

# Privatization of the Judiciary

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## ABSTRACT

The digital era invoked new challenges to judicial systems. The Internet enabled violation of privacy and intellectual property rights and enhanced the magnitude of criminal activity. Recognizing the inability of courts to handle a high magnitude of lawsuits, along with enforcement difficulties, policymakers worldwide chose to delegate quasi-judicial powers to online intermediaries that facilitate or enable such potential violations or infringements of rights. Search engines were first tasked to perform a quasi-judicial role under a notice-and-takedown regime to combat copyright infringement around the world. Recently, the European Union (EU) decided to delegate judicial authority to search engines by granting rights of erasure, or delisting of personal data, about EU individuals under certain circumstances. Effectively, the EU placed search engines—mainly Google currently—as a judiciary, tasked to balance different fundamental human rights. This privatization of the judiciary represents a new paradigm in legal systems and possesses vast global ramifications, which must be further scrutinized.

This Article provides such scrutiny. It begins by briefly exploring the rights to be forgotten and delisted. It then provides an overview of the quasi-judicial roles played by search engines prior to the new EU rights regime and compares them to their new judicial role. Following an examination of the pragmatic and normative difficulties in the implementation of the EU rights regime, this Article evaluates and discusses the future of the private judiciary. It examines the drawbacks and benefits of judicial privatization; explores whether other means of regulation are more appropriate; and proposes modest solutions to properly address the shortcomings of the new privatized judiciary. This Article warns against such form of privatization and its current implementation, especially when fundamental rights are at stake. If policymakers insist on adjudicating search engines, they must also restrain their judicial power and provide adequate safeguards for society in the form of transparency and proper oversight on both their removal procedure and decisions.

## INTRODUCTION

Digital technology invoked many new challenges to judicial systems. The Internet, along with its benefits, created a space in which individuals could misuse and violate rights. It made it easier to violate

privacy laws, infringe intellectual property rights, and commit crimes. Due mainly to financial, enforcement, and other technical difficulties, many policymakers worldwide chose to delegate quasi-judicial powers to online intermediaries that facilitate or enable such potential violations or infringements of rights. To a great extent, it makes sense. The state was unable to deal with the enormous number of potential violations that the Internet facilitates and thereby created a preliminary process for examination of the violation of such rights, while granting a right to appeal intermediaries' decisions to judicial authorities. Under such a mechanism, online intermediaries allegedly play merely a quasi-judicial role as a preliminary process before the judicial process. However, this Article shows that assumption is not always true.

Online intermediaries—perhaps, mostly search engines—make decisions on content based on two factors: internal policy and regulation. Filtering search results based on internal policy does not generally categorize search engines as a judiciary. As long as search engines comply with the law, as private companies, they are entitled to decide how to construct their services. Regulation does not also necessarily imply that search engines act as a judiciary. While search engines are subject to regulation regarding their search results, e.g., removing links to illegal content from a search query, they do not generally replace the role of courts. But along the way, search engines were tasked with making decisions on content removal, which changed their role from a preliminary decider to a quasi-judicial entity, and, most recently, in the European Union as a judiciary that effectively replaces courts.

The move to intermediaries acting as quasi-judicial entities began in 1998 in the United States under the Digital Millennium Copyright Act (DMCA)<sup>1</sup> and continued via other forms of regulation worldwide.<sup>2</sup> These forms of regulation created a notice-and-takedown regime to combat copyright infringement in which search engines receive requests from copyright owners or their representatives to remove search results that link to allegedly infringing materials.<sup>3</sup> Directly, the DMCA tasked search engines with making decisions on intellectual property rights, but indirectly, it also enabled them to decide on fundamental rights like free speech. Mostly, it triggered a potential paradigm shift: private entities that operated online could be delegated with judicial power and obligations previously reserved for courts. But such a judicial role is limited to a great extent. While fundamental rights are indirectly involved in the process, such claims revolve mostly around economic

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1. *See infra* note 88.

2. *See infra* note 89.

3. *See infra* Part II.A.

interests; these rights have more adequate safeguards that rely on oversight and transparency and generally comply with the rule of law.

The EU has recently taken the privatization of the judiciary a step further by adopting a right of erasure (right to be forgotten) under the General Data Protection Regulation (GDPR).<sup>4</sup> It is a “right of individuals to have their data no longer processed and deleted when they are no longer needed for legitimate purposes.”<sup>5</sup> Prior to its adoption, and until the GDPR takes effect after a two-year transition period, the European Court of Justice (ECJ) granted EU individuals a more limited right to be delisted under an interpretation of the Data Protection Directive (DPD).<sup>6</sup> On May 13, 2014, the ECJ held that Google, and more broadly, search engine operators, are responsible for the processing of personal data that appears on web pages published by third parties. Practically, it means that search engines that operate in the EU are obliged to “delist” any material that is inadequate, irrelevant, no longer relevant, or excessive in relation to those purposes and in the light of the time that has elapsed,<sup>7</sup> as balanced against the public’s right to the information.<sup>8</sup> In other words, under the current EU regime, search engines are obliged, under some circumstances, to remove search queries related to the search of a specific name.

Under the right to be delisted, search engines are tasked with a judicial role. They are obliged by the ECJ to decide which content will appear or disappear when someone uses a specific search query related to his or her name. If we once referred to search engines as gatekeepers of information,<sup>9</sup> they have now taken it upon themselves, or rather, have been ordered to undertake a new judicial task of balancing between legal and fundamental rights: privacy and data protection on the one hand, and freedom of speech, freedom of information, and freedom of the press on the other. Such a move delegates judicial power to search engines, which

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4. See *infra* note 29.

5. *A Comprehensive Approach on Personal Data Protection in the European Union*, *infra* note 29.

6. 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 O.J. (L 281) 31 [hereinafter EU Data Protection Directive].

7. See Case C-131/12, *Google Spain SL v. Agencia Española de Protección de Datos (AEPD)*, 2014 EUR-Lex CELEX 62012CJ0131 (May 13, 2014) [hereinafter *Google Spain*].

8. *Id.*

9. See, e.g., Niva Elkin-Koren, *Let the Crawlers Crawl: On Virtual Gatekeepers and the Right to Exclude Indexing*, 26 DAYTON L. REV. 179 (2001); Urs Gasser, *Regulating Search Engines: Taking Stock and Looking Ahead*, 9 YALE J.L. & TECH. 201 (2006); Eric Goldman, *Search Engine Bias and the Demise of Search Engine Utopianism*, 8 YALE J.L. & TECH. 188 (2006).

now operate as a judiciary in the digital world.<sup>10</sup> Their employees are the new digital judges, and they now act as a courthouse.

The judicial-like roles of search engines under the right to be delisted enhances and expands the roles of intermediaries in the digital era. It constitutes a form of privatization: For-profit, commercial entities—not the state—are placed as the judiciary to decide on fundamental rights. Indeed, privatization of governmental roles is not new in either the digital or kinetic worlds. States sometimes privatize some portion of the executive and the legislature by granting authorities a prerogative to regulate, allowing private forms of enforcement, and even hiring private militaries.<sup>11</sup> To some extent, even judicial roles are privatized, mainly through Alternative Dispute Resolution (ADR) procedures<sup>12</sup> or a unique procedure commonly referred to as “rent-a-judge,” in which parties commission retired judges to make binding adjudications.<sup>13</sup> But in terms of judiciary privatization, the right to be delisted takes two steps forward: It authorizes and obligates for-profit commercial entities to balance between fundamental rights and liberties with almost no oversight or transparency. Furthermore, it impacts the rights of many people that are not parties to the dispute.

What are the ramifications of this form of privatization? Can for-profit organizations serve as adequate judges on fundamental rights and liberties? What are the benefits and drawbacks of such an approach to human rights and the rule of law? This Article provides a normative evaluation of and strives to enrich the discussion on privatization, the roles of the judiciary in a democratic society, and the future of the Internet under the right to be forgotten and the right to be delisted.

The Article proceeds as follows: Part I explores the rights that are invoked in the new judiciary—the right to be forgotten and the right to be delisted under the ECJ ruling. Part II provides an overview of judicial roles played by online search engines prior to the right to be delisted and compares them to the new judicial role that they play under it. Part III scrutinizes the judicial difficulties in the implementation of the right to

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10. Edward Lee argued that under the right to be forgotten, Google is “functioning similar to how a government agency or administrative body might act.” Edward Lee, *Recognizing Rights in Real Time: The Role of Google in the EU Right to Be Forgotten*, 49 U.C. DAVIS L. REV. 1017, 1024 (2016). This Article argues further that search engines’ role in the right to be delisted (which will be further differentiated from the right to be forgotten) resembles judicial decisions made by courts.

11. See *infra* Part III.B.

12. For more on ADR of Internet-related disputes, see Jacques de Werra, *ADR in Cyberspace: The Need to Adopt Global Alternative Dispute Resolution Mechanisms for Addressing the Challenges of Massive Online Micro-Justice*, SWISS REV. INT’L & EUROPEAN L. (forthcoming, 2016) (discussing the potential of ADR mechanisms for solving Internet-related disputes in which online platforms are challenged by a massive amount of removal requests).

13. See *infra* note 184.

be delisted under the new courthouse from both pragmatic and normative aspects. Part IV evaluates and discusses the future of the private judiciary. It examines the drawbacks and benefits of judicial privatization; discusses whether other means of regulation are more appropriate; and proposes modest solutions to properly address the shortcomings of the new judiciary. Finally, Part V argues that when dealing with fundamental rights, the privatization of the judiciary is dangerous to both the rule of law and to the existence of a democratic society. If any country insists on using search engines as a judiciary, it must draw the contours of its judicial power and provide adequate safeguards for society.

#### I. THE RIGHTS TO BE FORGOTTEN AND DELISTED

The availability of information has dramatically increased in the digital age. Once information is posted online, it could forever orbit the digital atmosphere.<sup>14</sup> Unlike the limited capacity of the human mind to remember everything, the *e-memory revolution* could enable a never forgetting Internet.<sup>15</sup> Every picture of us posted, comment made, or video uploaded remains there for others to see. Anything that has been openly written about us could be accessible at all times by almost anyone with access to the Internet. Search engines make this information easily accessible to the public.

Although it would appear optimal to live in an ever-knowing society with endless access to information and potential for knowledge, it will hardly be utopian. The Internet works well for those individuals who can obtain information on anyone without ever meeting him or her. In that way, we can fulfill our voyeuristic needs and use it, for example, to pre-screen potential dates, pre-screen candidates for jobs, or even learn more about our neighbors and people living elsewhere. By the same

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14. See VIKTOR MAYER-SCHÖNBERGER, *DELETE: THE VIRTUE OF FORGETTING IN THE DIGITAL AGE* 50–91 (2009) (arguing that digital technology and storage have led to the demise of forgetting). However, it would be false to assume that the Internet never forgets. Information persistence research, a field of research dedicated to measuring how long information remains accessible and unchanged, suggests otherwise. Various studies on content availability found that most online content is not available after one year. See, e.g., Junghoo Cho & Hector Garcia-Molina, *The Evolution of the Web and Implications for an Incremental Crawler*, in *PROC. OF THE 6TH INT'L CONF. ON VERY LARGE DATA BASES 200–09* (2000); Dennis Fetterly, Mark Manasse, Marc Najork & Janet L. Wiener, *A Large-Scale Study of the Evolution of Web Pages*, 34 *SOFTWARE PRAC. & EXPERIENCE* 213, 213–37 (2004). However, along with technological advancement in various fields, e.g., storage capabilities, this might also change in the near future. For a summary of information persistence research and conclusions, see Meg Leta Ambrose, *It's About Time: Privacy, Information Life Cycles, and the Right to Be Forgotten*, 16 *STAN. TECH. L. REV.* 369, 372–73, 389 (2013).

15. For a general overview and discussion of the e-memory revolution, see GORDON BELL & JIM GEMMELL, *TOTAL RECALL* (2009).

token, everyone else could be harmed. The fact that online information cannot be removed for almost any reason<sup>16</sup> is not necessarily good. Constantly being under a magnifying glass could prove to be harmful for our social opportunities. For example, a picture of a teenager drinking at a party could affect her career opportunities for the rest of her natural born life.<sup>17</sup> Should technological advancements imply that we lost our ability to have or regain anonymity?<sup>18</sup> Could the Internet lead to a “Reputation Bankruptcy”?<sup>19</sup>

The concept of digital oblivion is intriguing.<sup>20</sup> The digital age clearly possesses potential negative ramifications for humankind, which should not be completely waived under the auspices of freedom of speech and freedom of information. Digital technology allows for unprecedented amounts of data collection and retention, which could be harmful for our existence.<sup>21</sup> However, as many scholars argue, regulation in the form of both the right to be delisted and the right to be forgotten could endanger freedom of speech, freedom of information, and freedom of press.<sup>22</sup> It raises concerns of censorship and presents many challenges to the framers of such rights. But what perhaps is more intriguing, and rarely discussed under the right to be delisted, is the reshaping of roles of search engines.<sup>23</sup>

But before we delve deep into the right to be forgotten and the ECJ ruling on the right to be delisted, we need to briefly understand their origins. It all goes back to Samuel Warren & Louis Brandeis who

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16. Both information and links to information could be removed under limited circumstance, depending on the type of information and the jurisdiction. *See infra* Part IIA.

17. Here are two examples of how online information negatively affected employment of individuals. Kimberley Swann, a sixteen-year-old British employee (at that time) at Ivell Marketing & Logistics, was fired for moaning on Facebook, “I’m so totally bored!!.” Stacy Snyder posted a photo on her Myspace account showing her at a party wearing a pirate hat and drinking from a plastic cup along with the caption “Drunken Pirate.” She was fired for promoting drinking in view of her under-age students. Andrew Levy, *Teenage Office Worker Sacked for Moaning on Facebook About Her ‘Totally Boring’ Job*, DAILY MAIL (Feb. 26, 2009), <http://www.dailymail.co.uk/news/article-1155971/Teenage-office-worker-sacked-moaning-Facebook-totally-boring-job.html>; Jeffrey Rosen, *The Web Means the End of Forgetting*, N.Y. TIMES (July 21, 2010), [http://www.nytimes.com/2010/07/25/magazine/25privacy-t2.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2010/07/25/magazine/25privacy-t2.html?pagewanted=all&_r=0).

18. *Briscoe v. Reader’s Digest Ass’n*, 483 P.2d 34, 41 (Cal. 1971) (“[J]ust as the risk of exposure is a concomitant of urban life, so too is the expectation of anonymity regained.”).

19. JONATHAN ZITTRAIN, *THE FUTURE OF THE INTERNET AND HOW TO STOP IT* 228–29 (2008).

20. *See generally* MAYER-SCHÖNBERGER, *supra* note 14.

21. *See* Meg L. Ambrose & Jef Ausloos, *The Right to Be Forgotten Across the Pond*, 3 J. INFO. POL’Y 1, 3 (2013).

22. *See infra* note 143.

23. For a brief history of the roles of search engines in the Internet, see, for example, Jonathan Zittrain, *A History of Online Gatekeeping*, 19 HARV. J.L. & TECH. 254 (2006).

articulated the need for a “right to be let alone.”<sup>24</sup> They gave birth to the right to privacy. Since then, various forms of privacy rights have appeared with different levels of legal protections.<sup>25</sup> Over time, and mainly after the emergence of digital technologies, the right to privacy seemed insufficient to cover many new aspects of our lives. For example, it did not sufficiently protect the interests of individuals to control information posted online that relates to them. Individuals were in need of new legal mechanisms to control the vast amount of information posted online. They were in need of a legal right that would enable them to decide what personal information may be posted online or available via search engines. This gave birth to a new privacy right,<sup>26</sup> the so-called “right to be forgotten.”<sup>27</sup>

#### A. Right to Be Forgotten (Erasure)

The right to be forgotten originates from the French and Italian “right of oblivion”—*le droit à l’oubli* and *diritto al’ oblio*, respectively—which censors the facts of an ex-criminal’s conviction and

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24. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890).

25. The right to privacy is protected differently around the world. Under United States law, for example, while the word “privacy” does not appear in the Constitution, certain aspects of the right to privacy are protected by various amendments to the Constitution, and perhaps mainly, by the Fourth Amendment. Other than the Constitution, privacy in the United States is protected by various federal and state laws, such as the Children’s Online Privacy Protection Act of 1998, Pub. L. No. 105–277, 112 Stat. 2681–728 (1998). The EU—aside from privacy protection in each Member State’s constitutions and laws—protects privacy under, *inter alia*, Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which provides the protection of “the right to respect for [an individual’s] private and family life, his home and his correspondence.” (Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, Nov. 4, 1950, 213 U.N.T.S. 221); and by the Charter of Fundamental Rights of the European Union, article 7 (protects respect for private and family life) and article 8 (mentioning the protection of personal data). See Charter of Fundamental Rights of the European Union, 18 December 2000, O.J. C 364/1–22.

26. Few scholars argue that the right to be forgotten should not be treated as a privacy right, but rather as a different kind of human right. See, e.g., Napoleon Xanthoulis, *The Right to Oblivion in the Information Age: A Human-Rights Based Approach*, 10 U.S.–CHINA L. REV. 84, 98 (2013) (“It is clear that ‘oblivion’ has proven, under certain circumstances, to be a necessity for safeguarding human well-being. A right to oblivion confirms the need for a paradigm shift in privacy, leading to a multidimensional conceptualization of the right to privacy.”).

27. The OECD also recognized in 2013 that “more extensive and innovative uses of personal data bring greater economic and social benefits, but also increase privacy risks.” See ORG. FOR ECON. CO-OPERATION AND DEV. (OECD), OECD GUIDELINES OF THE PROTECTION OF PRIVACY AND TRANSBORDER FLOWS OF PERSONAL DATA ch. 1, 11 (1980), <http://www.oecd.org/sti/ieconomy/2013-oecd-privacy-guidelines.pdf> [https://perma.cc/7F89-VHUF].

incarceration and is designed to allow rehabilitation.<sup>28</sup> In the context of online privacy, the right to be forgotten (articulated also as the right of erasure) made its debut in the EU as part of the GDPR.<sup>29</sup> Proposed by Viviane Reding, the European Commissioner for Justice, Fundamental Rights, and Citizenship,<sup>30</sup> the right to be forgotten enables a data subject (an individual) to “obtain from the controller the erasure of personal data concerning him or her without undue delay and the controller shall have the obligation to erase personal data without undue delay.”<sup>31</sup>

Such erasure should occur based on one of the following grounds: first, the data is no longer necessary in relation to the purposes for which it was collected or otherwise processed;<sup>32</sup> second, the data subject withdraws consent on which the processing is based and where there is no other legal ground for the processing of the data;<sup>33</sup> third, the data subject objects to the processing of personal data and there are no overriding legitimate grounds for the processing;<sup>34</sup> or where personal data are processed for direct marketing purposes and the data subject objects to the processing of his data;<sup>35</sup> fourth, the data has been unlawfully processed;<sup>36</sup> fifth, the data has to be erased for

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28. Jeffrey Rosen, *The Right to Be Forgotten*, 64 STAN. L. REV. ONLINE 88, 88 (2012). A more limited description of the right to be forgotten before the passage of the GDPR appeared in Eldar Haber, *The Cyber Civil War*, 44 HOFSTRA L. REV. 41, 63–67 (2015).

29. Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), 2016 (Apr. 27, 2016) [hereinafter GDPR]. Alex Türk, the French data privacy commissioner, was actually first to endorse the creation of a “right to oblivion.” Türk proposed forming an international body, which would evaluate removal requests on a case-by-case basis. See Jeffrey Rosen, *The Deciders: Facebook, Google, and the Future of Privacy and Free Speech*, 80 FORDHAM L. REV. 1525, 1533 (2012). Prior to the GDPR, the right to be forgotten was discussed in a communication of the EU in 2010. See *A Comprehensive Approach on Personal Data Protection in the European Union*, at 8, COM (2010) 609 final (Nov. 4, 2010).

30. Viviane Reding, Vice-President of the European Comm’n, EU Justice Commissioner, *The EU Data Protection Reform 2012: Making Europe the Standard Setter for Modern Data Protection Rules in the Digital Age* (Jan. 22, 2012). See generally Rosen, *supra* note 28 (exploring the right to be forgotten proposal in the EU).

31. GDPR, *supra* note 29, at art. 17. This article will mainly refer to the latest version of the GDPR from April 2016. The GDPR defines personal data as:

Any information relating to an identified or identifiable natural person (‘data subject’); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.

*Id.* at art. 4(1).

32. *Id.* at art. 17(1)(a).

33. See, e.g., *id.* at art. 6(1)(a), 9(2)(a). *Id.* at art. 17(1)(b).

34. Pursuant to article 21(1). *Id.* at art. 17(1)(c).

35. Pursuant to article 21(2). *Id.*

36. *Id.* at art. 17(1)(d).

compliance with a legal obligation under EU or Member State law to which the controller is subject;<sup>37</sup> and finally, the collection and/or processing of personal data belongs to a child below the age of sixteen.<sup>38</sup>

When the GDPR comes into force in early 2018, the EU will grant its citizens and residents a right to delete information from the Internet<sup>39</sup> upon meeting these criteria. The GDPR sets five exceptions.<sup>40</sup> First, for exercising the rights of freedom of expression and information;<sup>41</sup> second, for compliance with a legal obligation which requires processing of personal data under EU or Member State law to which the controller is subject, for the performance of a task carried out in the public interest, or in the exercise of official authority vested in the controller; third, for reasons of public interest in the area of public health;<sup>42</sup> fourth, for archiving purposes in the public interest, scientific or historical research purposes, or statistical purposes;<sup>43</sup> and finally, for the establishment, exercise, or defense of legal claims.<sup>44</sup>

The GDPR applies to “data controllers” that “determine the purposes and means” of processing personal data. Who are those data controllers?<sup>45</sup> Beyond search engines, it is currently unclear. Will hosting platforms like Facebook have erasure obligations under the GDPR? Only time will tell. Whoever will be subject to erasure obligations, violation of the right to be forgotten under the GDPR could lead to administrative fines up to 20,000,000 EUR, or in the case of an undertaking, up to 4% of the total worldwide annual turnover of the preceding financial year, whichever is higher.<sup>46</sup> Unlike EU Directives, the GDPR is self-executing:

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37. *Id.* at art. 17(1)(e).

38. Depending on the law of the EU Member State, but not below thirteen years old. *Id.* at art. 8(1), 17(1)(f).

39. While the right to be forgotten is often referred to as a right, it could also be characterized as an ethical or social value, or as a virtue or policy aim. See Bert-Jaap Koops, *Forgetting Footprints, Shunning Shadows. A Critical Analysis of the “Right to Be Forgotten” in Big Data Practice*, 8 SCRIPTED 229, 231 (2011).

40. See GDPR, *supra* note 29, at art. 17(3).

41. In accordance with Article 80. *Id.* at art. 80.

42. In accordance with Article 9(2)(h), (hb) as well as Article 9(4). See *id.* at art. 17(3)(c).

43. *Id.* at art. 17(3)(d).

44. *Id.* at art. 17(3)(e).

45. Under the latest version of the GDPR, data controllers means,

The natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes and means of the processing of personal data; where the purposes and means of processing are determined by Union law or Member State law, the controller or the specific criteria for his nomination may be designated by Union law or by Member State law.

*Id.* at art. 4(5).

46. *Id.* at art. 83(5).

when it comes into force, it will be enforceable as law in all Member States.<sup>47</sup>

The GDPR was approved in the EU and will soon grant EU citizens and residents the lengthily debated right to be forgotten or right of erasure. But, the future of such right and how it will be implemented in the EU is still highly unclear. What is clear is that the EU recognizes a more limited right, which applies to delisting results from search engines upon meeting specific criteria.

### B. Right to be Delisted

A more limited right to be forgotten exists in the EU under national data protection laws, as set by the DPD.<sup>48</sup> The DPD forms a right to access data and conditions the blocking of it. Under the DPD, Member States must guarantee that every data subject has the right to obtain from the controller<sup>49</sup> “the rectification, erasure or blocking of data, when the data processing is not in compliance with the Directive and particularly in instances where the data are ‘incomplete or inaccurate.’”<sup>50</sup> Article 6 ensures that personal data must be: (1) processed fairly and lawfully; (2) collected for specified, explicit, and legitimate purposes, in addition to historical, statistical, or scientific purposes;<sup>51</sup> (3) adequate, relevant, and not excessive in relation to the purposes for which they are collected and/or further processed; (4) accurate and, where necessary, kept up to date;<sup>52</sup> and (5) kept in a form that permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed.<sup>53</sup>

The DPD set the grounds for a *right to be delisted*. Unlike the current interpretation of the GDPR, content is not deleted, but rather delisted from some search results under certain circumstances. While this

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47. See *Regulations, Directives and Other Acts*, EUROPA, [http://europa.eu/eu-law/decision-making/legal-acts/index\\_en.htm](http://europa.eu/eu-law/decision-making/legal-acts/index_en.htm) [<https://perma.cc/679X-H3TM>].

48. See EU Data Protection Directive, *supra* note 6.

49. “Controller” under the EU Data Protection Directive means, [T]he natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes and means of the processing of personal data; where the purposes and means of processing are determined by national or Community laws or regulations, the controller or the specific criteria for his nomination may be designated by national or Community law.

*Id.* at art. 2.

50. *Id.* at art. 12.

51. Provided that Member States provide appropriate safeguards. *Id.* at art. 6.

52. Every reasonable step must be taken to ensure that data that are inaccurate or incomplete, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified. *Id.* at art. 6.

53. Personal data stored for longer periods should be stored for historical, statistical, or scientific use. *Id.* at art. 6.

Directive has existed since 1995, it was only recently that the ECJ revived such right in the digital environment, granting EU citizens and residents<sup>54</sup> an ability to better control information listed in search engines' results.

Prior to any normative evaluations of such right, we need to go back to the story behind the ECJ ruling. Back in 1998, Mario Costeja González's house was repossessed and put up for auction for the recovery of social security debts.<sup>55</sup> Under an order of the Spanish Ministry of Labour and Social Affairs, La Vanguardia Ediciones SL (La Vanguardia) published such information in its newspaper, both online and offline.<sup>56</sup> Since then, when someone Googled Mr. González's name, two links to La Vanguardia's article, from January and March 1998, would appear. Dissatisfied with Google's results, on March 5, 2010, Mr. González lodged a complaint with the Spanish Data Protection Agency (Agencia Española de Protección de Datos or AEPD) against La Vanguardia, Google Spain, and Google Inc.<sup>57</sup>

González requested that La Vanguardia remove or alter those pages so that the personal data relating to him no longer appeared. González also requested that Google remove or conceal the personal data relating to him so that they cease to be included in the search results and no longer appeared in links to La Vanguardia. The reason for such requests, according to González, was that the context of the attachment proceedings concerning him was now entirely irrelevant as it had been resolved for a number of years.<sup>58</sup>

Under the decision of the AEPD, Google was labeled a data controller,<sup>59</sup> responsible for removing search results regarding the plaintiff.<sup>60</sup> Google appealed to Spain's national high court (Audiencia

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54. Under the Working Party guidelines, a data subject is a citizen or resident of an EU Member State. See Article 29 Data Prot. Working Party, *Guidelines on the Implementation of the Court of Justice of the European Union Judgment on "Google Spain and Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González"* C-131/12, 8, WP 225, 1, 3 (Nov. 26, 2014), [http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2014/wp225\\_en.pdf](http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2014/wp225_en.pdf) [<https://perma.cc/ALD2-NZ9M>] [hereinafter Working Party].

55. *Google Spain*, *supra* note 7, ¶ 14.

56. *Id.*

57. *Id.*

58. *Id.* ¶ 15.

59. Under Section 2(d) of the EU Data Protection Directive which defines controller as:

[T]he natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes and means of the processing of personal data; where the purposes and means of processing are determined by national or Community laws or regulations, the controller or the specific criteria for his nomination may be designated by national or Community law . . . .

EU Data Protection Directive, *supra* note 6, at art. 2(d).

60. See *Google Spain*, *supra* note 7, ¶¶ 17, 33, 41. Specifically in this case, the AEPD ruled that La Vanguardia's posting was lawful, as "it took place upon order of the Ministry of Labour and

Nacional), which asked the ECJ for a preliminary ruling on the right to be delisted under the DPD. The ECJ held that search engine operators are responsible for their processing of personal data that appears on web pages published by third parties. Under the ECJ ruling, processing of personal data and the free movement of such data are interpreted as “processing of personal data” within the meaning of the DPD when the information contains personal data, and search engines<sup>61</sup> are “data controllers”<sup>62</sup> with respect to that processing. Thus, search engines must exclude results “where they appear to be *inadequate, irrelevant or no longer relevant, or excessive* in relation to those purposes and in the light of the time that has elapsed”<sup>63</sup> while they should be “fair[ly] balance[ed]” against the public’s right to the information.<sup>64</sup> EU citizens and residents are entitled to ask search engines to remove the links, and search engines—Google in this case—are obliged to remove links to web pages that are linked to a search of their name. The exceptions include “particular reasons, such as the role played by the data subject in public life, . . . justified by the preponderant interest of the general public in having . . . access to the information” when such a search is made.<sup>65</sup>

Though limited to some extent, the ECJ ruling sets the grounds for a narrow version of a “right to be forgotten,” which places liability on search engines.<sup>66</sup> But such right to be delisted is much narrower in its scope. For example, it currently applies only to search engines.<sup>67</sup> No

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Social Affairs and was intended to give maximum publicity to the auction in order to secure as many bidders as possible.” *Id.* ¶ 16.

61. The scope of the decision, while currently limited to search engines, could expand to other intermediaries “whenever the conditions established in the ruling are met.” *See* Working Party, *supra* note 53, at 8.

62. While the ECJ sought the opinion of Advocate General Niilo Jääskinen, which opined that Google should not be considered as a “controller” of the personal data appearing on web pages it processes, the ECJ concluded that “It is the search engine operator which determines the purposes and means of that activity and thus of the processing of personal data that it itself carries out within the framework of that activity and which must, consequently, be regarded as the ‘controller’ in respect of that processing pursuant to Article 2(d).” *See Google Spain, supra* note 7, ¶ 33. For the opinion of Advocate General Niilo Jääskinen, see Case C-131/12, Opinion of Advocate General Jääskinen, 25 June 2013. It should be noted that prior to the ECJ ruling on the right to be delisted, the working party opined that search engines are not “primary controllers.” *See* Working Party, *supra* note 53, at 14.

63. *See Google Spain, supra* note 7, ¶ 93 (emphasis added).

64. *Id.* ¶ 81.

65. *Id.* ¶ 97.

66. As noted by the ECJ: “it should be pointed out that the processing of personal data carried out in the context of the activity of a search engine can be distinguished from and is additional to that carried out by publishers of websites, consisting in loading those data on an internet page.” *Id.* ¶ 35.

67. *Cf. supra* note 61.

other intermediary is currently considered a data controller.<sup>68</sup> Mainly, online content is not deleted, only links for search queries upon searching an individual's name are deleted. Other links to that information will continue to exist, and perhaps more importantly, the content itself will not be deleted.

Much has happened since the ECJ ruling. Search engines like Google, Yahoo!, and Bing built online mechanisms to exercise a right to be delisted mostly under EU domains.<sup>69</sup> Not long after, requests began to flow in.<sup>70</sup> Obligated by the ECJ ruling, and, subsequently, by local data protection laws which implemented the DPD, search engines had to quickly form an evaluation process to comply with the large number of requests sent.<sup>71</sup>

The right to be delisted could have global ramifications.<sup>72</sup> One of the main drawbacks of the right to be delisted is its effect on the role of

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68. However, the Working Party noted in guidelines that “[t]he ruling is specifically addressed to generalist search engines, but that does not mean that it cannot be applied to other intermediaries. The rights may be exercised whenever the conditions established in the ruling are met.” See Working Party, *supra* note 53, at 17.

69. It should be noted that Google currently chooses to apply the right to be delisted not only on the twenty-eight Member States of the EU but also on the EFTA states (Iceland, Liechtenstein, Norway, and Switzerland). See Alastair Jamieson & Emma Ong, *Google Opens Privacy Web Form for ‘Right To Be Forgotten’ Requests*, NBC NEWS (May 30, 2014), <http://www.nbcnews.com/news/world/google-opens-privacy-web-form-right-be-forgotten-requests-n118211> [<https://perma.cc/57AP-U7KX>]. In addition, the right to be delisted may also expand beyond the EU, as it has at the beginning of 2016 in Russia. See *infra* note 254. Also, beyond disparities between the right to be forgotten and the right to be delisted, even after over two years since the ECJ ruling, much ambiguity exists in the territorial aspect of the right. While search engines currently treat the decision of the ECJ as limited to EU domains, the territorial scope of the judgment is still unclear. It is mainly unclear whether the individual's nationality or residence matters. Some commentators argued that “there would be no impediment under EU law, for example, to a Chinese citizen in China who uses a US-based Internet search engine with a subsidiary in the EU asserting the right to be forgotten against the EU subsidiary with regard to results generated by the search engine.” See Christopher Kuner, *The Right to be Forgotten and the Global Reach of EU Data Protection Law*, CONCURRING OPINIONS (June 1, 2014), <http://concurringopinions.com/archives/2014/06/the-right-to-be-forgotten-and-the-global-reach-of-eu-data-protection-law.html> [<https://perma.cc/NLL8-9X8B>].

70. While data on removal requests are rather limited, I analyze some statistical findings in Part IV.B.

71. See *infra* Part II.B.

72. The right to be delisted should not be treated as in a vacuum, i.e., that it only effects a portion of the world. Mainly, the right to be delisted could expand to include domains beyond the EU, such as Google.com. See *infra* note 145. In addition, the right to be delisted will also highly effect the U.S.–EU Safe Harbor Agreement as long as the agreement exists. Under this agreement, the EU enables the exporting of personal data from its domain only when U.S.-based privacy policies are adequate. See *U.S.–EU Safe Harbor Overview*, EXPORT, [https://build.export.gov/main/safeharbor/eu/eg\\_main\\_018476](https://build.export.gov/main/safeharbor/eu/eg_main_018476) (last updated Dec. 18, 2013) [<https://perma.cc/2UNX-28JQ>]. For a similar argument, see Michael L. Rustad & Sanna Kulevska, *Reconceptualizing the Right to Be Forgotten to Enable Transatlantic Data Flow*, 28 HARV. J.L. & TECH. 349, 386–87 (2015).

the judiciary. The ECJ effectively endowed search engines with the power to decide which links will remain online and which will not; it gave search engines the power to decide which fundamental rights prevail: privacy and data protection or freedom of speech, freedom of information, and freedom of the press. Essentially, search engines have become judges that adjudicate fundamental rights and liberties.

## II. THE NEW JUDICIARY IN THE DIGITAL WORLD

Prior to the emergence of the right to be delisted, and depending on the legal system in question, controlling the flow of information online was mostly limited to intellectual property restrictions, defamation claims, contractual obligations, and privacy torts.<sup>73</sup> The new right to be delisted, which tasked search engines to deal with a new type of claim, must be balanced against other fundamental rights before exercised. Effectively, the ECJ shifted enforcement and adjudication to for-profit commercial entities, which are not necessarily equipped or accountable to make such decisions. On the normative side, this move could lead to a paradigmatic shift in jurisprudence, transferring the traditional function of adjudication from public officials to private entities.<sup>74</sup>

Such *judiciary privatization* raises both pragmatic and normative difficulties that should be scrutinized. But prior to such evaluation, we first need to understand to what extent the ECJ ruling changed the roles of search engines. Is this indeed a new judicial role? What current legal obligations and practices apply to search engines that could also be labeled as adjudicative? How is such right different from current removal practices of search engines? In order to answer such questions, Part II.A will summarize and evaluate the judicial roles that search engines have played thus far in the digital world, mainly focusing on Google.<sup>75</sup>

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73. See Leta Ambrose, *supra* note 14, at 375. See generally Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop Others from Speaking About You*, 52 STAN. L. REV. 1049 (2000).

74. See William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 235 (1979) (reviewing the traditional roles of courts).

75. While various search engines currently exist, Google has unrivalled dominance in the search engine sector, with the most significant market share (as of October 2015, 89.2% of the global market), and therefore in many times will be used in this article as a key-example of search engines. For updated statistics on search engines' market share, see *Worldwide Market Share of Leading Search Engines from January 2010 to October 2015*, STATISTA, <http://www.statista.com/statistics/216573/worldwide-market-share-of-search-engines> (last visited Jan. 17, 2016) [<https://perma.cc/64Y7-UGSU>].

*A. Quasi-Judicial Roles of Search Engines*

The role that search engines play in the digital environment is debatable.<sup>76</sup> Google's announced search philosophy is that "[s]earch should reflect the whole web."<sup>77</sup> In practice, this philosophy hardly matches their actions. Search engines are not always neutral to content.<sup>78</sup> Google commonly filters search results.<sup>79</sup> Their algorithm, known as PageRank,<sup>80</sup> is a combination of regulation and internal policies.<sup>81</sup> The algorithm of each search engine decides, *inter alia*, which results will appear or not appear and how they will be ranked. As long as search engines comply with their legal obligations, they can construct the algorithm in any manner they desire. Thus, Google makes decisions on content depending on two factors: regulation and its own policy.

The first part is *regulation*. Even prior to the right to be delisted, and well beyond the European borders, search engines like Google were subject to regulation regarding their search results. Such regulation obviously depends on different legal systems and jurisdictions, but can be generally divided into three categories: sensitive information, copyrighted materials, and governmental requests.

Under the legal category of sensitive information, Google will generally remove links to content that includes child sexual abuse imagery.<sup>82</sup> But Google is also subjected to domestic laws, which obligate

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76. Some scholars opine that search engines should play a role of a neutral conduit, while others opine that they play a role of an active and opinionated editor. Whether search engines like Google should be treated as a "conduit" or an "editor," and thereby could be subject to speech regulation, extends beyond the scope of this article. For an overview and analysis of such views, see James Grimmelman, *Speech Engines*, 98 MINN. L. REV. 868 (2014).

77. See "Revenge Porn" and Search, GOOGLE PUB. POL'Y BLOG, <http://googlepublicpolicy.blogspot.co.il/2015/06/revenge-porn-and-search.html> [https://perma.cc/ZUP6-Y9UM].

78. Google decides on our freedom to access information. Google can place anyone down-the-list, in a manner which the information is inaccessible *de facto*. For a discussion on whether search engines are neutral, see James Grimmelman, *The Structure of Search Engine Law*, 93 IOWA L. REV. 1 (2007); Uta Kohl, *Google: The Rise and Rise of Online Intermediaries in the Governance of the Internet and Beyond (Part 2)*, 21 INT'L J.L. & INFO. TECH. 187, 190–97 (2013); Goldman, *supra* note 9.

