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SEEKING DIGITAL REDEMPTION: THE FUTURE OF FORGIVENESS IN THE INTERNET AGE

Meg Leta Ambrose,[†] Nicole Friess,^{††} and Jill Van Matre^{†††}

The tendency to use the power of the computer to store and archive everything can lead to stultification in thinking, where one is afraid to act due to the weight of the past.

—Liam Bannon¹

Abstract

The “Right to Be Forgotten,” a controversial privacy right that allows users to make information about themselves less accessible after a period of time, is hailed as a pillar of information privacy in some countries while condemned as censorship in others. Psychological and behavioral research indicates that one’s capacity to forget features of the past—or remember them in a different way—is deeply connected to his or her power to forgive others and move on, which in turn, has dramatic impacts on well-being. Second chances and the reinvention of self are deeply intertwined with American history and culture. Yet the possibility of a shared perpetual memory stored on and accessible through the Internet threatens to make it impossible to forget even the most insignificant transgression. This article examines whether the march of technological progress should retire notions of forgiveness as a social value, or if the privacy rights of individuals should include the ability

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1. Liam J. Bannon, *Forgetting as a Feature, Not a Bug: The Duality of Memory and Implications for Ubiquitous Computing*, 2 CODESIGN 3, 11 (2006).

to move on and afford second chances after information about them has been available for a certain amount of time. By analyzing a variety of well-established U.S. laws that provide for forgiveness, this article proposes a framework for crafting a response to the forgiveness void of the Internet Age within the U.S. legal system.

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INTRODUCTION

On October 2, 2006, five Amish girls were shot and killed in a one-room schoolhouse outside of Philadelphia, Pennsylvania.² The Amish community, awash in grief, reacted with forgiveness. Unconditional forgiveness is a sacred power for the Amish, and because of this, they may not need to forget in order to forgive.³ Yet how could anyone forgive an act, no matter how heinous, if they are constantly reminded of it? Even the Pennsylvania Amish community, leaning on the strength of their piety, removed every trace of the schoolhouse within two weeks of the shooting.⁴ Some degree of forgetting is required to forgive, allowing both the victim and wrongdoer, if one exists, to move forward.

Today, forgiveness has moved out of theological arenas into self-help books, therapy sessions, neurology labs, twelve-step programs, and personal and social aspirations. It has not, however, moved online. Due to ubiquitous connectivity and society's apparent inability to disregard gossip-worthy violations of social norms, some individuals must "forever" bear their scarlet letters. Pre-Internet indiscretions drawn in pencil may soon be carved in stone. As law professor and legal commentator Jeffrey Rosen notes, "Around the world citizens are experiencing the difficulty of living in a world where the Web never forgets, where every blog and tweet and Facebook update and MySpace picture about us is recorded forever in the digital cloud."⁵ The authors of this article know something about being college students in a Facebook-obsessed time, long before its ramifications were clear. As we watch search engines and social networks shift their societal roles, we wonder if forgiveness *can* and *should* move into the digital age, where information lingers indefinitely and restricts individuals to their pasts.

Theoretical and empirical research tells us that forgiveness greatly benefits individuals and societies, but as the tragic events

2. John Holusha, *Students Killed by Gunman at Amish Schoolhouse*, N.Y. TIMES (Oct. 2, 2006), <http://www.nytimes.com/2006/10/02/us/03amishcnd.html>. See also *Amish Forgive, Pray and Mourn*, CBS NEWS (Feb. 11, 2009, 5:55 PM), http://www.cbsnews.com/2100-201_162-2059816.html.

3. See *Amish Forgive, Pray and Mourn*, *supra* note 2.

4. Martha Raffaele, *Site of Amish Schoolhouse Shooting Razed*, WASH. POST (Oct. 12, 2006, 7:27 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2006/10/12/AR2006101200123.html>.

5. Jeffrey Rosen, *Free Speech, Privacy, and the Web That Never Forgets*, 9 J. ON TELECOMM. AND HIGH TECH. L. 345, 345 (2011).

above suggest, forgiveness is difficult with an ever-present memory of the violation. Forgetting is an important part of forgiving. Forgetting is also the way in which forgiveness is tied to privacy. Information about our pasts can keep us in that past, preventing reform and maturation. This notion is embedded into American ideology, from migration across the Atlantic to “going West” to reinvent oneself. Today, those who have made mistakes, no matter the degree of innocence, carry that information around with them—Google attaches it to their names, and soon their faces. Information associated with an individual can limit his or her professional pursuits, the interest of potential social ties, the ability to grow, and perceptions of self. The threat of an easily accessible permanent record may scare people away from pushing the boundaries of socially acceptable norms, stunting experimentation and creativity. In order to protect and foster autonomy, we must consider the impact of restricting individuals’ abilities to move beyond their pasts, free from old information.

A number of European Union member countries⁶ have reacted to scenarios in which an individual is financially, professionally, or socially harmed by the easy accessibility of information from his or her past. These European nations have established and enforced citizens’ Rights to Be Forgotten, which attempts to transform content distributed to the public into privately held information and allow citizens to move beyond their pasts.⁷ In redrafting its Data Directive, the European Union has also embraced the Right to Be Forgotten, a concept we refer to generally as oblivion.⁸ The United States currently

6. See generally Franz Werro, *The Right to Inform v. the Right to Be Forgotten: A Transatlantic Clash* (Georgetown Univ. Ctr. for Transnat’l Legal Studies Colloquium, Research Paper No. 2, May 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1401357 (describing the Swiss right to be forgotten as an example of the European approach); see also Lawrence Siry & Sandra Schmitz, *Online Archives on Trial in Germany: Is There a Right to Be Forgotten?* (position paper for the 26th BILETA Conference, Apr. 11-12, 2011), available at <http://www.law.mmu.ac.uk/wp-content/uploads/2011/04/Online-Archives-on-Trial-in-Germany.pdf> (discussing the German right to be forgotten).

7. Siry & Schmitz, *supra* note 6, at 1; see also Jennifer L. Saunders, *Understanding the “Right to Be Forgotten” in a Digital World*, IAPP (Oct. 15, 2010), https://www.privacyassociation.org/publications/2010_10_20_understanding_the_right_to_be_forgotten_in_a_digital_world (discussing the French right to be forgotten).

8. *Proposal for a Regulation of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data (General Data Protection Regulation)*, at 9, COM (2012) 11 final (Jan. 25, 2012), available at <http://ec.europa.eu/justice/data->

offers no redress for personal information that has been appropriately disclosed. By altering a few small facts in the scenarios that raise European rights, these scenarios become eligible for a cause of action under one of the four American privacy torts.⁹ If left unaltered, these scenarios are granted no recourse under the U.S. legal system. This article challenges that deficiency.

The first question we address is whether forgiveness, as a social value, should be preserved, or rather established, in the digital age, when information lasts an indefinite amount of time. The second question we address is what a law of, or legal action for, oblivion should look like in the legal system of the United States. In order to understand how a law can be crafted to promote digital forgiveness, we qualitatively analyze a number of United States laws that promote forgiveness in some form or another. The analysis of these questions proceeds as follows: Part I discusses research on the value of forgiveness from a number of disciplines, addressing its relationship to memory and privacy. Part II assesses tools to preserve forgiveness in a digital age, a time in which it is increasingly difficult to attain redemption. Part III surveys the rare instances of U.S. institutional forgiveness that have provided for forgiving and forgetting. Part IV extracts elements from these U.S. legal mechanisms by performing a thematic qualitative analysis. Finally, a framework for Web-forgiving-and-forgetting is presented that is appropriate for the culture and legal system of the United States.

I. THE VALUE OF FORGIVENESS

“In the course of human (and nonhuman) history, it is rare enough for a significant new regime of recording the past to develop.”¹⁰ The two most recent are the development of written

protection/document/review2012/com_2012_11_en.pdf. While oblivion may suggest notions of destruction, death, and nothingness, this article refers to an individual interest in the destruction, forgetting, or limited access to personal information when using the term oblivion. The notion is related to “practical obscurity,” articulated in *U.S. Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 780 (1989).

9. The four privacy torts are appropriation (unauthorized use of person’s name, likeness or identity for trade or advertising purposes), intrusion upon seclusion (a physical, electronic, or mechanical intrusion into one’s private space), public disclosure of private facts (publication of non-newsworthy, private facts about an individual that would highly offensive to a reasonable person), and false light (publication of false, highly offensive information about an individual). RESTATEMENT (SECOND) OF TORTS § 652A (1977).

10. Geoffrey C. Bowker, *The Past and the Internet*, in STRUCTURES OF PARTICIPATION IN DIGITAL CULTURE 20, 21 (Joe Karaganis ed., 2007).

record practices and the invention of the printing press.¹¹ Pervasive computing looks to be another rare new regime of recording the past. Law professor Harry Surden challenges those in technology policy to consider privacy interests protected by latent structural constraints on information, those secondary costs which protect the flow of information, before a particular cost-lowering technology becomes too widespread.¹² Advances in computer storage, content distribution, and information filtering have created ubiquitous information networks that threaten one's ability to make mistakes without severe consequences—a mark on one's permanent record, aggregated and presented to anyone by Google. If the Internet Age will limit our ability to forget, it will in turn limit our ability to forgive or be forgiven.¹³ We must ask whether forgiveness is something to carry with us into the future or whether we may leave it behind with analog.

Forgiveness is a complicated value that has been conceptualized and defined in different ways as a response to the memory of grievances. Forgiveness is defined as the “willingness to abandon one's right to resentment, negative judgment, and indifferent behavior toward one who unjustly injured us, while fostering the undeserved qualities of compassion, generosity, and even love toward him or her,” by psychology professor and pioneer of the scientific study of forgiveness Robert Enright.¹⁴ Slightly varied, Fred Luskin, co-founder of the Stanford University Forgiveness Project, describes forgiveness as the “peace and understanding that occurs when an injured party's suffering is reduced as they transform their grievance against an offending party.”¹⁵

While definitions of forgiveness vary, most psychologists agree that forgiveness is not forgetting, condoning, excusing offenses, reconciliation, re-establishment of trust, or release from legal accountability.¹⁶ These concepts are related, but do not represent

11. *Id.*

12. Harry Surden, *Structural Rights in Privacy*, 60 SMU L. Rev. 1605, 1605 (2007).

13. *See infra* Section I.B.

14. Robert D. Enright, Suzanne Freedman & Julio Rique, *The Psychology of Interpersonal Forgiveness*, in *EXPLORING FORGIVENESS*, at 46, 46-47 (Robert D. Enright & Joanna North eds., 1998).

15. ROBERT D. ENRIGHT & RICHARD P. FITZGIBBONS, *HELPING CLIENTS FORGIVE: AN EMPIRICAL GUIDE FOR RESOLVING ANGER AND RESTORING HOPE* 292 (2000) (quoting Fred Luskin, *The Effect of Forgiveness Training on Psychological Factors in College Age Adults* (1998) (unpublished Ph.D. dissertation, Stanford University)).

16. Julie Juola Exline et al., *Forgiveness and Justice: A Research Agenda for Social and Personality Psychology*, 7 PERSONALITY AND SOC. PSYCHOL. REV. 337, 339 (2003).

synonyms or definitions. As demonstrated above, many definitions of forgiveness are laden with normative intent. Instead, we utilize a more descriptive and general definition of forgiveness. Simplified, forgiveness means a decision to forego negative feelings, retribution, or vengeance.¹⁷

The broader definition embraces popular understandings of forgiveness. When polled, sixty-six percent of American adults found the statement “If you have really forgiven someone, you should be able to forget what they have done to you,” very accurate or somewhat accurate.¹⁸ The majority also agreed that if a person is to forgive another, he or she must want to release the other from the consequences of his or her actions¹⁹ and that the relationship should be rebuilt.²⁰ These results suggest that despite scholarly attempts to precisely define forgiveness as unrelated to forgetting, “many people believe that forgiving implies forgetting, reconciliation, or the removal of negative consequences.”²¹ Although the decision to relinquish negative feelings toward an individual may satisfy the baseline definition of forgiveness, moving forward is the motivation, focus, and goal of those engaging in the forgiveness process. In order to establish a form of forgiveness in the digital age, it is important to recognize popular experiences with, and attitudes toward, forgiveness and to bridge those experiences with the described moral value sought to be preserved.

A. *Benefits of Forgiveness*

Although legal scholars have not explored digital forgiveness in

17. See generally Enright et al., *supra* note 14, at 46-63. Whether forgiveness requires positive feelings toward an offender, or whether the absence of negative feelings alone is sufficient, is a definitional debate had by social psychologists. *Id.* The authors consider the absence of negative feelings the most important aspect of a definition of forgiveness related to this topic. *Id.* at 50.

18. ROBERT JEFFRESS, WHEN FORGIVENESS DOESN'T MAKE SENSE 221 (2000) (thirty-two percent found the statement very accurate and thirty-four percent found it somewhat accurate).

19. *Id.* at 218. When asked about the accuracy of the statement, “If you really forgive someone, you would want the person to be released from the consequences of their actions,” twenty-eight percent answered the statement was very accurate and thirty-two percent—somewhat accurate.

20. *Id.* at 220. When asked about the accuracy of the statement, “If you genuinely forgive someone, you should rebuild your relationship with that person,” thirty-five percent found it very accurate and thirty-eight percent found it somewhat accurate.

21. Exline et al., *supra* note 16, at 340.

great depth, in the last two decades scholars in other fields have produced an impressive body of literature and empirical study demonstrating the benefits of forgiveness.²² The range of benefits can be seen in the research area of restorative justice, where scholars in forgiveness research have attempted to establish alternatives to retribution.²³ Scholars of this movement attempt to preserve the rights and dignity of victims, as well as offenders, often providing opportunities for the parties to meet, communicate, apologize, and forgive.²⁴ Although not used for all crimes, restorative practices result in participants reporting high satisfaction with the process.²⁵ Victim and offender can benefit from restorative processes, while the social goal of judicial efficiency is also promoted by forgiveness, as shown by research examining how apologies facilitate averting lawsuits.²⁶ Some perpetrators that acknowledge wrongdoing may experience a gratefulness that motivates them to reciprocate goodwill through improved behavior and reparations, minimizing repeat offenses.²⁷

1. Those Who Forgive

A growing body of research strongly suggests that granting forgiveness to others is beneficial in a variety of ways. Individuals that received treatment to help them forgive through the Stanford Forgiveness Project showed significant reductions in anger, perceived stress, hurt, and physical symptoms of stress.²⁸ The Mayo Clinic lists six specific benefits to forgiving: healthier relationships; greater

22. See generally HANDBOOK OF FORGIVENESS (Everett L. Worthington, Jr. ed., 2005); Solangel Maldonado, *Cultivating Forgiveness: Reducing Hostility and Conflict After Divorce*, 43 WAKE FOREST L. REV. 441, 446 (2008).

23. Exline et al., *supra* note 16, at 337.

24. *Id.* at 338.

25. MARK S. UMBREIT, THE HANDBOOK OF VICTIM OFFENDER MEDIATION: AN ESSENTIAL GUIDE TO PRACTICE AND RESEARCH 183 (2001).

26. See generally Jonathan R. Cohen, *Apology and Organizations: Exploring an Example from Medical Practice*, 27 FORDHAM URB. L.J. 1447 (2000).

27. See Brad R. C. Kelln & John H. Ellard, *An Equity Theory Analysis of the Impact of Forgiveness and Retribution on Transgressor Compliance*, 25 PERSONALITY AND SOC. PSYCHOL. BULL. 864, 871 (1999). For example, following an ostensible transgression, an experimenter reacted in one of four ways: forgiveness only; forgiveness and retribution; retribution only; or neither forgiveness nor retribution. *Id.* at 865. Those transgressors that were forgiven without any form of retribution complied with experimenters' requests more than any other group. *Id.* at 869.

28. Frederick Luskin, *The Stanford Forgiveness Projects*, in FORGIVENESS: A SAMPLING OF RESEARCH RESULTS 14, 15 (2006), available at <http://www.apa.org/international/resources/forgiveness.pdf>.

spiritual and psychological well-being; less anxiety, stress and hostility; lower blood pressure; fewer symptoms of depression; lower risk of alcohol and substance abuse.²⁹ Being unforgiving can be a core component of stress associated with decreased mental health and increased levels of guilt, shame, and regret.³⁰

Particularly relevant are studies on the physical and emotional impact of rehearsing hurt and harboring a grudge. Once hurt, people both intentionally and unintentionally rehearse memories of the painful experience.³¹ In this state, individuals remain in the role of the victim and perpetuate negative emotions associated with rehearsing the hurtful offense.³² Nursing a grudge perpetuates the adverse health effects associated with anger and blame.³³ Generally, releasing a grudge “may free the wounded person from a prison of hurt and vengeful emotion, yielding both emotional and physical benefits, including reduced stress, less negative emotion, fewer cardiovascular problems, and improved immune system performance.”³⁴ One study examined the emotional and physiological effects rehearsing hurtful memories or nursed grudges compared with cultivating empathic perspective and imagining granting forgiveness; it revealed dramatic benefits to forgiving.³⁵ Feelings of valence, control, and empathy were all experienced to a greater degree during forgiving imagery exercises than when participants rehearsed painful experiences, which ignited significantly more negative feelings of sadness, arousal, anger,

29. *Forgiveness: Letting Go of Grudges and Bitterness*, MAYO CLINIC (Nov. 23, 2011), <http://www.mayoclinic.com/health/forgiveness/mh00131>.

30. Loren Toussaint & Jon R. Webb, *Theoretical and Empirical Connections Between Forgiveness, Mental Health, and Well-Being*, in HANDBOOK OF FORGIVENESS, *supra* note 22, at 349, 349.

31. Charlotte vanOyen Witvliet, *Traumatic Intrusive Imagery as an Emotional Memory Phenomenon: A Review of Research and Explanatory Information Processing Theories*, 17 CLINICAL PSYCHOL. REV. 509, 509 (1997).

32. See generally Roy F. Baumeister, Julie Juola Exline & Kristin L. Sommer, *The Victim Role, Grudge Theory, and Two Dimensions of Forgiveness*, in DIMENSIONS OF FORGIVENESS: PSYCHOLOGICAL RESEARCH & THEOLOGICAL PERSPECTIVES 79 (Everett L. Worthington, Jr. ed., 1998).

33. *Id.* at 98.

34. Charlotte vanOyen Witvliet, Thomas E. Ludwig & Kelly L. Vander Laan, *Granting Forgiveness or Harboring Grudges: Implications for Emotion, Physiology, and Health*, 12 PSYCHOL. SCI. 117, 118 (2001); see also Everett L. Worthington, Jr., *Empirical Research in Forgiveness: Looking Backward, Looking Forward*, in DIMENSIONS OF FORGIVENESS, *supra* note 32, at 321.

