

THE ANGLO-AMERICAN/CONTINENTAL PRIVACY DIVIDE? HOW CIVILIAN PERSONALITY RIGHTS CAN HELP RECONCEPTUALIZE THE “RIGHT TO BE FORGOTTEN” TOWARDS GREATER TRANSNATIONAL INTEROPERABILITY¹

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The European Court of Justice’s much-maligned decision in Google v Costeja González appears to compel search engines to remove links to certain impugned search results at the request of individual Europeans (and potentially by others beyond Europe’s borders). Further complicating an already thorny situation is the Court’s failure to impart much-needed practical guidance in Costeja.

What is more, Costeja may inadvertently and ironically have the effect of appointing (chiefly American) “data controllers” as unwitting private censors; arbiters of the European public interest. Indeed, the decision may be deemed a culmination of the growing divergence between Anglo-American and Continental approaches to privacy significantly extending beyond the United States to the United Kingdom. It further reflects internal normative contradictions within the continental tradition and emphasizes the urgency of reconceptualizing digital privacy in a more transsystemically viable fashion in Europe and beyond.

In light of the above, informational privacy must ultimately be retheorized in a manner that would presumably obviate—or at the very least palliate—the need for a stand-alone, ill-defined and under-theorized “right to be forgotten,” as set out at pains in Costeja. It is in essence a procedural right predicated on the impracticable idea that individuals “own” data, rather than a right to their identity itself and the perception thereof. It therefore fails to accord with the long-established civil tradition of personality rights, which, unlike its common law counterpart, emphasizes personhood not property. In the end, a more robust construction of privacy, predicated on

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¹ In the age of digital decontextualization—if not infinite memory; see Meg Leta Ambrose, “It’s About Time: Privacy, Information Life Cycles, and the Right to be Forgotten” (2013) 16:2 Stan Tech L Rev 369 [Ambrose].

protecting identity, would allow for a more nuanced balancing of privacy and freedom of expression.

L'arrêt très décrié rendu par la Cour de justice européenne, dans l'affaire Google c. Costeja González semble obliger les moteurs de recherche à éliminer les liens vers certains résultats de recherche contestés à la demande de citoyens européens (et possiblement d'autres, dépassant les frontières de l'Europe). Le silence de la Cour dans l'arrêt Costeja quant aux aspects pratiques, pourtant fort nécessaires, complique derechef une situation déjà très épineuse.

Qui plus est, l'arrêt Costeja peut, par inadvertance, et de façon ironique, se traduire par la nomination (principalement aux États-Unis) de « responsables du traitement des données » en tant que censeurs privés à leur insu, d'arbitres de l'intérêt public européen. D'ailleurs, l'arrêt peut être taxé de summum de la divergence croissante entre les approches anglo-américaine et « continentale » de la vie privée.

Il reflète, en outre, les contradictions normatives internes qui existent au sein de la tradition européenne et souligne l'urgence de la nécessité de repenser le concept de protection des renseignements personnels numériques d'une façon plus viable face à tous les systèmes concernés en Europe et ailleurs.

À la lumière de ce qui précède, la confidentialité des renseignements doit être repensée de façon à faire disparaître, ou à tout le moins, à pallier la nécessité d'un « droit à l'oubli » autonome mal défini et mal expliqué tel que le présente laborieusement l'arrêt Costeja. Il s'agit essentiellement d'un droit procédural fondé sur l'idée impossible à mettre en œuvre selon laquelle les personnes « possèdent » les données plutôt qu'un droit propre à leur identité et à sa perception. Cela ne correspond aucunement à la longue tradition civiliste de droits de la personnalité qui, contrairement au droit correspondant en common law, met l'accent sur l'identité individuelle plutôt que sur la propriété. En fin de compte, une conception de la vie privée plus solide fondée sur la protection de l'identité permettrait la création d'un équilibre plus nuancé entre la vie privée et la liberté d'expression.

“We have isolated pages of books placed in thousands of different libraries [...], and from those we draw a social image of a subject, which should not be misinterpreted in order to protect the right to personal identity.”² [translated from Italian original]

The European Court of Justice’s much-maligned decision in *Google Spain SL, Google Inc v Agencia Española de Protección de Datos, Mario Costeja González*,³ handed down in May of 2014, appears to compel search engines—most notably Google, which it deems a “data controller”—⁴ to remove links to certain impugned search results at the request of individual Europeans (and potentially by others beyond Europe’s borders).⁵ It so held by virtue of the “right to be forgotten,” recently enshrined in Article 12 of the revised 1995 *European Data Protection Directive 95/46/EC*.⁶ This addition was long-criticized by American companies and jurists alike as signaling the “biggest threat to freedom of expression on the Internet in the coming decade.”⁷ Further complicating an already thorny situation is the Court’s failure to impart much-needed practical guidance in *Costeja*. More importantly perhaps, the decision underscores “the right to be forgotten”’s

² Giusella Finocchiaro, “Identità personale su Internet: il diritto alla contestualizzazione dell’informazione” (2012) 28:3 *Il diritto dell’informazione e dell’informatica* 383 at 391.

³ *Google Spain SL, Google Inc v Agencia Española de Protección de Datos, Mario Costeja González*, C-131/12, [2014] (Grand Chamber), online: Info Curia <www.curia.europa.eu/juris/document/document.jsf?text=&docid=152065&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=129070> [*Costeja*]. In *Costeja*, the ECJ held that by virtue of the “right to be forgotten” (as set out under Article 12 of ECJ’s *European Data Protection Directive*), a search engine is under a duty to remove links to irrelevant and outdated information that is not in the public interest upon individual request.

⁴ *Ibid* at paras 41–43.

⁵ *Ibid* at para 100. See e.g. Paul Bernal, “Is Google undermining the ‘right to be forgotten’?”, *CNN Opinion* (7 July 2014), online: <www.cnn.com>: As Bernal explains, only search results arising from a search under a particular name are removed. Neither the underlying source material itself, nor the same (contentious) search results obtained when searched for in any other way are required to be removed.

⁶ EC, *Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data*, [1995] OJ, L 281/ 31. See generally Nathalie Mallet-Poujol, “Le droit à l’oubli numérique” [The Right to Digital Oblivion] (Address to the Université de Montréal, 8 February 2011), online: [Chaire LR Wilson](http://www.chairelrwilson.ca/videos/conf_droit_oublie.mp4) <www.chairelrwilson.ca/videos/conf_droit_oublie.mp4> (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”, *The New York Times* (21 August 2011) BU3, online: <www.nytimes.com>.

⁷ See Jeffrey Rosen, “The Right to be Forgotten” (2012) 64 *Stan L Rev Online* 88, online: <www.stanfordlawreview.org/online>. Many American scholars view this topic as the biggest threat to free speech on the Internet in the coming decade.

divisive character across common law⁸/civilian lines—now extending beyond the United States.⁹ Thus for instance, UK Justice Minister Simon Hughes vociferously pledged to oppose the *Costeja* decision, which he considered tantamount to censorship,¹⁰ not to mention unenforceable.¹¹ More recently, the UK House of Lords European Union Committee conducted an inquiry¹² into the right to be forgotten and was quite critical in its report, concluding that the right “must go” for it is “misguided in principle and unworkable in practice,” and advising the UK government to fervently oppose it.¹³

These comments coincide with Google itself restoring a number of links that it had initially suppressed¹⁴ at the request of individual Europeans.¹⁵ It did so after first disapproving of¹⁶ and subsequently attempting to comply with *Costeja*,¹⁷ presumably in an effort to placate its many European detractors.

⁸ Primarily Anglo-Saxon.

⁹ *Supra* note 6.

¹⁰ “We have criticized the government of China [...] for closing down people’s right to information. There are other countries with strict information access. It is not a good position for the EU to be in to look as if it is countenancing restrictions in the access of the citizen to access to information because it could be a very bad precedent.” Stuart Lauchlan, “Britain pledges to fight Europe’s Right to be Forgotten bad law,” *diginomica* (10 July 2014), online: <www.diginomica.com>.

