Erasing Transgender Public Figures' Former Identity with the Right to Be Forgotten

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* J.D., May 2021, The George Washington University Law School; B.A., Law & Society, May 2017, The American University. I would first like to thank Professor Dawn C. Nunziato, who helped inspire this Note and, more importantly, who encouraged me to write about what I believe in. Thank you to my friends for their relentless support of my fondness of going against the grain. Without all of you, I would not have survived the last three years of law school. Lastly, I would like to dedicate this Note to my father, whose biggest dream was witnessing my journey to becoming an attorney. Though you won't be around to see it, I know I've already made you proud.

I. INTRODUCTION

The name Zeke Smith may sound familiar: you might know him as the first transgender contestant on the popular CBS show *Survivor*. Less well known are the facts that he joined the show partly out of desire to validate his gender identity and that a fellow contestant torpedoed this desire by outing him as transgender on live television.

Zeke Smith began watching *Survivor* while coping with depression during his transition.[1] Transitioning was difficult for Zeke because, in his words, "the world doesn't treat trans people with much kindness," and it was only when his transgender identity was no longer widely known that he began to connect with others "in a meaningful way."[2] Zeke kept his gender identity a secret largely because "if [he] let anyone too close, they'd smell [his] stench and not want to be [his] friend anymore."[3]

It was not until Zeke became a *Survivor* contestant that he felt confident in his gender identity: "the moment I put . . . the official *Survivor* player uniform[] on . . . my confidence became real . . . I'd conquer whatever the game might throw at me. I was free."[4] Zeke decided "[not to] discuss [my] trans status . . . because I wanted the show to desire me as a game player . . . not as 'The First Trans *Survivor* Player.'"[5] But Zeke's costar, Jeff Varner, annihilated Zeke's newfound confidence by exposing him as transgender on live television by asking: "Why haven't you told anyone you're transgender?"[6] Zeke said he sat there "in a trance," feeling nothing but utter pain and shock.[7] On being outed, Zeke said:

1. *See* Lisa Respers France, *Zeke Smith Outed as Transgender on 'Survivor'*, CNN ENT. (Apr. 13, 2017, 8:35 PM), https://www.cnn.com/2017/04/13/entertainment/zeke-smith-transgender-survivor/index.html. [https://perma.cc/VPD2-H9YB].
2. Zeke Smith, *'Survivor' Contestant Opens up About Being Outed as Transgender (Guest Column)*, THE HOLLYWOOD REP. (Apr. 12, 2017, 9:00 PM), https://www.hollywoodreporter.com/live-feed/survivor-zeke-smith-outed-as-transgender-guest-column-991514 [https://perma.cc/D4K5-XPDV].
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. Smith, *supra* note 2.

> I'm not wild about [viewers] knowing that I'm trans. An odd sentiment, I realize, for someone who signed up for two seasons of the CBS reality giant, *Survivor* . . . when I got on a plane to Fiji last March, I expected to get voted out . . . I'd return home, laugh at my misadventure, and go about my life, casually trans in the same way that Zac Efron is casually Jewish.[8]

Despite Varner's profuse online apology, it did not ameliorate what he stole from Zeke in exposing his transgender status: his privacy.[9] As Zeke explained, "a person's gender history is private information and it is up to them, and only them, when, how, and to whom they choose to disclose that information."[10]

This anecdote about Zeke Smith underscores that a transgender person's ability to actualize their[11] gender identity requires the complete abdication of their former selves, which creates a unique privacy interest in maintaining the confidentiality of their birth names[12] and assigned sex at birth.[13] Revealing this personal information[14] exposes transgender persons to stigma and violence and threatens their ability to fully realize their gender identity.

However, U.S. privacy law is inadequate in guarding against the disclosure of transgender public figures' personal information. Public figures as a class are rarely successful in bringing actionable privacy claims given the emphasis courts place on accessibility to information concerning individuals with public-facing lives. On the off chance a public figure succeeds in their claim, the available legal remedies cannot completely rectify the harm done, for there is no legal mechanism that enables them to claw this sensitive

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8. *Id.*

9. *See* Jeff Varner (@jeffvarner), TWITTER (Apr. 12, 2017, 9:11 PM) https://twitter.com/JEFFVARNER/status/852328280095109120 [https://perma.cc/ZN92-GFFJ].

10. *See* France, *supra* note 1.

11. This Note uses singular "they, them, theirs," instead of the pronouns "she, her, hers" or "he, him, his" to respect the gender identities of transgender individuals, as well as all other identities within the gender non-conforming community.

12. This Note uses "birth name" and "legal name" interchangeably. Both refer to the name given to transgender individuals at birth, as opposed to their chosen names that reflect their gender identity. Another term used to refer to transgender individuals' birth names are their "deadnames." Using a transgender individuals' birth name or legal name instead of their chosen name is to "deadname" them, a hostile act aimed at undermining their gender identity. Adrien Converse, *What Does "Deadname" Mean?* DECONFORMING, https://deconforming.com/deadname/ (last visited Dec. 28, 2020) [https://perma.cc/DTU8-MBSQ].

13. The term "assigned sex at birth" (hereinafter "ASAB") refers to the label a doctor gives a person at birth, primarily based on medical factors, including a person's hormones, chromosomes, and genitals. When discussing someone's sex, the appropriate term is "assigned female at birth" or "assigned male at birth." *See Sex, Gender, and Gender Identity*, PLANNED PARENTHOOD, https://www.plannedparenthood.org/learn/sexual-orientation-gender/gender-gender-identity (last visited Dec. 20, 2020) [https://perma.cc/LVD2-8BJG].

14. When the term "personal information" is used in reference to transgender individuals, it means their legal names and ASAB.

information back from the public's view. This legal reality, coupled with the need of transgender individuals to keep their personal information confidential, creates a distinct issue for the case of a transgender public figure seeking to sanction revelation of this information in online publications.

The United States should look to the European Union's "right to be forgotten" (RTBF) for guidance because, compared to the U.S., the EU favors more robust privacy protections—even in the face of competing press and speech freedoms.[15] If adopted, the RTBF's delisting mechanism would enable transgender public figures to request the removal of online articles referencing their personal information and redaction of their personal information. This remedy is essential to respecting the unique privacy interest arising from the transgender identity, which outweighs First Amendment speech and press freedoms for two reasons. First, implementing this remedy would only alter privacy law for a tiny population subset, as transgender individuals make up less than 1% of the U.S. population[16]—meaning this change would do little in the aggregate to upset privacy jurisprudence. Second, in adopting this solution, the American legal system stands to protect transgender persons from rampant stigmatization, discrimination, and physical violence, which could play a significant role in combatting efforts to vitiate federal legal protections for transgender individuals, such as those that occurred under the Trump administration.[17]

Part II begins in Section A with an overview of the unique privacy interest encompassed by the transgender identity. Section B examines the tort of public disclosure as a mechanism to enforce privacy rights, noting the tort's inapplicability to "newsworthy" information, which is information of such

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15. The right to be forgotten (hereinafter "the RTBF") refers to a legal mechanism created by the European Court of Justice in *Google Spain SL v. Agencia Espanola de Proteccion de Datos* (*Google Spain*) designed to enforce privacy rights. The RTBF enables individuals (usually referred to as data subjects in this context) to request data controllers, like Google, to remove links resulting from searches for their names when those results are "inadequate, irrelevant, or excessive in relation to the purposes for which they are collected." *See* Dawn C. Nunziato, *The Fourth Year of Forgetting: The Troubling Expansion of the Right to be Forgotten*, 39 U. PA. J. INT'L L. 1011, 1014 (2018) (citing 2014 E.C.R. Case C-131/12, Google Spain SL v. Agencia Espanola de Proteccion de Datos and Mario Costeja Gonzalez, 317, para. 94, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62012CJ0131 [https://perma.cc/6X2F-6PCW] (hereinafter *Google Spain*)).

16. In 2016, less than 0.6% of the U.S. population identified as transgender. *See* Andrew R. Flores, et al., *How Many Adults Identify as Transgender in the United States?*, WILLIAMS INST. 3 (June 2016), https://williamsinstitute.law.ucla.edu/publications/trans-adults-united-states/ [https://perma.cc/78GM-N4ME].

17. Sandy E. James et. al, *The Report of the 2015 U.S. Transgender Survey*, NAT'L CTR. FOR TRANSGENDER EQUAL. 4–5 (Dec. 2016), https://www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.PDF [https://perma.cc/LZ3R-AMDF]; Lola Fadulu, *Trump's Rollback of Transgender Rights Extends Through Entire Government*, N.Y. TIMES (Dec. 6, 2019), https://www.nytimes.com/2019/12/06/us/politics/trump-transgender-rights.html [https://perma.cc/95J2-XAFT].

concern to the public it overrides a person's privacy interests or concerns an innately newsworthy person because they occupy a prominent role in public life and thus are considered a public figure. Section B explains that on the rare occasion when public figures succeed in making public disclosure claims, legal remedies are insufficient to rectify the harm done, which creates an obstacle for transgender public figures seeking to ban publication of their personal information. Section C introduces the EU's RTBF as a solution, positing the EU's privacy protections as instructive in resolving this issue.

Part III imports the RTBF to resolve the issue. Section A cements privacy law's failure to protect transgender public figures' personal information while finding the RTBF equipped to do so. Section B asserts that the RTBF comports with First Amendment freedoms, and further that certain legal mechanisms already act as blueprints for creating an American right of erasure. Finally, this Note concludes with a cursory overview of what implementation would look like, arguing in favor of federal legislation to codify this solution.