35. vanOyen Witvliet et al., *supra* note 34, at 117.

and lack of control.³⁶ During unforgiving imagery, participants experienced increased heart rates and blood pressure, significantly greater sympathetic nervous system arousal, elevated brown muscle activity,³⁷ and skin conductance, many of which persisted into the post-imagery recovery period.³⁸

On an interpersonal level, those who forgive exhibit greater empathy, understanding, tolerance, agreeableness, and insight resulting in prosocial transformations.³⁹ Those that are less forgiving tend to be less compassionate and score higher in depression, neuroticism, negative affectivity, and vengeful motivations.⁴⁰ As reported by spouses, one of the most important factors contributing to marital longevity and satisfaction is the capacity to offer and seek forgiveness.⁴¹ Children living in areas characterized by violence and poverty that are introduced to forgiveness in the classroom have shown significantly less anger.⁴² Families that report a history of forgiveness have better individual member mental health and higher levels of family functionality.⁴³ These findings add to a growing body of knowledge and have led some psychologists to explore unforgiveness as a public health problem.⁴⁴

The United Nations has been heavily involved in the promotion of forgiveness and related research, hoping to refine its amnesty practices and establish peaceful civil and international relationships.⁴⁵

36. *Id.* at 120.

37. *Id.* at 121 (measured by corrugator electromyograms).

38. *Id.* at 122.

39. Caryl E. Rusbult et al., *Forgiveness and Relational Repair*, in HANDBOOK OF FORGIVENESS, *supra* note 22, at 185, 194.

40. *Id.*

41. Frank D. Fincham, Julie H. Hall & Steven R. H. Beach, “‘Til Lack of Forgiveness Doth Us Part”: *Forgiveness and Marriage*, in HANDBOOK OF FORGIVENESS, *supra* note 22, at 207, 207.

42. Robert Enright et al., *Forgiveness Education with Children in Areas of Violence and Poverty*, in FORGIVENESS: A SAMPLING OF RESEARCH RESULTS, *supra* note 28, at 11, 12.

43. Cynthia L. Battle & Ivan W. Miller, *Families and Forgiveness*, in HANDBOOK OF FORGIVENESS, *supra* note 22, at 227, 233-34.

44. Frank D. Fincham, Steven R. H. Beach & Joanne Davila, *Forgiveness and Conflict Resolution in Marriage*, in FORGIVENESS: A SAMPLING OF RESEARCH RESULTS, *supra* note 28, at 8, 9.

45. *See, e.g.*, Eileen R. Borris, *Forgiveness and the Healing of Nations*, UNIVERSAL PEACE FED’N (Mar. 8, 2011), <http://www.upf.org/education/speeches/3464-eileen-r-borris-forgiveness-and-the-healing-of-nations> (Presentation at the Parallel Event of the 55th Commission on the Status of Women “Women and the World at a Turning Point,” Mission of Nigeria to the UN, New York, U.S.A.) (an example of the United Nations relationship with the Universal Peace Federation and their efforts and funding for fostering forgiveness).

Research demonstrates that “forgiveness programs can restore healthy emotions, thus potentially aiding social reconstruction and dialogue.”⁴⁶ This is true of mothers who lost sons due to conflicts in Northern Ireland and underwent the Stanford Forgiveness Project’s six day forgiveness training. The mothers showed a fifty percent reduction in perceived stress, a forty percent reduction in depression, and a twenty-three percent reduction in anger, a significant reduction in hurt, and a significant increase in physical vitality.⁴⁷ For groups, reminders of historical victimization, such as the horrendous events of the Holocaust, have been shown to result in legitimization of actions taken toward a new enemy, such as Palestinian terrorism, in the present.⁴⁸ Forgiveness intervention in Rwanda—where violence between groups had stopped, attitudes between members of the groups had not changed, and future violence was likely to occur—have promoted structural and institutional stability in the country’s justice system and educational system leading toward sustained mutual acceptance.⁴⁹

The benefits of forgiveness have been shown to “spill over” into situations and relationships outside of the original conflict, where those forgiven engage in more volunteerism, charity donations, and other altruistic behavior.⁵⁰ The interconnected world may find itself full lacking the above benefits if we do not recognize the value of forgiveness in the digital age and take steps to preserve it.

2. Those Who Are Forgiven

In addition, wrongdoers benefit from being forgiven by others. Individuals value the good will of their fellow human beings, and many of those who have transgressed “feel the bite of conscience for their misdeeds.”⁵¹ “Forgiveness may lighten the burden of guilt from

46. Enright et al., *supra* note 42, at 11, 13.

47. Luskin, *supra* note 28, at 14, 15.

48. Michael J. A. Wohl & Nyla R. Branscombe, *Forgiving the Ingroup or the Outgroup for Harm Doing*, in FORGIVENESS: A SAMPLING OF RESEARCH RESULTS, *supra* note 28, at 23, 24.

49. Ervin Staub & Laurie Anne Pearlman, *Promoting Reconciliation and Forgiveness After Mass Violence: Rwanda and Other Settings*, in FORGIVENESS: A SAMPLING OF RESEARCH RESULTS, *supra* note 28, at 31, 32-34.

50. Johan C. Karremans, Paul A. M. Van Lange & Rob W. Holland, *Forgiveness and Its Associations with Prosocial Thinking, Feeling, and Doing Beyond the Relationship with the Offender*, 31 PERSONALITY AND SOC. PSYCHOL. BUL. 1315, 1315 (2005).

51. Stephanos Bibas, *Forgiveness in Criminal Procedure*, 4 OHIO ST. J. CRIM. L. 329, 334 (2007).

their shoulders, making it easier for them to move on with their lives.”⁵² Those who avoid denying their mistakes and “ask for and receive forgiveness are more likely to learn their lessons.”⁵³ The desire to earn forgiveness can be a catalyst for healthy, positive change.⁵⁴ Like the process of forgiving another, being forgiven aids psychological healing, improves physical and mental health, restores a victim’s sense of personal power, promotes reconciliation between the offended and offender, and promotes hope for the resolution of real-world intergroup conflict.⁵⁵ Forgiving oneself is also beneficial. Lower self-esteem, greater depression, increased anxiety and anger are associated with difficulty forgiving the self.⁵⁶ Self-forgivers report better relationships with their victims, as well as less regret, self-blame, and guilt.⁵⁷

B. *Forgetting and Forgiving*

While forgiveness may be good for us individually and socially, it is difficult to obtain any level of forgiveness when we cannot escape reminders of the violation. “The capacity to forget aspects of the past (or remember them in a different way) is deeply connected to the power to forgive others.”⁵⁸ As one scholar notes, the “inability to modulate the emotional content of the memory of an affront severely diminishes the capacity to forgive it.”⁵⁹ In fact, those that have been wronged are “less likely to forgive to the extent that they exhibit greater rumination and recall a greater number of prior transgressions, and are more likely to forgive to the extent that they develop more benign attributions regarding the causes of the perpetrator’s actions.”⁶⁰ The ability to forgive oneself and to accept the forgiveness

52. *Id.*

53. *Id.* “As twelve-step programs such as Alcoholics Anonymous emphasize, admitting guilt is an essential step along the road to reform.” *Id.* at 334-35.

54. *Id.* at 335.

55. *Forgiveness—Definitions and Effects*, in FORGIVENESS: A SAMPLING OF RESEARCH RESULTS, *supra* note 28, at 5, 5.

56. See Paul A. Mauger et al., *The Measurement of Forgiveness: Preliminary Research*, 11 J. OF PSYCHOL. AND CHRISTIANITY 170 (1992).

57. Jeanne S. Zechmeister & Catherine Romero, *Victim and Offender Accounts of Interpersonal Conflict: Autobiographical Narratives of Forgiveness and Unforgiveness*, 82 J. OF PERSONALITY AND SOC. PSYCHOL. 675, 681 (2002).

58. O. Carter Snead, *Memory and Punishment*, 64 VAND. L. REV. 1195, 1233 (2011).

59. *Id.* at 1233-34; see AVISHAI MARGALIT, *THE ETHICS OF MEMORY* 205 (2002) (“[A]s long as the offended one retains any scars from the injury, the forgiveness is not complete.”).

60. Rusbult et al., *supra* note 39, at 185, 195.

of others depends, in part, on escaping memories of wrongs or indiscretions: “[T]he capacity to let go of the painful emotions associated with our memory of wronging others is integral to accepting their forgiveness for our faults.”⁶¹ Assuming information remains indefinitely accessible to a search engine, “forgiving” anyone, including oneself, may be incredibly problematic.

The perpetual memory of the Internet hinders forgetting, thereby stifling forgiveness. “Online, the past remains fresh. The pixels do not fade with time as our memories do.”⁶² Since we live in a world where everything is saved—archived instead of deleted—“memories have a way of forcing themselves to the surface in the most unexpected ways.”⁶³ Due to the Internet’s perfect memory, “we are no longer able to generalize and abstract, and so remain lost in the details of our past.”⁶⁴ Searching the Internet “might unearth some powerful moments you [had not] expected, or [would not] have necessarily wanted,” to remember.⁶⁵ Painful memories “can be paralyzing, like a digital [post-traumatic stress disorder], with flashbacks to events that you can’t control.”⁶⁶ Without information controls, we face a digital future that is forever unforgiving because it is unforgetting.⁶⁷

Currently, the European Union is pushing to update its 1995 Data Protection Directive⁶⁸ to add a “Right to Be Forgotten.”⁶⁹ The update would require Internet companies to get consent before storing personal data and to delete it on request,⁷⁰ and possibly require search

61. Snead, *supra* note 58, at 1234.

62. Kashmir Hill, *How the Past Haunts Us in the Digital Age*, FORBES (Oct. 4, 2011, 9:39 AM), <http://www.forbes.com/sites/kashmirhill/2011/10/04/how-the-past-haunts-us-in-the-digital-age/>.

63. *Id.*

64. VIKTOR MAYER-SCHÖNBERGER, *DELETE: THE VIRTUE OF FORGETTING IN THE DIGITAL AGE* 12 (2009).

65. Hill, *supra* note 62.

66. *Id.*

67. *Id.*

68. 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. (L281) 31, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995L0046:EN:NOT>.

69. Press Release, Eur. Comm’n, Data Protection Reform—Frequently Asked Questions (Nov. 4, 2010), <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/10/542>; Press Release, Eur. Comm’n, European Commission Sets Out Strategy to Strengthen EU Data Protection Rules (Nov. 4, 2010), <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1462>.

70. Jason Walsh, *When It Comes to Facebook, EU Defends the “Right to Disappear,”*

to ignore tagged results.⁷¹ As it redrafts its Data Protection Directive, it must confront the laws of a number of member countries that allow citizens to force the removal of certain harmful, private content after a specified amount of time.⁷² A unique and controversial aspect of these rights is the user may request that information that was once truthful and newsworthy may be blocked from search results after a certain amount of time in an attempt to make the information private. As a result, two compelling camps have arisen: the Preservationists and the Deletionists.⁷³ The Preservationists believe the Internet offers the most truthful and comprehensive history of humanity ever collected and feel a duty to descendants to create and protect raw digital legacies without censorship.⁷⁴ The Deletionists argue that the Internet must learn to forget in order to preserve vital societal values, that human culture cannot handle total recall gracefully, and that threats to the dignity and privacy of individuals will create an open yet oppressive networked space.⁷⁵

Forgiveness can be dangerous; it has the ability to cause its own injustices, particularly when offered by a third-party, as opposed to the wronged, or when offered too quickly.⁷⁶ A victim or offended observer may feel that the offender has not had to feel the proportional repercussions of his or her actions or that the act was simply unforgivable.⁷⁷ Philosophical writings on the subject promote forgiveness as a virtue,⁷⁸ but are found alongside writing addressing

CHRISTIAN SCI. MONITOR (Apr. 6, 2011, 1:41 PM), <http://www.csmonitor.com/World/Europe/2011/0406/When-it-comes-to-Facebook-EUdefends-the-right-to-disappear>.

71. Rosen, *supra* note 5, at 352.

72. See Status of Implementation of Directive 95/46 on the Protection of Individuals with Regard to the Processing of Personal Data, European Commission: Justice (Dec. 14, 2010), http://ec.europa.eu/justice/data-protection/law/status-implementation/index_en.htm (last updated Mar. 2, 2012) (listing national laws).

73. Sumit Paul-Choudhury, *Digital Legacy: The Fate of Your Online Soul*, NEW SCIENTIST (May 15, 2012, 11:39 am), <http://www.newscientist.com/article/mg21028091.400-digital-legacy-the-fate-of-your-online-soul.html>.

74. *Id.*

75. *Id.*

76. See Jeffrie G. Murphy, *Forgiveness in Counseling: A Philosophical Perspective*, in BEFORE FORGIVING: CAUTIONARY VIEWS OF FORGIVENESS IN PSYCHOTHERAPY 41 (Sharon Lamb & Jeffrie G. Murphy eds., 2002).

77. See generally Jeffrie G. Murphy, *Forgiveness, Mercy, and the Retributive Emotions*, 7 CRIM. JUST. ETHICS 3 (1988).

78. See Marilyn McCord Adams, *Forgiveness: A Christian Model*, 8 FAITH AND PHIL. 277 (1991); Margaret R. Holmgren, *Forgiveness and the Intrinsic Value of Persons*, 30 AM. PHIL. Q. 341, 341 (1993); Herbert Morris, *Murphy on Forgiveness*, 7 CRIM. JUST. ETHICS 15

the moral value of retribution and revenge.⁷⁹ The most severe threat of disrupting the benefits to forgiveness is from offering or receiving it too quickly or too late.⁸⁰ “[S]elf-respect, respect for the moral order, respect for the wrongdoer, and even respect for forgiveness itself” may be undermined by hasty forgiveness.⁸¹

It is important to remember that making scarring information less accessible does not require a victim, or anyone else, to forgive the offender in the traditional sense. Instead, decreased accessibility removes the constant reminder of the scarring information from all parties’ online experiences, allowing for forgiveness to occur naturally. Significant negative consequences result from too much memory, “in which families and relationships are forever destroyed by disordered and persistent memories of grievances suffered.”⁸² The authors propose that forgetting and forgiving are important aspects of privacy law because they allow personal information to become less public, and incite fewer negative effects for those involved. The exercise of such a legal claim or right to oblivion, if crafted correctly, could help maximize the expressive potential of the Internet, while quelling anxiety related to an inhibited, exposed existence. Section IV describes possible legal options for manipulating information and the resulting balances.

C. *Privacy and Forgiveness*

Forgiveness is tied to privacy through forgetting. Information about us that inhibits our ability to be autonomous triggers privacy concerns. Information can limit what an individual may realistically pursue in life, limit her ability to change and grow, and limit her

(1988); Joanna North, *The “Ideal” of Forgiveness: A Philosopher’s Exploration*, in *EXPLORING FORGIVENESS*, *supra* note 14, at 15, 34; Joanna North, *Wrongdoing and Forgiveness*, 62 *PHIL.* 499 (1987).

79. *E.g.*, PETER A. FRENCH, *THE VIRTUES OF VENGEANCE* (2001); Jeffrie G. Murphy, *Two Cheers for Vindictiveness*, 2 *PUNISHMENT & SOC’Y* 131 (2000); Michael S. Moore, *The Moral Worth of Retribution*, in *RESPONSIBILITY, CHARACTER, AND THE EMOTIONS: NEW ESSAYS IN MORAL PSYCHOLOGY* 179 (Ferdinand Schoeman ed., 1987).

80. Murphy, *supra* note 76; Murphy, *supra* note 77.

81. Jeffrie G. Murphy, *Forgiveness, Self-Respect, and the Value of Resentment*, in *HANDBOOK OF FORGIVENESS*, *supra* note 22, at 33, 33.

82. Snead, *supra* note 58, at 1234 (citing OTIS K. RICE, *THE HATFIELDS AND THE MCCOYS* 1 (1978) (noting that “the famous feud between the Appalachian Hatfield and McCoy families did not end until the parties ceased open hostilities and ‘both families chose to forget an ugly chapter in their history’”); WILLIAM SHAKESPEARE, *ROMEO AND JULIET* act 1, Prologue (“Two households, both alike in dignity,/ In fair Verona, where we lay our scene,/ From ancient grudge break to new mutiny,/ Where civil blood makes civil hands unclean”).

perception of self; thus, information privacy is an important aspect of moral autonomy.⁸³ A very direct limitation caused by personal information online exists in the job market. In 2011, 91% of recruiters reported incorporating social networking sites in their evaluation of job applicants.⁸⁴

Many have defined privacy as embodying concepts of forgiveness. According to Alan Westin, privacy is “the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others.”⁸⁵ Professor of law Charles Fried defines privacy as “not simply an absence of information about us in the mind of others; rather it is the *control* we have over information about ourselves.”⁸⁶ Law professor Jerry Kang defines privacy as “an individual’s control over the processing—i.e., the acquisition, disclosure, and use—of personal information.”⁸⁷ Without forgiveness, these definitions of privacy require people to make accurate predictions regarding the consequences of sharing information prior to disclosure.⁸⁸

Like privacy, forgiveness must be grounded in the “constellation of values to which most, if not all, societies are committed.”⁸⁹ The functional relationships forgiveness has to well-being, creativity, individual and community development, autonomy, mental health, and liberty are similar to those it has to privacy, as expressed by law professor Ruth Gavison.⁹⁰ Theoretically and empirically, forgiveness is tied to removing past mistakes, indiscretions, and negative associations to become happy, productive members of society. These notions promote individual and community development, mental health, well-being, and liberty.

Autonomy, creativity, and liberty are promoted when an

83. HELEN F. NISSENBAUM, *PRIVACY IN CONTEXT: TECHNOLOGY, POLICY, AND THE INTEGRITY OF SOCIAL LIFE* 81-82 (2010).

84. *Hold That Password: The New Reality of Evaluating Job Applicants*, KNOWLEDGE@WHARTON (Apr. 11, 2012), <http://knowledge.wharton.upenn.edu/article.cfm?articleid=2978>.

85. ALAN F. WESTIN, *PRIVACY AND FREEDOM* 7 (1967).

86. Charles Fried, *Privacy*, 77 *YALE L.J.* 475, 482 (1968).

87. Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 *STAN. L. REV.* 1193, 1203 (1998).

88. Definitions of privacy, as well as its designation as a claim, right, interest, or value, have stalled its substantive development. NISSENBAUM, *supra* note 83, at 74-75. While these analyses are important, they are largely beyond the scope of this article.

89. *Id.* at 73.

90. Ruth Gavison, *Privacy and the Limits of Law*, 89 *YALE L.J.* 421, 421 (1980).

individual is allowed to re-define himself, to change, to be something other than popular perceptions of him. In his book, *Delete*, professor and privacy expert Viktor Mayer-Schönberger explains that “digital memory” denies the possibility of individual evolution; our past transgressions, such as reckless behaviors characteristic of our teenage years, become conflated with the more commendable accomplishments of our adult life.⁹¹ If forgiveness is tied to change, digital memory impedes forgiveness because “there may be little incentive to actively work on escaping one’s caste and breaking out of one’s mold.”⁹²

While the European Union is contemplating a uniform Right to Be Forgotten, the United States has focused on consumer privacy and security.⁹³ The authors believe it is time for all countries reflecting on what types of restraints and freedoms should be placed upon the Internet to consider which values must be preserved, how those values should be preserved, and what can be left behind. The United States—the so-called “land of opportunity”—is itself the product of second chances and has allowed individuals and groups to wrangle free from their past to prosper. Those that were negatively labeled in Europe came to America to start a new life and later Midwesterners and Easterners migrated and settled the West looking to start a new life. These notions are of course romanticized, but one has to wonder whether permitting digital labels that permanently attach to individuals will strip second chances from the U.S. national identity and create significant injustices and/or inequalities for certain users.