¹¹ Owen Bowcott, “EU ‘right to be forgotten’ law unenforceable, says justice minister”, *The Guardian* (9 July 2014), online: <www.theguardian.com>:

[Justice Minister] Hughes said:

If politicians think they can delete findings about their expenses, that’s not going to happen. If people think they can delete their criminal history, it won’t occur. It looks to me as if it may be an unmanageable task. It will be a phenomenal task. It’s not technically possible to remove all traces of data loaded on to the internet from other sources. You can’t exercise the right to be forgotten. The information system could not be made to do it.

¹² UK, House of Lords, European Union Committee, *EU Data Protection law: a right to be forgotten?* (London, UK: The Stationary Office, 30 July 2014), online: <www.publications.parliament.uk/pa/ld201415/ldselect/ldcom/40/40.pdf> [House of Lords, *EU Data Protection*].

¹³ *Ibid* at para 62.

¹⁴ See e.g. “Google restores links to some media articles it erased”, *CBC News* (4 July 2014), online: <www.cbc.ca>.

¹⁵ These may be as pedestrian as some unhappy with online reports of a couple having sex on a train, a soccer referee’s dismissal or French office workers making post-it art, *inter alia*.

¹⁶ Rhiannon Williams, “Eric Schmidt: ECJ struck wrong balance over right to be forgotten”, *The Telegraph* (15 May 2014), online: <www.telegraph.co.uk>.

¹⁷ Google did so by releasing a web form (available online: www.support.google.com/legal/contact/lr_eudpa?product=websearch) to be filled out by Europeans invoking said right. It promised that it would “assess each individual request and attempt to balance the privacy rights of the individual with the public’s right to know and distribute information.” See Jules Polonetsky, “Google Responds Promptly to ECJ Ruling on “Right to be Forgotten””,

Telling for our purposes are Google's Peter Barron's comments to BBC News that the company is "learning as we go." For not only are Google and other such private entities incomprehensibly saddled with the gargantuan task of determining how to "balance the need for transparency with the need to protect people's identities"—¹⁸ a highly delicate and divisive assignment normally exclusively reserved for courts (especially constitutional courts) or policy makers—but in the absence of much-needed interpretive guidelines, the deemed "data controller" seems to have understandably, however lamentably, resorted to an *ad hoc* approach. Cryptically, the Court in *Costejo* instructed Google to suppress "inadequate, irrelevant or no longer relevant" links and said little else other than that Google was to take the "public interest"—a fluid concept, subject to differential interpretation in the US and Europe respectively—"into account."¹⁹ As one online reputation management (ORM) firm executive remarked in reference to Google's replies to individual requests "to be forgotten": "no one really knows what the criteria is [...] So far, we're getting a lot of noes. It's a complete no man's land."²⁰ This is so despite Google's legal counsel's diligent attempt to outline the company's underlying thinking on this point.²¹ However, transparency and accountability are notoriously difficult to cultivate when balancing delicate constitutional values that judges themselves struggle with in most democracies. Indeed, such balancing draws passionate censure and denunciation when performed by seasoned high court judges²² with

Future of Privacy Forum (30 May 2014), online: <www.futureofprivacy.org>. It further established a panel of experts to aid in the process.

¹⁸ Dave Lee, "Google reinstates 'forgotten' links after pressure", *BBC News* (4 July 2014), online: <www.bbc.com>.

¹⁹ At least to our knowledge (which itself raises the question of transparency and accountability) beyond the much-cited criteria of "inadequate", "irrelevant" or "no longer relevant", nothing else was proffered by the Court by way of guidance.

²⁰ Mr. Wadsworth of the UK ORM firm Igniyte, referring to the ECJ's recent decision in Mark Scott, "European Companies See Opportunity in the 'Right to Be Forgotten'", *The New York Times* (8 July 2014), online: <www.nytimes.com>.

²¹ See e.g. *inter alia*: Brice Dickson, *Judicial Activism in Common Law Supreme Courts* (Oxford: Oxford University Press, 2009). David Drummond, "We need to talk about the right to be forgotten", *The Guardian* (10 July 2014), online: <www.theguardian.com>. Google's Chief Legal Officer said to The Guardian:

When it comes to determining what's in the public interest, we're taking into account a number of factors. These include whether the information relates to a politician, celebrity or other public figure; if the material comes from a reputable news source, and how recent it is; whether it involves political speech; questions of professional conduct that might be relevant to consumers; the involvement of criminal convictions that are not yet "spent"; and if the information is being published by a government. But these will always be difficult and debatable judgments.

²² That is, cries of judicial activism. See e.g. Kermit Roosevelt III, *The Myth of Judicial Activism* (New Haven: Yale University Press, 2006). See also Marc Dawson, Bruno De Witte & Elise Muir, eds, *Judicial Activism at the European Court of Justice* (Northampton: Edward Elgar Publishing, 2013).

constitutional authority, *a fortiori* when this highly sensitive exercise is performed or attempted by inexperienced and reticent corporate actors, who are presumably lacking the requisite legitimacy for such matters.²³

Therefore, *Costeja*, which Jonathan Zittrain aptly described as a bad solution to a very real problem,²⁴ may inadvertently and ironically have the *effect* of appointing (chiefly American) “data controllers” as unwitting private censors—arbiters of the European public interest. What is more, the decision may be deemed a culmination of the growing divergence between Anglo-Saxon and continental approaches to privacy²⁵ significantly extending beyond the United States to the United Kingdom. In effect, as previously noted, the UK appears to be joining ranks with the United States in rejecting the “right to be forgotten,” at least as set out by the ECJ.²⁶

²³ The UK House of Lords, *EU Data Protection* report, *supra* note 12 noted as much at paragraph 36 cautioning that:

There is a further question, whether it is right that the judgment on issues such as this should be left to Google and other search engines. Neil Cameron thought not: he did not trust Google’s judgment. Jim Killock was “deeply uncomfortable” about leaving such judgments to commercial enterprises. Morrison & Foerster made the point that, self-evidently, a request to Google which they comply with will not cause information to be removed from Bing.com, Yahoo.com or Ask.com. Individuals would have to make the same request to each search engine separately, and different search engines might well reach different conclusions. Particular data which could no longer be found on one search engine might still be easy to find on another [footnotes omitted].

²⁴ Jonathan Zittrain “Don’t Force Google to ‘Forget’”, *The New York Times* (14 May 2014), online: <www.nytimes.com> [Zittrain]. See also David Streitfeld, “European Court. Lets Users Erase Records on Web”, *The New York Times* (13 May 2014), online: <www.nytimes.com>.

²⁵ This divergence is broader than the previously framed US/EU dichotomy. For a discussion of the narrower US/EU dichotomy see Jeffrey Rosen, “Continental Divide”, *Legal Affairs* (September/October 2004) at 49–50 (Article Review of “The Two Western Cultures of Privacy” by James Whitman):

When Europeans think about privacy, they are most concerned about personal dignity and the right to control one’s public image, a right threatened primarily by the mass media, the Internet, and commercial data warehouses. By contrast, American conceptions of privacy are focused on personal liberty and the right to be free from state surveillance, a right threatened primarily by government intrusions into the home.

²⁶ While it is beyond the scope of this modest article to discuss the important nuances between the respective UK, United States and Canadian normative frameworks in any detail, suffice it to note the following: privacy as understood (broadly speaking and accounting for important state particularities) in the United States is distinct from the majority of its common law counterparts and is of course sectoral. Canada follows a hybrid approach blending statutory and common law remedies to privacy protection. The UK for its part boasts a distinct body of law respecting confidentiality that, *inter alia*, is relevant to privacy protection. Bringing these and other nuances to a high level of abstraction allows the

It further reflects internal normative contradictions *within* the Continental tradition and emphasizes the urgency of reconceptualizing digital privacy in a more transsystemically-viable²⁷ fashion in Europe and beyond.

