

The ‘Right to Be Forgotten’: An Ethical Dilemma

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Should there be a digital ‘right to be forgotten’? Almost everyone has done something as a teenager or young adult that they later regret. With the advent of the Internet, social media, and the ubiquitous cell phone, a de facto permanent digital record of almost everything that is said or done has been created. These digital records are easily accessible, shared, and may have devastating personal, educational and professional consequences. This paper summarizes the status of the ‘right to be forgotten’ and provides specific incidents to inspire lively debate. The European Union’s ‘right to be forgotten’ law and California’s Minor Erase Law are both outlined. Two cases involving youthful indiscretions, one by a minor and the other by a young adult, are presented. Suggestions are made for discussion questions with additional teaching notes italicized.

Keywords: right to be forgotten, right to forget, minor eraser law, digital privacy, employment, digital records, first amendment, ethics case

INTRODUCTION

Historically, juvenile records were ‘sealed’ because it was deemed to be unfair to hobble a person’s educational and employment prospects based on a transgression committed early in life. Indeed, until the last 20 years, those early indiscretions were easily forgotten. Personal knowledge or an arduous search at a library would have been necessary to uncover an incident reported in a newspaper. Likewise, a background check entailed a trip to the local courthouse and a considerable amount of time combing through court records, and juvenile records would not be accessible.

Although memories fade over time, the Internet preserves digital records forever. The omnipresent smart phone has essentially created a permanent record of daily life. Almost everyone at some time has done or said something that they later regret. For example, Virginia Governor Ralph Northam was forced to publicly address the presence of a racist photo on his page of the 1984 Eastern Virginia Medical School yearbook. (Wong, 2019) Clearly, Governor Northam is not the first person and won’t be the last to have to face the consequences for making an insensitive comment or posting an offensive photo.

A timely ethical and legal issue with potential personal and long-term professional implications in our digital environment is whether there should be a ‘right to be forgotten’ or perhaps even a digital statute of limitations. The EU has formally adopted a ‘right to forget’ directive and California recently passed a Minor Eraser Law. There is a movement in the US to adopt some sort of ‘right to be forgotten’, creating an ethical dilemma because history could be rewritten.

This article includes two scenarios from the news to encourage students to consider whether there should be a ‘right to be forgotten’ – a student whose admission to Harvard was rescinded, and a junior

financial analyst who lost his job for leaking information about the Facebook IPO. Under what circumstances should a digital record be erased? Are there some events that should never be forgotten? Does erasure of an event create a false narrative? How does erasure affect freedom of speech? It is difficult to think of a more timely discussion.

The ‘Right to Be Forgotten’

The ‘right to be forgotten’ is based on an idea that was first recognized in the EU and has been defined as “the right to silence on past events in life that are no longer occurring.” (Pino, 2000) The right to be forgotten initially came from the landmark case of Mario Costeja González, who was forced to sell some property to satisfy a debt. The incident was reported in a Spanish newspaper in 1998. Almost a decade later, Costeja González attempted to have the article reporting the sale of his assets removed from the Internet by both Google and the newspaper, alleging that the incident was no longer relevant. The EU’s Court of Justice heard the case and held that search engines had an obligation to consider the good faith requests of EU citizens, and where appropriate, to remediate search engine results. With this precedent, “the digital right to be forgotten became a privilege enjoyed by all citizens within the E.U., and Google has removed 1.1 million links from its search results since.” (Swearingen, 2019) Now formally adopted by EU directive and recognized in EU courts, a person may file an application to have harmful personal information, videos, and photos removed from Internet records. In other words, the deleted information would not be revealed in search engine results performed in the EU.

On January 1, 2015, the California ‘Minor Eraser Law’ went into effect. The California Eraser Law (Cal. Bus. & Prof. Code §§ 22580-81) was passed in the wake of the EU ‘right to be forgotten’ and permits someone to request that an online server remove postings made by a person during their minority (before the age of 18). Additionally, the existence of this right must be included in a service provider’s privacy policy. (Ross, 2015) It should be noted that the right to have data permanently deleted only applies to an item posted by the person requesting deletion.

Two Cases to Consider

Harvard Rescinds Admissions Offer

Kyle was excited about being accepted for admission to Harvard – his first choice school. He had survived the Marjory Stoneman Douglas shooting in Parkland, Florida. While many of his fellow classmates were advocating gun control, Kyle presented a conservative response to the school shooting and met with President Trump in the Oval Office. After being accepted to Harvard, screenshots of Kyle’s private Facebook conversations made two years earlier were resurrected. These offensive postings were made while Kyle was sixteen and included racial slurs. According to Kyle, “After the story broke, former peers & political opponents began contacting Harvard urging them to rescind me. Harvard then sent this letter stating that Harvard “reserves the right to withdraw an offer of admission” and requested a written explanation within 72 hours.” (@KyleKashuv, June 17, 2019)

According to The Harvard Crimson, “if an admitted student engages or has engaged in behavior that brings into question their honesty, maturity or moral character”, Harvard’s Admissions Committee reserves the right to rescind offers of admission. (Avi-Yonah and Franklin, 2019) Kyle immediately responded to the rescission letter, took responsibility for his comments, provided an explanation, and apologized. He also emailed the Office of Diversity and Inclusion and expressed that he wanted “...to seek guidance on how to right this wrong and work with them once I was on campus.” (@KyleKashuv, June 17, 2019) The Admissions Committee reaffirmed its decision.