II. BACKGROUND

A. The Transgender Identity and Privacy Rights

Being transgender entails the complete abdication of an individual's former gender identity. The term itself embraces not only a difference in gender identity, but a personal metamorphosis: a transgender individual's "gender [identity] and [expression] [does] not conform to the gender they were assigned at birth."[18] A transgender individual may have made "social, medical, or surgical steps to physically or socially bring their body or gender expression in line with the gender with which they identify."[19] These social, medical, and surgical steps are part of transitioning, a process integral to the expression of a transgender person's gender identity.[20] Transitioning is motivated by a desire to compel the world to validate a transgender person's

18. See JACKSON WRIGHT SHULTZ, TRANS/PORTRAITS: VOICES FROM TRANSGENDER COMMUNITIES 200–01 (2015). *See also Glossary*, LAMBDA LEGAL, https://www.lambdalegal.org/protected-and-served/glossary#Transfeminine (last visited Nov. 24, 2020) [https://perma.cc/P3NM-4WYY] ("Transgender: refers to people whose gender identity . . . differs from their assigned or presumed sex at birth"). This is not to suggest all transgender individuals express their identity the same ways. The transgender identity is complex and not monolithic, but the above provides a baseline definition for the purposes of this Note.

19. SHULTZ, *supra* note 18, at 200–01.

20. *See* Stephanie L. Budge et al. *Transgender Emotional and Coping Processes: Facilitative and Avoidant Coping Throughout Gender Transitioning*, 41 THE COUNSELING PSYCH. 601, 603–04 (2013) (Transitioning refers to transgender individuals who have "[undergone] medical intervention, but it can be used more inclusively . . . the word *transition* literally means 'to change' . . . *Transition* . . . refer[s] to the process . . . transgender individuals go through to identify as transgender.").

gender identity,[21] but also partly by the fear of being "found out,"[22] given the vulnerability of transgender persons to social stigma, discrimination, sexual assault, and physical attack.[23] Such discrimination has always been pervasive, but has become even more so in recent years under President Trump, as illustrated by the increase in violence against transgender persons since the beginning of 2017,[24] as well as the former Administration's efforts to rollback legal protections for transgender persons.[25]

There is ample research evincing the scope of discrimination and violence perpetuated against transgender persons—especially when their gender identity is exposed. The D.C. Office of Human Rights' (OHR) study, *Qualified and Transgender*, outlines employers' discriminatory responses to an applicant's transgender identity—specifically, the study shows

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21. *See* Stacey M. Brumbaugh-Johnson & Kathleen E. Hull, *Coming Out as Transgender: Navigating the Social Implications of a Transgender Identity*, 66(8) J. OF HOMOSEXUALITY 1148, 1164 (2019). This comes from a study that examined transgender coming-out narratives. A transgender man explained that his decision to transition was done in part to compel his parents to validate his gender identity: "Steven said [his parents] still do not accept his identity. He expressed uncertainty about his parents' response to his next stages of transitioning: 'So, I think it'll be very interesting once I'm really beyond the point of no return in terms of low voice and beard and all that kind of thing . . . how they'll react to that, because then they really can't pretend anymore.'"

22. *Id.* at 1163. A transgender woman discussed her transition: "I wanted my transition to be complete . . . I didn't want to have that fear . . . [or] be worried [that] . . . somebody might figure it out. Somebody might know who I am."

23. James, *supra* note 17, at 4–5. (Transgender respondents reported severe discrimination in all aspects of life; 10% who were out to their family reported experiencing violence committed against them by their family because they were transgender; 8% were kicked out of their house because they were transgender. Of the respondents who were out as transgender in school, 54% were verbally harassed; 24% were physically attacked; 13% were sexually assaulted; and 17% left school because of mistreatment. Of the respondents that were out as transgender at work, 30% reported mistreatment at work due to being transgender, including being fired, denied a promotion, or physical or sexual assault).

24. *See, e.g.*, *Fatal Violence Against Transgender People in America 2017*, HU. RTS. CAMPAIGN 4 (2017), http://assets2.hrc.org/files/assets/resources/A_Time_To_Act_2017_REV3.pdf [https://perma.cc/W9P5-YS49] (finding 25 transgender persons were murdered since Trump's election in 2016); *Murders of Transgender People in 2020 Surpasses Total for Last Year in Just Seven Months*, NAT'L CTR. FOR TRANSGENDER EQUAL., (Aug. 7, 2020) https://transequality.org/blog/murders-of-transgender-people-in-2020-surpasses-total-for-last-year-in-just-seven-months [https://perma.cc/GSR2-86KE] (indicating violence against transgender persons increased from 2019 to 2020, with the number recorded "surpass[ing] the total for all of 2019"—that is, 28 transgender individuals lost their lives as of August 2020 as compared to 26 in 2019.).

25. Fadulu, *supra* note 17 (outlining how President Trump rolled back legal protections for transgender individuals, including the transgender military ban, the Department of Health and Human Services' proposal to vitiate the Affordable Care Act's ban on discrimination against transgender individuals in healthcare, the Justice Department's reduction of protections for transgender individuals in prisons, and the Department of Housing and Urban Development's attempts to rollback protections for transgender individuals in homeless shelters).

transgender persons face substantial hurdles in the hiring process, as evidenced by employers' selection of less qualified, cisgender[26] applicants over more qualified transgender applicants.[27] Similarly, Professor Cynthia Lee's article, *The Trans Panic Defense Revisited*, denotes the grave consequences of suddenly exposing a transgender individual's identity by outlining the "transgender panic defense," a criminal defense strategy asserted by a cisgender male defendant charged with murdering a transgender woman.[28] It is used as a provocation defense, where a male defendant claims upon discovering the victim was not biologically female but transgender, he became so enraged that he committed the murder because he lost control of himself, and thus should be convicted of a lesser offense, like voluntary manslaughter.[29] The defense originates from society's hostile belief that it is the transgender woman's fault for supposedly "deceiving" the defendant about her gender identity,[30] and when her gender identity is exposed, the natural response of anyone in the defendant's position would be violence.[31] This deeply entrenched belief that violence against transgender individuals is justifiable denotes the need for heightened legal protections of transgender individuals' personal information to shield them from violence. Professor Lee's research indicates both that transgender individuals have a privacy interest in safeguarding their personal information from the public, and that recognition and protection of this distinct privacy interest is integral to shielding them from stigma, violence, and their right to be free from discrimination on the basis of their gender identity.

However, the interest in maintaining the confidentiality of their personal information does not vanish when a transgender individual becomes "newsworthy" if they are considered a public figure.[32] In fact, transgender public figures are even more vulnerable to the effects of such disclosure because public figures are often unable to seek redress for exposure of private

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26. "Cisgender" describes individuals whose gender identity aligns with their assigned sex at birth. *See* Cynthia Lee & Peter Kwan, *The Trans Panic Defense: Masculinity, Heteronormativity, and the Murder of Transgender Women*, 66 HASTINGS L.J. 77, 90 (2014).

27. Teresa Rainy & Elliot E. Imse, *Qualified and Transgender*, D.C. OFF. HU. RTS. 6 (2015), https://ohr.dc.gov/sites/default/files/dc/sites/ohr/publication/attachments/QualifiedAndTransgender_FullReport_1.pdf [https://perma.cc/DJ8F-QK8N] (finding 48% of employers preferred at least one less-qualified cisgender applicant over a more qualified transgender applicant; 33% of employers extended interviews to one or more less-qualified cisgender applicants over a more qualified transgender applicant).

28. Cynthia Lee, *The Trans Panic Defense Revisited*, 57 AM. CRIM. L. REV. 1411, 1411 (2020).

29. *Id.*

30. *Id.* at 1436–38 (citing People v. Merel, No. A113056, 2009 WL 1314822, at *6–9 (Cal. Ct. App. May 12, 2009)).

31. *See* Lee, *supra* note 28, at 1436.

32. *Cf.* Wasser v. San Diego Union, 191 Cal. App. 3d 1455, 1462 (1987) (quoting William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 418 (1960)) (affirming the principle that once a person becomes a public figure, the details of their lives and of "'past events . . . can properly be a matter of present public interest,'" and that "'one quite legitimate function of the press is . . . educating . . . the public as to [that] past history'").

information.[33] Moreover, even when public figures are successful in bringing an invasion of privacy claim, civil liability does not adequately remedy the potential harm of such a revelation. Remedies usually take the form of monetary damages, which do not resolve the harm suffered, because no dollar amount can offset the disruption to a transgender person's life when another publicizes their information.[34] Nor is there a dollar amount that can offset the danger of being exposed to violence and stigma.[35]

Injunctive relief—whereby a court orders an injunction to restrain publication of information—is also an available remedy.[36] However, injunctive relief does little to remedy the harm done if publication has already occurred. While a court can restrain further publication, once the proverbial cat is out of the bag, there is no way to delete information from the public's view once it is published online.[37]

Understanding why privacy law is inadequate to rectify the harm done by publicizing a transgender public figure's personal information requires understanding the limits of U.S. privacy law—specifically, how First Amendment speech and press freedoms restrict informational privacy rights.

B. Privacy Law: Informational Privacy Rights Versus the First Amendment in the Tort of Public Disclosure

The notion a person has the right, within certain bounds, to maintain control over dissemination of their personal information is the cornerstone of

33. *See* Sipple v. Chron. Publ'g Co., 154 Cal. App. 3d 1040, 1049–50 (1984) (quoting the RESTATEMENT (SECOND) TORTS § 652D cmt. g (AM. L. INST. 1977)) (finding public figures are "regarded as properly subject to the public interest, and publishers are permitted to satisfy the curiosity of the public as to its heroes, leaders, villains and victims, and those who are closely associated with them.").

34. *See* Diaz v. Oakland Trib., Inc., 139 Cal. App. 3d 118, 136 (1983). *See, e.g.*, Budge, *supra* note 20, at 604.