Plainly put, informational privacy must ultimately be retheorized in a manner that would presumably obviate—or at the very least palliate—the need for a stand-alone, ill-defined and under-theorized “right to be forgotten,” as set out at pains in *Costeja*. While it is beyond the scope of this present article to delve into any great detail of European privacy law (itself not a monolith), suffice it to mention it would not be the first time that a chiefly Continental court (in this case the French *Cour de Cassation*) felt it necessary to retrench following the undesired effects of a broad, transsystemically-inoperable privacy decision.²⁸

In effect, the “right to be forgotten,” notwithstanding its obvious populist appeal in the digital context,²⁹ appears to have been hastily crafted and lacks conceptual coherence within the civil tradition.³⁰ It is, in essence, a *procedural right* predicated on the impracticable idea that individuals “own” data, rather than a right to their identity itself and the perception

article to contrast between various approaches of dealing with emerging issues from both a comparative and transsystemic perspective. Namely to distinguish between an “Anglo-American,” property-based conception of privacy versus the civil law notion of privacy as deriving from personality rights and thus being intimately connected to dignity and the duty to control personal data.

²⁷ Defined as the “ability to identify points of interface between [legal] systems” and harness them towards effective policy-making and the creation of interoperable definitions of foundational concepts. Transsystemia is a concept articulated by the McGill Faculty of Law in Montreal, Canada to explain its “transsystemic legal education.” This is a unique model based on the notion of the world of borderless human interactions in which we live today. For a further explanation of transsystemia and the need for a cosmopolitan understanding of the law, see “Transsystemic Legal Education”, Paul-André Crépeau Centre of Private and Comparative Law, online: <www.mcgill.ca/centre-crepeau/transsystemic>. The term “transsystemia” was coined by the McGill Faculty of Law [McGill, “Transsystemic”].

²⁸ In Cass soc, 15 December 2009, *Bruno B v Giraud et Migot*, (2009) Bull civ V, No 2651 [*Bruno B*], the *Cour de cassation* qualified its earlier ruling in Cass soc, 2 October 2001, *Nikon France SA Co v Onof*, (2001), No 4164, where it had prohibited employers from opening any employee emails that were ‘private’ without providing any criteria as to how an employer would determine which messages were private and which were not. In *Bruno B* it backtracked, shifting the burden to employees to label any correspondence they consider private, as per the duty rationale described in Part III below.

²⁹ Viktor Mayer-Schönberger, *Delete: The Virtue of Forgetting in the Digital Age* (Princeton: Princeton University Press, 2009) [Mayer-Schönberger].

³⁰ Karen Eltis, “Breaking through the “Tower of Babel”: a “right to be forgotten” and how transsystemic thinking can help reconceptualize privacy harm in the age of analytics” (2011) 22:1 *Fordham IP Media & Ent LJ* 69 [Eltis, “Babel”].

thereof. It therefore fails to accord with the long-established civil tradition of personality rights, which, unlike its common law counterpart, emphasizes personhood not property.³¹ It is curious in this context to note that the “right to be forgotten” is nevertheless often purported to derive its origins from personality rights, beyond the *Directive* where it is housed.³² In the words of one Italian scholar: “restraining the right to be forgotten to the protection of the personal information as property [as it now stands], risks to undermine [*sic*] and limit the scope of such a right.”³³ As I have argued elsewhere, prior to the ECJ’s treatment of the “right to be forgotten,”³⁴ the “faddish” notion of enshrining this right in the *Directive* grew out of a real frustration with the failure to properly articulate what various privacy rights mean more broadly and to prevent “informational injustice.” Lamentably, the legitimate frustration led to a knee-jerk response that needs to be more thoughtfully theorized.³⁵ Framed otherwise, this article submits that the “right to be forgotten” can only—as it already has—give rise to conceptual and practical uncertainty in its present form.

Consequently, rather than further expanding an already divisive, property-based procedural right, the following section posits that Europeans (and perhaps others as well) would do better to harness the ample protections found in traditional, substantive civil concepts pertaining to privacy—most notably personality rights—so as to develop a coherent set of principles that contextualize identity and the perception of personal (and/or corporate) identity in the digital realm. For unlike the poorly-theorized “right to be forgotten,” which unceremoniously imports all the rights traditionally associated with property,³⁶ the civil tradition offers time-tested, flexible

³¹ See Karen Eltis, “Can the Reasonable Person Still be ‘Highly Offended’? An Invitation to Consider the Civil Law Tradition’s Personality Rights-Based Approach to Tort Privacy” (2008) 5:1&2 *U Ottawa L & Technology J* 199 online: <www.uoltj.ca> [Eltis, “Highly Offended”]. On European protections more generally and specific national examples, see e.g. Koen Lemmens, “The Protection of Privacy Between a Rights-Based and a Freedom-Based Approach: What the Swiss Example can teach us” (2003) 10:4 *Maastricht J Eur & Comp L* 381 at 383–84.

³² See e.g. Rolf H Weber, “The Right to Be Forgotten: More Than a Pandora’s Box?” (2011) 2:2 *J Intell Prop, Inf Tech & E-Com L* 120 at 120–21, paras 1–4 [Weber].

³³ Alessandro Pancani, “*Searching to be Forgotten: An Investigation of the Effects of the Proposed “Right to be Forgotten and to Erasure” on Search Engines*” (LLM Thesis, Tilburg Law School, 2013) at 18 [unpublished] online: Tilburg University <www.arno.uvt.nl/show.cgi?fid=132432> [Pancani].

³⁴ Eltis, “Babel”, *supra* note 30 at 81–85.

³⁵ Jeroen van den Hoven, “Information Technology, Privacy, and the Protection of Personal Data” in Jeroen van den Hoven & John Weckert, eds, *Information Technology and Moral Philosophy* (New York: Cambridge University Press, 2008) 301 at 314.

³⁶ Pancani, *supra* note 33 at 15–16 [footnotes omitted]: “[T]he difference concerns the qualification of the right: data protection is a procedural right, it sets rules and procedures for respecting and enforcing other rights. whereas the right to privacy and the right to identity

principles that are generally subsumed under the category of personality rights. These principles were developed precisely to address the identity-related issues raised by new technologies,³⁷ such as photography—the capturing of one’s image—was at the time.³⁸ If anything, and more narrowly for our purposes, the proper place of the “right to be forgotten” is within the realm of personality rights, as Rolf Weber explains:

In Continental Europe, the right to be forgotten can be considered as being contained in the right of the personality, encompassing several elements such as dignity, honor, and the right to private life. Manifold terminologies are used in the context of the right of personality — mainly the right for the (moral and legal) integrity of a person not to be infringed and for a sphere of privacy to be maintained and distinguished. The (privacy) right to indeed keep certain things secret has already been arguably extended to the right of Internet users not to make their activity trails available to third persons. Essentially, rightholders are relying on their own autonomy to individually decide on the possible use of their own data.³⁹

Indeed, right holders can rely on their “own autonomy” rather than their ownership of data to claim such rights. Accordingly, with an eye towards fostering some measure of practical convergence or pragmatic bridging of national privacy models⁴⁰ and “at the same time prevent[ing] interruptions

are substantive rights, they directly promote values to be protected. According with this distinction, the right to be forgotten belongs to the first type, as the deletion of information is instrumental to the protection of a substantive right.” This is as opposed to those associated with personality rights; see Bert-Jaap Koops, “Forgetting Footprints, Shunning Shadows: A Critical Analysis of the “Right To Be Forgotten” in Big Data Practice” (2011) Tilburg Law School Research Paper No. 08/2012, online: SSRN <ssrn.com/abstract=1986719> at 13.

