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Così Fan Tutte: Why a right to be forgotten should not be pursued

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Così Fan Tutte: Why a right to be forgotten should not be pursued

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Abstract

In W.A. Mozart's opera *Così Fan Tutte* the protagonists are put through a social experiment to move from a state of innocence to one of experience. The goal is to understand that the idealized characterization of

a perfect mate is unrealistic. We must accept the weaknesses of others as well as the setbacks that occur in the real world even though the lessons can be bitter.

In this article we use secondary research and logical argumentation to show that the dissemination of personal information through public and private databases as well as social media is gradually educating humanity of the enlightened lessons that Mozart and his librettist Lorenzo da Ponte identified: humans are weak; everyone misbehaves; and we should accept public knowledge of the imperfections of ourselves and others. In the presence of so much information about people, how can society best protect us from potential harm? As we learn more about others through self-disclosed or other means we are noticing that while some people make egregious mistakes, most of us are moving toward a more realistic expectation of human behavior. We thus argue that the European Union directive on “the right to be forgotten” is misguided and unrealistic and suggest instead a series of principles that can protect us from the potentially harmful publication of private information.

The creation and distribution of information is happening frequently whether we are aware of it or not. As Gilani (2010) and Mayer-Schönberger (2011) indicate, we are losing the power to control our personal data to governments and corporations, or as Blanchette and Johnson (2002) articulated “The lesson of the 1980s and early 1990s is that when personal privacy is put into a cost-benefit analysis, it generally loses.” p. 35. In addition to the data that governments and corporations collect to achieve their objectives, individuals are also generating and sharing data that can cause harm. The so called “millennials” are realizing that information they put online will remain somewhere whether they want it to or not. While it is easy to post a photo, comment or video, it is much more difficult to erase it from the Internet as a whole. This is because, once posted, anybody can download and send it to friends. While some use apps such as Snapchat to minimize this issue, there are limits to any solution that purports to erase data as there are workarounds available to those who want to preserve it. The global nature of the Internet exacerbates this as content is no longer confined to the local newspaper.

People are justified in their concern about personal data being widely distributed over digital media. There have been many cases that point to abuses that people have suffered as a result of personal content being found (Mayer-Schönberger (2011). According to Rosen (2010), “a survey conducted by Microsoft found that 75% of U.S. recruiters and HR professionals are ordered to do online research about candidates; 70% reported having rejected candidates because of information that was found online” cited in (Ausloos, 2012, p. 144). In the presence of so much information about people, how can society best protect us from potential harm?

In this tension between information and the desire for privacy, “the right to be forgotten” is not an appropriate solution in part because of the many practical and societal challenges that the directive creates. It is a burdensome and expensive regulation of companies, organizations, and public entities that collect data and could result in the loss of potentially valuable information. We propose principles for future laws and regulations that put limits on the use of data and content to minimize harm to the individual.

Introduction

This paper analyzes right to be forgotten legislation and suggests alternatives. The origin of the right to be forgotten as (Rosen, 2012) explains is in French law. *Le droit à l’oubli*—or the “right of oblivion” allows criminal offenders to request that information about their crime be deleted from the public record after serving their sentence. The rationale is to give these people a chance to turn their lives around. This contrasts with the approach in the United States where the criminal history of a person is protected by the First Amendment of the Constitution (Rosen, 2012).

According to Weber (Weber, 2011) politicians have called for the right to be forgotten to be raised to the level of a human right. In 2010, France was the first government to conceive of the right to be forgotten, which was intended to require online and mobile service providers to delete emails and text messages after a certain period of time at the request of their customers. (Weber, 2011). This assumes that the email was not also stored in the recipient’s receiving server or any other server where the email may have been forwarded.

According to (Weber, 2011) in Europe the right to be forgotten is part of the right of a personality which encompasses several elements such as dignity and the right to a private life. The right of personality refers primarily to the right of the moral and legal integrity of a person not to be infringed, which includes privacy protections. In this context privacy is defined as things that the individual wants to maintain secret, which, in the context of the Internet, gives users the ability to prevent third parties from obtaining personal information. Most court cases in Europe in this area are related to requests by criminals. Their records are inaccessible to the public after a certain period of time has passed. It is deemed that such information is not in the public interest and may negatively affect a person’s rehabilitation (Weber, 2011).

