de Mars S, O'Callaghan P. [Narratives about Privacy and Forgetting in English Law](#). *International Review of Law, Computers & Technology* 2016, 26.

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This is an Accepted Manuscript of an article published by Taylor & Francis in International Review of Law, Computers & Technology on 12/02/2016, available online:

<http://www.tandfonline.com/10.1080/13600869.2015.1125163>

Date deposited:

22/02/2016

Embargo release date:

12 July 2017

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Narratives about Privacy and Forgetting in English Law

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Abstract

This paper examines narratives about the right of privacy in the UK. It argues that until relatively recently the dominant narrative was one which associated privacy with celebrity claimants and media defendants. Other narratives, such as those concerned with digital privacy and data protection, did not feature as prominently. But changing technological and social contexts mean that these narratives are now understood to be of immense importance too. This paper explores these narratives against the backdrop of the European Commission’s proposals for a ‘right to be forgotten’ (now relabelled a ‘right to erasure’), the subject-matter of this special issue, as well as the 2014 *Google Spain* judgment. The paper emphasises the importance of forgetting as an aspect of the right to privacy and argues that while the UK legislator and courts have been slow to give effect to erasure remedies, they must now start exploring the bounds of legal possibility in order to meet the challenges of the digital age.

Keywords

Privacy, Data Protection, Forgetting

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* We wish to thank the anonymous reviewers, Steve Hedley, Maeve McDonagh and Andrew Watson for their very helpful comments on earlier drafts of this paper. This paper refers to ‘English law’ because it draws on examples from the common law of England and Wales. However, where we draw on the Data Protection Act 1998 and official policy we refer to the UK.

1. Introduction

It is inevitable that a value as fundamental as privacy will be understood in different ways. From a legal perspective, privacy is a value that finds expression in many different (though sometimes overlapping) areas of law, with constitutional law, international human rights law, family law, tort law and data protection perhaps being the most common. Depending on the area of law, then, practitioners and academics will espouse different narratives about what a right of privacy means. These narratives matter because they have the potential to shape not only the understanding and practices of participants in the legal system but also the popular understanding of a ‘right of privacy’.

Though several narratives about privacy exist, this does not mean, to paraphrase Dworkin, that the narratives struggle side-by-side with litigants before the bar.¹ For a variety of reasons, which we mention below, one narrative dominated English law until relatively recently. This narrative associated privacy with celebrity claimants, super-injunctions and media defendants. While developments in this area of tort law have been important, not least because they bring English law into line with other European legal systems, changing social and technological contexts mean that other narratives, especially those concerned with digital privacy and data protection, are now understood to be of immense importance too.²

This paper is divided into six sections. Following the introduction, section 2 examines the current legal setting. In doing so, it considers how privacy and data protection have evolved as separate legal concepts and assesses what this means for protecting privacy in the contemporary context. The third section seeks to better understand the reaction on the part of public and private actors in the UK to the ‘right to be forgotten’ as it has appeared both in the Commission’s proposals and in the European Court of Justice’s *Google Spain* judgment.³ Against this backdrop, the fourth section seeks to provide justifications for why UK actors should pay closer attention to the new privacy narratives, arguing that the act of forgetting takes on added significance within the changing social context brought about by digitisation. In the fifth section, before we conclude, the paper explores the relationship between forgetting and the fundamental right to freedom of expression/freedom to receive information.

This paper’s central argument is that while the Commission’s proposals and the Court’s judgment are a step in the right direction, it is only a first step. More work needs to be done on the part of legislators and courts to explore the bounds of legal possibility in order to find ways of safeguarding both interests in privacy *and* the freedom of expression/freedom to receive information in the digital age. Historically, both the UK courts and the UK legislator have proven reluctant to engage with data subject rights to ‘erase’, but particularly since the *Google Spain* judgment, we appear to be seeing a change in attitude that suggests a greater willingness to engage with ‘forgetting’ in the digital age. Before we move on to develop this argument, we must start by considering the current legal setting.

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¹ R. Dworkin, *Law’s Empire* (Oxford: Hart, 1986), p 87.

² Though these narratives did not feature as prominently as the dominant narrative, this is not to say that they have been neglected by scholars. Over the past number of years, academics have produced many instructive textbooks and monographs which deal (at least partly, if not wholly) with the subject of privacy law and the internet. See, for example, S. Hedley, *The Law of Electronic Commerce and the Internet in the UK and Ireland* (London: Routledge, 2006); A. Murray, *Information Technology Law* (Oxford: Oxford University Press, 2010); C. Reed (ed) *Computer Law* (Oxford: Oxford University Press, 2011); P. Bernal, *Internet Privacy Rights* (Cambridge: Cambridge University Press, 2014).

³ Case C-131/12, *Google Spain SL v AEPD* [2014] ECLI:EU:C:2014:317.

2. Current Legal Setting

A 'Right to be Forgotten' in English Law?

At first glance, it would seem that a 'right to be forgotten', deriving from a right of privacy (of the sort we find documented in the other contributions to this special issue), does not exist in English law. However, we can find forms of what Ricoeur calls 'institutional forms of forgetting'.⁴ So, for example, we find a commitment to forgetting or being forgotten in the form of bankruptcy laws in which individuals are given the opportunity to wipe the financial slate clean.⁵ Similarly, under the Rehabilitation of Offenders Act (1974), the rules on spent convictions allow for a period of rehabilitation in certain cases, after which the individual is not required to divulge a previous conviction. Again, these rules give the individual a second chance and are of considerable importance in employment practice.⁶ Article 8 ECHR has further strengthened the forgetting dimension in this constellation of cases.⁷ We find further cases concerning the collection, retention and sharing of private material by the police in which interests in being forgotten are relevant.⁸ We might also argue that recognition of the importance of being forgotten was evident in a small number of privacy cases involving attempted publication by the press of private details of ex-offenders.⁹ What all of this means is that a commitment to forgetting does sometimes find expression in English law. Nonetheless, most UK-based lawyers would not accept that there is a 'right to be forgotten' in English law. By contrast, in continental Europe, we have historically found, it would seem, a greater willingness to think about the value of forgetting/being forgotten and the role of law in this context.¹⁰

In recent years, however, the narrative has started to change – in large part as privacy has had to adapt to the digital context, and data protection law has surfaced as a related but distinct procedural aspect of privacy law. Though there is conceptual overlap between data protection and privacy in the sense that the need for the former is justified to a significant extent by reference to the latter, the two remain, as Walden observes, 'distinct legal concepts under English law.'¹¹

Privacy Law

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⁴ P. Ricoeur, *Memory, History, Forgetting* (Chicago: University of Chicago Press, 2004) p 488.