³⁷ Although they can also “acquire patrimonial consequences,” see Roderick A Macdonald, “Reconceiving the Symbols of Property: Universalities, Interests and Other Heresies” (1994) 39:4 McGill LJ 761 at 789, citing P Kayser, “Les droits de la personnalité: Aspects théoriques et pratiques” (1971) 69 RTD civ 445.

³⁸ See Giorgio Resta, “The New Frontiers of Personality Rights and the Problem of Commodification: European and Comparative Perspectives” (2011) 26 Tul Eur & Civ LF 33, online: SSRN <ssrn.com/abstract=1952695> at 35 [footnotes omitted]: As Resta explains:

The protection of personality emerged as an autonomous “problem” only in the nineteenth century. The introduction of free press, the increase in the use of commercial advertisements, and the diffusion of new technologies (such as photography) enabled new and more subtle invasions of the personal sphere, which raised serious concerns in the ruling classes and triggered a growing amount of lawsuits.

³⁹ Weber, *supra* note 32 at 121, para 5 [footnotes omitted].

⁴⁰ For a more in-depth discussion of convergence versus harmonisation, see Joel R Reidenberg, “The Privacy Obstacle Course: Hurdling Barriers to Transnational Financial Services” (1992) 60:6 Fordham L Rev S137.

in international flows of data,”⁴¹ this article proceeds in three parts. Part I sets the context for this “bad solution to a very real problem”⁴² and explains why a coherent set of principles are needed to address this very real challenge. Part II proceeds to give a brief overview of the manner in which civil law traditionally responds to privacy, relating it to identity (rather than property) and the right to rehabilitation. This latter right may, in American terms, be construed as the ability to reinvent one’s self.⁴³ Whereas the particulars of privacy protection are not left untouched by the digital age, the underlying fundamentals have remained unchanged. Civil personality rights therefore provide deep insights into the development of a more nuanced cross-border approach to privacy protection, beyond the “right to be forgotten.” Part III highlights the potential contribution of civil thinking to ultimately refashioning the conceptual foundations of privacy policy in a transsystemically pragmatic fashion. 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 (or at least significantly longer-term) memory.

Finally, the article posits that the proposed re-examination is at a critical juncture, made all the more pressing by an apparent copycat phenomenon of sorts, whereby policy makers and courts beyond Europe—most recently in Canada—may be tempted to mimick the ill-defined “right to be forgotten” in *Costeja*. For instance, consider the *Equustek v Google Inc* decision,⁴⁴ in which the British Columbia Court of Appeal upheld a ruling compelling Google to delete any reference to the defendants from its *worldwide* search results, for trademark infringement.⁴⁵ Significant for our purposes, the Court specifically cited *Costeja* in support of its reasoning in favour of the international scope of the ruling,⁴⁶ opining that “international courts do not see these sorts of orders as being unnecessarily intrusive or contrary to

⁴¹ Organisation for Economic Co-operation and Development, *OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data* (Paris: OECD, 1980), online: <www.oecd.org/internet/ieconomy/oecdguidelinesontheProtectionofPrivacyandTransborderFlowsOfPersonalData.htm>.

⁴² Zittrain, *supra* note 24.

⁴³ The quintessentially American capacity to reinvent one’s self is aptly illustrated in the popular TV series *Mad Men* and often in other popular US culture. See e.g. Bill Keveney, “Stars of ‘Mad Men’ share thoughts on their characters”, *USA Today* (16 July 2010), online: <www.usatoday.com> (describing the characters of the show and elaborating on the development of the characters—their reinvention—throughout the seasons).

⁴⁴ *Equustek Solutions Inc v Google Inc*, 2015 BCCA 265, 386 DLR (4th) 224 [Equustek Solutions 2015].

⁴⁵ *Ibid* at para 107. They were using the plaintiffs’ trade secrets in contempt of a number of court orders in that regard.

⁴⁶ *Ibid* at para 95.

the interests of comity.”⁴⁷ Decisions such as this, when read together with discussions of whether Canadian policy makers should legislate a “right to be forgotten,”⁴⁸ or courts should read it in, points towards the possibility of an undue or premature contagion from this under-theorized concept.⁴⁹

1. “A Bad Solution to a Very Real Problem”

Over twenty years ago, a Spanish physician, Hugo Guidotti Russo, had a widely reported dispute with one of his patients over an allegedly botched breast surgery.⁵⁰ The matter was settled and he has since apparently practised plastic surgery successfully. And yet, the mere mention of his name online produces a myriad of results, some of which are gruesome, linked to the supposedly bungled procedure. These results are the first to appear and they dramatically overshadow (even overwhelm) any other presumably relevant—and more recent—information relating to his practice. Accordingly, Dr. Russo’s professional persona—and indeed identity (online and therefore off)—has been forever tainted, and possibly reduced to what he contends is an isolated incident, which was settled over twenty years ago. The mere mention of his name in cyberspace, which is the first “go-to” destination for many patients and potential employers, produces graphic reporting of his supposedly botched work. This presumably dissuades all but the most dedicated and meticulous searchers, who would take pains to go beyond these reports, from associating with the good doctor. Even if we

⁴⁷ *Ibid* at para 96.

⁴⁸ Geneviève Saint-Laurent, “Vie privée et «droit à l’oubli»: que fait le Canada?” (2015) 66 UNB LJ 185.

⁴⁹ See e.g. Andre Mayer, “‘Right to be forgotten’: How Canada could adopt similar law for online privacy”, *CBC News* (16 June 2014), online: <www.cbc.ca>. As unlikely as this might appear in Canada in light of *Crookes v Newton*, 2011 SCC 47 at para 14, [2011] 3 SCR 269, in which the Supreme Court of Canada recognized that a link “should never be seen as ‘publication’ of the content to which it refers”, it is not improbable. Legislators in Israel, for their part, have already drafted and proposed “right to be forgotten” legislation, see Itamar Sharon, “MKs file Israeli ‘right to be forgotten’ bill”, *The Times of Israel* (3 June 2014), online: <www.timesofisrael.com>. Jurisdictions as far as New Zealand are toying with the idea, see John Edwards, “A right to be forgotten for New Zealand?”, Privacy Commissioner Blog (1 July 2014), online: <www.privacy.org.nz/blog>.

In 1999, Australia’s most eminent jurist, The Hon Michael Kirby AC CMG, reviewed advances in technology and, in his typically prescient way, foretold a future demand for “a right not to be indexed”. Google was not yet on the scene, so his point was illustrated by referring to older engines such as AltaVista.

Prior to the ECJ ruling in *Costeja*, the Australian communication minister had also endorsed the idea: see Simon Breheny, “The right to be forgotten online sets a dangerous precedent for freedom of speech”, *Brisbane Times* (16 June 2014), online: <www.brisbanetimes.com.au>.

⁵⁰ Paul Sonne, Max Colchester & David Roman, “Plastic Surgeon and Net’s Memory Figure in Google Face-Off in Spain”, *The Wall Street Journal* (7 March 2011), online: <www.wsj.com>.

concede that Dr. Russo was in fact negligent at the time, the cyber search at the very least provides a *decontextualized and fragmented* version of his career and professional identity.⁵¹ This is caused by the hierarchical nature of search engine results, which are not listed chronologically nor ranked according to other transparent factors.⁵²

Eternally—or at least long-term⁵³—enshrined falsehoods or inadvertent distortions, boasting an aura of accuracy, are not easily remedied online, even by truths. The difficulty of proving an otherwise irrefutable fact online was somewhat amusingly illustrated by a piece in *The New York Times* by Zick Rubin, aptly titled “How the Internet Tried to Kill Me.”⁵⁴ Rubin chronicled his painful struggle with search engines and numerous fruitless attempts to prove that he was still alive, after a clerical error had him listed as deceased, rather than having merely changed professions!⁵⁵

Another man had to seek police protection after being chased by an angry mob following false accusations on Facebook, labelling him a killer and rapist:⁵⁶

⁵¹ Russo is one of ninety Spanish citizens who successfully lobbied Spain’s Data Protection Agency to adopt an online “right to be forgotten” mindset.