35. *See, e.g.*, Lee, *supra* note 28, at 1422; Abby Elin, *For Transgender Women, an Extra Dose of Fear*, N.Y. TIMES (Aug. 9, 2017), https://www.nytimes.com/2017/08/09/well/mind/for-transgender-women-an-extra-dose-of-fear.html [https://perma.cc/357U-PESH]; *Violence Against the Transgender Community in 2019*, HU. RTS. CAMPAIGN, https://www.hrc.org/resources/violence-against-the-transgender-community-in-2019 (last visited Dec. 28, 2020) [https://perma.cc/8AW9-B8SZ] (explaining in 2019, at least twenty-six transgender or gender non-conforming people were killed—an increase from 2018, in which there were at least twenty-two recorded murders of transgender individuals); *see also A National Epidemic: Fatal Anti-Transgender Violence in America in 2018*, HUM. RTS. CAMPAIGN, https://www.hrc.org/resources/a-national-epidemic-fatal-anti-transgender-violence-in-america-in-2018 (last visited Dec. 28, 2020) [https://perma.cc/4HS6-W93X].

36. *See, e.g.*, 37 CALIFORNIA FORMS OF PLEADING AND PRACTICE—Annotated § 429.392 (2019); Leavy v. Cooney, 214 Cal. App. 2d 496, 504 (1963); 4 TEXAS TORTS AND REMEDIES § 53.08 (2019).

37. *See* Garcia v. Google, 786 F.3d 733, 745 (9th Cir. 2015) (there is no right of erasure in the U.S. that allows a person to delete content from the Internet).

informational privacy.[38] The tort of public disclosure allows an individual to bring suit for invasion of privacy by alleging a defendant has publicized personal information that is private and highly sensitive.[39] However, the tort is largely restricted by First Amendment freedoms; this is because in assessing a defendant's liability for publicizing a plaintiff's personal information, courts will balance the plaintiff's need to assert control over their personal information against the public's interest in maintaining access to the information, as well as the press's right to print it.[40]

Samuel Warren and Louis Brandeis articulated the earliest iteration of a right to informational privacy in their law review article on a common law right to privacy, in which they stated there is a "right to be let alone" from unwarranted government intrusion into the privacy of one's home and life.[41] This was then codified in the Restatement (Second) of Torts as "one who gives publicity to . . . the private life of another."[42] Also dubbed the tort of public disclosure, this tort turns on whether information is "highly personal[,] representing the most intimate aspects of human affairs."[43] Remedies primarily take the form of monetary damages to compensate the plaintiff for the emotional pain caused by the disclosure of their personal information—including compensatory, punitive, and nominal damages, with types and amounts differing by state.[44] Injunctive relief is also available as a remedy.[45] When granted, it restrains further publication of the plaintiff's private information.[46]

Liability for the tort of public disclosure is triggered when (1) an individual publicizes a fact (2) that is private and (3) "highly offensive to a reasonable person," and (4) the public has no legitimate interest in this information.[47] These elements have been interpreted differently by lower courts, with only limited treatment by the Supreme Court.

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38. *See* U.S. Dep't of Just. v. Reps. Comm. for Freedom of the Press, 489 U.S. 749, 763 (1989).

39. *See* RESTATEMENT (SECOND) OF TORTS § 652D (AM. L. INST. 1977).

40. *See* Sean M. Scott, *The Hidden First Amendment Values of Privacy*, 71 WASH. L. REV. 683, 699–700 (1996) (summarizing Fla. Star v. B.J.F., 491 U.S. 524, 526 (1989)).

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

42. *See* RESTATEMENT (SECOND) OF TORTS § 652D.

43. Doe v. Luzerne Cnty., 660 F.3d 169, 176 (3d Cir. 2011).

44. *See Diaz*, 139 Cal. App. 3d at 136–37; *see, e.g.*, 1 LEXISNEXIS PRACTICE GUIDE: FLORIDA PERSONAL INJURY § 7.18 (2019) (Florida awards compensatory damages for invasion of privacy based on resulting injuries, but if evidence fails to show the plaintiff sustained a substantial injury, nominal damages may be granted; punitive damages may be awarded if there is a showing of defendant's "wantonness or recklessness"); 1 LEXISNEXIS PRACTICE GUIDE: PENNSYLVANIA PERSONAL INJURY § 2.17 (2019) (Pennsylvania awards nominal, compensatory, and punitive damages for invasion of privacy); 4 TEXAS TORTS AND REMEDIES, *supra* note 36 (Texas awards compensatory damages; nominal damages are awarded if the plaintiff cannot show the amount of loss; exemplary damages may be awarded if plaintiff suffered actual damage and proves defendant acted maliciously).

45. *See, e.g.*, 37 CALIFORNIA FORMS OF PLEADING AND PRACTICE—ANNOTATED § 429.392, *supra* note 36; 4 TEXAS TORTS AND REMEDIES, *supra* note 36.

46. *See, e.g.*, *Leavy*, 214 Cal. App. 2d at 504.

47. *See* RESTATEMENT (SECOND) OF TORTS § 652D.

The first element, publicity, requires a defendant to communicate a private fact to the public, regardless of the communication medium.[48] While the Restatement requires the communication be made to the public at large, the necessary *degree* of publicity varies across jurisdictions.[49] Some courts hold the communication must be made to a large number of individuals so the information is likely to become accessible to the general public.[50] Other courts construe it liberally and find communication to small subsets of the population satisfies the "publicity" criterion.[51]

The second element—whether information is "private"—turns on whether information is already in the public domain.[52] As such, information in public records is not private, so a person's birth date, military status, or pleading filed in a lawsuit are not private facts.[53] This is referred to as the "public records exception," which the Supreme Court outlined in *Cox Broadcasting Corp. v. Cohn*. In that case, the Supreme Court held that televising a deceased sexual assault victim's name was not actionable because the broadcaster obtained this information through publicly available court records.[54] So, when is information private? The Restatement elucidates that everyone has aspects of their lives they do "not expose to the public eye, but [keep] entirely to [themselves] or at most [reveal] only to . . . family or to close friends."[55] The Restatement lists sexual relationships, serious illnesses, and family quarrels as "intimate details" that, if revealed, may constitute an actionable invasion of privacy.[56]

The third element—whether the information disclosed is "highly offensive"—is a question of fact, which requires considering whether the average person would find revelation of the facts at issue to be offensive in context.[57] Courts have held that the disclosure of a person's HIV status or sexual orientation to a large number of people to constitute publicity of a

48. *See id.* cmt. a.

49. *See id.*

50. *See* St. Anthony's Med. Ctr. v. H. S. H., 974 S.W.2d 606, 610 (Mo. Ct. App. 1998) (the publicity element requires the communication be made "to the public in general or to a large number of persons" as opposed to just one or a few individuals).

51. *See*, *e.g.*, Hillman v. Columbia Cty., 474 N.W. 2d 913, 920 (Wis. Ct. App. 1991) (holding a prison guard communicating a private fact—an inmate's HIV-positive status—to other guards and inmates constituted publicity).

52. *See* RESTATEMENT (SECOND) OF TORTS § 652D cmt. b.

53. *See id.*

54. *See* Cox Broad. Corp. v. Cohn, 420 U.S. 469, 495 (1975).

55. RESTATEMENT (SECOND) OF TORTS § 652D cmt. b.

56. *Id.*; *see also* 1 LEXISNEXIS PRACTICE GUIDE: PENNSYLVANIA PERSONAL INJURY § 2.17, *supra* note 44 ("Inherently private facts include a person's financial, medical, or sexual life.").

57. *See* Pontbriand v. Sundlun, 699 A.2d 856, 865 (R.I. 1997); *see also* RESTATEMENT (SECOND) OF TORTS § 652D cmt. c. (noting that this inquiry will be relative to the customs and values of society).

highly objectionable kind.[58] Generally, this element turns on whether publication of the information would cause emotional distress or embarrassment to the average person.[59]

That said, even when facts are private, highly offensive, and are communicated with sufficient publicity, a plaintiff's public disclosure claim may still be defeated by the fourth element—the newsworthiness exception—if the information is deemed newsworthy. Information is newsworthy if it is central to the public's interest, either because the fact itself is of public importance, or the plaintiff occupies such a significant role in public life that they are of public importance.

1. Limiting the Public Disclosure Tort: The Newsworthiness Exception

The newsworthiness exception limits the public disclosure tort in that it requires weighing a person's privacy interest against speech and press freedoms.[60] This balance between privacy rights and First Amendment freedoms has teetered towards the latter, and over time, the newsworthiness exception has become so powerful it has "[swallowed] the tort."[61]

The Supreme Court has done little to clarify the contours of newsworthiness. It only referenced the newsworthiness exception in two cases, *Cox Broadcasting Corp. v. Cohn* and *Florida Star v. B.J.F.*, but failed to directly address whether the information at issue in both cases was

58. *See* Simpson v. Burrows, 90 F. Supp. 2d 1108, 1125, 1132 (D. Or. 2000) (finding disclosure of plaintiff's sexual orientation to a large number of people by mailing letters to public institutions revealing plaintiff was an "immoral" and "perverted" lesbian constituted revealing of facts in a manner that would be highly offensive to a reasonable person); *see also* Urbaniak v. Newton, 277 Cal. Rptr. 354, 360 (Ct. App. 1991) (holding the disclosure of plaintiff's HIV-positive status was actionable, as HIV was "ordinarily associated either with sexual preference or intravenous drug uses" and was, although should not have been, "viewed with mistrust or opprobrium," and thus disclosure would be highly offensive to a reasonable person).

59. *See* Prosser, *supra* note 32.

60. *See, e.g.*, Gill v. Hearst Pub. Co., 40 Cal. 2d 224, 228 (1953); *Cox Broad. Corp*., 420 U.S at 489.