79. See generally Dawn C. Nunziato, *The Death of the Public Forum in Cyberspace*, 20 BERKELEY TECH. L.J. 1115 (2005).

80. *Google Fun Facts*, INTERNET ARCHIVE (Apr. 24, 2009), <http://web.archive.org/web/20090424093934/http://www.google.com/press/funfacts.html> [https://perma.cc/BAV8-2KTG].

81. Regulation of search engines experienced a respectable amount of academic discussion much prior to the emergence of the right to be forgotten and the right to be delisted. For examples of such scholarship, see Lucas Introna & Helen Nissenbaum, *Shaping the Web: Why the Politics of Search Engines Matters*, 16 INFO. SOC'Y 169 (2000); Frank Pasquale, *Rankings, Reductionism, and Responsibility*, 54 CLEV. ST. L. REV. 115 (2006); Elkin-Koren, *supra* note 9; Gasser, *supra* note 9; Goldman, *supra* note 9; Grimmelman, *supra* note 78.

82. See *Removal Policies*, GOOGLE, <https://support.google.com/websearch/answer/2744324> (last visited Jan. 20, 2016) [https://perma.cc/5LRL-QJSZ].

it to remove search results in other instances as well.<sup>83</sup> For example, under the German and French versions of Google, it is forbidden to include sites containing extremist content, *inter alia*, featuring hate speech and Holocaust denial.<sup>84</sup> Pornography is blocked in many countries, especially child pornography.<sup>85</sup> Google Thailand filters sites and videos which might “*Lèse-majesté*,” i.e., insult Thailand’s King.<sup>86</sup> In EU Member States, under the obligation of the directive of electronic commerce, search engines are obliged to remove defamatory materials upon notice.<sup>87</sup>

Search engines also receive requests to remove links to websites that presumably infringe copyright, set under the Digital Millennium Copyright Act (DMCA)<sup>88</sup> in the United States and the Electronic

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83. For a full overview of regulatory requirements on search engines, see Kohl, *supra* note 78.

84. See Jonathan Zittrain & Benjamin Edelman, *Statement of Issues and Call for Data*, HARVARD (Oct. 26, 2002), <http://cyber.law.harvard.edu/filtering/google> [https://perma.cc/BY3Y-H9R4]; Letter from Peter Fleischer of Google to Isabelle Falque-Pierrotin, Chair, Article 29 Working Party, at 3, (July 31, 2014), <https://docs.google.com/a/kentlaw.iit.edu/file/d/0B8syaa6SSfiT0EwRUFyOENqR3M/preview> [https://perma.cc/Y943-DFU2] [hereinafter Letter from Peter Fleischer]. However, upon a relevant search, Google indicates the number of excluded results and refers to Lumen (previously known as Chilling Effects) for further explanation. For more on Lumen, see *infra* note 107.

85. Andy Greenberg, *Where Google Still Censors*, FORBES (Jan. 21, 2010), <http://www.forbes.com/forbes/2010/0208/outfront-technology-china-where-google-still-censors.html>; Danny Friedmann, *Paradoxes, Google and China: How Censorship Can Harm and Intellectual Property Can Harness Innovation*, in EMPIRICAL APPROACHES TO LEGAL ASPECTS OF KNOWLEDGE-ECONOMY BUSINESS MODELS 303, 307 (Aurelio Lopez-Tarruella ed., 2012).

86. Greenberg, *supra* note 84; Friedmann, *supra* note 84, at 307.

87. See Council Directive 2000/31, 2000 O.J. (L 178) 1 (EC) art. 12–14. The UK inserted such provision prior to the introduction of the E-Commerce Directive. See Defamation Act 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, c. 66, § 1(1) (Eng.) (amended by Defamation Act of 1996); Kohl, *supra* note 78, at 198.

88. The Digital Millennium Copyright Act of 1998 (DMCA), codified as 17 U.S.C. §§ 512, 1201–1205, 1301–1332; 28 U.S.C. § 4001 (2012). Under the DMCA, a service provider will not be held liable for monetary relief, for injunctive or other equitable relief, or for infringement of copyright by reason of the provider’s transmitting, routing, or providing connections for material through a system or network controlled or operated by or for the service provider, or by reason of the intermediate and transient storage of that material in the course of such transmitting, routing, or providing connections, if the transmission of the material was initiated by or at the direction of a person other than the service provider; the transmission, routing, provision of connections, or storage is carried out through an automatic technical process without selection of the material by the service provider; the service provider does not select the recipients of the material except as an automatic response to the request of another person; no copy of the material made by the service provider in the course of such intermediate or transient storage is maintained on the system or network in a manner ordinarily accessible to anyone other than anticipated recipients, and no such copy is maintained on the system or network in a manner ordinarily accessible to such anticipated recipients for a longer period than is reasonably necessary for the transmission, routing, or provision of connections; and the material is transmitted through the system or network without modification of its content. See 17 U.S.C. § 512 (2012); Niva Elkin-Koren, *Making Technology Visible: Liability of Internet Service Providers for Peer-to-Peer Traffic*, 9 N.Y.U. J. LEGIS. & PUB. POL’Y 15, 16 (2006).

Commerce Directive in the EU.<sup>89</sup> Under this “notice-and-takedown” regime to combat copyright infringement, search engines (and other online intermediaries) receive requests from copyright owners or their representatives to remove search results that link to such allegedly infringing materials.<sup>90</sup> Under the U.S. version of notice-and-takedown, intermediaries must respond “expeditiously” to notices of infringement by removing or disabling access to allegedly infringing material when certain conditions are met.<sup>91</sup> Other hosting services—not search engines—must promptly notify the subscriber that it has removed or disabled access to the material and forward any counter notices from alleged infringers back to the original complainant.<sup>92</sup> If a lawsuit has not been filed after ten to fourteen days following receipt of the counter notice, the intermediary reinstates the contested material.<sup>93</sup> In exchange for compliance, search engines receive a safe harbor from liability for Internet users’ acts of copyright infringement and for any mistaken removal of materials done in good faith.<sup>94</sup>

The last form of regulation, operates under “governmental requests.” Search engines like Google regularly receive requests from courts and government agencies around the world to remove links to content.<sup>95</sup> As national security plays a role in many of these requests, much secrecy lies within this form of adjudication. But Google does provide a few examples. For example, in 2014 Google received a request from Roscomnadzor, a federal executive body in Russia, to remove a Blogger blog post discussing jihad in Russia’s North Caucasus region.<sup>96</sup>

The second part is *policy*.<sup>97</sup> Beyond their legal obligations, search engines make decisions. These decisions vary among search engines. Google sometimes enables the removal of various types of personal information: contact information (such as an email address or a username); nonconsensual personal pictures which are sexually explicit;

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89. See Council Directive 2000/31, 2000 O.J. (L 178) 1 (EC), *supra* note 87 at art. 14.

90. In January 2016, in only one-month period, Google received 72,784,574 URLs requests to be removed for alleged copyright infringement. For statistical data on such removal requests in Google, see *Transparency Report*, GOOGLE, <https://www.google.com/transparencyreport/removals/copyright/?hl=en> [<https://perma.cc/HM6J-4ZWP>].

91. 17 U.S.C §§ 512(b)(2)(E)(i)–(ii), 512(c)(1)(C) (2012). In addition, the DMCA requires intermediaries to adopt and reasonably implement a policy to terminate the accounts of repeat infringers and must notify users of this plan, while also accommodate “standard technical measures” used by copyright owners to identify infringing material. See *id.* §§ 512(a)–(b), (d), (c), (i).

92. *Id.* §§ 512(g)(2)(A)–(B).

93. *Id.* § 512(d).

94. *Id.* §§ 512(c)(1)(A)–(B), (g)(1).

95. See *Transparency Report*, *supra* note 90.

96. *Id.*

97. For an empirical study of Google removal of content policy, see generally Jane R. Bambauer & Derek E. Bambauer, *Vanished*, 18 VA. J.L. & TECH. 137 (2013).

government-issued ID numbers; a bank account or credit card number; a pornographic site that contains a full name or business name; and images of handwritten signatures.<sup>98</sup> Under its advertising policy, Google does not allow “the promotion of some products or services that cause damage, harm, or injury.”<sup>99</sup> It sometimes delists socially relevant content that could harm autonomy, reputation, and emotional well-being, under some circumstances.<sup>100</sup> Google also offers a “SafeSearch” feature, which offers to block inappropriate or explicit images from Google’s Search results.<sup>101</sup> Recently, Google decided to add “revenge porn” to its potential delisting possibilities for search results worldwide.<sup>102</sup>

It is evident that search engines, like Google, already make judgments regarding content in their services. Many of these judgments should not be confused with judgments of a judiciary; compliance with internal policies is not judicial in nature. Other parts of the process are largely judicial in nature. Perhaps mainly, governmental requests and copyright infringement claims mandated by some regulators could be viewed as placing search engines and other intermediaries in a judicial role.<sup>103</sup> After all, they must make decisions on matters that relate to legal rights.

The notice-and-takedown regime has many flaws that are beyond the scope of this Article. In terms of judicial aspects, the decisions that intermediaries make under this regime are judicial in nature. They do not merely decide on an economic controversy but also affect fundamental

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98. *Remove Information from Google*, GOOGLE, <https://support.google.com/websearch/troubleshooter/3111061#ts=2889054%2C2889099> [<https://perma.cc/A3BT-VRMQ>].

99. Google provides examples of such products and services that they consider to be dangerous: explosives; guns & parts; dangerous knives; other weapons (any other product that is designed to (in modern-day usage) injure an opponent in sport, self-defense, or combat); recreational drugs & drug-related equipment; and tobacco products & related equipment. *Advertising Policies Help*, GOOGLE, <https://support.google.com/adwordspolicy/answer/6014299?hl=en> [<https://perma.cc/DD7Q-6RW5>].

100. Woodrow Hartzog & Evan Selinger, *Google Acknowledges, Revenge Porn Will Remain Available on Websites, but Delisting It from Search Engines Can Make Information Harder to Access*, GUARDIAN (June 25, 2015), <http://www.theguardian.com/technology/2015/jun/25/googles-revenge-porn-opens-right-forgotten-us> [<https://perma.cc/M3ML-Q349>].

101. *Turn SafeSearch On or Off*, GOOGLE, <https://support.google.com/websearch/answer/510?hl=en> [<https://perma.cc/HEN6-UK45>].

102. Joanna Walters, *Google to Exclude ‘Revenge Porn’ from Internet Searches*, GUARDIAN (June 21, 2015), <http://www.theguardian.com/technology/2015/jun/20/google-excludes-revenge-porn-internet-searches> [<https://perma.cc/744D-4Z25>].

103. Cf. Jennifer M. Urban & Laura Quilter, *Efficient Process or Chilling Effects - Takedown Notices Under Section 512 of the Digital Millennium Copyright Act*, 22 SANTA CLARA COMPUTER & HIGH TECH. L.J. 621, 639 (2006) (arguing that notice-and-takedown under the DMCA “constitutes an extrajudicial temporary restraining order”).

rights like free speech.<sup>104</sup> Many of the intermediaries use automated processes, which could pose even greater dangers to these rights.<sup>105</sup> Among others, this quasi-judicial process raises concerns of transparency and accountability.<sup>106</sup>

However, such a judicial role is much more limited in scope than the right to be delisted. Transparency exists, to some extent, when hosting services notify subscribers that they have removed or disabled access to materials. There are also projects, like Lumen (previously known as Chilling Effects), that enhance transparency by collecting and publishing cease-and-desist notices from a variety of sources, including all notices received by Google.<sup>107</sup> Most importantly, both sides, and usually even other interested parties, are granted an ability to take this controversy to court. Thus, in terms of privatization, search engines (and other intermediaries) under the DMCA's notice-and-takedown regime should be generally labeled as quasi-judicial entities.

### *B. The New Judicial Role of Search Engines*

To understand the judicial role that search engines play under the right to be delisted, we need to review the process. It begins with an EU citizen or resident, characterized as a data subject, who, upon discovering that his fundamental rights under Articles 7 and 8 of the Charter have been infringed upon, is entitled to approach the search engine with an online removal request.<sup>108</sup> These requests, which usually occur through a web form,<sup>109</sup> must clarify why a URL in the search engine's results is

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104. See, e.g., Theresa A. Lyons, *Scientology or Censorship: You Decide, an Examination of the Church of Scientology, Its Recent Battles with Individual Internet Users and Service Providers, the Digital Millennium Copyright Act, and the Implications for Free Speech on the Web*, 2 RUTGERS J.L. & RELIGION 1, 1 (2000).

105. For a general analysis of intermediaries' use of algorithmic enforcement under the DMCA, see Maayan Perel & Niva Elkin-Koren, *Accountability in Algorithmic Enforcement: Lessons from Copyright Enforcement by Online Intermediaries*, 19 STAN. TECH. L. REV. (forthcoming 2016).

106. For a general overview of transparency and accountability under the DMCA and intermediaries use of algorithmic enforcement, see *id.*

107. See generally LUMEN, <https://lumendatabase.org> [<https://perma.cc/5MFP-GWSC>].

108. The Working Party did not specify which specific mechanisms search engines should implement, but indicated that "online procedures and electronic forms, may have advantages and would be advisable because of its convenience." See Working Party, *supra* note 53, at 7. Google does not generally provide an alternative process for submitting a removal request (e.g., by fax, letter, and email). However, it does note that if a requester insists on not using the web form, Google will process his or her request. See Letter from Peter Fleischer, *supra* note 83, at 7.

109. This is how Google removal process currently works: first, the data subject is required to select the country (currently out of thirty-three states) whose law applies to his request. Then, the data subject provides the name used to search, which he wishes to delist, and provides his full name, even if making the request on behalf of someone else who he is authorized to represent, and contact email address. The data subject then must provide the URLs for the web pages that the result links

irrelevant, outdated, or otherwise inappropriate.<sup>110</sup> At this point, the search engine is required to examine whether the data subject has the abovementioned right and whether his right overrides their economic interest and the interest of the general public in having access to that information upon conducting a search relating to his name.<sup>111</sup>

While the ECJ did not specify what constitutes interests of the general public, it provided some criteria for examining requests: the nature or sensitivity of the information; public interest; the role played by the data subject in public life;<sup>112</sup> and the time elapsed.<sup>113</sup> While not obliged by the court, search engines will usually notify the website that the link was removed, but the website generally cannot object to a search engine's decision.<sup>114</sup> If the search engine decides to decline the removal request, after providing sufficient information on the grounds of the refusal,<sup>115</sup> the data subject can request that a "supervisory authority,"<sup>116</sup> which in most cases will be the local data protection authority (DPA), review the decision.<sup>117</sup> They can also file an appeal to the relevant judicial authority.<sup>118</sup> Otherwise, the search engine will remove the requested URLs from a list displayed following a search made on the

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to. For each URL, the data subject is required to explain how the linked URL relates to him and why the inclusion of that URL in search results is irrelevant, outdated, or otherwise objectionable. The data subject is then required to attach a legible copy of a document that verifies his identity (or the identity of the person whom he is authorized to represent). Finally, the data subject or his representative signs the form by typing his full name and providing the date of the request. *See Search Removal Request Under Data Protection Law in Europe*, GOOGLE, [https://support.google.com/legal/contact/lr\\_eudpa?product=websearch](https://support.google.com/legal/contact/lr_eudpa?product=websearch) [https://perma.cc/9B5N-L29U]. Yahoo!'s process also begins with filling in a form and uploading a document verifying the identity of the requester. In making the decision, Yahoo! is "taking into consideration numerous factors, including the number, nature and complexity of the requests we receive." *See Requests to Block Search Results in Yahoo Search: Resource for European Residents*, YAHOO!, <https://uk.help.yahoo.com/kb/SLN24378.html> [https://perma.cc/YK9N-AESJ].

110. See for example, in Google, where the removal request also demands, *inter alia*, a copy of a valid form of photo ID, personal details, and links associated that you want removed. *Search Removal Request Under Data Protection Law in Europe*, *supra* note 108.

111. *Google Spain*, *supra* note 7.

112. *Id.* ¶ 81.

113. *Id.* ¶ 93.

114. For an example of how Google exercised the right to be delisted on six articles published on the *Guardian* website, see James Ball, *EU's Right to Be Forgotten: Guardian Articles Have Been Hidden by Google*, *GUARDIAN* (July 2, 2014), <http://www.theguardian.com/commentisfree/2014/jul/02/eu-right-to-be-forgotten-guardian-google> [https://perma.cc/76KD-M7LZ].

115. *See Working Party*, *supra* note 53, at 7.

116. *Google Spain*, *supra* note 7, ¶ 77.

117. *Id.* ¶ 77. *Frequently Asked Questions*, GOOGLE, [http://www.google.com/transparencyreport/removals/europeprivacy/faq/?hl=en#how\\_does\\_googles\\_process](http://www.google.com/transparencyreport/removals/europeprivacy/faq/?hl=en#how_does_googles_process) [https://perma.cc/CAE4-ZGKA]. Any formal claims should be envisaged by Article 28(4) of the Directive and treated by DPAs under their national legislation in the same manner as all other claims for mediation. *See EU Data Protection Directive*, *supra* note 6; *Working Party*, *supra* note 53, at 11.

118. *Google Spain*, *supra* note 7, ¶ 77.

basis of the data subject's name. In some instances, the search engine, upon displaying name-based queries that were affected by the decision, will place a notification at the bottom of the search results indicating that results may have been removed.<sup>119</sup>

We can learn from the experience of Google about how such judicial processes works. As mentioned, the removal process necessitates human intervention. Every removal request must be thoroughly examined by a human examiner before making a decision.<sup>120</sup> Google, for example, has formed a team of specially trained reviewers who use “dedicated escalation paths to senior staff and attorneys at Google to adjudicate on difficult and challenging cases.”<sup>121</sup> While, in most cases, a single examiner is sufficient for deciding on a request, in some instances there would be multiple examiners for a single request.<sup>122</sup>

How do examiners review removal requests? Put differently: How does the Google courthouse operate? Two months after the ECJ ruling Google appointed an advisory council to aid in the determination of removal requests.<sup>123</sup> This advisory council consisted of experts, mostly external to Google, who reached out to the public for input.<sup>124</sup> Over time, Google has carefully developed criteria<sup>125</sup> in partial alignment with Article 29 of the Working Party's guidelines (Working Party).<sup>126</sup>

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119. See Letter from Peter Fleischer, *supra* note 83, at 10 (“With regards to the CJEU decision, our current approach is to show a notification at the bottom of all search result pages for queries where a name-based removal has occurred as well as for all other search result pages that appear to be for the name of a person, indicating that results may have been removed.”). The main exception, according to Mr. Fleischer, are “celebrities and other public figures,” which, according to Fleischer, “are very rarely affected by a removal, due to the role played by these persons in public life.” However, it should be noted that such practice is unlikely to continue in the EU, as it might jeopardize the rationales behind the right to be delisted. *Id.*

120. See *Frequently Asked Questions*, *supra* note 116; Letter from Peter Fleischer, *supra* note 84, at 7 (“We are not automating decisions about these [right to be delisted] removals. We have to weigh each request individually on its merits, and that is done by people.”).

121. See *Frequently Asked Questions*, *supra* note 116.

122. As of November 1, 2015, just over 30% of requests had been escalated for a second opinion. *See id.*

123. See Natasha Lomas, *Google Seeks to Shape Public Debate on Europe's Right to Be Forgotten Ruling*, TECHCRUNCH (July 11, 2014), <http://techcrunch.com/2014/07/11/google-agitates-for-public-debate-on-europes-right-to-be-forgotten-ruling> [<https://perma.cc/G9UT-7CWK>].