⁵ J.F. Blanchette & D.G. Johnson, 'Data Retention and the Panoptic Society: The Social Benefits of Forgetfulness' (2002) 18 *The Information Society* 33.

⁶ These rules do not apply to every criminal conviction. See further the Rehabilitation of Offenders Act (1974).

⁷ Consider, for instance, the recent case of *R v Secretary of State for the Home Department* [2014] UKSC 35. Here the Supreme Court upheld the Court of Appeal's declaration that particular sections of the Police Act (1997) were incompatible with Article 8 ECHR. See also *MM v UK* [2012] ECHR 1906.

⁸ See, for example *R (Ellis) v The Chief Constable of Essex Police* [2003] EWHC 1321 (Admin); *S and Marper v United Kingdom* [2008] ECHR 1581; *R (Wood) v Commissioner of Police for the Metropolis* [2010] 1 WLR 123. We are grateful to Andrew Watson for drawing our attention to these cases.

⁹ See *Venables v News Group Newspapers Ltd and Others*; *Thompson v News Group Newspapers Ltd and Others* [2001] Fam 430; *X, A Woman Formerly known as Mary Bell, Y v S O, News group Newspapers Ltd, MGN Ltd* [2003] EWHC 1101.

¹⁰ It is noteworthy that the discussion in the UK focuses on one aspect of the 'right to be forgotten' i.e. being forgotten by others. The language used in other European legal systems reveals another aspect i.e. the importance of forgetting for the individual agent. Consider, for example, the German *Recht auf Vergessen* or the French *droit à l'oubli*. On this point see further B.J. Koops, 'Forgetting Footprints, Shunning Shadows' (2011) 8(3) *SCRIPTed* 229, at 231-232.

¹¹ I. Walden, 'Privacy and Data Protection' in C. Reed (ed) *Computer Law* (Oxford: Oxford University Press, 2011) p 584.

The English common law lacks a general remedy for invasion of privacy but privacy has long been an underlying value in the common law.¹² Though privacy can be understood in many different ways, there have always been dominant narratives about its purpose. As early as 1604, in *Semayne's Case*, we find an understanding of privacy as the protection of one's property, or, as Sir Edward Coke puts it, the 'house of every one is his castle.'¹³ Indeed, for much of the nineteenth and early twentieth centuries, this was the dominant understanding of privacy.¹⁴ To varying degrees, nuisance,¹⁵ trespass¹⁶ and criminal law¹⁷ provided remedies to a plaintiff who claimed that the defendant had invaded his physical private sphere. As a consequence of urbanisation and the introduction of new forms of housing during the nineteenth century we can say, then, that the first legal narrative about privacy was one of privacy as property.

The next narrative emerged during the twentieth century. As the century progressed, the press became every more powerful and took an interest in the private lives of public figures. At the same time, celebrities sought to court publicity, in many cases using their names and images in merchandising agreements.¹⁸ Steadily, over the course of the twentieth century, the privacy narrative changed from an understanding of privacy as property to a concept that was associated with celebrity.¹⁹ This became even more pronounced following the introduction of the Human Rights Act (1998) (HRA).²⁰

The HRA incorporated the European Convention on Human Rights (ECHR) into domestic law, giving legal effect to the rights and freedoms of the Convention. For this reason, the Act itself was considered to be the great hope for privacy activists, those who lamented the lack of a general action in civil law. On the eve of the Act's implementation, Lord Irvine declared that the judiciary was 'pen-poised' to develop a right of privacy in the common law.²¹

Lord Irvine's predictions were at least partly accurate. English courts afforded indirect horizontal effect to Article 8 ECHR in a limited range of circumstances. Courts cautiously expanded the equitable doctrine of breach of confidence to cater for one particular type of invasion of privacy: misuse (generally by the press) of private information.²² Breach of confidence, as used in unauthorised disclosure of personal information claims, has evolved

¹² *Wainwright v. Home Office* [2004] 2 AC 406 at 422 (per Lord Hoffmann).

¹³ *Semayne's Case* (1604) 5 Coke Reports 91a.

¹⁴ See, for example, *Merest v Harvey* (1814) 5 Taunton 442; *Jones v Tapling* (1862) 12 Common Bench Reports (New Series) 826, 142 ER 1367; *Gee v Pritchard* (1818) 2 Swanston 402; *Prince Albert v Strange* (1849) 2 De Gex & Smale 652.

¹⁵ See *Walker v Brewster* (1867) LR 5 Eq 25.

¹⁶ See *Harrison v Rutland* [1893] 1 QB 142; *Hickman v Maisey* [1900] 1 QB 752.

¹⁷ Seipp provides examples of 'longstanding prohibitions against peeping Toms and eavesdroppers.' See D.J. Seipp, 'English Judicial Recognition of a Right to Privacy' (1983) 3 (3) *Oxford Journal of Legal Studies* 325 at 337.

¹⁸ *Tolley v. Fry* [1931] AC 333 is a neat illustration of these developments.

¹⁹ See, for example, *Tolley v. Fry* [1931] AC 333; *Kaye v Robertson* [1991] FSR 62. There were occasional exceptions, cases involving non-public claimants. See *Malone v Metropolitan Police Commissioner* [1979] Ch 344; *Wainwright v Home Office* [2004] 2 AC 406.

²⁰ A small selection of these cases include *Theakston v MGN Ltd* [2002] EMLR 22; *Campbell v MGN Ltd* [2004] 2 AC 457; *Douglas v Hello* (No 3) [2006] QB 125; *McKennitt v Ash* [2006] EMLR 10; *Mosley v News Group Newspapers Ltd* [2008] EMLR 20.