Migrating private information that has been made public back into the control of its subject would have significant benefits. By placing private information back into what political philosopher Michael Walzer calls its appropriate “sphere of justice,” informational injustice like harsh inferences, unfair dismissal, or inaccurate representations can be avoided.⁹⁴ Information rules should attempt to maintain information in the sphere where it belongs⁹⁵ and, we argue,

91. MAYER-SCHÖNBERGER, *supra* note 64, at 124-25.

92. *Id.* at 125.

93. *See, e.g.*, Secure and Fortify Electronic Data Act, H.R. 2577, 112th Cong. (2011); FED. TRADE COMM’N, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE: A PROPOSED FRAMEWORK FOR BUSINESSES AND POLICYMAKERS (2010), *available at* <http://www.ftc.gov/os/2010/12/101201privacyreport.pdf>.

94. *See generally* MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY (1983).

95. *Id.*

allow information to be re-located to the sphere that is appropriate at a given time. This gives individuals and groups a chance to forgive and be forgiven without constant reminders of information related to the harm, an act even the Amish needed to undertake in order to forgive and move forward.

Increasing aggregation and availability of information online means the past can be stirred with greater frequency, triggering memories that would have otherwise been forgotten. Philosophy professor Avishai Margalit argues persuasively that successful forgiveness requires the “overcoming of resentment” that attends the memory of the wrong done.⁹⁶ As individuals will acutely re-experience the humiliation or pain of their indiscretions, offenses or tragedies when memories of such come to mind, the Internet Age has decreased the chances of successful forgiveness.⁹⁷ When Montgomery County, Texas district attorney Brett Lignon began Tweeting the names of drivers arrested for drunk driving, he stated, “There is an embarrassment factor, the scarlet letter of law enforcement.”⁹⁸ A number of sites post arrest information, complete with photo, name, and arrest details.⁹⁹ The posts are not updated¹⁰⁰ as the charges progress. Moving beyond an arrest, no matter the innocence surrounding the incident, is more difficult in the Digital Age. The “scarlet letter of law enforcement” was not generally pinned to those simply arrested in an analog world. Judgments can turn inward in the context of cyberbullying. Fifteen year old Amanda Todd took her own life after posting a desperate YouTube video explaining the details of her bullying.¹⁰¹ In the video, the vulnerable girl explained that the scandalous image she had been convinced to create had led to brutal on and offline torment.¹⁰² She suffered from depression and anxiety; in the video, she holds a card that reads “I can never get that

96. MARGALIT, *supra* note 59, at 205-06.

97. See Snead, *supra* note 58, at 1234.

98. Laura M. Holson, *The New Court of Shame Is Online*, N.Y. TIMES, Dec. 26, 2010, at ST2, available at <http://www.nytimes.com/2010/12/26/fashion/26shaming.html>.

99. See, e.g., MUGSHOTS.COM, <http://mugshots.com> (last visited Oct. 30, 2012).

100. For a price, information can be removed from sites. UnpublishArrest.com is in the business of removing public arrest records from the Internet. See UNPUBLISHARREST.COM, <http://unpublisharrest.com> (last visited Oct. 30, 2012).

101. Lateef Mungin, *Bullied Canadian Teen Leaves Behind Chilling YouTube Video*, CNN (Oct. 12, 2012), http://www.cnn.com/2012/10/12/world/americas/canada-teen-bullying/index.html?hpt=hp_c2.

102. *Amanda Todd—My Story: Struggling, Bullying, Suicide, Self Harm*, YOUTUBE (Oct. 12, 2012), <http://www.youtube.com/watch?v=oj05LJryiKE>.

Photo back.”¹⁰³ Overly vivid memories keep resentment alive.¹⁰⁴ The time is ripe to ask whether the Internet should be a forgiving place or a resentful one—whether technology is an impediment to the well-being of society.

II. TOWARD PRESERVING FORGIVENESS WITH CODE, NORMS, AND MARKETS

Preserving a role for forgiveness in a networked future gains urgency with the increasing importance of digital reputations in the information economy. Publishing tools and search capabilities threaten to leave innocent victims without recourse, and inaccurate or outdated information is not as useful as accurate, up-to-date information. To avoid devolving toward a world where “you are [literally] who Google says you are,”¹⁰⁵ digital identity must be manipulable to allow for people to change and grow.

Of course, the appropriate time for legal intervention is hotly debated,¹⁰⁶ and often other mechanisms offer more efficient solutions to social problems. Values, including forgiveness, are governed and preserved differently in the digital realm. Lawrence Lessig, the foremost authority on privacy and technology, explains that, much like in real space, code, norms, markets, and law operate together to govern values and behaviors online.¹⁰⁷ This section analyzes how the confines of the computer code, the pressure of adhering to social norms, and the invisible hand of market-based solutions are assessed. The authors conclude that each are ineffective or incomplete means of preserving forgiveness.

A. Code

In *Forgetting as a Feature, Not a Bug: The Duality of Memory and Implications for Ubiquitous Computing*, professor of computer science and information systems Liam Bannon warned that “[t]he

103. *Id.*

104. MARGALIT, *supra* note 59, at 5.

105. J.D. LASICA, IDENTITY IN THE AGE OF CLOUD COMPUTING: THE NEXT-GENERATION INTERNET’S IMPACT ON BUSINESS, GOVERNANCE AND SOCIAL INTERACTION 24 (2009), available at http://www.aspeninstitute.org/sites/default/files/content/docs/pubs/Identity_in_the_Age_of_Cloud_Computing.pdf.

106. See generally Eric Pfanner, *Regulating the Internet in a Multifaceted World*, N.Y. TIMES (June 26, 2011), <http://www.nytimes.com/2011/06/27/technology/internet/27iht-internet27.html>.

107. LAWRENCE LESSIG, CODE: VERSION 2.0 at 124-25 (2006).

tendency to use the power of the computer to store and archive everything can lead to stultification in thinking, where one is afraid to act due to the weight of the past.”¹⁰⁸ Bannon insists:

What is necessary is to radically re-think the relation between artefacts and our social world. The aim is to shift attention to a portion of the design space in human–computer interaction and ubiquitous computing research that has not been much explored—a space that is supportive of human well-being.¹⁰⁹

One of the more interesting solutions to privacy problems that are not easily or appropriately addressed by the law alone is the concept of privacy-by-design.¹¹⁰ Building the value of privacy into the design of a system offers a preventative measure, establishes standards, and potentially lightens the load on government oversight and enforcement. Forgiveness-by-design or automated forgiveness would be a code-based solution, but at this point, an inappropriate one for the purposes outlined in this article.

Computer scientists have begun to play with coding forms of forgiveness, each outlining variables of forgiveness and re-establishing trust. DigitalBlush is a project designed to support technology-mediated facilitation of forgiveness focusing on the importance of the human emotions of shame and embarrassment.¹¹¹ The researchers developed a formal computational model of forgiveness and designed a tool to support rule violation reports and link victim with offender to facilitate forgiveness.¹¹² This required the researchers to categorize elements of human forgiveness. The first, violation appraisal, accounts for the severity, intent, and frequency of the exhibited behavior.¹¹³ The second, reversal, address the role of apologies and acts of restitution.¹¹⁴ Lastly, pre-existing factors like the familiarity with and level of commitment to the offender are

108. Bannon, *supra* note 1, at 11.

109. *Id.*

110. ANN CAVOUKIAN & JEFF JONAS, PRIVACY BY DESIGN IN THE AGE OF BIG DATA 7-9 (2012), available at http://privacybydesign.ca/content/uploads/2012/06/pbd-big_data.pdf.

111. Asimina Vasalou & Jeremy Pitt, *Reinventing Forgiveness: A Formal Investigation of Moral Facilitation*, in TRUST MANAGEMENT, THIRD INTERNATIONAL CONFERENCE ITRUST 2005, at 146, 147-48 (Peter Hermann et al. eds., 2005), available at http://luminainteractive.com/pdfs/forgive_itrust05.pdf.

112. *Id.* at 147-49, 156.

113. *Id.* at 150-51.

114. *Id.* at 151.

considered.¹¹⁵ Then the project collected user generated information on rule violations in specific communities.¹¹⁶

Other researchers have focused on the role forgiveness plays among artificial intelligence agents by portraying the re-establishment of trust as an assessment of regret that can be cured or diminished overtime depending on the conduct of the offending agent.¹¹⁷ The model is particularly valuable because it accounts for the limits of forgiveness (conduct that is unforgivable) and the importance of time.¹¹⁸ Viktor Mayer-Schönberger suggests that users should be able to attach an expiration date to information, after which it would no longer be accessible.¹¹⁹ Applying an expiration date would only be available for information created by the subject and would require predicting a useful lifespan at the time of creation.

The process of coding forgiveness of harmful online information carries the same issues as coding to remove unauthorized use of copyrighted material in such a way that also protects fair use: there are too many human elements. The delicate nature of human forgiveness and its implications for censorship require a non-automated response until a system can be designed to know when an individual feels extreme shame or harm by information online and whether it can be appropriately removed or unindexed. If not done thoughtfully, manipulation of this content or the system that preserves it in the name of forgiveness may threaten the openness and robustness of the Internet. This conclusion is not to suggest that technology cannot be used to support norms of forgiveness or that code is not an integral part of any forgiveness preservation effort, but only that a singularly technological effort will not solve the problem of individual stagnation of one's persona online.

B. Norms and Markets

Norms have been suggested as an answer to addressing digital memory and preserving moral dignity in cyberspace.¹²⁰ Julian

115. *Id.* at 151-53.

116. *Id.* at 154.

117. Stephen Marsh & Pamela Briggs, *Examining Trust, Forgiveness and Regret as Computational Concepts*, in *COMPUTING WITH SOCIAL TRUST* 9, 30-32 (Jennifer Golbeck ed., 2009).

118. *Id.* at 31-37.

119. MAYER-SCHÖNBERGER, *supra* note 64, at 171-73.

120. For example, in Japan, "social networking accounts are almost always pseudonymous[—]people rarely use their real names." Rosen, *supra* note 5, at 353-54 (footnote

Togelius, professor and artificial intelligence researcher in Copenhagen, argues that “we have to adapt our culture to the inevitable presence of modern technology. [. . .] We will simply have to assume that people can change and restrict ourselves to looking at their most recent behavior and opinions.”¹²¹ According to Danah Boyd, research fellow at the Harvard Berkman Center for Internet and Society, “People, particularly younger people, are going to come up with coping mechanisms. That’s going to be the shift, not any intervention by a governmental or technological body.”¹²² Jeffrey Rosen argues, “[T]he most practical solution to the problem of digital forgetting . . . is to create new norms of atonement and forgiveness.”¹²³ Essentially these scholars argue that we will all begin to accept seeing previously closeted skeletons revealed digitally and become capable of ignoring them or judge them less harshly.

Authors and commentators question the success of relying on social adaptation to preserve forgiveness in the age where it is impossible to forget. Viktor Mayer-Schönberger appreciates these ideas, but argues reliance on norms will take too long to avoid significant social damage or is simply an attempt at unattainable social changes.¹²⁴ Philosophy professor Jeffrey Reiman rebuts challenges of social adaptation as they relate to privacy by explaining that “[e]ven if people should ideally be able to withstand social pressure in the form of stigmatization or ostracism, it remains unjust that they should suffer these painful fates simply for acting in unpopular or unconventional ways.”¹²⁵ Ruth Gavison also refutes these arguments, noting that “the absence of privacy may mean total destruction of the lives of individuals condemned by norms with only

omitted) (quoting and citing Hiroko Tabuchi, *Facebook Wins Relatively Few Friends in Japan*, N.Y. TIMES, Jan. 10, 2011, at B1, who finds that in a “survey of 2,130 Japanese mobile Web users . . . , 89 percent of respondents said they were reluctant to disclose their real names on the Web”).

121. MAYER-SCHÖNBERGER, *supra* note 64, at 154 (alteration in original) (quoting Julian Togelius, SLASHDOT (May 10, 2007, 9:12 AM), <http://yro.slashdot.org/comments.pl?sid=234167&cid=19065957>).

122. Jessica Winter, *The Advantages of Amnesia*, BOSTON.COM (Sept. 23, 2007), http://www.boston.com/news/education/higher/articles/2007/09/23/the_advantages_of_amnesia/?page=full (quoting Danah Boyd).

123. Rosen, *supra* note 5, at 354.

124. MAYER-SCHÖNBERGER, *supra* note 64, at 155.

125. Jeffrey H. Reiman, *Driving to the Panopticon: A Philosophical Exploration of the Risks to Privacy Posed by the Highway Technology of the Future*, 11 SANTA CLARA COMPUTER & HIGH TECH. L.J. 27, 36 (1995).

questionable benefit to society.”¹²⁶

Those who are wronged “experience powerful, gut-level impulses toward vengeance,” impulses that must be tempered to make way for forgiveness.¹²⁷ However, the human memory and its ability to forget may not be susceptible to alteration. The brain’s management of information is a result of evolution over long periods of time as it adapts to the context and environments in which it is processing.¹²⁸ This view is shared by many leading psychologists, including Harvard University professor David Schacter who agrees that memory and forgetting mechanisms are deeply embedded in brain functionality.¹²⁹

Bad events experienced by individuals have stronger impacts on memory, emotion, and behavior than good events.¹³⁰ Negative impressions and stereotypes are “quicker to form and more resistant to disconfirmation” than positive ones.¹³¹ The brain reacts more strongly to stimuli it deems negative; a reaction termed “negativity bias.”¹³² This is bolstered by behavioral research. For example, Ph.D. candidate Laura Brandimarte at Carnegie Mellon University measured how people discount information with negative and positive valence.¹³³ These experiments support the conclusion that bad information is discounted less and has longer lasting effects than good information.¹³⁴

Markets also have limitations for addressing a society that is incapable of forgetting. Certainly, reputation systems¹³⁵ like those for sellers on eBay and Amazon allow for reputational cure by performing a large number of trust-affirming transactions, making the

126. Gavison, *supra* note 90, at 453.

127. Rusbult et al., *supra* note 39, at 187.

128. MAYER-SCHÖNBERGER, *supra* note 64, at 155.

129. *Id.*

130. Roy F. Baumeister et al., *Bad Is Stronger Than Good*, 5 REV. GEN. PSYCHOL. 323, 323 (2001).

131. *Id.*

132. Hara Estroff Marano, *Our Brain’s Negative Bias*, PSYCHOL. TODAY (June 20, 2003), <http://www.psychologytoday.com/articles/200306/our-brains-negative-bias>.

133. See Laura Brandimarte, *Discounting the Past: Bad Weighs Heavier Than Good* (H. John Heinz III Coll.–Sch. of Pub. Policy and Mgmt., Carnegie Mellon Univ., Second Research Paper, drft. 2010), available at <http://heinz.cmu.edu/research/384full.pdf> (addressing how information related to past events and retrieved today is discounted and evaluated by the reader).

134. *Id.* at Part VI, para. 1.

135. Reputation systems compute a reputation score for a set of objects based on opinions expressed by others on the object. Kristiina Karvonen et al., *Visual Nudges for Enhancing the Use and Produce of Reputation Information*, 612 CEUR WORKSHOP PROCEEDINGS 1, 1 (2010), available at <http://ceur-ws.org/Vol-612/paper1.pdf>.

poor review less representative of the seller's commercial conduct. The equivalent solution for personal reputation is to try to get negative information pushed off the first few pages of search results by bombarding the Internet with positive content. Those suffering from negative online content can and do hire reputation management companies, presenting positive information about the client as opposed to presenting the confidences and character testimony of others.¹³⁶ These services game the system and are only available to those that can afford them, targeting doctors, lawyers, and companies that have received negative comments online. Relying on the market, however, runs the risk of endangering consumers because it allows for those subjects whose information is the socially vital (i.e., politicians and professional service providers) to be hidden.¹³⁷ By allowing the market to effectively suppress speech to the last few pages of a search result, censorship is administered without any oversight or safeguards. This type of manipulation may also further victimize those that have been harmed by making them feel as though the subject suffered no social ramifications because he or she could pay to avoid them. Finally, the market ignores privacy as a right, only providing forgetting services to those that can afford it and those comfortable with a large online presence.

The above mechanisms are simply ill-equipped to handle forgiveness if the Internet Age continues its pervasive unforgetting. As we outsource our memories to computers, our lives are captured in incredibly minute and major ways.¹³⁸ This experience can lead to a variety of tangible, dignitary harms.¹³⁹ As expressed above, allowing privacy rights to be determined by preference exposes them to extinction and inappropriately characterizes their role in society.

III. FORGIVENESS AND THE LAW

As established in Part I, forgiveness plays an important role in the development of individual autonomy, and as a social value should not be discarded lightly. Basic American values and ideas of fairness

136. See, e.g., *A Bad Online Reputation Could Cost You the Election*, REPUTATION.COM, <http://www.reputation.com/reputationwatch/articles/a-bad-online-reputation-could-cost-you-the-election> (last visited Sep. 19, 2012).

137. See generally DAVID BRIN, *THE TRANSPARENT SOCIETY: WILL TECHNOLOGY FORCE US TO CHOOSE BETWEEN PRIVACY AND FREEDOM?* (1998).

138. Hill, *supra* note 62.

139. Rosen, *supra* note 5, at 345.

stemming from pioneer histories, including allowing individuals to start afresh or wipe the slate clean, are in stark contrast with existing data production, collection, retention, and retrieval practices.¹⁴⁰ The authors encourage an approach to privacy that recognizes the value of forgiveness to individuals and to society as a whole.¹⁴¹

The protection of one's personal information privacy is a fundamental right in the European Union.¹⁴² Without such a label in the United States, information privacy has been regulated in a piecemeal fashion by states, agencies, courts, and lawmakers. As law professor Samantha Barbas notes, "At any given time, a society calls on privacy law to do certain kinds of work—to validate particular social structures, practices, and ethics."¹⁴³ We propose to call on privacy law to validate the important role forgetting plays in the value of forgiveness, and to do so in a manner that respects and references existing legal regimes in this country.

Research establishes that forgiveness promotes important aspects of individual and social well-being and independence.¹⁴⁴ The authors define forgiveness broadly—encompassing notions of allowing the wrongdoer and victim to move on, providing a clean slate, promoting closure, and fostering a productive reintroduction to society. While not featured prominently in the U.S. legal system, forgiveness and forgetting are important elements of our cultural identity, and appear to varying degrees in different contexts.¹⁴⁵ The laws demonstrate that the U.S. is prepared to offer remedies of forgiving and forgetting when the benefits to individuals and to society outweigh the likely harms.¹⁴⁶ A survey of these laws, and the individual and social

140. See Jean-Francois Blanchette & Deborah G. Johnson, *Data Retention and the Panoptic Society: The Social Benefits of Forgetfulness*, 18 INFO. SOC'Y 33, 35 (2002).

The idea of "starting over" or moving to a new frontier is a powerful concept in American culture. The beliefs that once a debt has been paid to society it is forgotten and that people can change are important American traditions. Americans pride themselves on looking at what a person is today rather than what he may have been in the past.

Id. (quoting GARY T. MARX, UNDERCOVER: POLICE SURVEILLANCE IN AMERICA 223 (1988)).

141. *Id.* at 36.

142. Charter of Fundamental Rights of the European Union, art. 8, 2000 O.J. (C 364) 1, available at http://www.europarl.europa.eu/charter/pdf/text_en.pdf.