124. See *Google Advisory Council*, GOOGLE, <https://www.google.com/advisorycouncil> [<https://perma.cc/S7SH-5WFZ>]. In January 2015, Google's Council published its findings and recommendations in a report. LUCIANO FLORIDI, ET. AL, REPORT OF THE ADVISORY COMMITTEE TO GOOGLE ON THE RIGHT TO BE FORGOTTEN, <https://buermeyer.de/wp/wp-content/uploads/2012/02/Report-of-the-Advisory-Committee-to-Google-on-the-Right-to-be-Forgotten.pdf> [<https://perma.cc/5PV2-2PCU>].

125. See *Frequently Asked Questions*, *supra* note 116.

126. EU Data Protection Directive, *supra* note 6, art. 29; The Working Party consists of “a representative of the supervisory authority or authorities designated by each Member State and of a representative of the authority or authorities established for the Community institutions and bodies, and of a representative of the Commission.” *See id.* at art. 29(2); Working Party, *supra* note 53.

The process of evaluation consists of four stages.<sup>127</sup> First, the “examiner” determines whether the request contains necessary information for Google to reach a decision. In cases where an individual files a request that does not contain sufficient information for Google to make a decision, the examiner would ask for supplementary information to support the evaluation.<sup>128</sup> Second, Google examines whether the person making the request has a connection to a European country, such as residency or citizenship.<sup>129</sup> It verifies identity by requiring personal documents such as driver’s licenses or national ID cards.<sup>130</sup> Third, Google examines the pages that appear in search results for the requester’s name and ascertains whether the requester’s name appears on the page(s) requested for delisting.<sup>131</sup> Finally, Google decides whether the page requested for removal includes information that is inadequate, irrelevant, no longer relevant, or excessive (in relation to the purposes of the processing at issue) based on the information that the requester provides and whether there is a public interest in such information.<sup>132</sup>

Thus, Google becomes the judge and jury with respect to the right to be delisted.<sup>133</sup> Arguably, Google only plays the role of a preliminary decider before individuals take their cases either to the court or to the local DPA. However, as this Article further argues, from a legal realism point of view, Google serves as a de facto court due mainly to two factors: the inability to challenge approved requests and the practice of appeal for rejected ones.

The first reason Google serves as a de facto court is the inability to challenge approved requests. The process generally resembles an ex parte procedure, meaning that not all parties to the controversy are present.<sup>134</sup> If Google approves a request, there is no appeal, as the only

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127. See *Frequently Asked Questions*, *supra* note 116.

128. *Id.*

129. *Id.*

130. Such requirement is placed to verify identity, as Google has told media outlets it “often receives fraudulent removal requests from people impersonating others, trying to harm competitors, or improperly seeking to suppress legal information.” Caitlin Dewey, *Want to Remove our Personal Search Results from Google? Here’s How the Request Form Works*, WASH. POST (May 30, 2014), <https://www.washingtonpost.com/news/the-intersect/wp/2014/05/30/want-to-remove-your-personal-search-results-from-google-heres-how-the-request-form-works> [<https://perma.cc/LMA3-3FPA>].

131. See *Frequently Asked Questions*, *supra* note 116.

132. *Id.*

133. Ann Cavoukian & Christopher Wolf, *Sorry, but There’s No Online “Right to Be Forgotten”*, NAT’L POST (June 25, 2014), <http://news.nationalpost.com/full-comment/ann-cavoukian-and-christopher-wolf-sorry-but-theres-no-online-right-to-be-forgotten> [<https://perma.cc/KA4X-LSNF>] (“The European Court of Justice has mandated that the Googles of the world serve as judge and jury of what legal information is in the public interest, and what information needs to be suppressed because the facts are now dated and the subject is a private person.”).

134. See Lee, *supra* note 10, at 45.

interested party who is aware of the process is the requester who received her wish to be delisted. Under this process, other interested parties, including the publisher of the content, interested members of society, and practically every person that uses the search engine, cannot appeal. Therefore, Google does not play the role of a preliminary administrative authority, but rather that of a secret judiciary.

Next we have the practice of appeal for rejected requests. One example is Italy. Up until December 2, 2015, the total number of “delisting” requests to Google Italy was 27,478.<sup>135</sup> The number of URLs which were requested for removal was 89,693.<sup>136</sup> Google rejected to remove 70% of such URLs (51,877).<sup>137</sup> In more than a year and a half, how many of these cases were taken to the Italian DPA? Sixty.<sup>138</sup> We can see similar outcomes in other DPAs,<sup>139</sup> and while statistics of court filings are not widely available, they are likely to be even lower than DPA requests.<sup>140</sup> The number of appeals appears to be low for individuals who are trying to preserve their rights.<sup>141</sup> But some caution should be taken here, prior to making any normative claims. While the number of appeals to DPAs is currently low, this practice could change over time, as the right to be delisted is fairly new. More importantly, it is difficult to assess how many URLs were requested for removal by each individual who appealed. While highly unlikely, the sixty appeals to the Italian DPA could represent all the rejected URLs. All in all, with these caveats in mind, it seems that pragmatically, even if search engines like

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135. See *European Privacy Requests for Search Removals*, GOOGLE, <https://www.google.com/transparencyreport/removals/europeprivacy/?hl=en> [https://perma.cc/WRM5-75WU].

136. *Id.*

137. Unfortunately, Google does not currently publish the percentage of rejected requests, which may include multiple URLs. See *id.*

138. The Italian DPA resolved fifty complaints (and approved one-third) while ten complaints were still being examined at that time. See Rocco Panetta, *Right to Be Forgotten: The Italian DPA Has Resolved 50 Complaints After the Known Google Spain Decision*, NCTM (Dec. 2, 2015), <http://www.lexology.com/library/detail.aspx?g=a799812c-4961-42cd-aefd-191070af41e3> [https://perma.cc/Q97Q-RBFL].

139. Take Spain as another example. As of October 8, 2015, the Spanish data protection agency has received 325 requests, which represent 1.7% of the Spanish data subjects that received a rejection. Most member states DPAs received less than one hundred requests so far, and in five member states DPAs received less than ten. See Peter Teffer, *Europeans Give Google Final Say on ‘Right to be Forgotten’*, EUOBSERVER (Oct. 8, 2015), <https://euobserver.com/investigations/130590> [https://perma.cc/4J7B-CF6X].

140. For a similar argument, see Lee, *supra* note 10, at 22 (“The low rate of appeals of Google’s rejections to national DPAs thus far suggests that the rate of lawsuits in court will be even lower.”).

141. Traditionally in the United States, for example, approximately fifteen percent of state-court civil cases are appealed. See THOMAS H. COHEN, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NCJ 212979, APPEALS FROM GENERAL CIVIL TRIALS IN 46 LARGE COUNTIES, 2001–2005, at 2 (2006), <http://www.bjs.gov/content/pub/pdf/agctlc05.pdf> [https://perma.cc/5GQP-76UT].

Google are potentially just a preliminary filter for removal requests, it is effectively the definitive authority, or the “courthouse,” that decides on the right to be delisted.<sup>142</sup>

How is the right to be delisted different from the judicial roles that search engines already play online? In many aspects. Practices, like the notice-and-takedown of copyright infringement claims, are commenced under procedural safeguards such as oversight and transparency. Surely, such oversight and transparency are also limited under copyright infringement claims, but these elements are ensured to be resolved to a greater degree than under the right to be delisted. But mainly, prior to the right to be delisted, search engines dealt primarily with various applications of private law. They mostly decided on intellectual property or torts. But under the right to be delisted, search engines are placed in a position of a public court—deciding and balancing between fundamental human rights and liberties. While not justifying any judicial responsibilities placed on search engines, the latter has more profound ramifications to democracy and the rule of law.

### III. THE JUDICIAL DIFFICULTIES IN THE NEW COURTHOUSE

The rights to be forgotten and delisted have many benefits and drawbacks.<sup>143</sup> This Article focuses on the impact of the right to be delisted on the roles of intermediaries in the digital environment. It places search engines in a new role of guardians of human rights and liberties without proper transparency and oversight. This new judicial role raises both pragmatic and normative difficulties, which should be thoroughly scrutinized. Such scrutiny will show that these difficulties suggest against the right to be delisted in its current form. It will lead to a discussion on how to delineate a more appropriate method of ensuring privacy and protection of personal data, while keeping freedom of information, freedom of speech, and freedom of the press and without undermining the roles of the judicial system under the rule of law.

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142. See Teffer, *supra* note 139 (arguing that currently, EU citizens generally accept Google as the definitive authority in terms of the right to be forgotten [delisted]).

143. The benefits and drawbacks of the rights to be forgotten and delisted were scrutinized by many scholars and journalists, especially after the ECJ ruling. For examples of such academic research, see Ravi Antani, *The Resistance of Memory: Could the European Union's Right to Be Forgotten Exist in the United States?*, 30 BERKELEY TECH. L.J. 1173 (2015); Craig A. Newman, 'A Right to Be Forgotten' Ruling Will Cost Europe, WASH. POST (May 27, 2014), [http://www.washingtonpost.com/opinions/a-right-to-be-forgotten-will-cost-europe/2014/05/26/93bb0e8c-e131-11e3-9743-bb9b59cde7b9\\_story.html](http://www.washingtonpost.com/opinions/a-right-to-be-forgotten-will-cost-europe/2014/05/26/93bb0e8c-e131-11e3-9743-bb9b59cde7b9_story.html) [<https://perma.cc/3A92-7JZF>]; Jeffrey Toobin, *The Solace of Oblivion*, NEW YORKER (Sept. 29, 2014), <http://www.newyorker.com/magazine/2014/09/29/solace-oblivion> [<https://perma.cc/C7X3-34Y4>]; Ambrose, *supra* note 14; Haber, *supra* note 28, at 67–76.

*A. The Pragmatic Aspect*

From a pragmatic aspect, the right to be delisted is problematic for several reasons.<sup>144</sup> Consider the territorial component as an example of how the ECJ ruling is not necessarily applicable. Removal requests currently extend only to a specific European domain, meaning that search results will still be available through other EU domains and, obviously, non-EU domains such as “.com.”<sup>145</sup> If Europeans know that their search results are being manipulated, it will be fairly easy for them to bypass such manipulation. Employers—or anyone, for that matter—may choose to compare the U.S. Google results to the specific EU Google results to find out if their workers are trying to hide something from them. Not long ago, only basic computer skills were needed to make such a comparison: individuals only needed to click on the link that says “Use Google.com” in the bottom right-hand corner of the Google homepage.<sup>146</sup> Such comparison enabled these employers to quickly

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144. Other than reasons listed here, there are many potential reasons why the right to be delisted could be considered inapplicable. One example is “the Streisand effect,” named after Barbra Streisand, which attempted to suppress photographs of her residence in Malibu inadvertently generated further publicity of it. Under such effect, the efforts to suppress online information can backfire and end up making things worse for the would-be censor. In the context of the right to be forgotten, Mario Costeja González became famous due to the EU ruling. Instead of being forgotten, Mr. González is now well known across the globe. However, the fact that Mr. González is now famous does not imply that every person that will request erasure will be remembered. The Streisand effect will probably not occur with the high magnitude of removal requests. Another example is that the right to be delisted could also be abused commercially. See Letter from Peter Fleischer, *supra* note 83, at 6 (“Historically, we have seen [sic] many cases of business competitors trying to abuse removals processes to reduce each others’ web presence.”). For more on the Streisand effect, see T.C., *What is the Streisand Effect?*, *ECONOMIST* (Apr. 15, 2013, 11:50 PM), <http://www.economist.com/blogs/economist-explains/2013/04/economist-explains-what-streisand-effect> [<https://perma.cc/R25X-SWS9>].

145. The ECJ refrained from addressing the question of whether the right applies outside the EU. The Working Party identified the potential problem of the territorial effects of a delisting decision, and clearly stated that such behavior would be considered insufficient to comply with the Directive requirements. While the Working Party does not possess enforcement power over Google, it generally reflects the positions of national regulators in the EU, and thus could quickly become obligatory and enforceable for Google and other search engines. See Working Party, *supra* note 53, at 3; Sam Schechner & Frances Robinson, *EU Says Google Should Extend ‘Right to Be Forgotten’ to ‘.com’ Websites*, *WALL ST. J.* (Nov. 26, 2014), <http://www.wsj.com/articles/eu-says-google-should-extend-right-to-be-forgotten-to-com-websites-1417006254>; Liam Tung, *Bing and Yahoo Respond to ‘Right to Be Forgotten’ Requests*, *ZDNET* (Dec. 1, 2014) <http://www.zdnet.com/article/bing-and-yahoo-respond-to-right-to-be-forgotten-requests>.

146. Currently, almost every non-EU search domain will not be part of the right to be delisted. Peter Fleischer, Google’s Global privacy counsel, states, “We do not read the decision by the Court of Justice of the European Union (“CJEU”) in the case C-131/12 (the “Decision”) as global in reach—it was an application of European law that applies to services offered to Europeans.” See Letter from Peter Fleischer, *supra* note 83, at 3. But such practice might change in light of regulation. Beyond the Working Party’s recommendations on this matter, local data protection agencies have begun to instruct that the right to be forgotten must be applied across all versions of the search engine. The French data protection authority (CNIL) recently decided in such manner

discover the more hidden search results, as they will be missing from the specific EU Google domain.<sup>147</sup>

But as regulators quickly acknowledged, such problem could be resolved easily. Regulators could oblige search engines that operate in the EU, or perhaps even process data of EU citizens, to comply with the right to be delisted for all domains, meaning that the delisting will occur on all of their services; restrict access to such sites;<sup>148</sup> or use geolocation technology to restrict access to information for EU citizens.<sup>149</sup> While matters of jurisdiction and borders are highly controversial in the digital environment,<sup>150</sup> few courts have already obliged Google to remove results from *all* Google domains.<sup>151</sup> Recent reports suggest that search results removals are now applied to domains (including Google.com) beyond Europe, if the browser is located within the European Union.<sup>152</sup>

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against Google, and Google's informal appeal on this decision to the CNIL was rejected. Google's case will most likely be decided by the French Supreme Court. See Mason Hayes & Curran, *Right to Be Forgotten Going Global – French Regulator Orders Takedown on .coms*, SILICON REPUBLIC (Nov. 2, 2015), <https://www.siliconrepublic.com/enterprise/2015/11/02/right-to-be-forgotten-cnil-france-eu>; Samuel Gibbs, *French Data Regulator Rejects Google's Right-to-Be-Forgotten Appeal*, GUARDIAN (Sept. 21, 2015), <http://www.theguardian.com/technology/2015/sep/21/french-google-right-to-be-forgotten-appeal> [<https://perma.cc/47GA-B3XL>]; Working Party, *supra* note 53, at 9.

147. Jonathan Zittrain, *Don't Force Google to 'Forget'*, N.Y. TIMES (May 14, 2014), [http://www.nytimes.com/2014/05/15/opinion/dont-force-google-to-forget.html?\\_r=0](http://www.nytimes.com/2014/05/15/opinion/dont-force-google-to-forget.html?_r=0) (“Even in Europe, search engine users will no doubt cultivate the same Internet “workarounds” that Chinese citizens use to see what their government doesn’t want them to see.”).

148. In this context, restriction means that EU member states will pass regulation which will place civil, administrative or criminal liability on their citizens and/or third-parties for using search engines outside of the EU.

149. Horatia Muir Watt, *Yahoo! Cyber Collision of Cultures: Who Regulates?*, 24 MICH. J. INT’L L. 673, 683 (2003) (“[G]eographical indeterminacy on the Internet is not inevitable, but results from ideological choice.”); Steven C. Bennett, *The “Right to Be Forgotten”: Reconciling EU and US Perspectives*, 30 BERKELEY J. INT’L L. 161, 190 (2012). However, even the use of such technologies could be bypassed by users. See, e.g., Justice S. Muralidhar, *Jurisdictional Issues in Cyberspace*, 6 INDIAN J.L. & TECH. 1, 3 (2010) (“Even while it was thought that one could fix the physical location of the computer from where the transaction originates and the one where it ends, that too can be bypassed or ‘masked.’”).

150. For a general discussion on jurisdiction and territoriality in the Internet, see David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996); Henry H. Perrit, Jr., *Jurisdiction in Cyberspace*, 41 VILL. L. REV. 1 (1996); Joel R. Reidenberg, *States and Internet Enforcement*, 1 U. OTTAWA L. & TECH. J. 213 (2004).

151. See *Equustek Solutions Inc. v. Jack*, 2014 BCSC 1063 (Can.) for an example in Canada where the Supreme Court of British Columbia ordered Google to delete links to various websites. In terms of the right to be delisted, a French court fined Google for delisting results on its French subsidiary but not globally. See Lisa Vaas, *Google Fined for Not Taking Down “Right to Be Forgotten” Links Worldwide*, NAKEDSECURITY (Nov. 19, 2014), <https://nakedsecurity.sophos.com/2014/11/19/google-fined-for-not-taking-down-right-to-be-forgotten-links-worldwide> [<https://perma.cc/YMG6-UWVS>].

152. See Samuel Gibbs, *Google to Extend ‘Right to be Forgotten’ to All Its Domains Accessed in EU*, GUARDIAN (Feb. 11, 2016), <https://www.theguardian.com/technology/2016/feb/11/google-extend-right-to-be-forgotten-googlecom> [<https://perma.cc/QZB6-MZYD>].

But requiring such geolocation technologies would place a high burden on search engines, would raise privacy concerns, could stifle innovation, and could be generally dangerous for democratic societies.<sup>153</sup> Thus, unless EU citizens will be legally and/or technologically restricted from using search engines that operate outside the EU, the ability of the right to be delisted to achieve its purposes is unlikely.<sup>154</sup> But beyond technical problems, the right to be delisted raises pragmatic problems arising from Google's relatively unusual new role as a courthouse.

### 1. Decision-Making and Asymmetrical Information

Decision-making under the right to be delisted currently necessitates a nonautomated procedure. Unlike copyright infringement claims under a notice-and-takedown regime,<sup>155</sup> the right to be delisted is based upon human intervention, at least for now. Examiners are tasked with deciding which search results are inadequate, irrelevant, no longer relevant, or excessive. In order to evaluate whether to delist the data subject from search results, search engines' operators provide guidelines for their examiners to follow. However, as this Article further argues, such guidelines are technically almost impossible to meet, especially when search engines are the deciders, and this could lead to suboptimal results.

The four components of the right to be delisted are vague. Deciding whether content is inadequate, irrelevant, no longer relevant, or excessive requires a more substantive record and more evidence than a few notes written in an online form. It necessitates context. The decider needs to obtain background information on the data subject and the consequences surrounding the request. It may also require depositions, testimonies, and other types of evidence, which cannot be provided under the current practice. There may also be another side to the story, which search engines will not be aware of. It would be highly difficult, if not impossible, to evaluate such requests, when the only information examined is provided by the requester, and the evaluators rely only on

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153. For an overview of such potential normative and pragmatic difficulties, see Bennett, *supra* note 149, at 191–92.

154. It should be noted that currently more than 95% of all search queries in Google originating in Europe are on local versions, not Google.com. However, such practice may change in light of the right to be delisted and/or forgotten. See LUCIANO FLORIDI, ET. AL, REPORT OF THE ADVISORY COMMITTEE TO GOOGLE ON THE RIGHT TO BE FORGOTTEN 19 (2015), <https://buermeyer.de/wp/wp-content/uploads/2012/02/Report-of-the-Advisory-Committee-to-Google-on-the-Right-to-be-Forgotten.pdf> [<https://perma.cc/5PV2-2PCU>] (providing statistical use of Google in Europe).