²¹ HL Deb 24 November 1997, vol 583, col 784.

²² P. O'Callaghan, *Refining Privacy in Tort Law* (Berlin: Springer, 2012). Cf. T. Bennett, 'Corrective Justice and Horizontal Privacy' (2010) 7 *The Journal Jurisprudence* 545. For instructive analyses of the early developments see J. Morgan, 'Privacy, Confidence and Horizontal Effect: "Hello" Trouble' (2003) *Cambridge Law Journal* 443; N. Moreham, 'Privacy in the Common Law: A Doctrinal and Theoretical Analysis' (2005) 121 *Law Quarterly Review* 628; G. Phillipson, 'Transforming Breach of Confidence? Towards a Common Law Right of Privacy under the Human Rights Act' (2003) 66 *Modern Law Review* 726.

from the *Coco v Clark*²³ doctrine and can now be described as a tort of misuse of private information.²⁴

But in developing this tort, English courts responded to the privacy concerns of a relatively small class of potential claimants: public figures. This is not surprising. Given the high costs associated with civil litigation in the UK, those cases that find their way into the law reports will inevitably concern claimants who can afford to pursue and maintain a civil action. What this means is that there are few cases in English tort law in which claimants who are not public figures take actions for invasion of privacy; and there are even fewer successful claims.²⁵

This is not to say that privacy is not being protected in other ways, however. In the year 2012-2013, the Information Commissioner's Office (ICO) received almost 13,000 data protection complaints and just over 6,000 complaints relating to the Privacy and Electronic Communications Regulations.²⁶ The ICO's civil enforcement team dealt with over 1,300 cases in the same year.²⁷ But such enforcement has traditionally been relatively low-key in the sense that it does not attract much attention from the public. Until recently, the narrative that had 'set the tone' in the Bakhtinian sense,²⁸ thereby having a disproportionate influence in shaping the understanding as to what a right of privacy means, was the one that associated privacy claims with celebrity claimants and media defendants. Consider, for example, a 2012 parliamentary report on privacy.²⁹ The report begins by emphasising privacy's *universality*, saying that it is 'rooted in a belief in the dignity of the human being' but then the report proceeds to focus on misuse of private information claims against the press. This dominant narrative was further reinforced by high profile cases involving celebrities, the media coverage of 'super injunctions' (also known as anonymised injunctions) and controversies about phone-hacking. These latter controversies led to an inquiry into the 'culture, practices and ethics of the press', led by Lord Justice Leveson and published in November 2012.³⁰ We will return to these developments later in the paper. For now we turn to consider the evolution of data protection law in the UK.

Data Protection Law

Data protection law evolved independently of privacy law and is closely connected with the process of digitisation.³¹ Indeed, as Walden puts it, it is this very focus on

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²³ [1969] RPC 41

²⁴ Lord Nicholls refers to the equitable doctrine as a tort in *Campbell*, n 20 above, at [14]: 'The essence of the tort is better encapsulated now as misuse of private information'. See also *Vidal-Hall v Google Inc* [2014] EWHC 13; *Vidal-Hall v Google Inc* [2015] EWCA Civ 311.

²⁵ Of the occasional exceptions, see, for example, *Applause Store Productions v Raphael* [2008] All ER (D) 321.

²⁶ Information Commissioner's Office, *Annual Report 2012/13* (19 June 2013) pp 19 & 25. Available at: http://ico.org.uk/about_us/performance/~/_media/documents/library/Corporate/Research_and_reports/ico-annual-report-201213.ashx

²⁷ *Ibid* p 32.

²⁸ For Bakhtin, in each epoch or social group there are authoritative utterances that 'set the tone', on which 'one relies, to which one refers, which are cited, imitated and followed' and which, ultimately, shape our way of life and cultural practices. See M.M. Bakhtin, *Speech Genres and Other Late Essays* (C. Emerson and M. Holquist, eds., V.W. McGee, trans., Austin: University of Texas Press, 1984), pp 88-89.

²⁹ House of Lords and House of Commons Joint Report on Privacy and Injunctions, Session 2010-2012, HL Paper 273, HC 1443, published on 27 March 2012. Available at: <http://www.publications.parliament.uk/pa/jt201012/jtselect/jtprivinj/273/273.pdf>

³⁰ B. Leveson, *An Inquiry into the Culture, Practices and Ethics of the Press* (London: The Stationary Office 2012).

³¹ Murray, n 2 above, p 465.

digitisation or computerization that ‘can be seen as the beginnings of the divergence between the issue of privacy and that of data protection under English law, and their subsequent different treatment.’³²

UK legislative initiatives in the field of data protection have consistently been prompted by international law obligations. Its international origins may explain in part why there has been very little domestic data protection case law in the UK and why there is relatively little actual enforcement by the ICO.³³ It could also explain why as Erdos comments, the courts and the Information Commissioner in general have displayed a ‘reticent’ or ‘minimalist’ approach to interpreting data protection provisions.³⁴ The Leveson Inquiry has seemingly accurately summarised UK attitudes to data protection law in saying that:

‘[t]o say that [data protection] is little known or understood by the public, regarded as a regulatory inconvenience in the business world, and viewed as marginal and technical among practitioners (including our higher courts) . . . is perhaps not so far from the truth.’³⁵

The 1984 Data Protection Act (DPA), the first piece of legislation on data protection in the UK’s history, was enacted to comply with obligations set out in the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of 1981. In order to correctly transpose the EU Data Protection Directive (95/46/EC)³⁶, the substantially changed DPA 1998 was adopted. It remains the statutory framework for data protection in force in the UK to date. In what follows, this paper pays close attention to the ways in which the Act diverges from the EU Directive, seeking to determine whether the UK statutory framework could give effect to a ‘right to be forgotten’ or a ‘right to erasure’ in some way.