In Europe the Human Rights Court in Strasburg makes decisions using “a balance of interest between the right of privacy (Art. 8 ECHR) and the freedom of speech (Art 10 ECHR)” (Weber, 2011) p. 121. While in Europe privacy protections appear to take precedence over freedom of speech, in the United States the opposite is the case. In the United States courts are more likely to protect free speech arguing that restrictions can lead to self-censorship and the suppression of speech that should be available to the public (Weber, 2011).

A challenge to the decision of any given region to pass regulation that has effects beyond its boundaries is the obligation that it imposes on global companies, which will have to comply with legal requirements that may contradict each other. This is the case for the European Union’s decision to issue a right to be forgotten legal framework that protects the privacy of European citizens independently of where in the world the data is being processed (Commission, 2010).

As noted by (Bennett, 2012) in 2011, the Spanish data protection authorities required Google to remove links to news articles that were deemed out of date and infringing on the privacy of its citizens (Greg Sterling, Jan. 17, 2011). Similarly in Italy (Greg Sterling, Jan. 3, 2011) the government announced its intentions to govern Internet content similar to broadcasters and impose “corrections” to libelous content. A previous instance happened in 2009 in Germany when two convicted felons who had completed their prison sentences requested that Wikipedia remove references to their crime from Internet listings on its pages (Schwartz).

Privacy trends in Europe are beginning to influence the American psyche. This is evident through the efforts of organizations such as common sense media to ask industry and governments to protect the privacy of children with tools such as “the eraser button,” which allows parents and kids to delete information online (CSM, 2010).

In some places, criminal records of some offenders are publicly available. In the United States certain crimes such as those relating to sex require registries to be public and force some people who have completed their sentences to be segregated from society and to continue their punishment outside of prison because of their inability to find employment due to those public records. While intended to protect society from potential predators, it creates a class of people who have completed their sentence but cannot be productive due to societal restrictions. Under the right to be forgotten mandate, people who have committed a crime could be protected.

The problem with exposing information about somebody is not that the information itself is harmful but rather what people do with such information. Discrimination against people once convicted of criminal offences such as sex offender registries can be used to deny people employment and housing. By the same token courts do not release the names of minors who have been convicted of a crime precisely to protect them against discrimination in the future.

Now everyone's life record is public and we are all vulnerable to discrimination. The major policy recommendation of this paper, therefore, is that right to be forgotten legislation be replaced with an augmentation of anti-discrimination law. Prior to that, we will discuss the status of privacy and then explain why we believe that right to be forgotten laws are misguided.

The Status of Privacy

There are multiple sources of information about us and each are treated differently. For example, in the United States agencies such as the Department of Homeland Security (DHS) are instructed to collect and retain personally identifying information (PII) as long as it is relevant and necessary to accomplish the specified purpose (DHS, 2010). Similarly the Fair Credit Reporting Act obliges credit agencies to minimize the use of out of date or inaccurate information (DCT, 2010).

Even though free speech is considered a core value in the United States, there have been instances where a court decides to protect a person whose privacy was violated by interest in the media. As early as 1931 a Hollywood studio was found guilty of identifying the maiden name of a former prostitute and main character of the movie Red Kimono ("Melvin v. Reid," 1931). Similarly in 1971 ("Briscoe v. Reader's Digest Association, Inc," 1971) a court in *Briscoe v. Reader's Digest Association, Inc.* decided against the magazine for using the real name of the plaintiff, arguing that it impeded his rehabilitation. However there have also been instances where a court decides against the plaintiff if it believes that such information serves higher societal purpose. Sometimes when a court decides not to allow the release of private information about an individual it does so to prevent this information being used for "improper purposes" ("*Nixon v. Warner Communications*," April 18th, 1978). The outcomes of these cases indicate that the United States does not always support free speech and freedom of information over privacy. However there are several reasons why we may want to push the balance toward freedom of speech.

The notion that privacy means having some sort of control over our information is difficult to enforce because data we generate by visiting sites, buying products and services or interacting with the government are collected, aggregated and sold to the point that we don't know who had the information in the first place. To give an example, a few years ago one of the authors bought a gift for a friend that was about to have a baby. We then received baby formula. Given that the only place that the name could have been shared with the baby formula manufacturer was the baby store, we realized that the store had shared our information. This type of incident is becoming common and increasingly expected.