⁵² Karen Eltis, *Courts, Litigants and the Digital Age* (Toronto: Irwin Law, 2012).

⁵³ Ambrose, *supra* note 1 at 389.

⁵⁴ Zick Rubin, “How the Internet Tried to Kill Me”, *The New York Times* (12 March 2011), online: <www.nytimes.com> [Rubin].

⁵⁵ *Ibid.*:

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.

⁵⁶ John Brownlee, “Innocent Man Dodges Facebook Mob After False Accusations of Being a Serial Murderer/Rapist”, *Geek* (23 December 2010), online: <www.geek.com>.

23-year old Triz Jefferies is just a normal guy from Philadelphia, but he must have angered a pretty malevolent person, because someone decided to post his name and photo on a Facebook page dedicated to finding the so-called Kensington Strangler, a serial rapist and killer. As a direct result of that post, a large group of angry citizens began sending text messages and posting flyers up, reposting the claim that Jefferies was the perp behind at least three murders and several sexual assaults.

Jefferies himself, though, didn't realize how serious the accusations had become until an angry mob gathered around his house, ready to lynch. Terrified, Jefferies called the police, who came over and submitted Jefferies to a DNA test, which found him innocent of any of the murders or rapes.

Police Commissioner Charles Ramsey reiterated the man's innocence at a press conference. 'He is not a suspect, he is not connected with this,' Ramsey said.

The whole ordeal is hardly over for Jefferies, though: Facebook messages and flyers are still flying about that continue to accuse Jefferies of the crimes. It's very possible another mob will gather around his house before this is all over.⁵⁷

Less dramatically, but no less significantly, businesses face similar difficulties, particularly in terms of the decontextualized and fragmented nature of information online, as illustrated by a popular restaurant's fate on a commonly visited review site. While the first and most prominent review of New York City's Tapeo29 is dreadful and might discourage future patrons from visiting this establishment, a closer look reveals all subsequent reviews (unfortunately appearing beneath the first and requiring greater effort on the part of future diners) to be excellent.⁵⁸

In discussing the need for safeguards to mimic the forgetting that was once natural to the human condition and inherent to our minds, Viktor Mayer-Schönberger invites us to consider the following incident and reflect—if nothing else—upon the chilling effect of infinite digital memory:⁵⁹

In 2006, Vancouver-based psychotherapist Andrew Feldmar was crossing the Canada-US border to pick up a friend from Seattle airport—something he'd done many times before. This time, though, the border guard searched online and found that in 2001 Feldmar had written in an academic journal that he had taken LSD in

⁵⁷ *Ibid.* See also Jessica Hopper, "Wrong Man Shown in Wanted Photo for Philadelphia 'Kensington Strangler'", *ABC News* (21 December 2010), online: <abcnews.go.com>.

⁵⁸ "Tapeo29", online: Yelp <www.yelp.com/biz/tapeo-29-new-york> (The negative review that appeared at the top of the list had since been removed or moved). For additional examples, see Claire Cain Miller, "The Review Site Yelp Draws Some Outcries of its Own", *The New York Times* (2 March 2009), online: <www.nytimes.com>.

⁵⁹ Mayer-Schönberger, *supra* note 29.

the 1960s. As a result, Feldmar was barred entry to the US. This case shows that because of digital technology, society's ability to forget has become suspended, replaced by perfect memory.⁶⁰

Of course, some may argue that Feldmar, by voluntarily disclosing his unlawful behaviour, became the author of his own misfortune. Putting aside the obvious ramifications of the speech-chilling effect of enhanced digital memory, one can certainly concede that a great deal of information—true, false or merely, but perhaps most significantly, decontextualized—is posted online by third parties unbeknownst to each of us.

Thus, construed even from the freedom of expression as opposed to the privacy angle, this compelling incident, among many others,⁶¹ demonstrates the need for addressing “the end of forgetting.”⁶² At the very least, insidious decontextualization of personal information must be tackled.⁶³

In the context of the information age, the “reasonable expectation” standard, so prevalent in the Anglo-American conception of privacy, is falling into rapid desuetude. Not only does the standard appear to inadequately respond to contemporary circumstance, but it tends to reinforce social tolerance of intrusions once deemed unreasonable.

Paradoxically, the more we are watched, the less privacy we expect and the more we *expect to be watched*. The less we are 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, technological imperatives necessarily dictate that the sphere in which one can reasonably claim solitude will contract.⁶⁴

Moreover, as I have argued elsewhere, privacy today is not about wanting to be hidden from view, as many—particularly of the younger generation—reject seclusion and take pains to be exposed, be it via social networking, YouTube videos or Twitter.⁶⁵ It is not that we do not wish to be known or seen, but rather that we expect to be seen as we portray ourselves when we set out to bare our identities online.

Plainly put, where the idea is to share personal information in the cyber—as in the “real”—world, the intention is, not surprisingly, to

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² *Ibid.*

⁶³ Ambrose, *supra* note 1 at 406–07.

⁶⁴ Eltis, “Babel”, *supra* 30 at 80. More generally on point, see Eltis, “Highly Offended”, *supra* note 31.

⁶⁵ See Eltis, “Babel”, *supra* note 30.

expose what one considers an accurate rendering of oneself (whether it is in truth precise or not). More cynically, one might say that those sharing personal information online wish to preserve control over their ability to (mis)represent themselves to the world.⁶⁶ In most cases, people do not fear revealing even very personal information. Rather, they fear its—often irreparable—distortion and deformation.⁶⁷

That is certainly not to say that individuals no longer desire privacy. They simply want a form of privacy that translates as dignity or “informational self-determination” (to quote the German Federal Constitutional Court) rather than spatial seclusion.⁶⁸

In other words, instead of isolation (or “aloneness”), people covet and in fact require what sociologist Erving Goffman labeled “impression management.”⁶⁹ According to Goffman, most people deploy significant efforts to control or manage their identity (or the perception thereof) through what he called “presentation of self.” Offline, that is achieved by way of personal style, dress, body language and “the revealing and withholding of personal information to convey to the world who they are, or who they want to be taken to be.”⁷⁰

As Goffman explains, “[t]he physicality of the offline world provides built-in protections. When people talk to a group of friends, they can look around to see who is listening. When they buy a book or rent a video, if they pay in cash, no record is made connecting them to the transaction.”⁷¹

⁶⁶ Garrett Lynch, “A Metaverse Art Residency: ‘Garrett Lynch Yoshikaze “Up-in-the-air” Second Life Residency””, (2012) 2:2 *Metaverse Creativity* 163.

⁶⁷ Sarah Lyall, “For \$1,000, Site Lets Celebrities Say It Ain’t So”, *The New York Times* (28 March 2011), online: <www.nytimes.com>.

⁶⁸ Bundesverfassungsgericht (Federal Constitutional Court), Karlsruhe, 15 December 1983, (1983), 65 *BVerfGE* at 1 (Germany), translated in (1984) 5 *HRLJ* 94 at 97–101 [*Census* decision].

⁶⁹ Erving Goffman, *Stigma: Notes On the Management of Spoiled Identity* (New York: Simon & Schuster, 1974) at 130 [Goffman].

⁷⁰ Adam Cohen, “One Friend Facebook Hasn’t Made Yet: Privacy Rights”, *The New York Times* (18 February 2008), online: <www.nytimes.com>:

Goffman argued that people spend much of their lives managing their identity through “presentation of self.” Offline, people use clothing, facial expressions, and the revealing and withholding of personal information to convey to the world who they are, or who they want to be taken to be.

[...] It’s more complicated online. Social networking sites like Facebook and MySpace create identities for people and disseminate information about them to large numbers of people.

