

11-7-2014

We Don't Need a "Right to Be Forgotten." We Need a Right to Evolve

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Recommended Citation

Dawinder S. Sidhu, *We Don't Need a "Right to Be Forgotten." We Need a Right to Evolve*, New Republic (2014).

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We Don't Need a "Right to Be Forgotten." We Need a Right to Evolve.

The sad symptom of a judgmental culture

By Dawinder Sidhu

**New Republic
November 7, 2014**

“Modern cell phones,” Chief Justice John Roberts wrote earlier this year, “are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans the privacies of life.” With a few clicks, the intimate details held in your phone—photos, past locations, political opinions expressed in emails—may be transmitted to and forever memorialized on the Internet. The same, of course, is true of information uploaded from a computer or other electronic device.

Our online footprint can be vast. Beyond what we self-disclose, there’s all the sensitive information about us that others may post online. Friends, journalists, and government agencies, for example, may contribute to our digital record.

As more of our past becomes accessible in the present, so does the potential for it to redefine our identities, complicate our relationships, and generally be used for mischief. A recent incident from Canada helps illustrate the point. In the 1960’s and 1970’s, Jacqueline Laurent-Auger was a young actress hoping “to make a little money.” She moved to Paris, where she appeared nude in several films. This July, after her nude work was discovered online, Laurent-Auger, now 73, was terminated from her position as a drama teacher. The school director explained that the newly exposed “erotic portion” of her Laurent-Auger’s resume made her unfit for her post.

Laurent-Auger’s firing is exactly the sort of outcome that supporters of a “right to be forgotten” are seeking to prevent. This new digital-age protection empowers a person to secure the removal of information about his or her past from Google or other search engines. For those whose former (mis)deeds have been captured online, the right to be forgotten would ostensibly allow them to reclaim their privacy and prevent others from using the past against them. The concept has been formally recognized in the European Union and Argentina, and debate is underway about whether it should be adopted in the United States.

Creating a “right to be forgotten” in the United States would not be without costs. For one, it would arguably threaten free speech. In American society, with narrow exceptions, we allow the relative significance of a piece of information to be debated in the marketplace of ideas, not removed from public consideration altogether—our

belief is that the truth will emerge through competing views, and that neither the government nor any other party should decide for us, either through selection or omission, which information matters. The right to be forgotten would not only limit the scope of information in the public forum, but would put enforcement responsibilities in the hands of third-parties who, in the words of The New Republic's Jeffrey Rosen, would become "censors-in-chief." What's more, a right to be forgotten is necessarily ad hoc—information would be scrubbed only after it had already been online and accessible by the masses. Worse, given the possibility that information may be copied, shared, and downloaded, it is virtually impossible to entirely eliminate the information from the public domain. To put it simply, the right to be forgotten has constitutional and practical shortcomings.

But for all its potential flaws, the real problem is that we need a right to be forgotten at all. In judging or condemning a person today for past missteps or indiscretions, we as a country and a culture reveal our own vices. We can wrestle all we want over the efficacy and prudence of removing electronic information already released. The real danger, however, is not that the information is out there. As Judge Alex Kozinski of the United States Court of Appeals for the Ninth Circuit put it in an essay on technology and privacy, "The danger comes from a different source altogether...In the immortal words of Pogo: 'We have met the enemy and he is us.'"

Laurent-Auger's termination demonstrates an unfortunate fact: society is quick to anchor an individual's identity to a single unfavorable trait, even when associated with long-ago events, and even when the person has since demonstrably changed. We do it all the time, and to entire classes of people. Ex-felons are disenfranchised and screened out of employment opportunities solely because they were felons. Not too long ago, addicts were subject to criminal punishment simply because of their status as alcoholics; today, they continue to be branded with a monolithic identity, regardless of their possible success in recovery or contributions to society as spouses, siblings, employees, etc. "You are just a drug addict," Walter White told Jesse Pinkman, a Hollywood interpretation of this broader perception.

In contrast to a "right to be forgotten," it would be more fruitful to promote a "right to a dynamic identity" that would encourage society to perceive individuals in accordance with their recent behavior and would prohibit their classification based only on prior actions. Whereas the right to be forgotten is concerned with individual privacy keeping pace with technology, the right to a dynamic identity speaks to social perceptions keeping pace with current representations of the self. To be clear, the right to a dynamic identity would not (and could not) be a legally enforceable "right," but rather would operate as social norm that can regulate harmful attitudes.

While the right to a dynamic identity would apply to everyone, specific examples illustrate its need. Shon Hopwood spent over a decade in federal prison for five counts of bank robbery and a related gun charge. "My gut told me that Hopwood was a punk," the sentencing judge said (channeling his inner Walter White). Hopwood, released in 2009, went on to attend law school on a Gates Public Service Law Scholarship. He is now a law clerk to a federal appellate judge and has authored

multiple petitions for review that were granted by the Supreme Court, a remarkable accomplishment considering the relatively few number of cases the justices accept each year.

To maximize social utility, the ability of individuals like Hopwood to change should not just be acknowledged, but facilitated. Social support can enhance a person's prospects for employment and contributions to their families, their communities, and the workforce. (It is more useful to Laurent-Auger's students if she remains a drama teacher now, even if the Internet has told us she once posed for nude films.) There should be reasonable limits, of course. The greater the temporal and behavioral separation from the old self, the greater claim the person has to different treatment from others now. But if the old and current self are connected by consistent undesirable conduct, that claim is weaker. A man in his 40's with recent DUIs does not make a credible case that he has severed ties with the self arrested for driving under the influence as a young adult.

This is the core of the right to a dynamic identity: it's responsive to personal progress. It is a recognition that, despite continuity in name and body, people may be very different, in thought and action, at various points in their life. The right seeks to free people from the shadows of their past selves and demands that we be treated as moral agents, capable of growth. As more individuals face the spectre of social harm for their digitized past, it's an idea warranting real consideration.

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