The Fourth Amendment of the United States Constitution protects individuals against unreasonable searches. However these rights are not universal as was evident in ("Katz v. United States," 1967) when the Supreme Court stated that "the Fourth Amendment cannot be translated into a general constitutional right to privacy" (p. 350). It suggested what is now known as the third-party doctrine: "the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection" (P. 351). As a result, any information that we voluntarily provide to anybody is not expected to be private and if the party in turn shares the information with the government, it is not considered a violation of the Fourth Amendment (Marwick, Murgia Diaz, & Palfrey, 2010).

Concerns about the use of personal data have led people to suggest or devise solutions that give greater control over the information that we provide others knowingly or not. Technologists for example have developed software that allows blocking or informing about tracking. However these technologies are imperfect and often slower than alternatives without anti-tracking. Companies whose business is to harvest data are developing solutions that counteract these blocking applications.

Methods that help us anonymize ourselves, including software such as Cypherpunks or using a fake name to disguise our true identity, can eventually be traced back to us and the inconvenience can negatively affect our personal lives and productivity. There are also some technologies that are impossible to avoid if we want to participate in electronic communication, such as tracking of our computers and phones through GPS, cell towers and Wi-Fi networks.

These efforts by ourselves and others feed into a culture of fear, as (Angwin, 2014) stated in her book: "I didn't want to live in the world that I was building - a world of subterfuge and disinformation and covert actions. It was a world based on fear. It was a world devoid of trust. It was not a world that I wanted leave [sic] to my children" (p. 211).

Even with the concerns that the European Commission appears to have with private sector collection of data, there may be an even greater concern with the collection of data by U.S. government agencies and the lack of recourse that individuals have to correct or challenge it, particularly given that they often do not know the data exists.

There are many examples of the abuse that certain organizations have engaged in on the basis of information that their employees and students posted on social networking sites. Some well-known cases include Stacy Snyder, a student who was denied an education diploma in a program she had completed after school authorities disapproved of a picture of her wearing a pirate hat with the caption "drunken pirate". She went to court to try to reverse the decision on the basis of free speech, a claim that the court failed to recognize (Mayer-Schönberger, 2011). This is an example of the vulnerability of people to discrimination based on activities in their private lives.

Arguments against the right to be forgotten

This section outlines arguments against the right to be forgotten. It begins with a few of the best known ones and then proceeds to emphasize those developed by the authors. The right to be forgotten has an emotional appeal to many people. People often express a desire to govern their own data. It reinforces our belief in control and free will and this will make such laws difficult to reverse. There are many reasons why the right to be forgotten is problematic and these are outlined in the following sub-sections.

Loss of Valuable Data

Some people who advocate against the right to be forgotten are known in the literature as preservationists. They argue that our digital lives will become an online legacy and that future generations will study those of us who lived at the dawn of the digital age. As (Paul-Choudhury, 2011) indicates, in 2010 two thirds of Americans stored personal data in a cloud server. Future generations of sociologists, archaeologists and anthropologists studying our lives today will have a rich picture of our values, traditions, economic behavior and political views. This however could be jeopardized by people's ability to delete posts they do not like or by companies fulfilling requests by individuals to delete information about themselves. A potential problem identified by (Paul-Choudhury, 2011)P. 43 is that

The generations that went before us left no digital trace, and the ones that go after might leave nothing but sanitised "authorised biographies". We will be defined through piecemeal and haphazard collections of our finest and foulest moments. (Paul-Choudhury, 2011)P. 43

Free speech and freedom of information advocates argue that the right to be forgotten has the potential to erase information that future generations could use to understand human history. While we may think that our histories are not important, and even though any one of us may not have much impact on history, our individual lives tell a collective human story of our values, challenges, fights and accomplishments. As computing power improves, each of our histories and stories will become increasingly valuable as we have the capability to analyze massive amounts of data.

Some people are able to succeed in spite of their mistakes and this history should be celebrated rather than deleted. For example, James Brown was convicted of robbery at the age of 16 and spent time in prison where he helped organize a gospel quartet (J. Brown, 2002). Likewise Shon Hopwood spent over a decade in prison because of bank robberies he carried out at the age of 23. After his release he studied law and eventually became a clerk for a judge in the US Court of Appeals for the DC circuit (Memmott, 2013). As well, Cornealious "Mike" Anderson committed a robbery but was mistakenly released by clerical error and took advantage of this opportunity to successfully change his life. 13 years later the court discovered the error and convicted him. A judge then released him because he did not believe that keeping him in jail would serve any purpose (Staff, 2014). As Andrew Solomon said, "if you banish the dragons you banish the heroes" (Salomon, 2014).