⁷¹ *Ibid.*

Not so in the cyberspace. Accuracy, especially that relating to identity, is significantly *contextual* in a fragmented, inherently decontextualized networked environment. In cyberspace, depending on algorithm results, even otherwise exact information can easily convey a most misleading impression; take, for instance, the above-mentioned and supposedly defunct psychologist related in *The New York Times*. Worse still, search results may yield maliciously stage-managed data that is otherwise “accurate.” Similarly, time-tested truths may be presented alongside or on par with blatant falsehoods to the point of being indistinguishable from one another.⁷²

Given the nature of the digital environment, the end result might well be to bring individuals into disrepute—not for a finite period or in a manner that might be corrected with reasonable effort. Worse still, an unassailable version of one’s identity, entirely incompatible with one’s truth (or perhaps even “*the truth*”), might emerge and become entrenched as public record, upon which future thought is built; what Goffman calls “virtual versus actual identity.”⁷³ An individual might thus, in Goffman’s words (discussing stigma more generally), be “reduced in our minds from a whole and usual person to a tainted discounted one.”

What is more, identity, which Michel Foucault of course presented as a flexible construct, is no longer (or certainly less) malleable, as we become trapped in our deeds or even self-presentation of years past (what Jeffrey Rosen of *The New York Times Magazine* labelled “the end of forgetting”).⁷⁴ The capacity to reinvent oneself is therefore presumably either lost or severely compromised. Identity and its potential evolution is frozen in time, decontextualized, or in Goffman’s parlance “spoiled.”⁷⁵

2. *The Civil Law View*

In order to eventually supplant—or at the very least in the short term reinterpret—the “right to be forgotten” in a transsystemically-viable fashion both practically and conceptually, it behooves us to first clarify what privacy means in the Continental tradition. Particularly since this right’s proponents claim personality rights lineage despite the above-mentioned conceptual incoherence. As Weber recounts :

⁷² See e.g. Goodale TV, “DIGITAL AGE—When Should The First Amendment Lose?—Anthony Lewis. May 18, 2008” (16 July 2009), online: Youtube <www.youtube.com/watch?v=RxHEXcWKFo>.

⁷³ Goffman, *supra* note 69 at 2.

⁷⁴ Jeffrey Rosen, “The Web Means the End of Forgetting”, *The New York Times Magazine* (21 July 2010), online: <www.nytimes.com>.

⁷⁵ Goffman, *supra* note 69.

In Continental Europe, the right to be forgotten can be considered as being contained in the right of the personality, encompassing several elements such as dignity, honor, and the right to private life. Manifold terminologies are used in the context of the right of personality—mainly the right for the (moral and legal) integrity of a person not to be infringed and for a sphere of privacy to be maintained and distinguished. The (privacy) right to indeed keep certain things secret has already been arguably extended to the right of Internet users not to make their activity trails available to third persons. Essentially, rightholders are relying on their own autonomy to individually decide on the possible use of their own data.⁷⁶

Broadly speaking, civil 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 civil 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.

Furthermore, and as previously noted, in civil tradition privacy is considered to be a “personality right,” a concept alien to the common law.⁷⁷ Therefore, in civil law jurisdictions, privacy attaches to persons rather than property, irrespective of property or special constraints.⁷⁸ 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.⁷⁹ Privacy, as a personality right, is predicated on dignity and control of one's identity.⁸⁰ 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.”⁸¹ In the privacy context, the concept of dignity in Germany is encompassed within “the right to free

⁷⁶ Tom Gara, “The Origins of the ‘Right to be Forgotten’: Sir I demand a Duel”, *The Wall Street Journal: Corporate Intelligence Blog* (14 May 2014), online: <www.blogs.wsj.com/corporate-intelligence>.

⁷⁷ 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, *infra* note 78 at 357–58 (discussing the French approach in which personality rights are private law rights first and foremost) with Eberle, *infra* note 78 at 979 (“German personality law is thus a creature of the Constitutional Court, as rights of privacy are of the Supreme Court”).

⁷⁸ Adrian Popovici, “Personality Rights—A Civil Law Concept” (2004) 50:2 *Loy L Rev* 349 at 357–58 [Popovici]. See also Edward J Eberle, “Human Dignity, Privacy, and Personality in German and American Constitutional Law” [1997] *Utah L Rev* 963 [Eberle].

⁷⁹ Popovici, *supra* note 78 at 352.

⁸⁰ See also Eberle, *supra* note 78 at 980.

⁸¹ As cited in Eberle, *supra* note 78 at 976.

unfolding of personality.”⁸² In America, by contrast, dignity “falls under the rubric of privacy, including the zone of personal autonomy that emanates therefrom,”⁸³ that is to say privacy is spatially-defined (or as the right to be left alone).⁸⁴

While very important differences exist between the approaches discussed above, conceiving of the right to privacy as a personality right, free of spatial or property constraints, generally allows the civil legal method to grasp privacy as a zone of intimacy delineated by the basic needs of personhood, rather than by space or ownership.⁸⁵ In effect, “personality allows one to define oneself in relation to society” and can, therefore, be a very important “impression management” tool in the Internet age due to the difficulties set out in Part I of this article. As Resta observes:

In Continental Europe, by contrast [to the common law world], the evolution [of privacy] has been different. Instead of breaking up the traditional category of personality rights, courts have resorted to techniques of dynamic interpretation to adapt old provisions on name, image and privacy rights to changing social and economic landscapes. They have favored, in other words, a functional evolution (Funktionswandlung) of the category of personality rights, rather than a radical paradigm shift, like the one implied in the recognition of a full-scale intellectual property right in one’s own identity. It should be underlined that this development has been feasible only because the Continental law of personality has—from the very beginning—maintained a deeper and more ambiguous connection with the universe of property rights than a Warren style right to privacy [...]

At stake in these cases was the value of autonomy, which lies at the core of the continental system of personality protection.⁸⁶

More specifically and returning to duties, as Popovici notes 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.”⁸⁷ The dual emphasis is reflected in the controversial “right to be forgotten,” as well. Thus “[a]dvocating in

⁸² *Ibid* at 979.

⁸³ *Ibid* at 966.

⁸⁴ And Courts have yet to define “informational privacy” with respect to government action, let alone private intrusions—a matter beyond the scope of this paper’s limited discussion. On point see e.g. Timothy Azarchs, “Informational Privacy: Lessons From Across the Atlantic”, Comment, (2014) 16:3 U Pa J Const L 805.

⁸⁵ Eberle, *supra* note 78 at 980: “[p]ersonality allows one to define oneself in relation to society.”

⁸⁶ Resta, *supra* note 38 at 49–50 [footnotes omitted].

⁸⁷ Popovici, *supra* note 78 at 354.

favour 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.”⁸⁸

However, as previously mentioned, the tool that was recently developed in Europe to address what Richard Briffault has, in a different context, called the “over disclosure problem”⁸⁹ **ironically forces private US actors to usurp European courts’ function of balancing between important constitutional values.** It further tends to stifle rather than encourage free expression and has proven far too blunt and awkward for common law jurisdictions to swallow. Given the transnational nature of commerce, by virtue of which US companies must contend with European regulation, the novel concept of a right to be forgotten must be rethought,⁹⁰ on both a conceptual and practical level. This rethinking, this article has argued, should substantively work with the civil law tradition’s personality rights, which are based on personhood (identity) rather than the common law tradition’s underpinning in notions of ownership ironically reborn in the European context of data protection.

A) Personality Rights and Countervailing Duties

As noted, privacy in the Continental view implies not only rights but duties. Simply put, it is an individual’s responsibility not to unnecessarily compromise their own information with the misplaced hope that the information will not be abused.⁹¹

Thus for example, concepts like “*la responsabilisation de l’individu*”, roughly translated as “individual’s responsibility,” appear in both European

⁸⁸ See France, Sénat, Commission des lois, *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], by Yves Détraigne & Anne-Marie Escoffier, Report No 441 (27 May 2009) at 104, online: <www.senat.fr/rap/r08-441/r08-441_mono.html> [Sénat 2009] [translated by author].