61. Harry Kalven, Jr., *Privacy in Tort Law: Were Warren & Brandeis Wrong?*, 31 L. & CONTEMP. PROBLEMS, 326, 336 (1966).

newsworthy per se.[62] Given the Supreme Court's limited guidance, lower courts have found a variety of subject matter newsworthy.[63] Professor Richard Karcher surveyed the different tests employed by various courts for newsworthiness,[64] including the Ninth Circuit,[65] Second Circuit,[66] and District of Columbia Court of Appeals.[67] Each test examines different instances in which the public's interest in information trumps (or does not trump) a plaintiff's privacy rights—particularly in the context of a public figure plaintiff. Although these newsworthiness tests differ in various respects, they all share one significant commonality: they each vitiate the tort's deterrent value by decreasing the likelihood courts will impose liability on media defendants.[68]

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62. The facts of *Cox Broadcasting Corp. v. Cohn* and *Florida Star v. B.J.F* are similar. In *Cox*, plaintiff sued defendant for televising the name of a deceased sexual assault victim the defendant obtained from publicly available court records. *See Cox Broad. Corp.*, 420 U.S. at 473–74. In *Florida Star*, plaintiff sued a newspaper company for printing the full name of a rape survivor it obtained from a police report. *See Fla. Star*, 491 U.S. at 526. In both cases, the Court found publication of lawfully obtained, truthful information already in the public domain is protected by the First Amendment. *See Cox Broad. Corp.*, 420 U.S. at 471; *see also Fla. Star*, 491 U.S. at 541. Putting the onus on the state, the Court found the state had the power to restrict the public availability of this information. *See Cox Broad. Corp*, 420 U.S. at 497; *Fla. Star*, 491 U.S. at 540–41. The Court explained if the state did not affirmatively do so, it reflected the state's determination that the matter was of public concern, and therefore newsworthy, though it never directly addressed whether the information was per se newsworthy. *See Cox Broad. Corp*, 420 U.S. at 495; *Fla. Star*, 491 U.S. at 541.

63. *See, e.g.*, Walter v. NBC Tel. Network, Inc., 811 N.Y.S.2d 521, 523 (App. Div. 4th Dept. 2006) (comedic information is newsworthy); Hull v. Curtis Publ'g Co. 125 A.2d 644, 646 (Pa. Sup. Ct. 1956) (educational information is newsworthy).

64. *See* Richard T. Karcher, *Tort Law and Journalism Ethics*, 40 LOY. U. CHI. L.J. 781, 795–96 (2009).

65. *Id.* at 795 (quoting Capra v. Thoroughbred Racing Ass'n, 787 F.2d 463, 464 (9th Cir. 1986)). The Ninth Circuit designates three factors for juries to weigh in determining whether information is newsworthy: "(1) the social value of the facts published, (2) the depth of the publication's intrusion into ostensibly private affairs, and (3) the extent to which the [individual] voluntarily assumed a position of public notoriety."

66. *Id.* at 795 (citing Sidis v. F-R Pub. Corp., 113 F.2d 806, 809 (2d Cir. 1940)). The Second Circuit found publicizing truthful facts about public figures does not offend the average person's standards of decency, saying "the misfortunes and frailties of . . . 'public figures' are subjects of considerable interest and discussion to the rest of the population" and that courts should not bar discussion of such matters.

67. *Id.* at 796 (quoting Vassiliades v. Garfinckel's, Brooks Bros., 492 A.2d 580, 589 (D.C. 1985)). The Court of Appeals for the District of Columbia emphasized the First Amendment's role in the newsworthiness exception and its capability to bar public officials and even those who "attempted to avoid publicity" from seeking redress for publicizing information concerning "interesting phases of human activity and . . . information . . . appropriate so that an individual may cope with the exigencies of their period."

68. *Id.* at 796.

2. The Newsworthiness Exception and Public Figures

The Supreme Court defines public figures as those who garner public attention either by occupying "positions of . . . pervasive power and influence" or thrusting "themselves to the forefront of particular public controversies."[69] Lower courts have deemed a variety of individuals public figures: celebrities,[70] government officials,[71] criminals,[72] inventors,[73] and even individuals who become public figures unwillingly (such as an individual present at the scene of a crime).[74] Public figures are believed to have given up a range of privacy rights in "voluntarily acced[ing] to a position of public notoriety."[75] So long as the subject matter is true and newsworthy in that it captures the public's legitimate interest, courts generally side with publications—even in cases where the intrusion into private life appears excessive.[76] Because the First Amendment protects robust debate on public issues, courts find that even serious intrusions into a public figure's life serve this interest.[77] The following section outlines the various approaches lower courts have taken to gauge the newsworthiness of public figures' personal information.

3. "Testing" the Newsworthiness of Public Figures' Personal Information

Lower courts apply different newsworthiness tests. The following cases apply a standard loosely paraphrasing the standard articulated by the Ninth Circuit in determining the newsworthiness of public figures' personal information, weighing three factors: (1) the social value of the information, or the relevance of the information to understanding the story told in the publication or public figure themselves; (2) the extent the publication intrudes

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[69] Gertz v. Robert Welch, 418 U.S. 323, 345 (1974).

70. Shlomit Yanisky-Ravid & Ben Zion Lahav, *Public Interest vs. Private Lives—Affording Public Figures Privacy in the Digital Era: The Three Principle Filtering Model*, 19 U. PA. J. CONST. L. 975, 980 (citing Ann-Margret v. High Soc'y Mag., Inc., 498 F. Supp. 401, 404 (S.D.N.Y. 1980)).

71. *See id.* at 980–81 (citing *Gertz*, 418 U.S. 323, 345 (1974)).

72. *See id.* at 981 (citing Marcone v. Penthouse Int'l Mag. for Men, 754 F.2d 1072, 1085 (3d Cir. 1985)).

73. *See id.* (citing Thompson v. Curtis Publ'g Co., 193 F.2d 953, 954 (3d Cir. 1952)).

74. *See id.* (quoting *Gertz*, 418 U.S. at 345) ("Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare.").

75. *See generally* Kapellas v. Kofman, 1 Cal. 3d 20, 25 (1969).

76. *See, e.g.*, Jeffrey F. Ghent, Annotation, *Waiver or Loss of Right of Privacy*, 57 A.L.R. 3d 16, *5 (1974) (quoting Briscoe v. Reader's Dig. Ass'n, 4 Cal. 3d 529, 535 n.5 (1971)) ("Almost any truthful commentary on public officials or public affairs, no matter how serious the invasion of privacy, will be privileged."); Branson v. Fawcett Publ'ns, Inc., 124 F. Supp. 429, 433 (E.D. Ill. 1954).

77. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 281 (1964).

into a public figure's life; and (3) the degree to which the public figure willingly assumed a place in public life.[78]

In *Kapellas v. Kofman*, the Supreme Court of California applied these three newsworthy factors to decide whether the delinquent behavior of a politician's children was newsworthy.[79] There, Inez Kapellas, a political candidate, brought an invasion of privacy claim against a newspaper for an editorial denigrating her candidacy, stating her children's arrests reflected her poor parenting ability and political ineptitude.[80] First, the court found Kapellas' candidacy for public office made the information valuable because the public had a right to learn about "any facet of a candidate's life that may relate to [their] fitness for office."[81] Second, the court found the newspaper's conduct was justifiable and did not intrude into Kapellas's life.[82] Because the public had a right to information relevant to her candidacy, the press was allowed to have ample opportunity "to disseminate all information that may cast a light on a candidate's qualifications," making the intrusion permissible.[83] Also bearing on this factor was that her children's arrests were matters of public record and not confidential, minimizing the supposed intrusion into her private life.[84] Third, the court found Kapellas's participation in politics meant she voluntarily acceded to a position of prominence and thus knowingly subjected herself to a "searching beam of public interest and attention."[85] The court noted the salience of First Amendment freedoms in its decision, commenting the loss of Kapellas's children's privacy was "the cost[] of [retaining] . . . a free marketplace of ideas."[86]

Diaz v. Oakland Tribune diverges from the *Kapellas* court's approach to newsworthiness. Though the California Court of Appeals in *Diaz* decided a public figure's transgender identity was non-newsworthy, it reached this conclusion on weak footing. There, ToniAnn Diaz sued a newspaper for public disclosure of a private fact for publishing a story exposing her as transgender.[87] After changing her name and transitioning, Diaz kept her transgender identity secret.[88] Years later, while acting as her university's student body president, Diaz charged the school with fund misappropriation

78. *Capra*, 787 F.2d at 464 (designating three factors for the jury to weigh in determining whether information is newsworthy: "(1) the social value of the facts published, (2) the depth of the publication's intrusion into ostensibly private affairs, and (3) the extent to which the individual voluntarily acceded to a position of public notoriety.").
79. *See Kapellas*, 1 Cal. 3d at 24–25.
80. *See id.* at 26.
81. *Id.* at 36–37.
82. *Id.* at 38.
83. *Id.* at 36–37.
84. *Id.* at 38.
85. *Kapellas*, 1 Cal. 3d. at 37.
86. *Id.* at 38.
87. *See Diaz*, 139 Cal. App. 3d at 122–25.
88. *See id.* at 123.

and a local newspaper published a story on the controversy.[89] Somehow, a columnist discovered Diaz was transgender and publicized this fact, along with her legal name and ASAB.[90] Though the court admitted individuals who "voluntarily seek public office or willingly become involved in public affairs waive their right to privacy of matters connected with their public conduct," it found Diaz's gender identity was not newsworthy.[91] First, the court found the information lacked social value because there was no connection between Diaz's qualifications for office and her gender identity.[92] Although the question of whether the publication constituted a severe intrusion into Diaz's private life was a factual question for the jury, the court noted publications would not be privileged if they are so offensive that they constitute a "morbid and sensational prying into private lives for its own sake."[93] The court also found the question of whether Diaz voluntarily acceded to public notoriety was a factual question for the jury. However, it admitted the public arena Diaz entered was small, and being the first female student body president did not vindicate the disclosure—an indication the court did not find her transgender status central to the public's interest.[94] Also factoring into the court's decision, Diaz "scrupulously kept" her gender identity secret by changing her name and updating her driver's license, Social Security card, and high school records.[95]

However, *Diaz* does not signify a ban on all disclosures related to LGBTQIAP+[96] identities.[97] *Sipple v. Chronicle Publishing Co.* makes this clear. In *Sipple*, the California Court of Appeals found a public figure's sexual orientation constituted newsworthy information.[98] There, Oliver Sipple sued

89. *Id.* at 124.

