best implement this right in the United States. In the European Union, the General Data Privacy Regulation (GDPR) included a right to be forgotten along with several other rights aimed at protecting the personal information of users. The exact phrasing in Article 17 states that "The data subject shall have the right to obtain from the controller the erasure of personal data concerning him or her without undue delay and the controller shall have the obligation to erase personal data without undue delay" [7]. On the surface, this protection appears robust. Undue delay is given a specific time frame of a month and as long as the user can show that the data concerns them, companies are required to erase the data in question.

However, it lacks a lot of real consequences and enforcement. Several exceptions to the right to be forgotten are listed in Article 17 of GDPR. For example, the right to be forgotten can be suppressed if it is being used to comply with a legal ruling or if the data is being used to exercise the right to free speech [7]. Apart from the first category of the right to be forgotten, an individual's right to privacy and their ability to remove their information will always be at odds with another individual's or a collective's right to free speech. Offering outs for this means that the right to be forgotten will never win out. Additionally, allowing for government investigations to bypass the right to be forgotten still allows personal information to be held hostage, defeating the whole purpose of this right being introduced in the first place.

5. How can the right to be forgotten be reconciled against the First Amendment?

The main argument against the right to be forgotten in the United States is how it conflicts with the First Amendment. Critics argue that the right to be forgotten can end up becoming a glorified version of censorship. If anyone can take down articles they deem unsavory towards them, then any officials can avoid critique and the public's access to information would be severely limited. However, these arguments are far too narrow-minded. At its core, the right to be forgotten enables the freedom of expression. In *West Virginia Board of Education v. Barnette (1943)*, the Supreme Court found that the freedom of speech includes the freedom to not speak, specifically to not salute the flag [8]. Similarly, the right to be forgotten enables the right to not express oneself, which perfectly captures the spirit of the First Amendment. People and views change over time, and without the right to be forgotten, people are forced to constantly express an outdated version of themselves that does not represent them.

Additionally, the right to be forgotten can help correct some of the issues within the First Amendment and the Constitution as a whole. Critics complain about the right to be forgotten since expression is a constitutional right while privacy has not been codified anywhere in the Constitution. Privacy is implicitly protected by several amendments but due to the lack of specificity, several Supreme Court justices including Clarence Thomas believe that US citizens don't have a constitutional right to privacy [9]. Privacy is an important right that has become more pressing today with the advent of technology, and the inability of the Constitution to quickly adapt to the changing times shouldn't be an argument against the right to be forgotten. Instead, it should serve as support to introduce laws to allow for the right to be forgotten to pave the way for the Constitution to be amended to include the necessary changes.

Furthermore, the First Amendment has a glaring issue: the fact that it is not a universal right within the United States. Ever since *Citizens United v. FEC (2011)*, the Supreme Court codified that your expression means more if it is backed by a lot of money. This is inherently unequal, favoring rich people and corporations over all others. The courts have also long held the belief that the First Amendment must protect "the thoughts we hate to protect the speech we love" [10]. However, this mindset has also been a source of controversy due to its protection of hate speech, neo-Nazis, and other forms of speech that actively denigrate minorities. While the First Amendment is crucial to safeguarding free speech, it can also contribute to systemic inequality. The right to be forgotten offers a solution to this issue by empowering minority groups to express themselves more freely and without fear of being silenced.

6. How can the right to be forgotten uplift minority groups?

Building off of the previous point, the right to be forgotten would be a key to helping uplift minority groups. Firstly, while access to personal information is troubling for every group, the US has actively targeted minorities with this information. Surveillance for national security post 9/11 resulted in ethnic minorities, especially Muslim Americans, being subjected to far more surveillance and scrutiny than other groups. During the Black Lives Matter movement, protest leaders were identified through social media posts and labeled as threats or subjected to questioning by the FBI [11]. Given the lack of rights that minorities already face, the right to be forgotten would allow them to disrupt the power that the government holds over them, to potentially gain a more even footing of privacy.

However, aiming for inclusion in the status quo should not be the goal of improving the rights of minorities. We need to fix a more fundamental issue in how identity has been defined, and how the identity of minorities has been controlled. Information isn't just a proxy of identity, but it can also grow to embody identity itself. The narratives surrounding minority groups, such as indigenous communities and the queer population, often bear the imprint of those who wield the power to write and shape collective understanding. Historical accounts, literature, and media

representations play a pivotal role in constructing the identity of these marginalized groups, influencing how they are perceived by society at large. The narratives crafted by outsiders can either empower or perpetuate stereotypes, impacting the self-perception and social standing of these communities. Our knowledge about queer people originates from heteronormativity. Our knowledge about indigenous people is generally written by the colonizers. Their identities are implicitly shaped by these stories and they cannot reclaim their own culture.

By viewing the right to be forgotten under one of these lenses, we can see its true impact. Trevor Reed, an indigenous law professor from Arizona State University, put it best when he said that “Indigenous voices may need to decay or be forgotten for the sake of allowing Indigenous communities to fully live” [12]. Indigenous communities used to only pass down information orally, whereas communities and tribes had full control over the lifespan of information since they could choose when they wanted to share information or not. Now that their stories aren’t even their own, they have lost a fundamental part of their culture and identity. The permanence of the digital medium only adds to this dilemma. In the spirit of reparations, we have paid back land and money to certain indigenous groups, yet we haven’t given back their most valuable possessions: their identity and culture. Minorities should be given the ability to have their stories forgotten; to start from a blank slate and redefine their identity the way they want. Considering that we have already allowed for rights to extend to businesses and larger entities than a single person, it should not be difficult to extend this right to whole communities.

7. Concluding Thoughts

In general, the right to be forgotten holds the potential to empower individuals, particularly those from marginalized communities, to reclaim their personal information and identity. Despite some progress being made, there are still many areas where the adoption of this right has been slow. For instance, California has already passed the California Consumer Privacy Act (CCPA), which includes the right to be forgotten, but national legislature has been slow in implementing it. However, by advocating for this right with our representatives and emphasizing its significance, we can work towards national adoption. Although we may not be able to achieve full coverage of all three categories within the existing legal framework, starting with the first two categories is a step in the right direction. In the meantime, we should work on codifying the right to privacy as a constitutional right. With an explicit right detailed in the Constitution, the right to be forgotten would have a fighting chance at being expanded to encompass the full protections that it should have. Additionally, we should approve the petitions of indigenous groups to recover their cultural materials. Currently, these petitions have fallen on deaf ears or been contested on the grounds of indigenous people not having the authority to take it back, but as we have seen, they deserve to take it back on the grounds of freedom of expression. We should encourage other minority groups to follow stride, so they can reclaim their identity. By continuing to push for the right to be forgotten and advocating for the protection of personal data, we can create a more equitable and just future for all individuals, where their privacy and identity are respected and safeguarded.

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