143. Samantha Barbas, *The Death of the Public Disclosure Tort: A Historical Perspective*, 22 YALE J.L. & HUMAN. 171, 173 (2010).

144. See generally HANDBOOK OF FORGIVENESS, *supra* note 22.

145. Blanchette & Johnson, *supra* note 140, at 35-40.

146. *Id.*

benefits they seek to foster, informs and supports the exercise of imagining how forgiveness would most appropriately be incorporated into U.S. privacy law. This section begins with a survey of the U.S. legal approach to forgiveness and an analysis of the rare circumstances under which individual and social benefits have compelled us to legally forgive and forget in two key contexts: (a) restoration (financial, criminal, and immunity from suit); and (b) protection from the disclosure of information. We then employ thematic network analysis to extract overlapping themes to inform the development of a U.S. approach to oblivion.

A. Restoration

Restoration involves recognition of the social value of forgiveness and the ways in which the legal system can encourage forgetting.¹⁴⁷ It is a form of rebirth—a process that allows individuals to begin anew, unshackled by stigma and other impediments to being productive members of society.¹⁴⁸ In the United States, restoration is not taken lightly, and occurs as much for the benefit of society as a whole as it does for the individual.¹⁴⁹ This section explores the application of both financial and criminal restoration in U.S. law. These laws embody the value of forgiveness and provide for restoration in a variety of ways, permitting individuals to lessen the permanence of certain scarlet letters they may bear. “The restoration process may be gradual, just as the dialogue that leads to apology and forgiveness may gradually build mutual trust and understanding.”¹⁵⁰ Our document selection process included any legal mechanism that promotes moving on from past events or interactions toward a more productive lifestyle. The following describe themes extracted from the U.S. forgiveness laws.

1. Financial Restoration

American essayist, lecturer, and poet Ralph Waldo Emerson wrote, “A man in debt is so far a slave”¹⁵¹ In America, law offers financial forgiveness through bankruptcy—which is considered a “privilege offered to [those] who genuinely need the opportunity to

147. Bibas, *supra* note 51, at 341-42.

148. *Id.*

149. *Id.*

150. *Id.* at 342.

151. RALPH WALDO EMERSON, *THE CONDUCT OF LIFE* 90 (rev. ed., Riverside Press 1892).

start over.”¹⁵² A central purpose of the Bankruptcy Code is to allow for rebirth, “to provide a procedure by which certain insolvent debtors can reorder their affairs, make peace with their creditors, and enjoy ‘a new opportunity in life with a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.’”¹⁵³

However, while the history of bankruptcy law reveals a concern for the debtor, it is also clear that the law developed for the benefit of the creditor (and society) as well.

The literature on the history of bankruptcy law . . . [describes] the tension between individual and social interests which was finally (and perhaps, only) resolved when there was a coming together of *institutional interests* (creditors’ interest in a noncompetitive way to obtain whatever they could), *individual interests* in being able to start afresh (having their mistakes forgiven and forgotten), and *social interests* (in responding to major economic crises and getting entrepreneurs back into the economy).¹⁵⁴

Bankruptcy law offers debtors a fresh start through the forgiveness of debts, as well as means of combating stigma.

a. *Forgiving Debt*

The value of forgiveness is embodied in the Bankruptcy Code’s discharge provisions, which “were designed to assist a financially distressed debtor to receive a fresh start in life unencumbered from the financial vicissitudes of the debtor’s past,”¹⁵⁵ and relieved of most pre-petition liabilities.¹⁵⁶ Generally, courts are required to grant a debtor a discharge of debts unless an exception applies.¹⁵⁷ After a debtor receives a discharge, a creditor cannot seek to recover a discharged debt from the debtor¹⁵⁸ and the discharge operates to permanently stay any attempt to hold the debtor personally liable for

152. *E.g.*, *United States v. Thomas*, 342 B.R. 758, 762 (Bankr. S.D. Tex. 2005).

153. *Grogan v. Garner*, 498 U.S. 279, 286 (1991) (quoting *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934)).

154. *Blanchette & Johnson*, *supra* note 140, at 36-37 (emphasis added).

155. *In re Vina*, 283 B.R. 803, 807 (Bankr. M.D. Fla. 2002); *see Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 363-64 (2006).

156. *In re Strada Design Assocs., Inc.*, 326 B.R. 229, 240 (Bankr. S.D.N.Y. 2005); *see In re Detrano*, 326 F.3d 319, 322 (2d Cir. 2003).

157. 11 U.S.C. § 727(a) (2011). This is called “the heart of the fresh start provisions of the bankruptcy law.” H.R. REP. NO. 95-595, at 384 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6340, 1977 WL 9628.

158. 11 U.S.C. § 524(a)(2) (2011); *e.g.*, *DuBois v. Ford Motor Credit Co.*, 276 F.3d 1019, 1022 (8th Cir. 2002).

the discharged debts.¹⁵⁹

Federally insured student loan debt is subject to unique discharge treatment under the Code. Bankruptcy courts may discharge student loan debt if they find it is an “undue hardship” on the debtor or the debtor’s dependents to require payment.¹⁶⁰ Courts have exercised wide discretion in determining when repayment of the loan will impose an undue hardship. Most circuits that have addressed the issue of undue hardship have followed the test set forth in *Brunner v. New York State Higher Education Services*.¹⁶¹ Under the *Brunner* test, the debtor must show

(1) that the debtor cannot maintain, based on current income and expenses, a “minimal” standard of living for herself and her dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) that the debtor has made good faith efforts to repay the loans.¹⁶²

The *Brunner* test emphasizes the persistence of the disability, difficulty, or hardship. By requiring a showing of undue hardship, the Commission on the Bankruptcy Laws “envisioned a determination of whether the amount and reliability of income and other wealth which the debtor could reasonably be expected to receive in the future could maintain the debtor and his or her dependents at a minimal standard of living as well as pay off the student loans.”¹⁶³ When debtors cannot reasonably be expected to make student loan payments without falling below a minimum standard of living, the demand constitutes an “undue hardship.”¹⁶⁴ Some courts go beyond the financial impact of student loan debt—considering nonpecuniary effects when determining whether undue hardship will be incurred.¹⁶⁵ For example,

159. 11 U.S.C. § 524(a)(2); e.g., *In re Rosenfeld*, 23 F.3d 833, 836 (4th Cir. 1994).

160. 11 U.S.C. § 523(a)(8) (2011); e.g., *United Student Aid Funds, Inc. v. Espinosa*, 130 S.Ct. 1367, 1371 (2010).

161. *Brunner v. N.Y. State Higher Educ. Servs. Corp.*, 831 F.2d 395 (2d Cir. 1987) (per curiam).

162. *Id.* at 396.

163. *In re Nys*, 446 F.3d 938, 944 (9th Cir. 2006) (quoting *In re Brunner*, 46 B.R. 752, 754 (Bankr. S.D.N.Y. 1985)).

164. *Id.*

165. E.g., *In re Reynolds*, 425 F.3d 526, 533–34 (8th Cir. 2005) (“[E]xcepting the student loans from the discharge would cause an undue hardship to [debtor] because of the effect of the debts on [debtor’s] mental health.”).

hardship discharge has been permitted, in part, based on the psychological toll of unpaid student loan debt,¹⁶⁶ the strain such debt can have on a debtor's marriage,¹⁶⁷ and threat such debt potentially poses to a debtor's sobriety and mental stability.¹⁶⁸

The "fresh start" principle underlying bankruptcy law and policy "captures the notion that substantive relief should be afforded in the form of forgiveness of existing debt, with relinquishment by the debtor of either existing nonexempt assets or a portion of future income, in order to restore the debtor to economic productivity."¹⁶⁹ The willingness to forgive certain debts, as evidenced by the law of student loan debt discharge, is determined by considering the burdens imposed if forgiveness is withheld.

b. Combating Stigma

As noted previously, one of the main goals of U.S. bankruptcy law is to permit honest debtors to start fresh, freed from the burdens resulting from economic misfortune.¹⁷⁰ One of the most serious obstacles threatening the desired "fresh start" is not the debtor's legal obligations to creditors, which can easily be canceled by the operation of the bankruptcy law, but rather the social stigma which commonly attaches to those who have sought the protections of bankruptcy.¹⁷¹ Many people and institutions, regarding a debtor in bankruptcy as demonstrably improvident or perhaps even deceitful, may refuse to deal with the debtor in any regard, denying the debtor not only credit, but also essential services or the chance to earn a living.¹⁷²

To address these concerns, the Bankruptcy Code limits the effect

166. *E.g.*, *In re Larson*, 426 B.R. 782, 794 (Bankr. N.D. Ill. 2010).

167. *E.g.*, *In re Walker*, 406 B.R. 840, 865-66 (Bankr. D. Minn. 2009), *aff'd*, 427 B.R. 471 (B.A.P. 8th Cir. 2010), *aff'd*, 650 F.3d 1227 (8th Cir. 2011).

168. *In re Brooks*, 406 B.R. 382, 391-92 (Bankr. D. Minn. 2009).

169. Rafael I. Pardo & Michelle R. Lacey, *Undue Hardship in the Bankruptcy Courts: An Empirical Assessment of the Discharge of Educational Debt*, 74 U. CIN. L. REV. 405, 414 (2005).

170. *E.g.*, *Grogan v. Garner*, 498 U.S. 287, 286 (1991).

171. *See, e.g.*, Derek S. Witte, *The Bear Hug That Is Crushing Debt-Burdened Americans: Why Overzealous Regulation of the Debt-Settlement Industry Ultimately Harms the Consumers It Means to Protect*, 14 TEX. REV. L. & POL. 277, 282-83 (2010) ("[M]any individuals who likely could qualify for post-reform individual bankruptcy still refuse to do so because of the social stigma attached to bankruptcy.").

172. *See generally* John E. Theuman, Annotation, *Protection of Debtor from Acts of Discrimination by Private Entity Under § 525(b) of Bankruptcy Code of 1978 (11 U.S.C.A. § 525(b))*, 105 A.L.R. FED. 555 (1991).

this information can have on the individual's life. It bars the government from revoking or suspending a permit or license solely because the licensee is a Chapter 11 debtor, is insolvent, or has not paid a debt dischargeable under the Code.¹⁷³ Additionally, it prohibits the government from denying employment to, terminating the employment of, or discriminating with respect to employment against a person who has declared bankruptcy.¹⁷⁴ Although the Code does not prevent private employers from refusing to hire an individual based on his or her status as a bankruptcy debtor,¹⁷⁵ it does prohibit private employers firing based on that status.¹⁷⁶ Additionally, the Code prohibits private employers from engaging in discriminating employment practices based on one's status as a bankruptcy debtor, such as in promotions, demotions, hours, pay, and so forth.¹⁷⁷

The purpose of the antidiscrimination provisions of the Bankruptcy Code is to protect a debtor's means of earning a living or pursuing a livelihood.¹⁷⁸ These provisions help achieve one of the underlying purposes of the Code bestowing upon debtors "a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt."¹⁷⁹

2. Criminal Restoration

The stigma of bankruptcy can pale in comparison to that of a criminal conviction. Individuals who violate the law and are judged offenders are punished in part through the loss of certain basic civil rights and social standing. Apart from impairment of self-esteem and informal social stigma, a criminal conviction negatively affects an individual's legal status.¹⁸⁰ For example, ex-offenders may be

173. 11 U.S.C. § 525(a) (2011); *e.g.*, *In re Prof'l Sales Corp.*, 56 B.R. 753, 760 n.4 (N.D. Ill. 1985).

174. 11 U.S.C. § 525(a).

175. *See, e.g.*, *Myers v. TooJay's Mgmt. Corp.*, 640 F.3d 1278, 1283 (11th Cir. 2011); *In re Burnett*, 635 F.3d 169, 172-73 (5th Cir. 2011); *Rea v. Federated Investors*, 627 F.3d 937, 940-41 (3d Cir. 2010).

176. 11 U.S.C. § 525(b) (2011).

177. *Id.*; *Myers*, 640 F.3d at 1285-86.

178. *E.g.*, *In re Elsinore Shore Assocs.*, 66 B.R. 708, 720 (Bankr. D.N.J. 1986).

179. *Perez v. Campbell*, 402 U.S. 637, 648 (1971) (quoting *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934)).

180. UNIF. COLLATERAL CONSEQUENCES OF CONVICTION ACT, Prefatory Note, at 1-2 (amended 2010) [hereinafter UCCCA], available at http://www.uniformlaws.org/shared/docs/collateral_consequences/uccca_final_10.pdf.

ineligible to vote¹⁸¹ or hold public office,¹⁸² and federal law bars many persons with certain convictions from possessing firearms,¹⁸³ serving in the military,¹⁸⁴ and on both civil and criminal juries.¹⁸⁵

“The point of punishment is not to ostracize criminals into a permanent underclass, . . . [but to] exact appropriate retribution and prepare offenders to return to the fold.”¹⁸⁶ Forgiving and reintegrating offenders is valuable both symbolically and practically—it incentivizes reform, highlights a law-abiding way of life, and reflects “the humaneness of a society that, having denounced and punished, can rejoice over the return of its prodigal sons.”¹⁸⁷ The following sections explore several ways criminal law in the United States incorporates forgiveness and why it does so.

a. Restoration of Rights

For the first 150 years of the existence of the United States, the rights and reputations of criminal offenders were restored through the grant of executive pardons.¹⁸⁸ A pardon has been defined as a declaration on record that a person is thereafter relieved from the legal consequences of a specific crime.¹⁸⁹ It is also commonly referred to as “an act of grace, proceeding from the power intrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he [or she] has committed.”¹⁹⁰

A pardon serves as forgiveness, release, remission;

181. *Felon Voting Rights*, NAT'L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/legislatures-elections/elections/felon-voting-rights.aspx> (last updated Mar. 21, 2010); see, e.g., KY. CONST. § 145(1) (ex-felons permanently lose their right to vote absent pardon from the governor).

182. See, e.g., *State ex rel. Olson v. Langer*, 256 N.W. 377 (N.D. 1934).

183. 18 U.S.C. § 922(g)(1) (2011).

184. 10 U.S.C. § 504(a) (2011).

185. See generally Brian C. Kalt, *The Exclusion of Felons from Jury Service*, 53 AM. U. L. REV. 65 (2003).

186. Bibas, *supra* note 51, at 342.

187. *Id.*

188. Margaret Colgate Love, *Paying Their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act*, 54 HOW. L.J. 753, 764 (2011).

189. See *Biddle v. Perovich*, 274 U.S. 480, 486 (1927) (a pardon, when granted, is “the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed”); *Whittington v. Stevens*, 73 So. 2d 137, 139 (Miss. 1954); *State ex rel. Coole v. Sims*, 58 S.E. 2d 784, 789-90 (W. Va. 1950).

190. *United States v. Wilson*, 32 U.S. 150, 160 (1833); *Pa. Prison Soc’y. v. Cortes*, 622 F.3d 215, 241 (3d Cir. 2010).

“[f]orgiveness for an offense, whether it be one for which the person committing it is liable in law or otherwise.”¹⁹¹ The Constitution confers the power to grant pardons and reprieves on the President,¹⁹² and in most states similar power is vested in the executive branch.¹⁹³ The power to pardon, except as limited by the constitutions, extends to every offense against the government known to the law,¹⁹⁴ but is limited to offenses against the state as such.¹⁹⁵

According to the Supreme Court, a pardon “releases the offender from all disabilities imposed by the offence, and restores to him all his civil rights. In contemplation of law, it so far blots out the offence, that afterwards it cannot be imputed to him to prevent the assertion of his legal rights.”¹⁹⁶ Generally, a full pardon absolves one from all legal consequences of his or her crime.¹⁹⁷ When granted after conviction for a crime, it removes the penalties and disabilities which ordinarily follow from conviction.¹⁹⁸ For the vast majority of adult criminal offenders, a pardon offers the only way of completely avoiding or mitigating the collateral consequences of conviction.¹⁹⁹

Pardons have a broad restorative effect; they both relieve legal disabilities and signal rehabilitation of an offender.²⁰⁰ A pardon gives an offender “a new credit and capacity, and rehabilitates him to that extent in his former position.”²⁰¹ It is “the ‘gold standard’ for confirming good character, so that an employer, landlord, or lending

191. *Ex parte Wells*, 59 U.S. 307, 309 (1855); *United States v. Garwood*, 20 M.J. 148, 153 (C.M.A. 1985).

192. U.S. CONST. art. II, § 2, cl. 1 (conferring upon the President the power to grant pardons for offenses against the United States, except in cases of impeachment).

193. *See, e.g.*, *Glock v. Moore*, 776 So. 2d 243, 253 (Fla. 2001); *State v. Rafuse*, 726 A.2d 18, 19 (Vt. 1998); *State v. Horn*, 594 N.W.2d 772, 777 (Wis. 1999).

194. *Brown v. Walker*, 161 U.S. 591, 601 (1896); *Aguilera-Montero v. Mukasey*, 548 F.3d 1248, 1255 n.8 (9th Cir. 2008).

195. *Arnett v. Stumbo*, 153 S.W.2d 889, 891 (Ky. 1941); *Allen v. McGuire*, 57 So. 217, 217 (Miss. 1912).

196. *Knote v. United States*, 95 U.S. 149, 153 (1877).

197. *Pa. Prison Soc’y. v. Cortes*, 622 F.3d 215, 222 (3d Cir. 2010) (quoting *Commonwealth ex rel. Banks v. Cain*, 28 A.2d 897, 899-900 (Pa. 1942)); *In re Fredericks*, 315 P.2d 1010, 1013 (Or. 1957) (en banc).

198. *Ill. Cent. R.R. v. Bosworth*, 133 U.S. 92, 103 (1890); *Harbert v. Deukmejian*, 173 Cal. Rptr. 89, 91 (Ct. App. 1981).

199. *See MARGARET COLGATE LOVE, RELIEF FROM THE COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION: A STATE-BY-STATE RESOURCE GUIDE* 39-61 (2006).

200. Margaret Colgate Love, *Starting Over with a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code*, 30 FORDHAM URB. L.J. 1705, 1720 (2003).

201. *Knote*, 95 U.S. at 153.

institution will have some level of comfort in dealing with an individual who has been deemed worthy of this high-level official forgiveness.”²⁰²

In addition to an executive pardon, state statutes provide for automatic restoration of various civil rights upon completion of a criminal sentence.²⁰³ Our society also grants an ex-offender restoration of his or her rights through administrative procedures.²⁰⁴ Georgia’s Board of Pardons and Paroles may issue a certificate to an ex-convict if she meets the standard of five years of law-abiding conduct.²⁰⁵ The certificate restores her basic civil rights as well as lifts licensing restrictions imposed by state law.²⁰⁶ Other states have similar administrative procedures in place. Such schemes often certify the bearer’s successful avoidance of criminal activity.²⁰⁷ The impetus for these laws is society’s view is that once an ex-convict’s debt to society is paid, he or she deserves to rejoin society and enjoy the same basic rights as other law-abiding citizens.²⁰⁸

b. Addressing Collateral Consequences

Pardons and laws of automatic restoration have been criticized as having limited value. Automatic restoration does not provide confirmation of good character in a way that overcomes societal prejudice against criminal offenders, which may linger long after the penalties prescribed by law have been fully satisfied.²⁰⁹ Pardons have been considered an “inherently unreliable remedy, especially for those with limited means and few connections.”²¹⁰

202. Love, *supra* note 188, at 775-76.

203. Some jurisdictions essentially permit automatic restoration of all rights upon the completion of an ex-felon’s sentence. *See, e.g.*, MONT. CONST. art. II, § 28(2) (“Full rights are restored by termination of state supervision for any offense against the state.”). Others have rights-specific rules of automatic restoration. For example, offenders automatically regain the right to vote upon discharge from a felony sentence in only twenty-four states. Love, *supra* note 200, at 1718 n.56.