For our purposes, the most interesting parts of the Data Protection Directive are those that enable data erasure in set circumstances. First, there is Article 12(b), establishing a right to ‘rectification, erasure or blocking of data the processing of which does not comply with [the Directive]... in particular because of the incomplete or inaccurate nature of the data’. Article 6 of the Data Protection Directive then clarifies that personal data must be ‘processed fairly and lawfully’ (Art 6(1)(a)), ‘adequate, relevant and not excessive...’ (Art 6(1)(c)), ‘accurate, and where necessary, kept up to date... [and not] inaccurate or incomplete...’ (Art 6(1)(d)) and finally, ‘kept in a form which permits identification of data subjects for no longer than is necessary...’ (Art 6(1)(e)). The interpretation given to these two provisions in *Google Spain* make clear that the Data Protection Directive itself does not establish an unlimited ‘right to be forgotten’, meaning that a literal transposition of the Directive in the

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³² Walden, n 11 above, p 585. We should note here that despite their different treatment, courts have sometimes discussed data protection in the context of the emerging law of civil liability for invasion of privacy. See, for example, *Campbell v MGN* [2002] EWHC 499 (QB); *Campbell v MGN* [2002] EWCA Civ 1373; *Murray v Big Pictures Ltd* [2008] EWCA Civ 446.

³³ As found by Douwe Korff, ‘New Challenges to Data Protection: Country Study A.6 – United Kingdom’ (June 2010, *European Commission DG JFS*) at 59-64. Available at: http://ec.europa.eu/justice/policies/privacy/docs/studies/new_privacy_challenges/final_report_country_report_A6_united_kingdom.pdf.

³⁴ D. Erdos, ‘Data Protection and the Right to Reputation: Filling the Gaps after the Defamation Act 2013’ (2014) 73 *Cambridge Law Journal* 536 at 545, 548. Other explanations include the cost barrier of pursuing a claim, as highlighted by Korff, *ibid* at 53, 54, 57.

³⁵ Leveson, n 30 above, p 999.

³⁶ 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] OJ L 281/31.

UK would also not establish such a right.³⁷ However, the UK implementation of the Directive is not, on all points, literal, and in some ways appears to expand the scope of the Directive.

The UK transposition of the data subject rights established in Article 12(b) of the DPD is quite liberal. Section 14(1) of the DPA 1998 reads:

‘If a court is satisfied ... that personal data ... are inaccurate, the court *may* order the data controller to rectify, block, erase *or destroy those data* and *any other personal data ... which contain an expression of opinion which appears to the court to be based on inaccurate data.*’ (emphasis added)

On the one hand, s.14(1) suggests that the UK courts have discretion as to whether or not data subjects have the right to have data rectified, erased or blocked.³⁸ Correspondence between the European Commission and the UK government released in 2011 makes clear that in the Commission’s view, this discretion is contrary to EU law.³⁹ A discretionary right to erase, available to the UK courts under the DPA 1998, offers a more limited right to data subjects than a mandatory one as established under the DPD. Furthermore, the DPA 1998 departs from the DPD by omitting the notion that the data subject rights can be triggered by ‘incomplete’ data. This may be explained by the fact that s.14(1) appears to be copied verbatim from s.24 of the DPA 1984—but nonetheless suggests reluctance to enable data erasure in the UK. The definition of ‘inaccurate’, provided in s.70(2) of the Act, refers only to ‘data [that] ... are incorrect or misleading’, which may or may not cover the concept of ‘incomplete’ data. What little case law there is that interprets the DPA 1998, however, supports a limited reading of the data subject rights to erasure available under the Act.⁴⁰

However, the remainder of provision seems to actually expand on the ‘right to erasure’ granted by the Directive in Article 12(b). For one, the DPA 1998 appears to add a distinct remedy with the word ‘destroy’, which brings to mind a ‘right to oblivion’ in a way that none of the Directive’s original remedies do. The concept of ‘destroying’ is most likely relevant in the context of paper-based data rather than digital information, but its inclusion in the DPA 1998 remains notable, particularly as there is no reference to ‘destroying’ data in the (paper-era) DPA 1984. Even more interesting is the final clause of the section, which enables the erasure of *opinion* based on *inaccurate* data. The Directive, while not explicit on this point, is silent on the erasure of any material that is not explicitly factual; opinions are not regulated by its provisions at all. This wording is directly copied from the DPA 1984 rather than the Directive; on second reading of the Data Protection Bill in the House of Lords, Lord Williams expresses that it ‘replicates a broadly familiar right’ to data amendment/erasure.⁴¹ In enabling the erasure not just of the original *inaccurate* material but also any published opinion based on that material, the UK data protection law has thus continuously seemed to encourage more substantial ‘forgetting’ than the Directive does.

However, reluctance to actually award data erasure as a remedy resurfaces in s.14(2), where the DPA 1998 makes clear that UK courts further have the discretion to *not* award a

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³⁷ See *Google Spain*, paras. 93-94. For detailed analysis, see Orla Lynskey, ‘Control over Personal Data in a Digital Age: *Google Spain v AEPD and Mario Costeja Gonzalez*’ (2015) 78 MLR 522.

³⁸ The courts have interpreted s.14 accordingly: see *P v Wozencroft* [2002] EWHC 1724 (Fam); [2002] 2 F.L.R. 1118; *Quinton v Peirce* [2009] EWHC 912 (QB); [2009] F.S.R. 17 (QBD) [91].

³⁹ Marie-Helene Boulanger, ‘United Kingdom – Implementation of Directive 95/46/EC’ (12 December 2010, *European Commission DG JFS, Unit C3: Data Protection*). Available at: http://amberhawk.typepad.com/files/dp_infraction_reasons.pdf.

⁴⁰ See, for example, *KJO v XIM* [2011] EWHC 1768 (QB) (QBD) [50], on the ‘limits to the re-writing of history’ in the context of the Rehabilitation of Offenders Act (1974).

⁴¹ HL Deb 2 Feb 1998, vol 585, col 440.

right to erasure. Rather, courts can require that ‘data ... be supplemented by ... true facts’ in those situations where the data controller (normally the publisher) of the information in question published information that was legitimately extended by either the data subject or a third party. Thus, where the data controller acted *honestly* in publishing the information in question, it can satisfy the DPA 1998 by appending a statement with accurate information to the originally published data. Such actions are not contemplated at all by the Directive. What they would accomplish is something that is halfway between ‘erasing’ information and simply not touching it. The data subjects’ rights would be protected, in the sense that the ‘mistake’ would be annotated with the ‘truth’, but freedom of information would also be safeguarded, in that the original ‘mistake’ would remain visible.