90. *See id.*

91. *Id.* at 134.

92. *See id.* ("The fact that she is [transgender] does not adversely reflect on her honesty or judgment.").

93. *Diaz*, 139 Cal. App. 3d at 126 (quoting Virgil v. Time, Inc., 527 F.2d 1122 (9th Cir. 1975)). This insinuates the court's belief this publication constituted a severe intrusion into plaintiff's private life.

94. *See id.* at 134.

95. *Id.* at 123, 132.

96. The acronym LGBTQIAP+ stands for lesbian, gay, bisexual, transgender, queer, intersex, asexual, and pansexual/polysexual. The plus sign indicates any sexual or gender identities not captured by the acronym. Jesse Jade Turner, *LGBTQIAP+: We help you understand 23 gender terms*, PARENT24 (May 16, 2019), https://www.parent24.com/Teen_13-18/Development/lgbtqiap-we-help-you-understand-23-gender-terms-20190124 [https://perma.cc/8W5H-MCZ5].

97. The court in *Diaz* indicated Diaz's public disclosure claim was actionable not because the LGBTQIAP+ identity is necessarily private, but because she went to considerable lengths to maintain the confidentiality of her transgender identity. *But see Wasser*, 191 Cal. App. 3d at 1463 (distinguishing *Diaz*, where court dismissed plaintiff's invasion of privacy claim, where plaintiff brought suit against a newspaper for public disclosure for publishing a story on plaintiff being acquitted of murder, where the court held that unlike the plaintiff in *Diaz*, plaintiff here did not keep his acquittal secret but pursued various ancillary suits related to acquittal, thus vaulting himself into a place of public notoriety).

98. *See Sipple*, 154 Cal. App. 3d at 1048–50. This is not to say the lived experiences of transgender individuals and homosexual individuals are the same. They are not. Still, the California Court of Appeal's treatment of gender identity and sexual orientation serve as a useful point of comparison.

a newspaper for public disclosure of private facts for divulging his homosexuality in a news story.[99] After he foiled an assassination attempt on President Ford, Sipple garnered considerable publicity; subsequently, the San Francisco Chronicle published a story detailing how Sipple foiled the attempt, which would likely "break the stereotype" and instead influence the notion gay men were heroic.[100] The story was then run by the Los Angeles Times, then by various newspapers in other states.[101] Sipple sued, alleging he was not a public figure and his homosexuality was a private fact, as his family was unaware of his sexuality until the newspapers circulated it, which resulted in Sipple's family ostracizing him.[102] The court found Sipple's claim was not an actionable invasion of privacy.[103] It reasoned his homosexuality was not a "private" fact, as it was already widely known to the San Francisco community: the fact he frequented gay bars, marched in gay rights parades, and had a close public friendship with Harvey Milk (a prominent, openly gay man) meant his sexual orientation was public knowledge.[104] The court also emphasized that Sipple did not attempt to conceal his homosexuality. When asked, he would "frankly admit that he was gay."[105]

The *Sipple* court sidestepped the three newsworthiness factors, deciding the paramount test for newsworthiness was "whether the matter is of legitimate public interest which in turn must be determined according to the community mores."[106] The court found the newspaper's actions were not "morbid and sensational prying,"[107] but motivated by a legitimate interest in dismantling the stereotype that all gay men were "timid, weak, and unheroic" and raising the question of whether President Ford held prejudice against gay

99. *See id.* at 1043.
100. *See id.* at 1044.
101. *See id.* at 1043–44.
102. *See id.* at 1044–45, 1049.
103. *See Sipple*, 154 Cal. App. 3d at 1048.
104. *See id.*
105. *Id.* at 1048.
106. *Id.*
107. Interestingly, the California Court of Appeals did not cite to *Diaz*, in which it held just a year earlier disclosure of a public figure's transgender identity constituted a "morbid and sensational prying" into her private life. *Id.* at 1049. This possibly denotes the court was only willing to sanction disclosure of the LGBTQIAP+ identity in that specific case and would not broadly apply the *Diaz* holding in other similar circumstances. *Cf. Diaz*, 139 Cal. App. 3d at 126.

individuals, making the information newsworthy.[108] Finally, the court rejected Sipple's objection he was not a public figure because he did not intend to thrust himself into the limelight.[109] The court deemed Sipple an "involuntary public figure," saying there are some individuals who did not seek "publicity or [consent] to it, but through their own conduct or otherwise have become a legitimate subject of public interest. They have . . . become 'news' . . . These persons are regarded as properly subject to the public interest."[110] Thus, for the purposes of Sipple's public disclosure claim, he could be regarded as a public figure (albeit an involuntary one) and consequently the subject of legitimate public concern.[111]

Ultimately, public figures' ability to bring public disclosure claims is at the mercy of the newsworthiness determination, which is further complicated by the fact this determination is usually left to a jury's subjective judgment.[112] Compounding this is the role sensationalism plays in society's beliefs about what is newsworthy. To a large extent, sensationalism obfuscates the newsworthiness determination. Too often, trivial and lurid details of public figures' private lives are the subject of publicity.[113] This is to say, compared to private figures, public figures' ability to retain control over their private lives is flimsy.

C. The European Union's Right to Be Forgotten

The RTBF is an EU privacy right that grants citizens the ability to erase, limit, or delist personal data on the Internet which may be incorrect, embarrassing, irrelevant, or outdated.[114] The European Court of Justice (ECJ) first articulated the right in 2014 in *Google Spain SL v. Agencia Española de Proteción de Datos and Mario Costeja González* (*Google Spain*).[115] Upon Googling his name, Mario Costeja González discovered two links to a La

108. *Sipple*, 154 Cal. App. 3d at 1049. This exemplifies courts' belief that disclosure of sexual orientation is newsworthy if the disclosure is important to understanding the story being reported. This was discussed in Barbara Moretti's article, who explained sexual orientation is ordinarily a private fact, but media disclosure of sexual orientation will be privileged if it provides context to a news story. This notion undergirds the court's analysis in *Sipple*: it believed disclosure of Sipple's homosexuality constructed a heroic image, which contributed to an understanding of the assassination attempt. *See* Barbara Moretti, *Outing: Justifiable or Unwarranted Invasion of Privacy? The Private Facts Tort as a Remedy for Disclosures of Sexual Orientation*, 11 CARDOZO ARTS & ENT. L.J. 857, 896–97 (1993).

109. *See Sipple*, 154 Cal. App. 3d at 1049–50.

110. *Id.* at 1049–50 (quoting RESTATEMENT (SECOND) OF TORTS § 652D cmt. f).

111. *See id.* at 1050.

112. *See, e.g.*, *id.* at 1048.

113. Karcher, *supra* note 64, at 802 ("Much of today's news coverage . . . involves the publication of purely trivial information and events regarding public figures . . . including everything from child custody battles to failure to pay their debts. The publication of such trivial information does not serve the primary purpose of informing society. . . . ").

114. *See* Michael J. Kelly & David Satola, *The Right to Be Forgotten*, 2017 U. ILL. L. REV. 1, 3; Michael L. Rustad & Sanna Kulevska, *Reconceptualizing the Right to Be Forgotten to Enable Transatlantic Data Flow*, 28 HARV. J.L. & TECH. 349, 353 (2015).

115. *See Google Spain*, *supra* note 15.

Vanguardia article detailing an auction to pay off social security debts, which González claimed he repaid.[116] González requested La Vanguardia either remove or change the webpages so that Google searches of his name would no longer reveal this personal data.[117] He also asked the court to order Google Spain or Google Inc. to remove his personal data so the article would no longer appear and so his name would not be visible in links to the article.[118] González contended any articles detailing the attachment proceeding were no longer relevant, as he had paid the debts years ago.[119] In responding to González's complaint, the ECJ determined whether the right to privacy furnished by the EU's Data Protection Directive (the Directive) protected the *processing* of González's personal data, thus obliging Google to remove González's name from searches conducted for his name.[120] The ECJ ruled in González's favor, finding the Directive required Google to delist links to the La Vanguardia article.[121]

In doing so, the ECJ enunciated the standard for invoking the RTBF: a data subject can compel a data controller[122] to delist information if it is inadequate, irrelevant, or excessive in relation to the purposes for which they are collected.[123] In articulating this standard, the ECJ noted a data subject can still request a controller to delist information even if the information is true and "published lawfully by third parties," so long as it does not comply with the criteria set out by Article 6 of the Directive.[124]

The ECJ's decision also had some significant qualifications. One of the significant caveats was the "journalistic purposes" exception, which exempted third-party publishers from delisting obligations for information

116. *See id.* ¶ 14.
117. *See id.* ¶ 15.
118. *See id.*
119. *See id.*
120. *See id.* ¶¶ 1–3.
121. *See Google Spain*, *supra* note 15, ¶ 98.
122. A data controller is any "natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes and means of the processing of personal data." Directive 1995/46/EC of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L 281) art. 2(d), https://eur-lex.europa.eu/eli/dir/1995/46/oj [hereinafter, *Directive 1995/46/EC*]. Here, the ECJ considered Google—and notably, not La Vanguardia—to be a data controller, as Google dictated the processing of González's personal data online by "loading [his] data on an Internet page." *Google Spain*, *supra* note 15, ¶ 35. In contrast, the court determined La Vanguardia was an online publisher of the underlying article at issue and as such did not engage in the same processing actions as Google.
123. *See Google Spain*, *supra* note 15, ¶ 72.
124. *See id.* ¶ 85. Article 6 reads in relevant part: "Member States shall provide that personal data must be: processed fairly and lawfully . . . collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes . . . adequate, relevant and not excessive in relation to the purposes for which they are collected . . . accurate and, where necessary, kept up to date. . . . " *Directive 1995/46/EC*, *supra* note 122, art. 6.

published for "journalistic purposes."[125] In compelling Google to delist links to the La Vanguardia article, the ECJ distinguished between Google's actions as a data controller that processed personal data and La Vanguardia's actions as an online publisher.[126] The ECJ said La Vanguardia's actions of publishing personal information in online articles does not constitute "processing of personal data" by a data controller like Google within the meaning of the Directive.[127] Thus, La Vanguardia's actions as a third-party publisher were not tantamount to those of Google as a data controller.[128] To that end, the ECJ exempted third-party publishers from delisting obligations so long as they published a data subject's personal information exclusively for "journalistic purposes"[129] under Article 9.[130] This means it is possible for data subjects to have a claim against data controllers, but not against online publishers. The ECJ held La Vanguardia printed González's personal information for journalistic reasons, meaning that the RTBF imposed delisting obligations on Google, but not on La Vanguardia, thus freeing the newspaper from an obligation to delete the article.[131]

Though the ECJ limited its holding by not imposing any delisting obligations on La Vanguardia, many lower European courts have skirted the "journalistic purposes" exception and imposed delisting and sometimes even deletion obligations on publishers directly. This is the subject of the following section.