204. Love, *supra* note 200, at 1720.

205. *Id.*

206. *Id.*

207. Love, *supra* note 188, at 778.

208. *See, e.g., Minutes of the Meeting of the Assembly Committee on Judiciary*, 71st Sess. (Nv. 2001) (statement of Assemblywoman Giunchigliani), available at <http://www.leg.state.nv.us/71st/Minutes/Assembly/JUD/Final/650.html>; *see also* N.Y. UNCONSOL. LAW § 1.05(6) (McKinney 2012) (requiring judges presiding at criminal sentencing to consider what sentence will best help promote the defendant’s rehabilitation).

209. *See* Love, *supra* note 200, at 1708.

210. *Id.* at 1708-09.

In the 1950s utilitarian law reformers set out to build a legal framework to limit collateral legal penalties. They sought to ease efforts to re-establish the names of those convicted of crimes in their communities.²¹¹ They believed that “[a] theory of law which withholds the finality of forgiveness after punishment is ended is as indefensible in logic as it is on moral grounds.”²¹² The restoration of rights would have limited, unacceptable impact unless the “subtle punishment represented by societal prejudice” is also addressed.²¹³

However, beginning in 1984 and persisting for at least twenty years, “the official position of the federal government was that criminals were to be labeled and segregated for the protection of society, not reclaimed and forgiven.”²¹⁴ In 2003, the American Bar Association (ABA) “took the first step since the 1970s to address collateral consequences in a coherent and comprehensive fashion.”²¹⁵ The *ABA Criminal Justice Standards on Collateral Sanctions and Discretionary Disqualification*²¹⁶ conceive of collateral consequences as closer to criminal punishment than to civil regulation. In 2009, the Uniform Law Commission (ULC)²¹⁷ approved the Uniform Collateral Consequences of Convictions Act (UCCCA), which put the *ABA Criminal Justice Standards on Collateral Sanctions and Discretionary Disqualification* into language for state legislatures to utilize and establish a degree of national uniformity.²¹⁸

The UCCCA defines “collateral consequences” as including both “collateral sanctions” and “disqualifications.”²¹⁹ A collateral sanction is a “penalty, disability, or disadvantage” imposed by operation of law as a result of an individual’s status as a convicted individual.²²⁰ A

211. *Id.* at 1707.

212. *Id.* at 1705 n.1 (quoting AARON NUSSBAUM, *FIRST OFFENDERS, A SECOND CHANCE* 24 (1956)).

213. *Id.* at 1707-08.

214. Love, *supra* note 188, at 770.

215. *Id.* at 780.

216. ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS (2004).

217. The Uniform Law Commission was originally created to determine areas of state law in which uniformity is desirable and draft uniform and model acts for consideration by the states. See *About the ULC*, UNIF. LAW COMM’N, <http://www.uniformlaws.org/Narrative.aspx?title=About%20the%20ULC> (last visited Oct. 6, 2012).

218. Love, *supra* note 188, at 783-84.

219. UCCCA § 2(1).

220. *Id.* § 2(2).

disqualification is “a penalty, disability, or disadvantage . . . that an administrative agency, governmental official, or court in a civil proceeding is authorized, but not required, to impose on an individual on grounds relating to the individual’s conviction of an offense.”²²¹ The basic approach to relief under the UCCCA first eliminates legal barriers (“collateral sanctions”) and then guides discretion.

The relief provisions of the UCCCA provide immediate relief from specific status-generated legal barriers that might impede a convicted person’s ability to live in the community, and more complete relief from all such barriers after a period of law-abiding conduct.²²² Importantly, the UCCCA also establishes parameters to guide a discretionary decision to disqualify where a collateral sanction either does not apply or has been relieved.²²³

Section 10 of the UCCCA allows an individual to obtain relief as early as sentencing from a specific collateral sanction, if he can show that relief would “materially assist” in obtaining employment, education, housing, public benefits or occupational licensing, and that he has “substantial need” for the benefit to live a law-abiding life.²²⁴ Application for an “order of limited relief” may be made to the sentencing court as part of the guilty plea process or after a jury’s guilty verdict, until the close of the proceeding at which sentencing is imposed.²²⁵

Relief from all collateral sanctions would be available to an individual after a period of law-abiding conduct under Section 11 of the UCCCA, with five years being the suggested term.²²⁶ This more comprehensive relief, called a “certificate of restoration of rights,” may only be obtained from a designated board or agency, which is required to find that the individual is lawfully employed or otherwise has a lawful source of income, has been involved in no subsequent criminal conduct, and poses no danger to the public.²²⁷

No offense or offender is disqualified from seeking relief under either Section 10 or Section 11. Issuance of an order under Section 10 or a certificate under Section 11 converts an automatic collateral

221. *Id.* § 2(5).

222. *Id.* §§ 10-11; *see also id.* Prefatory Note, at 5-6.

223. *Id.* § 10; *see also id.* Prefatory Note, at 5.

224. *Id.* § 10(b) & cmt. at 29.

225. *Id.* § 10 & cmt. at 28.

226. *Id.* § 11(a).

227. *Id.* § 11 & cmt. at 31.

sanction into a discretionary “disqualification.”²²⁸ At that point, the discretionary provisions kick in to guide any case-specific decision to grant or deny a benefit or opportunity on grounds relating to an individual’s conviction. The discretionary provisions requires an “individualized assessment” before a decision-maker²²⁹ may deny a benefit or opportunity, and the “particular facts and circumstances involved in the offense, and the essential elements of the offense” may be considered only if they are “substantially related to the benefit or opportunity at issue.”²³⁰

Uniformity of the collateral consequences contained in state statutes and administrative regulations is desirable and would be furthered by adoption of the UCCCA or a similar act. While model or uniform legislation such as the UCCCA does not carry the force of law, its incorporation of forgiveness is noteworthy; uniform acts approved by the ULC have been, and continue to be, tremendously important in shaping the development of law across the country.²³¹

3. Immunity from Suit

If a criminal is able to avoid legal punishment for a long period of time, enforcement of an old claim can both halt rehabilitation and do a disservice to the community.²³² For those who view the purpose of the criminal justice system as rehabilitating wrongdoers, forgiveness can become easier after the passage of time, or after self-reform. Cornelius Pytsch, a California coal miner who had been orphaned at five, escaped from jail (where he was serving a sentence for statutory rape).²³³ He started over in Northlake, Illinois as Frank Raboski and became a diesel mechanic, president of the Northlake

228. *Id.* § 10 & cmt. at 28.

229. *Id.* § 8. The definition of “decision-maker” limits the application of the discretionary provisions to opportunities and benefits controlled by state actors, potentially including government contractors. *See id.* § 2(4). However, Sections 10 and 11 are not so limited by their terms, so that any collateral sanction that applied to a private entity (such as a nursing home or school) could be relieved under either of these sections. *Id.* § 10 & cmt. at 28-29.

230. *Id.* § 8.

231. One state (North Carolina) has adopted the UCCCA, and five states are currently considering adoption (Minnesota, New York, Vermont, West Virginia, and Wisconsin); *see Collateral Consequences of Conviction Act*, UNIF. LAW COMM’N, <http://www.uniformlaws.org/Act.aspx?title=Collateral%20Consequences%20of%20Conviction%20Act> (last visited Sep. 19, 2012).

232. Note, *The Statute of Limitations in Criminal Law: A Penetrable Barrier to Prosecution*, 102 U. PA. L. REV. 630, 634 (1954) [hereinafter *Limitations in Criminal Law*].

233. *Crime: The Good Citizen*, TIME, May 11, 1953, at 24.

Home Owners Association, and treasurer of the Northlake Crime Commission (which he co-founded to “halt an invasion of Chicago hoodlums”). Almost twenty years later, in 1953, his true identity was discovered. California was ready to demand his return to complete his sentence. His neighbors in Northlake, including the Chief of Police, pledged their homes to raise Raboski’s \$15,000 bail. They rallied behind him, appearing before the governor on his behalf.²³⁴ The Governor of Illinois was persuaded, and personally called Raboski to say that he would not be extradited.²³⁵ As in Raboski’s case, the pursuit of dormant claims can run contrary to notions of justice.

Statutes of limitations, barring suits after the passage of time, were established long ago by Roman law.²³⁶ Limitations on personal actions were incorporated in the common law with the Limitation Act of 1623.²³⁷ By 1652, Massachusetts law included a general limitation period of one year on the prosecution of misdemeanors.²³⁸ Similar statutes had been adopted throughout the federal system by the end of the eighteenth century.²³⁹

Today, statutes of limitations bar both civil and criminal claims in the U.S. In the criminal context, periods of limitation vary from state to state, and depend on the severity of the crime.²⁴⁰ Typically felonies have longer periods than misdemeanors, and murder and manslaughter are exempted entirely.²⁴¹ As in the criminal system, the precise limitation period varies in the civil context as well. For example, the periods of limitations for personal injury actions are usually two or three years, but can be as long as six years.²⁴²

Courts interpret statutes of limitations liberally.²⁴³ They typically

234. *A Fugitive’s Friends Finally Win His Freedom*, LIFE, June 22, 1953, at 47.

235. *Id.*

236. *Developments in the Law: Statutes of Limitations*, 63 HARV. L. REV. 1177, 1177 (1950) [hereinafter *Developments in the Law*].

237. *Id.* at 1178.

238. THE COLONIAL LAWS OF MASSACHUSETTS 163 (Rockwell & Churchill 1995) (1889).

239. *Limitations in Criminal Law*, *supra* note 232, at 631-32.

240. DANIEL W. SHUMAN & ALEXANDER MCCALL SMITH, JUSTICE AND THE PROSECUTION OF OLD CRIMES: BALANCING LEGAL, PSYCHOLOGICAL, AND MORAL CONCERNS 56 (2000).

241. *Id.*

242. *Id.* at 63.

243. See *Kavanagh v. Noble*, 332 U.S. 535, 538 (1947) (holding that a two-year rather than four-year period governs income tax refund claims); *United States v. Or. Lumber Co.*, 260 U.S. 290 (1922) (six-year statute of limitations held to apply against the federal government in suit brought six years after government discovered the injury); *Wood v. Carpenter*, 101 U.S. 135

run from the point when an injury is inflicted, but their application is subject to several exceptions, within the broad discretion of the legislature.²⁴⁴ In some cases, they do not begin to run until the point when the offense could “reasonably have been detected.”²⁴⁵ In other cases, concealment can result in the tolling of a statute.²⁴⁶ For example, if a perpetrator takes active steps to conceal his identity, changes residences, or otherwise attempts to escape detection or apprehension, the statute will not run during that period. Similarly, a statute can be tolled during continuing crimes, such as conspiracy.²⁴⁷

With scant legislative history, it is difficult to discern the original motivations for adopting statutes of limitations.²⁴⁸ However, courts have been willing to enforce them even in cases of hardship.²⁴⁹ In so doing, courts describe them as serving a range of purposes. Statutes of limitations encourage the state to punish recent crimes.²⁵⁰ In the criminal context, they are viewed as a means of protecting the accused from the burden of defending against stale charges of misconduct from long ago.²⁵¹ They are “founded upon the liberal theory that prosecutions should not be allowed to ferment endlessly in the files of the government to explode only after witnesses and proofs necessary to the protection of the accused have by sheer lapse of time passed beyond availability.”²⁵² Further, they seek to encourage the

(1879) (statute of limitations commenced running when fraud perpetrated, not when plaintiff learned of it); *Johns v. Evergreen Presbyterian Ministries, Inc.*, 826 F. Supp. 1050, 1056 (E.D. Tex. 1993) (“Statutes of limitations, *being procedural and remedial in nature*, are generally accorded retroactive effect, *unless they are unconstitutionally cast.*”) (quoting *Fust v. Arnar-Stone Laboratories*, 736 F.2d 1098, 1100 (5th Cir. 1984)); *Hazelgrove v. Ford Motor Co.*, 428 F. Supp. 1096, 1098 (E.D. Va. 1977) (stating that “our Court of Appeals has exhibited a consistent tendency to construe the time limitations contained in Title VII in such a way as to effectuate the statute’s broad remedial purposes”); *Lynch v. Am. Motorists Ins. Co.*, 101 F. Supp. 946, 949 (N.D. Tex. 1951) (“The policy that limitation statutes should be relaxed to avoid undue harshness where this can be done consistently with the true reason of such statutes has now been confirmed by legislative act . . .”).

244. See, e.g., *Terry v. Anderson*, 95 U.S. 628, 633 (1877); see generally *Farmers Coop. Co. v. Swift Pork Co.*, 602 F. Supp. 2d 1095 (N.D. Iowa 2009).

245. SHUMAN & SMITH, *supra* note 240, at 59.

246. See, e.g., *Holmberg v. Armbrrecht*, 327 U.S. 392, 397 (1946).

247. SHUMAN & SMITH, *supra* note 240, at 59.

248. *Limitations in Criminal Law*, *supra* note 232, at 632.

249. See, e.g., *Kavanagh v. Noble*, 332 U.S. 535, 538-39 (1947); *Kaltreider Constr., Inc. v. United States*, 303 F.2d 366, 368-69 (3rd Cir. 1962); *Burd v. McCullough*, 217 F.2d 159, 162 (7th Cir. 1954).

250. *United States v. Eliopoulos*, 45 F. Supp. 777, 780-81 (D.N.J. 1942).

251. *Id.*

252. *Id.* at 781.

introduction of fresher and therefore trustworthier evidence in criminal prosecution, rather than “evidence with a probative value which has grown weaker as man’s ability to remember has become impaired.”²⁵³ There are also strong reasons for requiring that civil suits be brought in a timely manner. In this context, statutes of limitations fulfill policies of fairness, repose and certainty.²⁵⁴

Fairness and forgiveness are inherent in the context of statutes of limitations, which are viewed as acts of grace.²⁵⁵ Such statutes reflect the idea that those who have not repeated errors, but rather have self-rehabilitated, should be free from “vexatious fear of prosecution for old crimes.”²⁵⁶ “It is easy to imagine how a revolutionary society eager to overthrow a discredited political system might be attracted by the notion of the fresh start implicit in the concept of limitation.”²⁵⁷

Offenders who have begun a process of rehabilitation, seem to pose less of a threat to society. For them, statutes of limitations can serve as forgiveness and restoration in the form of an assurance that they will not be called into court to account for past offenses, and an incentive for further rehabilitation.²⁵⁸

B. Protection from the Disclosure of Information

Legal forgiveness can be demonstrated through limitations on access to information. It is now surprisingly easy to delve anonymously into other people’s past—the Internet makes available to all arms of government and the general public aggregate public record information about millions of Americans.²⁵⁹ “After the terrorist attacks of 9/11, an entirely new industry devoted to background screening sprang up almost overnight”—an industry that remains essentially unregulated.²⁶⁰ Disseminating criminal and other public records has become a lucrative business—“information brokers and data-mining agencies [have] instant access to thousands of pieces of

253. *Limitations in Criminal Law*, *supra* note 232, at 632.

254. *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 558 (1974).

255. *Limitations in Criminal Law*, *supra* note 232, at 630.

256. *Id.* at 634.

257. SHUMAN & SMITH, *supra* note 240, at 56.

258. *Limitations in Criminal Law*, *supra* note 232, at 634.

259. *See, e.g.*, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NCJ 187669, REPORT OF THE NATIONAL TASK FORCE ON PRIVACY, TECHNOLOGY, AND CRIMINAL JUSTICE INFORMATION 58 (2001).

260. *Love*, *supra* note 188, at 772-73.

criminal record information each day.”²⁶¹ There are hundreds of private companies that hold what was once only held by the state and provide it to those with the incentive to inquire.²⁶²

The incentive to inquire is growing and the dissemination of information—criminal record²⁶³ information in particular—is proving to be quite lucrative. For example, a newspaper called “Busted Locals” publishes the mug shots, names, charges and sometimes addresses of people who have recently been arrested.²⁶⁴ The newspaper simply uses arrest records and mug shots to which the general public already has access.²⁶⁵ The content is successful and the print version sells out within days of appearing on store shelves.²⁶⁶ Bustedmugshots.com claims to hold 5,364,864 arrest records,²⁶⁷ and the Busted Newspaper’s Facebook page has received over 23,200 “likes.”²⁶⁸

With many courts now making their criminal records available online, access to such records “is becoming the norm rather than the exception.”²⁶⁹ As the Uniform Law Commission notes, “Twenty years ago, an applicant might not have been asked for her criminal record when renting an apartment or applying for a job, and it would have been difficult for even an enterprising administrator to find, say, a 15 year old, out-of-state, marijuana offense. Now, gathering this kind of information is cheap, easy and routine.”²⁷⁰

261. Michael H. Jagunic, Note, *The Unified “Sealed” Theory: Updating Ohio’s Record-Sealing Statute for the Twenty-First Century*, 59 CLEV. ST. L. REV. 161, 170-71 (2011) (citing James B. Jacobs, *Mass Incarceration and the Proliferation of Criminal Records*, 3 U. ST. THOMAS L.J. 387, 401 (2006), who notes that “private companies specializing in background checks have the expertise and motivation to copy this information to their own databases”).

262. *Id.* at 170.

263. We use the term “criminal record” to refer to both records of arrest and conviction.

264. See BUSTED LOCALS, <http://bustedlocals.com/advertising> (last visited Oct. 30, 2012) (weekly print newspaper distributed for \$1). Online subscription is also available for \$26 per year. See BUSTED LOCALS, <http://bustedlocals.com/subscribe-today> (last visited Oct. 30, 2012).

265. *Busted! Mission Statement*, BUSTEDMUGSHOTS.COM, <http://www.bustedmugshots.com/mission-statement> (last visited Oct. 30, 2012).

266. *Mug Shot Newspaper Taps Nerve, Sells Well*, KCTV5 KANSAS CITY NEWS (October 26, 2010), <http://www.kctv5.com/story/14794338/mug-shot-newspaper-taps-nerve-sells-well-10-26-2010>.

267. BUSTEDMUGSHOTS.COM, <http://www.bustedmugshots.com> (last visited Oct. 30, 2012).

268. BUSTED NEWSPAPER, <https://www.facebook.com/BustedNewspaper> (last visited Oct. 30, 2012).

269. Michael D. Mayfield, Comment, *Revisiting Expungement: Concealing Information in the Information Age*, 1997 UTAH L. REV. 1057, 1061 (1997).