155. See *supra* note 88.

what the requester claims to be accurate.<sup>156</sup> This is mainly due to the ex parte nature of the process and its secrecy. The process eventually leads to information gaps caused by imperfect or asymmetrical information,<sup>157</sup> which could be partially resolved under a judicial proceeding. Only through the crucible of an adversarial proceeding can a decision-maker fully comprehend the consequences of his or her judgments.

But the main problem is the decision process itself. One concern relates to the nature of the four components of the right to be delisted. Currently, the vagueness of how search engines should operate under the ECJ ruling presents a major challenge. Search engines require more detailed guidelines on how to interpret the ECJ ruling, which could aid them in deciding what is “inadequate, irrelevant, no longer relevant, or excessive.”<sup>158</sup> Until then, the decision-making procedure will be either performed according to the search engine’s own internal guidelines, or even worse, be merely arbitrary. That makes Google not only a judge, but also a regulator, as it creates the rules for the right to be delisted.

Another concern is the expertise of examiners. Examiners are Google employees. They are not necessarily equipped with proper expertise to evaluate complex requests. They are not likely to be retired judges or to have ever held any judicial position in their life. Many of them, though not all, are probably not experts in the field of EU privacy or information laws, either.<sup>159</sup> They are not necessarily even familiar with EU domestic law or the culture of the requester, which could be relevant to the examination. Aside from the normative problems such concerns raise, it might prove difficult for such examiners to make decisions. It is not merely an information gap problem, but rather one of necessary expertise to make difficult evaluations. Over time, such examiners could acquire expertise. Currently, the nontransparent nature of the removal process and the relatively short time the process has existed does not enable an evaluation of whether examiners are capable of acquiring

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156. Peter Fleischer states,

We generally have to rely on the requester for information, without assurance beyond the requester’s own assertions as to its accuracy. Some requests turn out to have been made with false and inaccurate information. Even if requesters provide us with accurate information, they understandably may avoid presenting facts that are not in their favour. *As such, we may not become aware of relevant context that would speak in favour of preserving the accessibility of a search result.*

Letter from Peter Fleischer, *supra* note 83, at 12 (emphasis added).

157. R. George Wright, *The Right to Be Forgotten: Issuing a Voluntary Recall*, 7 DREXEL L. REV. 401, 414 (2015).

158. While the Working Party provided some guidelines, they were highly limited and did not address all components. *See* Working Party, *supra* note 53, at 11–20.

159. *See* Lee, *supra* note 10, at 44 (suggesting that employees at the national DPAs may possess greater knowledge of EU privacy law than Google’s employees).

expertise. Moreover, acquiring such expertise could take time. Meanwhile, Google's examiners could be making uneducated decisions.

## 2. Costs and High Barriers of Market Entry

Exercising the right to be delisted is expensive. The removal process requires a decision by many human beings<sup>160</sup> and, therefore, demands allocating financial resources.<sup>161</sup> Another potential cost of implementation of the right to be delisted will arise if search engines become obliged to use geolocation technology to restrict access to information for EU citizens.<sup>162</sup> Such financial aspects raise pragmatic concerns as the magnitude of removal requests is relatively high and should not be taken lightly. In June 2016, two years after Google initiated their removal process, it received 443,501 requests containing 1,553,218 URLs that it had to evaluate for removal.<sup>163</sup> Roughly, this amounts to 2,065 URLs per day, every day.<sup>164</sup> Relying on such statistics, it is financially difficult for any search engine to fully comply with the right to be delisted.

Shortly after the ECJ ruling, even Google officials warned that the removal process might be beyond their financial capabilities.<sup>165</sup> It is not. While the quality of Google's decisions may be questionable,<sup>166</sup> in terms of managing the quantity of requests, it has done a rather good job thus far. Nevertheless, while Google currently possesses sufficient financial resources to comply with the EU decision, less wealthy search engines

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160. Peter Fleischer, Google's Global privacy counsel, stated, "We have many people working full time on the process, and ensuring enough resources are available for the processing of requests required a significant hiring effort." Letter from Peter Fleischer, *supra* note 83, at 10.

161. The creation of the removal process itself should not be expensive. Creating an online "removal" form for EU members is the easy part for search engines. It is relatively not costly, and does not require allocating many human resources. Therefore, such obligation is not costly and would not place a high burden on search engines and thereby will not place a high barrier for market entry.

162. For further discussion of the ramifications of geographical borders online, see generally Johnson & Post, *supra* note 149.

163. See European Privacy Requests for Search Removals, *supra* note 135.

164. Google officially launched their removal process in May 29, 2014, which means that 752 days passed until the compared statistics of removal dated in June 20, 2016. It should be noted that after Google launched their services, they reported a rate of 10,000 removal requests per day. See *id.*

165. See Martha Mendoza & Toby Sterling, *Google 'Right to Be Forgotten' Ruling Unlikely to Repeat in U.S.*, NBC NEWS (May 26, 2014), <http://www.nbcnews.com/tech/internet/google-right-be-forgotten-ruling-unlikely-repeat-u-s-n114731> [<https://perma.cc/7CMB-HB2E>] (quoting Al Verney, Google spokesman: "It seems aspirational, not a reality, to comply with such a standard . . . The re-engineering necessary to implement the right to be forgotten is significant.").

166. I further discuss the potential normative difficulties which arise from Google's process, which is difficult to assess due to lack of full transparency in Part III.B.

might not.<sup>167</sup> Thus, the high costs of compliance create another problem: they pose high barriers to market entry, and encourage an oligopoly market. In that sense, Google might actually benefit from the right to be delisted, as it could reduce competition and eliminate new search engines. New search engines will have much difficulty with complying with the ECJ ruling. Society loses in such a scenario, as innovation could take a huge hit.<sup>168</sup> Perhaps the ECJ decision leaves some room for interpretation regarding non-wealthy search engines, incapable of dealing with such process.<sup>169</sup> However, such a statement by the ECJ is subject to interpretation and does not necessarily exempt search engines lacking financial resources.

### B. The Normative Aspect

Normatively, the right to be delisted raises many concerns due to the fact that search engines are now making decisions for which they are unequipped and for which they should not be tasked.<sup>170</sup> The judicial system, not search engines, is tasked with upholding the rule of law and settling disputes. Under the ECJ ruling, search engines effectively became one of the three branches of government.<sup>171</sup> They should now be treated as a much more formal part of the judicial system, making judicial decisions on fundamental rights and liberties. This judicial role raises many normative concerns.

#### 1. The Problems of Judiciary Privatization

The state encodes rights into laws and uses threats and acts of coercion to enforce them.<sup>172</sup> Should some roles of the state be

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167. Catherine Baksi, *Right to Be Forgotten "Must Go," Lords Committee Says*, L. GAZETTE (July 30, 2014), <http://www.lawgazette.co.uk/law/right-to-be-forgotten-must-golords-committee-says/5042439.fullarticle> [<https://perma.cc/DMK7-G6HW>].

168. See Antani, *supra* note 143, at 1205 (“[T]he burden of handling right to be forgotten requests might favor larger internet entities like Google over smaller companies, stifling competition and subduing the entrepreneurial spirit of the internet.”).

169. See *Google Spain*, *supra* note 7, ¶ 83 (under the ruling, search engines are only subject to data protection rules “within the framework of its responsibilities, powers, and capabilities.”).

170. Critics from the House of Lords in the United Kingdom argued that it is “‘wrong in principle’ to leave it to search engines to decide whether or not to delete information, based on ‘vague, ambiguous and unhelpful’ criteria.” See Baksi, *supra* note 167.

171. Arguably, search engines could influence the three branches of government (legislative, executive, and judicial) by, for example, using lobbyists and are therefore a “fourth branch of government.” For more on lobbyists acting as a fourth branch of government, see for example, Alex Knott, *The ‘Fourth Branch’ of Government*, ALTERNET (Apr. 7, 2015), [http://www.alternet.org/story/21702/the\\_%27fourth\\_branch%27\\_of\\_government](http://www.alternet.org/story/21702/the_%27fourth_branch%27_of_government) [<https://perma.cc/V6XR-3NSY>].

172. Clifford J. Rosky, *Force, Inc.: The Privatization of Punishment, Policing, and Military Force in Liberal States*, 36 CONN. L. REV. 879, 885 (2004).

monopolistic?<sup>173</sup> And more specifically—should the judiciary?<sup>174</sup> In practice, these roles are not necessarily as monopolistic as we might assume. Privatization, the shifting of government functions to the private sector,<sup>175</sup> often occurs under all three branches of the government.<sup>176</sup>

We can witness some forms of privatization of the executive branch mainly in terms of enforcement. Many states have privatized policing.<sup>177</sup> As part of this enforcement privatization, some states also have partially privatized parts of their penal systems.<sup>178</sup> Even militaries are partially privatized.<sup>179</sup> The legislative branch is also privatized to some extent.

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173. *Id.* at 886–91 (suggesting the “monopoly thesis” regarding the use of force in society).

174. There are various justifications for the sole authority of the state to act as a judiciary. Thomas Hobbes argued under the social contract, sovereign must control civil, military, judicial, and ecclesiastical powers. See THOMAS HOBBS, *LEVIATHAN* 183 (C.B. Macpherson ed., Penguin Classics 1981) (1651). John Locke argued that in the State of Nature, men could be biased by their interest and partial to themselves. Justifying the sole authority of the state to act as a judiciary arises mainly from the consent of individuals to partake in civil society. See JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* (Peter Laslett ed., Cambridge Univ. Press 1988) (1690). For more on the Privatization of law and the framework which facilitates it, see Talia Fisher, *The Privatization of Law*, 30 *IYUNEI MISHPAT* 517, 524–28 (2008) (Isr.).

175. Privatization can mean many things. It could describe the sale of state-owned assets, deregulation, and contracting out the provision of goods and services. This article generally refers to privatization as the shifting of government functions to the private sector. See Jody Freeman, *Private Parties, Public Functions and the New Administrative Law*, 52 *ADMIN. L. REV.* 813, 822 (2000).

176. Many governments, like the U.S. Federal Government, are made up of three branches: legislative, executive, and judicial. See *Branches of Government*, U.S. HOUSE OF REPRESENTATIVES, [http://www.house.gov/content/learn/branches\\_of\\_government](http://www.house.gov/content/learn/branches_of_government) [https://perma.cc/676X-RWK2].

177. Privatization of policing occurs through, *inter alia*, “private security laws,” which enable the formation of a private security industry. Such industry employs guards, patrol personnel, and detectives. Beyond industrial facilities and commercial establishments, such security firms, sometimes also operate in office buildings, airports, shopping districts, and residential neighborhoods, thus privatizing roles of the police. For more on the privatization of enforcement, see Stephin Rushin, *The Regulation of Private Police*, 115 *W. VA. L. REV.* 159 (2012); David A. Sklansky, *The Private Police*, 46 *UCLA L. REV.* 1165 (1998); Rosky, *supra* note 172.

178. Under such privatization in the United States, by the early 1980s the government recruited private corporations to provide prison services. See Douglas C. McDonald, *Public Imprisonment by Private Means: The Reemergence of Private Prisons and Jails in the United States, the United Kingdom and Australia*, 34 *BRIT. J. CRIMINOLOGY* 29, 29–32 (1994); Rosky, *supra* note 172, at 902.

179. By privatization of the military, I mostly refer to the emergence of private military companies (PMCs) which offer training of troops, logistical support and specialization, military equipment and supplies, intelligence systems, materiel procurement, static-site defense, and peacekeeping. However, there are even some examples of privatization of actual combat. Two such examples are “Executive Outcomes” and “Sandline International,” two companies which engaged in direct military conflict for clients, mostly in Africa. In addition, there are numerous PMCs which were actively engaging in combat in Bosnia, Columbia, and around the world. See generally P.W. Singer, *CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY* (2003); Jonathan Weisman & Anitha Reddy, *Spending on Iraq Sets Off Gold Rush*, *WASH. POST* (Oct. 9, 2003), at A1 (discussing the services provided by private military companies in Iraq); Sam Kiley, *Send in the Mercenaries, Mr. Cook*, *TIMES* (London), Jan. 22, 1999, LEXIS, News Library, Times File; Rosky, *supra* note 172, at 904–12.

Regulation in many instances involves private actors.<sup>180</sup> Aside from private contributions to regulation, legislators often ask Standard Setting Organizations (SSOs) to produce standards that turn into legislation,<sup>181</sup> and sometimes delegate power to self-regulatory bodies.<sup>182</sup> The judiciary is no exception to such privatization in modern society.<sup>183</sup> Adjudication many times shifts to private systems of justice like those utilizing Alternative Dispute Resolution (ADR) procedures. In California, the judiciary was partially privatized through a procedure commonly referred to as “rent-a-judge.”<sup>184</sup> Many private parties also conduct some form of adjudication.<sup>185</sup> The ECJ ruling expands such judiciary privatization, and as this Article further suggests, the judicial role under the right to be delisted has different characteristics.

There are several arguments as to why Google should act as a judiciary under the right to be delisted. They begin with a pragmatic argument of economic efficiency. If Google serves as a more efficient judicial system than courts and DPAs in EU Member States, then from an economic perspective, it should be placed in such position. Generally, it could be more economically efficient to place the burden of removing links to content on search engines and/or other intermediaries than on courts. Courts are usually overloaded with cases as it is,<sup>186</sup> and the magnitude of removal requests could have possibly led to a highly slow mechanism, that is, if courts could even cope with such a magnitude of

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180. Douglas C. Michael, *Federal Agency Use of Audited Self-Regulation as a Regulatory Technique*, 47 ADMIN. L. REV. 171 (1995); Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 551 (2000).

181. See Paul R. Verkuil, *Public Law Limitations on Privatization of Government Functions*, 84 N.C. L. REV. 397, 433–36 (2006).

182. Freeman, *supra* note 180, at 551.

183. History tells an interesting story on the state and the judiciary. Interestingly, judicial services preceded the formation of the state. In primitive societies, while there was no concept of public law, there was often adjudication. See Landes & Posner, *supra* note 74, at 242–53.

184. “Rent-a-judge” usually refers to a procedure which allows opposing sides in civil suits to hire a retired judge or a “referee” to settle a dispute. Unlike traditional ADR, their judgments have the same effect as judgments of any other state court, as they are considered part of the state court system. Sara Terry, *Rent-a-judge: A Fast Way to ‘Day in Court’*, CSMMONITOR (Feb. 9, 1982), <http://www.csmonitor.com/1982/0209/020935.html> [<https://perma.cc/FV64-FMEY>]. For more on private adjudication, see Anne S. Kim, *Rent-a-Judges and the Cost of Selling Justice*, 44 DUKE L.J. 166 (1994); Steve Russell, *Rent-a-Judge and Hide-a-Crime: The Dark Potential of Private Adjudication*, in PRIVATIZATION OF CRIMINAL JUSTICE: PAST PRESENT AND FUTURE 113 (David Shichor & Michael J. Gilbert eds., 2000).

185. Insurance companies, for example, will review claims and decide whether it fits their contractual obligation. But generally, such adjudication will usually fall under examination of internal policies and/or contractual obligation, and the results of the dispute will only apply to rights of the individuals, which are linked to the company and/or institution. It thereby does not generally replace the role of courts in settling disputes.

186. See ABA ACTION COMM’N TO REDUCE COURT COSTS AND DELAY, ATTACKING LITIGATION COSTS AND DELAY I (1984).

requests in the first place. On the other hand, many search engines employ large numbers of workers and usually have vast financial resources that could be allocated to deal with such a high magnitude of removal requests.<sup>187</sup>

Search engines are most likely in the best position to prevent misconduct at a reasonably low cost.<sup>188</sup> It is easier and cheaper to sue Google than every website, especially since website operators could be located abroad.<sup>189</sup> In addition, aside from the problem of asymmetric information,<sup>190</sup> search engines are economically in the best position to delist; after all, search engines are the very entities that manage the lists. As shown from the pragmatic aspect of the right to be delisted, Google services are efficient, as they provide judgments quickly. The supply of courts or DPAs might not satisfy the magnitude of removal requests, i.e., the demand. Search engines are likely more efficient than the current overloaded judicial system, which relies on limited public financial resources. The mechanism used by Google reduces transaction costs for the parties involved in the dispute, which would be higher if courts were involved.<sup>191</sup> In addition, making search engines decision-makers could reduce chances of conflicting decisions, if say, DPAs or courts in the twenty-eight EU Member States were making such decisions.<sup>192</sup> In other words, placing liability on search engines eliminates courts from serving as a middleman, and directly links the data subject with the controller of the information (or the controller of the link to the information). Thus,

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187. Naturally, variance depends on the search engine in question and the magnitude of the removal requests.

188. Assaf Hamdani, *Who's Liable for Cyberwrongs?*, 87 CORNELL L. REV. 901, 911 (2002) (explaining why online intermediaries are sometimes liable for the wrongdoings of their users).

189. Although the European Commission has emphasized that the right to be forgotten (and the right to be delisted for that matter) would apply even when the "personal data is handled abroad by companies that are active in the EU market" or "offer their services to EU citizens," this task will not be achieved easily as many users will ignore notices, will not necessarily grasp the choice and resist making them unless compelled to do so. See Press Release, European Comm'n, Commission Proposes a Comprehensive Reform of Data Protection Rules to Increase Users' Control of their Data and to Cut Costs for Businesses (2012) IP/12/46; Muge Fazlioglu, *Forget Me Not: The Clash of the Right to Be Forgotten and Freedom of Expression on the Internet*, 3 INT'L DATA PRIVACY L. 149, 151 (2013) (making this argument); Christopher Kuner et al., *The Challenge of "Big Data" for Data Protection*, 2 INT'L DATA PRIVACY L. 47, 48 (2012) (arguing that mounting evidence shows that individuals ignore notices, often do not understand the choices and resist making them unless compelled to do so).

190. See *supra* Part III.A.

191. Geoffrey C. Hazard & Paul D. Scott, *The Public Nature of Private Adjudication*, 6 YALE L. & POL'Y REV. 42 (1988) ("Civil cases generally involve seemingly excessive transaction costs, both for the parties and for the public.").

192. See Lee, *supra* note 10, at 50.

from an economic perspective, placing liability on search engines could be justified.<sup>193</sup>

But the Google courthouse raises a few normative concerns that could surpass economic considerations. First, the judicial role of Google could potentially erode traditional judicial authority. Courts settle disputes; that is their primary purpose.<sup>194</sup> Beyond dispute settling, courts, at least in common law jurisdictions, have another important function: they engage in rulemaking.<sup>195</sup> They play an important role in society to “explicate and give force to the values embodied in authoritative texts . . . to interpret those values and to bring reality into accord with them.”<sup>196</sup> Public courts speak for society and their decisions carry social weight, far greater than the decisions of private courts.<sup>197</sup> Thus, making search engines courthouses—separate from other search engines who also act as courthouses—could risk the development of the law.<sup>198</sup>

Moreover, practical difficulties should not always prevail over a normative argument, especially where public interests and values are at stake.<sup>199</sup> Even economists would most likely agree that economic efficiency should not transfer the role of the state in judicial services.<sup>200</sup> Thus, the economic argument does not prevail here. While privatization of the judiciary could be justified in some cases, it cannot be for the right to be delisted, as public laws or public values are involved. Such cases must be reserved for a public judiciary, not Google.<sup>201</sup>

Another concern of privatization is public accountability. Privatizing adjudication of the right to be delisted diminishes the public accountability of the judicial system. The public accountability argument

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193. However, it should be noted that such assessments rely on assumptions which should be further analyzed by economists.