Our pasts reveal not only our personal weaknesses but also societal weaknesses. In the United States and some other countries people were legally segregated based on race. People may have made comments that would be unacceptable in today's environment but might have been common in earlier eras. Legal standards also change over time as we realize what matters and what does not. For example, harsh punishments were given for recreational drug use that now seem unreasonable. Our previous mistakes can be humiliating but they also are our background history and inspire our learning. For many people these painful events are the sources of their subsequent success. Society in turn should not condemn them for the rest of their lives and instead support their improvement. Greater knowledge of backgrounds and circumstances should increase understanding that human weakness is universal and that this calls for empathy and offering opportunities to those who have transgressed.

Freedom of speech

The right to free speech is threatened when individuals or companies delete information even when other people post them on the Internet. It may include information that somebody wrote, which may be embarrassing to the person being referred to and results in a request to delete. To what extent should individuals have this right to ask others to delete information about them that they do not control? This is becoming a bigger issue when it is so easy to create and distribute content and with those who feel entitled to do this as a result of the right to be forgotten directive. (Rosen, 2011) illustrates this point by indicating that some celebrities or other well-known people may demand potentially unflattering or damaging information about them be deleted, such as when someone decides to run for public office. Such deletions may undermine democracy.

The movement toward a right to be forgotten may lead to tremendous power for companies such as Google who will have to decide which speech is offensive, obnoxious or inappropriate for society as a whole. Google's deputy general, Nicole Wong, was known as "the decider" because she determined what type of content could be posted or not on Google's US site as well as Google.fr, Google.de as well as YouTube videos, which Google also controls. It is to a certain extent unsettling to think about the fact that a single person is making decisions about permitted speech in multiple nations, and that this results from well-meaning privacy legislation. We should feel uncomfortable if individuals have the right to delete information posted about them.

While protection of free speech or the condemnation of censorship is important, our argument goes beyond this basic right into a deeper understanding of human nature and the importance of tolerance and self-restraint.

Burden on content providers and search engines

We are living in an era where more and more personal content is moving to the web through "cloud services" that are now used to store one's data, video and photos. In many professions postings that people do on blogs or other social media become part of "personal brand" and deleting content is not in their own interest. One of the problems with deleting unflattering information is that once it has gone viral it will be impossible to entirely eliminate it as it can easily resurface by reposting.

If we were to take the right to be forgotten to its limits it would mean that we would all have the right to contact companies we have interacted with in the past to have them delete information about us. Although some people may want this, it is not practical and will lead to a substantial waste of resources.

Relatively few people want to be forgotten

Proposals such as self-generated content that expires after a certain amount of time has passed, the deletion of personal data by companies when it is no longer necessary or programming electronic devices to “forget” is deeply problematic on a practical level. There is an assumption that many people want to have their own stories deleted. This is hard to reconcile with the many attempts that people make to be noticed and remembered. There are now digital cemeteries¹ intended to preserve and immortalize people’s lives. We believe that human behavior shows that the majority of us do not want oblivion but rather to be remembered.

Conflicts between jurisdictions

In an interconnected world a newspaper in upstate New York can now be read anywhere with Internet access. Decisions about privacy become complicated when the issue involves entities in more than two countries which have different perspectives about privacy and free speech. In 2006, for example, Yahoo (“Yahoo! v. La Ligue Contre le Racism et L’antisemitisme,” 2006) was obliged to stop the selling of Nazi memorabilia on its French site, where these items are illegal. Conflicts across jurisdictions will occur and result in disputes. Content published in one country may be considered entirely inappropriate in another and this requires tolerance of differing standards in other places.

¹ <http://cemetery.cottonhills.com/>; <http://qr-memories.co.uk/>

Reinforcing a culture of fear and lack of trust

The right to be forgotten and other well-intentioned legal and technological solutions that have been proposed and implemented are based on the premise that we live in a world that cannot be trusted. It reinforces the notion of fear, the idea that everything we do or say can be used against us. This is in turn further exacerbated by the media's need for audience attention through scandalous events. We should of course take some precautions and we do not advocate living as if everyone can be trusted. As (Clarke, 1995) states, even the safest of environments may expect to be subject to robbery when we leave our things unattended. But we should recognize our technical and legal limitations to be effective at it.