⁸⁹ See Richard Briffault, “Two Challenges For Campaign Finance Disclosure After *Citizens United* and *Doe v. Reed*” (2011) 19 *Wm & Mary Bill Rts J* 983 at 1005 (description of problem), 1014 (term coined).

⁹⁰ Initially predicated on the French “*droit à l’oubli*,” which developed to permit the rehabilitation of convicted felons.

⁹¹ See e.g. France, Sénat, Commission des lois, *Proposition de loi visant à mieux garantir le droit à la vie privée à l’heure du numérique* [Proposed legislation to better guarantee the right to privacy in the digital age], by Christian Cointat, Report No 330 (24 February 2010), online: <www.senat.fr/rap/109-330/109-330_mono.html> [Sénat 2010] [translated by author].

and American practice, and help translate the EU's privacy principle into American dialect.⁹² 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.⁹³

Therefore, while at first glance personality rights (in a broader sense) appear to complicate matters by emphasizing the seemingly obscure notion of dignity, they ultimately help clarify and operationalize informational privacy in the digital age by adding a "duty" component—for both the individuals and the information-users—to the ever-nebulous right to privacy. In the German view, for instance, privacy is conceived at least in part as "informational self-determination,"⁹⁴ and is comprised of 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."⁹⁵ Furthermore:

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.⁹⁶

In other words, control over personal information is the power to control a measure of one's identity and the perception thereof. This is indispensable to the "free unfolding of personality."⁹⁷ It is also a right to a "rightful portrayal of self,"⁹⁸ crucial in the digital age—as illustrated by the case of Dr. Russo above. Not surprisingly then, Russo's own loss of control over

⁹² See Natch Greyes, "A Right To Be Forgotten" (17 June 2011), *William & Mary Student Intellectual Property Society*, online: <sips.blogs.wm.edu/2011/06/17/a-right-to-be-forgotten>.

⁹³ Sénat 2010, *supra* note 91.

⁹⁴ *Census* decision, *supra* note 68 at 94, 97–101. See also Paul Schwartz, "The Computer in German and American Constitutional Law: Towards an American Right of Informational Self-Determination" (1989) 37 Am J Comp L 675 at 687 [Schwartz].

⁹⁵ See Eberle, *supra* note 78 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.

⁹⁶ Schwartz, *supra* note 94 at 690.

⁹⁷ Eberle, *supra* note 78 at 966.

⁹⁸ *Ibid* at 1014.

his “portrayal of self” catapulted the “right to be forgotten” movement in Europe to where it is today, at least in part.

3. *Costeja’s Context: The Extraterritorial Application of American Constitutional Values into Europe and the “Right To Be Forgotten”’s Extension Into Canada*

In reality, *Costeja* appears no more than an *ad hoc* attempt to give redress to the increasingly disturbing—however pressing—issue of the unilateral reach of foreign (namely American) domestic norms into European territory, and the thorny issue it raises with regard to both democratic legitimacy and accountability.⁹⁹

Accordingly, the ECJ might have sought, however implicitly, to curtail the US Constitution’s First Amendment’s unwanted incursion onto European soil by way of American Internet giants, such as Google or Facebook. These are companies for whom an aggrandized notion of “free speech” must prevail over much else, including reputation, and to a large extent privacy, thus effectively (and practically) trumping European norms on this point. Ironically, however, in seeking to halt what it presumably conceived as an unacceptable degree of normative imperialism, Europe’s courts arguably opened the proverbial floodgates to an extraterritorial application of national law concerning jurisdiction, which is reverberating even in Canada.

Accordingly, a recent case, *Equustek v Jack*, foretells the “right to be forgotten”’s apparent Canadian ingression. Although Google (deemed a “data controller” in *Costeja*) did not initially appear as a party to what was at first glance a routine IP infringement case, the British Columbia Supreme Court’s decision is telling for our purposes. Succinctly, the plaintiffs applied “for an interim injunction restraining two non-parties, Google Inc. and Google Canada Corporation, from including the defendants’ websites in search results generated by Google’s search engines.”¹⁰⁰ Google, as the Court describes:

voluntarily complied with the plaintiffs’ request to remove specific webpages or uniform resource locations (“URLs”) from its Google.ca search results (*i.e.* from searches originating in Canada), removing 345 URLs in total. However, Google is

⁹⁹ For a broader discussion, see generally Karen Eltis, *The Democratic Legitimacy of the “International Criminal Justice Model”: The Unilateral Reach of Foreign Domestic Law and the Promise of Transnational Constitutional Conversation* in Christopher PM Waters, ed, *British and Canadian Perspectives on International Law* (Boston: Martinus Nijhoff Publishers, 2006).

¹⁰⁰ *Equustek Solutions Inc v Jack*, 2014 BCSC 1063, 374 DLR (4th) 537.

unwilling to block an entire category of URLs, sometimes referred to as “mother sites” from its search results worldwide.

[...]

This application raises novel questions about the Court’s authority to make such an order against a global Internet service provider.¹⁰¹

Somewhat surprisingly, the Court recognized its own “territorial competence” on the basis that people in the province where it sits (BC) can access the giant’s search engine from there (as from most anywhere else). Needless to say, such grounds for jurisdiction are tenuous, however increasingly popular, as evidenced by the *Shefet* case in France.¹⁰² In that instance, similarly respecting the “right to be forgotten” the Court of Paris (*Tribunal de grande instance de Paris*) issued an injunction against Google to remove defamatory references to the French/Danish attorney Dan Shefet worldwide (including but not limited to google.com) on the basis of the “right to be forgotten” and that individuals on French soil can, if they wish, access google.com *inter alia*.¹⁰³

While a robust discussion of jurisdiction far exceeds the scope of this modest article, suffice it to note that the *Costeja* decision’s repercussions for courts’ authority are broad and far-reaching, having had recent reverberations in common law jurisdictions like Canada. Whereas the ECJ in *Costeja* may have been chiefly concerned with sustaining the Continental values of privacy and reputation¹⁰⁴ in what it may have perceived as First Amendment expansionism via digital tools, the BC Supreme Court’s *Equustek* decision with its global injunctions (not unlike the *Shefet* case) may conversely affect American free speech rights by imposing a “right to be forgotten” beyond domestic borders. This may raise significant questions of comity, notwithstanding the BC Court of Appeal’s position to the contrary.¹⁰⁵

¹⁰¹ *Ibid* at paras 1, 9.

¹⁰² Re: *Shefet*, the decision is in French, see Trib gr inst Paris (injunction), 16 September 2014, *M. et Mme X et M. Y C / Google France*, (2014) [*Shefet*]. For commentary on the decision, see Liam Tung, “French ‘right to be forgotten’ decision takes link removal beyond Europe”, *Vive la tech* (17 November 2014), online: <www.zdnet.com>. For further commentary [in French] see, “Jurisprudence : Vie privée” *Legalis* (24 November 2014), online: <www.legalis.net>.

¹⁰³ Joseph Plambeck, “Daily Report: Google and the Spread of the ‘Right to Be Forgotten’” (6 August 2015), *The New York Times Bits* (blog); online: <bits.blogs.nytimes.com>.

¹⁰⁴ See James Whitman, “The Two Western Cultures of Privacy: Dignity versus Liberty” (2004) 113:6 Yale LJ 1151 at 1167 [Whitman, “Two Western Cultures”].

¹⁰⁵ *Equustek Solutions* 2015, *supra* note 44 at para 96.