Despite the ECJ's efforts to cabin the RTBF's delisting obligations to data controllers alone, many lower European courts have imposed erasure obligations on both data controllers and publishers of online articles alike. Lower courts' treatment of publishers varies.[132] Some mandate that third-party publishers delist online articles and anonymize them by redacting a data

125. *See Google Spain*, *supra* note 15, ¶ 85.

126. *See id.* ¶ 35.

127. *See id.*

128. *See id.*

129. Article 9 also exempts publishers from delisting obligations if they publish a data subject's personal information exclusively for "expressive" purposes. *See Directive 1995/46/EC*, *supra* note 122, art. 9 ("Member States shall provide for exemptions . . . for the processing of personal data carried out solely for journalistic purposes or the purpose of artistic or literary expression only if they are necessary to reconcile the right to privacy with the rules governing freedom of expression.").

130. *See Google Spain*, *supra* note 15, ¶ 85.

131. *See id.*

132. *See* S.T.S., Oct. 15, 2015 (J.T.S. No. 545/2015) (Spain), http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=TS&reference=7494889&links=%222772%2F2013%22%20%22545%2F2015%22&optimize=20151019&publicinterface=true [https://perma.cc/75CS-GKWY] (Spanish Supreme Court interpreting the RTBF to impose delisting obligations on online publishers); Hof van Cassatie [Cass.] [Court of Cassation], 29 Apr. 2016, AR C150052F, http://www.cass.be (Belg.), https://inforrm.files.wordpress.com/2016/07/ph-v-og.pdf [https://perma.cc/326M-8AN2] (Belgian Court of Cassation construing the RTBF to require a publisher to delist and anonymize an online article); Cass., sez. un., 24 giugno 2016, n. 13161, Giur. it. 2016, II, 1 (It.), http://www.altalex.com/documents/news/2016/07/07/cronaca-e-diritto-all-oblio [https://perma.cc/84X8-8295] (Italian Supreme Court of Cassation interpreted RTBF to necessitate a publisher's deletion of a true two-year old online article).

subject's personal information while others have gone so far as to require third-party publishers to delete entire articles from the Internet. In her 2018 article, Professor Dawn C. Nunziato detailed how lower courts have expanded the RTBF by imposing erasure and anonymization obligations on third-party publishers of online content, arguing that lower courts have "upset the balance that the [ECJ] initially carefully established between data subjects' privacy rights and newspapers' right to freedom of expression and journalistic privileges."[133]

The Spanish Supreme Court further expanded the RTBF by imposing delisting obligations on publishers of online articles in *A & B v. Ediciones El País SL*.[134] There, two former drug traffickers sued El País, a Spanish newspaper, for indexing online articles detailing their convictions.[135] The men argued that because the offenses occurred years ago and they were now rehabilitated working professionals, the article was irrelevant and should be made inaccessible.[136] The court rejected El País's argument that the journalistic purposes exception shielded it from liability and said the delisting obligations imposed on data controllers by the RTBF included not only search engines, but also third-party publishers of online content acting as data controllers.[137] The court held El País's processing of the men's personal data was no longer "adequate, relevant, and not excessive," asserting the press's primary purpose is to report on current events, with the archiving of past news being secondary.[138] The court determined that enough time had passed such that continued processing of this information was unnecessary and thus that the plaintiffs' privacy rights outweighed El País's expressive freedoms.[139] As such, the court ordered El País to hide the article from the public by making it inaccessible via general searches.[140]

The Belgian Court of Cassation expanded the RTBF further by imposing both delisting and anonymizing obligations on a publisher in *Olivier G v. Le Soir*.[141] There, Olivier G sued a newspaper for processing an online

133. Nunziato, *supra* note 15, at 1031.

134. *See* S.T.S., Oct. 15, 2015 (J.T.S. No. 545/2015) (Spain), http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=TS&reference=7494889&links=%222772%2F2013%22%20%22545%2F2015%22&optimize=20151019&publicinterface=true [https://perma.cc/75CS-GKWY].

135. *See* Nunziato, *supra* note 15, at 1022 (summarizing S.T.S., Oct. 15, 2015 (J.T.S. No. 545/2015) (Spain)).

136. *See id.* at 1022–23 (summarizing S.T.S., Oct. 15, 2015 (J.T.S. No. 545/2015) (Spain)).

137. *See id.* at 1023 (summarizing S.T.S., Oct. 15, 2015 (J.T.S. No. 545/2015) (Spain)).

138. *Id.* at 1023–24 (explaining S.T.S., Oct. 15, 2015 (J.T.S. No. 545/2015) (Spain)).

139. *Id.* at 1024 (explaining S.T.S., Oct. 15, 2015 (J.T.S. No. 545/2015) (Spain)).

140. *Id.*

141. Nunziato, *supra* note 15, at 1027–28 (summarizing Hof van Cassatie [Cass.] [Court of Cassation], 29 April 2016, AR C150052F, http://www.cass.be (Belg.), https://inforrm.files.wordpress.com/2016/07/ph-v-og.pdf [https://perma.cc/326M-8AN2]).

article detailing a fatal accident he caused by driving while intoxicated.[142] Upon discovering the article, Olivier G requested the newspaper anonymize it by replacing his name with an "X", but the newspaper refused, so he sued, claiming the newspaper's refusal contravened the RTBF.[143] Over the newspaper's objections that the journalistic purposes exception protected its actions, the court ruled in Olivier G's favor.[144] The court held that the RTBF enables individuals with past convictions to object to the availability of their criminal histories online, and that Olivier G's privacy interests superseded the newspaper's expressive freedoms because the availability of his criminal past online did more harm to him than it did to promote press freedoms.[145]

On the most extreme end of the spectrum is the Italian Supreme Court of Cassation.[146] The court extended RTBF obligations to PrimaDaNoi, an Italian newspaper publisher, requiring them to delete an article that it published two years prior.[147] At issue was an article published by an Italian newspaper, PrimaDaNoi, detailing assault charges brought against a restaurant owner.[148] Just two years after the article's publication, the restaurant owner, believing the online article marred his and his restaurant's reputation, demanded PrimaDaNoi delete it.[149] PrimaDaNoi refused.[150] The Court rejected PrimaDaNoi's argument that it was shielded by the journalistic purposes exception, finding the article was more harmful to the restaurant owner's privacy rights than it was beneficial to PrimaDaNoi's expressive freedoms despite the fact that the article was only two years old and that the criminal suit was ongoing.[151] The court determined the public's interest in the criminal proceedings against the restaurant owner was satisfied because the article was available online for two years. In the court's view, the public's interest in the information elapsed since its publishing, and thus the proper remedy was deleting the article.[152]

These European lower court decisions expanded the RTBF by holding privacy rights supersede the media's press and expressive freedoms. Many

142. *See id.*

143. *See id.*

144. *See id.* at 1028.

145. *See* Aaron Minc, *Right to Be Forgotten Requires Anonymization of Online Newspaper Article*, MINC L. (Sept. 14, 2018), https://www.minclaw.com/right-to-be-forgotten-requires-anonymisation-online-newspaper-article/ [https://perma.cc/ZLS4-DVYF] (summarizing the Belgian Court of Cassation's holding in Olivier G v. Le Soir).

146. Cass., sez. un., 24 giugno 2016, n. 13161, Giur. it. 2016, II, 1 (It.).

147. Nunziato, *supra* note 15, at 1029 (summarizing Cass., sez. un., 24 giugno 2016, n. 13161, Giur. it. 2016, II, 1 (It.)).

148. *See* Adam Satariano & Emma Bubola, *One Brother Stabbed the Other. The Journalist Who Wrote About It Paid a Price*, N.Y. TIMES (Sept. 23, 2019), https://www.nytimes.com/2019/09/23/technology/right-to-be-forgotten-law-europe.html [https://perma.cc/KAG2-FU2Q].

149. *See* Nunziato, *supra* note 15, at 1030 (summarizing Cass., sez. un., 24 giugno 2016, n. 13161, Giur. it. 2016, II, 1 (It.)). *See also* Satariano & Bubola, *supra* note 148.

150. *See id.*

151. *See id.* (summarizing Cass., sez. un., 24 giugno 2016, n. 13161, Giur. it. 2016, II, 1 (It.)).

152. *See id.*

believe the legal theories undergirding these decisions represent a stark departure from the U.S.'s concept of privacy.[153] The following section details how the RTBF would clash with American First Amendment freedoms, and how that tension can be resolved to allow transgender public figures to retain control over their personal information.