Transparency, anonymity and pseudonyms

Anonymity is a potential response to our increasing concerns over lack of privacy. Under this alternative, a person writes and speaks without exposing his or her identity. In the United States, the Supreme Court has ruled in favor of anonymous speech as protection of the First Amendment ("Buckley v. Am. Constitutional Law ", 1999; "McIntyre v. Ohio Elections Comm'n," 1995; "Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton," 2002). Lately there has been a call for such anonymity to be protected only when a person fears retaliation or against unwanted invasion of privacy.

Anonymity, however, is not an ideal solution for multiple reasons. Anonymizing technology is difficult to use and relatively few computer savvy individuals attempt to do so. More problematic is the fact that in an anonymous environment people display their worst traits and are not held accountable. As well, in social media, people do not wish to be anonymous but, to the contrary, share with others the joys and toils of their lives. There are also limits to anonymity for potential advertisers using Internet technologies. They want to trace potential customers.

(Zarsky, 2003) argues for the use of pseudonyms as a solution to the problem of privacy in an information age. It requires that a person use a consistent but unidentified persona that can be traced by certain entities but not others. For example, the government would have a master list of pseudonyms primarily for the purpose of payments and taxes. This does not solve the problem that some individuals might be mistakenly targeted by the government as a security risk.

Individuals will thus be encouraged to use pseudonyms when posting information about themselves on social media. However they need to keep track of the different pseudonyms that they have throughout

their lives and to be consistent in addition to the problem of trying to keep a wall between their physical and virtual personae, which is not easy to do.

Organizations such as insurance and credit agencies will find pseudonyms problematic because they need to be able to evaluate people to determine if they are good risks. Companies trying to market to people will find pseudonyms challenging because it will result in inaccurate and misleading behavioral patterns. The reason is that the frequent changing of pseudonyms will be difficult to analyze.

Given the weaknesses of the right to be forgotten and other alternatives to protect privacy, perhaps our view is closer to that proposed by David Brin (Brin, 1999) who argues that the best way of protecting privacy is by making everything so transparent that it will be obvious as to who is abusing or misusing any of our personal data. He argues that open information about everyone will balance the power between corporations who have most of the information and the rest of us. This in turn should lead to a society that feels more empowered by having access to everyone's information as well as the ability to correct mistakes. This would be difficult to achieve because, as (Zarsky, 2003) indicates, it runs almost entirely opposite the current practices.

Society should encourage the sharing of data about mistakes

Our life histories will become increasingly public as today's children are comfortable with using social media tools to communicate with family, friends and the world. Research indicates that their behavior is in fact different than those of their adult counterparts (Herring, 2008). As this generation grows we will become much more accustomed to seeing the frailties of human nature.

In a previous paper we argued that the Internet can be used effectively to reduce corruption. If the right to be forgotten is strictly enforced, negative news about a person that engaged in corruption, for example, could be deleted or hidden by filing a formal request with Google and other entities reporting the incident. This can be problematic when the court may have exonerated a person from such charges. In this case the individual will have a reason to have the information eliminated from search engine listings and news webpages. One could argue that it is in the public interest to know when people are wrongly accused of crimes and that it is not a good idea to simply delete this from the public record of the Internet.

Erasing personal stories also undermines our ability to learn from mistakes. It is natural to want a chance to start again. However it is not true that we start completely anew. We learn from past experiences and mistakes, which become part of our character and personal story.

Alternative approach – antidiscrimination legislation

While we do not agree with a right to be forgotten, we believe that harm to people from previous decisions should be minimized. How can we reconcile those two desires? Instead of supporting a right to privacy and thus a right to be forgotten, the approach should instead be to have a right to a personal life free of discrimination. The right to privacy is normally conceived as the right of people to keep their information inaccessible to others. It is for this reason that the European Union advocates the right of people to request information about them to be deleted. This conception of privacy differs from the alternative we propose: the right to a personal life instead means that the activities that we do in our private lives should not be used against us.

On that basis we believe that the mechanism that can protect people from harm is an expansion of the antidiscrimination laws. In the United States:

Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment on the basis of race, color, sex, or ethnic origin; the Age Discrimination in Employment Act (ADEA) prohibits discrimination against employees 40 years and older; and the Americans with Disabilities Act (ADA) prohibits discrimination in employment on the basis of disabilities and requires that employers reasonably accommodate individuals with disabilities who can otherwise perform a job (Houseman, 1999).

Antidiscrimination legislation is not unique in the United States as most countries have equivalents. In Europe they have an antidiscrimination directive based on the Treaty of Amsterdam (Union, 1997) which states in Article 2:

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

This legislation could be expanded to prevent organizations from discriminating against individuals who have had unflattering information posted about themselves in either online or off-line media.