Structured proportionality review, characterized by the thoughtful balancing of conflicting rights (also called “rights reconciliation”), is a cardinal rule of the Canadian approach; it has been reaffirmed by the Supreme Court of Canada on numerous occasions and in a variety of contexts.¹⁰⁶ The salience of this balancing invocation was confirmed afresh with regards to privacy rights in *Alberta (Information and Privacy Commissioner) v United Food and Commercial Workers, Local 401*, where the Supreme Court ruled that such rights must be balanced with freedom of expression.¹⁰⁷ In contradistinction, the ECJ in its *Costeja* decision ruled that “data controllers” are compelled to remove results predicated on a procedural right to data protection (which impinges on the privacy concerns of individuals), thus suggesting that the procedural “right to be forgotten” (and by indirect extension, as discussed above, privacy) must as a general rule triumph over freedom of expression. As Michael Geist commented, “[b]y eliminating the need for balance, the ruling shockingly undermines important speech rights in return for a bit of online obscurity.”¹⁰⁸ And yet, in the context of the *Equustek* decision, the normative underpinnings of the European *Costeja* case are being disconcertingly assimilated into Canadian law through such rulings. This risks potentially undermining the structured proportionality analysis and upsetting the careful balance between freedom of expression and privacy, as well as further complicating an already convoluted approach to digital privacy by predicating privacy on (specifically civil European) procedural data protection.

Indeed, the application of the “right to be forgotten” in the context of the global governance of data has led to the worldwide impact of local norms. The international reach of Canadian law in matters concerning the Internet, allowed by the *Equustek* decision, is indicative of this. Shortly following this BC decision, the Ontario Superior Court of Justice similarly ruled to give Canadian law wide reach over the Internet in *Goldhar v Haaretz.com*.¹⁰⁹ Although the Israeli-based Haaretz newspaper did not distribute any print editions in Canada, an online version of one of its articles had 216 unique visits in Canada.¹¹⁰ This article was allegedly defamatory to the reputation

¹⁰⁶ Frank Iacobucci, “‘Reconciling Rights’ The Supreme Court of Canada’s Approach to Competing Charter Rights” (2003) 20 SCLR (2d) 137 at 140.

¹⁰⁷ 2013 SCC 62, [2013] 3 SCR 733.

¹⁰⁸ Michael Geist, “‘Right to be forgotten’ ruling lacks balance: Geist”, *Toronto Star* (16 May 2014), online: <www.thestar.com>.

¹⁰⁹ 2015 ONSC 1128, 125 OR (3d) 619 [*Goldhar*].

¹¹⁰ *Ibid* at paras 11–12. As the Court explains:

This does not mean that 216 people viewed the Article online. A unique visit means a visit to the Haaretz website from a unique IP address on a particular day. Accordingly, there could have been a single visit to view the Article online by the same person each day for several days. As a result there could have been far fewer than 216 people who viewed the Article online. [...] On the other hand, since more than one computer may

of the Canadian owner of a well-known Israeli sports team. Having found that at least some of the unique visits came from Ontarian readers, the Court determined that reputational damage was thus sustained in Ontario, and that further action could therefore proceed before the Ontario courts.¹¹¹ Given the global reach of the Internet, the effect of this decision is that those who publish online can potentially be sued anywhere in the world, while further entrenching the global reach of Canadian law in particular.

While Canadian norms can be extended to global data, with related implications for privacy and freedom of expression, foreign law can in turn have a significant impact on those same rights of Canadians. Briefly after its *Equustek* decision, the BC Court of Appeal ruled that a privacy lawsuit against Facebook could not proceed in a Canadian court due to the fact that all users agreed to a forum selection clause in Facebook's terms and conditions that gave jurisdiction to a court in Santa Clara, California and the exclusive application of Californian law.¹¹² Thus, in many cases Canadian privacy law would largely be overridden by foreign legislation, with the privacy of Canadians being governed by foreign (mostly American) laws when in the presence of such agreements, which are used by most of the American Internet giants. That said, such extraterritorial effect is not exclusive to American values—Canadian norms are increasingly having global impact in the proverbially-borderless digital age. All the more so then, the interplay between conflicting privacy norms and their potential impact on Canadians—a microcosm of a larger global trend—stresses the need for a more interoperable definition of digital privacy that mimics brick and mortar “forgetting.”

4. Conclusion: A “Conceptual Middle Ground”?¹¹³

The global governance of data invites a cosmopolitan understanding of informational privacy. “Transsystemic thought,” it bears repeating, is defined as the ability “to identify points of interface between systems”¹¹⁴ and harness them towards effective policy-making and the creation of interoperable

share an IP address, one unique visit might have represented many people viewing the Article from one or more computers that share a single IP address.

¹¹¹ *Ibid* at paras 19, 50–51.

¹¹² *Douez v Facebook, Inc*, 2015 BCCA 279, 387 DLR (4th) 360.

¹¹³ Avner Levin & Mary Jo Nicholson, “Privacy Law in the United States, the EU and Canada: The Allure of the Middle Ground” (2005) 2:2 U Ottawa L & Technology J 357 [Levin & Nicholson].

¹¹⁴ McGill, “Transsystemic”, *supra* note 27. Transsystemia is a concept articulated by McGill Faculty of Law 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, please see the URL provided *supra* note 27.

definitions of foundational concepts. Recognizing conceptual incoherence and bridging the gap in policies and practices is urgently needed, and what we mean by key concepts (such as the “right to be forgotten”) needs to be more clearly theorized and enunciated. 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 can eventually aid scholars and lawmakers in formulating more coherent policies in this area.

Accordingly, this article endeavors to set out some proposals for revising the “right to be forgotten” as per *Costeja* and reinterpreting it in accordance with civil personality rights rather than the ownership of data, which ironically seems to stray from civil thinking on this point.

Instead, the civil law method’s traditional conception of privacy—as personality rights with their countervailing duties—appears commensurable with the goals of privacy management in an age of rapid technological advances and cross border exchanges. 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 property infringements of data. As James Whitman observed, referring to the dignity-based Continental view: “one’s privacy, like other aspects of one’s honor, was not a market commodity that could simply be definitively sold.”¹¹⁵ Thus, procedurally anchoring the “right to be forgotten” in ownership of data fails to comport with the time honoured civil paradigm of “extra patrimonial” personality rights surveyed above.

Perhaps this glimpse into civil thinking can eventually lead to an alternative approach to conceptualizing informational privacy in the digital context. Namely, a cross-cultural one in which both Facebook’s Mark Zuckerberg (who claims that privacy is dead)¹¹⁶ and former Director of the Federal Trade Commission’s Bureau of Consumer Protection, David Vladeck (who invited us to rethink privacy as dignity)¹¹⁷ are both correct. 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 (not the “loss” of data ownership *per se*)—is very much alive.

¹¹⁵ Whitman, “Two Western Cultures”, *supra* note 104 at 1176.

¹¹⁶ Marshall Kirkpatrick, “Facebook’s Zuckerberg Says The Age of Privacy is Over” (9 January 2010), *ReadWrite* (blog), online: <www.readwrite.com/2010/01/09/facebook_zuckerberg_says_the_age_of_privacy_is_ov/>.

¹¹⁷ Stephanie Clifford, “Fresh Views at Agency Overseeing Online Ads”, *The New York Times* (4 August 2009), online: <www.nytimes.com>.

In the end, a more robust—possibly transsystemic, but at least transsystemically-viable—construction of privacy predicated on protecting identity, rather than property, would allow for a conversation between common law and Continental jurists, and for a more nuanced balancing of privacy and freedom of expression. It may, as such, ultimately help overcome cultural barriers for the purpose of a transnational exchange in a way that the blunt, procedural and property-based “right to be forgotten” never will. It stands to reason that this, in turn, will facilitate rather than stunt or frustrate global commerce, perhaps eventually leading to a “conceptual middle ground,”¹¹⁸ or at least a practical one in the interim.

¹¹⁸ Levin & Nicholson, *supra* note 113.