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The European right to be forgotten: A challenge to the United States Constitution's First Amendment and to professional public relations ethics

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ABSTRACT

This paper explains how the European right to be forgotten violates the free flow of information in society, as evidenced by conflicts with the United States Constitution and ethical principles of professional communicators worldwide. As Europe imposes new data protection laws and incorporates the right to be forgotten that promotes censorship through search engine de-linking, United States constitutional law scholars ponder the implications of World Wide Web censorship, while journalists and public relations professionals struggle to understand how accurate transparent communication could occur in an ecosystem that allows for arbitrary information removal and the creation of memory holes. This article explains why the European notion of the right to be forgotten challenges U.S. constitutional law and professional public relations ethics, imperiling the online marketplace of ideas and eroding disclosure of information. The European Data Protection Directive and recent right to be forgotten movements directly conflict with the U.S. Constitution's First Amendment and professional communications ethics codes. The First Amendment of the U.S. Bill of Rights indicates the specific rights of citizens to freedom from government intervention into freedom of expression and freedom of the press. Recent actions by Google to honor European requests to remove data upon request collide with First Amendment theoretical concepts and contemporary constitutional law. Both the Public Relations Society of America (PRSA) and the International Association of Business Communicators (IABC) construct ethical principles for members that call for the active promotion of the free flow of information and the ethical disclosure of information. The European Data Protection Directive's right to be forgotten silences these core professional communication ethics and more significantly imperils the robust information exchange in a global society, ultimately altering the discourse and debate in democratic countries. This paper addresses the status of the right to be forgotten in the United States and indicates how adopting such a provision in the United States would violate First Amendment theories, as evidenced by the Marketplace of Ideas Theory, the Meiklejohnian Theory, and the Absolutist Theory, and would counter traditional public relations ethics codes, conducted in a context of dialogic ethics that calls for adherence to core values advocating for transparency, disclosure, and free flow of information.

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1. Introduction

The implementation of the European Data Protection Directive's "right to be forgotten" challenges United States Constitutional principles and conflicts with well-embraced communications theories to promote information exchange in a free society. While consumer advocates in the United States today urge the Federal Trade Commission to adopt similar right to be forgotten provisions similar to Europe laws regulating online activities, the movements challenge First Amendment theoretical frameworks, notably the Marketplace of Ideas Theory, the Meiklejohnian Theory, and the Absolutist Theory. While it has been asserted that privacy law in the U.S. may be applied or adapted to conform with the right to be forgotten in the U.S., the implementation of this new stream of privacy law controverts First Amendment principles. Digital privacy, concerned with the secure maintenance of online personal information, has conjured new dimensions in the right to privacy debate in the U.S. and in Europe. The implementation of the right to be forgotten in an era of big data assumes the creation of a grand arbiter who administers decisions on content removal, thus threatening the free flow information by placing the power of content judgments in a centralized, non-judicial source. The arbitrary creation of a private "data controller" offends the First Amendment by precluding the free flow of information, creates memory holes, and endangers the robust debate that characterizes the nation and serves as a foundation for the nation's democracy. The First Amendment, ratified in 1791, has endured numerous disruptive media forces, including the advent of mass-produced newspapers, radio, television, satellite, cable, and online search engines. The tenets of the First Amendment are integral to the United States experience of freedom of expression and protection from government intervention in media operations. Today, professions like journalism and public relations guided by ethics codes that advocate for the free flow of information and disclosure in society, are now forcefully rejecting movements to eradicate data under the "right to be forgotten."

At issue in this debate is the "right to be forgotten," a notion that has captured the attention of scholars and legal analysts in the United States and abroad. The notion of the right to be forgotten, which may be defined as third parties "forgetting" your past, is a topic of controversy among legal scholars, government officials, and the private enterprises that now confront the issue of government intervention in data control matters. The term, "right to be forgotten," was proposed in the 2012 draft of the European General Data Protection Regulation in Article 17, stipulating that an individual should have the right to apply for data removal (Gilbert, 2015). The European terminology has encompassed various characterizations such as "oblivion," allowing for the full deletion of certain public data, to the "right of erasure," removing personal data at the subject's request, leading to confusion among legal scholars about the precise definition and implications of the right to be forgotten (Ambrose & Ausloos, 2013). Today, the right to be forgotten remains a topic of concern in light of the European Data Protection Directive as search engines such as Google move to implement the regulation. The European Parliament and Council modernized the data protection rules in place since 1995 by incorporating the right to be forgotten and the right to notification when data has been hacked (European Commission News Release, 2015). The moves follow numerous memoranda and public statements indicating the legal grounding for the Act, including a May 2014 ruling by the Court of Justice of the European Union found that certain users may ask the search engines to remove results for queries involving the person's name. Google stipulates the results shown must be "inadequate, irrelevant, no longer relevant, or excessive" (Google, 2015a,b, FAQ), setting forth qualitative measures that can be arbitrarily enforced.

The administration of right to be forgotten provisions present complications, particularly for media companies and search engines operating on U.S. soil. For opponents of both the regulation and the implementation of the right to be forgotten for search engines in the U.S., a wealth of media law issues apply, including constitutional arguments about the First Amendment. Constitutional theories of the First Amendment are relevant as activists opposing government regulation of the data assert violations of the free flow of information. The Marketplace of Ideas Theory, with origins on the works of John Milton and John Stuart Mill, was articulated by U.S. Supreme Court Justice Oliver Wendell Holmes, Jr. in 1919 in a Supreme Court dissenting option in Abrams v. United States, who stated "ultimate good desired is better reached by trade in ideas – the best test of truth is power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution" (Abrams v. United States, 1919). The ubiquity of the Internet enables global communications channels, thus broadening the marketplace to encompass ideas created by both journalists and citizens. Closely tied to principles of market economics, the Marketplace of Ideas Theory resonates throughout American culture and has served as a foundation for the public relations profession, as evidenced by the PRSA ethics code of conduct urging advocacy for the free flow of information (PRSA, 2016). A second theory that may be invoked to counter the application of the right to be forgotten in the United States is the Meiklejohnian Theory, a tenet that holds freedom of expression is a means to successful self-government, thus a fundamental aspect of democracy (Pember & Calvert, 2015). Lastly, constitutional scholars may point to the Absolutist theory of the First Amendment to validate that government may adopt no laws to abridge freedom of expression. Articulated by U.S. Supreme Court Justice Hugo Black, the Absolutist theory has not prevailed, but instead has been limited by laws created to restrict speech for national security and public tranquility (Middleton & Lee, 2011). However, the Absolutist theory provides a central argument against government intervention into media and the free flow of information.

With an adherence to professional values and the proliferation of ethics in public relations curriculum (Hutchinson, 2002), this article addresses professional code provisions protecting the free flow of information and disclosure requirements found in leading public relations codes of ethics, paving the way for dialogic communication and ultimately the practice of dialogic ethics. The Public Relations Society of America (PRSA) Code of Ethics and the International Association of Business Communicators (IABC) Code of Ethics call for sustained access to an open marketplace of ideas. The incorporation of the