194. See Landes & Posner, *supra* note 74, at 236.

195. *Id.*

196. Owen Fiss, Comment, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984).

197. Hazard & Scott, *supra* note 191; Kim, *supra* note 184, at 190.

198. The existence of several data processors combined with lack of transparency, places the decisions in a vacuum, preventing learning from other decisions. When we categorize these data controllers as digital courthouses, this could be articulated as the lack of legal precedents. These courthouses might have the opportunity to learn from their own rulings, depending on the data controller judicial mechanism, but not from other similar courthouses. While civil liability usually relies on factual foundations, no such burden is placed on data subjects under the GDPR. See GDPR, *supra* note 29, at art. 17; Rustad & Kulevska, *supra* note 72, at 369. See generally Tracy Walters McCormack, *Privatizing the Justice System*, 25 REV. LITIG. 735 (2006).

199. See Lee, *supra* note 10, at 32 (“[W]here important public interests and values are at stake, governments should consider more than simply transaction costs.”); Verkuil, *supra* note 181.

200. See 2 ADAM SMITH, *THE WEALTH OF NATIONS* 231 (Edwin Cannan ed., 1976); Landes & Posner, *supra* note 74, at 235; Verkuil, *supra* note 181, at 456 (“The appropriate roles of the public and private sector raise questions beyond efficiency concerns.”).

201. Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 676 (1986); Kim, *supra* note 184, at 194.

is divided into two groups turning on the distinction between public and private institutional purposes and the distinction between public and private accountability mechanisms.<sup>202</sup> The first concern relates to the different purposes of the judicial system and Google. Google pursues economic gains more than political and legal goals.<sup>203</sup> The second concern rests on the assumption that the judicial system and Google rely upon different accountability mechanisms. While the judicial system relies on electoral accountability, Google relies on market accountability.<sup>204</sup>

The accountability arguments against privatization mostly rely on the nature of search engines. They are for-profit, commercial entities that were not chosen by the public to uphold a judiciary position. The individuals who make the decisions are not public officials, and their identity is hidden from the public. As the process is highly opaque and lacks proper oversight (such attributes will be further discussed in the next part), and as very few individuals currently appeal Google's decisions,<sup>205</sup> search engines will not be held accountable for most of their decisions. Overall, Google lacks public accountability for its decisions.<sup>206</sup>

The final concern is one of appellate remedies and is more of a general criticism of the right to be delisted. In most states, litigants are guaranteed at least one appeal as of right.<sup>207</sup> Such an appellate remedy is generally granted to protect against arbitrary or erroneous application of the law, to promote the development and standardization of legal doctrine, and to assist in standardizing outcomes for similarly situated litigants.<sup>208</sup> Such protections are not granted under the right to be delisted, as the appeal procedure is flawed. The European data subject is entitled to request that a local DPA review the decision and may even file a lawsuit against Google based upon its rejection.<sup>209</sup> But Google does not provide enough data on the rejection of claims to the claimant.<sup>210</sup>

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202. See Rosky, *supra* note 172, at 939.

203. ROBERT LEKACHMAN, VISIONS AND NIGHTMARES: AMERICA AFTER REAGAN 104–06 (1987) (noting that private corporations are motivated primarily by profit maximization); Rosky, *supra* note 172, at 939.

204. See Rosky, *supra* note 172, at 940.

205. See Panetta, *supra* note 138.

206. See Lee, *supra* note 10, at 43 (“Google’s employees are not public officials. Google’s employees cannot be held accountable by the public in same way as public officials (e.g., civil servants, judges, or legislators) can.”).

207. Marc M. Arkin, *Rethinking the Constitutional Right to a Criminal Appeal*, 39 UCLA L. REV. 503, 513–14 (1992).

208. Barbara B. Crabb, *In Defense of Direct Appeals: A Further Reply to Professor Chemerinsky*, 71 AM. BANKR. L.J. 137, 138 (1997); Cassandra Burke Robertson, *The Right to Appeal*, 91 N.C. L. REV. 1219, 1230 (2013).

209. See *Frequently Asked Questions*, *supra* note 117.

210. See Lee, *supra* note 10, at 45–46.

Moreover, while webmasters currently may request Google to reconsider a decision,<sup>211</sup> other impacted parties—most importantly, members of society—do not receive such right as they are unaware of any proceedings, and the option of a counter-notice does not constitute an appeal. Leaving the judicial role with the courts could enable at least third parties to participate in the controversy. Moreover, even if the right to be delisted will be adjudicated by courts without a de facto right to appeal, the decision will still be made by a judicial entity that is subject to some oversight, is generally more equipped to make educated decisions, and is more accountable for its decisions.

## 2. Transparency and Oversight

Transparency plays a crucial role in judicial processes. The process for exercising the right to be delisted is almost entirely opaque. Legally, there is currently no requirement under EU data protection laws to provide any sort of information on the process or the removed links. On the contrary, search engines are most likely forbidden from handing out information on removal requests.<sup>212</sup> Search engines like Google do publish transparency reports and provide some insights into their process.<sup>213</sup> Under its transparency report, Google provides a general numerical count of the total URLs that it evaluated for removal, the total requests that it received, the percentages of removals and rejections, a few examples of requests it received from individuals, and finally a site listing of the “most impacted websites” from such requests.<sup>214</sup> But such information is highly limited and should not constitute sufficient transparency. Contrast this reporting, for example, with the copyright notice-and-takedown regime, in which online service providers usually notify users that search results had been removed, and third parties, like *Lumen*, publish removal requests.<sup>215</sup>

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211. See *Frequently Asked Questions*, *supra* note 117.

212. As for informing webmasters on delisting, the Working Party instructed search engines’ managers, as a general practice, to not “inform the webmasters of the pages affected by de-listing of the fact that some webpages cannot be accessed from the search engine in response to specific queries.” See Working Party, *supra* note 53, at 10.

213. Google declares, “As a company we feel it is our responsibility to ensure that we maximize transparency around the flow of information related to our tools and services. We believe that more information means more choice, more freedom, and ultimately more power for the individual.” Google declares that “a copy of each legal notice we receive may be sent to the Lumen project for publication and annotation” or published in their transparency report. Practically, no such legal notice was published in Lumen yet. See *Legal Removal Requests*, GOOGLE, <https://support.google.com/legal/answer/3110420?rd=1&hl=en> [<https://perma.cc/QXT4-2SBG>]. For more on Lumen, see *supra* note 107.

214. See *supra* note 163.

215. See Lumen, *supra* note 107. Yahoo! indicates that they may “include a notice to users on [their] search results pages informing them that some results have been blocked pursuant to EU

The fact that some search engines publish transparency reports and provide insights to their process is important. While still limited, the current form of transparency Google provides is crucial for oversight and protection of fundamental rights. Knowing that Google does not reject nor accept all removal requests indicates that probably some form of decision-making occurs under its procedure. But this is far from enough. We need access to information on the nature of requests, such as what information typically gets delisted and what does not. While Google provides some examples of the requests and its decisions, such hand-picked, anecdotal evidence should not be treated as representative of the process.

Transparency is highly crucial for preserving fundamental rights. Beyond the fact that many search engines are publicly traded companies,<sup>216</sup> and thereby many of their actions must be observable by outsiders, the importance of transparency dramatically rises when these search engines act as courthouses. Lack of transparency arguably better protects the right to be delisted and will probably also exist in a traditional judiciary.<sup>217</sup> But this argument should not turn search engines into judges. If adjudication by search engines under the right to be delisted cannot be transparent, then we should not let search engines replace the judiciary—that is, unless we place search engines merely as a preliminary process before the judiciary. Not all courts are fully transparent. Some court hearings are behind closed doors, and some courts are even considered “secret courts.”<sup>218</sup> Even if the judicial role under the right to be delisted will be placed on courts, they will most likely be opaque. The difference, however, is mainly the impartiality and

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law.” See *Requests to Block Search Results in Yahoo Search*, *supra* note 109. But transparency in the right to be delisted should be differentiated from take-down notices of intellectual property infringements. In terms of copyright, the content is removed and only a description of what was removed is publicized. Information has a different nature, and the removal process would require publishing the information that was delisted. But this might undermine what the right to be delisted attempts to achieve. It could even lead to a less desired outcome in which the content is more readily available now, and that it could even attract the attention of individuals to why the subject matter asked to delink those webpages from the search engine. For more on Lumen, see Lumen, *supra* note 107.

216. For a list of publicly-traded companies which include Google (now a subsidiary of Alphabet Inc.) and Microsoft (which operates Bing), see *The World’s Biggest Public Companies*, FORBES, <http://www.forbes.com/global2000/list/#tab:overall> (last visited Jan. 17, 2016).

217. If the right to be delisted decisions, without PII, were publicly available, then arguably individuals could analyze the outcomes of such requests and learn how to manipulate the systems. However, this would hardly be different from the judicial process, in which individuals, and perhaps mostly lawyers, could try to learn patterns in the application of the law by courts.

218. Such example is the Foreign Intelligence Surveillance Court (FISC) in the United States, a “secret court” that examine classified information relating to national security. See Peter Margulies, *The NSA in Global Perspective: Surveillance, Human Rights, and International Counterterrorism*, 82 FORDHAM L. REV. 2137, 2139 (2014).

public accountability of such courts, which requires them to act under the rule of law.

The second normative concern comes from the lack of proper oversight. Someone must judge the judges. Without such oversight, search engines could misuse or even abuse their authority without repercussions. Oversight, in this matter, does not impede the right to be delisted. *Prima facie*, oversight exists under the right to be delisted, as data subjects can appeal to a DPA or a court on search engines' decisions. But as previously noted, this appeal process is flawed because it appears that most individuals effectively do not appeal, and it does not grant oversight on the accepted requests because there is no one to make an appeal. Even if oversight is problematic under the right to be delisted, much like in the concern of transparency, leaving adjudication in the courts could be important due to their impartiality and the public accountability of such courts to act under the rule of law.

### 3. Procedural Safeguards

One of the major difficulties of the right to be delisted is the negative impact on procedural safeguards.<sup>219</sup> Procedural safeguards could highly vary between states and legal systems, and Google's role as a judiciary under the right to be delisted should be scrutinized by each EU Member State or any other state that legislates such right.<sup>220</sup> The goal of this part is more normative than pragmatic: to examine general characterizations of procedural safeguards, commonly referred to in many countries as due process. Due process is usually divided into two separate categories: procedural due process and substantive due process.<sup>221</sup> What is most relevant here is procedural due process, which conventionally means that deprivations of life, liberty, and property must accord with lawful process.<sup>222</sup> It is generally comprised of sufficient notice, a right to an impartial arbiter, and a right to give testimony and admit evidence.

The first part of due process, sufficient notice, will present a problem that arises more from the right to be delisted itself than from the

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219. See Lee, *supra* note 10, at 45–46 (arguing that Google only grants minimal due process in the right to be forgotten [delisted] removal process).

220. For a comparison of due process in the U.S. and the EU, see David E. Shipley, *Due Process Rights Before EU Agencies: The Rights of Defense*, 37 GA. J. INT'L & COMP. L. 1 (2008).

221. For a distinction between substantive due process and procedural due process, see Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 418–19 (2010).

222. Nathan S. Chapman & Michael W. McConnell, Essay, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1776 (2012); Richard M. Re, *The Due Process Exclusionary Rule*, 127 HARV. L. REV. 1885, 1890 (2014).

role of search engines in the process. Some notice exists under the removal process. Google notifies the data subject and, in some instances, the webmaster of the URL that is requested for removal regarding the removal request and Google's decision.<sup>223</sup> While it seems that Article 7(c) and 7(f) of the DPD permit this disclosure,<sup>224</sup> under the instructions of the Working Party, such notification to webmasters might not be legal as a general practice,<sup>225</sup> but rather only in cases where the search engine needs to obtain additional information for the assessment of the circumstances surrounding that request.<sup>226</sup> However, there is another party to the controversy that does not get any form of notice but is deprived of liberty: other members of society.

The second potential procedural safeguard that specifically relates to search engines is the right to an impartial arbiter. Judges should be impartial.<sup>227</sup> Their decisions are unbiased, at least to some extent.<sup>228</sup> The judicial system as a whole, when it works properly, is generally impartial. However, when granting a judicial role to a for-profit, commercial entity, bias is almost inevitable.<sup>229</sup> Google, Yahoo!, and Bing, among other search engines, possess commercial and business incentives and policies. Their primary goal is to increase the wealth of

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223. It should be noted that Google only sends the webmasters the affected URLs, not the requester's name. However, in many cases, the requester's name should be obvious from the URL. See *Frequently Asked Questions*, *supra* note 117. Yahoo! indicates that they may "notify the operators or webmasters of websites impacted by your request." See *Requests to Block Search Results in Yahoo Search*, *supra* note 109.

224. EU Data Protection Directive, *supra* note 6, arts. 7(c), 7(f); Letter from Peter Fleischer, *supra* note 83, at 6.

225. See Working Party, *supra* note 53, at 3 ("Search engines should not as a general practice inform the webmasters of the pages affected by removals of the fact that some web pages cannot be accessed from the search engine in response to a specific name-based query.").

226. *Id.*

227. Cf. Tal Z. Zarsky, *Social Justice, Social Norms and the Governance of Social Media*, 35 PACE L. REV. 154, 163 (2014) (arguing that judges are, *inter alia*, subject to local pressures and of course local law).

228. Judges are human beings, and are therefore subject to various cognitive bias. One example is *adjustment and anchoring* bias: when people estimate, they have a starting value that is adjusted to the final answer. For more on *adjustment and anchoring* bias, see Paul Slovic & Sarah Lichtenstein, *Comparison of Bayesian and Regression Approaches in the Study of Information Processing in Judgment*, 6 ORG. BEHAV. & HUM. PERFORMANCE 649 (1971); Amos Tversky & Daniel Kahneman, *Subjective Probability: A Judgment of Representativeness*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 32 (Daniel Kahneman, Paul Slovic & Amos Tversky eds., 1982); Avishalom Tor, *The Methodology of the Behavioral Analysis of Law*, 4 HAIFA L. REV. 237, 251–54 (2008); Colin Miller, *Anchors Away: Why the Anchoring Effect Suggests that Judges Should Be Able to Participate in Plea Discussions*, 54 B.C. L. REV. 1667 (2013). However, as such cognitive bias impacts all humankind, the examiners of search engines should be equally affected by them.

229. See Lee, *supra* note 10, at 44–45 (suggesting that Google is biased in terms of the right to be forgotten).

their shareholders.<sup>230</sup> Such policies create a bias that is troubling when they are acting as judiciaries. Such bias could move Google to act over or underinclusively, depending on the specific reason behind its bias. Biases will generally result from competition and incentives.

Search engines compete with each other. When displaying search results, they often favor their own services if they exist.<sup>231</sup> They may also favor their own advertisers and affiliated corporate providers when providing search results.<sup>232</sup> They also compete on traffic with other websites that provide services. Some of these companies, like Google, are more than simply search engines. Indeed, they are a subsidiary of a parent company (Alphabet Inc.) that owns and operates various types of services, like social media platforms. Therefore, they are competing with other operators. Search engines might abuse their power to reduce traffic to competing services and websites. As the transparency of requests is highly limited, especially when they are approved, the lack of oversight would permit such practice without fear of antitrust violation or any other form of liability.

Then we have *incentives*. Search engines have two opposing incentives. On the one hand, their business models rely on information and access to this information. Removing links from their search results is against their incentive to provide accurate information and as much of it as possible. When they are not providing a search result that exists on the web, they are not performing the task that is at the heart of their business model. On the other hand, risking liability could be costly. To that end, search engines might choose to act overinclusively rather than underinclusively when making decisions.<sup>233</sup> Such overinclusiveness clearly leads to endangering freedom of information and speech, but it also leads to a biased mechanism by which search engines make decisions—that is, based on incentives and not on facts. Judicial systems should not be motivated by such considerations.

Finally, due process necessitates a right to give testimony and admit evidence. As decisions are conducted behind closed doors, in an *ex parte* procedure,<sup>234</sup> the claimant is the only one able to make requests to Google, and even he is not entitled to give oral testimony.<sup>235</sup> Other

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230. For such argument on the potential bias of Google in the application of the “right to be forgotten” (meaning right to be delisted), see *id.* at 42.

231. Adam Raff, Op-Ed., *Search, But You May Not Find*, N.Y. TIMES (Dec. 28, 2009), [http://www.nytimes.com/2009/12/28/opinion/28raff.html?\\_r=0](http://www.nytimes.com/2009/12/28/opinion/28raff.html?_r=0).

232. See Grimmelmann, *supra* note 78, at 21.

233. See Zittrain, *supra* note 147 (“[S]earch engines are likely to err on the safe side and accede to most requests.”).

234. See Lee, *supra* note 10, at 45.

235. *Id.*

parties interested in the controversy have neither a right to give testimony nor a right to admit evidence. If the role of the judiciary will be placed on courts, then the claimant will have the opportunity to give oral testimony, and perhaps even the publisher will have a chance to dispute the claim.

#### 4. Protecting Fundamental Rights

The right to be delisted might have a negative impact on fundamental rights. The first set of rights are *freedom of speech*, *freedom of information*, and *freedom of the press*.<sup>236</sup> The second set of rights are rights to *privacy*,<sup>237</sup> and an individual's right to *protect personal data* concerning himself or herself.<sup>238</sup> But here the argument goes beyond the traditional criticism of the possible negative impact of the right to be delisted on fundamental rights. Rather, the judicial role of search engines raises an even greater threat to the protection of such rights.

I begin with the former set of rights. The right to be delisted could be viewed as a form of Internet censorship,<sup>239</sup> as it potentially threatens speech,<sup>240</sup> access to information, and the freedom of the press.<sup>241</sup> *Prima*

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236. Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended), 4 November 1950, Europe. T.S. No. 5, art 10 [hereinafter ECHR] (“Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.”); European Union Charter of Fundamental Rights of the European Union, 18 December 2000, O.J. (C 364) 1–22. The exercise of freedom of expression may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

ECHR, *supra*, at art. 10(2).

237. Privacy in the EU is generally protected as a fundamental right under the Charter of Fundamental Rights of the European Union, art. 7, 2010 O.J. (C 83) 389, 393; Council of Europe Member States are also protecting privacy. See ECHR, *supra* note 236, at art. 8 (“Everyone has the right to respect for his private and family life, his home and his correspondence.”).

238. See Consolidated Version of the Treaty on the Functioning of the European Union art. 16, Oct. 26, 2012, 2012 O.J. (C 326) 47, art. 16(1) (“Everyone has the right to the protection of personal data concerning them.”); Charter of Fundamental Rights of the European Union, art. 8, 2000 O.J. (C 364) 1 (“Everyone has the right to the protection of personal data concerning him or her.”); Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data arts. 5–6, 8–9, Jan. 28, 1981, 1496 U.N.T.S. 65.

239. Rustad & Kulevska, *supra* note 72, at 373 (arguing that the right to be forgotten could lead to censorship of the Internet).