The DPA 1998’s provisions on the application of the Directive’s Article 6 ‘principles’ further emphasize that where information was legitimately obtained and the data controller has taken ‘reasonable steps’ to ensure that data was accurate, the data will not be deemed ‘inaccurate’ if the data indicates that in the data subject’s view, the data are not accurate.⁴² Consequently, where there is no definitive ‘proof’ of the inaccuracy of any data, the DPA 1998 rejects erasure of data as a remedy, and instead only offers the aforementioned ‘annotation’ as a remedy. This, again, is a more limited reading of the grounds that trigger a remedy under the Directive; add this to the fact that the DPA 1998’s data processing ‘principles’ also omit the ‘incomplete’ nature of data as a ground for erasure, and it appears that erasure is treated as a more limitedly available remedy under the DPA 1998 than under the Directive. Again, there has been very little case law applying the DPA 1998 in the UK to shed further light on whether or not these changes from the Directive are meaningful in practice; and what case law there has been appears to deal with the more extreme cases of ‘unlawful’ processing, rather than more controversial questions about data erasure rights. *Kordowski*, for instance, found that the publishing of defamatory material was by definition ‘unlawful’ processing, and consequently the material in question could be erased under s.14(1).⁴³

Quite in contrast to what appears to be a restrictive implementation of Article 6 of the Directive, ‘principle’ 5 omits parts of Article 6(1)(e) of the Directive in a way that seems to support data erasure rights. Article 6(1)(e) merely requires data subjects to not be *identifiable* in data for any longer than necessary, but this possibility for anonymizing personal data in order to comply with data protection law is absent in the UK transposition: ‘principle’ 5 instead simply states that personal data must not be ‘kept for longer than is necessary’ for processing purposes. The ICO has interpreted the DPA 1998 as not precluding anonymization as a ‘remedy’, but explicitly bases its guidance on recital 26 of the Directive, which may suggest that the DPA 1998 indeed does not provide a viable basis for anonymization.⁴⁴

What we thus find from a detailed analysis of the relevant parts of the DPA 1998 is a mixture of expansive and limiting transposition of the Directive. Certain provisions appear to preclude erasure or at least limit its availability to narrower circumstances than the Directive contemplates; however, in practice, those are likely to be treated as errors in transposition rather than legislative objections to the Data Protection Directive. Far more interesting are those provisions where, in the absence of case law interpretation, the DPA 1998 makes ‘forgetting’ possible without any particular prompting on the part of the EU. This, at least, means that it is possible that the UK government’s antipathy towards a ‘right to be forgotten’, as will be analysed below, stems from something other than outright opposition to erasure as a data subject right.

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⁴² DPA 1998, Schedule I, Pt II, s.7.

⁴³ *The Law Society and Ors v Kordowski* [2011] EWHC 3185 (QB) at [78], [142].

⁴⁴ ICO, *Anonymisation: managing data protection risk code of practice* (November 2012) at 12. Available at: <https://ico.org.uk/media/1061/anonymisation-code.pdf>.

3. Reactions to EU Developments on ‘Forgetting’

The Commission’s legislative proposals are examined elsewhere in this special issue. This section assesses the UK reaction to the Commission’s proposals on the ‘right to be forgotten’, as well as the seminal *Google Spain* judgment and its establishment of a ‘right to delist’. Many public and private actors in the UK remain highly sceptical of what the Commission is trying to achieve and what the Court of Justice has done. In its reaction to the Commission’s original proposals, the ICO expressed concerns about what an ‘insufficiently qualified right to be forgotten’ could have for freedom of expression and maintaining historical records.⁴⁵ Moreover, it stated that the technical difficulties associated with deletion meant that it remained ‘unclear’ how this right would operate in practice.⁴⁶

For its part, the Ministry of Justice launched a Call for Evidence on the proposals in February 2012 seeking information on their ‘potential impact’. The Ministry finds within the responses a consensus that the ‘right to be forgotten’ would place ‘unrealistic expectations on data controllers’.⁴⁷ According to the Ministry, what is clear from the responses is that the Regulation ‘has not taken into account the online ecosystem’ especially those instances in which information goes ‘viral’ and becomes almost impossible to control.⁴⁸ Given the tenor of the report, its conclusions are of no surprise: we learn that the government intends to ‘push for an overhaul’ of the proposed right.⁴⁹ The European Parliament’s amendments to the Commission’s Proposal might be seen as an ‘overhaul’ – but it remains to be seen if the government has fewer objections to the ‘right to erasure’ that is now in the proposed Regulation. Reactions to the *Google Spain* judgment would suggest otherwise. The ICO’s Head of Policy appeared to support the principles set out in the judgment, but equally appeared doubtful as to whether the ‘right’ set out by the Court of Justice was workable in practice.⁵⁰ The government was not even supportive of the principles at work in *Google Spain*: the House of Lords EU Select Committee wrote a highly critical report in the aftermath of the judgment, concluding that ‘the “right to be forgotten” as it is in the Commission’s proposal, and *a fortiori* as proposed to be amended by the Parliament, must go. It is misguided in principle and unworkable in practice.’ Their conclusion echoes that of the Minister of Justice, who stated that ‘the UK would not want what is currently in the draft, which is the right to be forgotten, to remain as part of that proposal. ... We think it is the wrong position.’⁵¹

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⁴⁵ Information Commissioner’s Office, *Initial Analysis of the European Commission’s Proposals for a Revised Data Protection Legislative Framework*, (27 February 2012) Available at: <http://www.scl.org/site.aspx?i=xb997>

⁴⁶ *ibid* p 13.

⁴⁷ Ministry of Justice, *Summary of Responses to Call for Evidence on the Proposed EU Data Protection Legislative Framework* (18 June 2012) p 17. Available at: <https://consult.justice.gov.uk/digital-communications/data-protection-proposals-cfe/results/summary-responses-proposed-data-protection-legislation.pdf>

⁴⁸ *ibid*.