This is not the first time that Harvard has rescinded an offer of admission based on offensive online postings. In 2017, ten members of the Class of 2021 had their offer of admission rescinded for participating in a Facebook messaging group formed with other newly admitted freshmen. This explicit group chat included obscene memes, mocked sexual assault, and the death of children. (Natanson, 2017)

It is interesting to note that if Kyle had been a resident of California, he would have been able to erase the offensive, private conversation he had when he was sixteen years old...before he applied to college and presumably before it resurfaced. It would have been gone without a trace.

1. Should a minor be allowed to erase postings? *A minor is someone who has not yet reached the age of 18. Under our civil law, minors are allowed to avoid almost all contracts made during their minority. These contracts may be avoided during minority and for a reasonable time after attaining majority (turning 18). The primary reason that we allow minors to avoid contracts is to protect them from making foolish decisions and/or from being taken advantage of by an adult. Although a minor may commit a criminal act, when a minor is prosecuted, the “record” is generally sealed. In other words, the offense must not be revealed to the prying eyes of the public. Again, our criminal laws acknowledge that a minor may commit an offense; however, that offense should not irreparably damage a person’s life.*
2. What if Kyle had posted the racist comment when he was 13 years old – would that change your opinion of whether the comment should be forgotten?
3. Is there a difference between Harvard’s rescission of Kyle’s admission offer and the revocation of the offer of admission to the ten members of the class of 2021?
4. Do you believe that a person can change...even after a relatively short period of time? *“The Green Book”, is a recent movie based on the true story of an African-American concert pianist and his Italian-American driver, Tony “the Lip”. In part, the movie shows the growth of a relationship between these characters. This could be an interesting part of a discussion of whether a person can change attitudes and paradigms as Tony did.*
5. Under what circumstances, if any, would you allow a posting to be erased? *Even a minor may be held responsible for some contracts made during his/her minority. Under the common law, a minor may not avoid contracts for “necessaries” – food, clothing, or shelter. This exception is logical. After all, many minors are employed and have disposable income – it would be unfair for a minor to go into a restaurant and order food and after eating a meal, refuse to pay for it. By statute in a majority of jurisdictions, a minor is not allowed to avoid a contract made while running a business. The rationale for this rule is that if minors are savvy enough to run a business, then they should be bound by business-related contracts.*

Junior Research Analyst (JRA)

In an effort to have full and fair disclosures, the Securities Exchange Act strictly regulates the primary securities markets and initial public offerings (IPO). The disclosure of inside and confidential information is strictly forbidden and analysts, underwriters and others working on an IPO are well aware of the importance of confidentiality. JRA is a 2008 Stanford graduate in his mid-twenties on a successful career path – that is, until May 2012. While working for Citigroup’s Internet analyst group, JRA disclosed non-public, confidential information about the Facebook IPO to his college pal, a writer for TechCrunch. When this indiscretion came to light, four things happened: Disclosure of this confidential information was publicized and JRA was identified online, Citigroup fired its Internet analyst group, the Internet analyst group was assessed a \$2 million fine by the state of Massachusetts for these unlawful disclosures, and JRA lost his job. (Carlson, 2012)

1. If JRA applied for an analyst position at your firm, would you want to know about the unauthorized disclosures and the \$2 million fine his previous employer had to pay? *A prospective employer would most likely want to know of the disclosure incident and the resulting fine. A relevant question is whether this was an isolated event or a character flaw? Additional questions a prospective employer may want to ask include the following: How did this impact your world view, your professional view or personal life? What would you do differently moving forward?*
2. Would you allow JRA to exercise the ‘right to forget’ and to have all of the associated coverage removed from search engine results? *By removing this coverage from all search engines, this would essentially change JRA’s history. Of course, one who has committed an unauthorized disclosure of confidential information may be the person least likely to do this again...or JRA could be a serial leaker. Is there a way to uncover whether JRA has a true sense of remorse? Does he take responsibility for his mistake or does he simply blame*

someone else? Where JRA places the blame could provide a clue as to whether he would do this again.

3. Are there any circumstances under which you would allow JRA to ‘erase’ his past unauthorized disclosures? After 10 years? After 20 years? *A relevant point to highlight is that this offense had a direct relationship to unauthorized disclosure of information on the Internet.*

ADDITIONAL QUESTIONS FOR DISCUSSION

1. What is the difference between Kyle’s offensive comment(s) and JRA’s disclosure of confidential information?
2. Is a ‘Minor Eraser Law’ a good idea?
3. Should the US have a ‘right to be forgotten’?
4. Given the First Amendment (freedom of speech/expression), should the right to delete personal information be limited to items that the individual posted? *Although photos may be “untagged”, Facebook has facial recognition technology – a face can be readily identified even if it is not “tagged”. Please note that students may have seen a Black Mirror episode (Netflix) highlighting such technology and social ranking, which could be part of this discussion.*
5. Could the ‘right to forget’ compromise the integrity of an Internet search? *Perhaps the ‘right to forget’ would re-write history and in effect, hamper due diligence of employers, investors, or even voters.*
6. If a ‘right to forget’ is adopted, what form should it take?
 - *Should the ‘right to forget’ be limited to information posted during a person’s minority?*
 - *What if that posting was a ‘hit list’?*
 - *Should the ‘right to forget’ be applied only to false and/or defamatory information?*
 - *Should the ‘right to forget’ be applicable to any/all information after a certain number of years?*
7. In 2015, the Commission nationale de l’informatique et des libertes (CNIL) asked Google to remove data from all versions worldwide. Should the EU be able to determine what search engines reveal on an international basis?
 - *Are there some things that should never be forgotten?*
 - *What about a sex offense or conviction as a sex offender?*
 - *Did the fact or act only affect you or did the act affect (or change the history) of another?*
 - *What if the item that was posted was about a minor? Example: A photo of a minor dressed inappropriately or a minor consuming alcohol.*

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