240. See Jeffrey Rosen, *Free Speech, Privacy, and the Web that Never Forgets*, 9 J. TELECOMM. & HIGH TECH. L. 345, 345 (2011) (“[A]lthough there are proposals in Europe and around the world, that would allow us to escape our past, these rights pose grave threats to free speech.”).

facie, freedom of information does not suffer a huge impact.<sup>242</sup> No information is deleted from the original source. Unlike the right to be forgotten, the right to be delisted only affects search engines' queries linked to a specific name where the link is to information that is irrelevant, outdated, or otherwise inappropriate. The right only affects the results obtained from searches of a person's name and does not require deletion of the link from the indexes of the search engine altogether. The information is not removed from the Internet, only from a specific EU domain.

However, search engines still play a crucial role in protecting such fundamental rights. When Google stops linking to a website, it is highly likely that fewer people will be able to locate it. Without links from search engines, the Internet will remain a collection of data sets so large and complex, they will be nearly impossible to use. Thus, the ECJ ruling could have a huge impact on freedom of speech, freedom of information, and freedom of the press. It also derogates the role of counter speech and could disrupt the process of communication.<sup>243</sup>

The second set of rights relates to privacy and data protection. Under the EU perception of privacy and data protection, the processing carried out by search engines is liable to significantly affect the fundamental rights to privacy<sup>244</sup> and the protection of personal data. Furthermore, the protection of these rights is crucial under the EU regime. But beyond merely being important, such right to be delisted was characterized in the EU as a fundamental or human right.<sup>245</sup> Under the right to be delisted, search engines, mainly Google, are the almost-sole enforcer and judge.

Privatization of the judiciary raises concerns for the protection of both sets of rights.<sup>246</sup> Google will not protect human rights to the extent that the traditional justice system will. Google might intentionally decide on requests to cut costs or to better serve its business model. While

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241. It should be noted that the right to be forgotten under the GDPR does address the question of free expression. It states clearly that the right does "not apply to the extent that processing of the personal data is necessary for exercising the right of freedom of expression and information." However, such a statement is rather vague and insufficient to protect such right. See GDPR, *supra* note 29, at art. 17(3)(a); see also *id.* at art. 80(2) ("Member States shall by law reconcile the right to the protection of personal data pursuant to this Regulation with the right to freedom of expression and information.").

242. For such argument, see Working Party, *supra* note 53, at 2 ("In practice, the impact of the de-listing on individuals' rights to freedom of expression and access to information will prove to be very limited.").

243. Robert G. Larson III, *Forgetting the First Amendment: How Obscurity-Based Privacy and a Right to Be Forgotten Are Incompatible with Free Speech*, 18 COMM. L. & POL'Y 91, 114 (2013).

244. See *supra* note 237.

245. *Google Spain*, *supra* note 7, ¶¶ 81, 91, 97, 99.

246. In the context of privatization of force, see Rosky, *supra* note 172, at 943–50.

current practice could suggest otherwise,<sup>247</sup> search engines could, at some point, be more likely to comply with many requests to remove content to avoid litigation and partially to reduce costs, thereby removing legitimate content and negatively impacting freedom of information.<sup>248</sup> They might also cut back on labor and find methods to reduce costs. They might find ways to improve the speed of the process. But such practices could erode the protection of human rights.

### 5. Empowering the Powerful

It would seem that search engines were given a role that is not in their best interests.<sup>249</sup> While the right to be delisted clearly imposes a financial burden on search engines, they could also benefit from their judicial role due to information they receive in the process of examination. Google already maintains vast amounts of power. It stores vast amounts of information on individuals around the globe. But placing Google in a judicial role enhances such power in a few ways. First, with judicial powers, Google could shape norms. This argument might be a bit naïve, in the sense that Google already possesses such ability, and Google does not require a right to be delisted to shape how individuals view information on the web. Mostly, it enhances its information-gathering capabilities. While Google already possesses enormous information-gathering capabilities, this argument is not naïve. Under the removal process, Google asks for documentation of the identity of the claimant, which it collects and stores.<sup>250</sup> Beyond storing information, it will now possess copies of personal documents, such as driver's licenses or national ID cards, from individuals in the EU.<sup>251</sup> Furthermore, when Google investigates the facts asserted in removal requests, it is able to gather more information on its users than is currently available online. It could acquire better contextual knowledge on the personal details of individuals' lives.

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247. For now, Google is hardly a rubber stamp, as they deny more requests than they grant. *See supra* Part II.B.

248. Zittrain, *supra* note 147 (arguing that "search engines are likely to err on the safe side and accede to most requests").

249. Eric Schmidt, Google Chairman, stated that they "didn't ask to be the decision maker." *See* Aoife White, *Google EU Ruling Response Vetted as Complaints Pile*, BLOOMBERG (Sept. 18, 2014), <http://www.bloomberg.com/news/articles/2014-09-18/google-eu-ruling-response-vetted-as-complaints-pile-up> [https://perma.cc/FS39-MPQF].

250. *See* Search Removal Request under Data Protection Law in Europe, *supra* note 109. However, Google states that they "use the identification documents that are submitted through the web form solely to help us determine the authenticity of the request and we generally delete the copy within a month of closing the removal request case." *See* Letter from Peter Fleischer, *supra* note 83, at 8.

251. *See* Dewey, *supra* note 130.

Such power could be highly problematic. While everyone else is forgetting, search engines now have more to remember. The main concern is not that search engines will be made even more knowledgeable, but rather that third parties could obtain such information. As data mining is at the heart of search engines' business models,<sup>252</sup> such information could be either traded to other companies or even to governments. As we learned from Edward Snowden's revelations, the National Security Agency (NSA) gathered electronic communications, including metadata and content, through public-private partnerships with companies like Google, among others.<sup>253</sup> Hence, beyond commercial actions such as targeted advertising, search engines might share information on EU citizens and residents with the U.S. government or other governments.

#### IV. THE FUTURE OF THE PRIVATE JUDICIARY

It is difficult to prophesize which trajectory the right to be forgotten will take. While the future of the right to be forgotten is uncertain, the right to be delisted is already implemented, even beyond the EU.<sup>254</sup> The EU placed search engines in a judicial role to solve some of the problems that arose from the *e-memory revolution*. Even if one accepts the notion that search engines should be placed in such positions—and this Article does not—it would be wise to first generally scrutinize whether a legal

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252. For more on the practice of data mining see for example, Ira S. Rubenstein, Ronald D. Lee & Paul M. Schwartz, *Data Mining and Internet Profiling: Emerging Regulatory and Technological Approaches*, 75 U. CHI. L. REV. 261 (2008); Daniel J. Solove, *Data Mining and the Security-Liberty Debate*, 75 U. CHI. L. REV. 343, 353 (2008).

253. Edward Snowden revealed that the NSA runs two “internal” programs: First, a bulk collection of call record information “metadata” pursuant to orders issued by the Foreign Intelligence Surveillance Court (FISC). Second, gathering electronic communications using two methods: PRISM and upstream collection. Under PRISM, the NSA targets the contents of communications of non-U.S. persons reasonably believed to be located abroad, and where such surveillance will result in acquiring foreign intelligence information. Under upstream collection, the NSA gathers electronic communications, including metadata and content, of foreign targets overseas whose communications flow through American networks. Snowden's leaked documents suggested a number of Internet companies that were specifically involved in PRISM: Microsoft, Yahoo, Google, Facebook, Paltalk, AOL, Skype, YouTube and Apple. See Glenn Greenwald, *NSA Prism Program Taps into User Data of Apple, Google and Others*, GUARDIAN (June 6, 2013), <http://www.theguardian.com/world/2013/jun/06/us-tech-giants-nsa-data?uni=Article:in%20body%20link> [https://perma.cc/Y6P3-NAGF]; Laura K. Donohue, *Bulk Metadata Collection: Statutory and Constitutional Considerations*, 37 HARV. J. L. & PUB. POL'Y 757 (2014); Margulies, *supra* note 218, at 2139. See generally Niva Elkin-Koren & Eldar Haber, *Governance by Proxy: Cyber Challenges to Civil Liberties*, 82 BROOKLYN L. REV. (forthcoming 2016).

254. Since January 1, 2016, the right to be delisted has expanded to Russia beyond the twenty-eight EU Member States (and the four EFTA states). See *Right to Be Forgotten' Law to Come into Force in Russia on January 1*, SPUTNIKNEWS (Jan. 1, 2016), <http://sputniknews.com/russia/20160101/1032563709/right-to-be-forgotten-russia-law.html#ixzz3vyZO01Ix> [https://perma.cc/4Y8Y-2MKB].

solution is needed. Under one hypothesis, if there are other, less restrictive measures that could be deployed to protect fundamental rights, then we should consider them first. If such less restrictive measures exist, then the debate on who should be tasked with acting as the judiciary could be pragmatically irrelevant.

### A. Regulating Behavior

The EU chose to revive data protection under the DPD, and thereby protect EU citizens and residents online. It is even attempting to strengthen such protection using the GDPR to create a right to be forgotten. In other words, the EU chose the law as a modality to regulate behavior. But the law is not the only modality for regulating behavior. Lawrence Lessig suggested three modalities (or constraints), other than law, for regulating behavior: architectural design (code), market, and social norms.<sup>255</sup> Any such modality, with or without the law, could potentially aid in achieving a right to be delisted.

The first modality (code, or stated more simply, technology) could aid in solving some of these issues. We can use privacy-by-design (PbD) to change the default rules for storing information altogether.<sup>256</sup> Systems could allow users to better control their information online by creating “deletion” buttons. On that ground we could also set *expiration dates* and place various restrictions on the use of information.<sup>257</sup> We can technologically (and legally) grant civilians a “reputation bankruptcy” ability to de-emphasize or entirely delete online information about them from time to time.<sup>258</sup> Yet this approach will mostly solve problems relating to the data subject’s own data, not third parties, and therefore would be insufficient.<sup>259</sup> Furthermore, such a self-censoring mechanism is highly problematic in terms of the flow of information online. Can we

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255. See LAWRENCE LESSIG, CODE: VERSION 2.0 120–37 (2006); LAWRENCE LESSIG, FREE CULTURE 11673 (2004). Michael Birnhack suggested that social norms and the market could be addressed as one because crediting importance to the free market makes it a social value. See Michael Birnhack, *Lex Machina: Information Security and Israeli Computer Act*, 4 SHA’AREY MISHPAT 315, 320 (2006) (Isr.). The benefit of this slight modification of Lessig’s model, is that it emphasizes the relationships between the modalities.

256. For more on privacy-by-design, see for example ANN CAVOUKIAN & JEFF JONAS, PRIVACY BY DESIGN IN THE AGE OF BIG DATA (2012).

257. TigerText, for example, offers a service that restricts text-message copying and forwarding and the ability to control message lifespan. See TIGERTEXT, <http://www.tigertext.com> [<https://perma.cc/Z2NU-9QCN>]. There are similar Apps for social media postings, etc. See Rosen, *supra* note 29, at 1535 (describing technological solutions to the right to be forgotten); MAYER-SCHÖNBERGER, *supra* note 14, at 171–95, 198; Rustad & Kulevska, *supra* note 72, at 382 (discussing the possibility of expiration dates for personally identifiable data).

258. ZITTRAIN, *supra* note 19, at 228–29.

259. See Koops, *supra* note 39, at 243–44.

really know how long information will be valuable for us or for society when we set an expiration date?

Another technological solution could arise from *contextualization*.<sup>260</sup> Under such an approach, data subjects will be granted the ability to correct online information that is inaccurate, false, incomplete, out-of-date, or otherwise inappropriate, by providing details explaining the data.<sup>261</sup> Such mechanism, to a great extent, is normatively opposite to the conception of censorship; instead of delisting results, and thereby deleting links to content to preserve privacy, search engines and other websites will contain more information.<sup>262</sup> But such a proposal would not qualify as a proper solution for privacy as viewed in the EU. To a great extent, it would depend on resources. An individual with high financial and human resources could manipulate information online by posting more than the mere individual who does not possess similar capabilities. Moreover, placing comments near a link to an article will not necessarily help repair reputation, especially when the reader is aware of the obvious impartiality of the commentator. And even so, such mechanism could be abused by third parties who wish to further harm the data subject either because of some personal connection or because they are simply Internet trolls.<sup>263</sup>

The second modality is that of the market. The market's role in securing civil rights and liberties could be significant. Consumer expectations could potentially create negotiable grounds for the usage and retention of data.<sup>264</sup> But more realistically,<sup>265</sup> if the law was chosen to regulate behavior, then the market can raise transparency of both the removal process and the requests made. Individuals could choose search engines that provide more transparency than their competitors. Such transparency could also come from third parties. Third parties could offer a one-stop shop for filing removal requests with search engines, and such

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260. See Rustad & Kulevska, *supra* note 72, at 384–85 (discussing contextualization as a solution to the dilemma of perpetual memory).

261. ZITTRAIN, *supra* note 19, at 229–30; Rustad & Kulevska, *supra* note 72, at 384.

262. ZITTRAIN, *supra* note 19, at 229–30.

263. An Internet troll is “an individual who harasses others by posting inflammatory remarks or images on social media or newsgroups.” *Internet Troll*, PC MAG, <http://www.pcmag.com/encyclopedia/term/68609/internet-troll> [<https://perma.cc/SFY8-R9SL>].

264. Chris Conley, *The Right to Delete*, AAAI SPRING SYMPOSIUM: INTELLIGENT INFORMATION PRIVACY MANAGEMENT 53, 58 (2010) (“If members of society can agree that individuals deserve the right to own their own digital persona, including records that are held by third parties, then a right to delete can be established absent any legal change. Private individuals will find a negotiated means of complying with requests to delete information (assuming that they even retain information in searchable form), and market actors will adapt to changing consumer expectations.”).

265. See Koops, *supra* note 39, at 245 (arguing that “relying on social or economic regulatory measures is not a feasible proposition”).

services have indeed begun to emerge.<sup>266</sup> These companies could then publish statistics and information on the outcomes of their requests (while, probably, removing personally identifiable information (PII)).<sup>267</sup> Thus, while search engines might refrain from publishing decisions, either because of a legal restriction or partially because they fear that individuals will accumulate knowledge on how to “beat the system,” external removal services could emerge.<sup>268</sup> Nevertheless, transparency of search engines does not only rely on economic incentives, which could be effected by the behavior of their consumers, but rather also on regulation. Generally, if a regulator decides to restrict such transparency, either by search engines or third parties that provide such transparency services, then market powers may be too limited to regulate behavior.

But instead of treating the symptoms of the application of the right to be delisted, like lack of transparency, the market can find other solutions to solve the problem of the (almost) never-forgetting Internet without turning to the right to be delisted. One service could be offered directly by search engines to either remove links upon request and/or make them practically invisible in a search query. It could be driven by economic incentives—i.e., that search engines like Google offer removal of links for a fee—or driven by market forces. For example, if consumers will only use search engines that offer such removal services for free, the market will eventually force search engines to comply. The first scenario is perhaps more plausible than the second, but they both appear fictional. For such a move by the market, there would have to be a consensus as to what constitutes online censorship. But these potential mechanisms would be highly controversial, as they would allow for the censorship of large swaths of information. From a legal perspective, such self-censorship could be problematic, as search engines might fear antitrust and unfair competition laws, which could mandate full disclosure of the removal process. Mainly, it requires search engines to act against their business models, which rely on information.

But a market solution could also come from third parties. Even today, individuals can deploy several self-aid mechanisms to reduce accessibility to harmful online content. One way, combined with the modality of code, is to manipulate search results, so that the harmful results will appear much lower in the search engine’s results. No technological expertise is needed here, as there are companies that

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266. Take for example [forget.me](https://forget.me), an online service for locating and submitting data requests to Google and Bing. See FORGET.ME, <https://forget.me> [<https://perma.cc/5YHA-PE99>].

267. However, even lacking PIIs, it would be unlikely that most individuals who wish to be “forgotten” will agree to such policy, and therefore will probably not use their services.

268. See Conley, *supra* note 264.

provide this service.<sup>269</sup> It is also not implausible to expect that more technologies for making communication disposable will emerge.<sup>270</sup> This could truly change the way we consume information, but it will still not be sufficient. It works better for some types of communication that we would fear falling into the wrong hands. But the Internet is comprised, and will most likely continue to be comprised, of vast amounts of information not posted by us, but rather by third parties. This information will not rely on these technologies, as it is designed to remain on the Internet.

Finally, we have social norms. Living in an all-knowing society with unlimited access to information could change opinions of individuals on search information. Under this argument, a cognitive adjustment in our view of search results will occur, and individuals will accept that almost everyone will have negative results when searching someone's name.<sup>271</sup> The assumption under the social norms modality is that if society accepts that everyone has a skeleton in his or her closet, the Internet closet, that is, then information will not negatively impact anyone's reputation. If an employer screens a candidate for hiring online and notices a few embarrassing photos, it would not impact his chances of getting the job, as "everyone has a few of those." But while such cognitive adjustment would be difficult to measure, it will most likely take time for individuals to make such an adjustment, if they do at all. Moreover, it will not apply to all individuals. Mr. González, for example, will likely still wish that his social security debts disappeared from the Internet.

### *B. Restraining Judicial Power*

Technology, the market, and social norms are limited in achieving what the EU regulators are trying to achieve. The law, as the last modality of regulating behavior, was chosen by the EU to regulate the almost-never-forgetting Internet. But the usage of the law here is misguided, as it incorporates search engines as part of the judicial

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269. For example, reputation.com, employs advanced techniques and technologies to help push the content you want to see higher up the search engine pages, whilst effectively pushing the detrimental content beyond page 1. Typically, people don't search past page 1 on Google, so by pushing negative content to subsequent pages, people see a true reflection of your online reputation.

See Reputation.com, *Out with the Old and in with the New*, <http://uk.reputation.com/suppress-misleading-search-results> [https://perma.cc/3AQ9-N88C].

270. See TigerText, *supra* note 257.

271. For an explanation of such hypothetical cognitive adjustment, see Rustad & Kulevska, *supra* note 72, at 385.

system. That is, if we choose the law to achieve the results of the right to be delisted, we need to scrutinize the most appropriate method to protect it.<sup>272</sup>

The primary normative claim of this Article is that privatization of the judiciary is highly dangerous for any democratic society. Search engines should not be placed as judge and jury to decide and balance between competing fundamental rights. States that wish to protect individuals against the negative consequences of the Internet should use regulation, with or without other modalities, in a different manner.

The first suggestion is to completely remove search engines from any judicial position in the process of delisting or forgetting. Such decisions should be made only by qualified judicial authorities or a regulator with judicial capabilities and special expertise,<sup>273</sup> not search engines or any other for-profit commercial entities. The judicial role should be taken by either current DPAs or state courts. It is also plausible that states will create new administrative agencies that will be tasked with the responsibility of dealing with such requests.

The counterargument rests mainly on economic grounds. It will be highly impractical for such bodies to deal with the large amount of removal requests<sup>274</sup> and, therefore, will not only be impractical, but will lead to suboptimal protection of privacy and data protection rights. I do not take such economic considerations lightly. If the state is unable to deal with such a high volume of requests, then it is not necessarily wise to place it in a position of safeguarding such rights. What I suggest, however, is that search engines will be responsible, at least partially, to fund the operation of such judicial bodies. Generally, I would vote against a practice in which nongovernmental entities fund operation of governmental services as it is inherently flawed.<sup>275</sup> It is the state which is

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272. See Wright, *supra* note 157, at 404 (suggesting that other legal instruments, e.g., common law privacy, nondefamation, confidentiality, emotional distress damages rights, and criminal expungement statutes, jointly provide a better alternative to the right to be forgotten).