⁴⁹ *ibid* p 34.

⁵⁰ European Union Select Committee, Inquiry on The Right to be Forgotten Evidence Session No. 2 (2 July 2014) Q21. Available at: <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-sub-f-home-affairs-health-and-education-committee/the-right-to-be-forgotten/oral/11216.html>.

⁵¹ European Union Select Committee, Inquiry on The Right to be Forgotten Evidence Session No. 3 (9 July 2014) Q 34. Available at: <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-sub-f-home-affairs-health-and-education-committee/the-right-to-be-forgotten/oral/11381.html>

We find similar views expressed by some private actors. Tessa Mayes' article in the *Guardian* newspaper is perhaps an indication of the deep-seated scepticism towards these proposals among some in Britain.⁵² She insists that our 'fundamental social existence as human beings means we are never truly forgotten' and argues that 'the right to be forgotten is a figment of our imaginations.'⁵³ This, she goes on, is a matter of concern because the proposed right is 'about extreme withdrawal, and in its worst guise can be an antisocial, nihilist act'. 'If enacted', she argues, 'a right to be forgotten would signify the emasculation of our power to act in the world.'⁵⁴ The *Google Spain* judgment has produced equally critical reactions from many commentators; in particular, concerns have been expressed about the extent to which the judgment seems to privilege the right to privacy over the right to freedom of expression, and whether it is appropriate to permit Google to act as, to use Julia Powles' words, 'judge and jury' of data subject rights.⁵⁵

There are undoubtedly a number of reasons for the critical reaction in the UK but it is worth mentioning the traditional scepticism about any policy proposals that emanate from Brussels. Illustrative of this point is the Eurobarometer study accompanying the Commission's proposals. When asked whether data protection rules should be enforced at EU level or national level, a slight majority of Europeans (44%) favoured EU level over national level (40%). The country registering the least enthusiasm for enforcement at EU level was the UK where only 17% of respondents favoured action at the EU level.⁵⁶ But in the same study, the majority of UK respondents (72%) wanted to be able to have online personal information deleted whenever they wished.⁵⁷ This was broadly in line with responses in other EU member states. This latter finding demonstrates that UK nationals are as concerned about online privacy as their neighbours. So what explains the seemingly negative reaction to the Commission's proposals? Bernal advances an interesting argument. He argues that the terminology 'right to be forgotten' causes or 'provokes emotional and instinctive reactions...rather than rational and thought-through responses.'⁵⁸ For Bernal, 'emotional reactions matter', not least because they feed into political debate.⁵⁹ A 'rebranding' of what the EU has proposed to a 'right to erasure' or a 'right to delist' does not necessarily negate those initial reactions. With this point in mind, we turn to consider possible justifications for a 'right to be forgotten' in English law.

4. Justifications for Forgetting in the Digital Age

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⁵² T. Mayes, 'We have no right to be forgotten online' *Guardian Newspaper* (18 March 2011). Available at: <http://www.guardian.co.uk/commentisfree/libertycentral/2011/mar/18/forgotten-online-european-union-law-internet>

⁵³ *ibid.*

⁵⁴ *ibid.*

⁵⁵ See, inter alia, Steve Peers, 'The CJEU's Google Spain judgment: failing to balance privacy and freedom of expression' (13 May 2014, EU Law Analysis) available at: <http://eulawanalysis.blogspot.co.uk/2014/05/the-cjeu-google-spain-judgment-failing.html>; Julia Powles, 'Google's data leak reveals flaws in making it judge and jury over our rights' (14 July 2015, *Guardian*) available at: <http://www.theguardian.com/technology/2015/jul/14/googles-data-leak-right-to-be-forgotten> accessed 23 July 2015.

⁵⁶ Special Eurobarometer 359, *Attitudes on Data Protection and Electronic Identity in the European Union* p 42. Available at: http://ec.europa.eu/public_opinion/archives/ebs/ebs_359_en.pdf (last visited 20 October 2012) p 183.

⁵⁷ *ibid* p 159.

⁵⁸ P Bernal, 'A Right to Delete' (2011) 2(2) *European Journal of Law and Technology* <<http://ejlt.org/article/view/75/144>> accessed on 23 July 2015.

⁵⁹ *Ibid.*

As we have already seen, the most recent dominant narrative as to what a *right* of privacy means in English law was very much a creature of the late nineteenth and early twentieth centuries. But rapid social and technological changes over the last number of decades have clearly produced new challenges for privacy protection. Indeed, by virtue of digitisation, as Mayer-Schönberger has argued, we have been entrusted with a ‘huge digital information treasure’ from which we can retrieve information in an instant.⁶⁰ Not only can we access this information remotely, advances in technology have ‘facilitated a culture of creation, bricolage, and sharing in which we have abandoned traditional forms of information control.’⁶¹ What this means is that we have ‘little incentive to forget’.⁶²

Digitisation, then, has provided an ‘architecture of perfect memory’.⁶³ In that government agencies and corporations are beneficiaries of ‘perfect memory’, theories of power imbalances and control-based accounts of data protection continue to be relevant. But the idea of ‘perfect memory’ also requires us to think about the individual and her cognitive well-being. This provides an additional justification for data protection laws in the digital environment.

This point becomes clearer when we reflect on some of the challenges faced by ‘digital natives’, those who cannot remember a pre-digital society.⁶⁴ Stories abound in the popular press about digital natives losing their jobs when their employers discover that they have posted ‘inappropriate’ material online. Though some scholars have criticised the ‘pervasive discourse’ about digital natives, finding a lack of empirical evidence to support many of the claims made about this group,⁶⁵ others have pointed to the increasing reliance on information technology and the potential implications for the psychological well-being of what Berardi calls the ‘first connective generation’.⁶⁶ Our social milieu, Berardi argues, must be considered within the ‘technological and anthropological context’ of ‘hyper-expressivity’ or ‘*just do it*’.⁶⁷

For Berardi, digital natives are ‘hyper-expressive’, they crave visibility. Other scholars concur on the hyper-expressivity point. Zimmerman, for instance, writes about a ‘genuine culture shift that has taken place.’⁶⁸ This is a culture in which people want to reveal their innermost secrets to the world at large. This culture shift is such that Mark Zuckerberg, founder of Facebook, has argued that privacy is no longer a ‘social norm’.⁶⁹

Members of the ‘just do it’ generation share even the most intimate personal information online. But if we accept that some degree of privacy is necessary for ‘normative agency’ then hyper-expressivity may have serious implications for individual well-being.⁷⁰ Without the proper privacy controls there is a risk that inherently private information that is posted online now could be stored indefinitely and accessed by anyone at any moment in the

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⁶⁰ V. Mayer-Schönberger, *Delete: The Virtue of Forgetting in the Digital Age* (Princeton: Princeton University Press, 2009) p 91.