III. PROTECTING TRANSGENDER PUBLIC FIGURES' PRIVACY RIGHTS WITH THE RTBF

A. Privacy Law: No Recourse for Transgender Public Figures

The balancing act courts conduct when analyzing a public disclosure claim raises distinct concerns with respect to transgender individuals. Though transgender persons' needs to maintain the confidentiality of their personal information to actualize their true gender identity is a weighty privacy interest, courts may not honor this interest, especially if a transgender person is a public figure and a court finds publication of their personal information necessary to satiate a legitimate public interest.[154] While it is true the First District of the California Courts of Appeal in *Diaz v. Oakland Tribune* enabled a transgender public figure to sue a newspaper for public disclosure for publishing her legal name and ASAB, this should not be read as an outright ban on the disclosure of a transgender public figures' gender identity.[155] There are a few reasons this decision is insufficient to resolve this issue.

First, *Diaz* was a state court decision, so it is not binding on other jurisdictions.[156] Second, the court's decision was cabined to its facts. The court was careful to indicate Diaz's public disclosure claim was actionable because she took extensive measures to keep her gender identity secret.[157] This suggests the court would be unwilling to penalize disclosure of a transgender public figure's gender identity if they did not "scrupulously [keep it] a secret."[158] Moreover, while the court agreed she was a public figure, it explained that the public arena for a university's student body president is small,[159] which suggests a transgender public figure with greater notoriety than Diaz, such as an actress or senator, may not rely on this decision. Third, it is significant the court decided this case in 1983, when the modern Internet

153. *See id.* at 1042.

154. *Id.*

155. *See Diaz*, 139 Cal. App. 3d 118.

156. It does not even seem to be binding in its own jurisdiction, as the California Court of Appeals did not cite to *Diaz* in a holding articulated one year later in *Sipple v. Chronicle Publishing Co. See Sipple*, 154 Cal. App. 3d 1040. Though *Diaz* involved disclosure of a plaintiff's transgender status and *Sipple* involved disclosure of a plaintiff's homosexuality, the issues are closely related as they both involve disclosures concerning LGBTQIAP+ identities.

157. *See Diaz*, 139 Cal. App. at 132.

158. *Id.* at 123.

159. *Id.* at 134.

did not exist.[160] Today, individuals often use the Internet in a way that compromises their privacy,[161] necessarily making it more difficult to guard against unwanted disclosures, a reality that courts must respond to when assessing individuals' information privacy rights today.[162] Also, were the same facts litigated today, a court could easily decide the other way, given the prevalence of anti-transgender policies implemented under President Trump's Administration,[163] and especially given Trump's appointment of numerous conservative justices with records of opposing LGBT+ rights to the federal bench.[164] Thus, it is unlikely a transgender public figure would be able to rely

160. One could argue that the fact that *Diaz* was decided in 1983 cuts in the other direction because, in theory, society's perception of transgender individuals has improved since then. However, given the rampant violence perpetuated against transgender individuals today, this is not an ironclad argument. *See, e.g.*, James et al., *supra* note 17; *Fatal Violence Against Transgender People in America 2017*, *supra* note 24; Fadulu, *supra* note 17 and accompanying text.

161. *See* Thomas H. Koenig & Michael L. Rustad, *Digital Scarlet Letters: Social Media Stigmatization of the Poor and What Can Be Done*, 93 NEB. L. REV. 592, 595 (2015).

162. *See* Agnieszka A. McPeak, *The Facebook Digital Footprint: Paving Fair and Consistent Pathways to Civil Discovery of Social Media Data*, 48 WAKE FOREST L. REV. 887, 946 (2013).

163. *See* Fadulu, *supra* note 17. *See also* Lee *supra* note 28, at 1415.

164. *See, e.g.*, *On the Bench: Federal Judiciary*, AM. CONST. SOC'Y (Dec. 18, 2020) https://www.acslaw.org/judicial-nominations/on-the-bench/ [https://perma.cc/T9U3-A6WA] (President Trump has confirmed 233 Article III judges to the federal bench during his administration, including three Supreme Court Justices); Colby Itkowitz, *1 in Every 4 Circuit Court Judges is Now a Trump Appointee*, WASH. POST (Dec. 21, 2019, 7:32 PM), https://www.washingtonpost.com/politics/one-in-every-four-circuit-court-judges-is-now-a-trump-appointee/2019/12/21/d6fa1e98-2336-11ea-bed5-880264cc91a9_story.html [https://perma.cc/V97Z-H9WN] (noting that Trump's aggressive installment of federal judges "has remade the federal judiciary, ensuring a conservative tilt for decades and cementing his legacy. . . . "); *Trump's Judicial Assault on LGBT Protections*, LAMBDA LEGAL 7–8 (2019), https://www.lambdalegal.org/sites/default/files/publications/downloads/trump-judicial-nominees-report-2019.pdf [https://perma.cc/XDL5-4UG8] (citing Gibson v. Collier, 920 F.3d 212 (5th Cir. 2019)) (observing that "over-one third of Trump's judicial nominees to the circuit courts have[] records of working to undermine LGBT rights and protections", noting the discriminatory conduct of Trump-appointee Judge James Ho, who sits on the U.S. Court of Appeals for the Fifth Circuit. Judge Ho authored an opinion in which he denied a transgender female inmate healthcare and continuously misgendered her "by using improper pronouns throughout the decision, even after the district court had used the correct pronouns."). *See also Gibson*, 920 F.3d at 216–17 (Judge Ho mentioned that Gibson was a transgender woman and that she "lived as a female since the age of 15" and used the name "Vanessa Lynn Gibson," but referred to her using male pronouns and her deadname, "Scott Lynn Gibson," throughout the decision).

on *Diaz* to assert their informational privacy rights and adequately protect themselves from discrimination.[165]

Even when courts find public disclosure claims actionable, the remedies available are inadequate to fully rectify the harm done to transgender individuals by the disclosure of their personal information. If a court finds a public figure's public disclosure claim actionable, it will either award the plaintiff damages or order an injunction to restrain further publication of the information at issue.[166] For example, in *Diaz*, the court upheld the jury's award of $250,000 in compensatory damages and $525,000 in punitive damages,[167] which the court said was meant to reflect the visceral pain Diaz suffered, but conceded the harm done to her by the newspaper revealing her ASAB and birth name was "not easily quantifiable."[168] To the court's point, monetary damages cannot fully compensate a transgender person for being "outed." Money cannot resolve the fact a publication has invalidated a transgender person's gender identity by bringing to the forefront of the public's mind their former identity, essentially undermining all of the work they undertook to transition.[169] Money also cannot compensate for the stigma[170] and physical violence[171] to which disclosure of this information exposes them. Nor can an injunction fully resolve the issue, because while a court can enjoin a newspaper from publicizing this information further, once it has been published, there is no way to erase this information from the public domain.[172]

To fully resolve this issue and ensure transgender public figures retain control over their personal information such that it does not pose a threat to their safety or inhibit them from expressing their gender identity requires looking across the Atlantic towards the EU's RTBF. The following section details how the U.S. might fashion a similar privacy right modeled after the RTBF. Importantly, the subsequent section does not recommend a verbatim importation of the *Google Spain* decision. Rather, it proposes forging a privacy right for transgender public figures based on the lower European

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165. Another important point to consider is the degree to which public figures use the Internet and social media today. Many celebrities and politicians use social media to make announcements, garner notoriety, and connect with the public. *See* Sherilynn Macale, *Why More Celebrities and Public Figures Are Turning to Social Media*, THE NEXT WEB (Oct. 17, 2011), https://thenextweb.com/socialmedia/2011/10/17/why-more-celebrities-and-public-figures-are-turning-to-social-media/ [https://perma.cc/P32Y-9MEY]; *see also* Jennifer Goldbeck et al., *Twitter Use by the U.S. Congress*, 61 J. AM. SOC'Y INFO. SCI. TECH. 1612 (2010) (exploring congresspersons' Twitter usage to self-promote and disseminate information to their constituents about their daily activities).

166. 4 TEXAS TORTS AND REMEDIES, *supra* note 36.

167. *See Diaz*, 139 Cal. App. 3d at 122.

168. *See id.* at 137.

169. SHULTZ, *supra* note 18, at 200–01.

170. Rainey & Isme, *supra* note 27 and accompanying text.

171. *See* Lee, *supra* note 28, at 1415 and accompanying text.

172. *See Garcia*, 786 F.3d at 745 (stating there is no RTBF in the U.S.).

courts' expansion and application of the RTBF. This is because simply delisting articles that reference transgender public figures' birth name and ASAB does not completely remedy the harm done by revelation of such information. The way to fully remedy such harm is by requiring the delisting of online articles that reference such information, as well as redacting such information from the online articles themselves.

B. Implementing the RTBF: How Feasible is an American Right of Erasure?

Before delving into how the U.S. may adopt the RTBF, it merits contextualizing American opposition to it. As the Ninth Circuit explained in *Garcia v. Google*, there is decidedly no RTBF in the U.S.[173] The unwillingness to recognize the RTBF stems from the belief it is anathema to First Amendment speech and press freedoms.[174] This is due to the power conferred by the RTBF because it is perhaps the greatest informational privacy mechanism ever, as it creates a right to wipe from the Internet any information a person deems unfavorable.[175] In this respect, the RTBF conflicts with Americans' guaranteed speech and press freedoms because the removal of information from online publications necessarily occludes the press's freedom to publish it.[176] There is also a concern the RTBF would signal the end of a free and open Internet, which is integral to the uninhibited expression of speech and exchange of information.[177]

However, there is reason to doubt legal scholars' and practitioners' concerns that the RTBF is incompatible with American legal principles. In fact, there are several aspects of American law that embrace the essence of the RTBF[178]—that is, the belief that some information is so private it should be redacted from the public sphere. For example, criminal erasure statutes that expunge a person's criminal records create a "legal fiction" that that person

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173. *Id.*

174. *See* Editorial, *Ordering Google to Forget*, N.Y. TIMES (May 13, 2014), https://www.nytimes.com/2014/05/14/opinion/ordering-google-to-forget.html?hp&rref=opinion [https://perma.cc/97JF-W353].