This would mean that employers or service providers would not be permitted to take actions that could harm a person on the basis of information posted on websites that is unrelated to a person's ability to perform his or her job. Workplace discipline should be based on the quality of the work performed at a job and not on the basis of the activities that one does in personal time. In the case of people who are employed with flexible time, evaluation should be based on the activity that has been contracted.

Similarly within the context of residential rentals or services to be performed, a person should not be allowed to discriminate on the basis of the activities that he or she engages in that do not directly affect his neighbors. For example, if he engages in drug consumption within the confines of his home and this is posted on an Internet site, an employer or landlord should not be allowed to take action on this basis. However if a person arrives to a workplace under the influence of drugs or alcohol this could be grounds for dismissal, for example.

Antidiscrimination legislation in any country could be modified to say something like this:

The nation prohibits discrimination on the grounds of age, disability, religion or belief, and sexual orientation. Discrimination is also prohibited on the basis of information about personal activities that are not directly related to the ability to perform a job.

The intent of laws like the right to be forgotten is to protect individuals from the mistakes of their past. This affects criminals the most because of the perception that they are dangerous to others. These are, of course, problematic individuals who have already served their time but continue to be punished by society. The problem we believe is not with the existence of such information but with what people do with it. People should not be discriminated against for the errors of their past or for current activities, hobbies and relationships that do not have a negative impact on others. A societal ethos that avoids discrimination against criminals will require better efforts at rehabilitating prisoners to make them productive members of society.

Enforcement of antidiscrimination laws often involves the challenge of disciplining an employee. Discrimination can be direct or indirect. In Australia, for example, it happens when "a person treats or proposes to treat someone unfavorably because of a personal characteristic protected by law." (VEO&HRC, 2012) Indirect discrimination happens when "a person imposes or proposes to impose a requirement, condition or practice that has, or is likely to have, the effect of disadvantaging people with

a protected attribute, and that is not reasonable” (VEO&HRC, 2012). Protection against discrimination is now even more pressing when there is a perception in the United States of a “post-racial” America where the presumption appears to be that discrimination is rare and judges are skeptical of these claims (Jones, 2010).

People are subject to surveillance and discrimination in the workplace. Candidates might be denied employment because of an illness. For example, a genetic screening could inform a potential employer of predisposition to certain diseases that the employer may not want to pay for given escalating health care costs. The surveillance however does not end at the workplace as some companies may prevent their workers from smoking tobacco, engaging in dangerous hobbies, or attempt to control their diet as a condition for employment (W. S. Brown, 1996). Therefore violations of privacy that happen in workplaces may become worse if governments or private entities gather even more data that can negatively affect us.

We thus argue that the problem is not with the data gathered but from how it is used. Rather than impeding those who produce and share information, the emphasis should be on discouraging its abuse. The thing that people do not want is to be discriminated against and laws should emphasize this instead. We believe that governments should strive to find a balance of incentives that would prevent abuses due to the availability of data.

In 1992 (Velasquez & Velazquez, 2002) proposed three conditions that should govern the ethics of workplace privacy. We believe these should be expanded to the manner in which organizations use data that has the potential of harming individuals. They proposed these conditions (p. 399):

(1) relevance - an employer should constrain areas of inquiry into the employee's lives to those clearly and distinctly related to employment.

(2) consent - an employee should be given the right to withhold consent prior to any query that might violate privacy.

(3) methods - an employer should distinguish between methods of inquiry that are reasonable and customary and those which are of questionable ethical grounding.

In addition to the expansion of nondiscrimination legislation, education is an important component of our proposal. Education is necessary to establish guidelines for employers or service providers to ensure that people are not discriminated against on the basis of information about private lives. These will entail

publishing a code of ethics in organizations that make people comfortable with the use of data in ways that do not harm people. Education is also necessary for individuals to avoid engaging in unethical behavior and restrain themselves from posting information that could potentially harm someone.

A primary reason people are concerned with their privacy is that we are afraid of being discriminated against. If somebody sees a picture of someone on the beach they may assume he is lazy and does not work enough. If people see a posting of a woman engaged in a favorite hobby, say salsa dancing, they may think that she may be unfaithful to her husband. Perhaps someone could be offended and report this to an employer. While this unfortunate outcome could occur, it should become less common as our personal lives become more open to the eyes of others.