⁶¹ *ibid.*

⁶² *ibid.*

⁶³ P.L. Bellia, “The Memory Gap in Surveillance Law” (2008) 75 *The University of Chicago Law Review* 137.

⁶⁴ See J. Palfrey & U. Gasser, *Born Digital* (New York: Basic Books, 2008).

⁶⁵ See, for example, C. Brown & L. Czerniewicz, ‘Debunking the ‘digital native’: beyond digital apartheid, towards digital democracy’ (2010) 26(5) *Journal of Computer Assisted Learning* 357-369.

⁶⁶ F. Berardi, *The Soul at Work: From Alienation to Autonomy* (Los Angeles: Semiotexte, Eng tr, 2009), p 179.

⁶⁷ *ibid* pp 179 – 180.

⁶⁸ D.L. Zimmerman, “The ‘New’ Privacy and the ‘Old’: Is Applying the Tort Law of Privacy Like Putting High-Button Shoes on the Internet?” (2012) 17(2) *Communication Law and Policy* 107, at 120.

⁶⁹ See <http://www.telegraph.co.uk/technology/facebook/6966628/Facebooks-Mark-Zuckerberg-says-privacy-is-no-longer-a-social-norm.html>

⁷⁰ By ‘normative agency’ Griffin means the ‘capacity to choose and to pursue our conception of a worthwhile life.’ See J. Griffin, *On Human Rights* (Oxford: Oxford University Press, 2008) p 45. On the importance of privacy for normative agency see O’Callaghan, n 22 above.

future. So, while we can explain the value of forgetting in the context of theories of power imbalances and information-control, the changing social context brought about by digitisation means that we can also emphasise the importance of forgetting on the grounds that it may help prevent psychological harm.

Notwithstanding such justifications, as we have already seen, one of the main concerns in the UK is the potential chilling effect that a ‘right to be forgotten’, in whatever form it may take, could have on free speech. Such concerns ought to be considered in a wider post-Leveson context in which some in the UK feel that the liberal commitment to freedom of expression is under threat.⁷¹ This is also the context in which English libel law, at least until the introduction of the Defamation Act (2013), was associated with the phenomenon of ‘libel tourism’, the implication being that it is easier to restrict speech in the UK than elsewhere in the developed world. It is for this reason that the paper now turns to consider the relationship between forgetting and freedom of expression/freedom to receive information.

5. Forgetting and Freedom of Expression/Freedom to Receive Information

The Commission’s proposals and the *Google Spain* decision are regarded by some legal scholars in the UK and elsewhere as a further impediment to freedom of expression. Rosen, for instance, sees the Commission’s plans as the ‘biggest threat’ to free speech on the Internet.⁷² According to Rosen, not only does the ‘right to be forgotten’ allow the individual to delete information she has posted about herself, it also enables her to request deletion of information that others have posted about her. Should these proposals be enacted, Rosen argues, the Internet will not be ‘as free and open as it is now.’⁷³ The House of Lords EU Select Committee’s call for evidence on *Google Spain* revealed similar concerns from UK-based commentators: Neil Cameron, for instance, stressed that Google’s search results represent

‘... a system that is now one of our primary records of the history of the human race. We cannot go around rewriting it as and when we feel like it. It is bad enough at the moment. Humanity always forgets to read the minutes of the last meeting. We need somewhere we can go to find out what happened – the history of the mankind.’⁷⁴

Such concerns must be taken seriously not least because both privacy under Article 8 and freedom of expression under Article 10 ECHR are fundamental rights, deserving of ‘equal respect’.⁷⁵ However, this paper argues that the concerns about chilling effects appear somewhat overstated once we pay close attention to the established legal framework. Here, we must first acknowledge an important conceptual point. The Commission’s proposals, as they currently stand, do not seek to prevent the initial posting of information; rather the legislation would provide a right to have information removed when there is nothing to justify retaining the information. Conceptually, this distinction is critical because it means that the ‘right to be forgotten’ becomes relevant only when the ‘social primary good’ of the

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⁷¹ Leveson, n 30 above.

⁷² J. Rosen, ‘The Right to be Forgotten’ (2012) 64 *Stanford Law Review Online* 88, at 88.

⁷³ *ibid* at 92.

⁷⁴ European Union Committee, *EU Data Protection Law: a “Right to be Forgotten”? Evidence* (July 2014) at 7. Available at: <http://www.parliament.uk/documents/lords-committees/eu-sub-com-f/righttobeforgotten/right-to-be-forgotten-evidence.pdf>.

⁷⁵ *Hachette Filipacchi Associés v France* (2009) 49EHRR 23; *Mosley v United Kingdom* (2011) 53 EHRR 30.

need to forget is at stake.⁷⁶ But even here, the data controller is under no obligation to remove the information when there are legitimate grounds to retain it. Though the Commission fails to provide extensive guidance on this point, freedom of expression is one such legitimate ground. Understood in this way, the legislative proposals are not unlike other areas of English law that seek to accommodate competing social primary goods, such as defamation, or a balancing of rights, such as the existing law of privacy. It is important to stress that the *Google Spain* judgment equally requires a balancing between privacy and freedom of expression, however much it has been criticized for appearing to privilege privacy.