270. UCCCA, Prefatory Note, at 2; see generally James B. Jacobs, *Mass Incarceration*

1. Criminal Record Disclosure

While criminal conviction records may severely impact numerous facets of an individual's life,²⁷¹ a mere arrest record—even an arrest *not* resulting in conviction—can also have devastating long term effects on the individual.²⁷² To begin, there is an undoubted “social stigma” involved in an arrest record.²⁷³ It is considered “common knowledge that a [person] with an arrest record is much more apt to be subject to police scrutiny—the first to be questioned and the last eliminated as a suspect to an investigation.”²⁷⁴ If the person is subsequently arrested, his or her arrest record “may arise to haunt him in presentence reports, which often include not only prior convictions but also prior arrests.”²⁷⁵ Additionally, prosecutors use prior arrest records to decide to formally charge an accused or allow a juror to sit.²⁷⁶ Records of arrest are used by judges in making decisions as to sentencing, whether to grant bail, or whether to release pending appeal.²⁷⁷

An individual may also suffer economic and personal harms if his or her arrest or conviction record (hereinafter “criminal record”) becomes known to employers, credit agencies, or even neighbors.²⁷⁸ Criminal records can work “as a serious impediment and basis of discrimination in the search of employment, in securing professional,

and the Proliferation of Criminal Records, 3 ST. THOMAS L. REV. 387 (2006).

271. See, e.g., *Journey v. State*, 895 P.2d 955, 959 (Alaska 1995) (“The pernicious effects of criminal records are well documented. Courts, commentators, and legislatures have recognized that a person with a criminal record is often burdened by social stigma, subjected to additional investigation, prejudiced in future criminal proceedings, and discriminated against by prospective employers.”) (footnotes omitted).

272. Jagunic, *supra* note 261, at 162; see also Fruqan Mouzon, *Forgive Us Our Trespasses: The Need for Federal Expungement Legislation*, 39 U. MEM. L. REV. 1, 2 (2008).

273. See *United States v. Dionisio*, 410 U.S. 1, 10 (1973) (noting that a record of arrest is a “record involving social stigma” (quoting *United States v. Doe* (Schwartz), 457 F.2d 895, 898 (2d Cir. 1972))).

274. *Davidson v. Dill*, 503 P.2d 157, 159 (Colo. 1972) (en banc).

275. *Id.* (citing *United States v. Cifarelli*, 401 F.2d 512 (2d Cir. 1968)).

276. *Id.* (citing *Losavio v. Mayber*, 496 P.2d 1032 (Colo. 1972)).

277. E.g., *Russell v. United States*, 402 F.2d 185, 186 (D.C. Cir. 1968) (citing *Rhodes v. United States*, 275 F.2d 78, 82 (4th Cir. 1960)) (record of arrests may be used to determine whether appellant may be released pending appeal); *Cifarelli*, 401 F.2d at 514 (citing *United States v. Doyle*, 348 F.2d 715, 721 (2d Cir. 1965)) (in imposing sentence, trial judge may consider evidence of other crimes for which defendant was not convicted); *Jones v. United States*, 307 F.2d 190, 192 (D.C. Cir. 1962) (pre-sentence report may include, and judge may consider, records of charges not leading to convictions).

278. *Dill*, 503 P.2d at 159.

occupational, or other licenses, and in subsequent relations with the police and the courts.”²⁷⁹ Our legal system attempts to mitigate these attendant consequences in numerous ways.

a. Sealing and Expungement

The most obvious method for mitigating the harsh effects of criminal records is to limit their availability.²⁸⁰ Expungement and record sealing are two ways our legal system limits the availability of criminal records. While sometimes used interchangeably, “sealing” a record and “expunging” a record have different meanings from state to state. Generally, when a record is sealed it is removed from the main file of similar records and is no longer publicly accessible, but still physically exists.²⁸¹ When a record is “expunged” it is usually deleted or erased, as appropriate for the record’s physical or electronic form or characteristic.²⁸² This means, in theory, that the record is permanently irretrievable.²⁸³

Record sealing and expungement practices developed from 1940s era “specialized state sentencing schemes for youthful offenders.”²⁸⁴ These laws were adopted on the theory that youthful offenders should be given a special “incentive to reform” because they could more easily be rehabilitated than adults.²⁸⁵ The basic idea was to have a court restore social status as well as legal rights.²⁸⁶ Expungement is not solely for the benefit of the juvenile offender, it is also in furtherance of protection of the public interest.²⁸⁷ Society has “a future interest in preventing ‘the deprived and delinquent children of today from becoming the deprived, inadequate, unstable and criminal citizens of tomorrow.’”²⁸⁸

In 1962, the National Council on Crime and Delinquency

279. *Id.*

280. Jagunic, *supra* note 261, at 179.

281. *See, e.g.*, FLA. STAT. § 943.059 (West, Westlaw through 2012 Sess.).

282. *See, e.g., id.* § .0585.

283. However, while expungement erases a criminal record, it does not necessarily require its destruction. *State v. Savoie*, 637 So. 2d 408, 410 (La. 1994); *see also* Love, *supra* note 200, at 1724-25 (discussing the drawbacks of various expungement statutes).

284. Love, *supra* note 200, at 1709.

285. Aidan R. Gough, *The Expungement of Adjudication Records of Juvenile and Adult Offenders: A Problem of Status*, 1966 WASH. U. L.Q. 147, 162 (1966).

286. Love, *supra* note 200, at 1709-10.

287. Blanchette & Johnson, *supra* note 140, at 37.

288. *Id.* (quoting PHILIP BEAN, PUNISHMENT: A PHILOSOPHICAL AND CRIMINOLOGICAL ENQUIRY 126 (1981)).

proposed a Model Act that would grant sentencing courts the authority to “annul” convictions in order to relieve offenders of the collateral effects of a criminal conviction.²⁸⁹ These efforts sparked the movement to reward ex-offenders for rehabilitation and eventually led to widespread criminal record-sealing and expungement statutes.²⁹⁰

Expungement serves to protect an individual from the likely resulting hardships of an arrest record,²⁹¹ particularly those who deserve a second chance or clean slate, such as those acquitted or exonerated.²⁹² While state statutes vary greatly, expungement is sometimes presumptively available without a showing of extraordinary or extreme circumstances.²⁹³ The determination whether the expungement of arrest or other criminal records is appropriate involves balancing the harm to the individual against the utility to the government of maintaining such records.²⁹⁴ Courts routinely balance the personal harm to privacy interests and other adverse consequences against the public interest in keeping the records open.²⁹⁵ In some states, “offenders whose records have been expunged may deny that they were ever convicted.”²⁹⁶ It is by denying the existence of the expunged or sealed record—whether it is a record of a conviction or an arrest—that we forgive ex-offenders by permitting them to escape the consequences of the record.²⁹⁷

Absent a statute, federal courts have recognized a narrow power to expunge the criminal records of a convicted individual where the

289. See Nat'l Council on Crime and Delinquency, *Annulment of a Conviction of Crime: A Model Act*, 8 CRIME & DELINQ. 97, 99 (1962).

290. See Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153, 155 (1999); see also Love, *supra* note 200, at 1710 (“The purpose of judicial expungement or set-aside was to both encourage and reward rehabilitation, by restoring social status as well as legal rights.”).

291. Commonwealth v. Butler, 672 A.2d 806, 808 (Pa. Super. Ct. 1996) (citing Commonwealth v. Malone, 366 A.2d 584, 588 (Pa. Super. Ct. 1976)).

292. Hoover v. State, 29 P.3d 591, 595 (Okla. Crim. App. 2001) (quoting State v. McMahon, 959 P.2d 607, 609 (Okla. Civ. App. 1998)); Love, *supra* note 188, at 766 n.49 (quoting ABA STANDARDS FOR CRIMINAL JUSTICE: LEGAL STATUS OF PRISONERS Standard 23-8.2 (Supp. 1986)) (proposing that expungement should “annul[] the fact of conviction and, thus, invalidate[] adverse actions taken . . . on the basis of the conviction”).

293. E.g., *In re L.B.*, 848 A.2d 899, 904 (N.J. Super. Ct. Law Div. 2004).

294. Livingston v. U.S. Dep't of Justice, 759 F.2d 74, 78-79 (D.C. Cir. 1985); see also Coles v. Levine, 561 F. Supp. 146, 153 (D. Md. 1983), *aff'd*, 725 F.2d 674 (4th Cir. 1984).

295. E.g., Hoover, 29 P.3d at 595 (citing McMahon, 959 P.2d at 609).

296. Love, *supra* note 200, at 1725 & nn.80-82 (citing numerous state laws addressing expungement).

297. See *id.*

governmental interest in retaining the individual's records under the circumstances did not outweigh the individual's interest in remaining free of the stigma of conviction.²⁹⁸ Additionally, under federal law expunged convictions are not counted when a court is evaluating an individual's criminal history to compute the individual's sentence after conviction.²⁹⁹

Oftentimes, the ease of access and duplication of information inhibit expungement and record sealing from remedying the harsh consequences of the dissemination of criminal records.³⁰⁰ The difficulty is that, unless a court can exercise complete control over its records, it cannot ever hope to seal them.³⁰¹ As one commentator notes, given today's rapid proliferation of information, criminal trials and records would need to be removed from the public view altogether if one were going to effectively limit access to criminal records.³⁰² This is the only way to preclude the proliferation of records in the digital world, but such Orwellian control of information is not an option.³⁰³

Limiting the disclosure of criminal records information only goes so far—disclosure-based restrictions do not prevent the use of criminal record information once it is obtained. As previously emphasized, modern technology has greatly accelerated the proliferation of information that was once largely unavailable. As such, controlling the use of criminal records serves an important role in protecting privacy and mitigating undesirable effects of mass dissemination.

b. Lowering Discrimination Barriers

The proportion of the American population that has been

298. *E.g.*, *United States v. Smith*, 940 F.2d 395, 396 (9th Cir. 1991).

299. U.S. SENTENCING GUIDELINES MANUAL § 4A1.2(j) & cmt. 10 (2010). However, expunged convictions may be considered when determining whether an upward departure from the sentencing guidelines is warranted. *Id.* cmt. 3.

300. For an example of individuals that may be eligible to expunge or seal a record but whose information is disclosed at the point of arrest see sites like <http://www.crowwingcriminals.com> and <http://www.mugshots.com>.

301. See T. Markus Funk, *A Mere Youthful Indiscretion? Reexamining the Policy of Expunging Juvenile Delinquency Records*, 29 U. MICH. J.L. REFORM 885, 887 (1996) (noting that if a court cannot completely destroy (or seal) records, it cannot prevent future access to the records).

302. *Mayfield*, *supra* note 269, at 1068-69.

303. *Id.* at 1069.

convicted of a state or federal felony offense is growing.³⁰⁴ Society has a strong interest in seeing that individuals convicted of crimes can regain the legal status of ordinary citizens to prevent the creation of a permanent class of “internal exiles” who cannot establish themselves as law-abiding and productive members of the community.³⁰⁵

A serious hurdle faced by ex-offenders is the employment discrimination they face due to their criminal records, which pervades both the public and private sector. Employers routinely run “background checks on current and prospective employees under advice from their lawyers or insurers not to take a risk on hiring someone with a criminal record, no matter how dated or minor the conviction.”³⁰⁶ The Equal Employment Opportunity Commission permits employers to inquire about and consider both conviction records and arrest records when determining whether to hire an applicant.³⁰⁷ “Where there are two or more applicants for the same job, those with previous arrest records clearly stand in a less favorable position than do other applicants.”³⁰⁸

Recognizing the long-lasting negative impact of a criminal record can have, a few states have enacted nondiscrimination laws to mitigate the negative impact these records can have on those seeking

304. HEATHER C. WEST & WILLIAM J. SABOL, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NCJ 224280, PRISONERS IN 2007, at 1 (2008). The U.S. prison population has increased dramatically since the early 1970s. THOMAS P. BONCZAR, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NCJ 197976, PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974-2001, at 1 (2003). In addition, to those serving or who have served prison time, an even larger proportion of the population has been convicted of a criminal offense without going to prison. Over four million adults were on probation in 2007, about twice as many as the number in jail or in prison. LAUREN E. GLAZE & THOMAS P. BONCZAR, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NCJ 224707, PROBATION AND PAROLE IN THE UNITED STATES, 2007: STATISTICAL TABLES at 1-2 (2009); *see also* PEW CENTER ON THE STATES, ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS 4 (2009), *available at* http://www.pewstates.org/uploadedFiles/PCS_Assets/2009/PSPP_1in31_report_FINAL_WEB_3-26-09.pdf.

305. *Cf.* Demleitner, *supra* note 290, at 153.

306. Love, *supra* note 188, at 772 (citing SOC’Y FOR HUMAN RES. MGMT., BACKGROUND CHECKING: CONDUCTING CRIMINAL BACKGROUND CHECKS 3 (2010) (finding ninety-two percent Society of Human Resources Management members surveyed perform criminal background checks on some or all job candidates, while seventy-three percent perform checks on all job candidates)).

307. *See* EEOC, NO. N-915-061, POLICY GUIDANCE ON THE CONSIDERATION OF ARREST RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED, 42 U.S.C. § 2000E ET SEQ. (1982), 1990 WL 1104708 (1990).

308. Davidson v. Dill, 503 P.2d 157, 159 (Colo. 1972) (en banc).

employment.³⁰⁹ These nondiscrimination laws typically state that an employer cannot use a criminal record to deny employment or negatively discriminate against an individual based on the fact that an applicant has a criminal record.³¹⁰ “The protection from discrimination is afforded to ex-offenders generally, with exceptions only where there is a ‘direct’ or ‘rational’ relationship between [his or her] particular conviction and the position for which the ex-offender has applied.”³¹¹ Additionally, some states “have attempted to impose limits on pre-employment inquiries”³¹² and some “are experimenting with so-called ‘ban-the-box’ schemes that postpone background checks until after a preliminary hiring decision has been made.”³¹³ Similar to the Bankruptcy Code’s antidiscrimination provisions, these statutory schemes promote forgiveness by attempting to mitigate negative attendant consequences when the existence or contents of a criminal record is exposed.

2. Consumer Report Information and the FCRA

Credit ratings are immensely important in modern life—determining a person’s ability to buy a car, get favorable terms on a mortgage, or simply take advantage of the convenience of credit cards. Credit ratings were designed to predict which people would pay on time, and which people would likely default on loans.³¹⁴ Before they were regulated, credit bureaus used almost any information that could legally be obtained about an individual’s past as an indication of future behavior.³¹⁵ For the sake of efficiency, they placed “special emphasis on seeking unfavourable or ‘derogatory’ information.”³¹⁶

309. Hawaii, New York, and Wisconsin prohibit discrimination based on conviction in public and private employment as part of their fair employment laws. *E.g.*, N.Y. CORRECT. LAW § 752 (McKinney 2012); HAW. REV. STAT. § 378-2(a)(1) (2010); WIS. STAT. § 111.321 (2010).

310. *See* N.Y. CORRECT. LAW § 752 (McKinney 2012); HAW. REV. STAT. § 378-2.5 (2010). Note that there is still the very difficult matter of enforcement. While employers may be prohibited from directly discriminating based on criminal records, they are not prohibited from *obtaining* the information. Employers can easily obtain and rely on criminal records and concoct explanations for discrimination, or simply offer no explanation when denying an applicant a position for which he or she has applied. Jagunic, *supra* note 261, at 174.

311. Jagunic, *supra* note 261, at 173.

312. Love, *supra* note 188, at 774.

313. *Id.* at 774-75 & n.97.

314. Blanchette & Johnson, *supra* note 140, at 37-38.

315. *Id.* at 38.

316. *Id.* (quoting JAMES B. RULE, PRIVATE LIVES AND PUBLIC SURVEILLANCE 193

A major problem resulting from mass aggregation and dissemination of information is controlling information accuracy and relevancy. “Quality control of public records systems is notoriously poor, and mistakes are common.”³¹⁷ The Fair Credit Reporting Act of 1970 (FCRA),³¹⁸ helps to protect individuals’ reputations³¹⁹ by mitigating the dissemination of inaccurate information³²⁰ and preventing unwarranted invasions of privacy.³²¹ It applies to private background screeners, among other entities.³²²

The FCRA was enacted in order to establish reasonable procedures for meeting the credit reporting needs of commerce and the banking industry in a “manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information.”³²³ The FCRA was essentially prompted by “congressional concern over abuses in the credit reporting industry.”³²⁴ As such, one of the main goals of the FCRA is to protect individuals from inaccurate or arbitrary information and preserve their creditworthiness and reputation.³²⁵

The FCRA regulates people and entities that assemble or evaluate consumer report information and furnish that information to third parties.³²⁶ Consumer report information includes anything bearing on an individual’s credit worthiness, standing or capacity, character, general reputation, personal characteristics, or mode of living when such information is used (or is expected to be used) to determine the individual’s eligibility for credit, insurance,

(1973)).

317. Love, *supra* note 188, at 773; *see also* OFFICE OF THE ATT’Y GEN., U.S. DEP’T OF JUSTICE, THE ATTORNEY GENERAL’S REPORT ON CRIMINAL HISTORY BACKGROUND CHECKS 3 (2006), available at http://www.justice.gov/olp/ag_bgchecks_report.pdf (stating that FBI is “missing final disposition information for approximately fifty percent of its records”).

318. 15 U.S.C. §§ 1681-1681x (2011).

319. Ackerley v. Credit Bureau of Sheridan, Inc., 385 F. Supp. 658, 659 (D. Wyo. 1974).

320. Treadway v. Gateway Chevrolet Oldsmobile, Inc., 362 F.3d 971, 982 (7th Cir. 2004).

321. *In re* Grand Jury Subpoena to the Credit Bureau of Greater Harrisburg, 594 F. Supp. 229 (M.D. Pa. 1984).

322. *See* Love, *supra* note 188, at 773.

323. 15 U.S.C. § 1681; *see also* Matthiesen v. Banc One Mortg. Corp., 173 F.3d 1242, 1245 (10th Cir. 1999).

324. Philbin v. Trans Union Corp., 101 F.3d 957, 962 (3rd Cir. 1996) (quoting Guimond v. Trans Union Credit Info. Co., 45 F.3d 1329, 1333 (9th Cir. 1995)).

325. Ackerley v. Credit Bureau of Sheridan, Inc., 385 F. Supp. 658, 659 (D. Wyo. 1974); *see also* Pinner v. Schmidt, 805 F.2d 1258, 1261 (5th Cir. 1986).

326. 15 U.S.C. § 1681a(f).

employment or other specific purposes.³²⁷

Individuals and entities regulated under the FCRA are prohibited (with limited exceptions) from disseminating stale and obsolete information.³²⁸ For example, no consumer reporting agency may furnish a report containing information concerning certain bankruptcy cases more than ten years old, concerning civil suits or arrest records dating back more than seven years, or concerning paid tax liens, accounts placed for collection or charged to profit and loss.³²⁹ Additionally, any other adverse item of information that casts the consumer in a negative or unfavorable light and antedates the report by more than seven years, other than a record of conviction of a crime, may not be disclosed.³³⁰

In addition to the prohibitions on disclosure, an individual has the ability to dispute out-of-date information contained in his or her consumer report under the FCRA.³³¹ The consumer reporting agency then has thirty days in which to determine whether the information is out-of-date; if it is, the information must be updated.³³² Alternatively, if the agency cannot verify the information it has reported, it must delete the unverified item from its files.³³³ Either way, the consumer reporting agency must also promptly notify the source from which the information was obtained about the inaccurate information.³³⁴

The FCRA's prohibitions on the disclosure of stale and obsolete information are fair and equitable to the consumer, with regard to the confidentiality and relevancy of such information.³³⁵ Arming consumers with dispute remedies furthers this purpose while protecting social values of forgetfulness.