We thus argue that instead of having records deleted, governments make an effort to reduce the stigmatization of people based on previous events in their lives. This, of course, is easier said than done considering that emotion is not easy to control. For example, there was a negative public reaction when in 1963 Supreme Court Judge William O. Douglas, at the time 64 years old, married a 23 year old law student (UPI, 1963).

Antidiscrimination legislation will tend to reduce concerns related to free speech and differing jurisdictions. We thus propose legal protections that punish actual abuses instead of potential abuses as in the case of the right to be forgotten directive, as well as awareness programs and curricular inclusion of civility and tolerance.

Conclusion

Up to this point the arguments that have been made by other scholars opposed to right to be forgotten legislation emphasize two main points. One is that it impedes free speech and the other is the onerous burden that it places on anyone that manages a website that potentially has information that someone could deem unflattering. We agree with these but also add a third which is consistent with the argument about imperfect human beings that we are making in this paper. The right to be forgotten can be justified by the belief that imperfect people will continue to be judgmental even in the presence of antidiscrimination laws. While this may occur we expect this issue to decline over time due to increased knowledge of the universality of human weaknesses.

We believe that the dissemination of personal information through public and private databases as well as social media is gradually educating humanity of the philosophical lessons identified by W.A. Mozart and his librettist Lorenzo da Ponte in the opera *Così Fan Tutte*, where the protagonists are put through a social experiment to move from a state of innocence to one of experience. The goal is to understand that the idealized characterization of a perfect mate is unrealistic. We must accept the weaknesses of others as well as the setbacks that occur in the real world even though the lessons can be bitter. Like the characters in the opera we are all learning that humans are weak; everyone misbehaves; and that we can accept public knowledge of the imperfections of ourselves and others.

The increased scrutiny on people's lives in recent years and the inability of people to repress knowledge of their mistakes means that we are all being forced to recognize each other's weaknesses. While right to be forgotten legislation may protect the reputations of some, this short term benefit will come at the cost of impeding the growth of humanity toward a more realistic understanding of our natures and impede our movement toward a more empathetic society.

References

- Angwin, J. (2014). *Dragnet Nation: A Quest for Privacy, Security, and Freedom in a World of Relentless Surveillance*: Macmillan.
- Ausloos, J. (2012). The 'Right to be Forgotten' – Worth remembering? *Computer Law & Security Review*, 28(2), 143-152. doi: <http://dx.doi.org/10.1016/j.clsr.2012.01.006>
- Bennett, S. C. (2012). The "right to be forgotten": reconciling EU and US perspectives. *Berkeley journal of international law*, 30(1), 161.
- Blanchette, J.-F., & Johnson, D. G. (2002). Data retention and the panoptic society: The social benefits of forgetfulness. *The Information Society*, 18(1), 33-45.
- Brin, D. (1999). *The transparent society: Will technology force us to choose between privacy and freedom?* : Basic Books.
- Briscoe v. Reader's Digest Association, Inc, No. 4 Cal. 3d 529 483 P.482d 434 (Supreme Court of California 1971).
- Brown, J. (2002). *James Brown: The godfather of soul*: Basic Books.
- Brown, W. S. (1996). Technology, workplace privacy and personhood. *Journal of Business Ethics*, 15(11), 1237-1248.
- Buckley v. Am. Constitutional Law 182 (US 1999).
- Clarke, R. V. (1995). Situational Crime Prevention. *Crime and Justice*, 19, 91-150. doi: 10.2307/1147596
- Commission, E. (2010). Data protection reform – frequently asked questions. [http://europa.eu/rapid/press-release MEMO-10-542_en.htm](http://europa.eu/rapid/press-release_MEMO-10-542_en.htm)
- CSM. (2010). Common Sense Media Calls for New Policy Agenda to Protect Kids and Teens' Privacy Online

Retrieved August 9, 2014, from <https://www.common sense media.org/about-us/news/press-releases/common-sense-media-calls-for-new-policy-agenda-to-protect-kids-and>

DCT. (2010) Protecting Privacy in Online Identity: A Review of the Letter and Spirit of the Fair Credit Reporting Act's Application to Identity Providers. Center for Democracy and Technology.

DHS. (2010). *Guide to implementing privacy*. DHS Retrieved from <http://www.dhs.gov/xlibrary/assets/privacy/dhsprivacyoffice-guidetoimplementingprivacy.pdf>.