175. *See generally* Eric Posner, *We All Have the Right to Be Forgotten*, SLATE (May 14, 2014), https://slate.com/news-and-politics/2014/05/the-european-right-to-be-forgotten-is-just-what-the-internet-needs.html [https://perma.cc/AZF5-M8YL].

176. Editorial, *supra* note 174 ("Lawmakers should not create a [RTBF] so powerful that it could limit press freedoms or allow individuals to demand that lawful information in a news archive be hidden.").

177. *See* Jeffery Rosen, *The Right to Be Forgotten*, 64 STAN. L. REV. ONLINE 88 (Feb. 13, 2012), https://review.law.stanford.edu/wp-content/uploads/sites/3/2012/02/64-SLRO-88.pdf [https://perma.cc/PC7Q-JTNC] ("Unless the [RTBF] is defined more precisely . . . it could precipitate a dramatic clash between European and American conceptions of the proper balance between privacy and free speech, leading to a far less open Internet.").

178. *See* Amy Gajda, *Privacy, Press, and the Right to be Forgotten in the United States*, 93 WASH. L. REV. 201, 206 ("[T]he essential elements of a Right to Be Forgotten have been a part of both U.S. common law and statutory law for decades, in spite of constitutional protections for the publication of truthful information.").

was never convicted.[179] This principle is also exemplified in the Restatement of Torts when it references the sort of private facts that give rise to actionable public disclosure claims, acknowledging there are parts of "[one's] past that he would rather forget."[180]

Further cementing feasibility of implementing the RTBF is the changed circumstances surrounding privacy law, evidenced by the increased demand for an American RTBF in recent years. Jurisprudence is often remade by social changes surrounding the law.[181] One significant social change since Warren's and Brandeis' article 130 years ago is the permanence of information, thanks to the Internet. The Internet's indelible recording of personal information is the reason people today must "live with the digital baggage of their pasts."[182] Such digital permanence has engendered a demand for a RTBF-type mechanism; this can be seen through the existence of certain legal mechanisms that emulate the RTBF's essential function.[183] One such mechanism is copyright law—specifically, the Digital Millennium Copyright Act (DMCA)'s takedown notice.[184] A takedown notice is a written request from a copyright owner to an Internet service provider (ISP) in which the copyright owner claims their copyrighted material is being infringed upon and requests the ISP remove the material from the Internet.[185] *Garcia v. Google*

179. Martin v. Hearst Corp., 777 F.3d 546, 550 (2d Cir. 2015).

180. *See* RESTATEMENT (SECOND) OF TORTS § 652D cmt. b.

181. Lynton Keith Caldwell, *Land and the Law: Problems in Legal Philosophy*, U. ILL. L. REV. 319, 320 (1986) (explaining land law reflects "prevailing social attitudes," and "when social attitudes change, the law will follow sooner or later.").

182. Daniel J. Solove, *Speech, Privacy, and Reputation on the Internet*, *in* THE OFFENSIVE INTERNET: PRIVACY, SPEECH, AND REPUTATION 15, 18 (Saul Levmore et al. ed., 2012).

183. For example, this section discusses the Takedown Notice of the Digital Millennium Copyright Act (DMCA), which grants a copyright owner a legal mechanism to request their copyrighted material be removed from the Internet if such material is infringed upon—imitating the RTBF's delisting function. *See* Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 17 and 28 U.S.C.) [hereinafter, Digital Millennium Copyright Act]. There is also existing research that outlines the demand for an American RTBF, much of which focuses on the way existing American legal structures already embrace the RTBF. *See, e.g.*, Edward J. George, *The Pursuit of Happiness in the Digital Age: Using Bankruptcy and Copyright Law as a Blueprint for Implementing the Right to Be Forgotten in the U.S.*, 106 GEO. L. J. 905, 928 (2018) (asserting that the digital permanence guaranteed by the Internet creates an impetus to import the RTBF, and moreover that the RTBF already exists in American legal mechanisms, such as the Takedown Notice of the DMCA, which requires the removal of certain webpages that infringe upon copyrighted materials); Brian O'Shea, *A New Method to Address Cyberbullying in the United States: The Application of a Notice-and-Takedown Model as a Restriction on Cyberbullying Speech*, 69 GEO. WASH. FED. COMM. L. J. 119, 121–23 (2017) (observing the impetus for an American RTBF to curb the alarmingly permanent impact of cyberbullying, finding that "there already exists a comparable mechanism" in the form of the DMCA's Takedown Notice).

184. *See* 112 Stat. 2860.

185. *See, e.g.*, 17 U.S.C. § 512(c); Andre Menko Bleech, *What's the Use? Good Faith Evaluations of 'Fair Use' and Digital Millennium Copyright Act 'Takedown' Notices*, 18 COMMLAW CONSPECTUS 241, 243 (2009).

denotes the parallels between the DMCA's takedown notice and the RTBF's erasure mechanism. In *Garcia*, Garcia played a role in a film that, unbeknownst to her, was later turned into an Islamophobic film and uploaded to the Internet.[186] After experiencing considerable social backlash for her role, Garcia sent Google five takedown notices to remove the video from the Internet, asserting that the film's online presence violated her copyright interest in her performance.[187] Google refused, so she sued.[188] Though the Ninth Circuit found Garcia's copyright claim too weak and denied her request to remove the video—affirming that no RTBF exists in the U.S.—*Garcia* stands for more than just a single American court's refusal to recognize the RTBF.[189] Rather, it signifies efforts to carve a RTBF out of existing law. These examples substantiate that there is a developing desire for such a mechanism in the U.S., and also the potential that a RTBF could descend naturally from existing law.

The above indicates that a solution modeled after the RTBF to protect transgender public figures' privacy rights would not be so foreign as to make American application of this right completely infeasible, which the subsequent section outlines in greater detail.

Resolving this issue requires implementing the RTBF to create a right specific to transgender public figures—one that would enable them to erase their private information, if unveiled, from the public's view. Doing so requires going further than the ECJ did in *Google Spain*. As explained above, the ECJ's decision in *Google Spain* mandated only that data controllers—like Google and other search engines—were required to delist articles resulting from a search of a data subject's name.[190] Importing the *Google Spain* decision is insufficient because requiring the delisting of articles that reference transgender public figures' birth names and ASAB does not fully capture the harm done to these individuals. Instead, the U.S. should import the lower European courts' application of the RTBF. The Spanish Supreme Court, Belgian Court of Cassation, and Italian Court of Cassation are instructive inasmuch as they bookend how far the U.S. should go in adopting a RTBF to protect the privacy rights of transgender public figures.

However, the U.S. should borrow from the Spanish and Belgian courts, but not from the Italian Court. The Italian court's decision to order the deletion of an article that was true and relatively recent at the time of the decision was too far-reaching, and in recommending a solution, it is important to be realistic about what will comport with First Amendment freedoms in the U.S. Complete deletion of online articles so radically contravenes speech and press freedoms that it would make implementation untenable. The U.S. should follow the Spanish Supreme Court instead by imposing delisting

186. *See Garcia*, 786 F.3d at 737–38.
187. *See id.* at 738.
188. *See id.*
189. *Id.* at 745–46.
190. *See Google Spain*, *supra* note 15, ¶¶ 82, 88.

obligations on both data controllers and third-party publishers of online articles referencing transgender public figures' personal information.

The U.S. should also emulate the Belgian Court of Cassation. Upon receiving requests from transgender public figures to delist articles, the U.S. should order anonymization of the article by requiring third-party publishers to redact transgender public figures' personal information from the articles. In practice, this anonymization would come in the form of replacing transgender public figures' ASAB and legal names with an "X."[191] The U.S. should also subject both data collectors and publishers to liability if they refuse to honor the requests of transgender public figures to delist articles and redact their personal information.

The next question is what this solution will look like. Given that privacy law in the U.S. varies by state, it would be best for Congress to pass comprehensive federal legislation as opposed to relying on the Supreme Court to solve the problem. This would both eliminate jurisdictional variation and circumvent the Court's obligation to overturn a vast amount of precedent to create such a right. That said, it is not this Note's objective to supply the exact blueprint of this legislation; that is a task ripe for further discussion and research by another author. This Note's purpose is solely to assert that transgender public figures' privacy rights merit protection and to identify the RTBF as a mechanism to do so.

IV. CONCLUSION

The tenuous ability of public figures to assert their information privacy rights is qualified by the value of their actions to the public. This presents a quandary for transgender public figures, whose needs to maintain the confidentiality of their ASAB and legal names are essential to actualizing their gender identities. Even if transgender public figures are permitted to recover, such legal remedies are insufficient to fully ameliorate the harm done to them by disclosure. Without a right of erasure to delete this information from the public domain, transgender public figures are vulnerable to further discrimination and stigmatization, which is why the RTBF is essential to resolving this issue.

When envisioning how legal structures oppress transgender individuals, privacy law is not the first thing that comes to most people's minds. However, the legal issue this Note seeks to resolve typifies one of the ways those with the power to do so can reform privacy law to support transgender individuals and other minority groups. A classic example of how privacy law has been used to support minority groups is *Lawrence v. Texas*.

191. Much like the "X" Olivier G requested the Belgian newspaper replace his personally identifying information with in *Olivier G v. Le Soir*. *See* Nunziato, *supra* note 15, at 1027 (summarizing Hof van Cassatie [Cass.] [Court of Cassation], 29 April 2016, AR C150052F, http://www.cass.be (Belg.)).

There, the Supreme Court used privacy jurisprudence to protect the rights of LGBTQ+ persons to engage in consensual sexual intercourse in the privacy of their own homes.[192] This issue similarly is another way privacy law can be used to support the needs of another marginalized community. This solution may seem extreme to those who strongly favor First Amendment freedoms, but what is more extreme is the violence and prejudice transgender individuals still face—and rectifying this issue is essential to uplifting transgender individuals and protecting them from discrimination.

192. Lawrence v. Texas, 539 U.S. 558, 578 (2003).