327. *Id.* § 1681a(d)(1).

328. *Id.* § 1681c(a)(1)-(4).

329. *Id.*

330. *Id.* § 1681c(a)(5); *see also* Equifax Inc. v. FTC, 678 F.2d 1047, 1050 (11th Cir. 1982) (quoting *In re Equifax Inc.*, 96 F.T.C. 844, 1980 WL 338977, at *2 (Dec. 15, 1980)) (defining "adverse information" as "information which may have, or may reasonably be expected to have, an unfavorable bearing on a consumer's eligibility or qualifications for credit, insurance, employment, or other benefit, including information which may result, or which may be reasonably expected to result, in a denial of or increased costs for such benefits").

331. 15 U.S.C. § 1681i(a).

332. *Id.*

333. *Id.*

334. *Id.*

335. *Id.* § 1681.

3. Government Records and the FOIA Privacy Exemptions

The Freedom of Information Act of 1966 (FOIA) is a law ensuring public access to U.S. government records.³³⁶ FOIA carries a presumption of disclosure; the burden is on the government—not the public—to substantiate why information may not be released.³³⁷ Upon written request, agencies of the United States government are required to disclose those records, unless they can be lawfully withheld from disclosure under one of nine specific FOIA exemptions.³³⁸

Two exemptions that are driven by the policy goal of protecting individual privacy are Exemptions 6 and 7(C). Exemption 6 prohibits government agencies from disclosing “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.”³³⁹ Exemption 7(C) permits the government to withhold records or information compiled for law enforcement purposes from disclosure if release of such information “could reasonably be expected to constitute an unwarranted invasion of personal privacy.”³⁴⁰ These exemptions call on agencies and courts to protect “the personal privacy of citizens against the uncontrolled release of information compiled through the power of the State.”³⁴¹

Exemption 6 is both broader and narrower than Exemption 7(C). It is broader in that it applies to files “similar” to personnel or medical files, which the Supreme Court in *United States Department of State v. Washington Post Co.* interpreted to mean any detailed information in government files about a particular individual from which the identity of the individual can be discerned.³⁴² Thus, records need not contain intimate details of a highly personal nature to be protected from disclosure.³⁴³ It is narrower in that it requires that the invasion of privacy be “clearly unwarranted”—the adverb “clearly” is omitted from Exemption 7(C).³⁴⁴ Additionally, whereas Exemption 6 refers to

336. 5 U.S.C. § 552 (2011).

337. *Id.* § 552(a)(4)(B).

338. *Id.* § 552(b).

339. *Id.* § 552(b)(6).

340. *Id.* § 552(b)(7)(C).

341. Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 172 (2004).

342. U.S. Dep't of State v. Wash. Post Co., 456 U.S. 595, 602 (1982) (quoting H.R. REP. NO. 89-1497, at 11 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2418, 2428).

343. *Id.* at 600.

344. U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749,

disclosures that “would constitute” an invasion of privacy, Exemption 7(C) encompasses any disclosure that “could reasonably be expected to constitute” such an invasion.³⁴⁵

The determination of the applicability of these exemptions involves weighing the public interest in disclosure of the information against the privacy interest in nondisclosure.³⁴⁶ This balancing test stems from the requirement that the invasion of personal privacy be an “unwarranted” one.³⁴⁷ On the privacy interest side, the more intimate the personal information the more protection it is given.³⁴⁸ Some courts measure the “personal nature” of information by considering whether it reveals intimate or embarrassing details of an individual’s private life, as evaluated in terms of the “customs, mores, or ordinary views of the community.”³⁴⁹ The privacy interest protected by Exemption 7(C) extends beyond “the right to control information about oneself,”³⁵⁰ it extends to information about an individual which he or she could reasonably assert an option to withhold from the public at large because of its intimacy or its possible adverse effects upon oneself or one’s family.³⁵¹

Importantly, courts have recognized that individuals have a privacy interest in information that was once public but may have been “wholly forgotten.”³⁵² As the Supreme Court noted in *United States Department of Justice v. Reporters Committee for Freedom of the Press*, “In an organized society, there are few facts that are not at one time or another divulged to another.”³⁵³ And continued, “[T]hat otherwise-private information may have been at one time or in some way in the ‘public’ domain does not mean that a person irretrievably loses his or her privacy interests in it.”³⁵⁴ The fact that “an event is not

756 (1989).

345. *Id.*

346. *Id.* at 762; *see also* Schrecker v. U.S. Dep’t of Justice, 349 F.3d 657, 661 (D.C. Cir. 2003) (citing *Reporters Comm.*, 489 U.S. at 762).

347. Nat’l Archives & Records Admin. v. Favish, 541 U.S. 157, 171 (2004) (citing *Reporters Comm.*, 489 U.S. at 762); *see also* Nadler v. U.S. Dep’t of Justice, 955 F.2d 1479, 1487 (11th Cir. 1992) (same).

348. *Favish*, 541 U.S. at 166 (citing *Reporters Comm.*, 489 U.S. at 773).

349. *Herald Co. v. City of Bay City*, 614 N.W.2d 873, 879 (Mich. 2000) (quoting *Mager v. Dep’t of State Police*, 595 N.W.2d 142, 146 (Mich. 1999)).

350. *Favish*, 541 U.S. at 165 (quoting respondent’s brief).

351. *Id.* at 169 (citations omitted).

352. *Reporters Comm.*, 489 U.S. at 769-70.

353. *Id.* at 763.

354. *Halloran v. Veterans Admin.*, 874 F.2d 315, 322 (5th Cir. 1989).

wholly ‘private’ does not mean that an individual has no interest in limiting disclosure or dissemination of the information.”³⁵⁵

The public interest side of the balance focuses on the FOIA’s central purpose of opening agency action to the light of public scrutiny and the value of the specific information at issue in furthering that purpose.³⁵⁶ In other words, the relevant public interest is the right of citizens “to be informed about what their government is up to.”³⁵⁷ When a private citizen is seeking information about another private citizen (for example, another person’s criminal record) and not about the activities of any agency, the public interest is at its low point and disclosure is likely unwarranted.³⁵⁸

When Exemption 7(C) in play, it is the responsibility of the requester to establish a “sufficient reason for the disclosure.”³⁵⁹ Thus, a person requesting the protected information must show that (1) “the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake” and (2) the information to be disclosed is “likely to advance that interest.”³⁶⁰ Without this showing, the invasion of privacy is unwarranted and protected information is exempt from disclosure.³⁶¹ Placing the burden on the party requesting protected information to show a public interest in its release is a marked exception to the general rule requiring the government to justify its need to withhold information from the public.³⁶² This departure from the usual rule that “the citizen need not offer a reason for requesting the information” is necessary to the balance between privacy and disclosure.³⁶³

While the FCRA and the FOIA exemptions may not provide for “forgiveness” as directly as sealing and expungement statutes, they strive to achieve similar goals. These statutes aim to protect

355. *Reporters Comm.*, 489 U.S. at 770 (quoting William H. Rehnquist, Assoc. J. of the U.S. Supreme Court, Is an Expanded Right of Privacy Consistent with Fair and Effective Law Enforcement?, Nelson Timothy Stephens Lecture at the University of Kansas Law School (Sept. 26-27, 1974), in 23 U. KAN. L. REV. 1, 8 (1974)).

356. *Id.* at 772 (quoting *Dep’t of Air Force v. Rose*, 425 U.S. 352, 372 (1976)); see also *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 234 (D.C. Cir. 1987).

357. *U.S. Dep’t of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 495 (1994) (quoting *Reporters Comm.*, 489 U.S. at 773).

358. *Reporters Comm.*, 489 U.S. at 780.

359. *Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004).

360. *Id.*

361. *Id.*

362. *Id.*

363. *Id.*

individuals—even those who have committed wrongs—from the negative consequences attendant with the disclosure of private information. In a sense the FCRA is forgiveness—it considers aged wrongs and indiscretions obsolete and prevents consumer reporting agencies from providing such information. So too are the FOIA exemptions forgiveness, limiting access to information that is generally “personal in character and potentially embarrassing or harmful if disclosed”³⁶⁴ thereby counteracting negative publicity and infamy.³⁶⁵

IV. FORGIVENESS ELEMENTS FOR THE DIGITAL AGE

In Section 3, we examined laws and legal practices with a “forgiving nature” outside of the context of privacy. The right to be forgotten being crafted and evolved by European countries and the European Union derive from the recognition of information privacy rights in article 8 of the European Convention on Human Rights³⁶⁶ and article 7 of the Charter of Fundamental Rights of the European Union.³⁶⁷ While the U.S. does not include privacy in the Constitution, the country does acknowledge legal forgiveness in a number of situations, as discussed in the previous section. In this section, we begin with an overview of the themes evident in those existing U.S. laws of forgiveness. We then propose a number of possible applications of the framework to create a U.S. legal approach to oblivion.³⁶⁸

A. *Thematic Network Analysis*

As previously discussed, we cannot simply build upon European principles of privacy to construct an American approach to forgiveness in the privacy context. To construct a legal tool that offers a form of forgiveness for past actions or provoked feelings represented digitally online that cause (allegedly) disproportionate harms, we first looked at how forgiveness has been institutionalized

364. U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 770 (1989) (quoting Whalen v. Roe, 429 U.S. 589, 605 (1977)).

365. Bibas, *supra* note 51, at 334.

366. Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, Nov. 4, 1950, 213 U.N.T.S. 221, *available at* http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/CONVENTION_ENG_WEB.pdf.

367. Charter of Fundamental Rights of the European Union, *supra* note 142, art. 7.

368. *See supra*, note 8 and accompanying text.

elsewhere in U.S. law. The forgiveness concepts, which are represented textually in a number of statutes and practices, were then scrutinized methodologically in order to construct a framework for qualitative analysis. Thematic network analysis offers a rigorous method of exploring and synthesizing the themes. Thematic networks summarize the main themes of a collection of texts into web-like structures through the systematic extraction of lowest-order premises evident in the text (basic themes), categories of basic themes grouped to summarize principles (organizing themes), and super-ordinate themes encompassing the text as a whole.³⁶⁹ Below, we describe the extracted themes, and explain how they can be used to develop and inform proposed legal solutions for oblivion.

1. Prerequisites for Legal Forgiveness

Our thematic network revealed three key factors which must be present before existing laws offer forgiveness: (1) a “forgivable” offense; (2) specific harms; and (3) social benefit.

The laws we analyzed apply only to “forgivable” offenses. Each area of law carves out exemptions—some offenses are unforgivable. None of the described legal forgiveness measures extend to all circumstances. There are financial decisions one can make that will preclude filing for bankruptcy. Some criminal activity will never be considered for informational forgiveness, particularly ones with high recidivism rates and severe public concern (e.g., the sex offender list). Statutes of limitations do not exist for murder or manslaughter. Some things are simply too terrible to forget or forgive. Online informational forgiveness should be no different. Certain information about an individual, no matter how reformed, should not be disassociated with the individual.

Legal forgiveness is not offered lightly. The individual harms must be those that are of similar degree and kind to those recognized by other forgiveness efforts. When an individual does not deserve punishment, pardons can end negative consequences and certify good character.³⁷⁰ Unfair prejudices are softened by forgiveness laws addressing financial limitations or denial of access to services created by information.³⁷¹ When inaccurate information related to an

369. Jennifer Attride-Stirling, *Thematic Networks: An Analytic Tool for Qualitative Research*, 1 QUALITATIVE RES. 385, 388 (2001).

370. *See supra* Part III.A.2.

371. *See supra* Part III.

individual may limit opportunities, pardons and the FCRA offer solutions.³⁷² Much of the writing on these laws also addresses the psychiatric and relational harms that create more hurdles for the individual. While social stigma is discussed in all of the above as severe, it is not always a harm acted upon because of overriding public interests.

The amount of information that resides on the Web, and the harms that stem from pervasive search practices, may both well be sufficiently damaging to warrant legal intervention. The information is heavily relied upon by prospective professional and social contacts. Currently, 79% of employers,³⁷³ 20% of universities, and 40% of law schools search applicants online.³⁷⁴ Searching an individual's name using Google to size him or her up is an increasingly common practice and will likely be more so with the adoption of smart phones. The practice is so common that expectant parents now consider how search results for their future child's name will impact the child's life.³⁷⁵ Parents search prospective names to help their kids retrieve top search results, and only a few rare parents want their children to be "lost in a virtual crowd."³⁷⁶ With 92% of U.S. children under the age of two holding an online presence, "[l]ife, it seems, begins not at birth but with online conception. And a child's name is the link to that permanent record."³⁷⁷

Searching for an individual is done for many different reasons, and more and more information is freely disclosed. But though the harm from information that resides online is severe, this harm not necessarily pervasive. Not everyone has his or her ill-fated relationship, prior arrests, or embarrassing photo posted online. In *The Future of Reputation*, law professor and privacy expert Daniel Solove detailed a number of horror stories about the harsh retribution handed

372. See *supra* Parts III.A.2, III.B.2.

373. *The Real-World Effect of Online Reputation Management*, REPUTATION.COM, http://www.reputation.com/how_to/the-real-world-effects-of-online-reputation-management (last visited July 2, 2012).

374. Paulina Firozi, *Law School Admissions Use Facebook, Google to Screen Applicants, Study Finds*, DAILY NW. (Oct. 30, 2011), <http://dailynorthwestern.com/2011/10/30/blogs/oncampus/law-school-admissions-use-facebook-google-to-screen-applicants-study-finds>.

375. Allen Salkin, *What's in a Name? Ask Google*, N.Y. TIMES (Nov. 25, 2011), http://www.nytimes.com/2011/11/27/fashion/google-searches-help-parents-narrow-down-baby-names.html?_r=2&ref=technology.

376. *Id.*

377. *Id.*

out by Web users in reaction to personal information found online.³⁷⁸ It is easy to sympathize with the difficulties created by regretful and embarrassing moments coming up first on a Google search for our name, but many of us only imagine such horror—we are not personally suffering such a fate. In considering the institutionalization of a forgiveness policy, a level of both severity and pervasiveness may be necessary.

Finally, legal forgiveness depends on some social benefit in addition to supporting a harmed individual. We see a weighing of interests, and requiring social benefit in a variety of contexts. Bankruptcy offers a fresh start for those that file, but it also benefits creditors. It removes the competitive nature of collection among creditors and enables collection across state lines.³⁷⁹ In addition to the debtors and creditors, bankruptcy promotes social interests in the form of means for responding to periodic national financial crises.³⁸⁰ Juveniles that accumulate a criminal record are often granted forgiveness not just to protect the youth population, but also to cultivate and protect society's future, decrease recidivism, and limit costs of committing individuals for essentially lifetimes. The social benefits of attaining credit to purchase everything from homes to electronics are economic, but inhibit credit evaluators from using any and all data to predict future payment. While some are disadvantaged by these laws, social benefit trumps those interests.

In considering legal approaches to oblivion, it is essential to evaluate and articulate the benefit to society as a whole.³⁸¹ Forgiveness laws in general offer great comfort. We, as a population, exert a sigh of relief knowing that certain violations do not remain on our record forever or that bankruptcy is an option when debt leaves us in ruin. Digital forgiveness is no different. A way to prevent being forever branded by a piece of negative information retrieved by a search engine would probably quell many of our fears of the digital

378. DANIEL J. SOLOVE, *THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET* *passim* (2007). One of the stories is about the “dog poop girl,” a young woman who refused to clean up after her dog in a South Korean subway train and suffered severe social shaming that resulted in her withdrawing from University. *Id.* at 1-2.

379. TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, *AS WE FORGIVE OUR DEBTORS: BANKRUPTCY AND CONSUMER CREDIT IN AMERICA* 20 (1989).

380. CHARLES WARREN, *BANKRUPTCY IN UNITED STATES HISTORY* 64 (1935).

381. *See generally* PRISCILLA M. REGAN, *LEGISLATING PRIVACY: TECHNOLOGY, SOCIAL VALUES, AND PUBLIC POLICY* (1995) (discussing the social importance of privacy, and arguing the necessity of addressing its benefits in policy debate).

age and perhaps make us freer individuals, more willing to participate in open public discourse. Addressing old information can also benefit the searcher. When old information no longer represents a person it is inaccurate and less valuable, particularly when it is presented out of context. Increasing information quality benefits the subject, the reader, and society as a whole. As time reveals the severity of the injustices that result from information transparency and accessibility, the need for remedies will be acutely felt.

2. Elements of a Legal Approach to Forgiveness

When the prerequisites to legal forgiveness have been satisfied, thematic analysis reveals three key elements of legal approaches to forgiveness: (1) time; (2) oversight; and (3) relief from accountability.

Time is an important aspect of each of the existing legal forgiveness measures. It helps to ensure that any relief is appropriate, and has been earned. For instance, sealing and expunging a juvenile criminal record occurs upon entry into the adult world.³⁸² Pardon or parole boards consider certification of good behavior after a set amount of time, generally five years after an individual has completed a criminal sentence.³⁸³ Similarly, when negative information is more than seven years old, the FCRA prevents its consideration, with exceptions for certain bankruptcy issues and criminal records.³⁸⁴ Immunity from suit attaches only after the statutorily proscribed period of limitations, which correlates with the severity of the offense. The element of time adds reassurance that relief is both deserved and appropriate.

Thus, restoring an individual who is the subject of negative information must account for time. The individual must be accountable for actions or interactions for some period of time before restoration becomes appropriate. Outside of the legal context, the time it takes to forgive an indiscretion depends on the indiscretion. In the legal context, it appears more suitable to require standardized sets of time before allowing for categories of information forgiveness.

In addition to incorporating time, a legal approach to forgiveness must incorporate the correct level of oversight by a decision-maker. The level of oversight necessary depends on the underlying offenses, harms, and societal interests. With the FCRA, relief is applied

382. *See supra* Part III.B.1.a.

383. *See supra* Part III.A.2.a.

384. *See supra* Part III.B.2.

automatically, but disputes may be heard by the judiciary.³⁸⁵ Statutes of limitations apply broadly to categories of offenses, but courts make determinations with respect to when the periods of limitations begins and whether the facts of a particular case warrant tolling or exemptions.³⁸⁶ Bankruptcy, pardons, and expungement require a decision-maker to make case-by-case determinations of whether forgiveness is appropriate.³⁸⁷ Without organized oversight, any right to be forgotten structure will be highly susceptible to manipulation.

When forgiveness or forgetfulness is sought with respect to information that has been rightfully disclosed, a legal approach must consider the public's right to access that information. Any legal mechanism for forgetting information will require the correct level of oversight of by a decision-maker to weigh the harms and benefits to individuals and to society as a whole.

Thematic network analysis of existing laws reveals a final common element: relief from accountability. Our legal system acknowledges that punishment should not necessarily be eternal, and that limiting the use of information about that individual can be used as a form of relief. In a sense, limiting the use of information can determine which sectors of society must not hold an individual accountable. This determination depends on the severity of the harm and its directed impact. Bankruptcy, the FCRA, and state employment discrimination statutes limit what and how information can be used to judge someone in certain situations. For instance, filing for bankruptcy relieves the individual of debt, and also insures that public and private employers cannot discriminate based on the filing.³⁸⁸ Relief in the form of an expunged or sealed record, if not otherwise disclosed, limits access to information about her offense, and offers the individual relief from legal and social stigma. Importantly, none of the existing legal schemes limit all use of the information by all parties.