Gilani, S. (2010). Viktor Mayer-Schönberger, Delete: the Virtue of Forgetting in the Digital Age. *Human Rights Law Review*, 10(4), 785-789.

Greg Sterling. (Jan. 3, 2011). Italy to Regulate YouTube & Other Video Sites Like TV Stations. *Search Engine Land*. <http://searchengineland.com/italy-to-regulate-youtube-other-video-sites-like-tv-stations-60098>.

Greg Sterling. (Jan. 17, 2011). Spanish Want Google To Police Libel On The Internet. *Search Engine Land*. <http://searchengineland.com/italy-to-regulate-youtube-other-video-sites-like-tv-stations-60098>.

Herring, S. C. (2008). Questioning the generational divide: Technological exoticism and adult construction of online youth identity. *Youth, identity, and digital media*, 71-94.

Houseman, S. (1999). Flexible Staffing Arrangements. Retrieved August 30th, 2014, from http://www.dol.gov/dol/aboutdol/history/herman/reports/futurework/conference/staffing/9.7_discrimination.htm

Jones, T. (2010). Anti-Discrimination Law in Peril. *Mo. L. Rev.*, 75, 423.

Katz v. United States, 347 (Supreme Court 1967).

Marwick, A. E., Murgia Diaz, D., & Palfrey, J. (2010). Youth, privacy and reputation. *Literature Review. The Berkman Center for Internet & Society at Harvard University*. Online http://cyber.law.harvard.edu/publications/2010/Youth_Privacy_Reputation_Lit_Review_found_9, 2010.

Mayer-Schönberger, V. (2011). *Delete: the virtue of forgetting in the digital age*: Princeton University Press.

McIntyre v. Ohio Elections Comm'n, 334 (U.S. 1995).

Melvin v. Reid, No. 297 91 (Court of appeal of California forth appellate district 1931).

Memcott, M. (2013). The Incredible Case Of The Bank Robber Who's Now A Law Clerk. August 9th, from <http://www.npr.org/blogs/thetwo-way/2013/09/10/219295368/the-incredible-case-of-the-bank-robber-whos-now-a-law-clerk>

Nixon v. Warner Communications, 435 598 (Supreme Court of the US April 18th, 1978).

Paul-Choudhury, S. (2011). Digital legacy: the fate of your online soul. *New Scientist*, 210(2809), 41-43.

Rosen, J. (2010). The web means the end of forgetting. *The New York Times*, 21.

Rosen, J. (2011). Deciders: The Future of Privacy and Free Speech in the Age of Facebook and Google, *The. Fordham L. Rev.*, 80, 1525.

Rosen, J. (2012). The right to be forgotten. *Stanford law review online*, 64, 88.

Salomon, A. (2014). How the worst moments in our lives make us who we are. *TED Talks*. Retrieved Sept. 3rd., 2014, from http://www.ted.com/talks/andrew_solomon_how_the_worst_moments_in_our_lives_make_us_who_we_are?language=en

Schwartz, J. (Nov. 12, 2009). Two German Killers Demanding Anonymity Sue Wikipedia's Parent. *N.Y. Times*. Retrieved from <http://www.nytimes.com/2009/11/13/us/13wiki.htm>

Staff. (2014). Man who went to prison 13 years late ordered released: CBS News.

Union, E. (1997). Treaty on European Union (consolidated version) Treaty of Amsterdam. from <http://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=48624b6b2>

UPI. (1963, August 7th 1963). The marrying justice. *The Straits Times*. Retrieved from <http://eresources.nlb.gov.sg/newspapers/Digitised/Article/straitstimes19630807.2.18.11.aspx>

- Velasquez, M. G., & Velazquez, M. (2002). *Business ethics: Concepts and cases*: Prentice Hall Upper Saddle River, NJ.
- VEO&HRC. (2012). Direct and indirect discrimination - simplified. Retrieved August 30th, 2014, from <http://www.victorianhumanrightscommission.com/www/simplified-definitions>
- Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton, 150 (US 2002).
- Weber, R. H. (2011). The Right to Be Forgotten. *More than a Pandora's Box*, 2.
- Yahoo! v. La Ligue Contre le Racism et L'antisemitisme, 433 1199 (US Court of Appeals for the Ninth Circuit 2006).
- Zarsky, T. Z. (2003). Thinking outside the box: considering transparency, anonymity, and pseudonymity as overall solutions to the problems in information privacy in the internet society. *U. Miami L. Rev.*, 58, 991.