273. Heather Greenfield, *CCIA's Response to European Court of Justice Online Privacy Ruling*, CCIA (May 13, 2014), <http://www.ccianet.org/2014/05/ccias-response-to-european-court-of-justice-online-privacy-ruling> [<https://perma.cc/WHV5-QM7Z>] (“[D]ecision about what is and is not in the public interest should be taken by qualified judges, not private censorship departments, which this ruling requires.”).

274. Cf. Jonathan Zittrain, *Righting the Right to Be Forgotten*, FUTURE OF THE INTERNET BLOG (July 14, 2014), <http://blogs.harvard.edu/futureoftheinternet/2014/07/14/righting-the-right-to-be-forgotten> [<https://perma.cc/9ET6-4QWB>] (arguing “[i]f Google can process 70,000 requests, so can and should the data protection authorities”).

275. Funding from the public for state services actually occurs in the United States. In 2015, the Orleans Public Defenders (OPD) which are Constitutionally-required to provide legal representation in New Orleans, launched a crowdfunding campaign to raise money. See *OPD Launches Crowdfunding Campaign to Meet Funding Gap*, OPD (Sept. 14, 2015),

tasked with funding such operations. But we can also borrow from the *polluter pays principle* in environmental law.<sup>276</sup> Search engines figuratively “pollute” the Internet. They are creating harm, which could be viewed as an externality, and they should, thereby, internalize the full social cost of their activity. While they can prevent pollution on their own (like they do currently), they could also pay someone else to stop or reduce pollution. Thus, they can fund, partially or fully, the operation of a governmental agency which handles removal requests.

While this Article supports the implementation of the first suggestion, which will cease the privatization of the judiciary, the EU is unlikely to retract from the current application of the right to be delisted. This Article therefore suggests how the EU, and any other state which enacts a right to be delisted, should better deal with it by restraining the judicial powers of search engines.

Restraining the judicial power of search engines under the right to be delisted should begin with transparency and oversight. Generally, if search engines remain in the position of judges, then transparency and oversight are a necessity.<sup>277</sup> We must be more informed on the process, about requests, and about the decisions that search engines make. Arguably, such transparency will undermine the rationales of the right to be delisted.<sup>278</sup> But such assumption is false. There are many ways of achieving transparency and still achieving the purpose behind the right to be delisted.

I begin with a few general recommendations. The delisting process should be more centralized. There is no necessity, and, in fact, it is economically inefficient, to have a decentralized removal process, in which every search engine runs its own services and makes decentralized decisions. Many of these URLs could appear in more than one search engine. Therefore, a standardized, online web form could be a proper

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<http://www.opdla.org/news-and-events/media-coverage/286-opd-launches-crowdfunding-campaign-to-meet-funding-gap> [<https://perma.cc/TL4P-SRTL>].

276. For an analysis of such principle, see generally Michael J. Gergen, *The Failed Promise of the “Polluter Pays” Principle: An Economic Analysis of Landowner Liability for Hazardous Waste*, 69 N.Y.U. L. REV. 624 (1994); Eric Thomas Larson, *Why Environmental Liability Regimes in the United States, the European Community, and Japan Have Grown Synonymous with the Polluter Pays Principle*, 38 VAND. J. TRANSNAT’L L. 541 (2005). For an adoption of the polluter pays principle regarding environmental law in the EU, see Single European Act, 17 Feb. 1986, 1987 O.J. (L 169) 1.

277. Jan Philipp Albrecht, a leading data protection MEP, stated, “We could be clear in the regulation that companies cannot just makes these decisions without some sort of independent oversight.” See Jennifer Baker, *Right to Be Forgotten? That’s Not Google’s Call—Data MEP Albrecht*, REGISTER (Jan. 7, 2015), [http://www.theregister.co.uk/2015/01/07/right\\_to\\_be\\_forgotten\\_not\\_google\\_call\\_data\\_mep\\_albrecht](http://www.theregister.co.uk/2015/01/07/right_to_be_forgotten_not_google_call_data_mep_albrecht) [<https://perma.cc/BEH6-7XAM>].

278. See Letter from Peter Fleischer, *supra* note 83.

solution for this problem.<sup>279</sup> A step further would be to create a forum in which search engines can share their knowledge and expertise from the process. Second, website owners under a removal request should also play a part in the process. It should be guaranteed that they would have the opportunity to review requests and potentially dispute claims. Such a move will increase transparency, reduce the problems of lack of procedural safeguards, and could shed more light on requests by, e.g., providing context to the information.

Now for specific recommendations. First, I propose that publishing decisions with PII could be part of the process. Naturally, that would be the worst fear of the framers of the right to be delisted. But search engines could publish the requests with PII for a limited time period, granting any interested party time to partake in the debate. Under such an approach, the right to be delisted is more forward looking in the sense that only limited harm is imposed when such requests will be available for a short time period before removal. I am aware, however, that such approach will not only fail to sufficiently advance transparency,<sup>280</sup> but could also undermine the rationale behind the right to be delisted.<sup>281</sup> Such an approach, thus, is not obligatory.

Regulators should next consider allowing the publishing of requests without PII.<sup>282</sup> Webmasters that receive notice from search engines should have the opportunity to publish the requests that they received, stripped of PII.<sup>283</sup> In that way, we simultaneously notify individuals in

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279. Edward Lee offers a solution to few of the problems of the right to be forgotten and Google's role in it. He first proposes to create a standardized online web form for individuals to make one right to be forgotten request. Lee argues that such standardization would reduce the time and hassle of filing separate requests, provide each claim to a second and third pair of eyes, and thereby improve the examination of the applications and improve oversight of decisions. *See* Lee, *supra* note 10, at 53–59.

280. Considering the large volumes of removal requests in the EU thus far and the number of search engines, it would be highly implausible to assert that such limited-time clause will actually be actionable and, thus, transparency here is highly limited.

281. While publishing the removal requests for a limited time could strike as a good solution for transparency, it might be proven harmful for the right to be delisted. First, because in many times, publishing the request made, even for a short while, places focus on the requester and thereby might lead to the before-mentioned “Streisand effect.” But perhaps mostly, it would enable third-parties to collect such requests and create a timeless database of all data subjects which could operate outside the EU.

282. The Working Party addressed the possibility of transparency, and stated that a practice of providing information to the public regarding delisted links could only be acceptable “if the information is presented in such a way that users cannot, in any case, conclude that one particular individual has asked for de-listing of results concerning him or her.” *See* Working Party, *supra* note 54, at 3.

283. Such market-based solution has already begun in some websites. For example, Wikimedia Foundation, which operates Wikipedia, began listing such requests. *See Notices Received from Search Engines*, WIKIMEDIA FOUNDATION, [https://wikimediafoundation.org/wiki/Notices\\_received\\_from\\_search\\_engines](https://wikimediafoundation.org/wiki/Notices_received_from_search_engines) [<https://perma.cc/658V-3Z98>; Tom Goldstein, *Somewhat*

society and affected third parties. To address the decentralization problem, meaning that users cannot be expected to examine all websites to find out which links were asked to be removed, such an initiative should be more centralized as it is with the *Lumen* project.<sup>284</sup> However, this practice, while important, is hardly enough in terms of practicality. Aside from the notion that such a practice could be viewed as undermining the rationales behind the right to be delisted, in many instances it would be fairly easy to understand from the URL which individual made the request, and it will be almost impossible for third parties to assess the decisions without information. But in most instances, the problem will be the converse; it will be almost impossible to examine such requests without PII and without context. If Mr. González's request would have been published without PII and without a link to the article, we would simply see a notice like: A Spanish national requested Google Spain to delist results relating to social security debts that were resolved, and thus outdated and irrelevant. What can we really learn from such a request and from Google's decision in this matter? Not much.

A solution could arise, which will safeguard other fundamental rights, by finding a middle ground between protecting the privacy rights of individuals and ensuring proper transparency. Such middle ground could take the form of contextual privacy.<sup>285</sup> While it is evident that publishing the "removed" webpages or the requests for removal, even without PII, could still endanger privacy, an impartial third party could play a role in oversight.<sup>286</sup> This could take two forms. The first is an oversight on the judicial process. Under this form of oversight, a third party will examine all requests made and all decisions by the data controllers. It could be done in either real time or over time. Such third party, while exposed to the requests made, is not violating privacy, as it only views such requests in the context of examining them. It is noted that such a mechanism is not economically efficient, and such third party

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*Significant Settlement*, SCOTUSBLOG (Feb. 7, 2005, 8:54 PM), <http://web.archive.org/web/20050208081922/www.scotusblog.com/movabletype>, [https://perma.cc/HYH3-VXL6]; Neil McIntosh, *List of BBC Web Pages Which Have Been Removed from Google's Search Results*, BBC (June 25, 2015), <http://www.bbc.co.uk/blogs/internet/entries/1d765aa8-600b-4f32-b110-d02fbf7fd379> [https://perma.cc/M2DJ-7DTD]; see also Geoff Brigham & Michelle Paulson, *Wikipedia Pages Censored in European Search Results*, WIKIMEDIA BLOG (Aug. 6, 2014), <https://blog.wikimedia.org/2014/08/06/wikipedia-pages-censored-in-european-search-results> [https://perma.cc/6D4H-JJK3]. The BBC, among others, published a list of articles that have been scrubbed from Internet searches.

284. *Lumen*, *supra* note 107.

285. See generally HELEN NISSENBAUM, *PRIVACY IN CONTEXT: TECHNOLOGY, POLICY, AND THE INTEGRITY OF SOCIAL LIFE* (2009).

286. Edward Lee suggests that oversight should be conducted by a newly formed "hybrid administrative agency." Such agency will bridge between the decisions of search engines and DPAs by serving as an appellate body for removal decisions. See Lee, *supra* note 10, at 53–59.

should have the judicial role of deciding, but if the EU insists on placing the judicial role on search engines, then such oversight is crucial. Such third party will not only serve as an oversight mechanism in specific cases, but will enable the development of the law. In such review mechanisms, the third party will be able to make recommendations to the regulator on how the shape regulations and guidelines. Unlike the first form, recommendations here are more general, and not individual.

The second form of recommendation relates to the practice of delisting. Currently in the EU, removal is almost perpetual. When search engines decide to delist, the content will most likely remain delisted, unless further action is taken by the website that holds the information. I suggest that removal should not be perpetual under any circumstances. Search engines like Google must not only provide mechanisms to delist, but also a mechanism to relist. While this recommendation is more of a general criticism on the right to be delisted, and not on specifically the privatization of the judiciary, it is highly important to emphasize it as the roles of search engines as judicial bodies enhances this problem. There are three arguments which support obliging such “relisting” provision.

The first argument relates to unjustified removals. Unjustified removal is a crucial element for protecting human rights and liberties, especially when search engines receive large numbers of requests and could possibly become overinclusive in their decisions. Even with oversight, mistakes are inevitable. Therefore, any regulator should necessitate a reversal mechanism, which would allow relisting content.

The second reason relates to the nature of information. What was once “inadequate” and/or “irrelevant” could change over time.<sup>287</sup> Inadequacy is relative term, subject to change by its nature. Irrelevancy is similar in that sense. Information about an unknown individual could become highly relevant if she is suddenly running for office. The opposite could also occur. Once public does not mean always public.<sup>288</sup> If a search engine refused to delist results for someone who is currently a public figure, it does not mean that such individual will not become a private figure in the future and will thereby gain a right to delist some links.<sup>289</sup>

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287. Leta Ambrose, *supra* note 14, at 408 (“Generally, there is no way for researchers to know what information will be relevant, useful, or valuable until time has passed.”); Zittrain, *supra* note 274 (“[S]omething that was once relevant could become irrelevant over time . . .”).

288. *See* *Briscoe v. Reader’s Digest Association*, 4 Cal.3d 529, 539 (1971) (“It would be a cross legal fiction to assert that a matter once public never becomes private again.”).

289. It is debatable whether such scenario is problematic under the right to be delisted. In such scenario, the previously-public figure—now a private figure—could simply file another removal request. However, as search engines might use the previous decision to repeat the decision, some reassurance that decisions are made interdependently are also crucial.

Third and finally, relisting ensures the integrity of history. If we set expiration dates on search engines decisions—not data—we reduce the negative impact on human rights and thereby the power of search engines to rewrite history. While human rights could still be impacted, the integrity of history will be reserved.

Such reinsertion process would require changes. It would first necessitate transparency. Obviously, as noted previously, publishing information on removal requests is problematic, with or without PII. Beyond the need for oversight by a third party designated to review requests, we need an impartial third party to have accessibility to all requests, at all times. It requires forming a database, hidden from the public and only viewable for a third party tasked with such mission, to review decisions and re-review them over time. It could be conceived as a *walled garden of information*, meaning that only certain certified individuals are eligible to enter such garden thereby preserving the right. Accessibility could be granted to, e.g., academic researchers<sup>290</sup> and human rights organizations. This approach still leaves public accountability concerns, as these are not public officials, but it could be viewed as the lesser of two evils by the public.

Any removal process must also contain a misuse provision. Fraudulent requests for removal should have consequences. Without a misuse provision, individuals and/or companies might abuse the removal process. A misuse provision is mostly important when search engines are acting in a judicial role because their removal process is free and more accessible than other judiciaries, and is therefore more prone to abuse and misuse. This misuse provision could prove to be more difficult than the mechanism for improper takedowns of alleged copyrighted materials that currently exists under the DMCA. Under the DMCA, the targets of improper takedowns can file suit against the takedown senders.<sup>291</sup> This DMCA misuse provision was designed to ensure that individuals will only file a notice-and-takedown request in appropriate cases. Indeed, the question of copyright infringement is not always clear, especially when there are various exemptions for copyright infringement like fair use,<sup>292</sup> which could make a supposedly valid claim of infringement erroneous. Nonetheless, this test is mostly objective and not similar to the right to be delisted. Whether the content in question is inadequate, irrelevant, or

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290. Zittrain, *supra* note 274 (suggesting to form a database of takedowns that independent academics can analyze).

291. 17 U.S.C. § 512(f) (2012).

292. U.S. copyright law provides a “fair use” exemption to copyright infringement for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, and research. *See id.* § 107.

excessive in relation to those purposes and in the light of the time that has elapsed is subjective and opened to a much broader interpretation.

But such misuse provision could still be used against individuals where it is clear that their claims were intentionally deceptive. It is plausible to codify a misuse provision in the application of the right to be delisted, to ensure that search engines, the content holder whose link was removed, or even third parties, could take legal action against the individual who requested the removal. But it all goes back to the need of transparency.

The final recommendation is more general to the right to be delisted and refers to procedural safeguards and the process of appeal. Like any court decision, the search engine ruling on a removal request should be subject to appeal. Currently in the EU, the right of appeal is reserved for the data subject who, upon rejection of her request, can ask the local data protection authority, or the relevant judicial authority, to review the search engine's decision.<sup>293</sup> The problem with this appeal system is twofold. First, it seems from practice that it does not work very well.<sup>294</sup> While people exercise their right through search engines, they are less inclined to do so through DPAs because they are either unaware that such DPAs exist<sup>295</sup> or unaware that they possess a right to appeal.<sup>296</sup> The second aspect is related to the parties that are not part of the judicial process. The webmaster and other individuals in society do not receive an appeal right. While webmasters sometimes receive notice of removals,<sup>297</sup> and such notice is not only optional but also perhaps even illegal,<sup>298</sup> their "appeal" is limited to asking the search engine to reconsider its decision. Other individuals in society do not receive any right of appeal.

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293. Any formal claims should be envisaged by Article 28(4) of the Directive and treated by DPAs under their national legislation in the same manner as all other claims for mediation. See Working Party, *supra* note 54, at 11.

294. See *supra* note 138.

295. A survey conducted in the UK in May 2015, suggested that only 1% of public have heard of the UK data protection authority (the Information Commissioner's Office). See DataIQ News, *ICO Admits Awareness Failings as Only 1% of Public Have Heard of It*, DATAIQ (May 19, 2015), <http://www.dataiq.co.uk/news/201505/ico-admits-awareness-failings-only-1-public-have-heard-it> [<https://perma.cc/38WS-J5VR>].

296. Joe McNamee, of the non-profit digital rights lobby group EDRi, suggested that it is plausible that Europeans do not even know they have the right to complain to their DPA. See Peter Teffer, *Google Should 'Inform More' on Right to Be Forgotten*, EUOBSERVER (Oct. 12, 2015), <https://euobserver.com/digital/130645> [<https://perma.cc/ZKF8-W398>]. However, it should be noted that upon rejection of a removal request, Google informs the requester of his or her right to bring the matter before the competent data protection authority. See Letter from Peter Fleischer, *supra* note 83, at 5.

297. See *supra* note 223.

298. See *supra* note 225.

Therefore, we need to form a more appropriate appeal mechanism for search engines decisions. If we embrace the *walled garden of information* approach, then these third party examiners will possess the right to file an appeal on behalf of both the third affected party and for the benefit of society. But unfortunately, due to the difficulties of the right to be delisted, in terms of its vagueness and information gaps from its ex-parte nature, such appeal is insufficient as a legal safeguard. While it is still a better practice than currently deployed in the EU, it should not be considered sufficient to protect fundamental rights.

While this Article suggests few methods to better implement a right to be delisted, all in all, it warns against granting judicial power to search engines. They are part of the problem, and could also be part of the solution, but not as a judiciary. Judicial roles should remain in the realm of the state, even if it is less economically efficient. It is crucial for any democratic society that the rule of law will be safeguarded from potential abuse. It is crucial that fundamental rights be protected by the state and not by for-profit organizations. Such a judicial role blurs the distinctions between private and public—the roles of the state, and those of companies.

#### CONCLUSION

The *e-memory* revolution presents new challenges for society. Information could not only become perpetual but also highly accessible through search engines. While individuals may evaluate the right to privacy in different manners, it should be evident that this revolution may require a new evaluation of digital technology's risks. The European Union's current right to be delisted and right to be forgotten do exactly that, but they do it poorly. They place a form of censorship on the Internet, while endangering freedom speech, freedom of information, and freedom of the press. They are impractical to a great extent, and they present many challenges for search engines and regulators.

But the main problem with those rights is normatively broader. They represent a dangerous path that modern societies have taken towards the privatization of the judiciary. What began as a quasi-judicial role for search engines under a notice-and-takedown regime of alleged copyright infringement takes a step-up under the EU's new rights enforcement regime. This new form of privatization is truly unique in modern society. Unlike other forms of judiciary privatizations, this judiciary is tasked with safeguarding only certain fundamental rights. It shifts decisions about these fundamental rights from the public sphere. Not only is such privatization unique in the sense of the type of rights that it handles, but it also almost entirely removes democratic safeguards

like oversight and transparency. When search engines like Google reach a decision, there are only a handful of cases, out of millions of URLs, that the state will reexamine under an appeal process. Rule of law does not apply here, nor do any procedural safeguards.

This Article argues that such privatization should not occur. While economic considerations could suggest otherwise, there is no room for privatizing the judiciary when dealing with fundamental rights. Public officials should be handling such requests, not search engines. If the EU insists on using search engines as a judiciary, they must also restrain their judicial power and provide adequate safeguards for society. In any such mechanism, policymakers must ensure proper transparency and oversight on search engines' removal procedure and decisions.

The implications of privatization of the judiciary extend far beyond the EU. They represent how states are coping with the threats that the digital era brings. Perhaps the roles of intermediaries online are changing, which may necessitate a reframing of their legal duties and responsibilities. By the same token, the threats that the digital era brings may also necessitate a reframing of the roles of the state and governance in this new digital era. What the digital era should not change is the protection of fundamental rights under the rule of law. If it does, the concept of democracy might also be forgotten.