Existing laws also offer relief from accountability by adjusting information. Appropriate information adjustment must be nuanced. Data can be added to the existing body of information related to an individual to provide a broader context for the individual represented in the information. For example, certifications of rehabilitation or

385. *See supra* Part III.B.2.

386. *See supra* Part III.A.3.

387. *See supra* Part III.

388. *See supra* Part III.A.1.

good behavior provided by state entities in the case of pardons and periods of law-abiding behavior supplement existing information.³⁸⁹ The old information does not go away; it is simply enriched and contextualized as part of an individual's past.

One must earn relief from accountability. Bankruptcy offers relief, but at the price of social scrutiny. Sealed records require the price of punishment, time, and good behavior. Statutes of limitations require a period of time without continued bad conduct as evidence of self-rehabilitation. Existing relief from accountability is narrowly tailored to situations where the price paid by the individual compensates for the wrong committed.

These types of relief from accountability can inform the development of new legal approaches to oblivion. Relief in this context could take the form of limiting how, by whom, and for what purpose information can be used. It could also involve the limited adjustment of online information. Similar to the way the market has addressed online reputational harms, adding more information can limit the weight given to negative information. This notion also fits with the marketplace of ideas, a foundational First Amendment concept. The truth will arise from the competition of ideas or as Thomas Jefferson explained it, "[T]his institution will be based on the illimitable freedom of the human mind. for [sic] here we are not afraid to follow truth wherever it may lead, nor to tolerate any error so long as reason is left free to combat it."³⁹⁰ Inaccurate, flawed, or low value information can be combated with more information.

In the case of past personal information found online, an individual seeking relief from accountability must pay some price to obtain it. The punishment of years of social scrutiny may be enough, but in instances where social norms have been harshly violated, such as violent criminal actions, or when social utility still exists, such as consumer protection, special rules may need to be instituted on top of the demand of time. Additionally or alternatively, one could earn relief through proven rehabilitation. It must be determined that relief from accountability for old information that identifies an individual is appropriate under a specific set of circumstances.

389. See *supra* Parts III.A, III.B.

390. Letter from Thomas Jefferson to William Roscoe (Dec. 27, 1820), available at <http://www.loc.gov/exhibits/jefferson/75.html>.

B. Toward a Suitable Approach to Oblivion in the U.S.

With the above thematic network in mind, we propose a number of possible directions that the U.S. legal system could take to deal with pervasive lingering personal information online that causes individuals to be significantly hindered in life. Assuming the prerequisites for legal action are met, each must account for a period of time in which the information should reside publicly, formal oversight at some point to determine appropriateness of the complaint, and means of information adjustment or limited use. The following proposals are presented in order of increasing retention of content.

The first possibility would eliminate all information about a person after a period of time, a solution proposed by law professor Jonathan Zittrain called reputation bankruptcy.³⁹¹ Zittrain expects difficult-to-shed indicators of identity will include collections of biological information, photos, locations and times of day, tipping practices, tracked license plates revealing driving habits, etc.³⁹² These indicators will provide opportunity for others to contribute judgments to an aggregated reputation profile or score. Reputation bankruptcy would create a clean slate for our digital selves: people should be able to de-emphasize or entirely delete old information that has been generated, such as political preferences, embarrassing actions, and youthful opinions, to avoid the inhibitions resulting from every action ending up on one's permanent record.³⁹³ Zittrain also suggests that this should probably include the cost of bankruptcy, a stigma created by the removal of all information, both good and bad.³⁹⁴ Reputation bankruptcy certainly meets the criteria of time and relief from accountability, but removing all information on an individual might deprive society of more information than is necessary to cure the harm and does not account for unforgivable violations.

A second possibility is to limit the use of personal information. Legislatures could enact laws that limit a potential employers' ability to search for or consider online information about a potential applicant that is older than a designated period.³⁹⁵ An employer may

391. JONATHAN L. ZITTRAIN, *THE FUTURE OF THE INTERNET AND HOW TO STOP IT* 228-29 (2008).

392. *Id.* at 219-20.

393. *Id.* at 228-29.

394. *Id.* at 229.

395. Paul Ohm, a law professor at the University of Colorado Law School, has argued that

have an interest in how an employee reflects upon the company to the world through a search engine, but less of an interest in how he or she reflects upon the company to a smaller group of connected people on Facebook. An employer digging around in applicants' social media profiles that are not publicly available is different than an employer searching for public information easily retrievable through a Google search. Thus, laws might distinguish between searching publicly available information, and seeking to obtain information only available through social networks or other more private spheres.

A third option is to make personal information less accessible. A legal claim that would allow subjects to have their name removed from a webpage or the specific content's URL removed from a search index would also be a possible solution. This approach aligns with the Spanish version of the "Right to Be Forgotten."³⁹⁶ If digital search results could be "expunged" or deleted from the source, harms to the subject would be prevented, but would also be irretrievable to the public.

Unlike the United States, some European countries provide a system for removal of content online. For example, Spanish citizens may file a complaint with the Spanish Data Protection Agency, where the claim is assessed and if appropriate, the agency will order Google to remove the URL from its index if content creators refuse to edit their content.³⁹⁷ Currently, the U.S. does not have a data agency to hear or enforce such citizen requests. It is generally up to an individual to enforce his or her privacy rights. A cause of action inspired by Digital Millennium Copyright Act of 1998 (DMCA)³⁹⁸ takedown notice regime may be most suitable.³⁹⁹ Such a cause of action would incorporate each of the above themes and serve as means for the law to "encourage informal attempts at resolving privacy disputes."⁴⁰⁰ The tort would establish a system which allows

it should be illegal for employers to fire or refuse to hire individuals for legal activities performed off duty discovered on social networking sites or search engine results. Jeffrey Rosen, *The Web Means the End of Forgetting*, N.Y. TIMES, July 25, 2010, at MM30, available at <http://www.nytimes.com/2010/07/25/magazine/25privacy-t2.html?pagewanted=all>.

396. Ciaran Giles, *Spain Launches First "Right to Be Forgotten" Case Against Google*, HUFFINGTON POST (April 20, , 9:32 AM), http://www.huffingtonpost.com/2011/04/21/right-to-be-forgotten-google-spain_n_851891.html.

397. *Id.*

398. Pub. L. No. 105-304, 112 Stat. 28-60 (1998) (codified as amended in scattered sections of 17 and 28 U.S.C.).

399. 17 U.S.C. § 512 (2011).

400. SOLOVE, *supra* note 378, at 190.

an individual to send a request to remove certain types of information after the passage of time. If such a request is unreasonably ignored, the tort would allow the individual to bring suit to remove the information.

After a certain amount of time, if an individual chooses to exercise a claim to oblivion, she can contact a site publishing the information, specify the URL and request action by the site operator. The operator of the site should be given flexibility to limit infringement on expression rights, and has the option to (1) remove the identifying information; (2) delete the entry completely; or (3) un-index the page. The site operator may not have received hits on old content in years, have no interest in keeping the content, and be willing to delete the content. Alternatively, the site can choose to alter only the identification of the person, removing his or her full name. The site could also make the content inaccessible to the public, but still maintain the record in to avoid issues of deleting potentially useful information.

This scheme is particularly plausible, given that it has been voluntarily implemented by certain sites. For instance, Public.Resource.org, a site that publishes court records, evaluates requests to remove these records from search engine results.⁴⁰¹ If Public.Resource.org finds limited access appropriate, it uses a robots.txt file⁴⁰² to prevent the content stored on its server to be published in search engine results in order to protect the privacy of the requester. Ethical crawlers that build the index of search engine page results will not crawl pages specified by the site in the robots.txt file.⁴⁰³ The documents still exist on Public.Resource.org's server and a researcher or journalist looking for court records can find them by going directly to the URL <http://bulk.resource.org/robots.txt>. All of the search engine-blocked cases' URLs are listed and can be easily accessed. But, the documents will not be retrieved by a search engine search for information on a certain person.

As in the DMCA, if a site owner or operator feels that identifying the individual is important, it can challenge the take-down

401. *Why Is My Court Case on the Internet?*, PUBLIC.RESOURCE.ORG, https://public.resource.org/court_cases.html (last visited July 2, 2012).

402. *About /robots.txt*, GET /ROBOTS.TXT, <http://www.robotstxt.org/robotstxt.html> (last visited July 2, 2012).

403. See <http://bulk.resource.org/robots.txt> for a list of files "disallowed" for crawlers by Public.Resource.Org.

notice before a formal decision-maker, giving the scheme oversight. If newsworthy information⁴⁰⁴ continues to be relevant⁴⁰⁵ and cannot be communicated without identifying the individual,⁴⁰⁶ it should

404. While the public disclosure of private facts tort is not fit to handle forgetting, because it punishes the publication of truthful information that is *private* and *not of concern to the public interest*, RESTATEMENT (SECOND) OF TORTS § 652D (1977), tests developed by the First and Tenth Circuit provide a useful analysis for the right to be forgotten, but generally the newsworthiness test has failed to provide privacy protection. The U.S. Supreme Court has not decided the constitutionality of the public disclosure tort. In 1967, the Supreme Court recognized newsworthiness as defense to privacy claims involving true disclosures in *Time, Inc. v. Hill*, 385 U.S. 374 (1967). In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), and *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989), the Court narrowly decided the issue of whether information obtained from the public domain subsequently published by the press created liability under the public disclosure tort favorably for the press. A few jurisdictions do not recognize the tort and five jurisdictions have rejected it completely. See Geoff Dendy, Note, *The Newsworthiness Defense to the Public Disclosure Tort*, 85 KY. L.J. 147, 158 (1997). Other jurisdictions defer to the press to determine newsworthiness. See *id.* at 159 (citing Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis' Privacy Tort*, 68 CORNELL L. REV. 291, 353 (1983)). A user, whether press or not, publishing information arguably verifies its public interest. The long tail of the Internet allows for a market for every piece of information. Attorney Jacqueline Rolfs has said “the newsworthiness defense engulfs the tort of public disclosure because, to a large extent, the media themselves determine what is newsworthy.” Jacqueline R. Rolfs, Notes, *The Florida Star v. B.J.F.: The Beginning of the End for the Tort of Public Disclosure*, 1990 WIS. L. REV. 1107, 1121 (1990).

405. Law professor Lior Jacob Strahilevitz explained how social networks theory can provide a methodology for determining whether private information shared by the plaintiff with the defendant would have been widely disseminated, regardless of the defendant’s actions. Lior Jacob Strahilevitz, *A Social Networks Theory of Privacy*, 72 U. CHI. L. REV. 919, 919 (2005). There are many variables that can be used to predict whether information will be widely disseminated, many of which relate to the nature of the information—its newsworthiness. *Id.* at 970-72. Understanding dissemination can also help determine whether information is still newsworthy. By using time and technology, the continued public concern or newsworthiness of the contested content can be assessed. The hit count of the page where the content resides can be calculated for specified dates. Google Trends, <http://www.google.com/trends>, allows users to track and compare search terms during select time periods.

406. Some courts have taken into account that information can be newsworthy but communicated without personally identifying an individual. The Fifth Circuit developed a test that requires a logical nexus between the plaintiff and the content of legitimate public interest. *Campbell v. Seabury Press*, 614 F.2d 395, 397 (5th Cir. 1980) (per curiam) (logical nexus must exist between the complaining individual and matter of legitimate public interest). See also *Nobles v. Cartwright*, 659 N.E.2d 1064, 1077 (Ind. Ct. App. 1995) (disclosure of private facts is of legitimate public interest “only if it was substantially relevant and closely related to a matter or an event which was of legitimate public interest”); *Anonsen v. Donahue*, 857 S.W.2d 700, 704 (Tex. Ct. App. 1993) (acknowledging that factual questions may be presented about the newsworthiness of private facts unrelated to general newsworthy topics); *Bonome v. Kaysen*, No. 032767, 2004 WL 1194731, at *5 (Mass. Dist. Ct. Mar. 3, 2004) (“Thus, otherwise private information may properly be published when it is sufficiently related to a broader topic of legitimate public concern.”). The Tenth Circuit adopted this test, but described the logical nexus as “substantial relevance,” meaning that the individual must be substantially relevant to the published content. *Alvarado v. KOB-TV, LLC*, 493 F.3d 1210, 1220 n.9 (10th Cir. 2007)

remain, but the digital age requires a closer look at newsworthiness than this article can offer. When information is no longer important to anyone except the individual it is harming,⁴⁰⁷ takedown notices may be the appropriate mechanism for addressing toxic information and reestablishing social forgetting.⁴⁰⁸

(“However, we observe that state law now defines torts involving publication to take into account First Amendment restrictions announced by the Supreme Court.”). The newsworthiness test established by these courts reinforces the notion that just because a story is of legitimate public concern does not mean that the plaintiff’s identity is necessary to disclose. Solove compares two cases involving a rare disease and a violent car wreck. The “Starving Glutton” case, or *Barber v. Time, Inc.*, 159 S.W.2d 291 (Mo. 1942), involved a woman that ate endlessly but continued to lose weight and claimed she was unnecessarily identified by the press that covered her rare disease. SOLOVE, *supra* note 378, at 133 (citing *Barber*, 159 S.W.2d at 295). The court found the information newsworthy, but the plaintiff’s identity was not newsworthy. The *Shulman v. Group W. Prods., Inc.* court, on the other hand, refused to make this determination regarding a woman who was identified by the news in association with a horrendous car crash. *Id.* (citing *Shulman v. Group W Prods., Inc.*, 955 P.2d 469 (Cal. 1998)). The court stated: “That the broadcast *could* have been edited to exclude some of Ruth’s words and images and still excite a minimum degree of viewer interest is not determinative. Nor is the possibility that the members of this or another court, or a jury, might find a differently edited broadcast more to their taste or even more interesting. The courts do not, and constitutionally could not, sit as superior editors of the press.” *Shulman*, 955 P.2d at 488.

407. In *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), the Court outlined a concept of “practical obscurity” for interpreting FOIA disclosures that fell under the privacy protections in Exemptions 6 and 7(C). It is well-established that time will not diminish the applicability of 7(C), even for law enforcement records of past crimes now criticized by the public. *See, e.g.*, *Ray v. FBI*, 441 F. Supp. 2d 27, 35 (D.D.C. 2006) (rejecting argument that passage of time and retirement of FBI Special Agents diminish their privacy interests); *Halpern v. FBI*, 181 F.3d 279, 297 (2d Cir. 1999) (“Confidentiality interests cannot be waived through . . . the passage of time.”); *McDonnell v. United States*, 4 F.3d 1227, 1256 (3rd Cir. 1993) (deciding that passage of forty-nine years does not negate individual’s privacy interest); *Maynard v. CIA*, 986 F.2d 547, 566 n.21 (1st Cir. 1993) (finding effect of passage of time upon individual’s privacy interests to be “simply irrelevant”); *Fitzgibbon v. CIA*, 911 F.2d 755, 768 (D.C. Cir. 1990) (concluding that passage of more than thirty years irrelevant when records reveal nothing about government activities). The “practical obscurity” concept “expressly recognizes that the passage of time may actually increase the privacy interest at stake when disclosure would revive information that was once public knowledge but has long since faded from memory.” DEP’T OF JUSTICE, GUIDE TO THE FREEDOM OF INFORMATION ACT 579 (2009) (citing *Reporters Comm.*, 489 U.S. at 767 (“[O]ur cases have also recognized the privacy interest inherent in the nondisclosure of certain information even when the information may at one time have been public.”); *Rose v. Dep’t of the Air Force*, 495 F.2d 261, 267 (2d Cir. 1974) (noting that “a person’s privacy may be as effectively infringed by reviving dormant memories as by imparting new information”) (Exemption 6), *aff’d*, 425 U.S. 352 (1976); *Assassination Archives & Research Ctr. v. CIA*, 903 F. Supp. 131, 133 (D.D.C. 1995) (finding that passage of thirty or forty years “may actually increase privacy interests, and that even a modest privacy interest will suffice” to protect identities)), available at http://www.justice.gov/oip/foia_guide09/exemption7c.pdf.

408. Sometimes the past becomes news later. William James Sidis, a child prodigy turned adult recluse, sued for violations to his privacy after two publications circulated “Where Are They Now?” pieces, but did not win because of his prior status as a public figure which created

Finally, information can be added to the harmful content to add context and accuracy to the information. A time frame can be added to false light claims, which offer the plaintiff the opportunity to correct old, online information that causes harm, can simply add a timeframe. When someone suffers the financial, social, or personal harms of truthful information from his or her past, a false light claim would ensure that the information is presented as old. Requiring web pages to include an accurate time stamp of when the content was created would allow technology to be layered to discourage digging around in old personal information in inappropriate circumstances. For instance, a search for an individual could be limited to time stamped content within the last five years. An individual should be able to demand that old information be marked as such, and not mislead potential viewers.

Like the examples of institutional forgiveness analyzed above, the above claims should not be allowed for unforgiveable categories of information. For instance, it may be determined that violent, sexual, or fraud-related criminal convictions are not the type of information that may be institutionally forgiven—removal of that information could endanger public safety. Additionally, information related to professional conduct also may be exempt from oblivion relief until the professional is no longer practicing in the field. Other categories of information may not need to wait any period of time. Disclosure of information such as social security numbers should be placed back into a private sphere immediately upon request.

CONCLUSION

Forgiveness, the decision to forgo negative feelings, retribution, or vengeance, produces a wide range of individual and social benefits—but relies on fading memories. Advances in search

considerable public interest. *Sidis v. F-R Publ'g Corp.*, 113 F.2d 806 (2d Cir. 1940). Resurrected news is difficult to manage legally. The right to be forgotten could be exercised after a certain time period starting from when the offense occurred or when the news about the event occurred. Starting the clock of at the time the information was made public, as opposed to the event's occurrence, allows for important resurrected information to become part of the public discourse. Resurrections should be distinguished from malicious exposures. Because resurrection is important to historians, journalists, and researchers, unindexing, as opposed to deletion, is another option to support social forgiving and the right to be forgotten. When an appropriate user request is received by a site manager, he or she can choose to prevent the page from being crawled. Instead of editing our history, we can simply make it harder to find. It would be similar to a library that can hold an infinite number of objects (books, journals, newspapers, art, movies, music) but operates on the old card catalog system.

algorithms, information seeking behavior, content creation and management practices, and decreasing costs of electronic storage capacity threaten to erode societal forgetting. In other legal contexts, the U.S. has institutionalized forgiving and forgetting in rare instances when the harms to individuals are severe, social benefits are articulated, and that which is forgivable is distinguished from that which is not. Relief from accountability may be offered after a certain amount of hardship is born by the individual for a period of time and formal oversight can be provided. Permitting digital labels to permanently attach to individuals contradicts notions of reinvention, which lie at the heart of U.S. national identity. Oblivion in the digital age is not impossible. Code, norms, and markets may offer partial solutions, but a complete approach to privacy in this context may require legal support. We have proposed four possible directions toward oblivion: reputation bankruptcy, limited use of the information by employers, an oblivion take-down regime similar to the DMCA system, and a false light claim to add context. We believe it is important that forgiveness follow us into the new Information Age and encourage further research in the area.