There is a further criticism we can make of those who advance the argument that free speech should always trump interests in forgetting/being forgotten. This criticism is that these scholars not take sufficient account of the fundamentally different nature of the new media compared to the old. In order to press this analysis further, it is worth considering the work of Diane Zimmerman who has sought to minimise the differences between the new and old media in debates about free speech. Zimmerman thinks that the calls for a 'right to be forgotten' are perhaps well-intentioned but does not believe that we will gain anything by regulating speech.⁷⁷ While she admits that search engines make it more difficult for embarrassing material to be forgotten once posted online, she argues that similar information 'distributed by the analog media was plenty sticky too.'⁷⁸ Understood in this way, there is nothing to justify regulating speech and this bright-line rule extends to the sort of deeply personal information digital natives routinely if thoughtlessly post online (including those instances when the information 'goes viral'). For Zimmerman, though this material may eventually cause embarrassment and distress, it is still newsworthy. Stories about digital natives and the consequences of their careless attitude to disclosing information online are part of a culture shift and these stories provide society with opportunities for 'informed debate'. On Zimmerman's account, such debate is 'sharper' and 'more insightful' when we can draw on examples from real life, against which we can test our theories.⁷⁹

Zimmerman's description of the generational shift chimes with Berardi's account of the 'just do it generation'. But even if Zimmerman is right that public debate is indeed 'sharper' and 'more insightful' when we can draw on the same stories as reference points, does it then follow that this information should stay online forever? And so we return to the central issue: online disclosure of information is fundamentally different to disclosure by the old media. The distinguishing feature here is the new media's capacity to provide an architecture of perfect memory. Though disclosure of embarrassing information by the old media was undoubtedly distressing and 'plenty sticky too', generally it had a more limited shelf-life before it was buried in the archives. Such information was not erased. It remained accessible but only after some effort on the part of the person seeking it. Contrast this with the easy and instant accessibility of even the most trivial information in the digital age. In stark contrast to the disclosures of old, then, the new media's perfect memory, in particular instant accessibility through search engines, risks causing permanent or repeated psychological and emotional damage.⁸⁰

The most recent developments in the UK courts indicate that there is growing appreciation for the fact that legal interpretations of privacy *must* somehow account for the impact of the internet on our lives. The months since *Google Spain* have seen the emergence of several cases where UK judges consider that there are serious grounds for advancing

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⁷⁶ On 'social primary goods' see J. Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1999), pp 90-95.

⁷⁷ Zimmerman, n 68 above, at 116.

⁷⁸ *ibid* at 118.

⁷⁹ *ibid* at 121.

⁸⁰ D. Keats Citron, 'Mainstreaming Privacy Torts' (2010) 98 *California Law Review* 1805, 1814.

‘unfair’ processing of personal data claims to trial; and that there are indeed particular rights, set out by the current DPA 1998 as well as the 1995 Directive, for those individuals whose data has been kept in violation of the provisions that demand processing ‘no longer than is necessary’. *Heggin v Persons Unknown* concerned defamatory material about the claimant who argued that Google was liable in part for continuing to make the defamatory material in question available via its search engine.⁸¹ The case settled out of court, but initial proceedings made it clear that the court was sympathetic to the private claimant’s concern about violation of his data subject rights.⁸² *Mosley v Google Inc* could be described as a UK version of *Google Spain*, involving a sex tape depicting the claimant which continues to be available through Google’s search engine despite an injunction against the original publisher of the sex tape.⁸³ On the claimant’s arguments regarding Google Inc’s liability under the DPA 1998, Mitting J stated that it ‘seems to me to be a viable claim which raises questions of general public interest, which ought to proceed to trial’.⁸⁴ While neither of these cases have to date explicitly acknowledged the merit of ‘forgetting’ as part of data protection law, they are strongly indicative of a shift in focus in the privacy narrative in English law.

6. Conclusion

This paper has argued that there have always been different narratives about what a ‘right of privacy’ means. Until relatively recently, one narrative had a disproportionate influence in shaping our understanding of privacy in English law. This narrative associated privacy with celebrity claimants and media defendants. In recent years, however, we have seen other narratives (concerned with digital privacy and data protection) increase in prominence. Such developments chime with Bernal’s argument for a ‘paradigm shift in privacy.’⁸⁵ Indeed, there are a number of signs that this shift may be gathering pace. In the past couple of years, we have seen an increasing number of media reports about online privacy. Recent cases at the EU level, such as *Digital Rights Ireland* and *Google Spain* have featured prominently in public discourse.⁸⁶ Importantly, as discussed, we can find evidence of shifts in the English legal system itself, with an increasing number of digital privacy cases coming before the courts based on the relevant provisions of the DPA.⁸⁷ Such cases indicate that UK courts have begun to explore the bounds of legal possibility in seeking to accommodate competing interests in privacy and freedom of expression/freedom to receive information in the digital age.

To the extent that the Commission’s proposals and the Court’s *Google Spain* judgment encourage forgetting in the face of an ever-expanding architecture of perfect memory, these developments ought to be welcomed. Undoubtedly, the UK government and the ICO are correct to be concerned about the specific nature of legal remedies that enable such ‘forgetting’, as a too-blunt implementation of such a remedy will result in a poor balancing of the competing rights to privacy and freedom of information/expression. However, it can be hoped that, as the idea of ‘forgetting’ starts to emerge even in domestic

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⁸¹ *Heggin v Persons Unknown* [2014] EWHC 2808 (QB) (QBD)

⁸² Owen Bowcott and Samuel Gibbs, ‘Google Settles online abuse court case’ (24 November 2014, *The Guardian*). Available at: <http://www.theguardian.com/technology/2014/nov/24/google-settles-online-abuse-court-case-daniel-heggin>

⁸³ *Mosley v Google Inc* [2015] EWHC 59 (QB).

⁸⁴ *Mosley v Google*, *ibid* [52].

⁸⁵ Bernal, n 58 above, at 9.

⁸⁶ C-293/12 *Digital Rights Ireland* [2012] ECLI:EU:C:2014:238

⁸⁷ *Vidal Hall*, n 24 above; *Heggin v Persons Unknown*, n 84 above; *Mosley v Google*, n 85 above.

case law, the relevant legislative and supervisory bodies in the UK will begin attempting to resolve the practical difficulties involved in establishing data erasure rights, instead of merely noting that such difficulties exist.